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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 MEMORANDUM OF POINTS  
AND AUTHORITIES IN OPPOSITION TO  
SAN DIEGO UNIFIED PORT DISTRICT'S  
MOTION TO RE-OPEN AND EXTEND  
DISCOVERY DEADLINES**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Designated Party National Steel and Shipbuilding Company (“NASSCO”) respectfully  
4 objects to the San Diego Unified Port District’s Motion to Re-Open and Extend Discovery  
5 Deadlines (“motion”) on two principal grounds, one procedural and the other substantive. First,  
6 the motion is not properly before the Regional Board at this time, as it should have been  
7 submitted to the appointed discovery referee, Mr. Mr. Timothy Gallagher, Esq., pursuant to the  
8 parties’ August 9, 2010 discovery extension stipulation (“Stipulation”) and prior direction from  
9 former Presiding Officer David King. Accordingly, the motion should be referred to Mr.  
10 Gallagher, the parties should then be afforded a reasonable amount of time to prepare responses  
11 to the Port’s seventeen-page motion, and Mr. Gallagher should hold an informal hearing and  
12 issue a ruling. The Regional Board or a newly appointed Presiding Officer would still have the  
13 discretion to consider any party’s appeal of a decision reached by Mr. Gallagher.

14 Second, while NASSCO does not oppose the Port’s (or any other party’s) request to  
15 obtain limited discovery against the Cleanup Team regarding changes made by the Cleanup  
16 Team in the September 15, 2010 version of the CAO/DTR relative to the prior version released  
17 in December 2009, particularly with regard to the Cleanup Team’s decision to name the Port as a  
18 primarily liable party, NASSCO does not believe that the Port should be entitled to take broad  
19 discovery against Designated Parties, aside from the Cleanup Team, that were not responsible for  
20 revising the CAO/DTR or naming the Port as a “discharger.”

21 Importantly, the Port and all other Designated Parties previously stipulated that any  
22 supplemental discovery propounded after the August 23, 2010 discovery cut-off date in the  
23 Presiding Officer’s February 18, 2010 Final Discovery Plan should be limited to discovery (i)  
24 against the Cleanup Team only, (ii) pertaining to revisions in the September 15, 2010 version of  
25 the CAO/DTR relative to the prior iteration, and (iii) which “could not, in the exercise of  
26 reasonable diligence, have been served prior to the release of the Revised CAO/DTR.” There is  
27 no reason to depart from the parties’ prior agreement now, and the scope of discovery  
28 contemplated in the Stipulation will protect the due process rights of the Port and the other

1 parties while simultaneously ensuring the process is not bogged down and potentially delayed by  
2 unnecessary or untimely discovery requests.

3 To the extent the scope of permissible discovery sought by the Port is narrowed as  
4 summarized above and described below, NASSCO does not *per se* oppose the time-frame for the  
5 additional discovery proposed by the Port. However, NASSCO prefers the shorter supplemental  
6 discovery time-frame proposed by the Cleanup Team, as set forth in Cleanup Team counsel  
7 Christian Carrigan's October 21, 2010 e-mail response to the Port's motion, and feels that the  
8 more limited scope of discovery advocated by NASSCO should ensure that any supplemental  
9 discovery can be completed in the time-frame contemplated by the Cleanup Team, without  
10 lengthy discovery disputes or other factors that could cause unforeseen delays.

11 **II. THE PORT'S DISCOVERY MOTION IS NOT PROPERLY BEFORE THE**  
12 **REGIONAL BOARD AT THIS TIME**

13 The Port filed its motion via an October 19, 2010 e-mail to Catherine Hagan, counsel for  
14 the Advisory Team, and requested that the motion be presented to the "new Presiding Officer for  
15 this matter so a ruling can be obtained on the motion as expeditiously as possible given that the  
16 current discovery deadline expires on October 26, 2010." In response, and on behalf of Acting  
17 Chair Destache, Ms. Hagan requested by email dated October 20, 2010 that the Designated  
18 Parties respond to the Port District's seventeen page motion by noon on October 22, 2010. As a  
19 preliminary matter, however, NASSCO believes that the motion is not properly before Acting  
20 Chair Destache or the Regional Board, and that Mr. Destache should decline to rule on the  
21 substance of the motion at this time. Instead, the motion should be referred to Mr. Gallagher, in  
22 his capacity as the appointed discovery referee in this proceeding.

