

1 LATHAM & WATKINS LLP  
2 Robert M. Howard (SB No. 145870)  
3 Kelly E. Richardson (SB No. 210511)  
4 Jeffrey P. Carlin (SB No. 227539)  
5 Ryan R. Waterman (SB No. 229485)  
6 Jennifer P. Casler-Goncalves (SB No. 259438)  
7 600 West Broadway, Suite 1800  
8 San Diego, California 92101-3375  
9 Telephone: (619) 236-1234  
10 Facsimile: (619) 696-7419

11 Attorneys for Designated Party  
12 National Steel and Shipbuilding Company

13 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

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 SUPPLEMENTAL  
21 MEMORANDUM OF POINTS AND  
22 AUTHORITIES IN SUPPORT OF MOTION  
23 REQUESTING DETERMINATION THAT  
24 TENTATIVE CLEANUP AND ABATEMENT  
25 ORDER NO. R9-2010-0002 IS EXEMPT FROM  
26 THE CALIFORNIA ENVIRONMENTAL  
27 QUALITY ACT (CEQA)**

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Introduction**

3 On July 27, 2010, the Presiding Officer directed designated party National Steel and  
4 Shipbuilding Company (NASSCO) to submit additional legal authority on whether the Presiding  
5 Officer has the authority to determine if Tentative Cleanup and Abatement Order No. R9-2010-  
6 0002 (CAO) is categorically exempt from environmental review under the California  
7 Environmental Quality Act (CEQA). The Presiding Officer's order was issued in response to  
8 NASSCO's July 23, 2010 motion seeking a determination from the Regional Board that the  
9 CAO is exempt from CEQA. This memorandum is submitted in response to the Presiding  
10 Officer's July 27, 2010 order, and it is intended to establish that CEQA requires the Regional  
11 Board determine as a matter of potential state-wide policy whether or not its CAOs are exempt  
12 from CEQA. The Regional Board may delegate such authority to the Presiding Officer, as a  
13 member of the Regional Board decision-making body, subject to an appeal of any decision by  
14 the Presiding Officer to the full Regional Board.

15 **II. Summary of Argument**

16 Under CEQA, the Regional Board, as the "lead agency" or the government authority with  
17 principal responsibility for the CAO, is specifically *required* to determine whether or not the  
18 CAO is exempt from CEQA; here, the record suggests that such a determination (as opposed to a  
19 recommendation by the Cleanup Team) has not yet been made. While the Regional Board's  
20 authority to determine if the CAO is exempt from CEQA *may* be delegated to Regional Board  
21 staff (and presumably to the Presiding Officer), if the Regional Board so chooses, the Regional  
22 Board retains the responsibility and authority to make the ultimate public policy determination  
23 (or the reversal of decades of prior public policy) regardless of the position that the Cleanup  
24 Team has taken.

25 An agency's categorical exemption determination will be upheld so long as it is  
26 supported by substantial evidence. Substantial evidence supports a determination that the CAO  
27 is categorically exempt because the CAO indisputably falls within the Class 7, Class 8, and Class  
28 21 categorical exemptions for agency enforcement actions and agency actions to protect natural

1 resources or the environment, as detailed in NASSCO's July 23, 2010 motion. These categorical  
2 exemptions are designed to facilitate implementation of measures to address or remediate  
3 environmental impacts without having to wait for completion of the lengthy CEQA process.  
4 These exemptions also highlight an important public policy consideration: whether a cleanup  
5 and abatement order should be delayed or obstructed because of environmental review  
6 requirements under CEQA, including completion of an environmental impact report (EIR), even  
7 though such orders fall within categories of projects that the State Natural Resources Agency has  
8 already determined will not cause significant environmental impacts, and which have therefore  
9 been categorically exempted from CEQA. This precise policy concern is implicated in the  
10 present matter, since a determination that the CAO is categorically exempt would allow  
11 implementation of the CAO's remedial actions for the Shipyard Sediment Site without the  
12 lengthy delay that would otherwise be associated with completing an EIR.<sup>1</sup>

