SANDI L. NICHOLS (BAR NO. 100403)
KATHRYN D. HORNING (BAR NO. 185610)
ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
Three Embarcadero Center, 12th Floor
San Francisco, CA 94111-4074
Phone: (415) 837-1515
Fax: (415) 837-1516
E-Mail: snichols@allenmatkins.com
khorning@allenmatkins.com

WILLIAM D. BROWN (BAR NO. 125468)
WENTZELEE BOTHA (BAR NO. 207029)
BROWN & WINTERS
120 Birmingham Drive, Suite 100F
Cardiff-by-the-Sea, CA 92007-1737
Telephone: (760) 633-4485
Fax: (760) 633-4427
E-Mail: bbrown@brownandwinters.com
wbotha@brownandwinters.com

DUANE E. BENNETT (BAR NO. 110202)
LESLIE A. FITZGERALD (BAR NO. 149373)
SAN DIEGO UNIFIED PORT DISTRICT
3165 Pacific Highway
P.O. Box 120488
San Diego, CA 92112
Phone: (619) 686-6219
Fax: (619) 686-6444
E-Mail: dbennett@portofsandiego.org
lfitzgerald@portofsandiego.org

Attorneys for Designated Party
SAN DIEGO UNIFIED PORT DISTRICT

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN DIEGO REGION

IN THE MATTER OF TENTATIVE CLEANUP AND ABATEMENT ORDER NO. R9-2011-0001 (formerly R9-2010-0002) (SHIPYARD SEDIMENT CLEANUP)	**SAN DIEGO UNIFIED PORT DISTRICT'S REPLY BRIEF IN SUPPORT OF MOTION TO RE-OPEN AND EXTEND DISCOVERY DEADLINES** **Acting Chair Destache**

I. INTRODUCTION

As set forth in the Port District's moving papers, this motion is properly before the Presiding Officer pursuant to the Administrative Procedures Act (in particular, Gov. Code § 11445.40) and Paragraph 5 of the Stipulation Regarding Discovery Extension, dated August 9, 2010 (the "Stipulation"), entered into in this proceeding and approved by then-Presiding Officer David King. The Discovery Referee has no authority, by law or agreement, to adjudicate the issues raised by this motion. Consequently, referral of this matter to the Discovery Referee would be unlawful.

No Designated Party disputes the Port District's entitlement to re-open discovery to address the revisions made in the September 15, 2010, TCAO/DTR. Most parties, including the Cleanup Team, also acknowledge that they had agreed to the compromise discovery schedule proposed in this motion, and most still find it acceptable. The Cleanup Team has reversed its position, and now urges that its original proposal should be adopted instead. But the Cleanup Team has offered no legitimate justification for abandoning its agreement to the compromise schedule now proposed by the Port District. Moreover, its alternative schedule does not provide adequate time for the Port District to undertake the discovery needed to meaningfully defend itself against the new allegations against it, which would deprive the Port District of due process in this proceeding. That schedule must therefore be rejected. No parties support the even shorter discovery schedule jointly urged by Coastkeeper and Environmental Health Coalition—which plainly would deprive the Port District of due process—so it too should be rejected.

Importantly, no party, with the exception of the two environmental groups, has claimed it would suffer any prejudice from the compromise schedule proposed by the Port District. It is undisputed that the proposed schedule will not delay a hearing on the TCAO/DTR. Any alleged prejudice to Coastkeeper/EHC in having to concurrently address discovery and CEQA review would be far outweighed by the prejudice that would be sustained by the Port District if the proposed schedule is not adopted.

