

CALIFORNIA COASTAL COMMISSION

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W9a

November 16, 2010

TO: Coastal Commissioners and Interested Parties

FROM: Alison Dettmer, Deputy Director
Tom Luster, Environmental Scientist

SUBJECT: Addendum to Staff Report on Substantial Issue Appeal A-5-HNB-10-225 – Poseidon Resources Corporation

This addendum includes several revisions to the above-referenced November 4, 2010 staff report, along with correspondence received and *ex parte* disclosures. The revisions do not change staff's recommendation that the Commission find substantial issue exists with respect to the project's conformity to the certified Local Coastal Program.

CORRESPONDENCE RECEIVED: Staff received the following correspondence (attached):

- Cabrillo Wetlands Conservancy, Inc. – letter received November 12, 2010.
- Eileen Murphy – letter received November 12, 2010.
- Poseidon Resources – letter received November 15, 2010.
- Mesa Verde Community, Inc. – two letters and petition received November 15, 2010.

EX PARTE DISCLOSURES: Commissioners submitted the following disclosures (attached):

- Chair Neely – November 12, 2010.
- Commissioner Krueger – November 12, 2010.

REVISIONS TO FINDINGS: Staff recommends modifying the staff report as shown below in ~~strikeout~~/underline:

Page 2, Substantive File Documents, add the following:

- “Coastal Commission Appeal File A-5-HNB-10-225”

Page 8, Marine Life and Water Quality – add the following after the last paragraph:

“Appellants also contend that the City’s approval does not adequately take into account the scheduled phase-out of the power plant’s once-through cooling system, which results in the City inadequately identifying impacts and necessary mitigation measures. The previous CDP issued by the City in February 2006 for the earlier version of this project

presumed that the power plant cooling system would continue to operate and that the desalination facility would rely solely on the power plant's cooling water discharge. This scenario provided the basis of the City's previous findings that the desalination facility would not cause marine life impacts beyond those caused by the power plant and would not require marine life mitigation measures beyond those required of the power plant.¹ In contrast, the current CDP acknowledges that the power plant is expected to phase out its cooling system, which would result in stand-alone desalination facility operations. However, the City's findings continue to rely in part on the project's 2006 NPDES permit, which anticipates that the facility will operate in conjunction with the power plant when the power plant is pumping at least 126.7 MGD through its cooling system.² Under the recently modified expectation of stand-alone operation, the desalination facility would operate the existing intake and discharge for several additional decades beyond the power plant's expected use of that cooling system and would pull in and discharge a higher minimum amount of seawater than anticipated in the co-location scenario described in the NPDES permit – i.e., the stand-alone facility would take in a minimum of 152 MGD instead of 126.7 MGD (about a 20% increase) and would discharge about 102 MGD instead of 76.7 MGD (about a 33% increase). The City's analyses do not adequately address the differences between the previous scenario on which the soon-to-expire NPDES permit relies and Poseidon's currently anticipated stand-alone operations, and they do not adequately characterize the adverse entrainment, impingement, and salinity impacts caused by this increased volume and duration.”

¹ The City's February 27, 2006 CDP, at page 11 of Agenda Item D1A, Suggested Findings for Approval – Coastal Development Permit 02-05, states:

“The Recirculated Environmental Impact Report analyzed the potential impacts to marine organisms due to entrainment and concluded that no mitigation measures were required. The Recirculated EIR noted that entrainment is currently permitted for the once-through cooling water system of the HBGS, and that the proposed desalination facility does not directly take seawater from the ocean, and that withdrawal of feedwater for desalination is from the HBGS cooling-water discharge and not subject to intake regulation under the Federal Clean Water Act (316b). In addition, the proposed project will not alter in any way existing HBGS cooling water intake operations. For those reasons, no mitigation measures are required to reduce entrainment impacts to marine organisms.”

² The current NPDES permit expires in August 2011. It requires the project to reduce its pumping when the power plant pumps less than 126.7 MGD.

November 11, 2010

Agenda Item W9a
Mary Jo Baretich

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c/o Coastal Commission Staff, Deputy Director Sherilyn Sarb, District Manager Teresa Henry, and Environmental Scientist Tom Luster

RE: Agenda Item W9a. Appeal No. A-5-HNB-10-225 Poseidon Resources, AES Huntington Beach

Dear California Coastal Commissioners,

I am writing on behalf of the Cabrillo Wetlands Conservancy, Inc. regarding the California Coastal Commission (CCC) Agenda Item W9a. We concur with the Appellants Orange County Coastkeeper, Surfrider Foundation, Residents for Responsible Desalination, Commissioners Wan and Mirkarimi, and the CCC Staff that substantial issues exist in that the project approved and conditioned by the City issuance of a Coastal Development Permit and Tentative Parcel Map does not conform to applicable Local Coastal Program (LCP) Policies.

We agree with Staff recommendations that the Commission find that there is substantial issue related to inconsistency with the Huntington Beach City LCP policies governing protection of marine life and water quality protection services, energy use and development, public recreation, water conservation, protection against seismic events and liquefaction, growth-inducement, coastal dependency, and the requirement for mitigation to the maximum extent feasible.

In the Subsequent Environmental Impact Report (SEIR), the City, in many cases, used the SEIR's less-than-adequate standards and inaccurate analyses to determine LCP conformity. LCP Policy 6.1.2 requires that marine resources be "maintained, enhanced, and where feasible, restored." There is currently a serious entrainment impact whenever the AES Generating Plant uses its intake water. Compare the amount of water taken in periodically now by the AES plant with the 100 MGD proposed by the Poseidon desalination plant 24 hours per day, 365 days per year. The resultant multiplication factor of destruction of marine life is unacceptable. We have witnessed a conveyor belt at the intake vat, filled with shellfish, crab, small fish and an assortment of other marine life. In the holding tank vat were eight-inch-long fish swimming around. According to former SCE workers, the dumpster into which the entrained marine life was dumped, filled almost daily. One worker saw lobster there periodically. These are the visible entrained marine life. Entrainment and impingement potentially harms millions of aquatic organisms each year, including fish, fish larvae and eggs, crustaceans, shellfish, sea turtles, and marine mammals. The largest impacts are likely to come from the removal of early life stages of fish and shellfish. Also, the project's chemical and saline discharge affects marine life and coastal waters, and according to LCP C6.1.1 requirement, the project must prevent the degradation of water quality and prevent substantial ecological losses of source populations of marine organisms.

We agree that the City did not adequately evaluate the project's impacts to coastal resources and did not identify necessary mitigation measures that would avoid or minimize those impacts.

We agree with the CCC Staff Report, that inadequate noise studies were done, and unacceptable solutions were proposed in the SEIR. There are substantial issues regarding the noise generated during the construction phase of the project and in the operational stage of the plant. We are very concerned about the noise impact on both humans and wetlands wildlife. The construction noise level range is stated in the SEIR to be between 77dBA to

85dBA for an expected duration of approximately 27 months. The combined noise levels (decibels) from all the desalination plant pumps have a range between 101dBA and 108dBA. Both the construction noise range and the pump noise range are not acceptable because they would exceed the City's applicable exterior noise standards, which are 55dBA during the day and 50dBA at night. Applying the mitigation NO-1 reduction of 20dBA by the addition of pump enclosures, will not be sufficient.

Even taking into account the distance of the homes to the project site, the decibel levels can cause serious human health problems. The mobilehomes in the mobilehome park across Newland Street are just over 200 feet away. These homes have little sound-proofing, and even keeping their windows closed will not lower the noise to acceptable levels.

Noise can affect human health, and that even moderate noise levels can produce disruptive after-effects, such as noise-induced hearing loss, effects on noise-induced sleep interference, noise stress factors, communication problems, performance and behavior changes, hypertension, increase in hostile behavior, and annoyance. Approximately 10 percent of people living in industrialized areas have substantial hearing loss.

At issue too, is the affect on the Animal Hospital and Humane Society animals directly across Edison Street to the north of the project.

We are extremely concerned that the City is not in compliance with LCP Policies C7.1.3 and C7.1.4 on their assessment of the present wetlands in close proximity to the proposed plant. The project is not in compliance, in that this project is being developed adjacent to environmentally sensitive habitat areas, and will impact these areas with noise and vibrations above the ambient levels.

Although the SEIR identified the City's noise standards for humans, it did not identify noise standards for wetlands or environmentally sensitive habitat areas. No provisions have been sufficiently brought forward regarding potential noise effects on sensitive species in the nearby wetland areas that are in some cases closer to the project site than the nearest residences.

These wetlands do exist and are environmentally sensitive habitat areas with endangered and threatened species of birds and other resident and migratory birds and animals living there. Because it did not adequately examine the site hydrology and wetland vegetation, the SEIR incorrectly concluded that there were no wetland areas that would be affected by the project. There is an environmentally sensitive habitat area to the northwest of the project, the Newland Marsh, where a study was conducted some years ago by Richard Zemba that determined that, at that time there were 18 pairs of Belding's Savannah Sparrows nesting on that particular wetland. There is a small wetlands directly east of the project that has periodic ponding, and hydrophytic vegetation. This small wetlands is not recognized in the SEIR but is in close proximity to the project, approximately 100 feet or less, and can be seen on any Google Map. An adequate buffer needs to be established for this wetlands.

It is also extremely important that construction be avoided during breeding and nesting seasons.

In order to reduce impacts, it is recommended that a thorough study be conducted by qualified Biologists or Ornithologists to assess current status of resident bird species and animals near the proposed site.

Although we recognize that noise can affect humans psychologically and be physically injurious, little attention has been paid to the potential effects that noise may have on individual animals and populations within an area. It is a known fact that any increase in ambient noise and frequencies can significantly affect the local wildlife. Noise can affect an animal's physiology and behavior, and if it becomes a chronic stress, noise can be injurious to an animal's energy budget, reproductive success and long-term survival. One fallout of increased noise

decibels is that birds, bats and small creatures communicating in the vicinity of the proposed Poseidon facility may be unable to communicate distress or mating calls effectively.

Clear song transmission is critical to most birds because their reproductive success may depend on it. Song is important in resolving conflicts between males, allowing them to maintain their territories and repel intruders. During the critical juvenile period of song learning, "Juveniles living in noisier areas may not hear, and thus not learn to sing the low-frequency notes of the previous generation. So song sparrows have to sing at a higher frequency and louder in a noisy environment. Singing loudly does have a cost - increased rates of oxygen consumption and energy expenditure. Also, the birds are more apt to be caught by a predator.

Two key metrics for measuring the effects of noise on animals are as follows:

The first, "alerting distance," is the distance at which sounds can be heard. These may be sounds made by a species to alert others to danger, or sounds made by predators (which the prey animals want to hear, so as to take cover).

The second, is "listening area," the full area around an animal in which it can hear other animals' calls, footsteps, and wing beats. A key insight offered by this approach is that even moderate increases in background noise (from nearby roads, pumps, and generators) can drastically reduce an animal's listening area.

For example, an owl needs to be able to acutely hear a mouse burrowing under the grasses .

In summary, we, the Cabrillo Wetlands Conservancy, agree with the Staff recommendations that the Commission determine that substantial issues exist with respect to the grounds on which the appeal has been filed.

We also agree with the Staff recommendation that the Commission find that there is a substantial issue related to inconsistency with the Huntington Beach City LCP Policies governing protection of marine life and water quality protection services, energy use and development, public recreation, water conservation, protection against seismic events and liquefaction, growth-inducement, coastal dependency , and the requirement for mitigation to the maximum extent feasible.

Respectfully submitted,



Mary Jo Baretich, President
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California Coastal Commission

%Commissioners

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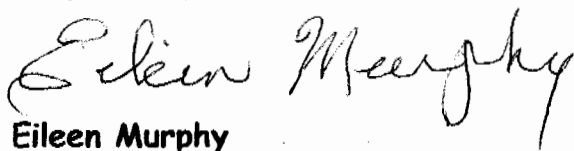
RE:Appeal A-5-HNB-10-225

Dear Chair and Commissioners

I am writing to urge you to hear the appeal by Coastkeeper, Surfrider, R4RD and Commissioners Wan and Mirkarimi from decision of City of Huntington Beach granting permit with conditions to Poseidon Resources for desalination facility at AES plant HB Power Plant, Huntington Beach, Orange County.(TL-SF)

Poseidon Resources has never successfully provided water of this volume for anyone anywhere. They failed to provide water as promised to Tampa Bay and had to be bought out. They are a private company and Water is a necessity of life and should not be owned by a private company.

Respectfully submitted,


Eileen Murphy

201 21st Street

Huntington Beach CA 92648



POSEIDON RESOURCES

November 12, 2010

**Agenda Item
W9a**

VIA OVERNIGHT DELIVERY

Chairperson Neely and Honorable Commissioners
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

Re: Appeal No. A-5-HNB-10-225: Response to Staff Report and Recommendation on Substantial Issues in Appeal of City of Huntington Beach Approvals for Poseidon's Huntington Beach Desalination Facility

Dear Chairperson Neely and Honorable Commissioners:

On behalf of Poseidon Resources (Surfside) LLC ("Poseidon"), we are writing to respond to the Commission's November 5, 2010, Staff Report regarding alleged substantial issues presented in the appeal of the City of Huntington Beach's (the "City") Coastal Development Permit ("CDP") approval for Poseidon's proposed Huntington Beach Desalination Facility (the "Project"). As noted in the Staff Report, portions of the Project are within the Commission's retained jurisdiction and subject to the Commission's consideration of a CDP application that Poseidon filed with the Commission in May 2006. Poseidon is preparing to amend that application to address changes to the Project that the City considered in conjunction with the CDP approval that is the subject of this appeal so that consideration of the appeal may take place concurrently with consideration of the amended CDP application. For this reason, Poseidon will not challenge the staff's recommendation that the Commission find the existence of substantial issues under the Coastal Act.¹

While Poseidon does not challenge a finding of substantial issue, we believe that the Staff Report omits key information and contains incorrect information concerning the Project, and that a full review of the Project indicates that it is consistent with both the City's certified Local Coastal Program ("LCP") as well as the Coastal Act. This letter briefly responds to and clarifies several key issues raised in the Staff Report and explains why the Staff Report's presentation of those issues does not accurately reflect the Project's consistency with the LCP and the Coastal Act. In addition, we would like to correct some of the most significant factual inaccuracies and omissions in the Staff Report as set forth in the Attachment to this letter. We look forward to

¹ Since Poseidon's CDP application for those portions of the Project within the Commission's retained jurisdiction is legally and factually related to this appeal, Poseidon requests that Commission staff prepare a consolidated staff report pursuant to Section 13058 of the Coastal Act Regulations (Cal. Code Regs., tit. 14, § 13058) and hear both matters concurrently.

continuing to work with Commission staff to resolve these issues and to further demonstrate why the Project is fully consistent with the Coastal Act and the LCP.

