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## ADDENDUM TO COMMISSION PACKET FOR ENERGY, OCEAN RESOURCES, and FEDERAL CONSISTENCY

For Thursday, December 10, 2009

**Item No. Th 9a**

**R-E-06-013**

Poseidon Resources (Channelside)

- Nov. 2, 2009 Environmental Groups Response to Poseidon Defense of CDP
- Dec. 3, 2009 Poseidon Response to Nov. 19, 2009 Staff Report
- Ex Parte Communications
- Correspondence

**CALIFORNIA COASTAL COMMISSION**

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# Th9a

December 8, 2009

**TO:** Coastal Commissioners and Interested Parties

**FROM:** Alison J. Dettmer, Deputy Director, Energy, Ocean Resources & Federal  
Consistency Division  
Tom Luster, Staff Environmental Scientist

**SUBJECT:** Addendum to Recommended Findings for R-E-06-013: Revocation Request on  
Poseidon Resources Desalination Facility in Carlsbad, San Diego County

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This addendum includes Commissioner *ex parte* forms, correspondence, and two additional documents for Commission consideration:

- November 2, 2009 Environmental Groups Response to Poseidon Defense of CDP.
- December 3, 2009 Poseidon Response to November 19, 2009 Staff Report.

Information provided in this addendum does not change staff's recommendation that the Commission **deny** the request for revocation, as described in the November 19, 2009 Staff Report.



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**November 2, 2009**

Peter Douglas  
Executive Director  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105-2219

Via Electronic Mail  
[pdouglas@coastal.ca.gov](mailto:pdouglas@coastal.ca.gov)  
[tluster@coastal.ca.gov](mailto:tluster@coastal.ca.gov)

**Re: Latham & Watkins Response to Environmental Groups Revocation Request  
Carlsbad Desalination Project  
Coastal Development Permit No. E-06-013**

Dear Mr. Douglas:

Please accept this letter on behalf of Coastal Environmental Rights Foundation, San Diego Coastkeeper, and Surfrider Foundation (collectively "Environmental Groups"), in response to Latham and Watkins' defense ("Defense") of Poseidon's Coastal Development Permit (CDP) for the Carlsbad Desalination Project ("Project").

As detailed below, Poseidon's Defense to Environmental Groups' request for revocation ("Revocation Request") lacks substance and fails to rebut Environmental Groups' claims for revocation. Because Environmental Groups have shown a prima facie case for revocation, the CDP revocation process must proceed as mandated by Coastal Commission regulations.

Please forward this correspondence to members of the Commission as part of any staff presentation or update on matter 20(a) (Status Report on Poseidon Desalination Plant in Carlsbad) at the Commission's November 5, 2009 meeting.

**I. Environmental Groups' Revocation Request Contains Sufficient Grounds for Initiation of Revocation Proceedings**

**A. Poseidon Intentionally Included Inaccurate, Erroneous, or Incomplete Information**

Environmental Groups detailed several instances of Poseidon's "intentional inclusion of inaccurate, erroneous or incomplete information in connection with [its] coastal development permit application."<sup>1</sup> Section 13105 applies a two-pronged test (1) whether the applicant intentionally included inaccurate, erroneous or incomplete information; and, (2) whether accurate and complete information would have caused the commission to require additional or different conditions on a permit or deny an application.<sup>2</sup>

"The regulations do not state that the intentional inclusion of erroneous information must be in bad faith." *Vadnais v. California Coastal Com'n* (2001) 2001 WL 1545497, 5. It is enough for Poseidon to have intended to submit information that is inaccurate, erroneous or incomplete. Poseidon admits the information submitted was not done by accident. Rather, it admits to

<sup>1</sup> 14 C.C.R. 13105; see Revocation Request, pp. 3-11.

<sup>2</sup> 14 C.C.R. 13106.

intentionally providing the Commission with impingement data that did not reflect all of Poseidon's impingement study results, but claims it did not do so in bad faith.<sup>3</sup> See Revocation Request, p.5. The determination of bad faith, and the relevancy thereof, should be considered subjects for adjudication by the Commission at the revocation hearing.

**i. Erroneous Calculation of Impingement**

Contrary to Poseidon's repeated contention, Environmental Groups have pointed to a multitude of evidence and facts to support their claims. The Revocation Request clearly contains sufficient grounds for revocation.

Poseidon concedes the erroneous calculation of impingement impacts was not made known until May 2009, well after CDP issuance and Marine Life Mitigation Plan ("MLMP") approvals in August 2008. Defense, p. 5. Though Poseidon insists Environmental Groups did not raise such erroneous calculation in their Revocation Request, the issue is squarely addressed therein. See Revocation Request, p.6. Environmental Groups simply do not concede Poseidon's offered corrected calculation of 3.43 pounds/day is accurate or *de minimis*.

Poseidon claims the Revocation Request says "nothing" about the erroneous calculation. To the contrary, the erroneous calculation is plainly highlighted in the Revocation Request:

However, in May 2009, Poseidon admitted the impingement calculation was erroneous. Poseidon opined that a more accurate impingement estimate is 1.56 kg/day, or 3.43lbs/day. However, the Regional Board and Coastal Commission's expert, Dr. Raimondi, found impingement calculations actually resulted in impingement rates of 4.7kg/day at a 50 percent confidence limit, 7.4 kg/day at an 80 percent confidence limit, and 9.1 kg/day at a 95 percent confidence limit. Regardless of the figures used, it is clear Poseidon did not provide accurate data or calculations to the Commission at the time of CDP approval, or thereafter during review of the MLMP.

Revocation Request, p.6 (emphasis added). Environmental Groups argue the impingement analysis was inaccurate, erroneous or incomplete on several grounds, including intentional submission of erroneous impingement rates. Poseidon's continued attempts to distort the record are telling.

**ii. Poseidon's Intentionally Submitted Incomplete, Inaccurate, and Erroneous Impingement Data**

Poseidon's attempt to rewrite history in its Defense is disingenuous. The contention that the full data set of impingement measured in 2004-2005 was "filed with the Regional Board prior to the filing of Poseidon's CDP application, and was continuously available to Commission staff" misses the point entirely.

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<sup>3</sup> Email communication from Peter MacLaggan, Poseidon Resources, to Chiara Clemente, Regional Board staff, on April 30, 2009

Poseidon unquestionably was in possession of the complete and accurate data set. Yet, company representatives simply failed to provide it to **the Commission**. The regulations require **the applicant** provide the Commission with **information that is not** "inaccurate, erroneous or incomplete...in connection with a coastal development permit application". Poseidon thus had a duty to present complete, error-free and accurate information to **the Commission**. It was neither Commission staff's nor the public's duties to procure such data from another agency.<sup>4</sup>

Although the Commission's findings for its 2007 approval refer to the 2004-2005 study, at the time the Commission was unaware accurate impingement data had not been provided.<sup>5</sup> Defense, p. 5-6.

However, in 2004-05, Poseidon conducted a study as part of the documentation for its *Flow, Entrainment, and Impingement Minimization Plan* to determine the entrainment impacts that would be caused by continuous 304 MGD water use. In May 2007, Poseidon provided a technical memorandum to Commission staff summarizing the results of that study and its *Flow, Entrainment, and Impingement Minimization Plan* and stated that the study used Regional Board approved protocols for sampling and analysis.<sup>6</sup>

Poseidon's selective quote in its Defense is followed by clarifying language, showing the Commission did not actually receive the full 2004-2005 study, but rather relied upon the version of the *Flow, Entrainment and Impingement Minimization Plan* available at the time. Defense, p. 6, note 18.

The *Flow, Entrainment and Impingement Minimization Plan* provides that the project, when operating stand-alone, is expected to impinge approximately 2.12 pounds offish per day, which Poseidon provides is less than the average daily consumption of an adult pelican (more than 2.5 pounds per day), which for this project the Commission considers *de minimis* and insignificant.<sup>7</sup>

Poseidon's assertion that the Commission had the complete data set in March 2008 is false, and further indication of its attempt to rewrite history. The "2007 Tenera Environmental Study" provided to the Commission in March 2008 for compliance with CDP Special Condition 8 was

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<sup>4</sup> Indeed, Commission staff was unable to obtain a copy of Poseidon's entrainment study before CDP approval. "Commission staff requested a copy of Poseidon's entrainment study but received only a summary of the study results. The Commission was therefore unable to fully evaluate the accuracy of the results or determine how those results were derived." Recommended Findings, November 2, 2007, p. 30. Further, to document the Project's entrainment impacts, the Commission required Poseidon to submit the full Entrainment Study and develop the MLMP based upon the study results. See Coastal Commission Final Adopted Findings for CDP (condition 8) Approval, August 6, 2008, p. 10

<sup>5</sup> Coastal Commission Final Adopted Findings for CDP Approval, August 6, 2008, p. 47

<sup>6</sup> Coastal Commission Final Adopted Findings for CDP Approval, August 6, 2008, p. 41

<sup>7</sup> *Id.* at 39.

meant to calculate **entrainment** impacts and mitigation. The "2007 Tenera Environmental Study" also contained only a **summary of impingement impacts**, not the full data set. In fact, aside from the mention of impingement in Special Condition 8, nowhere in the Commission's findings for its 2008 approval of the MLMP did it rely on such a study to conclude impingement impacts were *de minimis*, nor did it require mitigation for impingement impacts.<sup>8</sup> Such determinations were made based upon Poseidon's submissions for its November 2007 CDP application.<sup>9</sup>

Thus, contrary to Poseidon's assertions, the "2007 Tenera Environmental Study" did not contain the full impingement data set. Rather, it provided sample count and weight, bar rack count and weight, and heat treatment count and weight.<sup>10</sup> It did not contain all data sets by day, nor did it provide 52 distinct data points. The summary merely provided impingement by taxon.<sup>11</sup> Also conveniently missing from this summary was flow data for Encina Power Station, clearly an integral component of the calculation of impingement impacts per day and Poseidon's apportionment of impacts to the Project. Amazingly, even the "2007 Tenera Environmental Study" provided to the Commission well after CDP approval did not contain all the relevant and accurate impingement data ultimately presented to the Regional Board.

