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July 30, 2009

VIA EMAIL

Ms. Kristin Schwall
Associate WRC Engineer
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123-4353

File No. 030815-0013

Re: CRU:9 000000066:KSchwall
Tentative Order No. R9-2009-0099, NPDES No. CA0109134
Tentative Time Schedule Order No. R9-2009-0117

Dear Ms. Schwall:

On behalf of our client National Steel and Shipbuilding Company (NASSCO), this letter is sent to provide comments on Tentative Order No. R9-2009-0099, NPDES CA0109134 (the "Draft Permit") and Tentative Time Schedule Order No. R9-2009-0117 (the "Draft TSO"). NASSCO intends to provide further written comments on other aspects of the Draft Permit and TSO during the public comment period.

- 1. Annual Average and Monthly Numeric Limits for the Floodwater Discharges Should be Removed from the Permit¹**
 - a. Numeric Limits Should be Replaced with BMPs**

The Draft Permit proposes Annual Average Effluent Limitations (AAELs), Average Monthly Effluent Limitations (AMELs) and Maximum Daily Effluent Limitation (MDELs) for the facility's flood dewatering discharges, which occur intermittently and infrequently during a single day following a ship launch. Between 2003 and June 2007, there were only four total discharges at the graving dock flood dewatering system (M-2), and two discharges each at the Ways 3 and Ways 4 flood dewatering systems (M-3 and M-4).

¹ NASSCO intends to separately submit comments regarding the Draft Permit's proposed Annual Average Effluent Limitations for the hydrostatic relief water discharges (HR-1, HR-2 and HR-3) in the near term.

Given the infrequency of these discharges, which in many cases occur only once or twice per year (or less); the difficulty in isolating the potential sources of pollutants in these discharges; the fact that the source of the flood dewatering discharges is the San Diego Bay and the water is not treated or used in any process prior to discharge; and the difficulty in treating the discharges because, among other reasons, the high volumes and flows and the extremely low treatment levels required, NASSCO believes that numeric effluent limitations are infeasible and inappropriate.

As such, NASSCO requests that the proposed numeric limits be replaced with Best Management Practices (“BMPs”) designed to remove potential pollutant sources from the flood dewatering discharges. The use of BMPs as effluent limits, rather than numeric limits, is specifically authorized by the EPA’s regulations and supported by the caselaw, including in situations involving CTR-based effluent limits. 40 CFR § 122.44(k)(3) (authorizing BMPs in place of numeric limits where numeric limits are infeasible); *Diver’s Environmental Conservation Organization v. State Board*, 145 Cal.App.4th 246, 261-62 (2006) (“it is now clear that in implementing water quality standards, such as those set forth in the CTR, permitting agencies are not required to do so solely by way of corresponding numeric WQBEL’s.”). In the *Diver’s* case, the Court upheld an NPDES permit that imposed BMPs as WQBELs, in place of numeric limits. *See also Communities for a Better Environment v. State Board*, 109 Cal. App. 4th 1089 (2003) (holding that water quality based effluent limitations do not need to be numeric).

Given the infeasibility of applying numeric limits to the Facility’s floodwater discharges, the Regional Board should exercise its discretion to impose BMPs instead.

b. Even if Numeric Limits are Retained, a Per-Discharge Concentration Limit Should Replace Annual/Monthly Limits

Even if the Regional Board chooses to impose numeric limits, NASSCO believes that AAELs and AMELs are inappropriate and should be replaced with a per-discharge limit on the concentration of each applicable pollutant, equivalent to the MDEL proposed in the Draft Permit.

