



California Regional Water Quality Control Board

San Diego Region

Item 12 Doc. 4



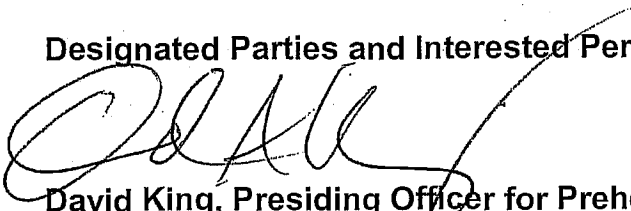
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TO: **Designated Parties and Interested Persons**

FROM: 
**David King, Presiding Officer for Prehearing Proceedings
Tentative Cleanup and Abatement Order No. R9-2010-0002
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD**

DATE: **July 27, 2010**

SUBJECT: **ORDER REQUESTING RESPONSES TO MOTION OF THE NATIONAL
STEEL AND SHIPBUILDING COMPANY REQUESTING A
DETERMINATION THAT TENTATIVE CLEANUP AND ABATEMENT
ORDER NO. R9-2010-0002 IS EXEMPT FROM THE CALIFORNIA
ENVIRONMENTAL QUALITY ACT**

On December 22, 2009, the Cleanup Team for the tentative Cleanup and Abatement Order (CAO) No. R9-2010-0002 released a California Environmental Quality Act (CEQA) Initial Study for the CAO, which stated that the CAO might have a potentially significant environmental impact. Since that time, the Cleanup Team has stated that an Environmental Impact Report (EIR) is required under CEQA before finalizing the CAO. The Cleanup Team has applied to the State Water Resources Control Board for the necessary funds to prepare the EIR.

On July 23, 2010, the National Steel and Shipbuilding Co. (NASSCO) submitted a Notice of Motion and Motion requesting the Regional Water Quality Control Board, San Diego Region (San Diego Water Board), make a determination that the tentative CAO is exempt from CEQA. The Notice of Motion and Motion, together with the supporting declaration by Jeffrey Carlin and a Proposed Order, was distributed simultaneously to the Designated Parties to the proceeding via e-mail and are attached to this Order. If the CAO is exempt from CEQA, an EIR would not be required.

NASSCO, specifically, is directed to submit additional memoranda in support of its motion setting forth the legal authority of the Presiding Officer to determine whether the CAO is categorically exempt from CEQA. All other designated parties may also submit memoranda addressing the propriety of, and legal authority for, a determination on the applicability of a categorical exemption by the Presiding Officer.

Designated Parties and Interested
Persons, Tentative CAO No.
R9-2010-0002

- 2 -

July 27, 2010

The Cleanup Team, specifically, is directed to comment on the applicability of a CEQA categorical exemption to the CAO and to submit a written response to the Motion filed by NASSCO on or before 5 p.m. on August 2, 2010. All written responses by Designated Parties or Interested Persons regarding the Motion must also be received by 5 p.m. on August 2, 2010. The Designated Parties are also directed to submit responses regarding whether the San Diego Water Board has the authority to issue a determination at this time that the CAO is exempt from CEQA.

After reviewing the Designated Parties' responses, the Presiding Officer will decide what action, if any, the San Diego Regional Board will take.

Attachment

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 Robert M. Howard (SB No. 145870)
 2 Kelly E. Richardson (SB No. 210511)
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6 Attorneys for Designated Party
 7 National Steel and Shipbuilding Company

8 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

9 SAN DIEGO REGION

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

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

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1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

2 PLEASE TAKE NOTICE THAT on August 11, 2010, or as soon thereafter as this matter
3 may be heard by the California Regional Water Quality Control Board, San Diego Region
4 (Regional Board), designated party National Steel and Shipbuilding Company (NASSCO) will
5 and hereby does move for a determination from the Regional Board that its review and issuance
6 of Tentative Cleanup and Abatement Order No. R9-2010-0002 (CAO) is categorically exempt
7 from the California Environmental Quality Act, Public Resources Code section 21000, *et seq.*
8 (CEQA), pursuant to sections 15307, 15308 and 15321 of CEQA's implementing regulations set
9 forth in Title 14 of the California Code of Regulations (CEQA Guidelines). This motion is made
10 pursuant to the Regional Board's responsibility, acting as lead agency, to determine whether or
11 not the CAO is exempt from CEQA, under CEQA Guidelines section 15061(a). This motion is
12 based on this notice, the attached memorandum of points and authorities, the declaration of
13 Jeffrey P. Carlin submitted concurrently herewith, such other evidence, argument and authorities
14 submitted prior to or in connection any hearing held on this motion, and the complete record of
15 proceedings in this matter.

