

## LATHAM & WATKINS LLP

May 11, 2012

### VIA FAX AND EMAIL

Shuka Rastegarpour  
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State Water Resources Control Board  
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File No. 048876-0001

Re: California State Water Resources Control Board's Section 401 Certification of EPA's 2013 Vessel General Permit

Dear Ms. Rastegarpour:

On behalf of our client, National Steel and Shipbuilding Company ("NASSCO"), we submit this comment letter regarding the State Water Resources Control Board staff's ("State Board") Public Notice regarding Water Quality Certification for USEPA Vessel General Permits, dated March 28, 2012, and attached hereto as Exhibit 1 ("Notice").

NASSCO is concerned that the State Board has not provided a meaningful opportunity for public comment regarding the issuance of a Clean Water Act Section 401 Certification ("401 Certification") for EPA's 2013 NPDES General Permit for Discharges Incidental to the Normal Operation of Vessels ("Vessel General Permit") and Small Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels Less Than 79 Feet ("Small Vessel General Permit"). While the State Board's Public Notice describes the requirements of EPA's 2013 Vessel General Permit, it does not include any specific information regarding what, if any, requirements the Board staff contemplates adding to the Vessel or Small Vessel General Permit through the 401 Certification. Further, despite numerous requests to various staff members at the State Board involved with the project, staff has not yet indicated whether it plans to add conditions to the 401 Certification, or what the content of any such conditions might be. See Exhibit 2, Letter from Latham & Watkins, LLP to Shuka Rastegarpour, dated April 26, 2012 (requesting information regarding the draft 401 Certification, and summarizing prior efforts to obtain the same). Without an opportunity to review the draft certification (and any conditions that might be attached), NASSCO is unable to comment meaningfully by the May 12, 2012 deadline set forth in the Notice. While NASSCO understands the time pressures Board staff is under, and appreciates Board staff's attempt to provide stakeholders an opportunity to comment,

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such opportunity is only meaningful if the Board staff issues the draft certification *prior to* the close of the comment period.

While NASSCO is unable to comment specifically on the proposed 401 Certification due to the lack of information provided, NASSCO reiterates that it would have significant concerns if the State Board pursues *any* conditions in connection with its 401 Certification, including but not limited to those addressed in NASSCO's comments regarding the previous certification for the 2009 Vessel General Permit. Accordingly, NASSCO hereby incorporates by reference its prior comments, attached hereto as Exhibit 3, and respectfully requests the Board to refrain from adding conditions to the 401 Certification, unless and until a meaningful opportunity for public comment on any such conditions is provided.

Thank you in advance for your attention to this important matter, and please feel free to contact me at (619) 238-2810, or Kelly Richardson at (619) 238-2876, should you have any questions or concerns regarding the above.

Very truly yours,



Jennifer P. Casler-Goncalves  
of LATHAM & WATKINS LLP

cc: Bill Orme, Senior Environmental Scientist, 401 Certification Unit  
Dominic Gregorio, Senior Environmental Scientist, Ocean Unit  
James Herink, Senior Counsel, Office of Chief Counsel

# EXHIBIT 1

State Water Resources Control Board  
Division of Water Quality  
Water Quality Certification Program

**Public Notice**  
**Water Quality Certification for USEPA Vessel General Permits**

Pursuant to federal law (33 U.S.C § 1341; Clean Water Act section 401), applicants for a federal license or permit for activities that may result in any discharge to waters of the United States must seek a Water Quality Certification (Certification) from the state in which the discharge originates. Such Certification is based on a finding that the discharge will meet water quality standards and other appropriate requirements of state law. In California, Regional Water Quality Control Boards (Regional Water Boards) issue or deny certification for discharges within their jurisdiction. The State Water Resources Control Board (State Water Board) has this responsibility where projects or activities affect waters in more than one Regional Water Board jurisdiction. The following information is provided in satisfaction of the public notice requirements of section 3861, title 23, of the California Code of Regulations.

**Applicant:** United States Environmental Protection Agency (USEPA)

**Applicant Contact:** Mr. David Smith  
USEPA, Region 9  
75 Hawthorne Street  
Mail Code: WTR-5  
San Francisco, CA 94105

**Project Names:** Vessel General Permit (VGP) and Small Vessel General Permit (sVGP)

**Date of Application:** 12/8/2011

**Project Description**

On December 8, 2011, the State Water Board received a letter from Mr. David Smith, on behalf of USEPA (applicant), requesting Certification for two (2) General Permits for discharges incidental to the normal operation of commercial and recreational vessels (General Permits). These 2 permits are the Vessel General Permit (VGP) and the Small Vessel General Permit (sVGP).