This approach would be consistent with the EPA’s regulations, which provide that there is no need or preference for using average monthly and maximum daily limits for “non-continuous” discharges². 40 CFR § 122.45(e). Pursuant to 40 CFR section 122.45(e), non-continuous discharges:

“shall be particularly described and limited, considering the following factors, as appropriate: (1) Frequency (for example, a batch discharge shall not occur more than once every 3 weeks); (2) Total mass (for example, not to exceed 100 kilograms of zinc and 200 kilograms of chromium per batch discharge); (3) Maximum rate of discharge of pollutants during the discharge (for example, not to exceed 2 kilograms of zinc per

² By contrast, maximum daily and average monthly discharge limits should be used “unless impracticable” for all “continuous” discharges other than publicly owned treatment works. 40 CFR § 122.45(d).

minute); and (4) Prohibition or limitation of specified pollutants by mass, concentration, or other appropriate measure (for example, shall not contain at any time more than 0.1 mg/l zinc or more than 250 grams (1/4 kilogram) of zinc in any discharge).”³

40 CFR § 122.45(e).

The use of AMELs for floodwater discharges is inappropriate because of their infrequency and irregularity, as the calculations used to derive an AMEL assume rather frequent and regular discharges. The SIP equations are based on compliance monitoring frequency as well as other factors (USEPA’s Technical Support Document for Water Quality-based Toxics Control, EPA/505/2-90-001, March 1991, “TSD”, p. 93). For instance, the SIP equations for calculating an AMEL require specification of the number of samples per month (n); Regional Board staff have assumed n to be 4 (the SIP default value). The use of n of 4 (or even the use of n of 1) assumes effluent discharges should occur at the same frequency or more frequently than the compliance sample monitoring. It is fundamentally wrong to apply this assumption to discharges that occur much less frequently than monthly (i.e., once or twice per year at most).

Annual averages are proposed in the Draft Permit to demonstrate that NASSCO is not adding any metals to background (receiving water) concentrations. “Discharges shall achieve an annual average effluent concentration that is no greater than the running annual average of the receiving water concentration. The annual average of the effluent concentrations shall be calculated once each month and compared to the average of the receiving water concentrations for the same 12-month time period.” (Draft Permit, Attachment F at F-42) The use of an AAEL that is simply calculated as a running annual average of the receiving water concentrations is not appropriate for the M-discharges because:

- 1) This calculation can result in the *magnitude* of a past exceedance(s) affecting the frequency of exceedances in the future. For instance, if one large exceedance already occurred within a 12-month time period before the current period, it could result in the current period and several more periods in the future having violations even if the current and future periods have concentrations well below the limit. An example is provided in **Table 1** with hypothetical data.
- 2) The calculation of an AAEL does not account for any variability that resides within the datasets. Calculations used to derive both average monthly effluent limitations and maximum daily effluent limitations incorporate the variability of dataset (i.e., the coefficient of variation (CV)), but the proposed calculation of the running annual average does not. This is not in agreement with the TSD: “The permit limit derivation procedure used by the permitting authority.....should adequately account for effluent variability.....[and] account for compliance sampling frequency....” (TSD p. 93)

³ Each of the examples are included in the text of the regulation as a hypothetical limitation on a non-continuous discharge, and are not intended to be specific limitations that would apply to NASSCO’s or any other facility.

- 3) It is impractical to set the allowable effluent concentration (i.e., the running annual average of the receiving water concentration) as a value that is never to be exceeded; USEPA provides an additional equation for converting calculated maximum allowable effluent concentration during critical conditions (i.e., the WLA) to an LTA concentration (TSD p. 98-104). This conversion is required because it is impractical to set the allowable effluent concentration as a value that is never to be exceeded. The staff allowed this conversion in the calculation of AMELs and MDELs (Draft Permit, Attachment F at F-30) but not in the AAEL.

For these reasons, NASSCO requests that the AAELs, AMELs and MDELs for discharges M-2, M-3 and M-4 be deleted from the Draft Permit, and, to the extent BMPs are not used as effluent limits, replaced with a maximum per-discharge concentration limit that is equivalent to the current MDEL. Similarly, the Interim Effluent Limits for these discharges should also be described as maximum per-discharge limits rather than maximum daily limits.

2. The Draft Permit/TSO Should Clarify that Treatment is Unnecessary if Full Compliance is Achieved Through Other Means

As written, certain provisions in the Draft Permit and TSO would arguably require NASSCO to construct a treatment system for certain discharges even if NASSCO, through other means, is able to achieve full compliance with the final effluent limitations; or, for discharges for which Intake Water Credits (IWCs) have been applied, has ensured that the amount of a pollutant in its waste stream is equal to or less than the amount of the pollutant in the intake water.

