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14 SAN DIEGO REGION

15 IN THE MATTER OF TENTATIVE
16 CLEANUP AND ABATEMENT ORDER
17 NO. R9-2010-0002 (SHIPYARD
18 SEDIMENT CLEANUP)

19 **NATIONAL STEEL AND SHIPBUILDING**
20 **COMPANY'S JOINDER IN BAE'S**
21 **OPPOSITION TO SAN DIEGO**
22 **COASTKEEPER'S AND ENVIRONMENTAL**
23 **HEALTH COALITION'S MOTION FOR**
24 **PROTECTIVE ORDER TO QUASH**
25 **DISCOVERY**

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1 Designated Party National Steel and Shipbuilding Company (“NASSCO”) hereby joins
2 with BAE Systems San Diego Ship Repair, Inc. (“BAE”) in opposition to San Diego
3 Coastkeeper’s (“Coastkeeper”) and Environmental Health Coalition’s (“EHC”) Motion for
4 Protective Order to Quash Discovery by NASSCO and BAE (“Motion to Quash”), and
5 incorporates the argument set forth in BAE’s Opposition as if set forth herein. This Joinder
6 hereby supplements BAE’s opposition to Coastkeeper’s and EHC’s Motion to Quash.

7 **I. INTRODUCTION**

8 Coastkeeper’s and EHC’s Motion to Quash arises from two successes achieved by these
9 groups in the matter concerning the Tentative Cleanup and Abatement Order No. R9-2010-0002
10 (“Tentative CAO”) and the Draft Technical Report (“DTR”) (the “Shipyard Sediment Matter”).
11 First, in September 2005, Coastkeeper and EHC prevailed in their motion to become Designated
12 Parties in the Shipyard Sediment Matter, thereby earning a number of rights not provided to the
13 general public, including the right to submit expert testimony and to seek discovery from the
14 other Designated Parties.

15 Second, in July 2010, Coastkeeper and EHC prevailed in their opposition to an otherwise
16 unanimous request by the other Designated Parties to extend the August 23, 2010 discovery
17 deadline, a motion prompted in part by the fact that the Regional Water Quality Control Board,
18 San Diego Region Cleanup Team (“Cleanup Team”) intends to publish a revised Tentative CAO
19 and DTR on or about August 27, 2010, after the currently scheduled close of discovery.

20 Ironically, Coastkeeper and EHC now seek to distance themselves from both prior
21 successes, first by moving the Presiding Officer to excuse them from performing their hard-won
22 duty to respond to discovery propounded by other Designated Parties, and next by contending
23 that any discovery conducted *before* the anticipated release of the revised CAO and DTR is
24 pointless because it may become moot. Motion to Quash, at 1-2.

25 As set forth in BAE’s Opposition, the Motion to Quash must be denied because
26 Coastkeeper and EHC did not comply with meet and confer procedures set forth in the Code of
27 Civil Procedure (“CCP”), as made applicable by the Final Discovery Order. Accordingly, the
28 scope of the discovery dispute – if in fact there turns out to be one – has not yet been defined by

1 the parties and therefore is not properly before the Presiding Officer.

2 Furthermore, the Motion to Quash does not disturb NASSCO's legitimate basis for
3 propounding discovery on Coastkeeper and EHC, respectively. Contrary to Coastkeeper's and
4 EHC's claims that NASSCO's discovery is intended to harass, punish, or even abuse them,
5 NASSCO's discovery is focused on four broad categories: (1) preparation of EHC's Angler
6 study, as relied upon by the Cleanup Team and discussed in Section 1.5.3.3 of the DTR; (2)
7 preparation of the October 2009 MacDonald report, commissioned by Coastkeeper and EHC,
8 and how it relates to the Tentative CAO and DTR; (3) EHC's and Coastkeepers'
9 communications with members of the Cleanup Team, Advisory Team, and Regional Board; and
10 (4) identifying and seeking information from EHC's and Coastkeeper's designated expert and
11 non-expert witnesses. All of these categories are relevant to the Shipyard Sediment Matter, and
12 properly within the scope the Final Discovery Plan. Accordingly, Coastkeeper's and EHC's
13 Motion to Quash must be denied.