**Background**

Less than one year after the Clean Water Act (CWA) was enacted, USEPA promulgated a regulation that excluded discharges incidental to the normal operation of vessels from National Pollutant Discharge Elimination System (NPDES) permitting. That regulation identifies several types of vessel discharges as being subject to NPDES permitting, but specifically excludes discharges incidental to the normal operation of a vessel.

In January 1999, a number of interested parties submitted a rulemaking petition to USEPA asking the Agency to repeal its long-standing regulation cited in 40 C.F.R. section 122.3(a) that excludes certain discharges incidental to the normal operation of

vessels, including ballast water, from the requirement to obtain an NPDES permit under the CWA. The petition seeking repeal expressed concern over discharges of ships' ballast water containing invasive species and other matter. In September 2003, USEPA denied the petition. Following USEPA's denial decision, several groups filed a lawsuit in December 2003 in the U.S. District Court for the Northern District of California. On March 30, 2005, the District Court ruled that the USEPA regulation excluding vessel discharges exceeded the Agency's authority under the CWA. Therefore, on September 18, 2006, the Court issued an order revoking the regulation (40 C.F.R. § 122.3(a)) as of September 30, 2008. In response to this Court order, USEPA developed a Vessel General Permit (2008 VGP) to regulate discharges from all commercial vessels and certain recreational vessels (those longer or equal to 79 feet). The 2008 VGP was issued in December 2008.

When USEPA requested certification of the 2008 VGP, California informed USEPA that USEPA lacked authority to issue NPDES permits applicable within California. However, to provide regulatory certainty and to avoid potentially conflicting state and federal law requirements for the regulated community, California issued a Certification for the 2008 VGP. The Certification included, among other things, the requirement for vessels operating under the 2008 VGP to comply with the applicable requirements of the California State Lands Commission with regard to ballast water and hull fouling/maintenance related discharges. The 2013 draft VGP being proposed would replace the current 2008 VGP, which expires on December 19, 2013. California maintains that USEPA lacks the authority to issue NPDES permits for discharges into California waters and the State Water Board reserves its rights to pursue appropriate challenges. For more information on the 2013 draft VGP see: [http://www.waterboards.ca.gov/water\\_issues/programs/beaches/](http://www.waterboards.ca.gov/water_issues/programs/beaches/).

### **Vessel General Permit Description**

The 2013 draft VGP incorporates the Coast Guard mandatory ballast water management and exchange standards and adds some additional requirements for ballast water management. The proposed VGP covers the original 26 potential vessel discharge streams plus one new potential discharge. The discharge streams eligible for coverage under this 2013 draft VGP are: ballast water, deck washdown and runoff, bilge water, anti-fouling leachate from anti-fouling hull coatings, aqueous film forming foam, boiler/economizer blowdown, cathodic protection, chain locker effluent, controllable pitch propeller hydraulic fluid, distillation and reverse osmosis brine, elevator pit effluent, firemain systems, freshwater layup, gas turbine water wash, graywater, motor gasoline and compensating discharge, non-oily machinery wastewater, refrigeration and air condensate discharge, rudder bearing lubrication discharge, seawater cooling overboard discharge, seawater piping biofouling prevention, small boat engine wet exhaust, stern tube oily discharge, sonar dome discharge, underwater ship husbandry, welldeck discharges, graywater mixed with sewage from vessels, exhaust gas scrubber wash water discharge, and fish hold effluent (which was previously exempt by Public Law 111-215).

For each discharge type, the 2013 draft VGP establishes effluent limits pertaining to the constituents found in the effluent and BMPs designed to decrease the amount of constituents entering the waste stream. A vessel might not produce all of these discharges, but a vessel owner or operator is responsible for meeting the applicable effluent limits and complying with all the effluent limits for every listed discharge that the

vessel produces. The 2013 draft VGP now contains numeric ballast water discharge limits for most vessels. The effluent limitations control a variety of materials, which have been classified into 7 major groups: Aquatic Nuisance Species (ANS) also known as invasive species, most conventional pollutants (Biochemical Oxygen Demand, oil and grease, pH, Total Suspended Solids), metals, nutrients (including nitrogen and phosphorus), pathogens (including E. Coli & fecal coliform), and other toxic and non-conventional pollutants with toxic effects (i.e. phthalates, phenol, tetrachloroethylene, chlorine residual, chlorides, etc). The 2013 draft VGP effluent limitations controls these materials, because, depending on the particular vessel, such materials are constituents in the industrial waste, chemical waste and/or garbage "pollutant" discharge resulting from the activities of these vessels.

The 2013 draft VGP also establishes additional technology-based requirements for certain discharges from eight (8) specific classes of vessels, such as cruise ships, research vessels, and large ferries and water quality-based effluent limits that incorporate requirements for impaired waterbodies. Under the 2013 draft VGP, certain discharge types would be limited or prohibited in waters protected for conservation purposes (i.e. national marine sanctuaries and national parks). The 2013 draft VGP also establishes specific corrective actions, inspections and monitoring requirements, as well as record keeping and reporting requirements.