16 Dated: July 23, 2010

Respectfully submitted,

LATHAM & WATKINS LLP

17
18
19 By 

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

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

This motion requests a determination from the California Water Quality Control Board, San Diego Region (Regional Board) that its review and approval of Tentative Cleanup and Abatement Order R9-2010-0002 (CAO) is exempt from the California Environmental Quality Act, Public Resources Code section 21000, *et seq.* (CEQA). Such a determination is warranted by CEQA's implementing regulations, which categorically exempt actions by regulatory agencies to protect natural resources or the environment, as well as enforcement actions taken by regulatory agencies. 14 Cal. Code Regs. (CEQA Guidelines) §§ 15307, 15308 and 15321. Such a determination would also be consistent with precedent from this and other regional boards throughout the state, which routinely have found the issuance of cleanup and abatement orders to be exempt from CEQA, including orders issued for prior sediment remediation and dredging projects in San Diego Bay. Further, it would 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).

On March 22, 2010, designated party National Steel and Shipbuilding Company (NASSCO) submitted correspondence to the Regional Board asserting that the CAO is categorically exempt from CEQA and urging the Regional Board to treat it as such, consistent with statewide practice. See Declaration of Jeffrey Carlin ("Carlin Dec."), Ex. 7. NASSCO's letter cautioned that adoption of the CAO would be delayed until the CEQA process was completed, to the extent CEQA was found to apply, and that preparation of an EIR would likely extend well beyond the six month time-frame then contemplated by the Cleanup Team. NASSCO's request has not received a formal response, but Regional Board staff is proceeding as if CEQA applies. To the extent Regional Board staff has found CEQA to be applicable, this motion constitutes an appeal of that staff-level decision to the Regional Board.

Because the CAO is categorically exempt from CEQA, and because NASSCO wishes to avoid any unnecessary delays that will result from CEQA review, NASSCO hereby seeks a determination from the Regional Board that CEQA is inapplicable to the CAO.

1 **II. SUMMARY OF RELEVANT FACTS**

2 An initial Tentative CAO in this matter was issued on April 29, 2005, designated as
3 Order No. R9-2005-0126. See Carlin Dec., Ex. 1. The Order indicated that “[t]his enforcement
4 action is exempt from the provisions of . . . CEQA” pursuant to CEQA Guidelines section 15321.
5 A revised version of Order No. R9-2005-0126 was released on August 24, 2007, and similarly
6 indicated that the CAO was categorically exempt from CEQA. See Carlin Dec., Ex. 2. A
7 subsequent revision to Order No. R9-2005-0126 was released on April 4, 2008, and again found
8 the CAO to be categorically exempt from CEQA, relying on CEQA Guidelines sections 15307,
9 15308 and 15321. See Carlin Dec., Ex. 3. It was not until the fourth iteration of the CAO,
10 released on December 22, 2009, that the Cleanup Team reversed itself to indicate that it had
11 decided to investigate whether “special circumstances” might apply to render a categorical
12 exemption inapplicable, while acknowledging that enforcement actions such as the CAO are “in
13 many cases” categorically exempt. See Carlin Dec., Ex. 4.

14 Also on December 22, 2009, the Cleanup Team released a CEQA Initial Study for the
15 CAO, in advance of a CEQA Scoping Meeting set for January 21, 2010. The Initial Study found
16 that the CAO might have a potentially significant environmental impact with respect to air
17 quality and geology/soils. A public comment period on the Initial Study ran through March 22,
18 2010, after one extension was provided. On January 21, 2010, designated party BAE Systems
19 San Diego Ship Repair, Inc. (BAE) submitted a comment letter to the Regional Board stating,
20 among other things, that the Scoping Meeting was premature because the Regional Board had
21 not yet determined whether or not the CAO was subject to CEQA. See Carlin Dec., Ex. 5. The
22 letter noted that many if not all prior cleanup and abatement orders have been considered
23 categorically exempt from CEQA under CEQA Guidelines sections 15307, 15308 and 15321.¹

24 On January 27, 2010, the Cleanup Team submitted correspondence to the Presiding
25

26 ¹ BAE submitted supplemental written comments on March 23, 2010, re-asserting that the
27 CAO should be categorically exempt from CEQA, and noting that such a determination
28 “would greatly speed the conclusion of the enforcement process and, hence, the cleanup
process itself.” See Carlin Dec., Ex. 8.