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15 <sup>1</sup> Notwithstanding the allegations of certain parties in this proceeding, NASSCO has  
16 repeatedly opposed delay in issuance of the CAO and implementation of remedial action.  
17 *See, e.g.*, Letter from David Mulliken, Latham & Watkins, to Michael P. McCann, Regional  
18 Board (Feb. 17, 2006) (stating that "NASSCO . . . remains concerned with the prolonged and  
19 continuing delay in the issuance of a Technical Report by the Cleanup Team . . ." and  
20 expressing NASSCO's dissatisfaction with the Cleanup Team and Board's "substantial delay  
21 in issuing the Technical Report."); Letter from David Mulliken, Latham & Watkins, to John  
22 Minan, Presiding Officer and Chairman, Regional Board (Mar. 31, 2006) (expressing  
23 concern regarding the "prolonged and continuing delay in the issuance of a Technical  
24 Report"); Letter from David Mulliken, Latham & Watkins to Michael P. McCann, Chief  
25 Engineer, Advisory Team, Regional Board (Aug. 25, 2006) ("NASSCO remains concerned  
26 by the prolonged and continuing delay in the issuance of a Technical Report by the Cleanup  
27 Team . . ."); Letter from Kelly Richardson, Latham & Watkins, to Regional Board, Region  
28 9 (Mar. 22, 2010) ("If, contrary to the applicable CEQA exemptions, the Regional Board  
decides that it must prepare an Environmental Impact Report ("EIR") for this CAO, then it is  
important for the Regional Board to understand that adoption of the CAO will be delayed  
until the CEQA process is completed—a result that NASSCO does not advocate.  
Furthermore, NASSCO considers the Regional Board's estimate that it will be able to  
prepare an EIR and complete the public review process in six months to be a very optimistic  
estimate. A more realistic estimate may be twelve to eighteen months, if not longer.");  
NASSCO's Motion Requesting Determination That CAO Is Exempt From CEQA, at 1  
(requesting CEQA exemption in order to "allow the Regional Board's review of the CAO to  
proceed without the lengthy and unnecessary delays that are certain to result from the  
preparation and certification of an environmental impact report (EIR)").

1 **II. CEQA Gives the Regional Board the Legal Authority to Make an Exemption**  
2 **Determination**

3 CEQA expressly provides that “a lead agency *shall* determine whether the project is  
4 exempt” from CEQA requirements. Cal. Code Regs. tit. 14, § 15061(a) (emphasis added). As  
5 NASSCO’s motion demonstrates, the policy of this Regional Board (and other Regional Boards  
6 throughout the state) has been to categorically exempt remediation projects, including prior  
7 sediment remediation projects in San Diego Bay. Accordingly, not only does the Regional  
8 Board have the authority to determine whether or not CAOs shall remain exempt from CEQA,  
9 the Regional Board, as the lead agency, is obligated to make such a determination in this case  
10 before the Cleanup Team reverses course on decades of prior practice. The record here suggests  
11 that the Regional Board has not yet evaluated the issue or determined whether a categorical  
12 exemption should apply to the CAO.

13 In making the requisite exemption determination, CEQA does not require the Regional  
14 Board to follow any specific procedure; and, by way of example, there is no requirement to  
15 prepare a detailed written evaluation or hold a public hearing. *See Ass’n for Prot. of Env’tl*  
16 *Values v. City of Ukiah*, 2 Cal. App. 4th 729, 730 (1991); *San Lorenzo Valley Community*  
17 *Advocates for Responsible Educ. v. San Lorenzo Valley Unified Sch. Dist.*, 139 Cal. App. 4th  
18 1356, 1385 (2006); Cal. Code Regs. tit. 14, § 15061. Accordingly, either the Presiding Officer,  
19 to the extent authorized by the Regional Board as a member of the Regional Board decision-  
20 making body, or the Regional Board decision-making body as a whole, may determine whether  
21 or not the CAO is exempt from CEQA (assuming of course such a decision by the Presiding  
22 Officer can still be appealed to the entire Regional Board), and may do so without adhering to  
23 any specific procedure or formalities.

24 The Regional Board is also entitled to delegate the exemption determination to its staff,  
25 as CEQA Guidelines section 15025(a)(1) provides that a “public agency *may* assign specific  
26 functions to its staff to assist in administering CEQA,” including “[d]etermining whether a  
27  
28

1 project is exempt.” Cal. Code Regs. tit. 14, § 15025(a)(1) (emphasis added).<sup>2</sup> This language is  
2 permissive; an agency’s decision-making body has the option to delegate an exemption  
3 determination to staff, but is not required to do so. Thus, the position that the Cleanup Team has  
4 taken does not bind the Presiding Officer or Regional Board in any way, since the Regional  
5 Board is obligated to make an exemption determination and retains discretion whether to follow  
6 any staff recommendation regarding same. *See Ukiah*, 2 Cal. App. 4th at 730; Cal. Code Regs.  
7 tit. 14, § 15061.