The 2013 draft VGP also requires submission of a Notice of Intent (NOI) for a subset of permittees if the vessel is greater or equal to 300 tons or has a ballast water capacity of at least 8 cubic meters. USEPA estimates that this requirement would affect 44,363 domestic and 7,834 foreign flagged vessels. All other vessels covered by the VGP would not have to submit an NOI. The proposed general permit will cover vessel discharges in the waters of the U.S. in all states and territories.

USEPA currently estimates that there will be approximately 91,000 U.S. flagged vessels that may be eligible for coverage under this permit. Additionally, USEPA estimates that there are up to 7,000 additional for foreign flagged vessels that may need coverage under this permit.

### **Small Vessel General Permit Description**

The 2013 draft sVGP would authorize discharges incidental to the normal operation of non-military and non-recreational vessels less than 79 feet in length. Currently, a Congressional moratorium (initiated by Public Law 110-299 and then extended by Public Law 111-215) exempts all incidental discharges, with the exception of ballast water, from commercial fishing vessels and non-recreational, non-military vessels less than 79 feet in length from having to obtain a Clean Water Act permit until December 18, 2013. The 2013 draft sVGP would provide permit coverage for vessels that fall into this category after that date. All vessel owner/operators must read and sign the Permit Authorization and Record of Inspection (PARI) Form which must be kept on board the vessel at all times to maintain valid sVGP coverage.

In the limits in the 2013 draft sVGP the term "minimize" means reduce and/or eliminate to the extent achievable using control measures and best management practices that are technologically available, economically practicable and achievable. The 2013 draft sVGP is organized by the following discharge management categories: fuel

management, engine and oil control, solid and liquid maintenance, graywater management, fish hold effluent management, and ballast water management.

Vessels with 8 cubic meters or greater of ballast water capacity that discharge ballast water will not be authorized to discharge under the 2013 draft sVGP, and will need to seek coverage under the 2013 draft VGP instead. Vessel owner/operators must conduct a quarterly visual inspection of each vessel covered by this permit. The inspection must cover all discharges, all applicable areas which impact discharges covered by the permit, and the visible portions of the hull.

#### **Proposed Water Quality Certification**

The State Water Board staff is proposing to regulate the VGP and sVGP pursuant to Section 401 of the Clean Water Act (33 U.S.C. § 1341) and the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.)

#### **Public Comments**

Staff will consider all comments submitted in writing and received at this office by mail during a 45 day comment period that begins on the first date of issuance of this notice (Wednesday, March 28, 2012) and ends at 5:00 p.m. on the last day of the comment period (Saturday, May 12, 2012).

Comments on this action are due within 45 days of the posting of this notice. Send comments in electronic format (MS Word or PDF) to Ms. Shuka Rastegarpour at [srastegarpour@waterboards.ca.gov](mailto:srastegarpour@waterboards.ca.gov).

**Note: No regulatory decision on the application is implied or intended in this public notice.**

If you have any questions, please contact Ms. Shuka Rastegarpour at (916) 341-5576, or Mr. Bill Orme at (916) 341-5464.

#### **State Water Board Staff Contacts**

Shuka Rastegarpour, Environmental Scientist  
Ocean Standards Unit  
Division of Water Quality  
State Water Resources Control Board  
Phone (916) 341-5576  
Fax (916) 341- 5808  
[srastegarpour@waterboards.ca.gov](mailto:srastegarpour@waterboards.ca.gov)

Bill Orme, Senior Environmental Scientist  
Chief, 401 Certification Unit  
Division of Water Quality  
State Water Resources Control Board  
Phone (916) 341-5464  
Fax (916) 341- 5808  
[borme@waterboards.ca.gov](mailto:borme@waterboards.ca.gov)

# EXHIBIT 2



Jennifer Casler-Goncalves  
Direct Dial: 619.238.2810  
jennifer.casler-goncalves@lw.com

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San Diego, California 92101-3375  
Tel: +1.619.236.1234 Fax: +1.619.696.7419  
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April 26, 2012

**VIA EMAIL AND U.S. MAIL**

Shuka Rastegarpour, Environmental Scientist  
Ocean Standards Unit  
Division of Water Quality  
State Water Resources Control Board  
Fax: 916.341.5808  
E-mail: [srastegarpour@waterboards.ca.gov](mailto:srastegarpour@waterboards.ca.gov)

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Hong Kong	Shanghai
Houston	Silicon Valley
London	Singapore
Los Angeles	Tokyo
Madrid	Washington, D.C.
Milan	

File No. 048876-0001

Re: State's Water Quality Certification Process for USEPA Vessel General Permits

Dear Ms. Rastegarpour:

We are writing in regards to the State Water Resources Control Board's ("State Board") Public Notice regarding Water Quality Certification for USEPA Vessel General Permits, dated March 28, 2012, and attached hereto for your convenience as Exhibit 1 ("Notice"). The Notice indicates that the State Board is proposing to regulate the U.S. Environmental Protection Agency's 2013 Vessel General Permit and Small Vessel General Permit pursuant to Section 401 of the Clean Water Act (33 U.S.C. § 1341) and the Porter-Cologne Water Quality Control Act (Cal. Wat. Code § 13000 *et seq.*), and sets forth a 45-day comment period on this action, which expires Saturday, May 12, 2012. See Ex. 1, Notice, at 4. However, neither the Notice nor the referenced State Board webpage ([http://www.waterboards.ca.gov/water\\_issues/programs/beaches](http://www.waterboards.ca.gov/water_issues/programs/beaches)) provides any information concerning the substance of the State Board's proposed certification, such as, for example, what (if any) standard, additional, or other conditions the State Board intends to require as part of the certification.

Beginning as early as last fall, we contacted various persons at the State Board to request information regarding the certification process for the 2013 vessel general permits (including multiple requests for all documents related to the certification, and information concerning what, if any, proposed conditions that the State Board intends to require as part of the certification), but we have not received any substantive response to date. We also signed up for the State Board's "CWA401 – Certification and Wetlands Program" e-mail subscription list, but have not received any relevant documentation.

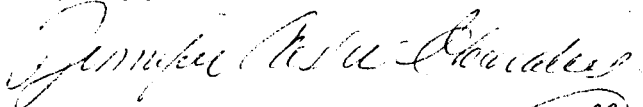
Because we have not been afforded access to the information concerning the State Board's proposed certification (including any proposed conditions), we have been deprived of a meaningful opportunity to comment on this important matter on behalf of our clients. As you


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know, the comment deadline is approaching rapidly; accordingly, we would appreciate it if you could forward us all documents pertaining to the State Board's certification of EPA's 2013 Vessel General Permit and Small General Vessel Permit—including the draft certification, any conditions the State Board intends to impose, and all supporting documents for the same—as soon as possible, but no later than April 30, 2012. We also request that the deadline for public comment be extended until at least 45 days after such documents are made public in order to allow sufficient time for interested persons, including our clients, to comment meaningfully on the proposed certification.

Thank you in advance for your prompt attention to this important matter, and please feel free to contact me at (619) 238-2810 should you have any questions or concerns regarding the above.

Very truly yours,

  
Jennifer P. Casler-Goncalves  
of LATHAM & WATKINS LLP



State Water Resources Control Board  
Division of Water Quality  
Water Quality Certification Program

**Public Notice**  
**Water Quality Certification for USEPA Vessel General Permits**

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**Applicant:** United States Environmental Protection Agency (USEPA)

**Applicant Contact:** Mr. David Smith  
USEPA, Region 9  
75 Hawthorne Street  
Mail Code: WTR-5  
San Francisco, CA 94105

**Project Names:** Vessel General Permit (VGP) and Small Vessel General Permit (sVGP)

**Date of Application:** 12/8/2011

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vessels, including ballast water, from the requirement to obtain an NPDES permit under the CWA. The petition seeking repeal expressed concern over discharges of ships' ballast water containing invasive species and other matter. In September 2003, USEPA denied the petition. Following USEPA's denial decision, several groups filed a lawsuit in December 2003 in the U.S. District Court for the Northern District of California. On March 30, 2005, the District Court ruled that the USEPA regulation excluding vessel discharges exceeded the Agency's authority under the CWA. Therefore, on September 18, 2006, the Court issued an order revoking the regulation (40 C.F.R. § 122.3(a)) as of September 30, 2008. In response to this Court order, USEPA developed a Vessel General Permit (2008 VGP) to regulate discharges from all commercial vessels and certain recreational vessels (those longer or equal to 79 feet). The 2008 VGP was issued in December 2008.

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#### **Vessel General Permit Description**

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management, engine and oil control, solid and liquid maintenance, graywater management, fish hold effluent management, and ballast water management.

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**Proposed Water Quality Certification**

The State Water Board staff is proposing to regulate the VGP and sVGP pursuant to Section 401 of the Clean Water Act (33 U.S.C. § 1341) and the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.)

**Public Comments**

Staff will consider all comments submitted in writing and received at this office by mail during a 45 day comment period that begins on the first date of issuance of this notice (Wednesday, March 28, 2012) and ends at 5:00 p.m. on the last day of the comment period (Saturday, May 12, 2012).

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**Note: No regulatory decision on the application is implied or intended in this public notice.**

If you have any questions, please contact Ms. Shuka Rastegarpour at (916) 341-5576, or Mr. Bill Orme at (916) 341-5464.