Marine Biology and Water Quality: The Project has been subject to multiple years of review and analysis by numerous local and state agencies, including the Regional Water Quality Control Board (“Regional Board”), the State Lands Commission and the Coastal Commission, and has been designed, modified and conditioned to ensure it will not cause adverse impacts to marine resources, water quality and other coastal resources and that it is consistent with Coastal Act and LCP policies. The Staff Report does not address this substantial body of information and its support for these conclusions. For example, although the Staff Report notes that LCP Policy C6.1.1 requires that new development “prevent the degradation” of water quality, it fails to consider that the Regional Board’s permit for the Project has set limitations for the Project’s discharge to avoid degradation consistent with the California Ocean Plan’s requirements. As the City’s Subsequent Environmental Impact Report (“SEIR”) confirmed, the Project would conform to the discharge limitations in the Regional Board’s permit,² which supports the City’s finding that “there would be no degradation of water quality.” Nevertheless, Poseidon looks forward to working with Commission staff to resolve its concerns regarding the Project’s consistency with Coastal Act and LCP policies related to water quality and marine biology.

Land Use: The Staff Report incorrectly asserts that it is not clear from the City’s record whether the Project is consistent with the City’s Coastal Element Land Use Plan. However, in approving the Project in 2005 and in 2010, the City has twice determined that the Project is consistent with the Land Use Plan. In addition, the City’s findings for the Project expressly reference substantial evidence in the record supporting this conclusion. For example, the City’s findings cite to a February 6, 2006, letter from the City Planning Department that determined because the Project will be a wholesale water supplier to regulated utilities – i.e., public water agencies and municipalities – and will provide needed water services to the public, the Project is properly classified as a public/semi-public use. As the Planning Department determined, the list of uses allowed in the Land Use Plan’s P (Public) designation, which applies to the Project site, is not exclusive and allows for “similar uses” to those listed – which include utilities and infrastructure. Thus, and based on this reasoning, the Planning Department appropriately concluded that the Project is consistent with the P (Public) designation and the City’s record fully supports that the Project is consistent with the City’s Coastal Element Land Use Plan. However, Poseidon welcomes the opportunity to continue working with Commission staff to resolve any outstanding questions concerning this issue.

Coastal Dependency: The Staff Report’s contention that the Project may not be “coastal dependent,” and as a result may be inconsistent with LCP Policy C1.1.2, is inconsistent with the Commission’s findings for Poseidon’s Carlsbad Desalination Facility. Exactly like the Carlsbad Facility, the Project will use an existing coastal-dependent power plant’s seawater intake to produce desalinated water, and thus requires “a site on, or adjacent to the sea” in order to draw seawater into the plant. For the Carlsbad Facility, the Commission expressly found that “Poseidon’s proposed seawater desalination facility would be a coastal-dependent industrial

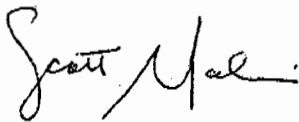
² See SEIR § 4.10.

facility, as it would need to be sited on or adjacent to the sea in order to function at all.”³ This Project is no different.

In addition, the Project is located adjacent to the existing AES Huntington Beach Generating Station, which is a coastal-dependent power plant that uses once-through-cooling technology.⁴ Commission staff cannot reasonably contend that the existing power plant’s site is located far enough away from the ocean that the power plant has somehow ceased being coastal dependent. The Coastal Act identifies electric generating facilities like the power plant as coastal dependent uses,⁵ and the Project’s location adjacent to the ocean and its intake of seawater are reasonably analogous to those of the power plant for purposes of determining coastal dependency. Accordingly, while Poseidon believes that the Project is a coastal dependent use, Poseidon will explore this issue further with Commission staff.

Poseidon looks forward to the upcoming opportunities to explain in detail to the Commission its position on the above-referenced issues, the factual corrections in the Attachment, as well as other issues regarding the proposed desalination facility’s conformance with the Huntington Beach LCP and the Coastal Act. In the meantime, if you have any questions or would like to discuss any points related to the facility, please do not hesitate to contact us.

Sincerely,



Scott Maloni
Poseidon Resources

Attachment

cc: Tom Luster, California Coastal Commission
Rick Zbur, Latham & Watkins

³ See Recommended Revised Findings, Coastal Development Permit Application No. E-06-013 (Approved August 6, 2008), at p. 114.

⁴ The Coastal Commission’s *Designation of Coastal Zone Areas Where Construction of An Electric Power Plant Would Prevent Achievement of the Objectives of the California Coastal Act of 1986* (Adopted September 1978; Re-Adopted December 1985), identifies the Huntington Beach Generating Station as one of 19 existing coastal power plants.

⁵ See Pub. Res. Code § 30001.2.

ATTACHMENT
FACTUAL CORRECTIONS

This document identifies and corrects several factual inaccuracies and omissions contained in the Staff Report.

A. Protection of Wetlands and Environmentally Sensitive Habitat Areas

- **Staff Report Contention:** The Staff Report states that the Project's SEIR did not evaluate for potential wetlands on the Project site in a manner that is consistent with the Commission's wetland delineation methods.
 - **Response:** The SEIR did evaluate the Project site for the presence of wetlands in a manner that is consistent with the Commission's wetland delineation methods. Attached as Appendix H to the SEIR is a December 2009, Jurisdictional Determination prepared by Glenn Lukos Associates, which is discussed in SEIR Section 4.9. The Jurisdictional Determination specifically describes the Commission's wetland delineation criteria and applies that criteria in its evaluation of each of the three decommissioned oil tank sites that are within the Project's footprint. For each of those three sites, the Jurisdictional Determination concluded that sites are not wetlands "in accordance with the federal or Coastal act definitions."⁶ The Staff Report does not cite to or otherwise reference this detailed analysis.
- **Staff Report Contention:** Based on its assertion that the SEIR did not evaluate potential on-site wetlands consistent with the Commission's wetland delineation methods, the Staff Report suggests that the SEIR did not adequately determine whether the Project's pipelines would affect additional wetlands.
 - **Response:** As discussed above, the SEIR evaluated for potential on-site wetlands in a manner that is consistent with the Commission's wetland delineation methods. In addition, the SEIR determined that the pipeline alignments are proposed entirely within existing roadways and disturbed areas, and "are not within any wetlands under federal or state jurisdiction."⁷

B. Noise

- **Staff Report Contention:** The Staff Report suggests that Poseidon admitted at the City's September 7, 2010, hearing on the Project that the SEIR misidentified the baseline noise levels in the Project area and underestimated the effects from Project-noise on nearby residences. The Staff Report also states that Poseidon offered to conduct further studies after Project operations commence and to mitigate for noise impacts above those allowed for residences.

⁶ See SEIR, Appendix H, pp. 15-17.

⁷ See SEIR, p. 4.9-47.

- Response: The Staff Report is incorrect; Poseidon did not state at the September 7, 2010, hearing that the SEIR's noise analysis was inaccurate. Mitigation Measure NOI-1 in the Project's SEIR requires that the Project's proposed outdoor pumps be enclosed, setback and screened to achieve acceptable noise levels consistent with the City's Noise Ordinance.⁸ In addition, that mitigation measure requires noise level monitoring after the pumps are installed to ensure that the Project does not exceed the noise standards established in the City's Noise Ordinance.⁹ However, in response to concerns raised by some community members, Poseidon voluntarily agreed to conduct additional noise analyses during the Project's design phase, and offered to implement additional noise attenuation measures that go above and beyond the City's Noise Ordinance requirements. Poseidon did not state that any such measures would be necessary to achieve compliance with the City's Noise Ordinance or to mitigate for a potentially significant effect under CEQA.

C. Energy Use and Development

- Staff Report Contention: The Staff Report states that the Project is inconsistent with LCP Policies C8.2.2 and C8.2.4 that relate to electricity generation and energy facilities.
 - Response: The Staff Report incorrectly applies LCP policies to the Project that are applicable to energy facilities, and based on that application the Staff Report improperly concludes that the Project is inconsistent with those policies. LCP Policies C8.2.2 and C8.2.4 are applicable only to electricity generators and coastal dependent energy facilities, and thus, any mitigation required by those policies would apply to future changes to the existing power plant – such as its potential conversion to another cooling system – and not to a desalination project.
- Staff Report Contention: The Staff Report states that the City's findings do not adequately recognize the potential for future power plant expansion, and suggest that the Project is inconsistent with LCP Policy C8.
 - Response: To the degree that LCP Policy C8 applies to the Project, that Policy requires development to “accommodate energy facilities,” and the Project has been designed to accommodate potential expansion of the power plant. Specifically, and as found by the City, the Project was reconfigured as part of the entitlement requests the City considered and approved in September 2010, to provide expansion area for the power plant so that it could convert to another cooling system at some point in the future. The City was not required to evaluate the power plant's potential expansion as part of its consideration of the Project's CDP, since that project has not been proposed and is wholly speculative. The fact that the power plant owner both requested and supported the Project's reconfiguration demonstrates that the Project has been designed to accommodate the plant and its potential future expansion.

⁸ See SEIR, p. 4.5-18.

⁹ See *id.*

- **Staff Report Contention:** The Staff Report suggests that City’s approval of the Project is not supportive of energy conservation and therefore that it is not consistent with LCP Policy C8.3.1.
 - **Response:** With respect to LCP Policy C8.3.1, in Commission staff’s substantial issue recommendation on the appeal of Poseidon’s prior CDP (Appeal No. A-5-HNB-06-101), Commission staff concluded that “no substantial issue exists with respect to the project’s consistency with this LCP provision” because LCP Policy 8.3.1 “directs the City to ‘promote’ and ‘encourage’ certain actions, not the project proponent.”¹⁰ Since Coastal Act Policy C8.3.1 has not changed since the Commission previously considered and approved staff’s recommendation, Poseidon believes that no substantial issue exists consistent with the Commission’s prior determination.

D. Effects on Public Services

- **Staff Report Contention:** The Staff Report states that the City’s approval of the Project does not conform to LCP Policies C1.1.1 and C1.2.3 concerning the adequacy of public services for the Project.
 - **Response:** The analysis in the Staff Report concerning the Project’s consistency with the LCP’s public services policies does not deal with the actual purpose of the policies – to ensure that adequate public services exist for proposed development sited in the Coastal Zone. There is no dispute that there are adequate public services to serve the Project – including water, sewer, roads and energy¹¹ – but the Staff Report’s analysis instead incorrectly focuses on the Project’s energy consumption and its alleged adverse effects on marine life and water quality. Since the SEIR concluded that there is sufficient energy to serve the Project,¹² and the Staff Report does not dispute that fact, the Staff Report’s discussion of energy consumption is not germane to LCP Policies C1.1.1 and C1.2.3. In addition, and as the Staff Report acknowledges, the LCP has separate policies addressing a project’s potential effects on marine life and water quality, and those are the policies that should be evaluated when analyzing the Project’s potential impacts to those resources.
- **Staff Report Contention:** The Staff Report suggests that the City’s approval of the Project does not conform to LCP Policy C1.2.3 because the City did not select a pipeline route for the Project.
 - **Response:** LCP Policy C1.2.3 concerns whether adequate public services “can be provided to serve the proposed development.” The Project’s pipeline will not consume public services. The pipeline itself is a Project element – not a public

¹⁰ See Staff Report and Recommendation on Appeal, Appeal No. A-5-HNB-06-101 (March 23, 2006), at pp. 12-13.

¹¹ See SEIR § 4.6.

¹² See SEIR, p. 4.6-15.

service to be provided to the Project – and thus this LCP Policy does not apply or relate to the pipeline’s location.

E. Effects on Public Recreation

- **Staff Report Contention:** The Staff Report suggests that because the Project’s intake will affect marine life, the Project will impact public recreation sites and therefore will not conform to LCP Policy C3.1.
 - **Response:** The Staff Report’s interpretation of LCP Policy C3.1 is inconsistent with a plain reading of the LCP, and suggests that any entrainment or impingement caused by the Project would adversely impact public recreation sites. The purpose of Policy C3.1 is to protect “existing public recreation sites in the Coastal zone,” while the broader protection of marine resources is addressed in other LCP Policies (i.e., LCP Policies 6.1.2, 6.1.3 and 6.1.4). The City’s LCP identifies the City’s recreational resources located in the Coastal Zone, all of which are located on land.¹³ In addition, to the degree that the Commission’s Findings for Poseidon’s Carlsbad Facility evaluated recreation in the ocean, the Commission’s analysis focused on that project’s potential impacts to recreational species.¹⁴ Thus, the Commission’s analysis of LCP Policy C3.1 should focus either on the Project’s potential impacts to a specific recreation site identified in the LCP, or its potential impacts to recreational species.

Since no specific public recreation sites have been identified in the vicinity of the Project’s intake, the Staff Report should focus on whether the Project will adversely impact recreational species. However, the Staff Report fails to address the fact that the City’s SEIR concluded species with “high commercial and recreational importance, such as California halibut and rockfishes, were shown to be very uncommon” in the existing power plant’s intake flows.¹⁵ The SEIR also analyzed the Project’s broader entrainment and impingement impacts – including potential impacts to recreational species such as crabs – and concluded those impacts would be less than significant.¹⁶ Thus, the SEIR fully supports the City’s finding that the Project would not adversely affect existing public recreation sites since the Project would not adversely impact recreational species.

F. Seismic Events and Liquefaction

- **Staff Report Contention:** The Staff Report suggests that the Project is not consistent with LCP Policy C10.1.4 because: (1) the construction of the Project’s pipelines may require extensive trenching and may disrupt traffic and coastal access; and (2) a detailed

¹³ See LCP, p. IV-C-62.

¹⁴ See, e.g., Recommended Revised Findings, Coastal Development Permit Application No. E-06-013 (Approved August 6, 2008), at p. 46.

¹⁵ See SEIR, p. 4.10-62 to 63.

¹⁶ See SEIR, p. 4.10-61 to 64.

geotechnical evaluation of the Project's pipeline route, which may have liquefaction potential, has not been provided.

- **Response:** In contrast to the Staff Report's presentation and analysis of LCP Policy C10.1.4, that Policy only provides that the City must require projects to be developed with appropriate engineering and building practices to withstand ground shaking and liquefaction. The Policy does not, however, impose requirements on how excavation or trenching is to be conducted, how traffic or coastal access may be temporarily disrupted during Project construction, or that a geotechnical analysis for all aspects of a project must be completed in order for the project to be consistent with the Policy. While the SEIR concluded that the Project's water delivery pipelines would be constructed primarily within existing street rights-of-way and utility lines, the SEIR also requires a design-level geotechnical investigation for the selected pipeline route and the incorporation of mitigation to ensure that potential impacts will be mitigated to less-than-significant levels.¹⁷ Because the SEIR requires these measures, and because Poseidon would adhere to Uniform Building Code requirements, the Project is consistent with LCP Policy C10.1.4.