1 Officer, which, in pertinent part, acknowledged that cleanup and abatement orders are “often
2 exempted” from CEQA review, but contended that an exception applied for the CAO due to
3 “unusual circumstances.” See Carlin Dec., Ex. 6. On this basis, the Cleanup Team believed that
4 an EIR was required, and it then estimated that the process would take at least six months, or
5 until August 23, 2010.

6 On March 22, 2010, NASSCO submitted written comments to the Regional Board
7 concerning the CEQA Scoping Meeting that was held on January 21, 2010. See Carlin Dec., Ex.
8 7. The letter asserted that the CAO is categorically exempt under the three exemptions identified
9 in BAE’s letter and earlier iterations of the CAO, explaining that these exemptions have been
10 widely applied by this Regional Board and other regional boards throughout the state. The letter
11 disputed the Cleanup Team’s position that “special” or “unusual” circumstances had been
12 identified relative to prior sediment remediation or dredging projects before the Regional Board,
13 inasmuch as air emissions, truck traffic, and the potential for seismic activity are conditions
14 common to all these activities. NASSCO’s letter also cautioned that if the Regional Board
15 elected to prepare an EIR, despite the categorical exemptions, “then it is important for the
16 Regional Board to understand that adoption of the CAO will be delayed until the CEQA process
17 is completed – **a result that NASSCO does not advocate.**” Finally, NASSCO opined that the
18 Cleanup Team’s estimate of six months to complete the EIR process was “very optimistic,” and
19 that the process could realistically be expected to take twelve to eighteen months, or longer.

20 On July 9, 2010, the Cleanup Team submitted further correspondence to the Regional
21 Board, which continued to assert that “unusual circumstances” prevented application of
22 categorical exemptions to the CAO. See Carlin Dec., Ex. 9. The Cleanup Team conceded that
23 such exemptions were “routinely used” for other Regional Board actions, including the issuance
24 of cleanup and abatement orders.

25 **III. ARGUMENT**

26 **A. Standard of Review**

27 **1. Certain Classes of Projects Are “Categorically Exempt” From CEQA**

28 Public Resources Code section 21084(a) requires the Secretary of the Natural Resources Agency

1 to prepare and adopt “a list of classes of projects which have been determined not to have a
 2 significant effect on the environment,” and which are therefore “categorically exempt” from
 3 CEQA. Pub. Res. Code (CEQA) § 21084(a); CEQA Guidelines § 15061(b)(2); *San Lorenzo*
 4 *Valley Cmty Advocates for Responsible Educ. v. San Lorenzo Valley Unified School Dist.*, 139
 5 Cal. App. 4th 1356, 1380 (2006) (“CEQA does not apply to projects that are . . . categorically
 6 exempt.”). Thirty-three such categorical exemptions are currently authorized, as set forth in
 7 CEQA Guidelines sections 15301-15333. Each exempted class of projects “embodies a ‘finding
 8 by the Resources Agency that the project will not have a significant effect on the environment’.”
 9 *San Lorenzo*, 139 Cal. App. 4th at 1381; CEQA Guidelines § 15300.

10 As pertinent here, the classes of exempted projects include (i) “actions taken by
 11 regulatory agencies as authorized by state law or local ordinance to assure the maintenance,
 12 restoration, or enhancement of a natural resource where the regulatory process involves
 13 procedures for protection of the environment” (Class 7); (ii) “actions taken by regulatory
 14 agencies, as authorized by state or local ordinance, to assure the maintenance, restoration,
 15 enhancement or protection of the environment where the regulatory process involves procedures
 16 for protection of the environment” (Class 8); and (iii) actions by agencies related to
 17 “enforcement of a law, general rule, standard, or objective, administered or adopted by the
 18 regulatory agency” (Class 21). CEQA Guidelines §§ 15307, 15308 and 15321.

19 If the lead agency determines a project is categorically exempt, the project “may be
 20 implemented without any CEQA compliance whatsoever,” and the agency may file a notice of
 21 exemption with the Office of Planning and Research or the county clerk after the project is
 22 approved. *Ass’n for Prot. of Env’tl Values in Ukiah v. City of Ukiah*, 2 Cal. App. 4th 720, 726
 23 (1991); CEQA Guidelines §§ 15061(d) and 15062. An agency’s factual determination that a
 24 project is exempt from CEQA will be upheld by a reviewing court if it is supported by
 25 “substantial evidence” in the record, or if the record contains any “relevant evidence that a
 26 reasonable mind might accept as adequate support for a conclusion,” even if another conclusion
 27 could also be reached based on the evidence. *Fairbank v. City of Mill Valley*, 75 Cal. App. 4th
 28 1243, 1251 (1999); *Banker’s Hill, Hillcrest, Park West Cmty Pres. Group v. City of San Diego*,

1 139 Cal. App. 4th 249, 261 n.10 (2006).