14 **II. ARGUMENT**

15 **A. Standard of Review**

16 The Final Discovery Plan sets out the types and procedures for permissible discovery in
17 the Shipyard Sediment Matter, and points to the CCP as the applicable source of authority,
18 except to the extent modified by the Final Discovery Plan. Notably, the Final Discovery Plan
19 sets no limits on the number of special interrogatories, requests for admission, or requests for
20 production of documents that may be propounded by the parties, expressly because of the
21 complexity and number of issues involved in the Shipyard Sediment Matter. Final Discovery
22 Plan, at §§ I.B.2, C., D.2.

23 Prior to filing a motion for protective order, an aggrieved party must make a reasonable
24 and good faith attempt at informal resolution of all issues to be addressed in the motion. CCP
25 §§ 2030.090(a) (interrogatories); 2031.060(a) (document production); 2033.080(a) (requests for
26 admissions). This meet and confer process may occur by conferring "in person, by telephone or
27 by letter with an opposing party or attorney . . ." CCP § 2023.010(i). If this meet and confer
28 process fails to resolve the issues, a moving party must file a "meet and confer" declaration with

1 its motion, attesting to “facts showing a reasonable and good faith attempt at an informal
2 resolution of each issue presented in the motion.” *Id.*; CCP § 2016.040 (setting forth
3 requirements of a “meet and confer declaration”). Where a “meet and confer” declaration is
4 required, as was the case here, it is a misuse of the discovery process to fail to meet and confer
5 “with an opposing party or attorney in a reasonable and good faith attempt to resolve informally
6 any dispute concerning discovery” CCP § 2023.010(i).

7 **B. No Meet and Confer Occurred**

8 Coastkeeper’s and EHC’s Motion to Quash is signed by Ms. Jill Witkowski, who attests
9 to conversations had by Ms. Gabriel Solmer with counsel for NASSCO and BAE. Motion to
10 Quash, at 2. No “meet and confer” declaration for Ms. Solmer is attached to the Motion to
11 Quash. Accordingly, on its face Coastkeeper’s and EHC’s Motion to Quash is procedurally
12 defective and must be denied. CCP §§ 2030.090(a) (meet and confer declaration required for
13 motion to quash); 2031.060(a) (same); 2033.080(a) (same). Furthermore, even if Ms.
14 Witkowski’s hearsay statements could be judged sufficient to support the Motion to Quash, no
15 “reasonable and good faith attempt” to resolve the issue actually occurred.¹

16 On Thursday, July 29, 2010, at 2:01 p.m., Mr. Kelly E. Richardson, counsel for
17 NASSCO, received a telephone message from Ms. Gabriel Solmer, attorney of record for
18 Coastkeeper and EHC, while he was engaged in ongoing mediation concerning the Shipyard
19 Sediment Matter. Declaration of Kelly E. Richardson (“Richardson Dec.”), ¶ 5. Ms. Solmer’s
20 message asked to meet and confer regarding NASSCO’s discovery requests to EHC and
21 Coastkeeper. *Id.*

22 On Friday, July 30, 2010, at 12:52 p.m., Mr. Richardson received a telephone message
23 from Ms. Jill Witkowski, attorney of record for Coastkeeper and EHC, while he was engaged in
24 ongoing mediation concerning the Tentative CAO and DTR. *Id.* at ¶ 6. In her message, Ms.
25 Witkowski informed Mr. Richardson that Coastkeeper and EHC would probably be filing a

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27 ¹ The Motion to Quash does not indicate whether Ms. Witkowski was present during the described telephone
28 conferences (Motion to Quash at 2).

