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April 11, 2008

San Diego Regional Water Quality Control Board
Attn: Michael P. McCann, Supervising Engineer
9174 Sky Park Court, Suite 100
San Diego, CA 92123

File No. 030815-0011

Re: Shipyards Sediment Site 2005 Tentative Cleanup and Abatement
Order No. R9-2005-0126: Request for Extension of Schedule

Dear Mr. McCann:

On behalf of General Dynamics NASSCO, we received the San Diego Regional Water Quality Control Board Advisory Team's Notice of Commencement of Phase III of Proceeding for the shipyard sediment matter dated April 4, 2008. We also received a hard drive that purportedly contains the administrative record ("Record"), as well as the revised Tentative Order ("Order") and revised Technical Report ("Report"). Upon review of the Record, we found that it consists of a convoluted database of documents, which is so large and unorganized that the Board members, the parties, and any reviewing body will not have the time or capacity to review it, conduct discovery and prepare for the hearing under the proposed schedule. As such, pursuant to Paragraph 3 of the First Amended Order of Proceedings, NASSCO requests an extension of the schedule proposed for Phase III.

Administrative Record and Timing for Phase III

The Record for the Order and Report consists of 375,000 pages of indexed documents, which amounts to 7,333 files on the index. In addition, there are approximately 1,500 files on the hard drive that are not indexed, for a total of approximately 8,800 files for the parties to review. Not only is the Record voluminous, there is no efficient or easy way to review it to locate relevant documents. The hard drive does not have a search engine that allows searches across all documents. Therefore, the parties will be required to open each individual document to search for relevant terms, which will be an extraordinarily time consuming and tedious process. Further, it appears that some of the attachments, including reports, are missing from various documents, and, some of the files contain only a photocopy of the cover or title page of the attachment, such as the face of a CD. The parties have no way of determining what is contained in the actual CD or document, or knowing how to locate that information. Due to the overall size and format of the Record, the parties will need a significant amount of time to meaningfully review it.

Besides the fact that the Record is massive and unsearchable, the index does not indicate the section of the Order or Report to which the documents pertain. Therefore, the parties will be forced to review every document to decipher the relevance of each and its applicability to the Order or Report, which is a burden that the parties should not have to bear. Because the index does not identify how each document supports the Order or Report, the parties have no way of knowing which documents belong in the Record. In fact, it appears as if the Regional Board staff dumped any and all documents relating to the parties and their facilities into the Record, rather than limiting the Record to those items that actually support the Order and Report. The process of sorting through each document to determine its relevance will add to the amount of time necessary for the parties to adequately review the Record.

NASSCO's procedural due process rights would be violated if it is not provided a reasonable and sufficient time to review the Record so that it can meaningfully prepare for, and conduct discovery in preparation for the hearing on the Order. The action that the Regional Board proposes affects the substantive rights of NASSCO, constitutes formal agency enforcement, and subjects NASSCO and the other parties to material risk (on the order of a hundred million dollars). Consequently, 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).

Accordingly, NASSCO hereby requests that the proposed schedule for Phase III be extended, to protect its procedural due process rights. The proposed hearing schedule renders it impossible for NASSCO and the other parties to exercise their procedural rights in proper fashion. NASSCO is entitled to a full and fair opportunity to prepare and present a defense, including exercising the rights to offer witnesses and depose and cross-examine those agency personnel involved in this action. Phase III is a sequential process: NASSCO must have adequate time to review the Record in order to sufficiently prepare for discovery, propound discovery, schedule depositions, conduct depositions, and provide the results of the discovery to its own experts to prepare their reports and testimony. Such measures require time. Instead of ensuring that NASSCO and the other parties have been provided a full and fair opportunity, the currently proposed schedule has the pretense of due process but is, in reality, simply an example of an agency inappropriately going "through the motions." *See Kempland*, 155 Cal. App. 3d at 650.

As discussed above, a decision by the Regional Board to proceed according to its current timetable will result in manifest prejudice to NASSCO. Additionally, there is no potential prejudice to the Regional Board associated with an extension on the proposed Phase III schedule. Data demonstrate that there is a thriving benthic community in the shipyard sediment site that is comparable to other areas of San Diego Bay. In addition, the Regional Board's own conduct in is evidence of a lack of any imminent harm. It has been nearly five years since NASSCO submitted its technical report as required by the Regional Board. After the first tentative order

was issued, the Regional Board staff took another three years to prepare its Report, develop the Order and compile the 375,000 page Record. It is now requiring NASSCO to review, understand and respond to the enormous Record, and complete all necessary discovery in ninety days. The five year period is evidence not only of a lack of urgency, but also of the amount of time necessary to address the complex issues and facts arising out of the vast amount of information compiled in the Record.

NASSCO is not requesting additional time for the sake of delay. To the contrary, NASSCO submitted several letters complaining about the delay in the Regional Board staff's issuance of the Record for the Order.¹ Indeed, more than two years ago, NASSCO stated that it "remains concerned, however, with the prolonged and continuing delay in the issuance of a Technical Report by the Cleanup Team that will allegedly support the conclusions in the Tentative Cleanup and Abatement Order."² NASSCO is not interested in unnecessarily delaying these proceedings; however, as described above, it is reasonable for the parties to obtain more time to review the voluminous Record, determine relevancy of the documents, prepare for discovery, schedule and complete depositions, and convey that information to their experts to prepare for the hearing.

There is no reason to deny the designated parties the additional time that they need and deserve under principles of due process to adequately prepare for, and conduct discovery. Based on the above, NASSCO would suffer irreparable harm if the Regional Board proceeds with the proposed Phase III schedule.

Discovery Issues

Additional issues must be addressed by the Regional Board so that the parties can proceed with discovery as expeditiously as possible. Specifically, the parties require certain information to commence discovery, and hence, NASSCO requests that the Cleanup Team provide the following:

- Confirmation that the Cleanup Team has provided all documents that are relevant to the Order and Report;
- Identification as soon as possible of all agencies, organizations, experts and others that were involved in the development of the Order, Report or Record and a description of each entity's involvement;
- Confirmation that the Cleanup Team has produced all of the relevant documents and files of the identified agencies, organizations, or persons;

¹ See letter from D. Mulliken to San Diego Regional Water Quality Control Board, Attn: Michal P. McCann (February 17, 2006); see also letter from D. Mulliken to San Diego Regional Water Quality Control Board, Attn: John Minan (March 31, 2006).

² Letter from D. D. Mulliken to San Diego Regional Water Quality Control Board, Attn: Michal P. McCann (February 17, 2006).

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- A redline comparison showing revisions to the 700+ page Report;³
- A redline comparison showing revisions to the Order; and
- Service list for all submittals.

For the foregoing reasons, NASSCO respectfully renews its request that the Regional Board extend the schedule proposed for Phase III and hold a case management conference to address the timing of Phase III and discovery issues generally.

Sincerely,



Kelly E. Richardson
of LATHAM & WATKINS LLP

cc: Advisory Team, c/o Michael P. McCann (12 copies)
David Barker, Regional Water Quality Control Board
Vice-Chair and Presiding Officer, David King, Regional Water Quality Control Board
Christopher Barnes, Esq., General Dynamics NASSCO
See Attached E-Mail Service List

³ The parties should not be required to re-review the entire 700+ page Report to locate the Cleanup Team's revisions.