Tellingly, Poseidon defends its selective exclusion of two data points in its impingement study by admitting the "disagreement about Poseidon's methodology for calculating the Daily Impingement Estimate [was] in Proceedings before the Regional Board, not the Commission." Defense, p. 6. Environmental Groups challenge the submission of the data to the Commission **precisely because Poseidon's exclusion of the two data points was not made known to the Commission or Environmental Groups until the Regional Board proceedings in 2009.** Moreover, Poseidon's steadfast defense of its exclusion of the two data points reinforces Environmental Groups' claim— Poseidon intentionally submitted the inaccurate and incomplete data set.<sup>12</sup>

**iii. Poseidon presented inaccurate, incomplete and/or erroneous velocity information**

Poseidon maintains Project intake velocities at the intake bar racks are below .5 feet per second ("fps"). Defense, p.12. Apparently, even Commission staff disagrees.

During the Commission's review, both Poseidon and the project's Environmental Impact Report (EIR) stated that Poseidon's use of 304

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<sup>8</sup> Coastal Commission Final Adopted Findings for MLMP Approval, December 10, 2008.

<sup>9</sup> Coastal Commission Final Adopted Findings for CDP Approval, August 6, 2008, p. 39.

<sup>10</sup> *Assessment of Potential Impingement and Entrainment Attributed to Desalination Plant Operations and Associated Area of Production Forgone*, Tenera Environmental, Inc., May 2007, pp. 3-6.

<sup>11</sup> *Id.* at 5.

<sup>12</sup> Pursuant to the Commission's discretionary authority, and to the Administrative Procedure Act (Gov. Code § 11400 et seq.), Environmental Groups reserve their right to depose Commission staff and/or obtain admissible declarations regarding facts in dispute relevant to the Revocation Request. 14 C.C.R. 13108; Gov. Code § 11445.20; Pub. Res. Code § 30333.

million gallons per day of seawater would cause intake velocities of 0.5 feet per second or less, which is the velocity range considered "best available technology" by the U.S. EPA. The Commission relied on characterizations by Poseidon and in the EIR in approving the project and in determining what mitigation requirements were needed for the project to conform to Coastal Act policies. As it turns out, the characterizations made both by Poseidon and in the project EIR regarding intake velocity are incorrect.<sup>13</sup>

Moreover, as stated by the Regional Board, "most intake and mortality from impingement do not occur at the bar rack but rather on the rotating screens. Reduced velocity at the bar rack will not necessarily minimize impingement losses on the rotating screens."<sup>14</sup> Though Poseidon argues its calculations are correct and the Regional Board and Commission staff have miscalculated velocities, the fact remains, a dispute as to the accuracy of Poseidon's intake velocity now exists. Commission staff has documented velocities higher than those presented to the Commission in November 2007. Commission staff has further demonstrated the Commission relied upon Poseidon's inaccurate, incomplete, and/or erroneous submissions in "approving the project and in determining what mitigation requirements were needed for the project to conform to Coastal Act policies."<sup>15</sup>

Environmental Groups have shown clear and convincing grounds exist for CDP revocation, and therefore initiation of revocation proceedings must proceed.<sup>16</sup>

#### iv. **Environmental Groups are not barred from requesting revocation of the CDP**

The Commission's issuance of the CDP approval was appealed to the San Diego Superior Court in *Surfrider Foundation v. Cal. Coastal Comm., et al.* (Case No. 37-2008-00075727). However, the court's decision did not rest on the Commission's review of Poseidon's **impingement study**. The court found the Commission received Poseidon's **expert's summary of entrainment impacts**. Moreover, the court found the Commission retained discretionary authority at the time of CDP approval in requiring submission of the full **entrainment study** and requiring further Commission approval of the MLMP. Statement of Decision, p. 4.

Importantly, the court said nothing of impingement impacts or impingement data. The entire analysis concerned entrainment. Thus, even if the doctrine of *res judicata* applied in this context (which Environmental Groups contest) it is inapplicable here as the court's decision did not concern the same cause of action.

Lastly, the Commission is not bound by the court's decision regarding the validity of the issuance of the CDP in determining whether revocation is appropriate. Subsequent to the

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<sup>13</sup> Coastal Commission Letter to Regional Board, May 6, 2009, p.2, approximately **nine months** after approval of final CDP findings.

<sup>14</sup> Regional Board Staff Report, March 27, 2009, p. 5.

<sup>15</sup> Coastal Commission Letter to Regional Board, May 6, 2009, p.2

<sup>16</sup> 14 C.C.R. 13105, 13106.

Commission's approval of the CDP and to the filing of the aforementioned litigation, the Regional Board staff found impingement impacts previously offered to the Commission by Poseidon were inaccurate. Further, the court's review of the Commission's grant of a CDP is reviewed with respect to the administrative record before the Commission at the time of CDP approval. Therefore, the accuracy of impingement impacts was not at issue in the record before the Commission or the court during its review of the CDP approval.

**B. The Coastal Commission Would Have Required Additional or Different Conditions on the CDP or Denied Poseidon's Application**

Poseidon defends its intentional submission of "inaccurate, erroneous or incomplete" information by inappropriately subsuming the different elements in sections 13105 and 13106 into one large amorphous test.

Confusingly, Poseidon blurs the distinction between Poseidon's submission of data that meets the test for "inaccurate, erroneous or incomplete" information, with the requirement that such information be of some consequence to the Commission's decision-making. Thus, Poseidon claims a different result could not have possibly resulted from Poseidon's actions because Environmental Groups failed to show any intentional submission of inaccurate, erroneous, or incomplete data. Poseidon's nonsensical approach is clearly intended to, yet again, confuse the Commission.

As detailed above, Environmental Groups pointed to numerous instances of such submissions, namely:

- 1) Intentional submission of erroneous calculation of impingement at .96kg/day;
- 2) Intentional submission of Incomplete, inaccurate or erroneous impingement data, omitting two critical data points;
- 3) Intentional submission of inaccurate or erroneous velocity; and
- 4) Intentional submission of the Project production capacity and Project description.

After Environmental Groups successfully identify instances of submission of "inaccurate, erroneous or incomplete" information, the question then becomes whether the accurate, error-free and complete information would likely have prompted the Commission to impose additional or different conditions, or to deny the application.

**i. The Regional Board did not impose sufficient mitigation to offset additional impingement impacts, nor did it act pursuant to the Coastal Act**

Unlike the Commission, the Regional Board did not use Poseidon's estimate of daily impingement rate when it approved the project. Rather, the Regional Board found, for co-located operations, 4.7 kg/day – almost five times the .96 kg/day impingement rate presented

to the Commission – was a reasonable estimate.

The Regional Board finds that 4.7 kg/day is a reasonable, conservative estimate of impingement associated with CDP's projected operations under co-located conditions and notes that the Discharger has agreed to meet a fish productivity standard of 1,715.5 kg/year, derived from the estimate of 4.7 kg/day, in the mitigation wetlands.<sup>17</sup>

The quoted language also reflects the Regional Board believed the mitigation imposed by the Commission through the MLMP would offset both the original entrainment impacts found by the Commission in August 2008, and the newly discovered impingement impacts.<sup>18</sup> However, the Commission staff strongly cautioned the Regional Board against such a determination, clarifying the Commission had not imposed the wetland mitigation to offset impingement impacts.<sup>19</sup>

ii. **The Commission did not impose impingement mitigation at the time of CDP approval, or through the MLMP**

In contrast to the Regional Board, the Commission granted a CDP for a stand-alone Project (without Encina Power Station). The Regional Board made clear the May 13, 2009 approval was only for a co-located Project (with Encina Power Station).<sup>20</sup> Notwithstanding Poseidon's contrary claim, the Regional Board's May 13, 2009 approval does not prohibit the Commission from reaching a different result. As mentioned above, the **Regional Board expressly deferred analysis and permitting of a stand-alone Project** until such time as Poseidon submits a new Report of Waste Discharge for a stand-alone Project.<sup>21</sup> **The Commission explicitly analyzed and issued a CDP for a stand-alone Project.**<sup>22</sup>

If, as Poseidon maintains, the Commission truly had no authority under Coastal Act section 30412(b) to take any action in conflict with the Regional Board, the Commission would have deferred issuance of the CDP altogether until the Regional Board had made a final determination, and the inconsistent approvals of co-located and stand-alone projects by the Agencies must be reconciled.

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<sup>17</sup> Order No. R9-2009-0038, p. 10.

<sup>18</sup> *Id.*

<sup>19</sup> Coastal Commission Letter to Regional Board, May 6, 2009, pp. 3-5.

<sup>20</sup> "If EPS permanently ceases operations and the Discharger proposes to independently operate the existing EPS seawater intake and outfall for the benefit of the CDP ("standalone operation"), it will be necessary to evaluate whether, under those conditions, the CDP complies with the requirements of Water Code section 13142.5(b)...The Discharger will be required to submit a new Report of Waste Discharge to the Regional Board for authorization to operate in stand-alone mode, and shall seek review under CWC section 13142.5(b) for such stand-alone operation" Order No. R9-2009-0038, p. 2.

<sup>21</sup> *Id.*

<sup>22</sup> Coastal Commission Final Adopted Findings for CDP Approval, August 6, 2008, p. 2.

**iii. The inaccurate, incomplete, and erroneous data submitted by Poseidon is of sufficient import under the Coastal Act**

Poseidon routinely minimizes the importance of the Project's original estimate of and newly discovered increase in impingement impacts by relating the daily impingement rate to an adult pelican's diet. Defense, p. 5, 7, 15. As pointed out in Poseidon's Defense and letter to Commission staff, an adult pelican may eat up to 1.8 kg of fish per day.<sup>23</sup> Defense, p. 15, note 38. Nowhere in the Coastal Act or Commission regulations is an adult pelican elevated to such status as to be the official reference point for assessment of marine life impacts. Sections 30230 and 30231 make no categorical exclusion for Projects with pelican-like impacts.<sup>24</sup> It is for the Commission to determine whether an increase from .96 kg to some higher amount (which Environmental Groups believe to be ten times greater) is of some import under the Coastal Act.

