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File No. 048876-0011

October 19, 2011

VIA EMAIL AND HAND DELIVERY

Mr. Vicente Rodriguez
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123
vrodriguez@waterboards.ca.gov

Re: NASSCO’s Comments on the proposed Final Environmental Impact Report for the Shipyard Sediment Remediation Project (SCH # 2009111098)

Dear Mr. Rodriguez:

Designated Party National Steel and Shipbuilding Company (“NASSCO”) submits the following comments regarding the proposed Final Environmental Impact Report (“FEIR”), including responses to comments (the “Responses”), for the Shipyard Sediment Remediation Project (“Project”), State Clearing House Number 2009111098, publicly released by the California Regional Water Quality Control Board, San Diego Region (“Regional Board”) on September 15, 2011.

I. LEGALLY INFEASIBLE MITIGATION MAY NOT BE ADOPTED

A. Mitigation Measures Proposed In The FEIR Must Be Economically Feasible Under Resolution 92-49

As stated in NASSCO’s initial CEQA comments, CEQA does not provide a lead agency with independent authority to mitigate environmental impacts; instead, agencies may exercise only those powers authorized by other statutes. Pub. Res. Code § 21004; *see also* CEQA Guidelines § 15040. Accordingly, mitigation is “legally infeasible” if its adoption is beyond the powers conferred by law on the agency, or prohibited by statutes governing the agency. *Kenneth Mebane Ranches v Superior Court*, 10 Cal. App. 4th 276, 291 (1992); *Sequoyah Hills Homeowners Ass’n v City of Oakland*, 23 Cal. App. 4th 704, 715-16 (1993). The Regional Board therefore may not adopt any mitigation measures for the proposed Project unless those measures are authorized by the Water Code or other applicable statutory authority beyond CEQA.

Under Resolution 92-49, cleanup levels must be evaluated for economic feasibility and cost-effectiveness before they can be adopted. Thus, as explained in NASSCO's initial comments, mitigation proposed in the DEIR cannot be adopted to the extent it was not included in the requisite economic feasibility analysis conducted for the TCAO. Any such mitigation is "legally infeasible" under CEQA.

The Responses fail to address this point, stating in conclusory fashion that the Regional Board disagrees with NASSCO's comment. Responses to Comments ("RTC"), at 78. This response is insufficient, (CEQA Guidelines § 15088(c)), and provides no justification to allow the Regional Board to adopt mitigation measures not evaluated for economic feasibility under Resolution 92-49.

This comment applies to the proposed Project and the other dredging alternatives.

B. The Regional Board May Not Use CEQA Mitigation To Dictate Cleanup Methods

NASSCO's initial comments also pointed out that, under Water Code section 13360(a), "[n]o waste discharge requirement or other order of a regional board . . . shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner." Hence, the Regional Board may not dictate cleanup methods, and any attempt to do so through CEQA mitigation is legally infeasible (and impermissible) for the above-stated reasons.

The Responses cite subdivision (b) of Water Code section 13360, which provides that, if an injunction is sought under the Water Code to restrain a discharger from discharging waste, and a court finds an injunction to be impracticable, the court may require specific measures to be taken "under the circumstances" to comply with the discharge requirements. RTC, at 78. But section 13360(b) is irrelevant here, as NASSCO's comment has no application to the context of a court ordered injunction. Instead, NASSCO simply pointed out that the Regional Board lacks authority to dictate cleanup methods under the Water Code, and, by extension, through CEQA.

The Responses also assert that mitigation proposed in the DEIR will not dictate how cleanup levels should be achieved, supposedly on the grounds that the EIR merely evaluates measures but none of the mitigation would be mandatory. RTC, at 78. This is incorrect, because mitigation measures are not "optional" under CEQA, and instead must be binding. CEQA Guidelines § 15126.4(a)(2); Pub. Res. Code § 21081.6(b).

That the FEIR seeks to dictate cleanup methods is made plain in the Responses. For example, NASSCO's initial comments (submitted by Anchor QEA, L.P.) explained that the mitigation measure requiring hydraulic placement of the sand cover in under pier areas should be deleted, because other feasible means of successfully placing the sand cover may exist. In response, the Cleanup Team stated that hydraulic placement "is feasible" and therefore required, and that the existence of other feasible means of accomplishing the task "is not a consideration factor in the selection of mitigation measures to protect water quality." RTC, at 155. In other

words, the Regional Board intends to dictate cleanup methods through the CEQA process, and other feasible approaches will not be considered. The point is also made clear by reviewing the proposed Project and the dredging alternatives, each of which proposes separate, binding methods to remediate the Site.

This comment applies to the proposed Project and the other dredging alternatives.¹

II. MITIGATION MEASURE 4.6.10 SHOULD BE REVISED TO CLARIFY THAT ALTERNATIVE FUEL CONSTRUCTION EQUIPMENT IS NOT REQUIRED UNLESS IT IS COST EFFECTIVE

The Errata included with the FEIR revises Mitigation Measure 4.6.10 to provide that alternative fuel construction equipment shall be utilized “to the extent 1) that the equipment is readily available, and 2), if such equipment is available in the San Diego Air Basin (SDAB), it is also cost effective.” Appendix A, A-17. NASSCO objects to this revision to the extent that it assumes that the mere availability of alternative fuel construction equipment in the SDAB compels the conclusion that it is cost effective, as the fact that a type of equipment is available says nothing about whether or not its use is cost effective.

Accordingly, Mitigation Measure 4.6.10 should be revised to make clear that alternative fuel construction equipment is not required unless it is readily available in the SDAB *and* its use is cost effective.

III. THE FEIR FAILS TO DESCRIBE STORMWATER DISCHARGES TO THE SITE OR EVALUATE POTENTIAL RECONTAMINATION

A. The Environmental Setting Is Deficient Because It Does Not Identify Continuing Stormwater Discharges To The Site

As explained in NASSCO’s initial comments, the DEIR’s description of the Project’s environmental setting completely ignores continuing and uncontrolled discharges of urban runoff to the Site from Chollas Creek and storm drains SW4 and SW9. The FEIR also fails to adequately address this issue, as the Responses make no attempt to justify the DEIR’s decision to exclude any description of stormwater discharges to the Site. *See* RTC, at 75.