1 motion the same day due to what she described as “the sheer volume and extent” of NASSCO’s
2 discovery requests to EHC and Coastkeeper. *Id.* Ms. Witkowski indicated that either she or Ms.
3 Solmer wanted to talk to Mr. Richardson on Friday afternoon before filing the motion to try to
4 convince him to strike some of NASSCO’s discovery requests to EHC and Coastkeeper. *Id.*

5 On Friday, July 30, 2010, Mr. Richardson reached Ms. Solmer by telephone at
6 approximately 3:30 p.m., immediately after leaving mediation on the Shipyard Sediment Matter
7 and while returning from mediation to his office.² *Id.* at ¶ 7. During their telephone conference,
8 Mr. Richardson informed Ms. Solmer that he did not have NASSCO’s discovery requests in
9 front of him because he was traveling, but would be happy to confer about the general nature of
10 NASSCO’s requests during that conversation, and subsequently to meet and confer regarding
11 any specific discovery requests as soon as convenient for Ms. Solmer, either later that afternoon
12 or early next week. *Id.* at ¶ 8.

13 Ms. Solmer informed Mr. Richardson that she felt that it did not make sense to conduct
14 discovery prior to the issuance of the revised Tentative CAO and DTR, which the Cleanup Team
15 has indicated will occur on or about August 27, 2010. *Id.* at ¶ 9. Mr. Richardson agreed that it
16 was impossible for Coastkeeper, EHC, and NASSCO to resolve among themselves the fact that
17 discovery will close on August 23, 2010, prior to the planned release of the revised Tentative
18 CAO and DTR on August 27, 2010, without the intervention of the Presiding Officer. *Id.*

19 Ms. Solmer informed Mr. Richardson that she would be filing a Motion for Protective
20 Order to Quash NASSCO’s and BAE’s discovery requests on Friday, July 30, 2010, within
21 approximately 30 minutes of their conversation, because she felt it was important that the
22 Presiding Officer have an opportunity to review the Motion over the weekend. *Id.* at ¶ 10.
23 Contrary to Ms. Witkowski’s representations in the Motion to Quash, however, Ms. Solmer and
24 Mr. Richardson never discussed the scope of NASSCO’s specific discovery requests at issue in
25 the Motion to Quash (although Ms. Solmer informed Mr. Richardson that she considered

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27 ² To Mr. Richardson’s knowledge, Ms. Witkowski was not on the telephone conference between Ms. Solmer and
28 himself on Friday, July 30, 2010.

1 NASSCO's discovery requests to be overbroad), nor did Ms. Solmer ask whether Mr.
2 Richardson thought they would be unable to resolve their differences without the intervention of
3 the Presiding Officer. Motion to Quash at 2; Richardson Decl., ¶ 11.

4 In fact, it is Mr. Richardson's belief that he may be able to resolve any differences with
5 respect to NASSCO's discovery requests with Ms. Solmer without the intervention of the
6 Presiding Officer, through a standard meet and confer process. *Id.* at ¶ 12.

7 On these facts, it is clear that Coastkeeper and EHC never made "a reasonable and good
8 faith attempt at an informal resolution of each issue presented by the motion." CCP § 2016.040.
9 Instead, the telephone conference between Ms. Solmer and Mr. Richardson on Friday, July 30,
10 2010, only minutes before the Motion to Quash was filed, can only be described as a notification
11 of Coastkeeper's and EHC's *intent to file* the Motion to Quash, not a good faith attempt to
12 resolve the issues presented in their Motion.

13 In fact, the Motion to Quash virtually admits that Coastkeeper and EHC never made any
14 attempt to answer NASSCO's and BAE's discovery requests. Using future tense, as if
15 Coastkeeper and EHC have yet to do so, it states, "[t]he amount of time and expense it would
16 take just to wade through the flood of discovery to search for legitimate discovery questions or to
17 craft individual objections to each of the 841 requests is not just unwarranted annoyance, it is
18 downright oppressi[ve]..." Motion to Quash at 9 (internal quotations omitted); *see id.* at 3 ("it
19 will be expensive and time-consuming for San Diego Coastkeeper and Environmental Health
20 Coalition to wade through the flood of discovery to even determine which requests are legitimate
21 and which are not . . ."). Accordingly, the Motion to Quash must be denied because it does not
22 comply with required good faith meet and confer requirements. CCP §§ 2030.090(a);
23 2031.060(a); 2033.080(a).