The SIP provides that IWCs may be granted to provide effluent limits allowing the facility to discharge a mass and concentration of the intake water pollutant that is no greater than the mass and concentration found in the facility's intake water. Under the SIP, IWCs may be applied so long as the pollutant in a waste stream is equal to or less than the amount of the pollutant in the intake water (and other conditions are met), regardless of whether or not NASSCO has implemented a treatment system to remove any pollutants in its waste stream. Accordingly, NASSCO requests the following modification to the last sentence in the third paragraph of page F-29 (proposed deletions are reflected in strikethrough and proposed additions in underline):

- “NASSCO is ~~planning to install a treatment system remove copper~~ is taking steps to ensure that it does not add a mass or concentration of copper to its discharge and/or removes copper from its waste stream so that the copper in the waste streams are equal to or less than the copper in the intake water.”

The Draft Permit also includes a Compliance Schedule to achieve final effluent limits proposed for cadmium, copper, nickel and zinc, which is set forth in Table 12 (page 27) and Table F-26 (page F-56) of the Draft Permit. The Compliance Schedule requires, by May 18, 2010, that NASSCO complete construction and permitting of any activities needed to implement new or modified control measures necessary to achieve final compliance. To clarify that NASSCO will not be required to proceed with such construction where full compliance with

final limits has been achieved through other means, NASSCO requests inclusion of the following language as a footnote to Tables 12 and F-26 in the Draft Permit:

- “NASSCO will not be required to implement control measures and/or a treatment system with regard to any discharge for which it has already achieved full compliance with the final effluent limits prescribed in this Order.”

Similarly, the Draft TSO proposes a Compliance Schedule for the design and construction of a treatment system for the facility’s graving dock floodwater discharge. NASSCO requests inclusion of the following language in the TSO to clarify that a treatment system need not be constructed if full compliance with the final limits for this discharge have already been achieved, whether through the required implementation of Best Management Practices (BMPs) or otherwise:

- “NASSCO will not be required to construct a treatment system or complete other tasks related to the construction of a treatment system that are contemplated in this Compliance Schedule in the event that NASSCO is able to achieve full compliance with the final effluent limits in Order R9-2009-0099 for discharge system M-2, whether through the implementation of BMPs, changes in flooding and dewatering procedures, or otherwise.”

3. Daily Flow Calculations Should be Deleted and Monthly Flow Estimates Used Instead

The Draft Permit proposes daily flow calculations for discharges HR-1, HR-2 and HR-3, and M-1 – M-4 and M-8. (Draft Permit, Tables E-2 and E-3, pages E-7 and E-8). By contrast, NASSCO’s current permit requires a monthly estimate of the daily flow for each discharge. Requiring daily flow calculations would place a significant burden on NASSCO in terms of time and costs, with no apparent benefit to the Regional Board. NASSCO therefore requests that the daily flow calculation requirement be deleted from the Draft Permit and replaced with the required monthly estimate found in NASSCO’s current Permit, as reflected in the requested revision to the first row of Tables E-2 and E-3 (pages E-7 and E-8) set forth below (note that the Tables below have accepted previous additions/deletions to the Tables that were reflected in the Draft Permit in underline/strikeout):

Table E-2. Effluent Monitoring for Hydrostatic Relief Water

Parameter	Units	Sample Type	Minimum Sampling Frequency	Required Analytical Test Method
Flow	GPD	<u>Estimate</u> Grab	<u>Monthly</u> 1/day	<u>Meter</u>
pH	standard units	Grab	1/month	1
Temperature	°F	Grab	1/month	1
Cadmium, Total Recoverable	µg/L	Grab	1/month	1