There is no excusable reason for this omission, since a complete and accurate description of a project’s environmental setting is one of the most fundamental and basic of all CEQA requirements, and also is a necessary predicate for a legally adequate assessment of the environmental impacts of the project. *E.g., Cadiz Land Co. v. Rail Cycle, L.P.*, 83 Cal. App. 4th 74, 87 (2000); *Galante Vineyards v. Monterey Peninsula Water Management Dist.*, 60 Cal. App. 4th 1109, 1122 (1997). This omission is particularly significant since the primary purpose of the

¹ NASSCO’s comments on the specifics of various mitigation measures proposed in the FEIR are set forth in the concurrently submitted memorandum prepared by David Templeton and Michael Whelan of Anchor QEA, L.P.

Project is to remediate sediment contamination at the Site, and stormwater discharges constitute a continuing source of contamination to Site sediments. The Responses even acknowledge that “the purpose of an EIR is to assess the project’s effects on the existing environment,” (RTC, at 75), which confirms the invalidity of an EIR that does not accurately identify the existing environment in the first instance.

As noted in NASSCO’s comment letter on the DEIR, the TCAO and DTR state plainly that stormwater discharges have deposited contaminants to sediments at the Site, and are continuing, and Cleanup Team members have acknowledged the same. Because these points are undisputed, the failure to identify and describe stormwater discharges to the Site from Chollas Creek, SW4 and SW9 renders the EIR invalid as a matter of law. Since this omission is a procedural violation rather than a factual conclusion, the substantial evidence test is inapplicable and the Regional Board will be afforded no deference. *E.g., Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 435-36 (2007); *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th 1184, 1208 (2004) (where agency omits consideration of an issue in EIR, the substantial evidence test does not apply and the “relevant question is whether the lead agency failed to proceed as required by law.”). Furthermore, because the Responses do not address the decision to exclude stormwater discharges from the DEIR, they are legally inadequate under CEQA. *See CEQA Guidelines § 15088(c)* (responses to comments must include “good faith, reasoned analysis” and “[c]onclusory statements unsupported by factual information will not suffice.”).

A recirculated EIR is required to adequately describe the existing environmental setting. CEQA Guidelines § 15088.5(a).

B. Recontamination From Stormwater Discharges Is A Reasonably Foreseeable Significant Environmental Impact

NASSCO’s initial comments also explained that the DEIR’s failure to disclose stormwater discharges to the Site resulted in the separate but related failure to consider whether or not those discharges will recontaminate the Site after the proposed dredging is underway or completed.

Attempting to address this omission, the Responses assert that “an EIR need not resolve existing environmental problems that will not be made worse by the project.” RTC, at 75. This statement is not well taken. The purpose of the Project is to remediate contaminated sediment at the Site, and the Cleanup Team has proposed dredging approximately 143,000 cubic yards of sediment in furtherance of this objective. The feasibility of the remediation Project, including its likelihood of success, cannot properly be evaluated by the public and the decision-makers when the FEIR fails to describe an ongoing source of contamination to sediments at the Site, and likewise fails to evaluate whether that ongoing source could nullify the benefits of the contemplated dredging. Since the purported purpose of the Project is to “resolve existing environmental problems” at the Site, the statement that the EIR does not need to do so misses the mark. For the same reason, the statement in the Responses that “[i]t is not the purpose of a DEIR to mitigate the existing conditions” is insufficient, since the stated purpose of the Project *is to do just that*, *i.e.*, mitigate the existing conditions in the sediments at the Site. RTC, at 75.

The Responses cite *Watsonville Pilots Ass'n v. City of Watsonville*, 183 Cal. App. 4th 1059 (2010) in support of this argument, noting that the *Watsonville* court held that an EIR for a new general plan was not required to resolve an existing groundwater overdraft problem. RTC, at 75. That case is clearly inapposite. *Watsonville* involved a general plan that called for residential construction near an airport. A challenge was made on the grounds that the EIR did not adequately address impacts from supplying water to the contemplated development under the general plan, where the groundwater basin supplying water to the city had been in overdraft for decades. The court rejected an argument that the EIR was invalid because it “fail[ed] to pinpoint a solution to the overdraft problem,” which was “a feat that was far beyond its scope.” 183 Cal. App. 4th at 1094. The EIR’s treatment of the water supply issue was held to be adequate because it discussed the impact and concluded that water demands from contemplated new development would be offset by decreased water usage associated with the conversion of farmland to other uses under the new general plan, and water conservation measures imposed by the city. Here, by contrast, the FEIR omits any mention of continuing stormwater discharges to the Site, and fails to consider the potentially significant impact of recontamination. Moreover, recontamination of Site sediments goes to the core of the Project, which is proposed for the specific purpose of remediating sediment contamination at the Site.

The responses referenced above apparently attempt to justify the non-evaluation of recontamination on the basis that recontamination is not a “direct” effect of the Project on the environment, inasmuch as the continuing stormwater discharges are not caused by the Project. But this unduly narrow view of potential impacts is inconsistent with CEQA, which requires an EIR to evaluate both the potential “direct and indirect” impacts of a proposed action. CEQA Guidelines § 15126.2. An indirect effect is one “which is not immediately related to the project, but which is caused indirectly by the project. If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment.” CEQA Guidelines § 15064(d)(2). In other words, indirect effects are those “which are caused by the project and are later in time or farther removed in distance. . . .” *Id.* at § 15358(a)(2). Thus, if areas dredged pursuant to the Project are subsequently recontaminated by an ongoing source, that recontamination is an “indirect” effect of the Project.

CEQA requires an assessment of indirect impacts so long as they are “reasonably foreseeable.” CEQA Guidelines §§ 15064(d)(2) and 15358(a)(2). Recontamination is reasonably foreseeable here, since there is no dispute that continuous discharges of stormwater reach the Site and impact its sediments. The Regional Board cannot argue otherwise, as the TCAO expressly recognizes the possibility of recontamination from urban runoff: “[u]pland source control measures . . . are also needed to eliminate ongoing contamination from [SW4] . . . and ensure that recontamination of cleaned up areas of the Shipyard Sediment Site from this source does not occur.” TCAO, ¶ 33. Moreover, the failure to address recontamination for the proposed Project is shown to be error by virtue of the fact that recontamination is noted as a significant concern in the FEIR with regard to Alternative 3; so much so that Alternative 3 cannot be implemented until source control is achieved to the satisfaction of the State Board. *See, e.g.*, RTC at 177; *see also* FEIR Appendix D, at 32-6 (“The San Diego Water Board generally concurs with the comment that the potential for recontamination from off-site sources would affect all potential remedies. . .”).