24 C. NASSCO's Discovery Requests Are Relevant and Appropriate

25 Contrary to Coastkeeper's and EHC's assertions in the Motion to Quash, NASSCO's
26 discovery requests are entirely proper. In addition to the argument advanced in BAE's
27 Opposition, NASSCO adds the following points.

28 Two primary thrusts of NASSCO's discovery requests concern EHC's Angler study, as

1 discussed in Section 1.5.3.3 of the DTR, and the preparation of the October 2009 MacDonald
2 report, commissioned by Coastkeeper and EHC, and how the report relates to the Tentative CAO
3 and DTR. Both of these areas of inquiry are narrowly focused on Coastkeeper's and EHC's own
4 contributions to the administrative record, and in no way can be construed as "fishing
5 expeditions." Motion to Quash, at 8 (quotations and citations omitted). Closely correlated to
6 these subjects are NASSCO's requests to identify Coastkeeper's and EHC's experts with regard
7 to various disciplines involved in determining the proper scope of the remedial footprint, a series
8 of requests necessitated by Coastkeeper's and EHC's deficient expert and non-expert witness
9 designations. *Compare* CCP § 2034.010 *et seq.* (requiring specific information about expert
10 witness designations), *with* Coastkeeper's and EHC's Expert and Non-Expert Witness
11 Designations, July 19, 2010 (naming ten witnesses, not distinguishing between expert and non-
12 expert witnesses, and not providing the required declaration and accompanying information).

13 Focusing on those three categories of discovery requests alone – the Angler study, the
14 MacDonald Benthic Report, and questions about Coastkeeper's and EHC's experts – reveals that
15 fully 58 of 84 (69%) NASSCO's Special Interrogatories directed to Coastkeeper concerned those
16 subjects. *See, e.g.*, NASSCO's First Set of Special Interrogatories to San Diego Coastkeeper
17 (Angler study, Nos. 1 – 28; MacDonald Benthic Report, Nos. 32 – 39; questions about
18 Coastkeeper's and EHC's experts, Nos. 62 – 83). Contrary to Coastkeeper's and EHC's claim
19 that the "vast majority" of NASSCO's and BAE's interrogatories focus on "communications"
20 with "various people about the Tentative Order, Draft Technical Report, or the cleanup site", in
21 fact the vast majority of NASSCO's requests focus discretely on relevant and proper topics.
22 Motion to Quash, at 4.

23 With regard to NASSCO's discovery requests seeking Coastkeeper's and EHC's
24 communications with the Advisory Team and the Regional Board with respect to the Shipyard
25 Sediment Matter, those answers should be short indeed, because any such communications are
26 prohibited. *See, e.g.* NASSCO's First Set of Special Interrogatories to San Diego Coastkeeper
27 (Nos. 52, 54).

28 Finally, NASSCO is more than willing to work with Coastkeeper, EHC, and BAE to

1 ensure that any duplicative discovery responses need only be answered once, and to reach
2 agreement to limit specific discovery requests that Coastkeeper and EHC view as overbroad.
3 The total number of requests, however, is not a basis for objecting to NASSCO's discovery.

4 **III. CONCLUSION**

5 It is fair to say that all Designated Parties are struggling with the Presiding Officer's July
6 16, 2010, decision not to extend the August 23, 2010, discovery deadline, including NASSCO.
7 NASSCO reaffirms its offer to meet and confer with Coastkeeper and EHC to attempt to resolve
8 any specific objections they have to NASSCO's discovery requests.

9 Coastkeeper's and EHC's Motion to Quash has no basis on the facts and argument
10 presented therein. Furthermore, the evidence presented in BAE's and NASSCO's Oppositions
11 shows that the required meet and confer process has yet to occur. Accordingly, NASSCO
12 respectfully requests that the Presiding Officer deny Designated Parties EHC's and
13 Coastkeeper's Motion for a Protective Order to Quash Discovery by NASSCO and BAE in its
14 entirety.

15 Alternatively, or in conjunction with further meet and confer efforts, NASSCO also
16 supports a reasonable extension of the discovery cut-off for the reasons previously placed on
17 record as well as those set forth herein.