Additionally, there is no dispute that the Port District is entitled to undertake discovery against the Cleanup Team. The tenant-Dischargers, however, seek to prevent the Port District

from undertaking any discovery against them. They oppose any inquiry into their financial resources by misconstruing the express language of the TCAO/DTR making the adequacy of their financial resources a prerequisite to the Port District's being identified as "secondarily responsible." Moreover, if, as they suggest, there is no reason for such an inquiry because there is no basis for assuming they do not have the financial resources to perform the cleanup and to comply with the Order, then they should stipulate that they have such resources and the Port District will withdraw its request for such discovery. The tenant-Dischargers' reliance upon the fact that the DTR now names the Port District as a "Discharger" based upon alleged discharges into the tidelands segments of the MS4 system backfires; those allegations make plain the Port District's need to now propound discovery to them relating to their historical discharges into the MS4 system, for which they, and not the Port District, should be primarily liable.

Last, the tenant-Dischargers' claim that the Port District is seeking to harass them by inquiring as to their insurance assets is wrong. The Port District has no intention of asking for insurance policies that have already been produced. But the Port District lacks additional relevant information, such as an explanation as to gaps in coverage and policies that were not produced, and whether tenants have "sold back" policies to their insurers in exchange for monetary consideration paid to the tenants that should be made available to fund the cleanup of the Site.

Consequently, the Port District submits that the schedule and scope of discovery proposed in the Port District's motion are both reasonable and necessary to afford the Port District due process and a meaningful opportunity to participate and defend itself in this administrative enforcement proceeding.

II. ARGUMENT

A. THIS MOTION IS PROPERLY MADE TO THE ACTING CHAIR AS THE CURRENT PRESIDING OFFICER; THE DISCOVERY REFEREE HAS NO AUTHORITY UNDER APPLICABLE LAW OR THE STIPULATION TO ADJUDICATE THIS MOTION

As discussed in the Port District's opening brief (Section II.A.), under California's Administrative Procedure Act (Gov. Code, § 11370 et seq.), it is the presiding officer in an informal adjudicative hearing who "shall regulate the course of the proceeding." (Gov. Code, §

11445.40(b).) The former Presiding Officer in this matter did so on numerous occasions, including issuance of the February 18, 2010 "Order Issuing Final Discovery Plan for Tentative Cleanup and Abatement Order No. R9-2010-0002 And Associated Draft Technical Report (the "Final Discovery Order"), and approval of the Stipulation Regarding Discovery Extension, dated August 9, 2010 (the "Stipulation"), which modified the Final Discovery Order and set the discovery deadlines that all parties agree should now be extended. This motion seeks further modification of the Final Discovery Order issued by the Presiding Officer and, by statute and stipulation, must be directed to the Presiding Officer, and not the Discovery Referee, for adjudication.

Government Code section 11445.40[1] expressly provides, at subsection (b):

> In an informal hearing ***the presiding officer shall regulate the course of the proceeding***. The presiding officer shall permit the parties and may permit others to offer written or oral comments on the issues. The presiding officer may limit the use of witnesses, testimony, evidence, and argument, and may limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal.

Gov. Code § 11445.40(b), emphasis added. Because this motion addresses a procedural matter that impacts the course of the proceeding, i.e., the discovery schedule, it is for the Presiding Officer, and not the Discovery Referee, to decide.

NASSCO and BAE Systems, however, seek to construe this motion as one involving a mere "discovery dispute," which they say should be directed to the Discovery Referee under Paragraph 6 of the Stipulation, which provides for such referral. They cite as precedent the former Presiding Officer's referral to the Discovery Referee of the State Water Resources Control Board's Motion to Quash and Motion for Protective Order regarding the deposition subpoena issued to a State Board employee. *See* NASSCO's Opposition to Port District's Motion ("NASSCO Opp."), at 3:7-13; BAE Systems' Response to Port District's Motion ("BAE Response"), at 2:19-23 (also

[1] Although this motion was expressly based upon Government Code § 11445.40 (*see* Port District's Notice of Motion and Motion to Re-Open and Extend Discovery Deadlines ("Port Motion"), 2:7-9; 12:27-28; 17:13-17), neither BAE Systems nor NASSCO address it.

noting, at fn. 1, that the Discovery Referee's ruling was subject to appeal to the Presiding Officer).[2]