G. Reduced Water Imports

- **Staff Report Contention:** The Staff Report states that no element of the Project ensures reduced State Water Project imports into Orange County, so there is no basis for the City's assumption that the Project would reduce electricity use.
 - **Response:** The SEIR includes a detailed April 2010, technical memorandum by Malcolm Pirnie entitled *Orange County Water Resources Mix and Implications for Desalinated Water Offsets of Imported Water Supplies*, which was commissioned by the Municipal Water District of Orange County as part of its review of the Project.¹⁸ Based on the analysis contained in that report, the SEIR concluded that the Project "would provide direct, one-to-one replacement of imported water to meet the requirements of the participating water agencies, thus eliminating the need to serve customer demand by pumping 56,000 AF of water into the region."¹⁹ In addition, the SEIR concluded that due to this reduction in imported water to Orange County, the Project would avoid 175,500 MWh/yr of electricity consumption that would otherwise be required to deliver that water to Orange County.²⁰

¹⁷ See SEIR, p. 4.2-23.

¹⁸ See SEIR, Appendix W.

¹⁹ See SEIR, pp. 4.12-29 to 30.

²⁰ See *id.*

H. Growth Inducement

- Staff Report Contention: The Staff Report states that the SEIR's determination that the Project would provide "replacement water" is inconsistent with the fact the SEIR concluded the Project may be growth inducing.
 - Response: The SEIR's conclusions that the Project would replace imported water supplies but may have "potential indirect growth-inducing effects outside of Orange County" are fully consistent.²¹ As explained in the SEIR, the Project would provide a new source of desalinated water in Orange County that would offset imported water supplies that are already being counted upon to meet the future supply needs for projected population increases.²² More specifically, and as discussed above, the SEIR concluded that the Project "would provide direct, one-to-one replacement of imported water to meet the requirements of the participating water agencies, thus eliminating the need to serve customer demand by pumping 56,000 AF of water into the region." Thus, the Project would provide "replacement water" that would avoid the electricity and greenhouse gas emissions associated with pumping imported water into Orange County.²³

In addition, and based on the Growth Assessment and General Plan Evaluation included as Appendix X to the SEIR, the SEIR determined that the Project would not supply water in excess of what is already anticipated to meet future projected needs in Orange County, and therefore that the "Project will not cause significant growth-inducing impacts in Orange County."²⁴ However, because Poseidon cannot control whether or if the Metropolitan Water District ("MWD") chooses to make imported water supplies the Project replaces available to other uses outside of Orange County, the SEIR appropriately concludes that the Project could result in potential indirect growth inducing effects outside of Orange County.²⁵ Since it is wholly speculative if and where MWD may relocate imported water supplies the Project replaces, and whether such relocation of supplies would promote growth, the SEIR concluded that it could not engage in an additional and speculative analysis of this potential impact.²⁶ As a result, while the SEIR acknowledges the potential for MWD to make imported water supplies the Project replaces available to other uses outside Orange County, the SEIR concludes the Project will provide "replacement water" to Orange County and will not result in significant growth-inducing impacts in that area.²⁷

²¹ See SEIR § 5.2.

²² See SEIR, p. 5-15.

²³ See SEIR, p. 4.12-30.

²⁴ See SEIR, pp. 5-15 to 16.

²⁵ See SEIR, p. 5-16.

²⁶ See *id.*

²⁷ See *id.*

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NOV 15 2010

CALIFORNIA
COASTAL COMMISSION

November 11, 2010

Commissioners
California Coastal Commission
45 Fremont Street, suite 2000
San Francisco, CA 94105
Re: Proposed Poseidon pipeline and New Appeal #A-5-HNB-10-225

CC Mr. Tom Luster

Dear Commissioners,

This note is to explain why we are sending you the following letter. We are Mesa Verde Community Inc., a group that serves as a voluntary homeowners association for a neighborhood in the Northwest area of Costa Mesa, California. Mesa Verde is a neighborhood of about 3000 homes; we have at least 600 households that are dues-paying members.

As you know, Poseidon Resources wants to build an Ocean Desalination facility in Huntington Beach, the city directly west of ours. Poseidon has selected a preferred primary route for their pipeline that traverses our city. Pipeline construction would directly affect many residents in our neighborhood. We found the information available in the Huntington Beach EIR to be seriously inadequate as far as informing us what we could really expect from pipeline construction. Part of the route through our neighborhood wasn't even described correctly.

Our Board of Directors felt compelled to support the concerns of many of our residents with the enclosed letter. Originally we were sending our letter only to Costa Mesa City Council and Mesa Consolidated Water District. We thought your interest had little to do with our neighborhood until we read the staff report for New Appeal #A-5-HNB-10-225. As Staff so eloquently describes, pipeline impact analysis is impressively inadequate. We found many of our concerns are similar to those in your Staff's report.

We agree with Staff's assessment that there are substantial issues with the EIR, and although you are looking at the overall project's CDP and we are focusing on pipeline impacts in our city, it would be very beneficial to us if this matter proceeded to a full hearing and more information was forthcoming.

Please read our enclosed letter. Please also read the "Residents letter and petition" referenced in our letter; signed William M Burke, dated 11/11/10. It should arrive under separate cover about the same time this does.

Thank you for your vigilance and diligence in protecting our coastal environment.

Robin Leffler
Government Relations Chair for Mesa Verde Community Inc.



MESA VERDE COMMUNITY, INC.
Established 1965
"To Inform, Educate and Beautify Mesa Verde"

November 10, 2010

Costa Mesa City Council
77 Fair Drive
Costa Mesa CA 92628
CC City Manager and Director of Public Services

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NOV 15 2010

CALIFORNIA
COASTAL COMMISSION

Mesa Consolidated Water District
1965 Placentia Avenue
Costa Mesa CA 92627

Subject: Proposed Poseidon pipeline through Costa Mesa
Reference: "Residents Letter and Petition," Signed William M. Burke, Nov.11, 2010,

Dear Mayor, City Council Members, MCWD President and Directors,

Mesa Verde Community Inc. is a volunteer homeowners association for the Mesa Verde area, and we take an active interest in issues that affect our neighborhood.

Recently, a group of residents in our neighborhood brought to our attention their concerns regarding the proposed Poseidon Resources pipeline through Costa Mesa. Their concerns echo many of our own. Please see their enclosed letter. We support the points addressed and add the following comments of our own.

As you may know, Mesa Verde Community Inc. is closely following the Poseidon Resources Desalination project and proposal for a pipeline through Costa Mesa. This is of concern to our Board in several ways. We recognize significant impacts on the broader environment, not just our own "back yard." We also continue to question the project's financial feasibility. As pointed out in the residents' letter, Poseidon has yet to successfully complete an ocean desalination facility in the United States. From recent news we see that Poseidon Resources also has yet to demonstrate it can raise the funds for the project they are attempting in Carlsbad. That should be cause for great caution for Mesa Consolidated Water District and the City of Costa Mesa about involvement with every aspect of business with them.

Among our foremost concerns are the impending impacts from the proposed construction of a pipeline through Costa Mesa. The extremely minimal environmental analysis in the Huntington Beach Final Subsequent Environmental Impact Report (FSEIR) is disturbing. In fact, the description of the proposed pipeline route through our neighborhood was incorrect and incomplete. In the Draft SEIR (DSEIR), impacts from construction in roadways in front of residential properties were briefly mentioned, but without much detail, and there was no mention of construction impacts to homes that back up to and directly abut the primary pipeline option where trenching would occur. Comments to the DSEIR were submitted by a Mesa Verde

Mesa Verde Community, Inc. P.O. Box 4102 Costa Mesa, CA 92628-4102 (949) 225-4296



MESA VERDE COMMUNITY, INC.
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resident. The responder to the written comments stated, "The commenter was incorrect," and "...confused the primary route with the primary alternate route." Mesa Verde Community Inc. made oral comments to refute this during the Huntington Beach Public Hearing for certification of the FSEIR, and submitted a page from the Thomas Guide to demonstrate how the primary route does not just "turn east from Placentia and enter Golf Course property." Omitted from DSEIR description in this section was any mention of Fairview Park and residential properties on Tanager and Swan Circle, which directly adjoin the proposed construction site.

As the Thomas Guide depicts, the description in the DSEIR was incorrect, not the comments from the public. Two HB Council members acknowledged the error, but the mistake was not corrected and no further analysis was forthcoming. Although this error in the FSEIR is of minor importance overall, it is very important to those of us who live here and is an indication that there may be other more serious uncorrected errors, insufficient information and inaccuracies in this FSEIR.

We also believe more information about the effects of desalinated water on infrastructure, people and plants is necessary. MCWD staff confirmed that there are "turnouts" along this pipeline route where desalinated water would directly enter the Costa Mesa system. The FSEIR states that the water is at or above required standards for drinking water, but does not address the potential effects on plants; including what concentrations of boron will be present. Many Costa Mesa residents have Citrus trees, vegetable gardens and other landscape plants that are particularly susceptible to low levels of boron. The location of entry points to the Costa Mesa system should be identified for the public and potential impacts to sensitive uses such as gardens, nurseries, parks, and municipal landscape should be disclosed. (See Comment Letter from Coast keeper, FSEIR at OCCK2-307, OCCK2-308 and OCCK2-315)

Mesa Verde Community Inc. is keenly interested in protecting our neighborhood. We support the goals of the enclosed letter from our residents. We ask that Mesa Consolidated Water District and the Costa Mesa City Council, **prior to any decision**, demand an EIR for construction impacts of a pipeline through Costa Mesa. We ask for specific detail as to possible consequences to Costa Mesa homes and their residents, other sensitive uses, streets and traffic, Costa Mesa Golf Course and Fairview Park.

In addition to sketchy detail, the Huntington Beach FSEIR says in numerous places that analysis will be performed **prior to construction**. It is our request that Mesa Consolidated Water District and the Costa Mesa City Council insist that all analysis be performed **prior to pipeline project approval**, not after. Unfortunately, that was not the case in Huntington Beach. To quote from the "Residents Letter": "These issues should have been addressed in the DSEIR and FSEIR and not left for future resolution." As decision makers regarding a pipeline route through Costa Mesa, it is now up to the Costa Mesa City Council and Mesa Consolidated Water District to pursue specific and detailed analysis of the impacts. The information in the Huntington Beach FSEIR is too threadbare and lacking in specific detail to use as the basis for any informed decision.



MESA VERDE COMMUNITY, INC.

Established 1965

"To Inform, Educate and Beautify Mesa Verde"

We understand that Mesa Consolidated Water District is in ongoing negotiations with Poseidon for a lease and other undisclosed issues relating to the proposed pipeline route. The City Council will be asked to approve or deny street cuts and will have oversight over construction through Fairview Park. An Environmental Impact Report is a document that should inform decision makers and the public about all of the environmental impacts of the proposed project, so that *prior* to a vote the governing bodies have all the information needed on which to base well-informed decisions. The public must also have this information so that they understand how a project will affect them and allow them to make informed comments to their elected officials. "The EIR...is a document of accountability...the EIR process protects not only the environment but also informed self-government." (From the landmark CEQA Court decision 'Amador County vs. El Dorado Water'). Before Mesa Consolidated Water District continues negotiations with Poseidon and before this issue comes back to the City Council, we ask both our water district (MCWD) and our City Council to obtain additional environmental reports specific to Costa Mesa and the issues raised in these community letters.

The residents who signed the referenced letter and petition have valid concerns. As representatives of our community, Mesa Verde Community Inc. supports them in their efforts to have all issues addressed prior to any decisions on the pipeline. We cannot support this project nor can we recommend to our members that they support it.

Respectfully submitted,

Darnell Wyrick, President

Mesa Verde Community Inc. Board Members: Cindy Brenneman, Arlene Jones, Dave Kinkade, Robin Leffler, Martie O'Meara, Joe Panarisi and Kim Shettler

Mr. Luster:

Per our telephone discussion.

Bill Burke

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CALIFORNIA
COASTAL COMMISSION

PETITION

To: The Costa Mesa City Council and the Mesa Consolidated Water District

From: Costa Mesa Residents and Homeowners

Dated: November 11, 2010

Re: Poseidon Resources LLC Pipeline

The undersigned residents and homeowners of the City of Costa Mesa submit this Petition to the Costa Mesa City Council and the Mesa Consolidated Water District expressing our opposition to the construction of a pipeline in the City of Costa Mesa as part of the Poseidon ocean desalination water facility to be constructed in the City of Huntington Beach.

We oppose construction of the pipeline in the City of Costa Mesa for the following reasons:

Poseidon Has No Track Record as to Building a Successful Desalination Facility in the United States

The Environmental Impact Report Related to the Facility Identifies No Concrete Benefits to the City of Costa Mesa

The Environmental Impact Report Materially and Inaccurately Identifies the Pipeline Route in the City of Costa Mesa

The Environmental Impact Report Fails to Adequately Address Construction Related Impacts on Residents and Businesses in the City of Costa Mesa

The Environmental Impact Report Does Not Address Adequately the Impact of Commingling Desalinated Water with Existing Water Sources Used in the City of Costa Mesa

Construction of the Pipeline will have Significant, Negative and Unmitigated Impacts on Traffic Congestion in the City of Costa Mesa

A more complete statement of our reasons for opposing construction of the pipeline in the City of Costa Mesa is set forth in the letter attached to this Petition.

We respectfully request the Costa Mesa City Council and the Mesa Consolidated Water District to oppose construction of the Poseidon pipeline in the City of Costa Mesa or, at the very least, open their own public investigation of the risks posed by the construction of the pipeline in the City.

SIGNATURE PAGE

(manual signatures on file with William M. Burke)

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November 11, 2010

Costa Mesa City Council
77 Fair Drive
Costa Mesa, Ca. 92626
Attn. Mayor and Council Members

Mesa Consolidated Water District
1965 Placentia Avenue
Costa Mesa, Ca. 92627
Attn. Board of Directors

Re: Poseidon Pipeline Project

Dear Mayor, Council Members and Directors:

I write this letter upon behalf of certain residents and homeowners of the City of Costa Mesa ("Homeowners") in opposition to the construction of a pipeline in the City of Costa Mesa ("City") as part of the proposed Poseidon ocean desalination water project ("Project"). We urge the Costa Mesa City Council ("Council") and the Mesa Consolidated Water District ("MCWD") to reject this Project as it relates to the pipeline to be constructed in the City or, at the very least, immediately open the Project up to public comment and input from residents of the City and other affected persons and entities.