8 For the above reasons, the Presiding Officer or the Regional Board as a whole may  
9 presently determine that the CAO is exempt from CEQA. For the reasons set forth in  
10 NASSCO’s July 23, 2010 motion, substantial evidence supports a finding that the CAO is  
11 categorically exempt from CEQA under the Class 7, Class 8 and Class 21 exemptions for agency  
12 enforcement actions and agency actions to protect natural resources or the environment, and no  
13 “unusual circumstances” exist which would warrant an exception to those exemptions. *See Cal.*  
14 *Code Regs. tit. 14, §§ 15307-15308, 15321.*

15 **III. Conclusion**

16 For the foregoing reasons as well as those set forth in NASSCO’s July 23, 2010 motion,  
17 NASSCO respectfully requests that the Regional Board or the Presiding Officer issue a  
18 determination that the CAO is categorically exempt from CEQA.

19 Dated: August 2, 2010

LATHAM & WATKINS LLP

20  
21 By   
22 Kelly E. Richardson  
23 Attorneys for Designated Party  
24 NATIONAL STEEL AND  
25 SHIPBUILDING COMPANY

26 \_\_\_\_\_  
27 <sup>2</sup> The CEQA Guidelines implement CEQA. Although they are not binding, they warrant great  
28 weight by the courts. *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 6 Cal.  
4th 1112, 1123 n.4 (1993).

1 **PROOF OF SERVICE**

2 I am employed in the County of San Diego, State of California. I am over the age of 18  
3 years and not a party to this action. My business address is Latham & Watkins LLP, 600 West  
4 Broadway, Suite 1800, San Diego, CA 92101-3375.

5 On **August 2, 2010**, I served the following document described as:

6 **NATIONAL STEEL AND SHIPBUILDING COMPANY'S SUPPLEMENTAL**  
7 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**  
8 **REQUESTING DETERMINATION THAT TENTATIVE CLEANUP AND**  
9 **ABATEMENT ORDER NO. R9-2010-0002 IS EXEMPT FROM THE**  
10 **CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

11 by serving a true copy of the above-described document in the following manner:

12 **BY ELECTRONIC MAIL**

13 **Upon written agreement by the parties, the above-described document was transmitted via**  
14 **electronic mail to the parties noted below on August 2, 2010.**

15 Catherine Hagan  
16 Staff Counsel  
17 California Regional Water Quality Control  
18 Board, San Diego Region  
19 9174 Sky Park Court, Suite 100  
20 San Diego, CA 92123-4340  
21 [chagan@waterboards.ca.gov](mailto:chagan@waterboards.ca.gov)  
22 (858) 467-2958  
23 (858) 571-6972

24 Raymond Parra  
25 Senior Counsel  
26 BAE Systems Ship Repair Inc.  
27 PO Box 13308  
28 San Diego, CA 92170-3308  
[raymond.parra@baesystems.com](mailto:raymond.parra@baesystems.com)  
(619) 238-1000+2030  
(619) 239-1751

18 Michael McDonough  
19 Counsel  
20 Bingham McCutchen LLP  
21 355 South Grand Avenue, Suite 4400  
22 Los Angeles, CA 90071-3106  
23 [michael.mcdonough@bingham.com](mailto:michael.mcdonough@bingham.com)  
24 (213) 680-6600  
25 (213) 680-6499

26 Christopher McNevin  
27 Attorney at Law  
28 Pillsbury Winthrop Shaw Pittman LLP  
725 South Figueroa Street, Suite 2800  
Los Angeles, CA 90017-5406  
[chrismcnevin@pillsburylaw.com](mailto:chrismcnevin@pillsburylaw.com)  
(213) 488-7507  
(213) 629-1033

23 Brian Ledger  
24 Kristin Reyna  
25 Attorney at Law  
26 Gordon & Rees LLP  
27 101 West Broadway, Suite 1600  
28 San Diego, CA 92101  
[bledger@gordonrees.com](mailto:bledger@gordonrees.com)  
[kreyna@gordonrees.com](mailto:kreyna@gordonrees.com)  
(619) 230-7729  
(619) 696-7124