This motion, however, does not concern a "discovery dispute," so Paragraph 6 is irrelevant. We are not arguing over whether a deposition should go forward, or about whether interrogatories were sufficiently responded to or not. This motion seeks to re-open and extend discovery deadlines previously adopted and approved by the Presiding Officer. The Presiding Officer previously made plain his authority and intention to rule on such procedural matters in this CAO Proceeding. *See, e.g.,* August 10, 2010, Order Denying Motion of NASSCO Requesting a Determination that TCAO R9-2010-0002 is Exempt from CEQA, p. 2 ["The role of the Presiding Officer is to decide procedural matters."]. Indeed, as set forth above, such procedural matters are exclusively within the purview of the Presiding Officer as a matter of law.

The parties also recognized this by including Paragraph 5 in the Stipulation, which expressly requires that motions such as this one be directed to the Presiding Officer, not the Discovery Referee.[3] Paragraph 5 provides:

> 5. This stipulation does not prohibit any party from seeking permission ***from the Presiding Officer*** to take additional discovery that is not authorized by this stipulation or the terms of the Final Discovery Plan.

Stipulation, ¶ 5, emphasis added.

It is obvious that the Port District's motion seeks "additional discovery that is not authorized by [the] stipulation or the terms of the Final Discovery Plan." Indeed, that is exactly what triggered the objections from NASSCO and BAE Systems to this motion. In particular, this motion seeks to establish new deadlines for written and deposition discovery, and for the designation of experts and submission of expert reports. And, because of the entirely new allegations against the Port District with respect to the MS4 and the new standard set forth in the

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[2] Campbell Industries and San Diego Gas & Electric Company (SDG&E) submitted emails joining in the NASSCO Opp. and the BAE Response.

[3] NASSCO and BAE Systems also completely ignore Paragraph 5, upon which this motion was expressly made, and which the Port District cited at least four times in its moving papers. *See* Port Motion, at 2:7; 12:28; 13:15-18; 17:13-17.

TCAO/DTR for naming the Port District as a "Discharger," the Port District now seeks to undertake discovery not only against the Cleanup Team, but against the tenant-Dischargers too, which is not already authorized by the Stipulation.[4] Thus, this motion falls squarely within the scope of Paragraph 5 of the Stipulation and not Paragraph 6, and is properly directed to the Presiding Officer and not the Discovery Referee.

The Acting Chair, as the Presiding Officer, is therefore the sole person legally authorized, by statute and Paragraph 5 of the Stipulation, to hear this motion. The request of NASSCO, BAE Systems, and those joining them, to refer this matter to the Discovery Referee should therefore be rejected.

B. THE DISCOVERY SCHEDULE PROPOSED BY THE PORT DISTRICT SHOULD BE ADOPTED

1. The Cleanup Team, NASSCO, BAE Systems, Campbell Industries, and the City of San Diego Already Agreed to the Proposed Discovery Schedule

The Cleanup Team, after encouraging the Port District to reduce its originally-proposed discovery schedule by some six weeks, and agreeing to the revised stipulation that shortened the timeframes for the phases of discovery to accommodate the Cleanup Team's request that all discovery be completed by the end of March 2011 (*see* Nichols Decl., ¶¶ 6-8, and Exhs. B and C, thereto), has now reneged on that agreement and urges that *its* originally-proposed discovery schedule should be adopted instead. *See* email from Cris Carrigan to Ms. Hagan, dated October 21, 2010. The Cleanup Team attempts to justify its retreat by noting that Coastkeeper/EHC and SDG&E still object to the proposed compromise schedule. Its excuse rings hollow.

