

August 2, 2010

**Via Email**

David King  
Presiding Officer for Prehearing Proceedings  
San Diego Regional Water Quality Control Board  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123-4353

**Re: San Diego Unified Port District Response to Order dated July 27, 2010,  
Requesting Responses to Motion of National Steel and Shipbuilding  
Company Requesting a Determination that TCAO No. R9-2010-0002 is  
Exempt from the California Environmental Quality Act**

Dear Mr. King:

Pursuant to the above-referenced July 27, 2010, Order, the San Diego Unified Port District ("Port District"), a Designated Party, supports the Cleanup Team's determination that unusual circumstances apply to Tentative Cleanup and Abatement Order No. R9-2010-0002 ("TCAO") such that it cannot be found to be categorically exempt from environmental review under the California Environmental Quality Act ("CEQA"). If the TCAO did not contain a specific cleanup plan and the record did not contain evidence that the cleanup may result in potential significant adverse environmental impacts, its adoption may fall within a CEQA exemption. However, for this TCAO, an exemption is inappropriate because there is substantial evidence in the record that the magnitude and scope of the sediment remediation project defined in the TCAO may cause potentially significant adverse environmental impacts related to air quality, geology/soils, and biological resources.

Additionally, the Port District supports the Cleanup Team's conclusion that these potential adverse impacts need to be fully evaluated in an Environmental Impact Report ("EIR") that must be prepared for the San Diego Regional Water Quality Control Board's ("Regional Water Board") consideration before the Board can determine whether to adopt the TCAO. Through the EIR process, the Regional Water Board as well as the public can timely consider additional reasonable cleanup alternatives to the overland disposal of the dredged sediment as well as the development of feasible mitigation measures to minimize the potential adverse environmental impacts from this massive cleanup project before the TCAO is adopted.

### **Shipyard Sediment Cleanup Project**

As a result of the extensive efforts the Cleanup Team, the Dischargers, and the other Designated Parties spent in private mediation over the last two years, the TCAO contains sufficient information to define the proposed cleanup project such that its potential adverse environmental impacts and feasible alternatives and mitigation methods need to be evaluated under CEQA. The TCAO specifies the overall remediation footprint as well as the most contaminated sediment areas within the footprint to be dredged to proposed cleanup levels.

As you know, normally, a TCAO directs a responsible party to develop a plan to clean up contaminants from an area to a specified level and does not specify the remediation method to be used. The responsible party then has 90 days after the issuance of the CAO to submit a Remedial Action Plan (“RAP”) to the Regional Water Board proposing how the party actually plans to conduct the cleanup required in the CAO. The Regional Water Board normally determines at that point what environmental review is required under CEQA for the proposed RAP. The Shipyard Sediment TCAO is remarkably different in scope and detail due to the consensus reached by the parties, including the Cleanup Team, participating in the mediation last December.

The preferred cleanup method in the TCAO proposes the dredging of over 143,000 cubic yards of contaminated marine sediment from a defined remediation area, the dewatering of the dredge spoils, and then the trucking of 215,000 tons of the dried contaminated sediment to an offsite disposal site. The transportation of the sediment is estimated to require 50 truck trips a day, six days a week for three six-month dredging phases (18 months) through the Barrio Logan community. (Source - Cleanup Team’s 7/14/2010 San Diego Bay Sediment Mediation Presentation, pg. 18.) Thus, the TCAO contains sufficient detail about the proposed project (cleanup) to warrant an evaluation now of its potential adverse environmental impacts under CEQA.