Responding to NASSCO's comment that Cleanup Team members have admitted that it is probable that discharges from Chollas Creek will remain uncontrolled in the future (and likely even beyond the 2028 compliance date in the Chollas Creek TMDL for metals), the Responses state that "[c]ontaminated sediment discharges from Chollas Creek will be addressed in the sediment TMDL for the mouth of Chollas Creek that is in preparation at this time." RTC, at 93. But the Regional Board may not forego analysis of a reasonably foreseeable impact from the Project now, on the grounds that the un-evaluated and un-mitigated impact allegedly will be addressed by a contemplated future administrative action at an uncertain future time. Nor is there any evidence that discharges from Chollas Creek would be confined solely to the area of the mouth of that creek.

The Responses also state that "available storm water best management practices for sediment control are capable of eliminating most, if not all sediment discharges from the Chollas Creek MS4." RTC, at 93-94. But the Responses fail to describe any of these practices or provide any analysis of how they could eliminate most or all of the sediment discharges from Chollas Creek, a dubious proposition to say the least. CEQA forbids such conclusory responses to comments. *Cleary v. County of Stanislaus*, 118 Cal. App. 3d 348, 358 (1981) ("conclusory statement, unsupported by empirical or experimental data, scientific authorities, or explanatory information . . ." is insufficient under CEQA); *see also* CEQA Guidelines § 15088(c).

Finally, without ever describing the stormwater discharges to the Site, evaluating their potential to contaminate sediments at the Site, or describing any "source control efforts" to address same, the Responses contend that "a detailed discussion on the basis for the San Diego Water Board Cleanup Team's [unstated] conclusion that cleanup pursuant to the TCAO can proceed while source control efforts are underway is contained in Response 4.1" to the Responses to Comments submitted on the TCAO ("Response 4.1"). But the referenced response only underscores why it was impermissible for the DEIR to exclude evaluating recontamination under CEQA. First, Response 4.1 (which does not purport to provide CEQA analysis) acknowledges that continuing contamination sources could make remediation "unsuccessful," an implicit concession that recontamination could cause a potentially significant impact for CEQA purposes. Response 4.1 tries to deflect this concern by stating that if increasing contaminant of concern ("COC") concentration trends are identified after the proposed remediation, the Regional Board could require "accelerated cleanup and abatement" of that source. But the means by which this would be accomplished are not described in Response 4.1, or the EIR, and no enforceable measures that would require this to be done are proposed in the EIR. Unenforceable or illusory promises are insufficient under CEQA. CEQA Guidelines § 15126.4(a)(2); Pub. Res. Code § 21081.6(b).

Second, Response 4.1 states that the risk of recontamination from Chollas Creek discharges is "low" because the time period between the proposed Project and an anticipated future cleanup of Chollas Creek "will be short (five to six years)." But no information supporting this statement is provided, and there is no assessment of the likely time period for implementing the TCAO or any cleanup of Chollas Creek (the administrative process for which has not been publicly initiated). Given the inherent regulatory uncertainty that attends to such matters, this is a significant oversight. Indeed, the current TCAO proceeding has been pending

for more than a decade, and its implementation time is still uncertain based on factors presently unknown.

Third, Response 4.1 states that Chollas Creek discharges are or will be controlled by “stringent requirements” associated with various regulatory approaches, none of which are identified, relied upon or assessed in the CEQA document. The acknowledged need for measures to mitigate stormwater discharges highlights why recontamination needed to be evaluated in the EIR, under CEQA, with all feasible mitigation measures considered to address the admitted potentially significant impacts.

Fourth, Response 4.1 makes no effort to quantify the contribution of contamination to the Site caused by Chollas Creek and other stormwater sources, or the extent to which any other regulatory approaches (contemplated or approved) will address same, and thus is devoid of any reasoned explanation showing that recontamination is not likely to occur. For example, the Response states simply that TMDLs “should ensure” that Chollas Creek will not recontaminate the Site to a harmful degree. This is insufficient.

Fifth, and finally, the FEIR’s failure to respond directly to NASSCO’s comments regarding recontamination, following up on the omission of the issue from the DEIR, and the decision to rely entirely on Response 4.1 (buried within 734 pages of an appendix to the FEIR), fails to comply with CEQA’s requirement to clearly identify and evaluate for the public and the decision-makers the potentially significant impacts of the Project. *See, e.g., Santa Clarity Org. for Planning v. County of L.A.*, 106 Cal. App. 4th 715, 722-23 (2003) (information “scattered here and there in EIR appendices,” or a report “buried in an appendix,” is not “a good faith reasoned analysis in response.”). Given the seriousness of this issue, it merited discussion in the text of the EIR.

IV. THE MONITORED NATURAL ATTENUATION ALTERNATIVE SHOULD BE ADOPTED, BUT, AT A MINIMUM, MUST BE STUDIED IN DETAIL IN A RECIRCULATED EIR

The Responses do not dispute that Monitored Natural Attenuation (“MNA”) is environmentally superior to the Project, as it will avoid all of the Project’s significant and potentially significant impacts. *See RTC*, at 85-86. Instead, the Responses contend that MNA is not feasible, and therefore did not need to be mentioned in the DEIR. This contention is incorrect.

The Responses attempt to distinguish as “out of context” authority cited by NASSCO for the proposition that “an in depth discussion is required of any alternative that is at least potentially feasible.” *RTC*, at 72 (citing *Center for Biological Diversity v. County of San Bernardino*, 185 Cal. App. 4th 866, 883 (2010) and CEQA Guidelines § 15126.6(a) (an EIR “must consider a reasonable range of potentially feasible alternatives...”). The Responses make the circular argument that these authorities apply only to alternatives that already have been selected for consideration. This argument misses the point. If an alternative is *potentially feasible* and will avoid some or all of a project’s impacts, it warrants detailed review in the EIR,

so that it may be considered by the public and the decision-makers. Any final determination that such an alternative is infeasible should only be made after an adequate assessment in the EIR.

NASSCO's position that MNA will feasibly attain Project Objectives while avoiding all significant and potentially significant Project impacts is detailed at length in its initial CEQA comments, and need not be reiterated here. The Responses make no earnest effort to address these contentions on the merits.