2 **2. In Limited Cases, “Unusual Circumstances” May Allow an Exception**
 3 **to a Categorical Exemption**

4 A public agency may not require an EIR or negative declaration for a categorically
 5 exempt project unless one of the exceptions enumerated in CEQA Guidelines section 15300.2
 6 applies. CEQA Guidelines § 15061(b)(2); CEQA §§ 21080(b)(9) and 21084. Here, the Cleanup
 7 Team has asserted that an exception exists for the CAO because “unusual circumstances” will
 8 allegedly result in a reasonable possibility that the CAO will have a significant effect on the
 9 environment. CEQA Guidelines § 15300.2(c). Application of this exception “involves two
 10 distinct inquiries. First, . . . whether the Project presents unusual circumstances. Second, . . .
 11 whether there is a reasonable possibility of a significant effect on the environment due to the
 12 unusual circumstances.” *Banker’s Hill*, 139 Cal. App. 4th at 278. “A negative answer to either
 13 question means the exception does not apply.” *Id.* (quoting *Santa Monica Chamber of*
 14 *Commerce v. City of Santa Monica*, 101 Cal. App. 4th 786, 800 (2002)).

15 Unusual circumstances will not be found unless some feature distinguishes the project
 16 from other typical projects in the exempt class, such that the type of environmental impacts that
 17 may result are different than the type of environmental impacts likely to result from other typical
 18 projects within the class. *E.g.*, *Santa Monica*, 101 Cal. App. 4th at 801-03. Thus, for example,
 19 the location of a proposed 14-story residential project next to a condominium project, which
 20 would block the views of residents in the condominium, is not an “unusual circumstance”
 21 justifying an exception to a categorical exemption for urban in-fill projects because “[t]he
 22 location of urban in-fill construction next to another building, which might result in blocked
 23 views, is not an unusual circumstance [since] such construction normally takes place in an
 24 already built-up urban environment.” *Banker’s Hill*, 139 Cal. App. 4th at 279 n.26.

25 Any agency determination relating to the existence of a particular factual circumstance is
 26 reviewed under the substantial evidence standard described above, while a reviewing court
 27 would determine whether or not such a circumstance is “unusual” as a matter of law. *Banker’s*
 28 *Hill*, 139 Cal. App. 4th at 261 n.11. To the extent the Regional Board found the CAO to be

1 exempt from CEQA, an opponent of that finding would bear the burden of proving that an
2 exception exists in any subsequent lawsuit. *Santa Monica*, 101 Cal. App. 4th at 739.

3 **B. The CAO Is Exempt From CEQA Under Class 7, Class 8 And Class 21**

4 There is no dispute that the CAO falls within the class of projects regularly found to be exempt
5 under the Class 7, Class 8 and Class 21 categorical exemptions. As noted, these categorical
6 exemptions were relied upon in the first three iterations of the CAO during 2005-2008; the
7 Cleanup Team has acknowledged that “Regional Boards have often exempted CAO projects
8 from CEQA” under these categorical exemptions; and the current CAO continues to
9 acknowledge the applicability of these exemptions subject to a Regional Board investigation to
10 determine if an exception would apply.

11 The Cleanup Team has also acknowledged that this Regional Board “has routinely used
12 these categorical exemptions when taking regulatory actions, including when it issues cleanup
13 and abatement orders.” This is correct. In fact, the Regional Board has previously found exempt
14 from CEQA cleanup and abatement orders it issued for prior sediment remediation and dredging
15 projects in San Diego Bay, such as the Campbell Shipyard Site (where the remediation was
16 completed in or around 2007), Paco Terminals and Convair Lagoon. See Carlin Dec., Ex 10, 11,
17 and 12. Also attached to this motion are a variety of cleanup and abatement orders issued by
18 other regional boards which were found to be exempt from CEQA, showing that CEQA
19 exemptions are commonly applied throughout the state. See Carlin Dec., Ex. 13.

20 Since the CAO is plainly an agency enforcement action carried out to protect the
21 environment and natural resources, no reasonable argument could be made that it does not fit
22 within the Class 7, Class 8 or Class 21 exemptions, and the Cleanup Team has not asserted
23 otherwise. Thus, CEQA cannot apply unless a supportable finding can be made that “unusual
24 circumstances” require an exception. As discussed below, the requisite unusual circumstances
25 do not exist here.