**State Water Board Staff Contacts**

Shuka Rastegarpour, Environmental Scientist  
Ocean Standards Unit  
Division of Water Quality  
State Water Resources Control Board  
Phone (916) 341-5576  
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Bill Orme, Senior Environmental Scientist  
Chief, 401 Certification Unit  
Division of Water Quality  
State Water Resources Control Board  
Phone (916) 341-5464  
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[borme@waterboards.ca.gov](mailto:borme@waterboards.ca.gov)

# EXHIBIT 3

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**LATHAM & WATKINS LLP**

January 16, 2009

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814

File No. 030815-0018

Re: Petition for Reconsideration - Clean Water Act Section 401 Water Quality Certification for EPA's Vessel General Permit

Dear Members of the Board:

On behalf of our client, General Dynamics NASSCO ("NASSCO"), we submit this Petition for Reconsideration of the State Water Resources Control Board ("State Board") staff's issuance of the Order for Clean Water Act Section 401 Certification (the "401 Certification") for EPA's NPDES General Permit for Discharges Incidental to the Normal Operation of Vessels ("Vessel General Permit"). NASSCO appreciates State Board staff's efforts to address certain discharges by vessels. However, in light of the absence of sufficient evaluation of the feasibility of complying with the 401 Certification, and the need for further technical analysis and public comment, NASSCO respectfully petitions the State Board, pursuant to Title 23, California Code of Regulations § 3867 *et seq.*, to reconsider the conditions and requirements contained in the 401 Certification. NASSCO further requests that the State Board stay the implementation of the conditions of the 401 Certification for the reasons outlined below and in the attached affidavit.

In addition to the arguments set forth in this letter, NASSCO agrees with, and incorporates by reference, the arguments submitted by the Pacific Merchants Shipping Association in its Petition for Reconsideration and Request for Stay ("PMSA Petition").

NASSCO is a shipbuilding and repair company, specializing in auxiliary and support ships for the U.S. Navy, and oil tankers and dry cargo carriers for commercial markets. Located in San Diego, California, NASSCO is the only major ship construction yard on the West Coast of the United States. NASSCO must operate the vessels that it constructs to test and certify systems under normal operating conditions prior to transferring title of the vessels. Hence, as a result of its operations, NASSCO is subject to the provisions of the Vessel General Permit.



LATHAM & WATKINS LLP

**I. NAME, ADDRESS, AND TELEPHONE NUMBER OF PETITIONER**

General Dynamics NASSCO  
2798 Harbor Drive  
San Diego, CA 92113  
Attention: T. Michael Chee  
Telephone: 619-544-7778  
Email Address: mchee@nassco.com

**II. SPECIFIC ACTION WHICH THE STATE BOARD IS REQUESTED TO RECONSIDER**

NASSCO incorporates by reference the specific State Board action referred to in the PMSA Petition. Further, NASSCO requests that the State Board reconsider the following conditions contained in the 401 Certification:

1. all sampling requirements;
2. all numeric effluent limitations;
3. all testing requirements; and
4. all reporting requirements.

**III. DATE ON WHICH THE CERTIFICATION ACTION OCCURRED**

The 401 Certification was issued by the Executive Director of the State Board on December 17, 2008.

**IV. STATEMENT OF REASONS WHY THE ACTION WAS INAPPROPRIATE OR IMPROPER**

NASSCO incorporates by reference the arguments made in the PMSA Petition and adds the following comments:

- A) **NO OPPORTUNITY FOR MEANINGFUL PUBLIC COMMENT WAS PROVIDED PRIOR TO THE ISSUANCE OF THE FINAL 401 CERTIFICATION**

The State Board issued a Public Notice of the Application for Water Quality Certification (the "Notice") on August 27, 2008. While the Notice described the requirements of the federal Vessel General Permit, it did not include any specific information regarding any requirements that Board staff contemplated adding to the Vessel General Permit through the 401 Certification, and the State Board staff did not indicate at any time prior to December 17, 2008 that it planned to add extensive onerous conditions. Stakeholders did not have the opportunity to comment on any conditions prior to the issuance of the Order of Certification on December 17, 2008. Due to the compressed time schedule imposed by the USEPA, the 401 Certification was issued in the absence of data, scientific study, or public comment. The consideration of public comments and an in-depth technical evaluation are essential for such a comprehensive regulatory scheme that

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has far-reaching consequences for commerce and the environment. As currently written, the 401 Certification does not represent a fully informed and scientifically sound approach to regulating discharges from vessels.