23 Mr. Gallagher was appointed discovery referee in the Final Discovery Plan issued by  
24 former Presiding Officer King on February 18, 2010, which authorized Mr. Gallagher to resolve  
25 any discovery disputes subject to an appeal to the Presiding Officer. Further, pursuant to the  
26 Stipulation entered into by the Designated Parties (including the Port District) on August 9,  
27 2010, Mr. Gallagher, as the discovery referee, is specifically authorized to resolve any discovery  
28 disputes arising after the August 23, 2010 discovery cut-off period established in the Final

1 Discovery Plan, during the extended discovery period implemented through the Stipulation. In  
2 response to the parties' Stipulation, Ms. Hagan indicated by email on August 10, 2010 that the  
3 Presiding Officer "is unwilling to consider or resolve discovery disputes beyond the August 23,  
4 2010 discovery deadline established in the final discovery schedule." Ms. Hagan's email also  
5 indicated that the Presiding Officer was agreeable to Mr. Gallagher acting as the final arbiter of  
6 any discovery disputes occurring after August 23, 2010.

7 Accordingly, when the State Water Resources Control Board ("State Board") filed, on  
8 September 15, 2010, a Motion to Quash and Motion for Protective Order concerning NASSCO's  
9 Subpoena for Deposition and Document Production issued to State Board employee Chris  
10 Beegan, the Presiding Officer declined to rule on the motion and required that it be resolved by  
11 Mr. Gallagher, pursuant to the Stipulation, subject to an appeal to the Presiding Officer. Mr.  
12 Gallagher promptly held a hearing and issued a ruling to resolve the motion, which no party  
13 appealed. The same procedure should be followed here.

14 **III. THE PORT'S PROPOSED SCOPE OF DISCOVERY IS OVERLY BROAD AND**  
15 **LACKS JUSTIFICATION**

16 NASSCO does not object to the Port's request to obtain limited discovery against the  
17 Cleanup Team regarding changes made in the September 15, 2010 version of the CAO/DTR  
18 relative to the prior version released in December 2009, particularly with regard to the Cleanup  
19 Team's decision to name the Port as a primarily liable party based on the Port's (1) responsibility  
20 for the actions, operations and omissions of its tenants, and (2) ownership and operation of a  
21 municipal separate storm sewer system ("MS4") that discharges contaminants of concern to the  
22 San Diego Bay and Shipyard Sediment Site. In fact, NASSCO and the other Designated Parties  
23 (including the Port) previously stipulated to allow such discovery, with important limitations that  
24 should be followed now.

25 The underlying rationale of the parties' discovery Stipulation was that all parties,  
26 including the Port, had had the opportunity to serve discovery concerning the December 2009  
27 version of the CAO/DTR prior to the August 23, 2010 discovery cutoff date established by the  
28 Final Discovery Plan. This point was emphasized repeatedly by former Presiding Officer King,

1 most visibly through his July 16, 2010 order denying the Cleanup Team’s request to extend the  
2 remaining discovery deadlines. The Stipulation stated expressly that it was “intended primarily  
3 to ease the burden of certain parties in responding to discovery that has already been timely  
4 propounded so that it could otherwise be completed within the parameters of the Final Discovery  
5 Plan.” More specifically, the Stipulation indicated that an extension in the discovery period had  
6 been requested by Coastkeeper and Environmental Health Coalition, because these entities could  
7 not produce their designated expert for deposition prior to August 23, 2010.

8           Accordingly, the August 9, 2010 Stipulation provided that any new discovery  
9 propounded after August 23 should be limited to discovery “against the Cleanup Team only, and  
10 not against any other designated party,” and further “limited to discovery (i) pertaining to  
11 revisions made to the Revised Tentative CAO/DTR, relative to the prior version of the Tentative  
12 CAO/DTR released publicly on December 22, 2009, and, importantly, (ii) “that could not, in the  
13 exercise of reasonable diligence, have been served prior to the release of the Revised  
14 CAO/DTR.” The Stipulation thus recognized that future discovery would be limited to any  
15 changes made to the revised CAO/DTR, and served only against the party responsible for  
16 making those changes, the Cleanup Team. The Stipulation likewise recognized that the parties’  
17 due process right relative to discovery concerning the December 2009 iteration of the CAO/DTR  
18 had been protected. The scope of discovery agreed upon through the Stipulation would protect  
19 the Port’s due process rights to take discovery regarding the Cleanup Team’s decision to name  
20 the Port as a primarily liable party, without bogging down the proceedings with unnecessary or  
21 untimely discovery between Designated Parties that should have been served prior to the August  
22 23 close of discovery.