Background

Poseidon Resources L.L.C. ("Poseidon"), a private company, has pursued the development of an ocean seawater desalination facility in the City of Huntington Beach since 1999. The facility would be constructed on a 13-acre site located next to the Applied Energy Services Electric Generator facility on Pacific Coast Highway in Huntington Beach. Desalinated water produced at the plant would be transported to unknown end users via a 10-mile pipeline through the cities of Huntington Beach and Costa Mesa. Approximately 6 miles of the pipeline would be located in Costa Mesa.¹

¹ Several alternative pipeline routes have been proposed. This letter refers only to the primary, preferred route described in this letter. Most of the comments in this letter would also apply to the alternate routes.

The primary pipeline route would proceed as follows: (i) north from the desalination facility on Newland Street, (ii) east on Hamilton Avenue, (iii) north on Brookhurst Street, (iv) east on Adams Avenue, (v) south on Placentia Avenue, (vi) east at the intersection of Placentia Avenue and Swan Circle across the northern boundary of Fairview Park, (vii) continuing east across the northern boundary of the Costa Mesa Country Club immediately adjacent to the 9th and 10th fairways of the Los Lagos public golf course, (viii) continuing east across, or adjacent to, the northern boundary of Fairview State Hospital, (ix) south on Harbor Blvd. across, or adjacent to, the eastern boundary of the Fairview State Hospital, (x) east on Fair Drive, possibly crossing the Orange County Fair and Events Center parking lot, or some other parking lot in the vicinity, (xi) continuing east under the State Route 55 Freeway and (xii) terminating at the intersection of Del Mar Avenue and Elden Avenue, at which point it would connect with the Orange County Water District Line OC-44. See pipeline route attached to this letter.

The pipeline would be built using open trench construction, with the exception of bridge, water and freeway crossings. Virtually all of the pipeline route in Costa Mesa would involve open trench construction. The 48 to 54 inch pipe would require a trench at least 5 to 6 feet wide, with approximately 1 foot of workspace on each side, and 9 to 10 feet deep. A 20-foot easement may be needed to meet this requirement. Construction would last approximately 21 months.

The Huntington Beach City Council certified an Environmental Impact Report for the Project on September 6, 2005. On November 1, 2005, the Costa Mesa City Council conducted a lengthy hearing related to the Project in which serious issues were raised in written reports by city planners and in the testimony of numerous citizens as to the negative impact the pipeline construction would have on the City. At the conclusion of the hearing, the Council approved a motion "opposing the construction of a pipeline in Costa Mesa, based on current information." By letter dated November 30, 2005, the Director of Public Services in Costa Mesa notified the Director of Public Works in Huntington Beach of the Council action and requested the City of Huntington Beach to review Costa Mesa's serious concerns.

The City of Huntington Beach prepared a Draft Subsequent Environmental Impact Report ("DSEIR") dated May, 2010 and requested comments from interested persons no later than June 21, 2010. Over 48 comment letters were submitted raising hundreds of issues related to the Project, including the desalination plant and the pipeline. The City of Costa Mesa submitted comments largely mirroring the issues raised at the November 1, 2005 Council hearing, none of which were addressed in the DSEIR. These issues will be discussed later in this letter. The MCWD submitted a letter approving and endorsing the Project without raising a single issue. The City of Huntington Beach filed a Final Subsequent Environmental Impact Report ("FSEIR") on August 23, 2010, making largely cosmetic changes to the DSEIR. On September 7, 2010, the Huntington Beach City Council certified the FSEIR.

On September 20, 2010, the City of Huntington Beach approved a coastal development permit related to the Project upon the basis of its conclusion that the development conforms to the certified local coastal program ("LCP"). This decision was appealed to the California Coastal Commission ("CCC") by the Orange County Coastkeeper, Surfrider Foundation, the Residents for Responsible Desalination and CCC

Commissioners Sara Wan and Ross Mirkarimi. The hearing on this appeal has been set for November 17, 2010. On October 5, 2010, the Staff of the CCC issued a lengthy report on the appeal concluding that the appeal raises substantial issues related to the Project and its conformity to the LCP. If the CCC accepts the recommendation of its Staff, it will proceed to a full public hearing on the merits of the Project.

We oppose the Project for the reasons set forth below. Although we share many of the concerns raised in the DSEIR comment letters as to the feasibility of the desalination facility and its adverse impact on the environment, our letter and opposition address only the pipeline aspects of the Project as it relates to Costa Mesa.

In reviewing our concerns and the adequacy of the DSEIR and the FSEIR to address these concerns, we believe the comment submitted by the CCC, an independent state agency, is telling:

“We recommend overall that the SEIR provide a more comprehensive and balanced review of the proposed project. Rather than presenting an independent ‘arms length’ review of likely project impacts, feasible alternatives, and necessary mitigation measures, the document largely cites references and studies in a selective manner that support the project as proposed and leaves out relevant information and credible studies that would raise concerns or would identify project-related impacts needing to be mitigated.” California Coastal Commission comment letter at 1.

The October 5, 2010 report submitted by the Staff of the CCC recommending de novo review of the Project by the CCC is equally telling:

“In sum, the project will clearly cause adverse impacts to marine resources, water quality, and other coastal resources in excess of those that would allow consistency with the above LCP policies. The City’s approval did not adequately identify the full range of impacts, in part due to using incorrect standards of review, inaccurate determinations of significance, and incomplete analysis of feasibility and needed mitigation measures. As a result, the City did not adequately evaluate the project’s impacts to coastal resources and did not identify necessary mitigation measures that would avoid or minimize these impacts. The City’s approval is therefore not sufficient to determine whether the project conforms to the above LCP provisions. Based on the record provided by the City and the information provided by the appellants, the Commission finds that substantial issues exist with respect to the project’s consistency with the City’s certified LCP”

Poseidon Has No Track Record as to Building a Successful Desalination Facility in the United States

Poseidon is a private company accountable only to its investors and not to the public as would be the case with a public utility. It has not built a successful seawater desalination facility in the United States. We are informed that its seawater desalination facility in Tampa, Florida failed, apparently because of the bankruptcy of a contractor, and was ultimately taken over by a public utility. As pointed out by the CCC in its comment letter related to the DSEIR, recent information related to Poseidon’s proposed desalination facility in Carlsbad, California indicates that it has been determined to be

financially infeasible at the present time. See California Coastal Commission comment letter at 2, 12. The City of Huntington Beach's response to this comment is that the concern is irrelevant to the FSEIR because it raises economic, and not environmental, issues. FSEIR at 12-581.²

Homeowners believe that this economic issue should be highly important to the Council and the MCWD to the extent the Council or the MCWD is counting on Poseidon to complete the pipeline on schedule and consistent with construction plans and risk mitigation promises, pay fees for use of City or MCWD properties or facilities and deliver water to the City pursuant to any contract entered into between the MCWD and Poseidon.

The DSEIR and FSEIR Fail to Identify any Concrete Benefit to the City of Costa Mesa

The DSEIR states that the Project will benefit Costa Mesa because it will offer a source of water supply to the City that will provide a direct one-to-one replacement of existing water supplies available to the City. DSEIR at 3-72; FSEIR at 12-583; FSEIR at 12-673. However, in a December 30, 2009 letter to Darnell Wyrick, the President of the Mesa Verde Community, Inc. Homeowners Association ("Letter to Wyrick"), the MCWD states that it does not intend to use the Poseidon desalinated water as a replacement source of water for citizens of Costa Mesa because "District customers currently enjoy one of the most reliable water supplies in Orange County thanks to decades of forward planning, a well-managed local groundwater basin and key infrastructure improvements." Letter to Wyrick at 1. Instead, the MCWD states that it intends to use the Poseidon water only as a back-up source of water in case of droughts, pipeline breaks or other supply interruptions. *Id.*³ It thus appears that Poseidon and the MCWD have conflicting motives: Poseidon is motivated to sell every gallon of water produced at the facility so as to make the Project economically feasible, while the MCWD is motivated to reserve water supplies for future purchase in rare times of emergency.

Even assuming these cross-purposes can somehow be reconciled, in the Letter to Wyrick, the MCWD concedes that the availability of the Poseidon water to the MCWD in case of emergency will depend on whether the pricing for the water will make it cost-effective for the MCWD as compared to the price of water generated from other local or regional sources. Letter to Wyrick at 5. Because the availability and pricing of the Poseidon water is currently unknown, the MCWD has not entered into any binding commitment to purchase water from Poseidon. Nor, to Homeowner's knowledge, has any other public agency. One of the other benefits of the Project cited by the MCWD is that Poseidon may pay fees for use of MCWD infrastructure which will create a source of revenue for the MCWD. Letter to Wyrick at 4. As is the case with pricing, these fees have not yet been identified, negotiated or agreed upon.

² All page references in this letter are to the DSEIR and the FSEIR online, which, for unknown reasons, differ from the page references in the DSEIR and the FSEIR on file at the Huntington Beach Planning Department.

³ This statement by the MCWD directly conflicts with the suggestion in the DSEIR that the MCWD has signed a Letter of Intent expressing interest in "purchasing specific amounts of desalinated water in each year that water is produced" at the facility. DSEIR at 3-79-80.

Because of the severe and negative impact that the pipeline construction will have on the City of Costa Mesa and its residents and businesses, Homeowners believe that it is imprudent for the Council or the MCWD to endorse or approve the Project until tangible, economic benefits have been identified and agreed upon and then compared to the costs associated with the negative impacts that construction of the pipeline will have on the City.

In his letter to the MCWD, Mr. Wyrick asked the MCWD to describe the benefits to the City of Costa Mesa from the Project. The MCWD responded as follows: "This question would be best directed to the City." Letter to Wyrick at 4. As invited by the MCWD, Homeowners now direct this question to the Council.⁴

The DSEIR Materially and Inaccurately Describes the Pipeline Route

The DSEIR fails to describe accurately the pipeline route in the following material respects:

First, the DSEIR does not state that the pipeline will cross Fairview Park, a passive park which is home to a number of endangered species, including burrowing owls, coast horned lizards and trap door spiders, see Orange County Coastkeeper comment letter at 26, and could be the site of significant historical or archaeological resources. Since the DSEIR does not state that the primary pipeline route will cross Fairview Park, the DSEIR does not discuss these issues. The crossing of Fairview Park is recognized in the FSEIR, but no information concerning the Park is provided, and the concern about sensitive species, habitats and historical sites is dismissed with the observation that studies will be done before trenching begins and/or problems will be dealt with as, and when, they arise.⁵

Second, the DSEIR fails to state that the pipeline route in Costa Mesa will be in close proximity to residential lot lines and homes along Adams Avenue, Swan Circle (inaccurately described in the DSEIR as Swan Lane and then inaccurately described in the FSEIR as Swan Drive), Tanager Drive and apartments at Harbor and Harla Street. In discussing construction related impacts, the DSEIR states that residences would be approximately 40-50 feet away from the proposed open trench pipeline construction along roadway rights of way. DSEIR at 4.9-39. In fact, the construction of the pipeline in Fairview Park and the Costa Mesa Country Club will directly abut residential properties on Swan Circle and Tanager Drive, which are improved with homes, a senior

⁴ As stated by Costa Mesa Mayor, Allan Mansoor, in the November 1, 2005 public hearing, any benefits Poseidon might offer to Costa Mesa to offset the pipeline detriments would need to be "an awful lot of compensation, and I am just not seeing it at this point."

⁵ Homeowners find it curious that nothing is said about the impact of pipeline construction on Fairview Park while, at the same time, the DSEIR contains an extensive analysis of biological, wildlife and cultural resources related to similarly sensitive sites in the City of Huntington Beach. DSEIR at 4.9.2-4; 4.9-13-19; 4.9-46-50. The DSEIR attempts to justify this omission with the observation that "construction of the offsite water conveyance pipelines would not directly impact any sensitive species or habitats, because they are proposed entirely within existing roadways and disturbed areas." DSEIR at 4.9-47. This statement is demonstrably inaccurate. Either no one in the City of Huntington Beach walked the primary pipeline route or the City was aware of the impacts on Fairview Park and chose not to discuss them in the DSEIR and the FSEIR.

citizens' assisted living facility, pools, spas, patios, retaining walls and other backyard improvements. The adobe soil on which these improvements are constructed is highly unstable. One of the Homeowners on Tanager Drive was required to remove a pool in his backyard at a cost of over \$100,000 because of this soil instability. Homeowners have attached to this letter a photograph of the pipeline route behind the homes on Tanager Drive that conclusively proves that the pipeline route directly abuts these residences. Homeowners believe this material omission in the DSEIR, which was not corrected in the FSEIR, fatally taints the analysis in both the DSEIR and the FSEIR related to construction related impacts and mitigation measures.

The DSEIR and FSEIR Fail to Adequately Address Construction Related Impacts on Residents and Businesses in the City of Costa Mesa

Homeowners are gravely concerned as to the impact the construction will have on their peaceful enjoyment of their properties. The DSEIR identifies numerous construction related impacts on properties adjacent to the pipeline, including (i) construction emissions which would be significant and unavoidable for nitrogen oxides for construction for 27 months, DSEIR at 4.9-28, 63, (ii) mitigated construction emissions exceeding localized significant thresholds in year 1 and 2 for PM10 and PM 2.5, DSEIR at 4.9-31, 32, 63, (iii) fugitive dust emissions, DSEIR at 4.9-34, (iv) vehicle exhaust which would remain significant and unavoidable for NOx emissions, DSEIR at 4.9-34, (v) toxic air contaminants, DSEIR at 4.9-35, (vi) noise, DSEIR at 4.9-35-38 and (vii) vibration, DSEIR at 4.9-38-41.

Property owners immediately adjacent to the construction of the pipeline, identified above, would be at significant risk of soil destabilization and damage to the improvements to their properties from open trench construction and soil compaction. These concerns are not imagined or speculative as evidenced by (i) the problems that developed when Crystal Court was built and adjacent homes developed cracks and settlement problems, (ii) the damage to homes that occurred on Newland Avenue when the street was excavated to build a larger storm drain (see comment letter from John Scott), (iii) the claims filed by 62 homeowners along Bushard for damage to their homes when a sewer line that involved trenching and dewatering was placed below the street (*id*), and (iv) the damage to a pool constructed by a Homeowner on Tanager Drive as a result of unstable soil (see discussion above). The concerns of the Homeowners are magnified by the fact that, as stated above, the DSEIR and FSEIR do not take into account the close proximity of the residential properties to the proposed pipeline construction and the fact that these settlement problems often do not manifest themselves until months or years after construction has been completed. Homeowners on Tanager Drive are also concerned that the trenching for the pipeline could damage the mature trees that line the 9th fairway to the public golf course, presenting a risk to property owners, golfers and the Costa Mesa Country Club.⁶ The FSEIR should identify all of these risks and provide appropriate mitigation measures to reduce the risks and state that Poseidon or the MCWD will provide insurance to protect property owners, golfers and

⁶ Homeowners on Tanager Drive will strongly oppose any proposal by Poseidon or the City of Huntington Beach to remove mature trees along the pipeline route since these trees were planted by the City over 20 years ago to protect Homeowners against errant golf balls.

the Costa Mesa Country Club in the event these unknown mitigation measures fail of their essential purpose.