In fact, the Cleanup Team never made its agreement to the proposed schedule contingent upon complete agreement of the parties. Nor did the Cleanup Team reverse its position after receiving the October 13-14 emails from the environmental groups and SDG&E, respectively, expressing their objection to the compromise schedule set forth in the revised (October 12) draft

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[4] Notably, that Stipulation was entered into by the Port District on August 9, 2010, without the slightest hint that the Cleanup Team intended to name it as a "Discharger," or to assert allegations never before mentioned in any prior discussions or documents, which the Cleanup Team did not make known until it issued the revised TCAO/DTR some five weeks later. *See* Port Motion, pages 9-11 and supporting Declarations.

stipulation,[5] though it had an opportunity to do so after it received those comments and the Port District's response to them on October 14, 2010. *See* Nichols Decl., ¶ 7, Exh. D.

NASSCO, BAE Systems, Campbell Industries and the City each also agreed to the revised schedule now proposed by the Port District (*see* Nichols Decl., ¶ 8), and none of them dispute this. Now, however, with the exception of the City (which has stood by its agreement), they say, without explanation, that they "prefer" the schedule proposed by the Cleanup Team in Mr. Carrigan's October 21 email. *See* NASSCO Opposition, 2:4-7; BAE Response, 1:16-18; 3:1-11. Given the lack of valid justification for abandonment of the agreement to the proposed schedule, which already reflects a compromise by the Port District, and given the lack of any prejudice to them or the Cleanup Team from the proposed schedule, the Cleanup Team's October 21 proposal should be rejected and the discovery schedule proposed by this motion should be adopted.

2. The Proposed Schedule Must Be Adopted To Avoid Significant Prejudice To The Port District And To Assure the Port District Is Afforded Due Process

As explained in the Port Motion, the constitutionally-mandated opportunity to be heard must be meaningful. *See generally, Matthews v. Eldridge*, 424 U.S. 319, 333 (1972) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."). To be meaningful, the opportunity to respond requires provision of adequate preparation time. *See Brady v. Gebbie*, 859 F.2d 1543, 1555 (9th Cir. 1988) (finding that defendant did not have sufficient time to prepare for the hearing; thus, he did not have a "meaningful" opportunity to respond to the charges and was denied due process); *see also Kempland v. Regents of University of California*, 155 Cal. App. 3d 644, 649 (1984).

The Port District has demonstrated the significant prejudice to it if it is deprived of an adequate opportunity to review, analyze, and do written and deposition discovery on the new allegations made in the new TCAO/DTR and the Addendum to the Administrative Record. *See* Port Motion at pages 4-6, 8-11, 13:19-15:13; FitzGerald Decl., ¶¶ 10-12; Nichols Decl., ¶¶ 4, 5, 8 and 10. On the other hand, no parties other than Coastkeeper/EHC claim they will be prejudiced if the proposed schedule is adopted, and none of them claim to share Coastkeeper/EHC's view that

[5] *See* Nichols Decl., ¶ 7, and Exh. C, thereto.

the proposed schedule would interfere with their review of CEQA documents relating to the TCAO. In fact, Coastkeeper/EHC have fewer burdens on them during the course of the additional discovery than the rest of the Designated Parties, including the Port District, who will be conducting discovery in the related federal litigation too. So whatever inconvenience Coastkeeper/EHC will experience as a result of the proposed discovery schedule is outweighed by the significant prejudice the Port District will suffer if it is not adopted.

Furthermore, the Port District is seeking significantly less time than others have had to prepare for the hearing and respond to the allegations against it. Indeed, the calculations offered by Coastkeeper/EHC to the contrary are inaccurate. Coastkeeper/EHC submit that other alleged "Dischargers" had only 168 days to undertake their discovery.[6] *See* Coastkeeper/ EHC's Response, last paragraph of page 2/first paragraph of page 3. In fact, with the exception of Star & Crescent Boat Company, all other named "Dischargers" have had many years—some at least 20 years, and others more than five years since the first TCAO was issued for this Site in 2005—to investigate the allegations against them. The Port District, on the other hand, was named as a "Discharger" for the first time only two months ago, and on grounds and theories never before asserted against it. Moreover, although the TCAO/DTR was published on September 15, 2010, the Cleanup Team does not anticipate producing the Addendum to the Administrative Record to allegedly support the new allegations until at least November 1, 2010. *See* C. Carrigan's October 21, 2010 email. So, assuming this motion is granted, the Port District will have a mere 150 days (i.e., five months) from that date until the March 31, 2011, close of discovery proposed by the Port District, to complete its discovery, not 197 days as suggested by the environmental groups.[7] So,