Most significantly, the statement that MNA is infeasible is made without acknowledging or responding to the fact that MNA was selected as the preferred remedy out of three alternative remedies studied in detail in the expert-prepared Detailed Sediment Investigation underlying the TCAO/DTR ("Shipyards Report"), which was developed at the direction of and with substantial oversight from Regional Board staff, along with input from stakeholders and the public. Because the Shipyards Report provides the foundation for the DTR and TCAO, and because it concludes (based on the opinion of leading experts in the field) that the MNA alternative would feasibly achieve the TCAO objectives, there is no justifiable basis for omitting this alternative from the DEIR. Nor is there any justification for failing to provide a reasoned analysis in response to comments on the DEIR, submitted by the expert authors of the Shipyards Report, urging that MNA should be studied and adopted by the Regional Board. Conclusory responses to comments that fail to address the opinions of experts casting doubt on the adequacy of the EIR are invalid. *E.g., Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm'rs*, 91 Cal. App. 4th 1344, 1371 (2001).

Given the recommendation of the Shipyards Report and based on the other evidence cited in NASSCO's initial CEQA comments, there can be no dispute that there is substantial evidence within the Administrative Record showing that the MNA alternative can feasibly attain the Project Objectives. CEQA Guidelines § 15384 (b) ("substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts."). As such, there is no basis for exclusion of the MNA alternative from detailed consideration in the EIR, which prevents the public from understanding clearly the basis for any ultimate decision to pass over the environmentally preferred MNA alternative and accept the significant environmental impacts and extensive mitigation requirements associated with the proposed Project (or the other dredging alternatives). Only in this manner can the EIR foster CEQA's goal of informed decision-making and public participation.

The Responses also state without analysis that MNA is insufficient because it would result in adverse impacts to beneficial uses over an extended period of time. For the reasons explained in Section V of this letter, however, this statement is dependent upon the hypothetical baseline used in the EIR, which relied upon unrealistic assumptions in the DTR—rather than existing conditions at the Site—and thus is not permitted under CEQA. Because no such risks are found when realistic assumptions are utilized (as explained in NASSCO's initial CEQA comments), this statement is unsupported and is an insufficient basis for refusing to consider the MNA alternative. For the same reason, the Responses' stated reliance on TCAO Response to

Comment numbers 1.1, 31.1 and 32.1 is unhelpful, as those responses dismiss MNA based primarily on the same erroneous conclusions regarding risk to beneficial uses at the Site.²

Response 32.1 concedes that sediment sampling conducted in July 2009 demonstrated lower COC concentrations than sampling conducted in 2001 and 2003. The Cleanup Team contends nonetheless that “[e]ach sediment sample is unique” so that it cannot be determined if natural attenuation is occurring based on the 2009 samples. Appendix D, at 32-5. But this concern would also apply to any post-dredge sampling, and cannot properly be used to dismiss the results of the 2009 testing, which may well be attributable to natural attenuation. Accepting the Cleanup Team’s reasoning, one could never confirm that lower COC concentrations are the result of any remedial action taken.

Response 32.1 goes on to state that additional data is needed to confirm that natural attenuation is responsible for the lower COC concentrations observed in 2009. Rather than supporting rejection of MNA, however, this statement at best supports further sampling now, to better understand if natural attenuation is achieving the goals of the TCAO before accepting the significant environmental impacts and associated costs that will result from the proposed dredging. This is but one reason why the MNA alternative needs to be evaluated in the EIR, so the public and decision-makers can weigh the environmental costs and benefits of the proposed Project before it is too late.

Finally, the Responses state that NASSCO participated in working group meetings in fall 2010 where the range of alternatives to be evaluated was discussed. RTC, at 80. To the extent the Cleanup Team is of the position that working group discussions can take the place of analysis required to be included in the publicly disseminated EIR, NASSCO disagrees. Such a position finds no support in CEQA.

V. THE FEIR’S HYPOTHETICAL BASELINE VIOLATES CEQA

NASSCO’s initial CEQA comments explained that the “baseline” in an EIR, against which the potential environmental impacts of a project are measured, must be premised on “existing physical conditions” and not hypothetical situations. *E.g., Communities for a Better Env’t v. South Coast Air Quality Mgmt. Dist.*, 48 Cal. 4th 310, 316, 319, 321 n. 7 (2010); *Sunnyvale West Neighborhood Ass’n v. City of Sunnyvale*, 190 Cal. App. 4th 1351, 1373 (2010). Rather than adhering to this mandate, the DEIR assumes (without providing any factual or analytical support) that Site sediments present risks to aquatic life, aquatic-dependent wildlife and human health beneficial uses. These assumptions color the entire CEQA review, including the Project Objectives and the analysis of alternatives and mitigation measures, and go to the heart of the decision whether the proposed Project should be pursued notwithstanding its undisputed environmental impacts.

² Moreover, the basis of any decision to exclude the MNA alternative from detailed consideration needs to be set forth in the text of the EIR, not in an appendix. *See, e.g., Santa Clarity Org. for Planning v. County of L.A.*, 106 Cal. App. 4th 715, 722-23 (2003).

In response, the FEIR states that the Water Code “demands that the San Diego Water Board make reasonably conservative and environmentally protective assumptions about exposure, consumption, and risk in determining potential effects to beneficial uses from the pollutants accumulated in the sediment.” RTC, at 76. This response proves NASSCO’s point: the FEIR has admittedly morphed the applicable regulatory mandate by using unrealistic assumptions from the DTR to establish the CEQA baseline. Because CEQA requires the baseline to reflect actual, existing conditions, the FEIR is invalid.

It is telling that the Responses make no attempt to argue that the baseline is compliant with CEQA, or that it reflects existing conditions. The only response is that the DTR allegedly complied with the Water Code, and therefore it was proper for the DEIR to adopt wholesale the DTR’s conclusions. RTC, at 76. This is incorrect. Likewise, the Responses purport to rely on the extent and duration of the studies that underlie the DTR, while failing to muster any opposition to the point that the DTR’s conclusions of harm to beneficial uses (derived from such studies) are predicated on hypothetical assumptions rather than existing conditions. RTC, at 97.