18 Dated: August 2, 2010

LATHAM & WATKINS LLP

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20 By 
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22 Attorneys for Designated Party
23 NATIONAL STEEL AND
24 SHIPBUILDING COMPANY
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13 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

14 SAN DIEGO REGION

15 IN THE MATTER OF:
16
17 CLEANUP AND ABATEMENT ORDER
18 NO. R9-2010-0002

**DECLARATION OF KELLY E.
RICHARDSON IN SUPPORT OF
NATIONAL STEEL AND SHIPBUILDING
COMPANY'S JOINDER IN BAE'S
OPPOSITION TO SAN DIEGO
COASTKEEPER'S AND
ENVIRONMENTAL HEALTH
COALITION'S MOTION FOR
PROTECTIVE ORDER TO QUASH
DISCOVERY**

Before David King, Presiding Officer for
Prehearing Proceedings

DECLARATION BY COUNSEL OF RECORD

I, Kelly E. Richardson, declare as follows:

1. I am an attorney duly licensed to practice before all the courts of the State of California. I am a partner with the law firm of Latham & Watkins LLP, counsel of record for Designated Party National Steel and Shipbuilding Company (“NASSCO”) in the above-captioned matter concerning Tentative Cleanup and Abatement Order No. R9-2010-0002 (“Tentative CAO”) and the Draft Technical Report (“DTR”) (the “Shipyard Sediment Matter”). I am personally familiar with the facts set forth herein and if called upon to do so, could and would testify competently thereto.

2. On Thursday, July 22, 2010, on behalf of NASSCO, Latham & Watkins LLP served discovery requests, pursuant to the February 18, 2010 Final Discovery Order, on the following three Designated Parties in the Shipyard Sediment Matter: the Regional Water Quality Control Board, San Diego Region Cleanup Team (“Cleanup Team”), the Environmental Health Coalition (“EHC”), and the San Diego Coastkeeper (“Coastkeeper”).

3. On Thursday, July 22, 2010, the BAE Systems San Diego Ship Repair, Inc. (“BAE”), the City of San Diego (“City”), and San Diego Gas & Electric Co. (“SDG&E”) also served discovery requests on other Designated Parties in the Shipyard Sediment Matter. BAE served discovery requests on the Cleanup Team, Coastkeeper, and EHC; the City served discovery requests on the Cleanup Team; and SDG&E served discovery requests on the San Diego Unified Port District (“Port”) and the Cleanup Team.

4. On both Thursday, July 29, 2010, and Friday, July 30, 2010, I was engaged in ongoing mediation concerning the Shipyard Sediment Matter for large portions of both days.

5. On Thursday, July 29, 2010, at 2:01 p.m., I received a telephone message from Ms. Gabriel Solmer, attorney of record for Coastkeeper and EHC, while I was engaged in ongoing mediation concerning the Shipyard Sediment Matter. Ms. Solmer’s voicemail sought to meet and confer regarding NASSCO’s discovery requests.

///

1 6. On Friday, July 30, 2010, at 12:52 p.m., I received a telephone message
2 from Ms. Jill Witkowski, attorney of record for Coastkeeper and EHC, while I was engaged in
3 ongoing mediation concerning the Tentative CAO and DTR. In her message, Ms. Witkowski
4 informed me that Coastkeeper and EHC would probably be filing a motion to quash the same
5 day due to what she described as “the sheer volume and extent” of NASSCO’s discovery
6 requests. Ms. Witkowski indicated that she or Ms. Solmer wanted to talk to me Friday
7 afternoon, before filing the motion, to try to convince me to strike some of NASSCO’s discovery
8 requests.

9 7. On Friday, July 30, 2010, I returned Ms. Witkowski’s voicemail message
10 from earlier that afternoon, and left her a voicemail message indicating a willingness to meet and
11 confer regarding NASSCO’s discovery requests. After leaving that message, I reached Ms.
12 Solmer by telephone at approximately 3:30 p.m., immediately after leaving mediation on the
13 Shipyard Sediment Matter, and while driving from mediation to my office.