**B) THE STATE BOARD DID NOT COMPLY WITH CEQA PRIOR TO ISSUING THE 401 CERTIFICATION**

The State Board initially received a letter from USEPA on June 27, 2008, requesting issuance of the 401 Certification. This certification request was denied on August 5, 2008 because State Board staff concluded that the compressed time schedule in USEPA's June 27, 2008 letter did not allow the State Board enough time to comply with the California Environmental Quality Act ("CEQA"). On August 22, 2008, the State Board staff reversed its position and committed to taking an expedited approach to the 401 certification under a Class 8 categorical exemption from CEQA. That exemption simply does not apply here, nor is NASSCO aware of any prior instances where the State Board applied this categorical exemption to any other certifications. The August 5, 2008 letter clearly demonstrates the State Board staff's awareness that the 401 Certification was subject to CEQA requirements. Subsequent communications with USEPA regarding a compressed time schedule do not lawfully excuse compliance with the provisions of CEQA. The State Board staff has unreasonably expanded the Class 8 categorical exemption beyond its terms.<sup>1</sup> Allowing a Class 8 categorical exemption for the 401 Certification would run counter to the legislative purposes of the Act.

**C) THE STATE BOARD DID NOT EVALUATE THE FEASIBILITY OF COMPLYING WITH THE CONDITIONS PRIOR TO ISSUING THE 401 CERTIFICATION**

The stated purpose of the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act") is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000)<sup>2</sup> The 401 Certification does not conform to that purpose given that the State Board staff has not considered the economic burden imposed by its conditions.

The 401 Certification issued by the State Board adds requirements that go far beyond what is practical or even feasible. Affected parties will not be able to comply with the 401 Certification conditions should the implementation period commence on February 7, 2008. The

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<sup>1</sup> See *McQueen v. Mid-Peninsula Regional Open Space*, 202 Cal. App. 3d 1136 (1988) (holding that categorical exemptions to CEQA are to be construed strictly and shall not be unreasonably expanded beyond their terms).

<sup>2</sup> See also, Cal. Water Code § 13241 (stating that water quality objectives in water quality control plans should take into consideration water quality conditions that can "reasonably be achieved" as well as "economic considerations").

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401 Certification regulates 28 types of discharges, 20 of which require effluent sampling and 3 of which require sampling of receiving water. Testing of each effluent sample must be performed by a State certified laboratory for more than 155 chemical constituents. There is no indication whether testing and reporting is required on a periodic basis or for each individual discharge occurrence. There is also no evidence to suggest that the chemicals or compounds required for testing are even present in the covered discharges or pose any threat to water quality.

NASSCO is concerned that the time constraints placed on the 401 Certification have precluded key affected parties from providing the State Board with relevant information vital to the creation of vessel discharge requirements that can be practically implemented, and standards that are reasonably achievable. Even in those circumstances where conditions may eventually be satisfied, they can not be met within 45 days (by February 6, 2008), because a significant amount of time is needed to modify the vessels to allow for sampling, obtain agency approvals for same, conduct sampling, analyze the samples, study possible solutions if any issues are detected, retrofit or upgrade equipment, certify the modifications, identify and implement new BMPs, and possibly install new treatment systems. These events necessarily must occur in series, and can not be accomplished in the time between the issuance of the 401 Certification and the effective date of the Vessel General Permit.

For example, of the 20 types of discharges where effluent sampling is required, at least 8 of them require physical modifications to the vessels to even allow for sampling to occur. Prior to modification, the organization that regulates ship construction, ABS, requires shipbuilders to obtain approval for the modification. Not only is it uncertain whether such approvals can be obtained, it is impossible to do so prior the effective date of the 401 Certification.

Moreover, State Board staff should evaluate the significant amount of data and analyses compiled under the Uniform National Discharge Standards ("UNDS") study that was conducted for the better part of a decade by EPA and the United States Navy. Staff indicated that it did not review existing data in connection with the issuance of the 401 Certification. NASSCO understands that there is a great deal of information gathered by the UNDS study which should be considered prior to issuance of conditions for the 401 Certification.

D) **THE STATE BOARD DID NOT CONSIDER WHETHER THE ECONOMIC BURDEN OF COMPLIANCE WITH THE 401 CERTIFICATION BEARS A REASONABLE RELATIONSHIP TO OBTAINED BENEFITS**

California Water Code section 13267 requires that the economic burden of any waste discharge monitoring program bear a reasonable relationship to the need for the reports and the benefits to be obtained from them. The State Board staff has not analyzed the economic burden of compliance with the 401 Certification monitoring and reporting provisions. Indeed, there has been absolutely no study into whether the requirements are feasible to implement and necessary for water quality.