The Responses fail to address NASSCO’s comment that information in the DTR and the Administrative Record shows no risk to aquatic-life, aquatic-dependent wildlife or human health beneficial uses. Instead, the Responses state that “the comment references the DTR . . . not the Draft PEIR” and thus “is not a comment on the environmental analysis contained in the Draft PEIR.” RTC, at 99. But the FEIR cannot rely on the DTR as the only support for its baseline assumption that sediments at the Site present risk to beneficial uses, and then refuse to respond to comments challenging the DTR’s conclusions on the grounds that the comments do not raise CEQA issues.

In other areas, the Responses refuse to acknowledge the dispositive role that hypothetical assumptions played in the DTR’s conclusions of harm to beneficial uses. NASSCO’s initial comments explained that the DTR’s finding of risk to human health was based on the assumption that subsistence anglers fish at the Shipyard and would derive their entire daily protein source from fish caught at the shipyard every day for 70 years. NASSCO pointed out that this assumption is entirely unrealistic, since no fishing is allowed at the Shipyards, which maintain strict security requirements due to work for the U.S. Navy. Despite its prior reliance on the DTR to inform the DEIR’s baseline; despite the fact that the DTR’s finding of risk to human health unquestionably relies upon this assumption; and despite the fact that this assumption has no connection to existing conditions at the Site, the Responses state without explanation that “[t]he EIR does not rely on an assumption that fishing occurs at the shipyards.” RTC, at 101. This does not qualify as the “reasoned analysis” that CEQA requires. If the FEIR truly does not assume fishing takes place at the Shipyards, then it must explain the basis for its finding of risk to human health beneficial uses, or be revised and recirculated to state clearly that there are no such risks.

In addition, for example, the Responses concede that the DEIR shows that the DTR’s assumption that a least tern would consume 100% of its diet from the Site is unrealistic, but fails to square this concession with the fact that the DTR’s conclusion of risk to aquatic-dependent wildlife at the Site (relied on in the FEIR’s baseline) depends on this very same assumption. RTC, at 100. The Responses also acknowledge that the DEIR relied upon the assumption that

special status species forage exclusively at the Site, but fail to address or respond to NASSCO's point that this assumption is unrealistic, does not reflect existing conditions at the Site, and is not appropriate for use in setting the CEQA baseline. *Id.*

The Responses cross-reference TCAO Response to Comment numbers 24.1 and 28.1, which address the assumptions used in the aquatic-dependent and human health beneficial use impairment analyses, respectively. These TCAO responses confirm NASSCO's position that the assumptions used are not based on existing conditions. For example, Response 24.1 states "[t]he Cleanup Team's selection of an AUF of 1.0 in the risk analysis may overestimate the exposure of the receptors to Site contaminants" because it does not account for the receptor's actual foraging activities. Appendix D, at 24-5. Further, the Cleanup Team concedes that the Site contains active industrial uses that would discourage foraging by aquatic-dependent wildlife species, but speculates that in the future (sometime after the current lease expires in **2040**) the land use may change and the Site could be transformed into an attractive spot for wildlife feeding. *Id.* at 24-6. In other words, the baseline is premised on assumptions derived from speculated future uses of the Site that might or might not occur in 30 years. Finally, it also is worth noting that Response 24.1 concedes that the Cleanup Team deviated from EPA Guidance in order to use even more conservative assumptions than those recommended by EPA. *Id.* at 24-4 and 24-6. Whether or not this is appropriate in the context of the Water Code, it is impermissible under CEQA.

Similarly, Response 28.1 concedes the human health analysis relied on the "assumption that recreational and subsistence anglers catch and consume 100 percent of their seafood from the Shipyard Sediment Site," even though security restrictions admittedly preclude fishing at the Site. Appendix D, at 28-5.

Finally, the Responses state that elevated levels of pollutants were found in sediments at the Site and present risk of a condition of pollution and harm to beneficial uses. RTC, at 76. But the Responses do not address NASSCO's comment that the alleged harm to beneficial uses is based on extremely conservative and unrealistic assumptions, or NASSCO's request that the Cleanup Team use realistic assumptions—based on actual conditions—to inform the CEQA analysis. The Responses therefore are inadequate. *California Oak Found. v. City of Santa Clarita*, 133 Cal. App. 4th 1219, 1236-37 (2005) (CEQA response to comment invalid where it is "completely devoid of any direct discussion" of the comment submitted and "provided no analysis of the point.").

VI. CEQA PRECLUDES ADOPTION OF THE CONVAIR LAGOON ALTERNATIVE IN PLACE OF THE PROPOSED PROJECT

A. The Responses Confirm That Alternative 3 Is Environmentally Inferior To The Proposed Project, And Infeasible

At the outset, NASSCO is pleased with the Cleanup Team's statement that the Convair Lagoon Alternative ("Alternative 3") is not "the preferred course of action," and that Alternative 3 is environmentally inferior to the proposed Project. RTC, at 130 ("The Convair Lagoon Alternative was not identified as an Environmentally Superior Alternative to the proposed project and would require mitigation measures in addition to those required for the proposed

project in multiple areas, most significantly including water quality and biological resources.”); *id.* at 138 (“The San Diego Water Board Cleanup Team agrees with the comments regarding the loss of eelgrass, intertidal and open water habitat . . . the scale, geographic location, and status of the eelgrass beds as an existing mitigation site **clearly** classifies Alternative 3 as **not** Environmentally Superior to the proposed project.”) (emphasis added). The Responses also state that the Cleanup Team “concur[s]” with expert-prepared comments submitted on behalf NASSCO indicating Alternative 3 has “increased impacts to aquatic habitat compared to the proposed project.” RTC, at 162 (responding to Comment O-3-190); *see also* FEIR, Appendix C, Comment O-3-190 (“[o]ne obvious negative aspect of Alternative 3 is the dramatically greater loss of aquatic habitat . . . due to the destruction of existing habitat in the CDF area, which is diverse and of relatively high quality.”).

The Responses also appear to acknowledge that Alternative 3 (without further analysis) should be treated as causing a significant impact to water quality, hazards and hazardous materials, and marine biological resources, given that the FEIR fails to analyze in sufficient detail the risk that contaminated sediment placed into the CDF will escape and recontaminate another portion of the Bay. Rather than refuting or directly addressing this comment, the Responses indicate Alternative 3 would “also” result in significant unavoidable impacts to air quality. RTC, at 135-36 (Comment O-3-121).

