

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)**

MEMORANDUM OF POINTS AND AUTHORITIES**I. Introduction**

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

II. Summary of Argument

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

An agency's categorical exemption determination will be upheld so long as it is supported by substantial evidence. Substantial evidence supports a determination that the CAO is categorically exempt because the CAO indisputably falls within the Class 7, Class 8, and Class 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.¹

15 ¹ 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).² 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 ² 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).

PROOF OF SERVICE

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

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

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

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

BY ELECTRONIC MAIL

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

Catherine Hagan
Staff Counsel
California Regional Water Quality Control
Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340
chagan@waterboards.ca.gov
(858) 467-2958
(858) 571-6972

Raymond Parra
Senior Counsel
BAE Systems Ship Repair Inc.
PO Box 13308
San Diego, CA 92170-3308
raymond.parra@baesystems.com
(619) 238-1000+2030
(619) 239-1751

Michael McDonough
Counsel
Bingham McCutchen LLP
355 South Grand Avenue, Suite 4400
Los Angeles, CA 90071-3106
michael.mcdonough@bingham.com
(213) 680-6600
(213) 680-6499

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

Brian Ledger
Kristin Reyna
Attorney at Law
Gordon & Rees LLP
101 West Broadway, Suite 1600
San Diego, CA 92101
bledger@gordonrees.com
kreyna@gordonrees.com
(619) 230-7729
(619) 696-7124

Christian Carrigan
Senior Staff Counsel
Office of Enforcement, State Water Resources
Control Board
P.O. Box 100
Sacramento, CA 95812-0100
ccarrigan@waterboards.ca.gov
(916) 322-3626
(916) 341-5896

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

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

6 Jill Tracy
 Senior Environmental Counsel
 7 Sempra Energy
 101 Ash Street
 8 San Diego, CA 92101
jtracy@sempra.com
 9 (619) 699-5112
 (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
 (619) 226-6546
 (619) 226-6557

11 Leslie FitzGerald
 Deputy Port Attorney
 12 San Diego Unified Port District
 PO Box 120488
 13 San Diego, CA 92112
lfitzger@portofsandiego.org
 14 (619) 686-7224
 (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
 (619) 532-2511
 (619) 532-1663

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

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

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

William D. Brown, Esq.
 Brown & Winters
 120 Birmingham Drive, #110
 Cardiff By The Sea, CA 92007
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
6 (619) 699-3620
7 (619) 764-6620

Sandi Nichols, Esq.
Allen Matkins
Three Embarcadero Center, 12th Floor
San Francisco, CA 94111
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