The Commission should consider persuasive that the Regional Board did not find the impact *de minimis*, nor did it use the pelican-standard as a reference. More importantly, the Regional Board did not agree with Poseidon's methodology, and assumed an impingement rate of 4.7 kg/day, which happens to be more than two and one half times the "average daily consumption of a pelican."<sup>25</sup> Defense, p. 15. Under Poseidon's own arbitrary test, the impingement impacts are not *de minimis*. Thus, the Commission would have required additional or different conditions for the permit or may have denied the application altogether. 14 C.C.R. 13105.

**II. Environmental Groups Pursued the CDP Revocation with Due Diligence**

Poseidon's points to Environmental Groups' use of quasi-judicial administrative economy as support for untimely submission of the Revocation Request. Defense, p.7.

In mis-characterizing Environmental Groups' explanation, Poseidon claims Environmental Groups object to Commission "staff's procedural determinations." *Id.* at 8. Rather, Environmental Groups now seek revocation of the CDP because the Commission has not addressed the issue of inaccurate, erroneous, or incomplete information of its own accord.<sup>26</sup> As Poseidon is well aware, several different means exist to address the discovery of Poseidon's submission of inaccurate, erroneous, or incomplete impingement data exist. Until the October Commission hearing, Environmental Groups properly relied upon the Commission's authority to require an amendment to the Permit, review the permit during an extension hearing, and address the matter at the October hearing. Indeed, had Environmental Groups presented a Revocation Request while the Commission staff was considering Poseidon's extension application or possible CDP amendment, the matter may have been deemed moot.

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<sup>23</sup> September 3, 2009 Letter from Latham and Watkins to Executive Director Douglas, p. 2.

<sup>24</sup> Pub. Res. Code §§ 30230, 30231.

<sup>25</sup> Order No. R9-2009-0038, p.10.

<sup>26</sup> In light of the Commission's letter to the Regional Board and staff's communication with Poseidon regarding the need to amend, the CDP, Environmental Groups properly relied upon the Commission to address the need for review of the CDP. Coastal Commission Letter to Regional Board, May 6, 2009; Poseidon's Response to Tom Lust Email re Permit Amendment, May 5, 2009.

Moreover, in Poseidon's attempt to legislatively exempt the Project from the Coastal Act construction deadline, Poseidon's offer to "voluntarily" mitigate the Project's impingement impacts was first made public.<sup>27</sup> Further, in the five months between Regional Board approval and submission of the Revocation Request, important new information regarding Project production capacity has come to light. Though Poseidon claims the impingement data methodology was available in April 2008, the erroneous, incomplete, and inaccurate nature of the impingement calculation was not made public until May 2009.

Because Poseidon has yet to begin construction, and the CDP has not issued nor vested during the short period in which new facts came to light and the Commission chose not to require CDP amendment, Poseidon suffered no injury. Rather, Environmental Groups submitted the Revocation Request just days after the October Commission hearing concluded with no action taken. Therefore, the revocation was pursued with due diligence.

### III. The Commission's Regulation Require Suspension of the CDP While Revocation Proceedings Are Ongoing.

Though Poseidon interprets Commission regulations to require more, section 13107 is clear.

Where the executive director determines in accord with Section 13106, that grounds exist for revocation of a permit, the operation of the permit shall be automatically suspended until the commission votes to deny the request for revocation.<sup>28</sup>

Section 13106 states the "executive director shall review the stated grounds for revocation and, unless the request is patently frivolous and without merit, shall initiate revocation proceedings." (Emphasis added). Thus, the section 13106 patently "frivolous and without merit" standard is the correct test for application of the section 13107 suspension. Further, the test for initiation of revocation proceedings is not "a mere allegation or claim." Defense, p. 17. The standard is clearly laid out in section 13106. If the Executive Director finds the revocation request not patently frivolous and without merit, the CDP is merely *suspended, not revoked*. Moreover, Commission regulations provide Poseidon with sufficient due process safeguards, including notice and an opportunity to be heard before revocation. 14 C.C.R. 13108. The Commission has a legitimate interest in protecting the coastal zone, which "is a valuable resource belonging to all the people" and "its permanent protection is a paramount concern to the citizens of the state..." *State of California v. Superior Court* (1974) 12 Cal.3d 237, 253.

Poseidon's contention that the Commission suspension of the CDP would violate Poseidon's due process rights is unsupported by judicial rulings.<sup>29</sup> Poseidon has not "acquired a fundamental vested right" in the 2007 CDP approval. Purely economic interests are not

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<sup>27</sup> September 3, 2009 Letter from Latham and Watkins to Executive Director Douglas, pp.1-2.

<sup>28</sup> 14 C.C.R. 13107 (emphasis added).

<sup>29</sup> "What is a 'reasonable' opportunity to be heard will 'not turn solely on the fact that a constitutionally protected interest is affected by governmental action . . . the nature of the claimed procedural rights, the extent of interference with the private interest, and the governmental interest' all coalesce to define the scope of due process." [internal citations omitted] *Stanson v. San Diego Coast Regional Com.* (1980) 101 Cal.App.3d 38, 45.

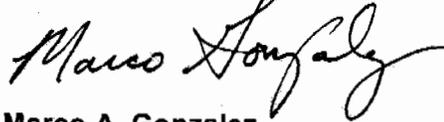
"fundamental vested rights" entitled to the independent judgment review. In previous cases, the courts have held certain "administrative actions implicated purely economic interests because there were no contentions, nor evidence, that the actions would force the companies out of business or cause them to lose their property." *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1528. In *Goat Hill*, the court found the "avowed purpose and result of the city's decision [was] to shut down [an existing business]." *Id.* Poseidon does not claim it will lose its property (which it leases from Cabrillo) or will have to shut down an existing business. Rather, Poseidon has spent money in preparation of construction, which is not considered a fundamental vested right for purposes of administrative review.<sup>30</sup> *Id.* at 1526-28.

#### IV. Conclusion

Environmental Groups have submitted information detailing Poseidon's intentional submission of inaccurate, incomplete and erroneous information which would have effected the Commission's approval of the CDP application. Based on the foregoing, the Executive Director must initiate revocation proceedings. We look forward to the opportunity to address the Commission at the revocation hearing.

Sincerely,

COAST LAW GROUP LLP



Marco A. Gonzalez



Livia Borak

Attorneys for San Diego Coastkeeper and  
Coastal Environmental Rights Foundation

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<sup>30</sup> Poseidon's reliance on *Gray v. Superior Court* is also misplaced. In *American Liberty Bail Bonds, Inc. v. Garamendi* (2006) 141 Cal.App.4th 1044, 1062, the court found *Gray* concerned the Medical Board's adherence to its own regulations and procedures. Defense, p. 17.



# POSEIDON RESOURCES

December 3, 2009

**Agenda Item  
Th9a**

**VIA OVERNIGHT DELIVERY**

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

Re: Carlsbad Desalination Project Request for Revocation No. R-E-06-013  
Response to November 19, 2009 Staff Report

Dear Chairperson Neely and Honorable Commissioners:

On behalf of Poseidon Resources (Channelside) LLC ("Poseidon"), this letter responds to the Coastal Commission Staff Report dated November 19, 2009 regarding the October 9, 2009 request for revocation ("Revocation Request") of Coastal Development Permit No. E-06-013 ("CDP") submitted by Surfrider Foundation, Coastal Environmental Rights Foundation and San Diego Coastkeeper (the "Opponents"), which is scheduled to be considered by the Commission at its December 10, 2009 meeting. Poseidon supports Commission Staff's recommendation to deny the Revocation Request on the basis that no grounds for revocation exist under the standards set forth in Section 13105 of the Coastal Commission's regulations ("CCC Regulations") and respectfully requests that the Commission deny the Revocation Request.

**I. THE PROJECT IS A CRITICALLY IMPORTANT COMPONENT OF  
SOUTHERN CALIFORNIA'S WATER SUPPLY**

The Carlsbad Seawater Desalination Project (the "Project") is a central component of state, regional and local water supply planning, which will meet already-identified demand and provide an important and much-needed source of potable, desalinated water to Southern California. The Project will have a capacity to produce approximately 50 million gallons per day or 56,000 acre-feet per year of water for the San Diego region – an amount that will serve the needs of over 300,000 residents in San Diego County. As the three-year old drought escalates, the need for the Project remains critical and continues to grow. Poseidon commenced Project construction under the CDP on November 13, 2009, and is diligently pursuing construction to bring this critically needed water to Southern California by 2012.

**These materials have been provided to Coastal Commission Staff**

**Poseidon Resources Corporation**

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## II. THE COASTAL COMMISSION REGULATIONS ESTABLISH A VERY HIGH STANDARD FOR CDP REVOCATION

As noted in the Staff Report, because of the impact on the permittee, the CCC Regulations set a very high standard for CDP revocation with very narrow grounds. The Opponents bear the burden of proving *all three elements* under CCC Regulations Section 13105(a): (i) intentional inclusion; (ii) of inaccurate, erroneous or incomplete information in connection with a CDP application; and (iii) where the Commission finds that accurate and complete information would have caused the Commission to require additional or different conditions on a permit or deny an application.<sup>1</sup>

## III. THE REVOCATION REQUEST DOES NOT SATISFY THE HIGH STANDARD FOR CDP REVOCATION

Poseidon agrees with the Staff Report's conclusion that the Revocation Request does not satisfy the CCC Regulations' stringent requirements for revocation with respect to the Opponents' three claims, as discussed below:

1. Impingement Data and Impingement Impacts Analysis: Poseidon agrees with the Staff Report's conclusions that Poseidon provided impingement data from "all 52 sampling events" prior to the Commission's November 2007 CDP approval, and that there is no evidence that the daily impingement calculation error Poseidon previously acknowledged was intentionally submitted to the Commission. Since there is no basis for Opponents' claim that any inaccurate, erroneous or incomplete information was intentionally provided to the Commission regarding the Project's impingement data or impingement impacts analysis, the Opponents have failed to satisfy the grounds for revocation regarding this claim.
2. Intake Velocities: Poseidon agrees with the Staff Report's conclusion that Poseidon did not intentionally supply the Commission with any inaccurate, erroneous or incomplete information regarding the Project's intake velocities, and thus that the Opponents have failed to satisfy the grounds for revocation regarding this claim. However, Poseidon believes the Staff Report contains some factual inaccuracies regarding this issue, and maintains that it did not submit any inaccurate, erroneous or incomplete information regarding the Project's intake velocities. While Commission staff acknowledges that the measurement of intake velocities is a "complex technical issue", and that Poseidon's measurement location is "one of several locations that can be used to measure velocity", Poseidon has consistently maintained that the location of its intake velocity measurements is at the "entrance to the bar racks". Further, that measurement location has not changed and diagrams depicting the intake design were submitted to the Commission prior to its approval of the Project's CDP. These issues are addressed more fully in Exhibit A, hereto.