Given the additional significant and potentially significant impacts of Alternative 3, and its additional mitigation requirements (with their own resulting impacts and mitigation requirements),³ the Regional Board should clearly and expressly identify Alternative 3 as environmentally inferior to the proposed Project, consistent with the above-referenced Responses and the text of the DEIR.

We also note that the Responses acknowledge the “substantial regulatory obstacles” and associated issues that could prevent implementation of Alternative 3; in particular, the requirement to achieve upland source control from Convair Lagoon (to the satisfaction of the State Board) before Alternative 3 could be implemented. RTC, at 177-78. Thus, the Cleanup Team determined that “[e]ven assuming that a CDF could be permitted at Convair Lagoon, **it is unlikely that it could be permitted in time to meet the contemplated TCAO implementation schedule.**” *Id.* (emphasis added).

³ NASSCO’s comments pointed out that Alternative 3 required additional mitigation measures, the success of which was uncertain, and that these additional mitigation measures would cause significant environmental impacts of their own requiring even further mitigation, weighing heavily against adoption of Alternative 3. The Responses fail to respond to this comment directly, so it is assumed that the Cleanup Team agrees. RTC, at 140-41 (Comment O-3-135).

Because the Cleanup Team does not specifically respond to comments requesting information on the anticipated time it would take to achieve control (of a still uncertain)⁴ source of contaminants to Convair Lagoon, (RTC, at 136), and then obtain all necessary permitting, the Regional Board must make clear that Alternative 3 is not feasible, and therefore cannot be adopted in place of the proposed Project. CEQA Guidelines § 15364 (“‘feasible’ means capable of being accomplished in a successful manner *within a reasonable period of time*, taking into account economic, environmental, legal, social, and technological factors.”) (emphasis added); RTC, at 74 (asserting MNA is infeasible because it allegedly could not implement TCAO remediation goals “in a reasonable period of time.”). Since the Cleanup Team asserts that MNA is infeasible because it cannot be accomplished in a reasonable period of time (a point NASSCO disputes), it cannot make a contrary determination as to Alternative 3.

Alternative 3 is infeasible for the additional reason that it is not clear at this point whether Alternative 3 *could* ultimately be permitted, regardless of the anticipated delays that would arise. RTC, at 136, 177-78.

Since Alternative 3 is not environmentally preferable to the Project (indeed, quite the opposite), and since it cannot feasibly accomplish Project Objectives in a reasonable time period, there is no basis for including a detailed analysis of the alternative in the DEIR. *See* CEQA Guidelines § 15126.6(a) (“EIR shall describe a range of reasonable alternatives . . . which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project.”).⁵ In any event, it certainly would not be permissible under CEQA for the Regional Board to adopt Alternative 3 in place of the proposed Project.

B. The Responses Confirm Alternative 3 Could Not Be Adopted Without Additional CEQA Review

As noted in NASSCO’s DEIR Comments, it is quite unusual that approximately 31% of the DEIR is devoted solely to Alternative 3. Given this extensive treatment, it seemed possible that the Cleanup Team viewed the analysis as sufficient to adopt Alternative 3 in lieu of the Project at the upcoming hearing. We understand from the Responses, however, that the Cleanup Team believes additional “site specific” CEQA review would be necessary prior to adopting Alternative 3 (or any other dredging alternative). RTC, at 130-31. Such review, by way of example but without limitation, would be required to evaluate whether the proposed CDF would adequately protect against contaminated sediment escaping from the CDF and recontaminating the Bay. RTC, at 128-29 (Response O-3-105, the “integrity of an engineered cap [proposed in

⁴ The Responses acknowledge that the source of contamination to Convair Lagoon is not known with certainty. RTC, at 177, 136-37.

⁵ For reasons discussed below, any argument that the Port District’s “special status” as a responsible agency warrants evaluation of its proposed alternative, even though the alternative is infeasible and causes more environmental harm than the proposed Project, is inconsistent with CEQA.

Alternative 2] . . . notably would also be subject to further environmental review . . . [n]o reported CEQA case has suggested or required a level of detail similar to that of the proposed project [for an alternative] . . .”); RTC, at 136-37 (referencing Response O-3-105 as also applying to the need for additional analysis of the integrity of Alternative 3’s CDF).

In fact, the Responses’ acknowledgment that additional CEQA review is needed to determine if the proposed CDF is sufficient to sequester the contaminated sediment serves as a concession that there is no substantial evidence supporting a contrary conclusion, and that the Regional Board therefore must treat Alternative 3 as causing a significant impact to water quality, hazards and hazardous materials, and marine biological resources. CEQA does not permit a lead agency to defer assessment of environmental impacts or the development of mitigation for same. *E.g., Communities for a Better Env’t v. City of Richmond*, 184 Cal. App. 4th 70, 95 (2010).

The Responses likewise defer analysis regarding a host of issues pertaining to the feasibility of Alternative 3, confirming the Cleanup Team’s apparent position that the FEIR has not conducted sufficient analysis to make a determination as to the feasibility of Alternative 3 and its numerous required mitigations. RTC, at 164-66 (Comments O-3-193-199).

Another key omission in the analysis of Alternative 3 is a description of the contemplated future use of the Convair Lagoon parcel, beyond serving as a CDF. The analysis is critical, because, as stated in Exponent’s comments, the proposed design is unlikely to be capable of supporting any structure or redevelopment without significant risk of containment failure. CEQA requires environmental review at the earliest possible time, and an agency may not defer evaluation of impacts from foreseeable future activities simply because such activities have not formally been approved. *E.g., Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 394-95 (1988); *Vineyard Area Citizens*, 40 Cal. 4th at 431 (CEQA “is not satisfied by simply stating information will be provided in the future” and “[t]iering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis . . .”). Any contemplated uses of the Convair Lagoon parcel should be made clear as part of the analysis of Alternative 3, so that the environmental consequences of those uses can be assessed at this time.

C. The Port District Received Improper Special Treatment With Regard To Alternative 3

NASSCO’s initial CEQA comments explained that it was improper for the Regional Board to allow the Port District to prepare its own alternative, with its own consultants, that comprised approximately 31% of the entire DEIR, particularly when the alternative would result in significant financial benefits for the Port District. The Responses do not provide the good faith, reasoned analysis required by CEQA.