The DSEIR and FSEIR state that pipeline construction will take place on property owned by the Costa Mesa Country Club, but do not describe the impact of the construction on the public golf course or mitigation measures that will be undertaken to allow the golf course to remain fully operational during construction of the pipeline. As stated above, they also fail to discuss the impact of the pipeline construction on mature trees that line the 9th fairway of the golf course immediately adjacent to the proposed pipeline route. The DSEIR merely states that all necessary approvals will be obtained before construction begins. Nothing is said about whether the owner or manager of the golf course has been advised of the pipeline construction along the 9th and 10th fairways of the Los Lagos public golf course and has taken a position as to the pipeline construction. The response of the City of Huntington Beach--we will advise property owners and responsible agencies and obtain appropriate consents if, and when, needed--is a consistent theme of the responses in the FSEIR to many of the concerns raised in comments submitted to the City of Huntington Beach related to the DSEIR. As aptly pointed out in one comment letter, this creates a form of circular priority in which responsible property owners and public agencies, like the City of Costa Mesa and the MCWD, are dependent upon the City of Huntington Beach, as "Lead Agency" in the EIR, to point out risks and mitigation measures, and the City of Huntington Beach, in turn, relies on these property owners and agencies to identify risks and demand appropriate mitigation measures. See Orange County Coastkeeper comment letter at 6-7.

The DSEIR fails to state whether the pipeline will cross the Orange County Fair and Events Center ("Center"). In response to a comment raising this issue, the FSEIR vaguely states that "in the event the pipeline would be located within the Orange County fair lands, which are outside of the public right-of-way, an agreement would need to be reached with the property owners prior to construction." See FSEIR 12-644. Again, no information is provided as to what specific impact the construction will have on the Center or whether the owner or manager of the Center has been informed as to the pipeline construction or its affect on the Center. Homeowners believe that, after 11 years of study, Poseidon and the City of Huntington Beach should know whether the pipeline will cross property owned by the Center and, if so, what impacts will result and what mitigation measures are necessary. These issues should have been addressed in the DSEIR and the FSEIR and not left for future resolution. See circular priority comments in the immediately preceding paragraph.

The DSEIR and FSEIR do not Address Adequately the Impact of Commingling Desalinated Water with Existing Water Sources Used in Costa Mesa

Homeowners understand that, whether or not the MCWD purchases water from Poseidon, desalinated water produced at the facility will be commingled with water currently being purchased by the MCWD and used and consumed by Costa Mesa residents. This raises serious water quality issues. In a comment letter submitted to the City of Huntington Beach, the Metropolitan Water District of Southern California ("MWDSC") stated that "the introduction of desalinated water into existing treated water distribution systems can increase the overall corrosivity of the blended water." MWDSC comment letter at 2. In that same letter, the MWDSC stated that the FSEIR should

discuss “potential effects on downstream users from turbidity and changes in bromide, temperature, alkalinity, hardness, pH, chloride-to-sulfate mass ratios, and corrosion indices.” *Id.* The FSEIR either dismisses these concerns or passes them off as subjects of further study and agreement between Poseidon and the MWDSC. See FSEIR at 12-614, 615.

The lengthy and thoughtful comment letter submitted by the CCC points out that the pipeline will extend along the northern boundary of the Ascon Landfill, which is currently undergoing toxic contamination remedial action through the Department of Toxic Substances Control. California Coastal Commission comment letter at 6. The Commission’s concern is that the pipeline construction could mobilize contaminants from the landfill “and could both affect, and be affected by, the landfill cleanup activities.” *Id.* Once again, the response of the City of Huntington Beach is that “[c]onstruction of the project and the off-site pipeline would necessarily involve coordination with the current and ongoing remediation activities at the Ascon Landfill site.... However, the DSEIR meets the requirements of [law].” See FSEIR at 12-586.

Construction of the Pipeline will have Significant, Negative and Unmitigated Impacts on Traffic Congestion in the City of Costa Mesa

The DSEIR identifies several major public streets in Costa Mesa that will be disturbed during construction of the pipeline, including Adams Avenue, Harbor Blvd., Fair Drive and Placentia Avenue. DSEIR at 4.9-9. Construction within these streets would require lane closures for trenching, construction, staging and equipment maneuvering, DSEIR at 4.9-45, and “[t]hese activities have the potential to result in significant short-term impacts related to traffic congestion and traffic safety.” *Id.* One to two lanes of traffic would be closed during this construction, DSEIR at 3-67, with the effective loss of one lane in each direction. FSEIR at 12-610.

The City of Costa Mesa submitted a comment letter in response to the DSEIR raising issues related to the traffic impact of construction of the pipeline. The City’s comments and the response of the City of Huntington Beach are as follows:

--All pipeline construction within the City of Costa Mesa must be trenchless unless otherwise approved by the director of Public Services. Costa Mesa comment letter at 1. This requirement is rejected by the City of Huntington Beach because mitigation measures are deemed adequate. FSEIR at 12-610. This requirement of the City of Costa Mesa is rejected even though the Preliminary Pipeline Assessment attached as Appendix I to the DSEIR recommends trenchless construction where the pipeline crosses Harbor Blvd. at Fair Drive. See Appendix I at 5.

--Closure of two lanes of traffic during the day will not be allowed by the City of Costa Mesa. Costa Mesa comment letter at 2. This requirement is rejected by the City of Huntington Beach as construction of the pipeline will require one to two lanes to be closed. FSEIR at 12-610.

--The construction impacts on major streets and residences and businesses in Costa Mesa needs to be addressed in detail and not just as part of the permit process. Costa Mesa comment letter at 2. This comment is noted by the City of Huntington

Beach with the observation that it will dealt with as part of the governmental approval process. FSEIR at 12-611.

--The traffic analysis in the DSEIR must document at the intersection and segment level the specific impacts that would be caused by construction. Costa Mesa comment letter at 2. This requirement is rejected as unnecessary. FSEIR at 12-611.

--The average daily traffic ("ADT") statistics in the DSEIR are inaccurate for streets in Costa Mesa. Costa Mesa comment letter at 2. The City of Huntington Beach acknowledges this point but states it is irrelevant because the DSEIR seeks to measure the percentage increase in traffic count on streets in Costa Mesa from the lowest ADT number applicable to those streets. FSEIR at 12-611. Homeowners find this response both unconvincing and flawed. The response is unconvincing because the DSEIR describes only modest increases in traffic volume numbers for each street and then declares victory because the largest percentage increase does not exceed 2.1%. However, the DSEIR does not explain how those traffic increases were determined. The response is flawed because the DSEIR fails to describe accurately average ADT levels for each affected street in Costa Mesa and then measure the increased traffic delay that will result from squeezing that traffic volume into far fewer lanes.

--The City of Costa Mesa requires that a detailed review of traffic impacts be conducted and included as part of the FSEIR. Costa Mesa comment letter at 2. This requirement is rejected by the City of Huntington Beach as "not required and/or warranted." FSEIR at 12-611.

--The Traffic section of the DSEIR is not adequate as most of the language is generic and typical of any construction project. The FSEIR should be modified to discuss actual impacts. Costa Mesa comment letter at 2. This requirement is rejected. FSEIR at 12-611.

--Although not mentioned in the Costa Mesa comment letter, it is well established that pipeline construction on public streets shortens their useful life. The DSEIR and FSEIR do not address this issue or state what compensation will be provided to the City of Costa Mesa for this negative impact.

The stunningly arrogant and uncompromising rejection by the City of Huntington Beach of virtually every requirement of the City of Costa Mesa is itself a justification for the Council and the MCWD to oppose construction of the pipeline in the City.

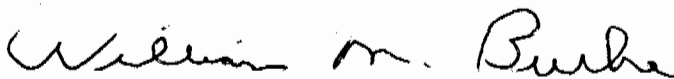
Conclusion

We urge the Council and the MCWD to reject the Poseidon project as it relates to the construction of a pipeline through the City of Costa Mesa. At the very least, the Council and the MCWD should carefully review the comment letters submitted in response to the DSEIR and open their own thorough and public investigation of the risks posed by the construction of the pipeline.

It is understandable that Poseidon and the City of Huntington Beach want to kick this can of worms down the Costa Mesa road. However, it is clearly not in the public interest to further defer consideration of these major issues since it will only ensure these issues will be reviewed and negotiated behind closed doors and out of the public eye and at a time when maximum pressure will be put on property owners and public agencies, like the Council and the MCWD, to approve the pipeline since the desalinization plant will already be under construction. The residents and business owners of the City of Costa Mesa deserve better.

We also request that the Council and the MCWD give Homeowners and all other affected persons and entities notice of all public hearings related to the pipeline.

Respectfully submitted,

A handwritten signature in cursive script that reads "William M. Burke".

William M. Burke

cc: Costa Mesa City Manager



Ana River Easement
r
ar Ave/Santa Ana Ave

HUNTINGTON BEACH
SEA WATER
DESALINATION FACILITY

Bristol
Pump
Station

OC-1
Bypa
Statio

DEB MAR AVE

FAIR DR

FAIRVIEW RD

HARBOR BLVD

Adams
Meter/PRV
Station

ADAMS AVE

BROOKHURST AVE

Hamilton
Metering
Station

HAMILTON AVE

ATLANTA AVE

ADAMS AVE

NEWLAND ST

NEWLAND ST



The distance between the chairs is 20 feet

W 9a.

**FORM FOR DISCLOSURE
OF EX PARTE
COMMUNICATION**

Date and time of communication:
(For messages sent to a Commissioner by mail or facsimile or received as a telephone or other message, date time of receipt should be indicated.)

November 12, 2010, 10:45am

Location of communication:
(For communications sent by mail or facsimile, or received as a telephone or other message, indicate the means of transmission.)

Commissioner Neely's Eureka Office

Person(s) initiating communication:

Maggy Herbelin, Local ORCA Representative

Person(s) receiving communication:

Commissioner Bonnie Neely

Name or description of project:

W.9.a. Appeal No. A-5-HNB-10-225 (Poseidon Resources, Huntington Beach) Orange County Coastkeeper, Surfrider Foundation, Residents for Responsible Desalination, and Commissioners Wan & Mirkarimi from decision of City of Huntington Beach granting permit with conditions to Poseidon Resources for desalination facility, at AES Huntington Beach Power Plant, Huntington Beach, Orange County. (TL-SF)

Detailed substantive description of content of communication:

(If communication included written material, attach a copy of the complete text of the written material.)

Our colleagues in ORCA on behalf of the Residents for Responsible Desalination & Surfrider Foundation Support staff recommendation to find substantial issue. The commission already found substantial issue on an earlier version of this project, and all of the same issues still apply to the current permit.

Date: November 12, 2010


Bonnie Neely, Commissioner

If the communication was provided at the same time to staff as it was provided to a Commissioner, the communication is not ex parte and this form does not need to be filled out.

If communication occurred seven or more days in advance of the Commission hearing on the item that was the subject of the communication, complete this form and transmit it to the Executive Director within seven days of the communication. If it is reasonable to believe that the completed form will not arrive by U.S. mail at the Commission's main office prior to the commencement of the meeting, other means of delivery should be used, such as facsimile, overnight mail, or personal delivery by the Commissioner to the Executive Director at the meeting prior to the time that the hearing on the matter commences.

If communication occurred within seven days of the hearing, complete this form, provide the information orally on the record of the proceedings and provide the Executive Director with a copy of any written material that was part of the communication.

Coastal Commission Fax: 415 904-5400

**FORM FOR DISCLOSURE OF
EX-PARTE COMMUNICATIONS**

Name or description of the project: Agenda Item W.9.a.

Appeal No. A-5-HNB-10-225 (Poseidon Resources, Huntington Beach)

Time/Date of communication: Friday, November 12, 2010

Location of communication: 7727 Herschel Avenue, La Jolla, CA

Person(s) initiating communication: David Grubb, for the Surfrider Foundation and Residents for Responsible
Desalination

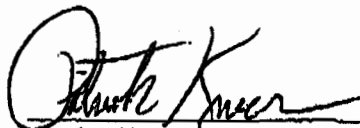
Person(s) receiving communication: Patrick Kruer

Type of communication: Meeting

We support the staff recommendation to find substantial issue

1. This project was granted a CDP by the City in 2006 and that decision was appealed by several groups and two Commissioners. The Commission found substantial issue in those appeals.
2. The project was modified and required a new CDP. The modifications to the project have not resolved the issues the Commission already decided were substantial in 2006 -- it has exacerbated those unresolved issues.
3. The project is inconsistent with many provisions of the Huntington Beach LCP. The city approved a CDP in spite of the inconsistencies.

Date: 11/12/10


Patrick Kruer

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
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FAX (415) 904-5400



W9a

Filed: 10/05/10
49th Day: 11/22/10
Staff: TL-SF
Staff Report: 11/4/10
Hearing Date: 11/17/10

STAFF REPORT AND RECOMMENDATION ON APPEAL SUBSTANTIAL ISSUE

Local Government: City of Huntington Beach

Decision: Approval with Conditions

Appeal No.: A-5-HNB-10-225

Applicant: Poseidon Resources / AES Huntington Beach

Project Description: Construction and operation of a desalination facility.

Project Location: On the site of the AES Power Plant, 21730 Newland Avenue, Huntington Beach, Orange County

Appellants: Orange County Coastkeeper, Surfrider Foundation, Residents For Responsible Desalination, Commissioners Wan and Mirkarimi

SUMMARY OF STAFF RECOMMENDATION: Staff recommends the Commission determine that **substantial issue exists** with respect to the grounds on which the appeal has been filed. The appellants have raised substantial issues in that the project as approved and conditioned by the City through issuance of a coastal development permit and Tentative Parcel Map does not conform to applicable Local Coastal Program (LCP) policies. Staff recommends that the Commission find that there is a substantial issue related to inconsistency with LCP policies related to protection of marine life and water quality, protection of wetlands and environmentally sensitive habitat areas, land use, adequate public services, energy use and development, public recreation, protection against seismic events and liquefaction, growth-inducement, coastal dependency, and the requirement for mitigation to the maximum extent feasible. Staff additionally recommends the Commission find no substantial issue related to the project's consistency with the LCP's water conservation policy.