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<sup>1</sup> We note that the Staff Report and our October 15, 2009 letter both recognize that Opponents do not assert any defects in noticing the Project's CDP as governed by CCC Regulations Section 13105(b). Accordingly, there are no grounds for revocation of the CDP based on those issues.

3. **Project Capacity:** Poseidon agrees with the Staff Report's conclusion that there is no evidence in the Commission's administrative record to support the contention that Poseidon plans to expand the Project's capacity beyond the 50 million gallons per day contained in Poseidon's Project description. As the Staff Report acknowledges, Poseidon's CDP and its approvals from the City of Carlsbad limit the Project's production capacity to approximately 50 million gallons per day, and Poseidon cannot increase that capacity without amendments to those approvals. Thus, the Opponents have failed to satisfy any of the grounds for revocation regarding this claim.

#### **IV. ADDITIONAL GROUNDS FURTHER SUPPORT DENIAL OF THE REVOCATION REQUEST**

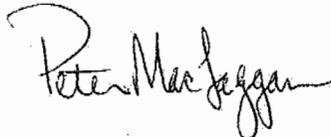
While we believe that the bases set forth in the Staff Report are alone sufficient to require denial of the Revocation Request, we also believe there are additional grounds that require denial, which are discussed in detail in our October 15, 2009 letter to the Commission, attached hereto as **Exhibit B**. Among other things, our letter explains that the Opponents fail to make any showing that the Commission would have required additional or different conditions on the CDP or denied the application had the Commission considered Poseidon's correction to its daily impingement calculation error because: (i) the San Diego Regional Water Quality Control Board considered Poseidon's correction to the calculation error and did not require mitigation acreage above what the Commission required in the Project's Marine Life Mitigation Plan; and (ii) while we understand that Commission Staff does not share this view, we believe Coastal Act Section 30412(b) prevents the Commission from taking any action in conflict with any determination by the Regional Board in matters relating to water quality. (See Exhibit B, at pp. 7, 14-16.)

Poseidon does not waive these or any other basis for denial of the Revocation Request discussed in our October 15 letter, and hereby incorporates these bases for denial into this letter.

Based on the information contained in the Staff Report and our October 15, 2009 letter to the Commission, we concur with the Staff Report's recommendation that "the Commission find[] that the request for revocation does not satisfy the requirements contained in Section 13105(a) and (b) of the Commission's regulations and therefore the revocation request shall be denied."

We appreciate the Commission's consideration of these important issues and respectfully request that the Commission deny the Revocation Request.

Sincerely,



Peter MacLaggan  
Poseidon Resources

Attachments

cc: Alison Dettmer; Tom Luster; Rick Zbur

**These materials have been provided to Coastal Commission Staff**

## EXHIBIT A

### Poseidon's Clarification of Factual Inaccuracies Regarding Intake Velocities

While Poseidon concurs with the Staff Report's conclusion that the Revocation Request does not meet the strict standards of CCC Regulations Section 13105(a) and therefore must be denied, the Staff Report contains certain factual inaccuracies regarding the location for measuring the Project's intake velocities, which require correction for the record.

In particular, Poseidon disputes the accuracy of following statement from page 5 of the Staff Report: "The Regional Board also clarified that Poseidon had based its stated intake velocities of 0.5 feet per second (fps) on a different location than had been assumed during Commission review, which could also lead to higher impingement rates."

This statement finds no support in the Regional Board record. There was no such "clarification" made during the Regional Board's hearing regarding the Flow, Entrainment and Impingement Minimization Plan, nor is it addressed in Regional Board Order No. R9-2009-0038. This Order does not address the location where the 0.5 fps intake velocity was measured; it notes only that Poseidon will "reduce both inlet (bar racks) and fine screen velocity" when the EPS is temporarily shut down. (Regional Board Order No. R9-2009-0038, at pp. 6-7.)

Poseidon has never claimed that it measured stated intake velocities at any "different location" from what it presented to the Commission. Throughout the entire permitting process before the Commission, Poseidon has always stated that the expected 0.5 fps intake velocity was measured "at the entrance to the bar racks." (Poseidon Resources, November 9, 2007 Response to Staff Report, Exhibit A at p. 10.) Prior to the Commission's approval of the Project, Poseidon submitted a diagram that delineates the intake's entrance to the bar racks, a copy of which is attached hereto as Exhibit C.<sup>2</sup> This diagram is virtually identical to Staff Report Exhibit 5, but does not include the notes and arrows on that document indicating Poseidon and Coastal Commission staff's respective points of velocity measurement. The notes and arrows shown on Staff Report Exhibit 5 were added to the diagram in response to Coastal Commission staff's May 6, 2009 letter that brought to our attention for the first time that there was a misunderstanding as to the point of velocity measurement.

As the Staff Report concurs, "the EPA's guidance on the section 316(b) regulations recognizes that an intakes velocity can be measured at different locations . . . and Poseidon's proposed measurement point is one of several locations that can be used to measure velocity." (Staff Report, p. 10.) The Project's intake velocities remain consistent with the intake velocities

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<sup>2</sup> This diagram was included in the Tenera Environmental Study prepared for the power plant owner's NPDES permit that shows the power plant's intake structure plan. (See Encina Power Station Proposal for Information Collection Clean Water Act Section 316(b), at Attachment 5 (Attachment A, p. 2), dated April 1, 2006.) Poseidon first submitted the diagram to the Coastal Commission as Attachment 25 to its June 1, 2007 Response to Coastal Commission February 20, 2007 Request for Additional Information, and resubmitted it as an attachment to Poseidon's March 6, 2008 Flow, Entrainment and Impingement Minimization Plan.

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## LATHAM & WATKINS LLP

October 15, 2009

### VIA FEDEX AND EMAIL

Peter Douglas  
Executive Director  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105-2219

#### FIRM / AFFILIATE OFFICES

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Re: Carlsbad Desalination Project (Coastal Development Permit No. E-06-013):  
Response to October 9, 2009 Permit Revocation Request

Dear Mr. Douglas:

On behalf of Poseidon Resources (Channelside), LLC ("Poseidon") we are responding to the October 9, 2009 revocation request ("Revocation Request") regarding the Carlsbad Desalination Project's (the "Project") Coastal Development Permit ("CDP") submitted by Surfrider Foundation, Coastal Environmental Rights Foundation<sup>1</sup> and San Diego Coastkeeper (the "Opponents"). As discussed in detail in this submittal, Opponents' assertions have no merit and are either unsubstantiated or contrary to the evidence already before the Commission in the Project's administrative record. In addition, the CCC Regulations provide that "[i]f the commission finds that the request for revocation was not filed with due diligence, it shall deny the request."<sup>2</sup> As discussed below, since Opponents waited for more than five months to bring the Revocation Request, the Commission must deny it. Consequently, there are numerous bases for both the Executive Director and the Commission to deny the Revocation Request.

On its face, the Revocation Request is "patently frivolous and without merit," and as such, no revocation hearing before the California Coastal Commission (the "Commission") is

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<sup>1</sup> Poseidon notes that Coastal Environmental Rights Foundation is not a proper party to the Revocation Request and should be removed as a party from any revocation proceeding. California Code of Regulations, title 14 (the "CCC Regulations"), Section 13106 only allows revocation requests to be brought by "[a]ny person who did not have an opportunity to fully participate in the original permit proceeding . . ." As shown on the California Secretary of State's website (a printout of which is attached as Exhibit A), Coastal Environmental Rights Foundation was not registered as a business in California until October 17, 2008 – well after the Commission's November 15, 2007 hearing on the Project's CDP, and its August 6, 2008 hearings on the Project's mitigation plans. Accordingly, Coastal Environmental Rights Foundation cannot be a party to the Revocation Request because it did not exist at the time of those hearings, and thus could not have had an "opportunity to fully participate" in those hearings.

<sup>2</sup> CCC Regulations § 13108, subd. (d).

required.<sup>3</sup> The Commission's regulations set a very high standard for CDP revocation, which requires Opponents to prove three elements under CCC Regulations Section 13105(a): (1) that the applicant intentionally submitted inaccurate, erroneous or incomplete information to the Commission; (2) that the information intentionally submitted is in fact inaccurate, erroneous or incomplete; and (3) that the Commission would have required additional or different conditions or denied the CDP had accurate and complete information been submitted.<sup>4</sup> The Opponents bear the burden of proving *all three prongs* to establish that revocation is necessary, and have failed to satisfy any of those prongs or show that Poseidon has engaged in any conduct that meets the grounds for revocation.