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[6] Even from a purely numerical perspective, Coastkeeper/EHC's calculation of 168 days is inaccurate. It improperly uses August 23, 2010, as the applicable discovery cutoff, and neglects to include the extensions set forth in the Stipulation. In fact, the discovery cutoffs were extended by one month for written discovery (from August 23, 2010, to September 26, 2010), and by two months (from August 23, 2010, to October 26, 2010) for the taking of depositions and submittal of expert reports. *See* Stipulation, ¶ 1:27-2:3. So, in fact, even under Coastkeeper/EHC's analysis, the other alleged "Dischargers" had far more time for written and deposition discovery and disclosure of expert reports than the Port District proposes for itself in this motion.

[7] Coastkeeper/EHC also wrongly assume that the Port District could have initiated discovery as of the date the new TCAO and DTR were published. Under the Final Discovery Plan, as amended by the Stipulation, such discovery cannot be initiated until this motion to re-open

under any scenario, the Port District's proposed discovery schedule is *far* shorter than the other named "Dischargers" have been allowed to investigate the allegations against them.

In summary, the discovery schedule proposed by the Port District—and previously agreed to by almost all parties—is the bare minimum required to provide a meaningful opportunity for the Port District to undertake the necessary written and deposition discovery, to identify experts, and to submit expert reports to respond to the changes in the new TCAO/DTR and defend itself in this proceeding. *See* FitzGerald Decl., ¶ 12; Nichols Decl., ¶ 10. We therefore respectfully submit that the discovery schedule proposed by the Port District should be adopted to assure the Port District is afforded due process in this proceeding.

C. TO ASSURE THE PORT DISTRICT HAS A MEANINGFUL OPPORTUNITY TO PREPARE ITS DEFENSE IN THIS PROCEEDING, IT MUST BE PERMITTED TO UNDERTAKE DISCOVERY AGAINST ALL DESIGNATED PARTIES AND NOT JUST THE CLEANUP TEAM

1. The Port District Must Be Allowed To Inquire Into The Tenant-Dischargers' Financial Resources and Storm Water Discharges

There is no disagreement amongst the Designated Parties that additional discovery on the revisions to the TCAO/DTR since December 2009 is necessary and appropriate. Yet the Designated Parties other than the Cleanup Team seek to prevent any discovery against *them* relating to those changes.[8] They rely upon the Stipulation provision that limits potential additional discovery to the Cleanup Team. *See, e.g.,* BAE Response, 3:19-22; NASSCO Opposition, 4:8-16. Again, however, they wholly ignore the Port District's right, under Paragraph 5 of the Stipulation, to seek permission of the Presiding Officer to obtain discovery that was not previously authorized.

Such permission must be granted here to afford the Port District a meaningful opportunity to respond to the new TCAO/DTR. Indeed, at the time the Port District entered into the Stipulation, it had no inkling that the Cleanup Team intended to name it as a "Discharger," particularly on the grounds now being asserted. *See* FitzGerald Decl., ¶ 10; Nichols Decl., ¶ 4.

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[8] discovery is granted. Coastkeeper/EHC object to the re-taking of any depositions of their witnesses who have already been deposed. Coastkeeper/EHC Response, page 3. The Port District agrees that such a limitation is appropriate and will not seek to re-depose any of those witnesses.