First, the Responses state that the inclusion of detailed analysis on Alternative 3 was merely “intended to illuminate the potential effects of such an alternative and to inform the decision-makers.” RTC, at 133. But that should be the purpose of each alternative considered,

and provides no basis for affording special consideration to a single alternative championed by one of the many Designated Parties to the TCAO proceeding.

Second, the Responses state that the Port District is entitled to special treatment because it is a responsible agency with some discretionary authority over the Project, and is not a private entity like the Shipyards. RTC, at 174-75. The Responses further indicate that, as a responsible agency, the Port District was entitled to request a meeting to discuss the EIR under Public Resources Code section 21080.4(b). *Id.* But these arguments do not apply in the context of the proposed Project. Like the Shipyards and other Designated Parties, the Port District is a named party to the TCAO, and is asserted to have primary liability for the alleged sediment contamination at the Site. It thus stands on equal footing with the other parties, will be liable for its equitable portion of the cleanup costs, and should not be afforded any special “status” because it is also a responsible agency.

CEQA is an environmental protection statute, and its provisions regarding responsible agencies are intended to further that goal. No provision in CEQA supports a finding that an entity’s status as a responsible agency allows the entity to use that status to pursue financial or other gain. The FEIR’s treatment of Alternative 3 reflects bias in favor of the Port District.

D. Alternative 3 Conflicts With Port Master Plan Goals

NASSCO commented that Alternative 3 is inconsistent with Port Master Plan (“PMP”) Goal X, requiring protection of the waters of the state, because Alternative 3 would eliminate 10 acres of water by converting it to upland habitat. In response, the Cleanup Team contends that eliminating water can still protect the “quality” of that water, and that Alternative 3 does not conflict with this PMP goal. RTC, at 139. This argument contradicts the plain terms of the PMP.

The Cleanup Team also argues that its interpretation is supported by the opinion of the Port District, as expressed in private consultations, and thus is supported by “expert opinion.” But no evidence of any interpretation by the Port District is included in the record, and no deference is warranted on the basis of an interpretation that was advanced in private conversations. *See McPherson v. City of Manhattan Beach*, 78 Cal. App. 4th 1252, 1266 n.6 (2000). Moreover, deference is never warranted to an interpretation that conflicts with the plain terms of a document, which a reviewing court will interpret as a matter of law. *See id.*

Likewise, Alternative 3 conflicts with PMP Goal XI, which requires natural resources to be protected, preserved and enhanced, because Alternative 3 will destroy up to six acres of eelgrass at the Convair site, and destroy the benthic community, and thus cannot be said to “preserve” the same. RTC, at 139-40. The creation of eelgrass off-site will not preserve the eelgrass currently existing at the site.

For these reasons, Alternative 3 will cause a significant impact regarding consistency with local policies and ordinances, and the FEIR is deficient for failing to so state.

VII. RECIRCULATION IS REQUIRED

Because the FEIR and the Responses fail to address meaningfully the concerns raised in NASSCO's comments on the DEIR, NASSCO reiterates that the FEIR requires recirculation, for the reasons previously stated as well as those set forth herein.

VIII. THE FEIR'S ASSUMPTION THAT 15% OF THE DREDGED MATERIAL WILL BE "HAZARDOUS" IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Comments submitted by NASSCO and other parties noted the lack of support for the DEIR's assumption that 15% of the material proposed to be dredged will be "hazardous." The Responses indicate that this assumption was determined by Regional Board staff, and "[m]ore specific information is not necessary." RTC, at 77. But one of the key purposes of an EIR is to foster informed decision-making and public participation; this purpose is not satisfied by statements that staff reached a given conclusion but will not provide information used to support that conclusion. *See California Oak Foundation*, 133 Cal. App. 4th at 1237 ("[t]o facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions."). Thus, the Responses' admitted reliance on the bare conclusion of Regional Board staff is insufficient under CEQA, and also constitutes a failure to adequately respond to comments. *See People v. County of Kern*, 62 Cal. App. 3d 761, 770, 772 (1976) ("conclusionary statement unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind" does not constitute good faith, reasoned response to comment, particularly where the agency "fail[s] to identify in any manner the data available to it upon which it reaches its conclusion . . .").

Nor is it appropriate to defer an adequate analysis of the likely extent of contaminated sediment included in the remedial footprint, as suggested by the Responses. RTC, at 77 ("Future decisions and implementing actions following certification of the PEIR and approval of the project will be subject to subsequent environmental review pursuant to CEQA."). Given that this assumption underlies all of the environmental impact areas assessed for the Project and the dredging alternatives, it demands thorough analysis at this time.

IX. THE CUMULATIVE IMPACTS ANALYSIS FAILS ADEQUATELY TO EVALUATE REASONABLY ANTICIPATED FUTURE DREDGING PROJECTS

NASSCO's comments on the DEIR noted that the cumulative impacts analysis does not address the potential impacts of the Project when considered cumulatively with other reasonably anticipated future dredging projects. Although the DEIR estimates that 245,000 cubic yards of sediment is dredged annually from San Diego Bay, the Responses state that no specific information regarding any future dredging projects could be obtained. *E.g.*, RTC, at 117 ("it is difficult or impossible to predict the timing that various areas within the Bay will require dredging."). The Responses also state, however, that permitting for dredging occurs after applications have been received, and that applications for dredging approvals and permits are available on the Regional Board's website. RTC, at 119. Based on this response, this information should have been obtained and included in the FEIR, in order to provide an accurate forecast for the cumulative impacts analysis.

The Responses go on to state that future dredging was estimated based on historical records, and that this estimate was used to analyze cumulative impacts. RTC, at 116. But this is incorrect; the FEIR does not analyze the proposed Project's impacts when considered cumulatively with the expected impacts of other dredging projects. No discussion of the expected impacts from other dredging projects is included. Accordingly, the cumulative impacts analysis is deficient.

In response to NASSCO's request for information regarding whether other dredging projects are subject to CEQA review, the Responses state that "CEQA review has been required for the referenced previous dredging projects that required issuance of a Certification of Water Quality or Waste Discharge Requirements." RTC, at 118. But this statement is unhelpful because no previous dredging projects are specifically referenced.