23           Each party had the opportunity to choose the discovery it wanted to propound during the  
24 discovery period supplied by the Final Discovery Plan, and many parties propounded significant  
25 discovery. The Port, for reasons known only to it, elected not to do so. The Port now appears to  
26 regret its decision, and is seeking to make up for that decision by requesting leave to propound  
27 wide-ranging discovery against other Designated Parties on matters where it has effectively  
28 waived its discovery rights by failing to comply with the Final Discovery Plan.

1 Specifically, the Port's request to take "discovery relating to the financial resources and  
2 insurance assets" of current tenants such as NASSCO is unfounded and untimely for several  
3 reasons. First, the Port *was* named as a responsible party in the December 2009 iteration of the  
4 CAO/DTR, in connection with the actions, omissions and operations of its tenants. Thus, any  
5 concerns the Port had regarding its potential liability relative to its tenants, whether primary or  
6 secondary liability, could and should have been addressed in discovery served prior to the close  
7 of the August 23, 2010 discovery period.

8 Second, the Port's reliance on language in the DTR indicating that the CAO "may" be  
9 modified by the Regional Board to identify the Port a "secondarily responsible party in the  
10 future," depending on whether or not current or former tenants "fail to comply with the order,"  
11 does not justify discovery related to the financial resources of the Port's tenants. Whether or not  
12 the Port's tenants fail to comply with the CAO will not be known until after the CAO is adopted,  
13 and the Regional Board can then take any steps it feels are appropriate. The Port cannot  
14 establish through discovery taken now whether or not all of its current and former tenants will  
15 comply with the CAO.

16 Third, independent of the activities of its tenants, the Port has also been named as a  
17 primarily liable party based on its ownership and operation of an MS4 that is discharging  
18 contaminants of concern to the San Diego Bay and Shipyard Sediment Site. Thus, the Port will  
19 remain a primarily liable party regardless of the financial resources or insurance policies of its  
20 tenants.

21 Fourth, NASSCO has already produced to the Port District all applicable insurance  
22 policies in its possession, as part of the discovery process in the federal allocation lawsuit  
23 captioned *City of San Diego v. NASSCO, et al.*, Case No. 09-CV-2275 W (BGS), and NASSCO  
24 will produce any additional policies that may be uncovered as part of the discovery process in  
25 that lawsuit. The Port's attempt to obtain a second copy of the same policies through duplicative  
26 discovery in this proceeding is redundant, burdensome and plainly designed to harass NASSCO  
27 and the Port's other tenants that are parties to the federal lawsuit, and which have also produced  
28 their insurance policies accordingly.

1 Fifth, the Port's request to take discovery regarding its tenants' "financial resources" is  
2 overly broad and unduly burdensome, and seeks sensitive information that is irrelevant to the  
3 Regional Board's adoption of the CAO.

4 **IV. CONCLUSION**

5 For each and all of the foregoing reasons, NASSCO respectfully requests that the Port's  
6 motion be referred to Mr. Gallagher. To the extent that Acting Chair Destache chooses to  
7 entertain the Port's motion, NASSCO respectfully requests that the scope of any supplemental  
8 discovery be limited to (i) discovery against the Cleanup Team only, (ii) related to revisions in  
9 the September 15, 2010 version of the CAO/DTR relative to the prior version released in  
10 December 2009, and (iii) which "could not, in the exercise of reasonable diligence, have been  
11 served prior to the release of the Revised CAO/DTR," consistent with the Port's and other  
12 parties' prior agreement.

13 Dated: October 22, 2010

Respectfully submitted,

LATHAM & WATKINS LLP

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16 By \_\_\_\_\_

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

1 **PROOF OF SERVICE**

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

5 On **October 22, 2010**, I served the following document described as:

6 **NATIONAL STEEL AND SHIPBUILDING COMPANY'S MEMORANDUM OF**  
7 **POINTS AND AUTHORITIES IN OPPOSITION TO SAN DIEGO UNIFIED PORT**  
8 **DISTRICT'S MOTION TO RE-OPEN AND EXTEND DISCOVERY DEADLINES**

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

10 **BY ELECTRONIC MAIL**

11 Upon written agreement by the parties, the above-described document was transmitted via  
12 electronic mail to the parties noted below on **October 22, 2010**.

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16 I declare that I am employed in the office of a member of the Bar of, or permitted  
17 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.

18 Executed on **October 22, 2010**, at San Diego, California.

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21 Lauren M. Luhmann  
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