Most significantly, the Revocation Request *does not present a single material fact* that demonstrates Poseidon has engaged in any intentional conduct whatsoever that falls within the scope of CCC Regulation Section 13105(a), and Opponents *have not cited to any single instance where Poseidon provided inaccurate, erroneous or incomplete information* to the Commission that can operate as a basis for revocation.<sup>5</sup> By failing to provide any such necessary evidence in their Revocation Request, Opponents have failed to satisfy any of the three prongs necessary for revocation, and therefore their request must fail. Without citing a single material fact supporting the standard for revocation, the Revocation Request is patently frivolous and without merit, and the Executive Director is not required to initiate revocation proceedings.<sup>6</sup>

Even if the Executive Director decides to initiate revocation proceedings, which Poseidon strongly contends is contrary to the facts before the Commission, Opponents have not shown that any of the grounds for revocation have been met. Accordingly, and based on the arguments below and the facts already in the Commission's record, the Executive Director should recommend to the Commission that Opponents' request is without merit and should be denied. Further, since the grounds for revocation have not been met, the Executive Director should not and may not suspend Poseidon's CDP because the CCC Regulations only allow for the suspension of a CDP where the Executive Director has found that "grounds exist for revocation

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<sup>3</sup> See CCC Regulations § 13106 ("The executive director shall review the stated grounds for revocation and, *unless the request is patently frivolous and without merit*, shall initiate revocation proceedings.") (emphasis added).

<sup>4</sup> See CCC Regulations § 13105, subd. (a).

<sup>5</sup> The single mathematical calculation error in the estimated prediction of the average daily pounds of fish that could be impinged by the Project, of which Commission staff is already aware, is not raised in the Revocation Request as a basis for revocation. Instead, and as discussed in detail in Sections I and II below, Opponents have disputed the methodology Poseidon's expert used to predict Project impingement under standalone conditions that was based on complete and accurate data Poseidon provided to the Commission. Since Opponents did not raise the mathematical calculation, it cannot be a basis for revocation, and Opponents have failed to provide evidence of the submission of any other inaccurate, erroneous or incomplete information to the Commission.

<sup>6</sup> See CCC Regulations, § 13106.

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of a permit.”<sup>7</sup> Finally, if the Executive Director determines that a revocation hearing is necessary, Poseidon respectfully requests that the hearing be scheduled in November 2009, consistent with the CCC Regulations’ requirement that a revocation hearing be scheduled “at the [Commission’s] next regularly scheduled meeting.”<sup>8</sup>

**I. OPPONENTS’ REQUEST IS PATENTLY FRIVOLOUS AND WITHOUT MERIT BECAUSE THEY CANNOT MEET THEIR BURDEN OF PROOF**

Section 13106 of the CCC Regulations provides that when a revocation request is submitted to the Commission, “[t]he executive director shall review the stated grounds for revocation and, *unless the request is patently frivolous and without merit*, shall initiate revocation proceedings.”<sup>9</sup> Thus, the Executive Director has the authority to deny a revocation request upon his determination that the request is “patently frivolous and without merit.” Opponents’ Revocation Request is patently frivolous and without merit because it is clear that Opponents have not met their burden of demonstrating that the grounds for revocation of the CDP have been satisfied.

More specifically, Section 13105 of the Commission’s Regulations contains the two grounds for CDP revocation and provides that a CDP may be revoked by the Commission where there has been:

“(a) Intentional inclusion of inaccurate, erroneous or incomplete information in connection with a coastal development permit application where the Commission finds that accurate and complete information would have caused the commission to require additional or different conditions on a permit or to deny an application;

(b) Failure to comply with the notice provisions of Section 13054, where the views of the person(s) not notified were not otherwise made known to the commission and could have caused the commission to require additional or different conditions on a permit or deny an application.”<sup>10</sup>

The Revocation Request focuses solely on the revocation grounds contained in CCC Regulation 13105(a), and since Opponents do not assert any defects in noticing the Project’s CDP as governed by CCC Regulation 13105(b), there are no grounds for revocation of Poseidon’s CDP based on those issues.

As discussed above, Section 13105(a) of the CCC Regulations is divided into three elements: (1) that the applicant intentionally submitted inaccurate, erroneous or incomplete information to the Commission; (2) that the information intentionally submitted is in fact

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<sup>7</sup> See CCC Regulations § 13107; Section IV, below.

<sup>8</sup> CCC Regulations § 13108, subd. (a).

<sup>9</sup> CCC Regulations § 13106 (emphasis added).

<sup>10</sup> CCC Regulations § 13105, subd. (a).

inaccurate, erroneous or incomplete; and (3) that the Commission would have required additional or different conditions or denied the CDP had accurate and complete information been submitted. While the CCC Regulations do not provide a definition of the phrase “patently frivolous and without merit,” a revocation request that fails to provide any evidence supporting any one of the three required prongs in Section 13105(a) should be considered patently frivolous and without merit because the request cannot succeed if any one of the three prongs remains unproven. The Revocation Request submitted by Opponents fails to provide evidence supporting any of the three required elements in Section 13105(a) as follows:

1. No Intent. While the Revocation Request claims that Poseidon intentionally submitted “inaccurate, incomplete and erroneous information in connection with its CDP application”,<sup>11</sup> *Opponents do not cite to a single piece of evidence that demonstrates such intent.* Instead, the Revocation Request implies that if Poseidon provided inaccurate, erroneous or incomplete information to the Commission, it must have done so intentionally. Opponents’ failure to provide any evidence that Poseidon intentionally supplied such information to the Commission is a fatal defect to the Revocation Request.

Moreover, while Poseidon has admitted that its consultant made a mathematical calculation error<sup>12</sup> in the Project’s daily impingement estimate previously submitted to the Commission, once that calculation error was discovered, Poseidon voluntarily offered to provide 11 acres of additional wetland restoration to compensate for any additional impingement impacts Commission staff believed the Project might cause. Poseidon made that offer even though the San Diego Regional Water Quality Control Board (“Regional Board”) did not require Poseidon to do so, and instead found that Poseidon’s obligation to create or restore up to 55.4 acres of estuarine wetlands through the Commission’s approved Marine Life Mitigation Plan (“MLMP”) provided a reasonable basis to conclude that Poseidon will fully mitigate impingement associated with the Project’s operations.<sup>13</sup> Poseidon’s voluntary offer clearly demonstrates that Poseidon did not intentionally submit inaccurate, erroneous or incomplete information to the Commission, because Poseidon was willing to provide additional mitigation to compensate for its consultant’s calculation error despite the fact that Poseidon believes additional mitigation is not lawfully required. Accordingly, since Opponents have not shown that Poseidon acted with intent as required under Section 13105(a), and because Poseidon’s own actions counter Opponents’ implications that intent exists, the Executive Director should consider the Revocation Request to be patently frivolous and without merit.

2. No Intentional Submittal of Inaccurate, Erroneous or Incomplete Information. As discussed in detail in Section II(B) below, Opponents have falsely claimed that Poseidon submitted significant amounts of inaccurate, erroneous and/or incomplete information to the Commission, *but have not provided a single fact to support the claims in the Revocation*

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<sup>11</sup> See, e.g., Revocation Request, p. 9.

<sup>12</sup> As discussed below, this calculation error was not raised by Opponents as a basis for revocation, and therefore cannot be a basis for the Commission to revoke the CDP.

<sup>13</sup> See Exhibit B (Regional Board Order No. R9-2009-0038, at p. 11).

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**Request.** Contrary to Opponents' assertions, Poseidon provided the Commission with: (1) the full, accurate and complete set of existing impingement data from the existing Encina Power Station ("EPS") seawater intake facility; (2) full, accurate and complete information on the size, shape and location of the seawater intake facility and its existing seawater intake velocities under current EPS operations, and on Poseidon's predicted future seawater intake velocities if standalone operations occur; and (3) full, accurate and complete information on the Project's production capacity. There are no facts alleged in the Revocation Request supporting a finding that any of that information is inaccurate.

The sole issue (of which Commission staff already is aware), concerns a single estimated prediction of the average daily pounds of fish that could be impinged by the Project under potential future standalone conditions (the "Daily Impingement Estimate"). As part of the Flow, Entrainment and Impingement Minimization Plan ("Minimization Plan") Poseidon provided to the Commission in 2007, Poseidon's consultant calculated the Project's Estimated Daily Impingement based on the complete and accurate existing impingement data for EPS contained in the Minimization Plan. While the data presented in the Minimization Plan was accurate and complete, there was a math error in the consultant's calculation of the Daily Impingement Estimate in which the total amount of measured impingement at EPS was divided by 365 days rather than 52 weeks (the "Math Error"). In April 2008, Poseidon corrected the Math Error and provided a revised Daily Impingement Estimate to the Regional Board of only 3.43 pounds of fish per day. That Daily Impingement Estimate is *de minimis* and only slightly higher than the previous *de minimis* estimate of 2.12 pounds per day that resulted from the Math Error.<sup>14</sup> Both estimates remain consistent with the Commission's finding that the Project's impingement impacts would be *de minimis* and less than the daily diet of an adult pelican.<sup>15</sup> In addition, the Regional Board found, after reviewing the revised Daily Impingement Estimate, that Poseidon's mitigation obligations under the Commission's approved MLMP will fully mitigate any of the Project's impingement impacts.<sup>16</sup>

The Revocation Request says nothing about the Math Error described above. As discussed further in Section II(B)(1) below, since it does not raise the Math Error as a basis for revocation, ***the Math Error is therefore not at issue as part of the Revocation Request.***

Instead, the Revocation Request bases its claim of inaccurate information only on a completely false statement that Poseidon failed to provide the full data set of the observed impingement at EPS. To the contrary, the full data set of observed impingement measured by Tenera during 52 surveys conducted from June 2004 to June 2005 was filed with the Regional Board prior to the filing of Poseidon's CDP application, and was continuously available to Commission staff. In the unsuccessful lawsuit challenging the Commission's approval of the CDP, the Court specifically found that the complete data set was made available to the

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<sup>14</sup> See Exhibit C (May 5, 2009 Letter from Peter MacLaggan to Tom Luster, at p. 2).

<sup>15</sup> Findings – Coastal Development Permit Application E-06-013, page 47 of 133 (Adopted August 6, 2008).

<sup>16</sup> See Exhibit B (Regional Board Order No. R9-2009-0038, at p. 11).