X. THE ANALYSIS OF THE "NO PROJECT" ALTERNATIVE IS FLAWED

The DEIR's conclusion that the "no project" alternative presents risk to aquatic life, aquatic-dependent wildlife and human health beneficial uses, and would perpetuate a "public nuisance" at the Site, is predicated entirely on the DEIR's hypothetical baseline, which admittedly was derived from the analysis in the DTR (using unrealistic assumptions) and does not reflect actual, existing conditions at the Site. RTC, at 126-27. For the reasons explained above, CEQA does not permit use of a hypothetical baseline, and the decision to do so invalidates the FEIR, including these statements regarding the "no project" alternative.

XI. THE ANALYSIS OF ALTERNATIVES 2 AND 4 IS FLAWED

With regard to the confined aquatic disposal ("CAD") facility proposed in Alternative 2, NASSCO commented that the DEIR fails to provide sufficient analysis to determine whether or not the CAD would maintain integrity and prevent contaminated sediments from escaping, which is further complicated by the DEIR's failure to identify any proposed locations for the CAD, precluding assessment of whether the alternative is feasible. RTC, at 127-29. The exact same concerns apply with respect to the CDF contemplated by Alternative 4. RTC, at 131-32.

The Responses state that the requested level of detail is not required at this time (because these are only alternatives), and that further "site specific" environmental review would be required under CEQA before either approach could be approved. Given this concession, the FEIR should treat each alternative as causing significant impacts to marine biological resources, hydrology and water quality (and any other areas affected by a breach of the CAD/CDF), and also treat each alternative as environmentally inferior to the proposed Project. Neither alternative may be approved now, given these additional significant impacts relative to the proposed Project. In addition, approval of the alternatives at this time is precluded because assessment of potentially significant environmental impacts and associated mitigation requirements may not be deferred. *E.g., Communities for a Better Env't v. City of Richmond*, 184 Cal. App. 4th 70, 95 (2010). It is also difficult if not impossible to assess the feasibility of a proposed CDF/CAD without identifying the proposed location of same.

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It is noteworthy that the Responses do not squarely address the substantially different level of treatment afforded Alternative 3 as opposed to Alternatives 2 and 4. If, as the Responses contend, the robust description of Alternative 3 was needed “to illuminate the potential effects of such an alternative and to inform the decision-makers,” (RTC, at 136), an explanation should also be provided as to whether or not the substantially less-detailed analysis of Alternatives 2 and 4 was sufficient for that purpose.

XII. THE PROJECT IS CATEGORICALLY EXEMPT FROM CEQA REVIEW

NASSCO’s initial CEQA comments detailed the reasons why NASSCO believes the Project is categorically exempt from CEQA and no “unusual circumstances” apply to overcome the exemption, inasmuch as the proposed dredging of 143,000 cubic yards admittedly “falls within the historic ranges for the yearly overall volume of dredging activity in San Diego Bay.” DEIR, at 4-2 (annual average of 245,000 cubic yards of sediment is dredged from the Bay). The Responses indicate that the lead agency has discretion to determine whether or not the Project is categorically exempt, which is not in dispute. RTC, at 145. But the lead agency’s decision must be supported by substantial evidence in the administrative record. For the reasons explained in NASSCO’s DEIR comments, no substantial evidence exists to support a finding of unusual circumstances here.

The Responses also indicate that the Regional Board may distinguish between maintenance and environmental dredging, (RTC, at 147), but provide no analysis of the extent to which the annual sediment dredging figures provided in the DEIR involve maintenance versus environmental dredging, or the extent to which (or reasons why) one type of dredging requires environmental review while the other does not. To the contrary, the Cleanup Team elected not to provide the records of annual dredging in San Diego Bay between 1994-2005, relied upon in the DEIR, in response to a direct request by NASSCO. Instead, the Cleanup Team stated that NASSCO should submit a Public Records Act request and then file a motion to have the documents admitted into the TCAO proceeding. CEQA’s informational purpose is not fulfilled when highly relevant information is not included in the EIR or disclosed in response to comments, and the burden is shifted to the public to submit Public Records Act requests to obtain same.

Thank you for your consideration of these comments.

Very truly yours,



Jeffrey P. Carlin
of LATHAM & WATKINS LLP

cc: Frank Melbourn and Catherine Hagan, on behalf of the Advisory Team
Designated Parties (per attached proof of service)

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 **October 19, 2011**, I served the following document described as:

NASSCO'S COMMENTS ON THE PROPOSED FINAL ENVIRONMENTAL IMPACT REPORT FOR THE SHIPYARD SEDIMENT REMEDIATION PROJECT (SCH #2009111098)

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 **October 19, 2011**.

BY HAND DELIVERY

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for hand delivery by a messenger courier service or a registered process server. Under that practice, documents are deposited to the Latham & Watkins LLP personnel responsible for dispatching a messenger courier service or registered process server for the delivery of documents by hand in accordance with the instructions provided to the messenger courier service or registered process server; such documents are delivered to a messenger courier service or registered process server on that same day in the ordinary course of business. I caused a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for hand delivery by a messenger courier service or a registered process server.

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Upon written agreement by the parties, the above-described document was transmitted via electronic mail to the parties noted below on **October 19, 2011**.

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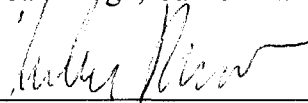
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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing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

Executed on **October 19, 2011**, at San Diego, California.

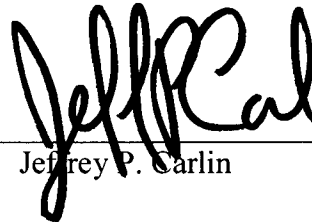


Andrea Rasco

Certification of Authenticity of Electronic Submittal

I, Jeffrey P. Carlin, declare:

I am an associate at Latham & Watkins LLP, counsel of record for National Steel and Shipbuilding Company ("NASSCO") in the Matter of Tentative Cleanup and Abatement Order R9-2011-0001 before the San Diego Regional Water Quality Control Board ("Water Board"). I am licensed to practice law in the State of California and make this declaration as an authorized representative for NASSCO. I declare under penalty of perjury under the laws of the State of California that the electronic version of NASSCO's Comments on the Proposed Final Environmental Impact Report for the Shipyard Sediment Remediation Project (SCH #2009111098), submitted to the "Water Board" and served on the Designated Parties by e-mail on October 19, 2011, is a true and accurate copy of the submitted signed original. Executed this 19th day of October 2011, in San Diego, California.



Jeffrey P. Carlin