The new grounds include: (1) imposition of a new standard for assigning "secondary responsibility" to a non-operating public entity landlord, which ignores long-established precedent of the State Water Board and this Regional Board and now requires a showing of the sufficiency of the tenant-Dischargers' "financial resources to clean up the Shipyard Sediment Site and comply with the Order" (September 15, 2010 DTR, page 11-4) before secondary responsibility can be established; and (2) imposition of liability on the Port District for alleged discharges from the portion of the MS4 storm drains on the tidelands adjacent to the Site (*id.,* page 11-5), which are or were leased by the tenant-Dischargers. Discovery to the tenant-Dischargers on both of these issues is therefore necessary for the Port District to have a meaningful opportunity to defend itself in this proceeding.[9]

In particular, inquiry into the tenant-Dischargers' financial resources is obviously essential, unless, of course, the tenant-Dischargers are prepared to stipulate that they have such resources, as suggested by BAE Systems and Campbell Industries. *See, e.g.,* BAE Response, 5:14-17; Email from Campbell Industries' counsel, James Handmacher, dated October 22, 2010 ("...the Dischargers as a group have far more than adequate financial resources to complete the cleanup."). Absent such a stipulation, this proposed scope of discovery is appropriate.

BAE Systems and NASSCO argue that their financial resources are irrelevant, and that the Port District's proposed inquiry into them is "premature," unless the tenant-Dischargers fail to comply with the Order, and because the Port District is independently alleged to be a "Discharger" in the TCAO/DTR on the ground that it is the alleged owner/operator of the MS4 system. *See* BAE Response, 5:2-12; NASSCO Opp., 5:8-20. They are wrong on both counts.

First, they improperly misconstrue and wrongly parse the relevant language of the DTR. Unlike all prior TCAOs/DTRs, the new DTR no longer allows the Port District the benefit of secondary liability pending future non-compliance by its tenants with the Order. Instead, as a

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[9] NASSCO wrongly seeks to impugn the Port District for seeking this discovery now, suggesting that the Port District "elected not to" propound it sooner, and now "appears to regret its decision." NASSCO Opp., 4:23-28. This is absurd. Before the issuance of the September 15, 2010, TCAO/DTR, the Port District would have had no reason or justification for propounding this discovery, and the tenant-Dischargers surely would have objected to it—just as they do now, despite its obvious relevance to the new TCAO/DTR.

prerequisite to "secondary responsibility" status, the DTR now requires a showing that the tenant-Dischargers have "sufficient financial resources to clean up the Shipyard Sediment Site and comply with the Order." *See* September 15, 2010 DTR, page 11-4. Contrary to NASSCO and BAE System's interpretation, the subject "financial resources" condition is in the conjunctive; that is, the tenant-Dischargers must have sufficient financial resources to clean up the Shipyard Sediment Site, and they must have sufficient financial resources to comply with the Order (which requires not just cleanup, but also post-remedial monitoring and reporting, among other things). So, under the new TCAO/DTR, it is not whether the tenant-Dischargers "comply with the Order" that determines the Port District's primary or secondary responsibility status in the first instance, it is whether they have the "financial resources…to comply with the Order" that is at issue. The relevance of their financial resources is, thus, not dependent upon some future non-compliance with the Order. It is expressly made relevant now.[10]

Second, the fact that the new TCAO/DTR names the Port District as a "Discharger" on the ground that it is the alleged operator of the portion of the MS4 on the tidelands is no reason to deny the Port District the opportunity to undertake discovery against the tenant-Dischargers, as BAE Systems and NASSCO contend. To the contrary, these new allegations provide further justification and necessity for the Port District to undertake discovery on this issue, not only against the Cleanup Team, but also against the tenant-Dischargers who have historically discharged into that MS4. As acknowledged by the Cleanup Team in the DTR, "there is no evidence in the record that the Port District initiated or contributed to the actual discharge of waste to the Shipyard Sediment Site." September 15, 2010, DTR, page 11-4. Thus, any responsibility of the Port District for the MS4 discharges is derivative of the liability of its tenants for *their* discharges into the storm drain system, and for which they should bear primary responsibility. The Port District is therefore entitled to discovery from the tenant-Dischargers, and not just the Cleanup Team, as to the respective tenants' historical storm drain systems, the content of the

[10] Neither NASSCO nor BAE Systems offer any explanation as to when or how the Port District could even engage in the proposed discovery once this proceeding is concluded and the Order is adopted.

discharges into the storm drain inlets on their leaseholds, any sampling and analysis of those discharges, and the like, in order to adequately defend itself in these proceedings.