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E) **THE 401 CERTIFICATION INCLUDES EFFLUENT LIMITATIONS AND OTHER STANDARDS DERIVED FROM THE CALIFORNIA OCEAN PLAN THAT ARE NOT APPLICABLE TO VESSEL DISCHARGES**

Moreover, the 401 Certification includes standards adopted from the California Ocean Plan (and other water quality objectives); however, vessel discharges have been exempt under the Ocean Plan, and the State Board has never studied the application of those standards to vessel discharges. Those water quality plans must first be amended through formal rulemaking (which provides for public comment) before they can be applied to vessel discharges. The Board can not apply water quality standards to discharges which are *expressly excluded* in the Ocean Plan without first completing an economic impact analysis.<sup>3</sup>

F) **THE TERMS AND CONDITIONS IN THE 401 CERTIFICATION EFFECTIVELY BECOME NATIONAL STANDARDS AND SUBSTANTIALLY AFFECT INTERSTATE COMMERCE IN VIOLATION OF THE DORMANT COMMERCE CLAUSE**

The 401 Certification has the potential to affect a large number of vessels that move through interstate waters and thus is likely to place a substantial burden on interstate commerce.<sup>4</sup> California ports serve as the nation's gateway to the global economy, and thousands of exporters and importers across the country rely on them as their primary entry for trade. The 401 Certification covers large vessels which are highly mobile and routinely move from port to port, state to state, and country to country. Most of the affected vessels inherently traverse multiple state lines. As a result, the vessel discharge requirements set forth in the 401 Certification, which is far more stringent than those certifications issued by other states, may indeed become the default vessel discharge standards for the rest of the nation. For example, when vessels that do not usually visit ports in California suddenly find a need to do so, they will not be able to enter waters of the State due to the risk of non-compliance with California's unique and onerous effluent limitations, resulting in potential enforcement proceedings, including fines and penalties. Those ships would not be able to offload cargos in California ports, creating an unreasonable burden on interstate commerce. Hence, the conditions of the 401 Certification are unconstitutional.

This nationwide (and arguably global) impact of the 401 Certification magnifies the need for thorough review, analysis and public comment before implementation.

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<sup>3</sup> See *Cities of Arcadia, et al. v. State Water Resources Control Board, et al.* (Super. Ct. Orange County, 2007, No. 06CC02974)

<sup>4</sup> See *United States v. Locke*, 529 U.S. 89,108 (2000) (holding that a state law which affects international maritime commerce should be "consistent with the federal statutory structure, which has as one its objectives a uniformity of regulation for maritime commerce").

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**V. THE MANNER IN WHICH PETITIONER IS AGGRIEVED**

NASSCO and other affected parties will suffer significant harm if they are required to immediately comply with the conditions set forth in the 401 Certification. See attached affidavit. There has been no established protocol for compliance with the imposition of numeric effluent limitations on such a broad range of routine vessel discharges, or for the performance of the sampling, testing and reporting required by the State Board. It is technologically infeasible to comply with such an expansive regulatory program prior to February 6, 2009, as discussed above.

**VI. SPECIFIC ACTION THAT PETITIONER REQUESTS BE TAKEN BY THE STATE WATER BOARD**

NASSCO incorporates by reference the specific requested action referred to in the PMSA Petition under this section. In addition, NASSCO requests that the State Board hold workshops to obtain input from the public and regulated community, and stay implementation of the conditions of the 401 Certification pending completion of that public process.

**VII. LIST OF PERSONS (IF ANY) OTHER THAN PETITIONER, ITS MEMBERS, AND APPLICANT KNOWN TO HAVE AN INTEREST IN THE SUBJECT MATTER OF THE PETITION**

NASSCO incorporates by reference the list of persons referred to in the PMSA Petition under this section.

**VIII. STATEMENT THAT THE PETITION HAS BEEN SENT TO THE EXECUTIVE DIRECTOR AND TO THE APPLICANT**

A true and correct copy of this Petition for Reconsideration/Review was sent via facsimile and email on January 16, 2009 to the following individuals:

State Water Board Representative

Dorothy Rice  
Executive Director  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

EPA (Applicant) Representative

Douglas E. Eberhardt  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105-3901

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**IX. COPY OF A REQUEST TO THE EXECUTIVE DIRECTOR FOR PREPARATION OF THE STATE WATER BOARD'S STAFF RECORD**

By copy to the Executive Director, NASSCO hereby reiterates the request by PMSA for preparation of the State Board's Staff Record.