14 8. During our telephone conference, I informed Ms. Solmer that I did not
15 have NASSCO’s discovery requests in front of me because I was traveling, but would be happy
16 to confer about the general nature of NASSCO’s requests during that conversation, and
17 subsequently to meet and confer regarding any specific discovery requests as soon as convenient
18 for her, either later that afternoon or early next week.

19 9. Ms. Solmer informed me that she felt that it did not make sense to conduct
20 discovery prior to the issuance of the revised Tentative CAO and DTR, which the Cleanup Team
21 has indicated will occur on or about August 27, 2010. I agreed that it was impossible for
22 Coastkeeper, EHC, and NASSCO to resolve between us the fact that discovery will close on
23 August 23, 2010, prior to the planned release of the revised Tentative CAO and DTR, without
24 the intervention of the Presiding Officer.

25 10. Ms. Solmer informed me that she would be filing a Motion for Protective
26 Order to Quash NASSCO’s and BAE’s discovery requests on Friday, July 30, 2010, within
27 approximately 30 minutes of our conversation, because she felt it was important that the
28 Presiding Officer have an opportunity to review the Motion over the weekend.

1 11. Ms. Solmer and I never discussed the scope of NASSCO's specific
2 discovery requests, although she informed me that she considered NASSCO's discovery requests
3 to be overbroad. Ms. Solmer did not ask whether I thought we would be able to resolve our
4 differences with respect to NASSCO's discovery without the intervention of the Presiding
5 Officer.

6 12. I believe that Ms. Solmer and I may be able to resolve our differences with
7 respect to NASSCO's discovery requests, without the intervention of the Presiding Officer,
8 through a standard meet and confer process.

9 13. To my knowledge, Ms. Witkowski was not on the telephone conference
10 between Ms. Solmer and me on Friday, July 30, 2010.

11 14. EHC and Coastkeeper ceased participating to mediation in the Shipyard
12 Sediment Matter in late 2009.

13 15. The San Diego Unified Port District withdrew from mediation in the
14 Shipyard Sediment Matter effective January 19, 2010.

15 16. Because NASSCO, BAE, the City, SDG&E, the Navy, and other
16 Designated Parties have been actively participating in mediation and collaborating on the
17 Tentative CAO and DTR, there is less of a need for them to seek discovery against one another.

18 I declare under penalty of perjury under the laws of the State of California that the
19 foregoing is true and correct. Executed on August 2, 2010, at San Diego, California.

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9 SAN DIEGO REGION

10 IN THE MATTER OF TENTATIVE
11 CLEANUP AND ABATEMENT ORDER
NO. R9-2010-0002 (SHIPYARD
12 SEDIMENT CLEANUP)
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DECLARATION OF SERVICE

Assigned To: Presiding Officer, David King.

1 I am a resident of the State of California, over the age of eighteen years, and not a
2 party to the within action. My business address is Latham & Watkins, 600 West Broadway,
3 Suite 1800, San Diego, California 92101. On August 2, 2010, I served the within document(s):

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**NATIONAL STEEL AND SHIPBUILDING COMPANY'S JOINDER IN BAE'S
OPPOSITION TO SAN DIEGO COASTKEEPER'S AND ENVIRONMENTAL
HEALTH COALITION'S MOTION FOR PROTECTIVE ORDER TO QUASH
DISCOVERY**

**DECLARATION OF KELLY E. RICHARDSON IN SUPPORT OF NATIONAL
STEEL AND SHIPBUILDING COMPANY'S JOINDER IN BAE'S OPPOSITION TO
SAN DIEGO COASTKEEPER'S AND ENVIRONMENTAL HEALTH COALITION'S
MOTION FOR PROTECTIVE ORDER TO QUASH DISCOVERY**

BY E-MAIL: I caused the above-referenced documents to be converted in digital
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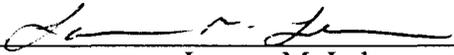
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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **August 2, 2010**, at San Diego, California.



Lauren M. Luhmann