2. The Port District Must Be Allowed To Inquire Into The Tenant-Dischargers' Insurance Assets

NASSCO and BAE Systems assert that the Port District has no valid reason for inquiring about their insurance assets. They claim that they and others already produced insurance policies in the federal court litigation and should not be required to produce them again. *See* NASSCO Opposition, 5:25-28; BAE Response, 5:22-26. We agree. The Port District has no intention of asking for documents it already has. But the Port District has a right to inquire about policies that may have been issued to its tenants that were not produced,[11] and to seek explanations as to why those policies would not be available to respond to the TCAO, among other things. For example, discovery regarding whether historical insurance policies that could have provided coverage to respond to the CAO were "sold back" by the tenants to their respective insurance carriers in exchange for monetary consideration paid to the tenants is relevant to the "financial resources" showing now required under the TCAO/DTR. If such policies have been sold back (without the knowledge or permission of the Port District, which required that the tenants obtain insurance policies as a term of most of its Leases and Tidelands Use and Occupancy Permits), then the proceeds of the sale of the policies should be required to be available to cover the cleanup costs.

Accordingly, discovery of such information is critical to assuring the Port District due process in this proceeding, while simultaneously benefitting the San Diego community and the environment by assuring that all appropriate and available resources are devoted to the cleanup of this Site.

III. CONCLUSION

This motion is properly directed to the Acting Presiding Officer for determination pursuant to the authority granted exclusively to the Presiding Officer under Government Code section 11445.40(b), and Paragraph 5 of the Stipulation. The schedule and scope of the discovery

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[11] As noted by NASSCO, the parties produced those policies they had located as of the date of the required production in the federal court litigation, but additional policies may become known and available for production. *See* NASSCO Opp., 5:23-25.

proposed by the Port District is both reasonable and necessary to assure the Port District is afforded a meaningful opportunity to defend itself in this administrative enforcement proceeding. For these reasons, we respectfully submit that the Port District's motion should be granted.

DATED: October 25, 2010

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: Sandi L. Nichols
SANDI L. NICHOLS
Attorneys for Designated Party
SAN DIEGO UNIFIED PORT DISTRICT

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is Three Embarcadero Center, 12th Floor, San Francisco, CA 94111-4074.

On October 25, 2010, I served the within documents described as:

SAN DIEGO UNIFIED PORT DISTRICT'S REPLY BRIEF IN SUPPORT OF MOTION TO RE-OPEN AND EXTEND DISCOVERY DEADLINES

PROOF OF SERVICE

on the interested parties in this action as stated on the attached mailing list:

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on and in accordance with a court order or agreement of the parties to accept service by e-mail or electronic transmission, I caused a true copy of the document to be sent to the persons at the corresponding electronic address as indicated in the attached Service List on the above-mentioned date. My electronic notification address is knewsome@allenmatkins.com. I am readily familiar with this firm's Microsoft Outlook electronic mail system and did not receive any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 25 , 2010, at San Francisco, California.

Kathryn Newsome
(Type or print name)

Kathryn Newsome
(Signature of Declarant)

