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Item 12 Doc. 10

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August 31, 2010

VIA E-MAIL

Chair King and Honorable Board Members
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

File No. 030815-0025

Agenda Item 12

Re: Shipyard Sediment Site Cleanup Project and Tentative Cleanup and Abatement Order No. R9-2010-0002

Dear Chair King and Honorable Board Members:

This letter is submitted in connection with the San Diego Regional Water Board's (Regional Board) consideration of NASSCO's July 23, 2010 Motion Requesting Determination that Tentative Cleanup and Abatement Order No. R9-2010-0002 Is Exempt From CEQA. NASSCO's motion is agendized as Item 12 for the Regional Board's September 8, 2010 hearing. NASSCO respectfully requests that the Regional Board grant its motion for the reasons detailed therein; adopt the proposed order submitted concurrently with NASSCO's motion (located at pages 121 and 122 of Document 3 for Item 12); and deny staff's Tentative Resolution R9-2010-0115 (Tentative Resolution) proposing that the Regional Board find CEQA applicable to Tentative Cleanup and Abatement Order No. R9-2010-0002 (TCAO).

The grounds for NASSCO's position that the TCAO should be exempt from CEQA have already been detailed in its motion, and will not be reiterated here. This letter is provided solely to make the following four points. First, neither the Tentative Resolution nor the submissions by the Cleanup Team or San Diego Unified Port District demonstrate that implementation of the TCAO will have different types of environmental impacts than other sediment dredging projects approved by the Regional Board for San Diego Bay and found to be categorically exempt from CEQA, including the Campbell Shipyard Site, Paco Terminals and Convair Lagoon. Such a showing is necessary to support a determination of "unusual circumstances" sufficient to warrant an exception to categorical exemptions which the Cleanup Team and staff have both acknowledged are typically applied to cleanup and abatement orders.

Second, NASSCO does not wish for any unnecessary delay in the Regional Board's consideration and adoption of the TCAO, and is concerned that a finding that the TCAO is

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subject to CEQA – which is a departure from precedent – may cause substantial delay in the proceedings.

Third, notwithstanding NASSCO's belief that CEQA should not apply to the TCAO, NASSCO has agreed to fund more than its per capita share of costs for the preparation of an environmental impact report (EIR), subject to a Regional Board finding that an EIR is necessary. Thus, NASSCO has committed to ensure that it will not be responsible for any delay that could result in the CEQA process due to lack of funding.

Fourth, in what appears to be a procedural anomaly, we note that the "consent" calendar for the September 8 hearing includes as Item 10 Tentative Resolution R9-2010-0102, requesting State Board approval of funding for CEQA review of the TCAO. Tentative Resolution R9-2010-0102 includes a finding that the TCAO is subject to CEQA review and that an EIR should be required. Given the apparent intent to adopt this resolution before the hearing on NASSCO's motion to determine whether or not CEQA applies to the TCAO, the agenda suggests that denial of NASSCO's motion is a foregone conclusion.

Thank you for your consideration of this matter.

Very truly yours,



Kelly E. Richardson
of LATHAM & WATKINS LLP

cc: Designated Parties

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 31, 2010**, I served the following document described as:

NASSCO's Comments regarding NASSCO's Motion Requesting Determination that Tentative Cleanup and Abatement Order No. R9-2010-0002 is Exempt from CEQA (Agenda Item 12, San Diego Regional Water Quality Control Board Meeting, September 8, 2010)

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 31, 2010**.

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

14 Executed on **August 31, 2010**, at San Diego, California.

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16 _____
17 Lauren M. Luhmann