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Copper, Total Recoverable	µg/L	Grab	1/month	1,2
Nickel, Total Recoverable	µg/L	Grab	1/month	1
Zinc, Total Recoverable	µg/L	Grab	1/month	1
Settleable Solids	ml/L	Grab	1/year	1
Turbidity	NTU	Grab	1/year	1
Total Suspended Solids	mg/L	Grab	1/year	1
Oil and Grease	mg/L	Grab	1/year	1
Total Petroleum Hydrocarbons (TPH)	mg/L	Grab	1/year	1
Polynuclear Aromatic Hydrocarbons (PAH) ³	µg/L	Grab	1/year	1
Tributyltin (TBT)	µg/L	Grab	1/year	1
Acute Toxicity	Pass or Fail	Grab	1/year	1
Chronic Toxicity	TUc	Grab	1/year	1
Total Residual Chlorine	µg/L	Grab	1/year	1
Lead, Total Recoverable	µg/L	Grab	1/year	1
Remaining CTR Priority Pollutants	µg/L	Grab	1 in Year One 1 in Year Five	1

Table E-3 Effluent Monitoring for Miscellaneous Effluents

Parameter	Units	Sample Type	Minimum Sampling Frequency ^{4,5}	Required Analytical Test Method
Flow	GPD	<u>Estimate</u> Grab	<u>Monthly</u> 1/day	Meter
pH	standard units	Grab	1/month	1
Temperature	°F	Grab	1/month	1
Copper, Total Recoverable	µg/L	Grab	1/month	1,2
Nickel, Total Recoverable	µg/L	Grab	1/month	1
Cadmium, Total Recoverable	µg/L	Grab	1/quarter	
Zinc, Total Recoverable	µg/L	Grab	1/quarter	1
Settleable Solids	ml/L	Grab	1/year	1
Turbidity	NTU	Grab	1/year	1
Total Suspended Solids	mg/L	Grab	1/year	1
Oil and Grease	mg/L	Grab	1/year	1
Total Petroleum Hydrocarbons (TPH)	mg/L	Grab	1/year	1
Polynuclear Aromatic Hydrocarbons (PAH) ³	µg/L	Grab	1/year	1
Tributyltin (TBT)	µg/L	Grab	1/year	1

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Acute Toxicity	Pass or Fail	Grab	1/year	1
Chronic Toxicity	TUc	Grab	1/year	1
Total Residual Chlorine	$\mu\text{g/L}$	Grab	1/year	1
Lead, Total Recoverable	$\mu\text{g/L}$	Grab	1/year	1
Remaining CTR Priority Pollutants	$\mu\text{g/L}$	Grab	1 in Year One 1 in Year Five	1

Thank you for your consideration of the enclosed request.

Sincerely,



Kelly E. Richardson
of LATHAM & WATKINS LLP

Enclosure

cc: David Barker, Supervising WRC Engineer
Robert Hillstrom, NASSCO
Matthew Luxton, NASSCO
T. Michael Chee, NASSCO

Table 1. An example of comparison between the AAEL and 12-month average effluent concentrations for M-discharge with hypothetical data. ‘-’ indicates no discharge occurs.

i th month	Receiving water concentration	12-month running average receiving water concentration	Effluent concentration	12-month average effluent concentration	MDEL Exceedance?	AAEL Exceedance?
1	8.2	10.8	-			
2	8.9	10.6	-			
3	9.6	10.5	-			
4	10.0	10.4	9.0	10.0	No	No
5	10.0	10.3	-			
6	12.0	10.4	-			
7	12.0	10.5	-			
8	15.0	10.8	-			
9	15.0	11.1	-			
10	12.0	11.2	-			
11	12.0	11.3	-			
12	14.0	10.4	15.0	12.0	Yes	Yes
13	13.0	10.9	-			
14	12.0	11.2	-			
15	10.0	11.4	-			
16	10.0	11.4	-			
17	10.0	11.4	-			
18	10.0	11.3	-			
19	11.0	11.1	-			
20	10.5	10.8	10.0	12.5	No	Yes
21	10.0	10.4	-			
22	10.0	10.2	-			
23	10.0	10.0	-			
24	10.0	9.7	-			
25	10.0	9.5	-			
26	10.0	9.3	-			
27	10.0	9.3	9.0	9.5	No	Yes