SUBSTANTIVE FILE DOCUMENTS:

- Certified City of Huntington Beach Local Coastal Program.
- City of Huntington Beach Coastal Development Permit (CDP) File No. 10-014.
- Coastal Commission Appeal File No. A-5-HNB-06-101.
- Appeal Applications from Orange County Coastkeeper, Surfrider Foundation, and Residents For Responsible Desalination (collectively the Environmental Group Appellants), and Commissioners Wan and Mirkarimi.

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I. APPELLANT CONTENTIONS

Appellants contend that the project does not conform to several provisions of the City’s LCP related to protection of marine life and water quality, protection of wetlands and environmentally sensitive habitat areas, land use, adequate public services, energy use and development, public recreation, water conservation, protection against seismic events and liquefaction, growth-inducement, and the requirement for mitigation to the maximum extent feasible.

II. LOCAL GOVERNMENT ACTION

The coastal development permit was approved by the City of Huntington Beach City Council on September 20, 2010, concurrent with approval of Tentative Parcel Map #10-013. Previously, on September 7, 2010, the City certified a Final Supplemental Environmental Impact Report for the project. Concurrent with the City's approval of this CDP, it rescinded a CDP it had previously issued to the applicant for a similar project in February 2006.

III. APPEAL PROCEDURES

After certification of a LCP, the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits. Projects within cities and counties may be appealed if they are located within the appealable areas as defined by Section 30603(a) of the Coastal Act. The grounds for appeal are limited to the assertion that "development does not conform to the certified local coastal program." Where the project is located between the first public road and the sea or within 300 feet of the mean high tide line, the grounds of appeal are limited to those contained in Section 30603(b) of the Coastal Act. Those grounds are that the development does not conform to the standards set forth in the certified local coastal program or the access policies set forth in the Coastal Act.

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless it determines that no substantial issue is raised by the appeal. If the staff recommends "substantial issue" and no Commissioner objects, the Commission will proceed to a *de novo* hearing on the merits of the project at the same meeting if the staff has prepared a recommendation on said merits, or at a subsequent meeting if there is no such recommendation.

If the staff recommends "no substantial issue" or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have three minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project at either the same or a subsequent meeting as described above. If the Commission conducts a *de novo* hearing on the permit application, the applicable test for the Commission to consider is whether the proposed development is in conformity with the certified LCP. In addition, for projects located between the sea and the first public road paralleling the sea, Section 30604(c) of the Coastal Act requires a finding that the development conforms to the public access and public recreation policies of Chapter 3.

The only persons qualified to testify before the Commission at the "substantial issue" stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. At the time of the *de novo* portion of the hearing, any person may testify.

IV. MOTION & RESOLUTION

*I move that the Commission determine that Appeal No. A-5-HNB-10-225 raises **NO** substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.*

Staff Recommendation of No Substantial Issue:

Staff recommends a **NO** vote. Failure of this motion will result in a *de novo* hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the appointed Commissioners present.

Resolution to Find Substantial Issue:

The Commission finds that Appeal No. A-5-HNB-10-225 presents a substantial issue with respect to the grounds on which the appeal has been filed under section 30603 of the Coastal Act regarding consistency with the certified local coastal plan and/or the public access and recreation policies of the Coastal Act.

V. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

1. PROJECT DESCRIPTION

The development approved by the City is a desalination facility to be constructed and operated by Poseidon Resources within the AES Power Plant site in Huntington Beach. The project also includes a water delivery pipeline that will be constructed along a route yet to be determined, but that is estimated to range from about eight to 10 miles long. The pipeline would connect the facility to the regional water distribution system. The purpose of the project is to produce from seawater approximately 50 million gallons per day (MGD) of potable water for use within various parts of Orange County.

The approved development includes several buildings and structures that will house pre-treatment facilities, desalination equipment, a product water storage tank, administration offices, and other supporting structures and equipment. These structures would be located in portions of the northern part of the power plant site. Part of the proposed facility footprint includes fuel oil storage tanks formerly used by the power plant. Those tanks would be removed as part of the project. The project also includes pipelines connecting the power plant cooling system with the pre-treatment part of the facility.

To produce potable water, Poseidon would withdraw approximately 100 MGD of seawater from the once-through cooling system currently used by the power plant.¹ The cooling system's 14-foot diameter intake structure extends under the beach and seafloor to approximately 1700 feet offshore where it emerges into the water column, and a similar discharge structure extends under the beach and seafloor to about 1500 feet offshore where it emerges into the water column. With the 100 MGD pulled in by the desalination facility, it would produce 50 MGD of potable water and about 50 MGD of a high-salinity effluent. That effluent, along with up to 6.5 MGD of backwash water and cleaning fluids, would be routed to the outfall and mixed with the power plant cooling water discharge to create a combined discharge with salinities ranging up to more than 20% over ambient seawater salinity.

2. PERMIT JURISDICTION

Most of the land-based portions of the project are located within the Coastal Zone in the City of Huntington Beach and subject to the City's certified Local Coastal Plan (LCP). The project is also within the appeal jurisdiction of the Coastal Commission.² Additionally, a portion of the project is within the Commission's retained jurisdiction – the facility's intake and outfall are within coastal waters and the project involves both a “change in intensity of use” of those waters and a discharge to those waters – so the project will require a permit directly from the Commission.

3. PERMIT HISTORY

In February 2006, the City issued CDP #02-05 to Poseidon for construction and operation of a desalination facility similar to the current project, but at a different location within the power plant site. That CDP was appealed to the Commission, and on April 12, 2006, the Commission found that the appeal raised Substantial Issue with consistency to the City's Local Coastal Program.³ In May 2006, Poseidon submitted a CDP application to Commission staff for those portions of the project within the Commission's retained jurisdiction; however, that application remains incomplete.

In early 2010, the City started review of a Supplemental Environmental Impact Report to address modifications to the original proposed project. In September 2010, the City certified the Supplemental EIR, rescinded its previously-issued CDP, and issued a new CDP. On October 4 and 5, 2010, Commission staff received timely appeals from the Environmental Group Appellants and from Commissioners Wan and Mirkarimi.

¹ Poseidon's current NPDES permit, which expires in August 2011, allows it to operate at its design capacity only when the power plant cooling system is using at least 126.7 MGD. Power plant operations have varied from very low intake flows when it is not generating electricity to up to 507 MGD. The power plant cooling system is scheduled to be shut down on or before 2020 and replaced with a system that does not use seawater.

² Pursuant to Coastal Act Section 30603, the Commission's appeal jurisdiction includes developments approved by a local government that are located within 100 feet of any wetland, estuary, or stream, within 300 feet of the inland extent of the mean high tideline of the sea where there is no beach, or on tidelands or public trust lands.

³ In its April 2006 decision, the Commission found that substantial issue existed with respect to several of the LCP policies contested in this current appeal, including LCP policies related to protection of marine life and water quality (LCP Policies C6.1.1, C6.1.2, C.6.1.3, C6.1.4, and C6.1.19), protection of environmentally sensitive habitat areas (LCP Policy C7.1.3), energy use and development (LCP Policy C8), and adequate public services (C1.2.3).

4. APPELLANTS' CONTENTIONS & STANDARD OF REVIEW

All appellants contend that approval of the project by the City is inconsistent with policies of the City's certified LCP related to marine resources and water quality, wetlands and environmentally sensitive habitat areas, land use, public services, energy use and development, and the LCP requirement that adverse impacts be mitigated to the maximum extent feasible. Environmental Group Appellants additionally contend the City's approval is inconsistent with LCP policies governing public recreation, growth-inducement, and water conservation. Appellants Wan and Mirkarimi additionally contend the City's approval is inconsistent with LCP policies related to protection against seismic and liquefaction events. The standard of review for this appeal is consistency with the certified LCP of the City of Huntington Beach.

5. APPEAL ISSUES RAISING SUBSTANTIAL ISSUE

5A) Appeal Issue: Marine Biology and Water Quality

LCP Policy C 6.1.1 states:

“Require that new development include mitigation measures to enhance water quality, if feasible and at a minimum, prevent the degradation of water quality of groundwater basins, wetlands, and surface water.”

LCP Policy C 6.1.2 states:

“Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance.”

LCP Policy C 6.1.3 states:

“Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.”

LCP Policy C 6.1.4 states:

“The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain organisms and for the protection of human health shall be maintained and, where feasible, restored.”

LCP Policy C 6.1.19 states:

“Prior to approval of any new or expanded seawater pumping facilities, require the provision of maximum feasible mitigation measures to minimize damage to marine organisms due to entrainment in accordance with State and Federal law.”

These LCP provisions apply to the approved project due to its use of seawater and its new pumping facilities.⁴ The provisions generally require that marine resources and water quality be maintained, enhanced, and where feasible,⁵ restored, and that maximum feasible mitigation measures be required to minimize entrainment. The City's findings state, for a number of reasons, that the project is consistent with the above policies. Appellants contend, for reasons described below, that the project is inconsistent with those policies. The Commission's Findings regarding overall consistency with the above policies are provided below, along with Findings on specific policies and appeal contentions.

For all the above policies, it appears that the City used several criteria or standards of review that were not adequate for defining the significance or severity of the project's impacts for purposes of LCP conformity. In several instances, it also analyzed project impacts in ways that were not sufficient to evaluate the project's conformity to these policies. Examples are provided below.

- **Use of Incorrect Review Standards:** In several instances, the City's nonconformity with the above LCP policies appears to be due to the City's reliance on standards and determinations of significance selected for use in the EIR rather than those required by the LCP. The focus of the EIR was to determine whether the project causes significant impacts; whereas many provisions of the LCP require that any impacts be identified and then mitigated, where feasible. Some of the criteria the EIR used to define a "significant impact" resulted in determinations of significance that fell far short of identifying the kinds of impacts for which the LCP requires avoidance, additional analysis, mitigation, or other measures.

The City acknowledges in the EIR that the project's conformity for purposes of the Coastal Act requires use of a more rigorous standard. The EIR's Response to Comments states that the EIR review was meant to determine whether the project would conflict with applicable plans and policies, and then states:

"[d]etermining whether a conflict may arise that would preclude implementation of a plan or policy is entirely different from the more extensive process that may be involved in making a determination of "conformance" or "consistency" with a particular law, policy or other regulatory program. While it is understood that the Coastal Commission may apply a more rigorous standard in determining conformance of the project with the Coastal Act, such a standard is not required under CEQA."

Even with this acknowledgement, the City used the EIR's less-than-adequate standards to determine LCP conformity. For example, the City's findings for LCP Policy 6.1.2 rely on the EIR's conclusions that the project would cause less than significant entrainment impacts; however, the EIR defined a significant entrainment impact, in part, as whether the project would affect a species' ability to sustain its population, which is a less protective standard than the LCP Policy's requirement that marine resources be "maintained, enhanced, and where feasible, restored". Similarly, regarding the effects of the project's chemical and saline discharges on marine life and coastal waters, LCP Policy C6.1.1 requires that the

⁴ The City's General Plan Coastal Element includes waters of the Pacific Ocean in its definition of "surface waters."

⁵ "Feasible" is defined in the LCP (and the Coastal Act) as "Capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors."

project “prevent the degradation” of water quality, whereas the EIR standards referenced in the CDP determined whether there were project impacts based on less stringent criteria, such as whether marine organisms experienced “substantial ecological losses of source populations”. The City’s findings on LCP Policy 6.1.3 state that the project’s high salinity effluent will not affect areas that support sensitive species; however, the standard of review for that LCP policy is that the project will maintain healthy populations of all marine species.

In its findings for LCP Policy 6.1.4, the CDP merely states that the project is consistent with this policy because it would not degrade water quality or adversely affect marine life as described in the CDP’s findings on LCP Policies 6.1.1 and 6.1.3. As noted elsewhere in these Findings, however, the CDP’s conclusions about those policies are not adequate for ensuring LCP conformity. Further, the City’s findings do not address the “feasible restoration” aspect of LCP Policy 6.1.4’s standard of review. Regarding LCP Policy C6.1.19,⁶ the CDP states that neither the project’s entrainment nor its high-salinity effluent will negatively influence affected species’ ability to sustain their populations, which is the incorrect standard of review for a policy requiring that damage to marine organisms be minimized. Overall, the standards of review and levels of significance the City used in the EIR cannot be relied upon to determine conformity of the project to these LCP policies.

- **Use of Incomplete/Inaccurate Analyses:** In several instances, the City’s CDP findings relied on EIR analyses that were not adequate to determine the project’s conformity to these LCP policies. For several of the policies, the City’s findings state that the project does not require mitigation measures because the EIR identified the project’s impacts as less than significant. However, because the cited EIR analyses were based on different, and generally less protective, standards of review than required under the LCP, they are not adequate for determining LCP conformity.

These include insufficient analyses of necessary and feasible mitigation measures required pursuant to LCP Policies C6.1.2, 6.1.4, and 6.1.19. For example, the CDP implies that the project intake does not require mitigation measures under LCP Policy 6.1.2 because it is not located within an Area of Special Biological Significance; however, the CDP does not acknowledge, as it should, that the facility’s entrainment affects organisms from not just the immediate area, but from coastal waters up to several dozen miles away with areas of sensitive marine habitats. Similarly, for LCP Policy C6.1.19, which requires maximum feasible mitigation measures in accordance with state and federal law, the City’s findings state that the project is not anticipated to conflict with applicable provisions of state Water Code Section 13142.5 regarding impingement, but the findings do not address that section’s full requirements regarding the project’s entrainment impacts.⁷ For LCP Policy C6.1.4, the City refers to its findings for LCP Policies C6.1.1 and 6.1.3, which, as described elsewhere in these Commission Findings, are not adequate to ensure conformity to those policies.

⁶ The project is subject to LCP Policy C6.1.19 because it includes new pumps to bring seawater into the desalination facility and may include new pumps to replace existing pumps within the power plant.

⁷ Water Code Section 13142.5(b) states: “For each new or expanded coastal powerplant or other industrial installation using seawater for cooling, heating, or industrial processing, the best available site, design, technology, and mitigation measures feasible shall be used to minimize the intake and mortality of all forms of marine life.”

Additionally, several of the City's analyses resulted in what are described as mitigation measures but are more appropriately defined as minor and incidental benefits that are caused by, and are incidental to, the project's adverse impacts. Regarding LCP Policy 6.1.1, for example, the CDP states that the EIR includes a number of mitigation measures meant to improve water quality and prevent water quality degradation; however, the measures cited are those resulting from substantial adverse project-related impacts. For instance, the CDP notes that the project will be "removing bacteria from source water", which is solely an incidental effect of the significant adverse entrainment impacts the project will cause by removing seawater containing fish eggs, larvae, plankton, and other important coastal resources. The CDP also notes that the project will be "reducing thermal footprint of the discharge from the power plant during the co-located operating condition"; however, this is similarly an incidental effect of the project's introduction of 50 MGD of highly saline effluent into the power plant outfall.