### **Unusual Circumstances Preclude the Application of a Categorical CEQA Exemption to the Shipyard Sediment TCAO**

The California Secretary of Resources has developed a list of types of projects that are to be categorically exempt from the requirement to prepare environmental impact analysis documents under CEQA. These exemptions are for classes of projects that ordinarily will not have a significant adverse effect on the environment. National Steel and Shipbuilding Company (“NASSCO”) is correct that the Regional Water Board routinely uses three of these categorical exemptions in adopting typical Cleanup and Abatement Orders. These categorical exemptions apply to regulatory agencies’ actions to: 1) protect natural resources (14 California Code of Regulations (“Cal. Code Regs.”) §15307); 2) protect the environment (14 Cal. Code Regs. §15308); and 3) for enforcement actions (14 Cal. Code Regs. §15321). However, the Regional Water Board cannot use a categorical exemption if there is a reasonable possibility that the project/TCAO will have a significant effect on the environment due to unusual circumstances. (14 Cal. Code Regs. §15300.2 (c).)

Unusual circumstances exist for the Shipyard Sediment TCAO that preclude the use of these typical categorical exemptions. First, the proposed TCAO cleanup is larger than **all** the prior San Diego Bay sediment cleanups combined. (Testimony of David Gibson, Regional Water Board Prehearing Conference 7/14/2010.) Additionally, the prior CAOs requiring sediment remediation in San Diego Bay involved capping in place (e.g., the sand cap over Convair Lagoon and the engineered cap at the former Campbell Shipyard to the north of the subject site). None involved the proposed dredging of over 140,000 cubic yards of sediment over 18 months and then the trucking of that dewatered sediment to a landfill through sensitive bay front communities.

In addition to the magnitude of the proposed cleanup and proposed remediation methods, this TCAO is not typical, as the record already contains sufficient evidence that the preferred cleanup method will potentially cause substantial adverse environmental impacts to a variety of environmental areas. The most significant potential environmental impact is to air quality from the proposed 18 months of diesel emissions generated by the dredging equipment and the diesel powered trucks used to transport the dredge spoils to an offsite landfill. Through the EIR process, the Port District anticipates that other feasible alternatives to this proposed transportation and disposal remediation method will be evaluated to identify a remedial option, or combination of remedial options, that could potentially result in fewer or less significant potential adverse environmental impacts than the proposed project.

### **San Diego Regional Water Board's CEQA Responsibilities**

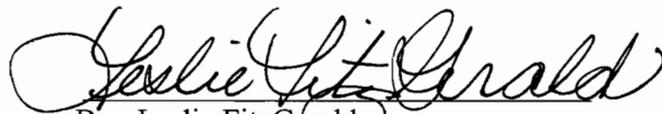
It is the Regional Water Board's ultimate responsibility to determine whether its adoption of the Shipyard Sediment TCAO is categorically exempt under CEQA or whether some type of environmental analysis is required before the Board considers the adoption of the TCAO. Additionally, the Regional Water Board must determine whether the CEQA environmental document is sufficient to fully inform the Board as the decision maker as to all the potentially significant adverse environmental impacts that may result if the cleanup proposed in the TCAO is adopted. While the Board may rely on its scientific and legal staff's recommendations in regard to CEQA compliance, it is ultimately the responsibility of the Board as a whole to determine whether the requirements of CEQA have been met before it takes an enforcement action, including the issuance of a Cleanup and Abatement Order here. Normally, the Regional Board would make this determination immediately before a TCAO is adopted. However, should the Board desire, it could make a determination at this point in time, although the issue may need to be revisited at the time a Cleanup and Abatement Order is adopted.

**Conclusion**

The typical categorical CEQA exemptions for enforcement actions that Regional Water Quality Control Boards have historically applied to other TCAOs are not applicable to the Shipyard Sediment Site TCAO due to the special and unusual circumstances that exist for this sediment cleanup. Therefore, a full analysis is needed of the potentially significant environmental impacts that may result from the proposed cleanup before the Regional Water Board can make a fully informed decision as to whether it should issue this particular TCAO. The Port District looks forward to the adoption of the TCAO and the cleanup of the Shipyard Sediment Site in a publicly transparent and legally defensible manner, which includes a thorough environmental review.

Respectfully submitted,

San Diego Unified Port District

A handwritten signature in black ink, reading "Leslie FitzGerald". The signature is written in a cursive style with a large, looping initial "L".

By: Leslie FitzGerald  
Deputy Port Attorney