SERVICE LIST

Catherine Hagan, Esq. RWQCB Staff Counsel chagan@waterboards.ca.gov	Attorney for RWQCB Advisory Team **Served via email**
Christian Carrigan, Esq. Senior Staff Counsel, State Water Resources Control Board ccarrigan@waterboards.ca.gov	Attorney for RWQCB Clean up Team **Served via email**
Raymond Parra, Esq. Raymond.parra@baesystems.com	Attorney for BAE Systems Ship Repair **Served via email**
Michael McDonough, Esq. Michael.mcdonough@bingham.com	Attorney for BP West Coast Products LLC **Served via email**
Christopher McNevin, Esq. chrismcnevin@pillsburylaw.com	Attorney for Chevron USA, Inc. **Served via email**
Brian Ledger, Esq. bledger@gordonrees.com	Attorney for City of San Diego **Served via email**
Nate Cushman, Esq. Nate.cushman@navy.mil	Attorney for U.S. Navy **Served via email**
Marco Gonzalez, Esq. marco@coastlawgroup.com	Attorney for Environmental Health Coalition & SD Coastkeeper **Served via email**
James Handmacher, Esq. jvhandmacher@bvmm.com	Attorney for Marine Construction & Design; Campbell Industries **Served via email**
Leslie FitzGerald, Esq. lfitzger@portofsandiego.org	Attorney for San Diego Unified Port District **Served via email**
Melanie Andrews, Esq. Melanie.andrews@usdoj.gov	Attorney for U.S. Navy **Served via email**
David Barrett, Esq. dbarrett@sempra.com	Attorney for Sempra Energy and San Diego Gas & Electric Company **Served via email**
Matthew Dart, Esq. Matthew.dart@dlapiper.com	Attorney for BAE Systems Ship Repair **Served via**
Gabe Solmer, Esq. Gabe@sdcoastkeeper.org	Attorney for San Diego Coastkeeper **Served via email**
Tom Stahl, Esq. Thomas.stahl@usdoj.gov	Attorney for U.S. Navy **Served via email**

Kelly E. Richardson, Esq. Kelly.richardson@lw.com	Attorney for NASSCO **Served via email**
Mike Tracy, Esq. Mike.tracy@dlapiper.com	Attorney for BAE Systems Ship Repair, Inc. **Served via email**
James Dragna, Esq. Jim.dragna@bingham.com	Attorney for BP West Coast Products **Served via email**
Steven Goldberg, Esq. sgoldberg@downeybrand.com	Attorney for BAE Systems Ship Repair, Inc. **Served via email**
Vincent Gonzales, Esq. vgonzales@sempra.com	Attorney for Sempra Energy **Served via email**
Jennifer Lucchesi, Esq. Jennifer.lucchesi@slc.ca.gov	Attorney for CA State Lands Comm. **Served via email**
Matthew Luxton, Esq. Matthew.luxton@nassco.com	Attorney for NASSCO **Served via email**
Karl Lytz, Esq. Karl.lytz@lw.com	Attorney for NASSCO **Served via email**
David Mulliken, Esq. David.mulliken@lw.com	Attorney for NASSCO **Served via email**
Frederick Ortlieb, Esq. fortlieb@sandiego.gov	Attorney for City of San Diego **Served via email**
Douglas Reinhart, Esq. Douglas.reinhart@bp.com	Attorney for BP **Served via email**
Miles Scully, Esq mscully@gordonrees.com	Attorney for City of San Diego **Served via email**
David Silverstein, Esq. David.silverstein@navy.mil	Attorney for U.S. Navy **Served via email**
Jill Tracy, Esq. jtracy@semprautilities.com	Attorney for Sempra Energy and San Diego Gas & Electric Company **Served via email**
Roslyn Tobe, Esq Roslyn.tobe@navy.mil	Attorney for U.S. Navy **Served via email**
Brian Wall, Esq. bwall@chevron.com	Attorney for Chevron **Served via email**
Jill Witkowski, Esq. jill@sdcoastkeeper.org	Attorney for San Diego Coastkeeper and Environmental Health Coalition **Served via email**
Sarah Brite Evans, Esq. sarah@sshbclaw.com	Attorney for Star & Crescent Boat Company **Served via email**

Scott Spear, Esq. Scott.spear@usdoj.gov	Attorney for U.S. Navy **Served via email**
Sharon Cloward Sharon@sdpta.com	Representative of Port Tenants Association **Served via email**
William D. Brown, Esq. bbrown@brownandwinters.com	Attorney for San Diego Unified Port District **Served via email**