Commission.<sup>17</sup> That complete data set (which includes all 52 data points in the Tenera Study) allowed both Regional Board and Commission staff to test and recalculate Poseidon's Daily Impingement Estimate, and in fact was used by Regional Board staff to detect the Math Error. Commission staff also analyzed that complete data set in determining the Project's impingement impacts, as demonstrated in the CDP's findings.<sup>18</sup>

The claim actually made in the Revocation Request is that Poseidon's "consultants 'intentionally' deleted data from the complete dataset."<sup>19</sup> That is not true. Opponents' claim does not relate to the actual impingement data set submitted to the Commission, and instead concerns a disagreement about Poseidon's methodology for calculating the Daily Impingement Estimate in proceedings before the Regional Board, not the Commission. First, because this methodology that excluded "outlier" data points (as described below) was never part of the Commission's proceedings, it cannot be the basis of a claim for CDP revocation. Second, it has been and remains Poseidon's view, and the view of its experts, that the most accurate methodology for calculating the Project's Daily Impingement Estimate should exclude 2 "outlier" data points (resulting from anomalous rainfall events) from the 52 total data points in order to accurately conduct the regression analysis used to make future predictions of Project impingement impacts. Poseidon and its experts consistently provided the rationale for this methodology in proceedings before the Regional Board, and while this was a contested issue in the Regional Board's hearings in 2009, the Board ultimately found it unnecessary to resolve whether Poseidon's methodology or some other methodology is a better way to calculate the Project's Daily Impingement Estimate.

The Revocation Request is not based on a claim of inaccurate information, but rather reflects the Opponents' disagreements with Poseidon's methodology for predicting the

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<sup>17</sup> In *Surfrider Foundation's* unsuccessful lawsuit challenging the Commission's approval of the CDP, the San Diego Superior Court specifically rejected *Surfrider's* claim that Poseidon had improperly "withheld" the Tenera Study from the Commission prior to its approval of the CDP. See **Exhibit D** (May 7, 2009 Statement of Decision, *Surfrider Foundation v. Cal. Coastal Comm., et al.*, Case No. 37-2008-00075727, at p. 4.) As such, Opponents are barred by the doctrine of res judicata from re-asserting this claim here. See *Fed. of Hillside and Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202-03 (holding that res judicata bars subsequent actions if "(1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding.").

<sup>18</sup> "Regarding Poseidon's expected impingement impacts, the project EIR at Section 4.3 and *Poseidon's 2004-05 study* described below showed that it would not cause impingement at levels beyond those caused by the power plant and that its use of the power plant intake would impinge about 20,000 fish per year (or about 55 per day) weighing a total of about 4500 pounds (or about 12 pounds per day). During the study period, however, most of this impingement – about 80% – was caused by power plant heat treatments, which Poseidon would not have to do as a stand-alone desalination facility. Therefore, Poseidon's impingement rate would be much less, averaging less than 2.5 pounds per day." (Findings – Coastal Development Permit Application E-06-013, pages 47 of 133. (Adopted August 6, 2008) (emphasis added).)

<sup>19</sup> Revocation Request, p. 5.

Daily Impingement Estimate in proceedings before the Regional Board. Because Opponents have not provided any substantiated facts to prove that Poseidon intentionally submitted inaccurate, erroneous or incomplete information to the Commission, the Executive Director should find the Revocation Request to be patently frivolous and without merit.

3. No Different Result. Opponents have not made the required showing that the Commission would have reached a different result. As discussed more in Section II(C) below, Opponents cannot make this showing because: (1) they have not raised any evidence of inaccurate, erroneous or incomplete information provided by Poseidon; (2) the revised Daily Impingement Estimate of 3.43 pounds of fish per day is only slightly higher than the prior estimate of 2.12 pounds of fish per day, which the Commission found would be “*de minimis* and insignificant”<sup>20</sup>; (3) pursuant to Coastal Act Section 30412(b), the Commission may not take any action in conflict with any determination by the Regional Board in matters relating to water quality or the administration of water rights, and the Regional Board considered Poseidon’s revised Daily Impingement Estimate and did not require mitigation acreage in excess of that required by the Commission in its Project CDP approvals; and (4) Opponents have not shown that any information about the Project’s impingement data set, intake velocity or production capacity was inaccurate or not already considered by the Commission. Moreover, the circumstances and facts surrounding those issues have not changed since the Commission approved the Project’s CDP and its mitigation plans, and there are no facts provided in the Revocation Request to suggest otherwise. Since the Revocation Request has not overcome this burden, the Executive Director should find the request to be patently frivolous and without merit.

In addition to failing to satisfy their administrative burden in the Revocation Request, Opponents’ request should also be found “patently frivolous and without merit” because Opponents have brought it with improper motive. In the context of judicial appeals, courts have found an appeal to be frivolous “when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment. . . .”<sup>21</sup> The Revocation Request admits that Opponents are pursuing revocation of Poseidon’s CDP not because the standards for revocation have been satisfied, but because Opponents had believed “the Commission would pursue a permit amendment . . . [and] would require Poseidon to come before it with a status update on “prior to” issuance and construction conditions of the CDP.”<sup>22</sup> Opponents also admit that when Commission staff decided not to impose those additional procedures on Poseidon and its CDP and “[u]pon learning the Commission did not intend to do so, Environmental Groups promptly pursued this request.”<sup>23</sup> As Commission staff is aware, revocation of a CDP is only appropriate

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<sup>20</sup> Findings – Coastal Development Permit Application E-06-013, page 47 of 133 (Adopted August 6, 2008). The revised Daily Impingement Estimate remains below “the average daily consumption of an adult pelican”, the *de minimis* standard advanced by Poseidon and relied upon by the Commission.

<sup>21</sup> *Avila v. Continental Airlines, Inc.* (2008)165 Cal.App.4th 1237, 1262.

<sup>22</sup> Revocation Request, p. 11.

<sup>23</sup> *Id.*

where specific regulatory requirements have been satisfied, and *not where a project opponent objects to Commission staff's procedural determinations.*

It is telling that Opponents have known about what they allege to be Poseidon's impingement "calculation error" since at least May 2009,<sup>24</sup> but that they chose not to seek revocation of the CDP for five months since they assumed the Commission would require a CDP amendment that would invariably delay Poseidon's Project. While Opponents claim that the grounds for revocation of the CDP have been satisfied, those claims belie Opponents' actual intent to delay the Project. The fact that Opponents have filed their Revocation Request while Poseidon is actively trying to obtain CDP issuance and commence construction authorized by it on or before the November 14, 2009 deadline set forth in Poseidon's CDP, and only after they learned that Commission staff would not require Poseidon to amend its CDP, demonstrates that Opponents are only seeking to delay or stop the Project, and not to inform the Commission of some alleged intentional misrepresentation by Poseidon (which would be impossible since no such intentional misrepresentation has occurred). *Seeking CDP revocation only for purposes of delaying or stopping a Project that Opponents do not like is an improper motive*, and therefore the Executive Director should also find the Revocation Request to be patently frivolous and without merit on that basis.

## II. OPPONENTS HAVE FAILED TO SHOW THAT THE GROUNDS FOR REVOCATION HAVE BEEN MET

Even if the Executive Director determines that the Revocation Request is not patently frivolous and without merit, which Poseidon contends it is, based on the facts before the Commission the Executive Director must conclude that the grounds for revocation do not exist and recommend denial. As discussed in Section I above, Section 13105(a) of the CCC Regulations is divided into three elements: (1) that the applicant intentionally submitted inaccurate, erroneous or incomplete information to the Commission; (2) that the information intentionally submitted is in fact inaccurate, erroneous or incomplete; and (3) that the Commission would have required additional or different conditions or denied the CDP had accurate and complete information been submitted. For the following reasons, the Revocation Request fails to demonstrate that any of those three grounds have been satisfied.

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<sup>24</sup> Revocation Request, p. 11. However, as discussed above, the "calculation error" Opponents claim to rely upon was never part of the CDP process before the Commission, and is actually a part of the methodology used by Poseidon's expert to calculate the Project's Daily Impingement Estimate that excludes two anomalous rainfall events that do not reflect actual impingement from the seawater intake. Poseidon continues to believe this is an appropriate methodology to use in making impingement predictions, consistently explained this methodology in proceedings before the Regional Board, and the methodology has been available since April 2008 (and was resubmitted to the Regional Board on February 2, 2009 for its February 2009 hearing).

**A. Opponents Have Not Demonstrated Intent**

See Section I(1), above. Opponents have not provided a single fact to demonstrate that Poseidon acted with intent to submit inaccurate, incomplete or erroneous information to the Commission. Since this is a required finding under CCC Regulations Section 13105(a), and it has not been met, the Executive Director cannot determine that the grounds for revocation exist.

**B. Opponents Have Not Demonstrated That Poseidon Intentionally Submitted Inaccurate, Erroneous Or Incomplete Information**

As summarized in Section I(2) above and discussed in detail below, the Revocation Request does not demonstrate the “[i]ntentional inclusion of inaccurate, erroneous or incomplete information in connection with . . .” Poseidon’s CDP application.<sup>25</sup> Opponents falsely claim Poseidon intentionally submitted inaccurate, erroneous or incomplete information regarding three issues: the Project’s impingement impacts; the Project’s intake velocity; and the Project’s production capacity. Contrary to those assertions, the Project’s impingement data, intake velocity and production capacity provided by Poseidon were all accurate and complete.

The only inaccuracy Opponents could have raised, *but did not raise in the Revocation Request*, concerns the Math Error.<sup>26</sup> Once Poseidon learned of the Math Error, it submitted a revised Daily Impingement Estimate in April 2008, and the resulting estimate of 3.43 pounds of fish per day was still *de minimis* and only slightly higher than the prior *de minimis* estimate of 2.12 pounds of fish per day. Both estimates were based on the complete June 2004 to June 2005 data set that was before the Commission and used by the Commission in evaluating the Project’s impingement impacts.<sup>27</sup>

The Revocation Request does not raise or rely on the Math Error, but instead falsely characterizes as inaccurate Poseidon’s expert’s methodology for calculating the Daily Impingement Estimate using the EPS data set of observed impingement from June 2004 to June 2005. That methodology was only at issue in proceedings before the Regional Board. As Commission staff is aware, based on facts and information already in the Project’s administrative record and at staff’s disposal, Opponents have not raised a single fact that indicates that Poseidon submitted any inaccurate, erroneous or incomplete information, and therefore Opponents have failed to satisfy this ground for revocation.