29 Christian Carrigan  
30 Senior Staff Counsel  
31 Office of Enforcement, State Water Resources  
32 Control Board  
33 P.O. Box 100  
34 Sacramento, CA 95812-0100  
35 [ccarrigan@waterboards.ca.gov](mailto:ccarrigan@waterboards.ca.gov)  
36 (916) 322-3626  
37 (916) 341-5896

1 Marco Gonzalez  
2 Attorney at Law  
3 Coast Law Group LLP  
4 1140 South Coast Highway 101  
5 Encinitas, CA 92024  
6 [marco@coastlawgroup.com](mailto:marco@coastlawgroup.com)  
7 (760) 942-8505  
8 (760) 942-8515

James Handmacher  
Attorney at Law  
Morton McGoldrick, P.S.  
PO Box 1533  
Tacoma, WA 98401  
[jvhandmacher@bvmm.com](mailto:jvhandmacher@bvmm.com)  
(253) 627-8131  
(253) 272-4338

6 Jill Tracy  
7 Senior Environmental Counsel  
8 Sempra Energy  
9 101 Ash Street  
10 San Diego, CA 92101  
11 [jtracy@sempra.com](mailto:jtracy@sempra.com)  
12 (619) 699-5112  
13 (619) 699-5189

Sharon Cloward  
Executive Director  
San Diego Port Tenants Association  
2390 Shelter Island Drive, Suite 210  
San Diego, CA 92106  
[sharon@sdpta.com](mailto:sharon@sdpta.com)  
(619) 226-6546  
(619) 226-6557

11 Leslie FitzGerald  
12 Deputy Port Attorney  
13 San Diego Unified Port District  
14 PO Box 120488  
15 San Diego, CA 92112  
16 [lfitzger@portofsandiego.org](mailto:lfitzger@portofsandiego.org)  
17 (619) 686-7224  
18 (619) 686-6444

Nate Cushman  
Associate Counsel  
U.S. Navy  
SW Div, Naval Facilities Engineering Command  
1220 Pacific Hwy  
San Diego, CA 92132-5189  
[nate.cushman@navy.mil](mailto:nate.cushman@navy.mil)  
(619) 532-2511  
(619) 532-1663

16 Laura Hunter  
17 Environmental Health Coalition  
18 401 Mile of Cars Way, Suite 310  
19 National City, CA 91950  
20 [laurah@environmentalhealth.org](mailto:laurah@environmentalhealth.org)  
21 (619) 474-0220  
22 (619) 474-1210

Gabe Solmer  
Legal Director  
San Diego Coastkeeper  
2820 Roosevelt Street, Suite 200A  
San Diego, CA 92106-6146  
[gabe@sdcoastkeeper.org](mailto:gabe@sdcoastkeeper.org)  
(619) 758-7743, ext. 109  
(619) 223-3676

21 Tom Stahl, AUSA  
22 Chief, Civil Division  
23 Office of the U.S. Attorney  
24 880 Front Street, Room 6293  
25 San Diego, CA 92101-8893  
26 [thomas.stahl@usdoj.gov](mailto:thomas.stahl@usdoj.gov)  
27 (619) 557-7140  
28 (619) 557-5004

William D. Brown, Esq.  
Brown & Winters  
120 Birmingham Drive, #110  
Cardiff By The Sea, CA 92007  
[bbrown@brownandwinters.com](mailto:bbrown@brownandwinters.com)  
(760) 633-4485  
(760) 633-4427

1 Mike Tracy, Esq.  
2 DLA Piper LLP US  
3 401 B Street, Suite 1700  
4 San Diego, California 92101-4297  
5 [mike.tracy@dlapiper.com](mailto:mike.tracy@dlapiper.com)  
6 (619) 699-3620  
7 (619) 764-6620

Sandi Nichols, Esq.  
Allen Matkins  
Three Embarcadero Center, 12<sup>th</sup> Floor  
San Francisco, CA 94111  
[snichols@allenmatkins.com](mailto:snichols@allenmatkins.com)  
(415) 837-1515  
(415) 837-1516

8 I declare that I am employed in the office of a member of the Bar of, or permitted  
9 to practice before, this Court at whose direction the service was made and declare under penalty  
10 of perjury under the laws of the State of California that the foregoing is true and correct.

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

12   
13 \_\_\_\_\_  
14 Brittany Brewton