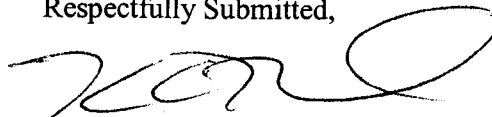
**X. SUMMARY OF THE MANNER IN WHICH AND TO WHAT EXTENT PETITIONER PARTICIPATED IN ANY PROCESS LEADING TO THE ACTION OR FAILURE TO ACT IN QUESTION**

NASSCO did not submit formal written comments in response to the State Board's Public Notice of Application for Water Quality Certification issued on August 27, 2008. The notice did not contain any information regarding any requirements contemplated to be added to the 401 Certification and NASSCO had no indication that the 401 Certification would dramatically expand the requirements of the Vessel General Permit. NASSCO did not have an opportunity to participate in the process leading to the 401 Certification because the State Board did not issue a draft version of the 401 Certification for formal public notice and comment prior to the Executive Director's issuance of the document as final on December 17, 2008. Indeed, the failure to provide sufficient notice is one of the bases on which NASSCO is petitioning for reconsideration.

**CONCLUSION**

NASSCO appreciates the State Board staff's apparent willingness to meet with certain organizations regarding the 401 Certification. Provided that NASSCO receives notice of such discussions, it intends to provide input and participate should the State Board reconsider the 401 Certification and stay implementation of its conditions. The time constraints placed on the 401 Certification process have precluded affected vessel owners from providing the State Board with relevant information vital to the creation of vessel discharge standards that can be feasibly implemented. NASSCO respectfully petitions the State Board to reconsider the 401 Certification in order to engage in a public review and comment process, and to perform appropriate and necessary technical evaluations. NASSCO looks forward to working cooperatively with the State Board staff to develop a scientifically sound and workable solution, and firmly believes an open dialogue between the State Board staff and affected vessel owners will result in reasonably achievable conditions protective of water quality in California.

Respectfully Submitted,



Kelly E. Richardson  
of LATHAM & WATKINS LLP

cc: Jeannette Bashaw, SWRCB

## AFFIDAVIT OF T. MICHAEL CHEE

I, T. Michael Chee, declare as follows:

1. I am the Environmental Manager of General Dynamics NASSCO ("NASSCO") in San Diego, California. I am authorized to make this affidavit on behalf of NASSCO. The matters set forth below are within my personal knowledge, to which I could and would testify competently if called upon to do so.

2. I have read the Order For Clean Water Act Section 401 Water Quality Certification ("401 Certification") for United States Environmental Protection Agency Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels ("Vessel General Permit") issued on December 17, 2008 and know its terms and requirements.

3. The State Water Resources Control Board ("State Water Board") issued a Public Notice of Application for Water Quality Certification on August 27, 2008. NASSCO did not submit comments regarding the Draft Vessel General Permit because the notice did not include any conditions in addition to the terms of the Vessel General Permit, and the State Water Board did not release any information pertaining to the 401 Certification requirements during the 21-day comment period. Despite contacting State Water Board staff since early November, 2008, NASSCO and its representatives did not receive an advance copy of the 401 Certification at any time prior to its date of issuance on December 17, 2008 and had no indication that the additional terms and conditions in the 401 Certification would dramatically expand the requirements of the Vessel General Permit.

5. NASSCO will suffer substantial harm if a stay of the 401 Certification is not granted. NASSCO can not implement the sampling, testing and other conditions required in the

401 Certification by February 6, 2009, the effective date of the Vessel General Permit. Of the 28 regulated discharges, 20 of them are required to be sampled and at least 8 of those discharge locations can not currently be sampled and will require modifications to the vessel to physically allow for sampling. Modifications to systems on ships must first be approved by ABS, the regulating entity for ship construction. This process can not be accomplished by the effective date of the 401 Certification.

6. Granting a stay of the 401 Certification will not present an immediate or substantial harm to public health, safety or the environment because the provisions of the USEPA Vessel General Permit will remain valid while the State Water Board evaluates the feasibility of the 401 Certification requirements, and because these discharges have been entirely exempt from regulation for more than 35 years since the Clean Water Act regulations were first promulgated.

7. There are significant technical questions that must be resolved prior to the implementation of the Vessel General Permit. Compliance with the 401 Certification requirements as currently written is infeasible due to the lack of clarity in regards to the frequency of sampling, laboratory analysis, and reporting required for any of 28 different discharges, and because there is insufficient time before the Vessel General Permit becomes effective to comply with the conditions in the 401 Certification.

I declare under penalty of perjury under the laws of the State of California that the foregoing statements are true and correct.

Executed on 1/16/09 at San Diego, California.

  
\_\_\_\_\_



State of California  
County of San Diego

On 1/16/09 before me,  
Jacquelyn Johnson, personally  
appeared Thomas Michael Chee  
\_\_\_\_\_  
\_\_\_\_\_

who proved to me on the basis of satisfactory evidence to be the person~~(s)~~ whose name~~(s)~~ is/~~are~~  
subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same  
in his/~~her/their~~ authorized capacity~~(ies)~~, and that by his/~~her/their~~ signature~~(s)~~ on the instrument  
the person~~(s)~~, or the entity upon behalf of which the person~~(s)~~ acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the  
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Jacquelyn Johnson (Seal)