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<sup>25</sup> CCC Regulations § 13105, subd. (a).

<sup>26</sup> Contrary to claims in the Revocation Request (see Revocation Request, p. 5, fn. 1), the Math Error is the only inaccuracy to which Poseidon has admitted.

<sup>27</sup> See Findings – Coastal Development Permit Application E-06-013, pages 47 of 133. (Adopted August 6, 2008)

1. The Commission Had The Complete Impingement Data Set

The Revocation Request claims that Poseidon intentionally “failed to provide Commission staff with the full impingement dataset.”<sup>28</sup> That claim is false. Poseidon provided complete and accurate impingement data both to the Commission and the Regional Board. Only the single Math Error based on that data was inaccurate. As Poseidon explained in its May 5, 2009 letter to Commission staff, attached hereto as Exhibit C, the projected impingement impacts Poseidon provided to the Commission were:

“[B]ased on data collected at the Encina Power Station seawater intake from June 1, 2004 to May 31, 2005 and set forth in the May 2007 Tena Environmental Study. A summary of this study was submitted to the Coastal Commission in June 2007 as part of the Project’s Revised Flow, Entrainment, and Impingement Minimization Plan, and it contained data concerning the total amount of impingement measured by Tena during the study. The study data remains accurate to this date.”<sup>29</sup>

Poseidon provided a full copy of the 2007 Tena Environmental Study to the Commission in March 2008 in compliance with CDP Special Condition 8(a), which required “[d]ocumentation of the Project’s expected impacts to marine life due to entrainment and impingement caused by the facilities intake of water from Agua Hedionda Lagoon.” This Study contained the full data set of impingement measured in 52 separate observations by Tena from June 2004 to June 2005 (the “Tena Study Data Set”). None of the 52 observations contained in the Tena Study Data Set were withheld or deleted from any submission to the Commission. At all times Poseidon has used its best efforts to provide complete and accurate information to the Commission, and at no time did Poseidon intend to provide inaccurate information. As Poseidon has consistently maintained, and is re-confirming with this letter, the Tena Study Data Set Poseidon provided to both the Commission and the Regional Board is complete and accurate.

Instead, and as Poseidon explained in its May 5, 2009 letter, Regional Board staff determined on April 17, 2008 that there was a Math Error in Poseidon’s consultant’s calculations using the Tena Study Data Set, which produced a “minor underestimation of the Project’s impingement” concerning Daily Impingement Estimate.<sup>30</sup> The fact that Regional Board staff ascertained the Math Error by conducting its own calculations using the Tena Study Data Set underscores that the data Poseidon provided to the Commission and the Regional Board to conduct those confirming calculations was accurate and contradicts any claim that inaccurate data was intentionally submitted. On April 30, 2008, Poseidon provided Regional Board staff with a revised Daily Impingement Estimate using 50 of the 52 data points contained in Tena Study Data Set, and explained that Poseidon and its experts believe 2 of the 52 data points are “outliers.”

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<sup>28</sup> Revocation Request, p. 5.

<sup>29</sup> Exhibit C (May 5, 2009 Letter from Peter MacLaggan to Tom Luster, at p. 2).

<sup>30</sup> *Id.*

While Poseidon and Regional Board staff disagreed about whether the 2 “outlier” data points should be included in arriving at the Daily Impingement Estimate, both the Regional Board and the Commission had access to those data points, which were contained in the Tenera Study Data Set Poseidon submitted to both agencies. Accordingly, even though there was a debate among experts about how the Tenera Study Data Set should be used to calculate the Daily Impingement Estimate, at no point did Poseidon intentionally include “inaccurate, erroneous or incomplete” information about its impingement data in connection with the CDP or Poseidon’s Regional Board proceedings. To the contrary, Poseidon clearly explained how it used the Tenera Study Data Set in calculating the Daily Impingement Estimate, and the Regional Board relied on the Tenera Study Data Set in approving the Project’s Minimization Plan on May 13, 2009.<sup>31</sup> Therefore, there is no merit to Opponents’ claims that Poseidon withheld the complete and accurate data set. Opponents simply disagree with the methodology used by Poseidon’s expert, and this disagreement has nothing to do with any alleged inaccurate or incomplete data provided to the Commission.

Ultimately, the Regional Board considered the revised Daily Impingement Estimate and approved Poseidon’s Minimization Plan in May 2009. In doing so, the Regional Board did not require Poseidon to provide any additional mitigation acreage to compensate for any increased impingement or other marine life impacts above the 55.4 acres required in the Commission’s approved MLMP. Despite this fact, Poseidon voluntarily agreed to provide 11 acres of additional wetland restoration mitigation for the Project due to Commission staff’s representation that providing 11 acres would fully address Commission staff’s concerns about the methodology used to calculate the Daily Impingement Estimate and the Regional Board’s conclusions that no additional mitigation was needed for predicted impingement impacts. That voluntary offer demonstrates that any submission of the Math Error to the Commission was not intentional, because Poseidon was willing to provide compensation to address Commission staff’s concerns even though the Regional Board did not require it to do so and Poseidon believes the additional mitigation is not necessary and could not have been lawfully required by the Commission.

## 2. Project Intake Velocities Have Not Changed

Opponents also falsely claim that Poseidon’s intake velocities have changed since the Commission approved the Project’s CDP in November 2007, and that change in velocities “reveals Poseidon’s intentional submission of inaccurate, incomplete and erroneous information in connection with its CDP application.”<sup>32</sup> Opponents’ claims are wrong for several reasons:

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<sup>31</sup> See, e.g., Exhibit E attached hereto (Excerpt from Responsiveness Summary Including Responses to Comments for Order R9-2009-0038, at p. 11 (“the CDP’s impingement projection was calculated using data collected pursuant to the EPS’s Regional Board-approved 316(b) Impingement Mortality and Entrainment Characterization Study plan. Tenera collected 52 impingement samples on a weekly basis from June 24, 2004 to June 15, 2005.”)).

<sup>32</sup> Revocation Request, p. 9.

- First, the Project's intake velocities remain consistent with the intake velocities provided to and analyzed by the Commission. In Poseidon's November 7, 2007 response to the Commission's Staff Report, Poseidon again confirmed that "Poseidon has documented that the velocity of the water at the entrance to the bar racks is below 0.5 feet per second. Therefore the proposed operation would be consistent with what the U.S. EPA considers to be 'best available technology' for cooling water intakes." (Poseidon Resources, November 7, 2007 Response to Staff Report, Exh. A at p. 10.) Poseidon maintains that the intake velocities at the Project's intake bar racks remain below 0.5 feet per second.
- Second, in determining that Project intake velocities could be higher than 0.5 feet per second in connection with Poseidon's proceedings before the Regional Board, it appears that Commission staff calculated the velocity at the wrong location. The Project's "intake" or the "entrance to the bar racks" is shown in attached **Exhibit F**. This is the location that Poseidon used to calculate the water velocity that provided the basis for the projected 0.5 feet per standalone standard included in the Commission's findings. It is also the location where the entrainment samples were collected during the 2004-05 Tenera Environmental Study. Poseidon confirmed that it would be able to operate at or below this velocity for tidal conditions from mean lower-low water (MLLW)<sup>33</sup> through mean higher-high water (MHHW)<sup>34</sup>. The depth of water at the entrance to the intake ranges from 12.3 feet at MLLW to 17.6 feet at MHHW. The average depth over all tidal cycles (mean sea level or MSL) is 15.0 feet. The width of the intake structure at this location is 79 feet.

While the Commission staff stated that the velocity of the water could be up to 250% higher than the originally stated 0.5 feet per second, staff reached this determination by arbitrarily moving the point of measurement downstream of the entrance to the bar racks to a location where the cross-sectional area of the channel is considerably smaller than that at the entrance to the bar racks.

There is a direct relationship between the cross-sectional area of the channel through which the water is flowing and the velocity of a given volume of water in that channel:

$$\text{Velocity (ft/s)} = \text{Flow (Ft}^3\text{/s)} / \text{cross-sectional area of channel (ft}^2\text{)}$$

This means that the smaller the cross-sectional area of the intake, the higher the velocity for a given volume of water. Given this relationship, it is no surprise that Commission staff found that the velocity of water would be higher. The channel cross-section at Commission staff's measurement point is less than half that at the entrance to the bar racks; so one would expect the velocity to more than double.

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<sup>33</sup> Mean low-low water (MLLW) is defined as the average of the lowest water level each day averaged over a specific 19-year tidal epoch, currently defined as the years 1983-2001.

<sup>34</sup> Mean higher-high water (MHHW) is similarly defined, except that the highest water readings for each day are averaged.

The estimated velocity of the water at the entrance to the bar racks under the Project's standalone operations is summarized in Table 1 below for the full range of tidal conditions analyzed. This is the appropriate measurement of the Project's intake velocities, which have not changed since the Commission considered the CDP.

Operating Condition	Flow (MGD)	Flow (Ft <sup>3</sup> /sec)	Channel Width (Ft)	Channel Depth (Ft)	Velocity (Ft/sec)
MHHW	304	470	79	17.6	0.34
MSL	304	470	79	15.0	0.40
MLLW	304	470	79	12.3	0.48

- Third, it appears that Commission staff's calculations also understate the elevation of the Lagoon at the mid-point in the tidal cycle. Commission staff identified 0.00 feet MLLW as the mid-point in the tidal cycle. The actual mid-point in the tidal cycle is +2.73 MLLW. Also known as mean sea level (MSL), this number represents the average sea surface elevation in the vicinity of the proposed Project (as measured at the nearby Scripps Pier tide gage, NOAA # 931-0230). The significance of this mistake is that for average standalone operating conditions, the Commission staff underestimated the depth of the water at the intake and overstated of the velocity of the water by 22%. In addition, Commission staff incorrectly assigned extreme water elevations in the lagoon. Extreme high water level in the lagoon is + 7.83 ft MLLW, not +7.2 ft MLLW as assumed in their calculations, (NOAA, 2006; Jenkins and Wasyl, 2007), resulting in a 9% inflation of the lowest expected velocity extreme during high tides.