26 **C. There Is No Evidence Of “Unusual Circumstances” Warranting an**
27 **Exception to the CAO’s Categorical Exemption from CEQA**

28 The “unusual circumstances” exception cannot apply without a two-pronged showing that

1 (1) unusual circumstances differentiate the CAO from the “general” circumstances of other
2 sediment remediation/dredging projects falling within the categorical exemptions, and (2) such
3 unusual circumstances create an environmental risk that does not exist for the general category of
4 projects. *Banker’s Hill*, 139 Cal. App. 4th at 278. For the reasons detailed below, the exception
5 does not apply because no unusual circumstances exist, rendering unnecessary any inquiry into
6 the second prong. *Id.*

7 Notably absent from the record is any evidence showing that this CAO contains
8 environmental circumstances unusual to those seen in other sediment remediation or dredging
9 projects that have been found categorically exempt by the Regional Board. The Cleanup Team
10 has asserted that unusual circumstances exist here based on the potential release of contaminants
11 into the air or water from sediment management activities (including diesel emissions from
12 dredging equipment); air, noise and other potential effects of truck trips to transport sediment
13 away from the site or other materials to the site; and the potential for seismic activity to shift
14 backfill material and expose underlying contaminated sediment. Yet these circumstances are
15 applicable to most if not all dredging projects, and are not “special” or “unusual” circumstances
16 tied only to this CAO.

17 Accordingly, none of the above factors is sufficient to mandate preparation of an EIR
18 under the “unusual circumstances” exception. *See Banker’s Hill*, 139 Cal. App. 4th at 279 n.26
19 (construction of residential tower next to condominium not an unusual circumstance warranting
20 exception to urban in-fill exemption because urban in-fill projects are “normally” constructed in
21 already built-up urban environment); *Fairbank*, 75 Cal. App. 4th at 1260-61 (alleged traffic and
22 parking effects not “unusual circumstances” warranting exception to categorical exemption for
23 small commercial structures built in urban areas because such effects were not unusual from the
24 effects of other small buildings added to a downtown area); *Santa Monica*, 101 Cal. App. 4th at
25 802-03 (denying claim that “unusually large” size of resident-only permit parking district,
26 “unusually restrictive” 19-hour per day time-period of parking permit requirement, and
27 “unusually diverse” mix of parking purposes (i.e., non-profit, commercial, academic and
28 residential) warranted application of “unusual circumstances” exception because these are the

1 “normal and common” considerations any city might face when operating public parking
 2 facilities and allocating limited curbside parking); *Ass'n for Prot. of Env't'l Values in Ukiah v.*
 3 *City of Ukiah*, 2 Cal. App. 4th 720, 736 (1991) (surface and groundwater runoff from the
 4 construction of a new house were not unusual circumstances warranting exception to single
 5 family residence categorical exemption because “[s]urface and groundwater runoff are common
 6 and typical concerns with sloping lots”).

7 Since the potential environmental impacts associated with the CAO are the “normal and
 8 common considerations” involved with other sediment remediation and dredging projects
 9 exempted from CEQA, the unusual circumstances exception does not apply.

10 **D. Policy Considerations Support a Finding That The CAO is Exempt**

11 Finally, there is an important public policy rationale underlying the categorical
 12 exemptions applicable to the CAO: Regional Board-mandated efforts to remediate the
 13 environment should not be delayed or obstructed because of additional environmental review
 14 requirements where, as here, the State Natural Resources Agency has already determined that the
 15 activity falls within a class of projects that will not cause significant environmental impacts.
 16 This policy rationale is consistent with state-wide practice to treat cleanup and abatement orders
 17 as exempt from CEQA. Reversing course now and preparing an EIR for this CAO, despite the
 18 applicability of categorical exemptions, would upset this policy and could establish precedent for
 19 subjecting other Regional Board enforcement actions to CEQA review.

20 **IV. CONCLUSION**

21 For each and all of the foregoing reasons, NASSCO respectfully requests that the
 22 Regional Board determine that the CAO is categorically exempt from CEQA and proceed to
 23 review the CAO without mandating preparation of an EIR or other CEQA document. Such a

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1 determination would comply with CEQA and cause the Regional Board's review of this matter
2 to be completed expeditiously.

3 Dated: July 23, 2010

LATHAM & WATKINS LLP

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5 By 

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

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