For both of the above examples, the measures the City claimed were sufficient for LCP adequacy were not supported by adequate analyses and the resulting findings were used either to require inadequate mitigation or to support the inclusion of incidental effects as adequate mitigation. As a result, neither the City's CDP nor the project EIR on which the City relied for its CDP findings identified or properly evaluated many of the project's expected adverse impacts or the potentially feasible mitigation measures that could be required of the project to avoid or minimize these impacts. The City's approved CDP therefore does not conform to the above LCP policies.

In sum, the project will clearly cause adverse impacts to marine resources, water quality, and other coastal resources in excess of those that would allow consistency with the above LCP policies. The City's approval did not adequately identify the full range of impacts, in part due to using incorrect standards of review, inaccurate determinations of significance, and incomplete analyses of feasibility and needed mitigation measures. As a result, the City did not adequately evaluate the project's impacts to coastal resources and did not identify necessary mitigation measures that would avoid or minimize those impacts. The City's approval is therefore not sufficient to determine whether the project conforms to the above LCP provisions. Based on the record provided by the City and the information provided by the appellants, the Commission finds that substantial issue exists with respect to the project's consistency with the City's certified LCP.⁸

⁸ Note: In its 2006 Substantial Issue Findings for the previous version of this project, the Commission found that substantial issue existed with respect to the project's consistency with LCP Policies C6.1.1, C6.1.2, C6.1.3, C6.1.4, and 6.1.19.

5B) Appeal Issue: Protection of Wetlands & Environmentally Sensitive Habitat Areas

LCP Policy C 6.1.4 states:

“The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain organisms and for the protection of human health shall be maintained and, where feasible, restored.”

LCP Policy C6.1.20 states:

“Limit diking dredging, and filling of coastal waters, wetlands, and estuaries to the specific activities outlined in Policy 30233 and 30607.1 of the Coastal Act and to those activities required for the restoration, maintenance, and/or repair of the Municipal Pier and marina docks. Conduct any diking dredging and filling activities in a manner consistent with Section 30233 and 30607.1 of the Coastal Act.”

LCP Policy C7.1.3 states:

“Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.”

LCP Policy C7.1.4 states:

“Require that new development contiguous to wetlands or environmentally sensitive habitat areas include buffer zones. Buffer zones shall be a minimum of one hundred feet setback from the landward edge of the wetland, with the exception of the following:

A lesser buffer may be permitted if existing development or site configuration precludes a 100 feet buffer, or conversely, a greater buffer zone may be required if substantial development or significantly increased human impacts are anticipated. In either case, the following factors shall be considered when determining whether a lesser or wider buffer zone is warranted. Reduced buffer zone areas shall be reviewed by the Department of Fish and Game prior to implementation.

- a) Biological significance of adjacent lands: The buffer should be sufficiently wide to protect the functional relationship between the wetland and adjacent upland.*
- b) Sensitivity of species to disturbance: The buffer should be sufficiently wide to ensure that the most sensitive species will not be disturbed significantly by permitted development, based on habitat requirements of both resident and migratory species and the short and long term adaptability of various species to human disturbance.*
- c) Susceptibility of parcel to erosion: The buffer should be sufficiently wide to allow for interception of any additional material eroded as a result of the proposed development based on soil and vegetative characteristics, slope and runoff characteristics, and impervious surface coverage.*

- d) *Use existing cultural features to locate buffer zones: The buffer zones should be contiguous with the environmentally sensitive habitat areas and make use of existing features such as roads, dikes, irrigation canals, and flood control channels where feasible.*”

LCP Policy C.7.1.5 states, in relevant part:

“Notify County, State and Federal agencies having regulatory authority in wetlands and other environmentally sensitive habitats when development projects in and adjacent to such areas are submitted to the City.”

The above-referenced LCP policies require protection of wetlands and environmentally sensitive habitat areas and limit the kinds of development that may be approved in or near those areas. The City’s findings do not evaluate the project’s conformity to wetland protection components of LCP Policies C6.1.4 and C6.1.20. For LCP Policies C7.1.3 and C7.1.4, the City states that the project has been located to avoid significant impacts to the nearby Magnolia Marsh through setbacks and buffers, berms, grading, redirection of stormwater, and other measures. For LCP Policy C7.1.5, the City states that the project does not conflict with this policy because it involves no development in wetlands.

Appellants contend that the City’s approval is inconsistent with the above policies for three main reasons – first, that the City did not properly delineate wetlands present within the project footprint and therefore did not adequately avoid and mitigate for wetland impacts; second, that the City’s noise studies were inadequate to identify possible impacts to wetland-dependent wildlife species; and third, that the lack of an identified pipeline route makes it impossible to know whether the potential river crossing or the locations of pipelines and pump stations might adversely affect wetlands in a manner inconsistent with the above LCP policies.

Regarding the first appeal issue – the potential presence of wetlands within the project footprint – the project EIR evaluated site wetlands in a manner inconsistent with the Commission's wetland delineation methods.⁹ As a result of the City’s reliance on the EIR, the CDP findings do not properly identify the project’s potential impacts to wetlands and do not adequately address the project’s conformity to these LCP policies. Further, and contrary to Commission staff guidance, observations during a Commission staff site visit, and previous Commission determinations regarding similar wetland issues nearby, the EIR does not adequately examine site hydrology and improperly asserts that wetland vegetation at the site is not acting as wetland

⁹ The City’s definition of wetlands is similar to that of the Coastal Commission. The City’s General Plan Coastal Element defines wetlands as: “Land which may be covered periodically or permanently with shallow water and includes saltwater marshes, freshwater marshes, open or closed brackish water marshes, mudflats, and fens. Wetlands are lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification, wetlands must have one or more of the following attributes:

1. At least periodically, the land supports predominantly hydrophytes; or
2. The substrate is predominantly undrained hydric soil; or
3. The substrate is non-soil and is saturated with water or covered by shallow water at some time during the growing season of each year.

vegetation.¹⁰ Because the EIR erroneously concludes that there are no wetland areas that would be affected by the project, the CDP apparently omits the necessary findings regarding those areas and the findings needed to determine the project's conformity to the above policies. At the very least, additional evaluation is necessary to make a conclusive wetland determination at the site and to properly assess the project's conformity to the LCP wetland protection policies.

Regarding the second appeal issue about the impacts of project-related noise on nearby wetlands, the City heard testimony at its September 7, 2010 CEQA hearing that the project's noise studies misidentified the baseline noise levels in the project area and underestimated the effects on nearby residences of project-related noise from several types of pumps, construction equipment, and other machinery. At that hearing, Poseidon offered to conduct further studies after the facility started operating and to mitigate for any noise impacts that were at decibel levels above those allowed for residences. This proposed modification, however, does not address likely or potential noise effects on sensitive species in nearby wetland areas that are in some cases closer to the project site than the nearest residences. Some of the EIR's apparently underestimated noise levels at the nearby residences are at or above City noise standards, which suggests that nearby wetland species could experience noise at even higher levels. The EIR identified species known to exist in the wetlands include the endangered Belding's Savannah Sparrow and California least tern, several raptors (Cooper's hawk, Sharp-shinned hawk, Northern harrier, etc.), and other birds. However, the EIR did not identify noise standards for wetlands or environmentally sensitive habitat areas and did not identify those nearby areas as sensitive noise receptors. As a result, the EIR did not evaluate potential noise impacts on species in nearby wetland or environmentally sensitive habitat areas. Because these expected noise levels are likely to disturb or adversely affect various species – e.g., breeding and nesting birds – or may require additional buffering or mitigation measures, the City's findings do not ensure conformity to the above LCP policies.

Regarding the third appeal issue about the potential for additional wetland impacts due to subsequent selection of pipeline routes and pump station locations, neither the CDP nor EIR adequately address this issue for purposes of LCP conformity. Because the CDP relies on the inadequate EIR approach to wetland delineation, it is not apparent whether there are additional wetlands that may be affected in or near the possible pipeline routes, and therefore no certainty as to potential impacts or necessary mitigation measures.

Therefore, based on the record provided by the City and the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project's consistency with the above policies of the City's certified LCP.¹¹

¹⁰ The EIR's conclusions contradict site characteristics identified by the Commission's ecologist, Dr. Jonna Engel, on a site visit in the spring of 2009 during which she identified evidence of wetland vegetation and hydrology.

¹¹ Note: In its 2006 Substantial Issue Findings for the previous version of this project, the Commission found that substantial issue existed with respect to the project's consistency with LCP Policy C7.1.3.

5C) Appeal Issue: Land Use

LCP Policy C1.2.1 states:

“Accommodate existing uses and new development in accordance with the Coastal Element Land Use Plan and the Development and Density Schedule Table C-1.”

The City’s findings state that “[t]he project is consistent with this policy because it is consistent with the Coastal Element Land Use Plan and Density Schedule.” The Land Use Plan designates the project site as “Public”, and the City states that the project falls within this designation because the project is similar to a utility, which is allowed under this designation.¹² Appellants contend that the City’s CDP findings regarding this policy are insufficient to determine conformity to the LCP, since the findings merely assert that the project is consistent with the policy. Appellants also contend that the City’s approval does not conform to this LCP policy because the project is not an allowable type of development under the Land Use Plan’s site designation. Appellants further contend that allowing an industrial and non-public, non-utility use such as this project at this site would require an amendment to the City’s LCP.

Note: See related appeal issues on land use designation below in Section 5D – Energy Use and Development.

The City’s application of this policy is inconsistent with the LCP in at least two ways:

- First, the City partially supports its conclusion that the project is similar to a utility by referencing the City’s zoning code that allows “water or wastewater treatment plants...and similar facilities of public agencies or public utilities.”¹³ However, this zoning code appears to allow only water treatment plants of public agencies or public utilities, which does not include the proposed project. The project is not public, as it is owned by a private entity. The City acknowledges that the project is not subject to oversight or regulation by the state Public Utilities Commission (PUC), so it is not a utility for purposes of state law, and neither the CDP nor the EIR cite the PUC as a permitting or regulating agency.¹⁴
- Second, in some instances, the City’s review identifies the project as something other than a utility, including an “industrial use”, which is not allowed under the Land Use Plan’s site designation.¹⁵ The City notes that the project will be subject to a “commercial/industrial” capital fee tax and the EIR incorporates the project’s NPDES permit, which describes the project as an “industrial” facility conducting “industrial” activities and allowing the use of affected ocean waters for “industrial service supply” (that permit also specifically exempts

¹² Pursuant to the City’s Zoning Code at Chapter 214, uses allowed under the Public and Semipublic classification are: Cemetery, Cultural Institutions, General Day Care, Government Offices, Hospitals, Maintenance & Service Facilities, Park & Recreation Facilities, Public Safety Facilities, Religious Assembly, General Residential Care, Public or Private Schools, Major Utilities, and Minor Utilities.

¹³ Referenced in the City’s findings for LCP Policy C10.1.4.

¹⁴ At the time of the City’s adoption of the relevant policy, the power plant site was owned by Southern California Edison, which was regulated as a utility by the state Public Utilities Commission.

¹⁵ The City’s Zoning Code at Section 214.06 prohibits uses that are not listed within the designation.

those waters from municipal and domestic supply). The U.S. EPA additionally categorizes the facility for NPDES purposes as an industry.¹⁶ The City also notes that the project is subject to state Water Code Section 13142.5, which applies to industrial facilities. Further, Poseidon categorizes itself as something other than a “utility” – for example, in its City business license as a “government administrator of general economic programs” (through SIC Code 9611), and as a “manufacturing/industrial” entity rather than a “utility” in its declarations to the California Secretary of State.¹⁷ Finally, the City and Poseidon have apparently disagreed as to whether the project is subject to certain City taxes or is exempt because Poseidon is a “water corporation,” not a utility.

It is therefore not clear from the City’s record whether the project is a utility, a non-allowed industrial use, or some other use. At the very least, additional evaluation is necessary to address these inconsistencies and to conclusively determine whether the project conforms to this LCP policy or whether the proposal may require an amendment to the land use designation. Therefore, based on the record provided by the City and the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project’s consistency with LCP Policy C1.2.1 (see also the discussion of the site designation for energy facility expansion in Appeal Issue 5D – Energy Use and Development).¹⁸

5D) Appeal Issue: Energy Use and Development

LCP Policy C8 state:

“Accommodate energy facilities with the intent to promote beneficial effects while mitigating any potential adverse effects.”

LCP Policy C8.2.2 states:

“Require the mitigation of adverse impacts from new technologies employed in electricity generation to the maximum extent feasible.”

LCP Policy C8.2.4 states:

“Accommodate coastal dependent energy facilities with the Coastal Zone consistent with Sections 30260 through 30264 of the Coastal Act.”

LCP Policy C8.3.1 states:

“Promote the use of solar energy and encourage energy conservation.”

¹⁶ The EPA Facilities Registry System identifies the project as “SIC Code 4941: Industrial Group – Water Supply (link accessed 10/29/10) http://iaspub.epa.gov/enviro/fii_query_dtl_disp_program_facility?p_registry_id=110027244480

¹⁷ See Poseidon’s filings pursuant to Government Code 86104 at <http://cal-access.sos.ca.gov/Lobbying/Employers>.

¹⁸ Note: In its 2006 Substantial Issue Findings for the previous version of this project, the Commission found that a substantial issue exists with respect to the project’s consistency with the LCP land use policies.

The CDP findings for LCP Policy C8 state that the project is configured to accommodate both the existing power plant and its potential future plans to expand or switch to a different cooling system. The City did not evaluate the project for consistency with LCP Policy C8.2.2. For LCP Policy C8.2.4, the City states that the project is not an energy project, but that it has been configured to accommodate an existing energy facility and is therefore consistent with the policy. The City states that the project is consistent with LCP Policy C8.3.1 because the project will reduce energy used to pump water into Orange County (see also Appeal Issue 5E below). Appellants contend that the City's approval is inconsistent with the above policies for several reasons, including inadequate or inaccurate review to determine consistency with these policies and designation under both City and Coastal Commission policies of the entire power plant site as being available for power plant expansion. For LCP Policy C8.3.1, appellants contend that the City's conclusions about net energy use resulting from the project are based on an erroneous analysis and that the project EIR is internally inconsistent regarding this analysis.

