LATHAM & WATKINS LLP
Robert M. Howard (SB No. 145870)
Kelly E. Richardson (SB No. 210511)
Jeffrey P. Carlin (SB No. 227539)
Ryan R. Waterman (SB No. 229485)
Jennifer P. Casler-Goncalves (SB No. 259438)
600 West Broadway, Suite 1800
San Diego, California 92101-3375
Telephone: (619) 236-1234
Facsimile: (619) 696-7419
Attorneys for Designated Party
National Steel and Shipbuilding Company

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

IN THE MATTER OF TENTATIVE CLEANUP AND ABATEMENT ORDER NO. R9-2010-0002 (SHIPYARD SEDIMENT CLEANUP)

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

¹ Notwithstanding the allegations of certain parties in this proceeding, NASSCO has repeatedly opposed delay in issuance of the CAO and implementation of remedial action. See, e.g., Letter from David Mulliken, Latham & Watkins, to Michael P. McCann, Regional Board (Feb. 17, 2006) (stating that “NASSCO . . . remains concerned with the prolonged and continuing delay in the issuance of a Technical Report by the Cleanup Team . . . .” and expressing NASSCO’s dissatisfaction with the Cleanup Team and Board’s “substantial delay in issuing the Technical Report.”); Letter from David Mulliken, Latham & Watkins, to John Minan, Presiding Officer and Chairman, Regional Board (Mar. 31, 2006) (expressing concern regarding the “prolonged and continuing delay in the issuance of a Technical Report”); Letter from David Mulliken, Latham & Watkins to Michael P. McCann, Chief Engineer, Advisory Team, Regional Board (Aug. 25, 2006) (“NASSCO remains concerned by the prolonged and continuing delay in the issuance of a Technical Report by the Cleanup Team . . . .”); Letter from Kelly Richardson, Latham & Watkins, to Regional Board, Region 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)”).
II. CEQA Gives the Regional Board the Legal Authority to Make an Exemption Determination

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

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

The Regional Board is also entitled to delegate the exemption determination to its staff, as CEQA Guidelines section 15025(a)(1) provides that a “public agency may assign specific functions to its staff to assist in administering CEQA,” including “[d]etermining whether a
project is exempt." Cal. Code Regs. tit. 14, § 15025(a)(1) (emphasis added). This language is permissive; an agency’s decision-making body has the option to delegate an exemption determination to staff, but is not required to do so. Thus, the position that the Cleanup Team has taken does not bind the Presiding Officer or Regional Board in any way, since the Regional Board is obligated to make an exemption determination and retains discretion whether to follow any staff recommendation regarding same. See Ukiah, 2 Cal. App. 4th at 730; Cal. Code Regs. tit. 14, § 15061.

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

III. Conclusion

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

Dated: August 2, 2010

LATHAM & WATKINS LLP

By

Kelly E. Richardson
Attorneys for Designated Party
NATIONAL STEEL AND SHIPBUILDING COMPANY

2 The CEQA Guidelines implement CEQA. Although they are not binding, they warrant great 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
christmcnevin@pillsburylaw.com
(213) 488-7507
(213) 629-1033

Brian Ledger
Kristol Reyna
Attorney at Law
Attorney at Law
Gordon & Rees LLP
Gordon & Rees LLP
101 West Broadway, Suite 1600
101 West Broadway, Suite 1600
San Diego, CA 92101
San Diego, CA 92101
bledger@gordonrees.com
kreyna@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
carrigan@waterboards.ca.gov
(916) 322-3626
(916) 341-5896
Marco Gonzalez  
Attorney at Law  
Coast Law Group LLP  
1140 South Coast Highway 101  
Encinitas, CA  92024  
marco@coastlawgroup.com  
(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  

Jill Tracy  
Senior Environmental Counsel  
Sempra Energy  
101 Ash Street  
San Diego, CA  92101  
jtracy@sempra.com  
(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  

Leslie FitzGerald  
Deputy Port Attorney  
San Diego Unified Port District  
PO Box 120488  
San Diego, CA  92112  
lfitzger@portofsandiego.org  
(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  

Laura Hunter  
Environmental Health Coalition  
401 Mile of Cars Way, Suite 310  
National City, CA  91950  
laurah@environmentalhealth.org  
(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  

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

William D. Brown, Esq.  
Brown & Winters  
120 Birmingham Drive, #110  
Cardiff By The Sea, CA  92007  
brown@brownandwinters.com  
(760) 633-4485  
(760) 633-4427
Mike Tracy, Esq.
DLA Piper LLP US
401 B Street, Suite 1700
San Diego, California 92101-4297
mike.tracy@dlapiper.com
(619) 699-3620
(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

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 August 2, 2010, at San Diego, California.

Brittany Brewton