The City's findings and the supporting EIR do not provide an adequate assessment for determining conformance to these policies. LCP Policy C8.2.4 incorporates by reference Coastal Act policies that designate the entire power plant site, including the area the City slated for the desalination facility, as being available for power plant expansion. The LCP's Coastal Element (at page IV-C-75) additionally states that vacant land adjacent to the power plant provides an opportunity for its potential expansion. The City's findings state only that the project was configured to accommodate the existing plant, with inadequate recognition of potential future expansion. Siting the desalination facility adjacent to the power plant may affect the ability of the plant to expand or to make the upcoming required changes to its cooling system; however, the City's review does not adequately describe how much of the area of the site may be needed for expansion, a new system, or both. Further, because the City did not evaluate the project's potential conflict with LCP Policy C8.2.2, it did not adequately address the project's likely non-conformity with this policy's requirement to address the expected new cooling technology needed at the power plant. Reducing the area available on the site will constrain the plant's options for either expansion or new and less environmentally harmful cooling technology, and therefore is not consistent with the first three policies above.¹⁹ Regarding LCP Policy C8.3.1, and as described in Appeal Issue 5E below, because the City conducted an inaccurate analysis of the project's expected energy use, it downplays the project's likely substantial effects on local energy supplies and is not supportive of energy conservation.

Therefore, and based on the record provided by the City, the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project's consistency with the City's certified LCP.

¹⁹ The Commission previously identified areas inland of the existing power plant as suitable for expansion in its 1978 consideration of a proposal by Southern California Edison to construct additional combined-cycle power units at Huntington Beach.

5E) Appeal Issue: Adequate Public Services

LCP Policy C1.1.1 states:

“With the exception of hazardous industrial development, new development shall be encouraged to be located within, contiguous or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services, and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources.”

LCP Policy C1.2.3 states:

“Prior to the issuance of development entitlement, the City shall make the finding that adequate services (i.e., water, sewer, roads, etc.) can be provided to serve the proposed development, consistent with the policies contained in the Coastal Element, at the time of occupancy.”

These LCP provisions require in general that new development be sited in areas able to accommodate it or in areas with adequate public services, and that the development not result in significant adverse effects. The City’s CDP findings state that the project is consistent with LCP Policy C1.1.1 because it is to be located in close proximity to the Huntington Beach Generating Station and that it is consistent with LCP Policy C1.2.3 because there are adequate services available. Appellants contend that the City’s findings are inadequate to support the project’s consistency with the requirements of these LCP policies to avoid potential adverse effects and to ensure the availability of needed public services.

Regarding LCP Policy C1.1.1, which requires that projects avoid significant adverse impacts, the City’s approval does not adequately acknowledge or evaluate the expected adverse impacts resulting from the project extending the life of the intake and discharge used by the power plant cooling system. The project would extend and expand the system’s impacts to marine life and water quality due to its planned continual use (24 hours per day, 365 days per year) for several additional decades, which represents a significant increase over the power plant system’s current relatively intermittent operations and its currently scheduled retirement on or before 2020 (see also the discussion of the project’s marine life and water quality impacts in Appeal Issue 5A above).

Regarding the policies’ requirements related to adequate public services, the City’s findings essentially state that the project will be consistent with these policies because adequate services can be provided. Those findings refer to Section 4.6 – Public Services and Utilities – of the project EIR; however, neither the assertion in the City’s findings nor the EIR analyses show that the City’s approval is consistent with these policies, particularly as they relate to the facility’s expected electricity use. The EIR states that the facility’s continual use of from 30 to 35 megawatts of electricity (or about 306,680 megawatt hours per year, which is equal to that used by about a quarter-million households) will result in a net reduction of electricity because the project will eliminate the electricity used by the State Water Project (SWP) to import water into Orange County – that is, because the project will provide 56,000 acre-feet of water annually for Orange County, the SWP will reduce its pumping and its electricity demand.

For several reasons, however, the City's analysis and conclusion are incorrect and understate the project's impact on local electricity supplies.²⁰ First, no element of the project ensures reduced SWP water imports into Southern California or Orange County, so there is no basis for the City's assumption of reduced electricity use, either locally or at the state level. As the Coastal Commission determined earlier this year regarding Poseidon's similar assertions for its Carlsbad project,²¹ the project does not ensure a one-for-one reduction of water imports to Southern California and would therefore not necessarily reduce electricity use.

Further, even if the SWP were to reduce its electrical use due to the project, the project itself would continue to demand 30 to 35 megawatts of electricity. The EIR bases its review on the project obtaining electricity from either the adjacent power plant or from the grid; however, neither the EIR nor the CDP assess how the desalination facility's local demand on electricity from the power plant would affect coastal resources and how or whether such use would conform to the requirement of LCP Policy C.1.2.3 to be consistent with the City's Coastal Element policies. For example, if the power plant produces more electricity than it would otherwise to provide power to the adjacent desalination facility, it would result in more entrainment than it would otherwise, at least until the power plant's current cooling system is retired. However, neither the City's CDP nor EIR identifies measures to avoid or mitigate this impact, and the resulting increased operations of the power plant may not be consistent with the marine biology provisions of the City's Coastal Element.

Appellants additionally contend that the City's approval does not conform to LCP Policy C1.2.3 because the City did not identify a selected pipeline route for the project, and it is therefore not possible to determine whether pipeline-related impacts and needed mitigation for those impacts will conform to that policy. Depending on the yet-to-be selected route, the project could cause additional adverse effects due to a potential river crossing or due to the likelihood of liquefaction along some areas of the route. Either of those elements could require more substantial excavations or construction methods than contemplated by the City, and those methods could result in more significant harm or disruption to public services than was addressed in the City's review. For example, evidence provided to the City during its review suggests that pipeline placement along roadways in areas with high liquefaction potential could require much more extensive excavations (in both width and depth) than the City evaluated, which could lead to major public access disruptions and could render all or some of the routes infeasible. It is not apparent from the record that the City adequately considered this information (see also Appeal Issue 5G below).

²⁰ Note: The City's analysis for these policies is also inconsistent with its findings regarding the project's growth-inducing impacts. See Appeal Issue 5H below.

²¹ See the Commission's "Final Adopted Findings for R2-E-06-13 – Request For Revocation on Poseidon's Carlsbad Desalination Facility", February 2010. The Commission found for the Carlsbad project, which uses the same proposed approach as this Huntington Beach proposal for energy and greenhouse gas reduction, that, at best, the region's main water importer – the Metropolitan Water District of Southern California – might occasionally forego marginal transfers or purchases of imported water if it deems Poseidon's supply more suitable. Additionally, many of those transfers or purchases are not necessarily foregone, but are instead stored for later transport to Southern California, which would require the use of electricity that the CDP incorrectly presumes would not be needed.

Therefore, based on the record provided by the City, the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project's consistency with the above policies of the City's certified LCP.²²

5F) Appeal Issue: Effects on Public Recreation

LCP Policy C3.1 states:

“Preserve, protect, and enhance, where feasible, existing public recreation sites in the Coastal Zone.”

The City's findings state that the project is consistent with this policy because it will have a negligible impact on parks and recreational facilities. With regard to the project's effects on fishing due to its intake of seawater and its discharge of high-salinity effluent, the CDP states that fish with high commercial or recreational value are uncommon in the source water and that nearby areas do not support sensitive species. Applicants contend that the project's continuance of the system used by the power plant to draw in and discharge seawater causes adverse effects that run counter to this policy's requirement to protect existing recreational fishing opportunities.

Regarding the intake, and as noted by the appellants, the City's findings are inconsistent with conclusions of numerous state and federal agencies about the adverse effects of open water intakes on marine life. The findings are also inconsistent with the entrainment study done at this power plant showing its effects on commercially- and recreationally-important species, such as halibut, crab, and others. The most recent entrainment study for the power plant showed that the intake drew in and killed organisms originating along the Southern California shoreline from up to several dozen miles away, which is a much larger source water area than considered in the City's findings.

Regarding the discharge, concerns raised during the City's review include the potential that the project's high-salinity effluent will adversely affect marine life. The effluent's salinity concentration is expected to be about 40 parts per thousand, which is about 20 percent higher than ambient seawater salinity and about 10 percent higher than naturally-occurring variability. Discharge modeling shows that the project will create areas of higher than natural salinity covering from about five to several dozen acres of nearshore benthic habitat, and affecting similarly-sized areas of the nearshore water column. The City's findings state that this would not represent substantial ecological effects or water quality degradation because those immediate areas do not include special biological areas or endangered or threatened species and because many of the species present in the nearby waters are also present in higher-salinity waters elsewhere – e.g., in the Gulf of California. However, this conclusion does not address the likelihood that local organisms not acclimated to higher salinities may avoid areas within the effluent plume, resulting in loss of foraging habitat as well as loss of recreational fishing opportunities within that area. The findings also state that any species exposed to elevated salinities would have low exposure times and that the areas represent insubstantial foraging areas; however, the City has not cited *in situ* tests or monitoring results to support such findings.

²² Note: In its 2006 Substantial Issue Findings for the previous version of this project, the Commission found that substantial issue existed with respect to the project's consistency with LCP policy C1.2.3.

Therefore, and based on the record provided by the City, the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project's consistency with the City's certified LCP.

5G) Appeal Issue: Adequate Protection Against Seismic Events and Liquefaction

LCP Policy C10.1.4 states:

“Require appropriate engineering and building practices for all new structures to withstand ground shaking and liquefaction such as those stated in the Uniform Building Code.”

The City's findings state that its approval provides consistency with this policy because it requires the project to meet all appropriate and adequate building standards related to ground shaking and liquefaction and because it will be consistent with applicable provisions of the Uniform Building Code. Appellants contend that the City's findings are inadequate because the project does not yet include an identified pipeline route, and the City can therefore not yet determine what measures are needed to withstand potential liquefaction. Appellants further contend that the City did not adequately address testimony provided at its September 7, 2010 CEQA hearing documenting that the City's approval would not sufficiently avoid liquefaction impacts.

The EIR review is based on pipelines being located largely within existing public streets, easements, or other rights-of-way and states that the alignments will not disturb native vegetation or adversely affect sensitive resources. It identifies anticipated traffic effects as being limited to no more than two traffic lanes during construction, and further states that a project-specific geotechnical evaluation will be needed before pipelines are placed. At the same time, the City has identified the project site and the entire area surrounding the power plant site, including portions of likely pipeline routes, as having high liquefaction potential.²³ Testimony provided to the City suggests that soil and subsurface characteristics within potential pipeline routes may require trenching that is much more extensive (in both width and depth) than evaluated in the EIR and may require a type of fill that is incompatible with roadways. Both the additional trenching and alternative fill could result in significant disruptions to traffic and coastal access, as well as substantially increase the project's construction-related and air quality impacts. It does not appear that the City evaluated these concerns sufficiently to ensure conformity to this LCP policy, and, in fact, put off until some future date the geotechnical analysis needed to identify and mitigate potential impacts. Therefore, based on the record provided by the City, the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project's consistency with the City's certified LCP.

²³ See the “Liquefaction Potential” Map at page IV-C-93 of the City's General Plan Coastal Element.

5H) Appeal Issue: Mitigation to the Maximum Extent Feasible

LCP Policy C1.1 states:

“Ensure that adverse impacts associated with coastal zone development are mitigated or minimized to the greatest extent feasible.”

The City’s findings for this LCP Policy state that all the project’s potential adverse impacts have either been mitigated or have been minimized to the greatest extent feasible.²⁴ As described in the appeal issues above, appellants contend that the City failed to address or adequately mitigate many of the project’s potential or likely impacts, resulting in non-conformity with the above-referenced policies as well as with LCP Policy C1.1.

In addition, appellants contend that the City’s findings are contradictory with regards to the project’s anticipated growth-inducement, and that these contradictory findings prevent conformity to this policy. The City evaluates the project both as not being growth-inducing – for example, in its analyses of the project’s electrical use and greenhouse gas emissions – and as being growth-inducing – in the EIR’s discussion of growth-inducement and the associated Statement of Overriding Considerations. The City’s analyses inconsistently determined both that the project would provide “replacement water” – that is, it would only replace an existing source of water – as well as “new water” – that is, it would result in new water being brought into the area, resulting in potential additional growth. As a result of this inconsistency, it is not clear that the City’s review evaluated all potential mitigation measures that may be needed to address the project’s impacts. Therefore, based on the record provided by the City, the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project’s consistency with the City’s certified LCP.

5I) Appeal Issue: Coastal Dependency

LCP Policy C1.1.2 states:

“Coastal dependent developments shall have priority over other developments on or near the shoreline. Coastal-related developments should be accommodated within reasonable proximity of the coastal-dependent uses they support.”

The City’s findings state that the project is a coastal-dependent development because it needs to be sited on or adjacent to the ocean in order to function at all. The City states the project is similar to other coastal-dependent developments, such as electrical generating facilities, refineries, and offshore oil and gas production. Appellants contend that the City is incorrect in categorizing the project as coastal-dependent since it does not need to be “on or adjacent to the sea in order to function at all.”²⁵

²⁴ The findings also note, however, that the City adopted a Statement of Overriding Considerations to address adverse impacts related to growth-inducement and construction that have not been mitigated to a level of insignificance.

²⁵ The City’s Coastal Element defines “coastal dependent” as “any development or use which requires a site on, or adjacent to, the sea to be able to function at all.”

While the current proposed project would rely in part on existing coastal-dependent infrastructure – i.e., the intake and discharge of the power plant – the desalination facility itself would be located about a quarter-mile from the ocean, not “on or adjacent” to the ocean. Further, as evidenced by many desalination facilities that are similarly set back from the shoreline and by many inland desalters that draw brackish water from inland aquifers, desalination facilities do not necessarily require a location “on or adjacent” to the ocean. The City’s findings do not make it clear that this particular project is coastal dependent. Therefore, based on the record provided by the City, the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project’s consistency with the City’s certified LCP.

6. APPEAL ISSUES NOT RAISING SUBSTANTIAL ISSUE

6A) Appeal Issue: Water Conservation

LCP Policy C6.1.12 states:

“Periodically review the City’s policies on water conservation, including the Water Conservation Ordinance, to ensure the use of state of the art conservation measures for new development and redevelopment, and retrofitting of existing development, where feasible and appropriate, to implement these measures.”

The City states that the project is consistent with this policy in that it must comply with applicable provisions of the City’s Water Conservation Ordinance. Appellants contend the City’s approval is inconclusive regarding consistency with this policy.

The policy primarily provides direction to the City to ensure it updates elements of City requirements related to water conservation. The City’s Water Conservation Ordinance is one of those elements, and includes conservation provisions applicable to new and existing development, such as limits on water use, timing of landscape watering, limits on new development during severe declared water shortages, and other similar measures. Because the policy provides guidance to the City rather than to particular new projects, the City’s approval does not result in an inconsistency with this policy. Further, as noted in the City’s findings, the approved project will be subject to applicable provisions of the Water Conservation Ordinance. Therefore, based on the record provided by the City, the information provided by the appellants, and for the reasons cited above, the Commission finds that *no* substantial issue exists with respect to the project’s consistency with LCP Policy C6.1.12.