In addition, Opponents also claim that Poseidon's CDP required it to obtain an incidental take permit from the National Marine Fisheries Service ("NMFS") as a "safeguard" to ensure that it complies with EPA's "best available technologies", but that is not accurate. CDP Special Condition 4 requires that Poseidon "shall submit to the Executive Director for review and approval documentation showing that the project has obtained final approvals for project construction and operation from the . . . National Marine Fisheries Service . . . or documentation showing that these approvals are not needed." On October 1, Commission staff confirmed that the January 12, 2009 NMFS letter (stating that Poseidon would not need a permit because the Encina Power Station has applied for an incidental take permit) complies with this requirement. Accordingly, Poseidon has complied with all CDP requirements for approvals from NMFS.

Accordingly, and for the foregoing reasons, Poseidon's submittals to the Commission regarding the Project's intake velocities remain accurate, complete and consistent, and Opponents' arguments to the contrary have no merit.

3. Project Production Capacity Has Not Changed

Opponents also claim that Poseidon's submission to the California Infrastructure and Economic Development Bank demonstrates "a clear intention to expand the capacity of the Project" and therefore that Poseidon's project description "intentionally included incomplete information, and was inaccurate."<sup>35</sup> Opponents' claims are false. None of the modifications to the Project approved by the City of Carlsbad would allow for increased production (or increased coastal resource impacts) above the level reviewed by the Commission. The Project as revised would continue to produce approximately 50 MGD of potable water from 304 MGD of seawater with no change in capacity. Poseidon reaffirmed this fact to the City of Carlsbad in its proceedings on the Project's modifications.<sup>36</sup> Consequently, the proposed modifications do not change impacts to Coastal resources as no increase in plant seawater intake or discharge or change to the desalination process is proposed. Further, as Commission staff is aware, Special Condition # 9 in the Project's CDP limits Poseidon's intake to an average flow of 304 MGD "during the life of the project" unless a CDP amendment is obtained. Poseidon is not seeking a capacity increase above the permitted 304 MGD, and the Project and its treatment process and discharge have been designed around this 304 MGD requirement. Accordingly, the Project (including its intake, treatment and discharge processes) continues to fall within the environmental envelope analyzed by the Commission when it approved the Project's CDP, and no CDP amendment is required. Therefore, Opponents' claims that Poseidon's project description is inaccurate, erroneous or incomplete are wrong, and Opponents have not provided any basis for revoking Poseidon's CDP.

C. Opponents Have Not Shown That The Commission Would Have Reached A Different Result

A third element the Opponents must prove to establish grounds for revocation is that the Commission would have reached a different result. Even if Poseidon intentionally submitted inaccurate, erroneous or incomplete information to the Commission, which it did not, under CCC Regulations Section 13105(a), the standard for revocation requires:

"Intentional inclusion of inaccurate, erroneous or incomplete information in connection with a coastal development permit application *where the Commission finds that accurate and complete information would have caused the commission to require additional or different conditions on a permit or to deny an application . . .*" (emphasis added).

Opponents cannot make this showing because: (1) they have not raised any evidence of inaccurate, erroneous or incomplete information provided by Poseidon; (2) the revised Daily Impingement Estimate of 3.43 pounds of fish per day is only slightly higher than the prior

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<sup>35</sup> Revocation Request, p. 10.

<sup>36</sup> Latham & Watkins September 14, 2009 Response to Coast Law Group August 19, 2009 Comment Letter to City of Carlsbad Planning Commission, at p. 17 (attached hereto as **Exhibit G**).

estimate of 2.12 pounds of fish per day, and is still consistent with the Commission's finding that the Project's impingement impacts would be *de minimis* and less than the daily diet of an adult pelican; (3) pursuant to Coastal Act Section 30412(b), the Commission may not take any action in conflict with any determination by the Regional Board in matters relating to water quality or the administration of water rights, and the Regional Board considered Poseidon's corrected impingement estimate prior to approving the Project's Minimization Plan on May 13, 2009, and did not require mitigation acreage in excess of that required by the Commission in its Project approvals; and (4) Opponents have not shown that any information about the Project's impingement data set, intake velocity or production capacity was inaccurate or not already considered by the Commission, the circumstances and facts surrounding those issues have not changed since the Commission approved the Project's CDP and its mitigation plans, and there are no facts provided in the Revocation Request to suggest otherwise.

Opponents' hollow allegations in the Revocation Request are not supported by the evidence and cannot lead to a conclusion that the Commission would have taken a different action. Specifically, the Commission already found that the prior estimate of 2.12 pounds of fish per day impinged was "*de minimis* and insignificant", in part due to the fact that it is "less than the average daily consumption of an adult pelican".<sup>37</sup> The revised Daily Impingement Estimate of 3.43 pounds of fish per day remains *de minimis*, and is still less than the average daily consumption of an adult pelican.<sup>38</sup> Opponents have provided no facts that demonstrate the Commission would have reached a different result.

In addition, as Poseidon previously has explained to Commission staff, Poseidon believes that the Regional Board's Minimization Plan approval provides full mitigation for all Project entrainment and impingement impacts, and that the Commission does not have the authority to impose marine life mitigation obligations on the Project that are inconsistent with the Regional Board's action, which requires Poseidon to provide up to 55.4 acres of wetland restoration mitigation. Specifically, Coastal Act Section 30412(b) does not allow the Commission to "modify, adopt conditions or take any action in conflict with any determination by . . . any California regional water." The Regional Board considered the revised Daily Impingement Estimate of 3.43 pounds of fish per day, and determined that Poseidon does not need to provide any mitigation acreage above the 55.4 acres already required in the Commission's MLMP approval.<sup>39</sup> Opponents have not and cannot show that the Commission would take an action in conflict with Coastal Act Section 30412(b).

Finally, all other issues discussed in the Revocation Request were considered by the Commission, and there is no evidence that any of those issues would have caused the Commission to require additional or different conditions or to deny the CDP. Therefore, the

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<sup>37</sup> See Findings – Coastal Development Permit Application E-06-013, page 47 of 133.

<sup>38</sup> An adult pelican may eat up to 1.8 kg (3.78 pounds) of fish per day. See San Diego Zoo Animal Bytes, Pelican. Available at: [www.sandiegozoo.org/animalbytes/t-pelican.html](http://www.sandiegozoo.org/animalbytes/t-pelican.html)

<sup>39</sup> See Exhibit B (Regional Board Order No. R9-2009-0038, at p. 11).

required finding that the Commission would have acted differently cannot be met and the Revocation Request must be denied.

### III. OPPONENTS' SIGNIFICANT DELAY IN BRINGING THE REVOCATION REQUEST REQUIRES DENIAL

Opponents' Revocation Request provides clear evidence that they were aware of the issues raised in the request as early as May 13, 2009 by explaining "the existence of grounds for revocation has only recently come to light. Poseidon's Flow Plan was not approved until May 13, 2009 . . ." <sup>40</sup> The CCC Regulations provide "[i]f the commission finds that the request for revocation was not filed with due diligence, *it shall deny the request.*" <sup>41</sup> It is clear from Opponents' admission that they have not proceeded with due diligence since they have known about any and all issues raised in Poseidon's Regional Board proceedings for five months. The fact that Poseidon submitted Project information to the California Infrastructure and Economic Bank in September 2009 is not relevant to the Revocation Request because, as discussed in Section II(B)(3) above, the Project's production capacity has not changed and is expressly capped by CDP Special Condition # 9, and Opponents cite to no facts in that submission that are relevant to the grounds for revocation. Therefore, given Opponents' delay and the fact that it appears the Opponents have submitted the request with the improper motive to delay and stop the Project as discussed in Section II above, the Commission is required to deny the request.

### IV. THERE IS NO BASIS TO SUSPEND THE CDP

The legal requirement for suspending the Permit cannot be met because: (1) the Executive Director is not initiating revocation proceedings on his or her own motion; and (2) as discussed in Sections I and II above, there is no basis for the Executive Director to recommend revocation. The standard for suspension of the Permit presents a very high bar. In order to suspend the CDP under CCC Regulations Section 13107, the Executive Director must affirmatively determine "that grounds exist for revocation of a permit." Unlike the standard for setting a revocation request for hearing, which requires a review of the request and a determination of whether it is "patently frivolous and without merit," in order to suspend a CDP, the Executive Director must engage in an affirmative analysis and determine that the grounds do in fact exist for revocation, meaning that staff must be prepared to recommend revocation.

Not only do the grounds not exist for revocation and suspension, Opponents cannot even meet the "patently frivolous and without merit" standard for setting a revocation hearing. The Opponents have failed to provide any real evidence to meet their burden that the grounds for revocation exist. First, Opponents have provided no evidence to establish the requisite intent. Second, Opponents have not raised any basis or provided any evidence that Poseidon submitted "inaccurate, erroneous or incomplete" information to the Commission. Finally, there is no evidence that a different result would have been reached. Opponents have the burden to

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<sup>40</sup> Revocation Request, p. 11.

<sup>41</sup> CCC Regulations § 13108, subd. (d) (emphasis added)

establish all three prongs of the revocation test. They have failed to meet their burden on any of them. Because Opponents cannot even meet the lower standard for setting a revocation hearing, it is legally impossible to meet the much higher bar of affirmatively recommending revocation in order to suspend the CDP. Therefore, the CDP cannot be suspended.

We also note that even if grounds to revoke and suspend the CDP existed under the Commission's existing regulations, which they clearly do not, any "automatic suspension" of the CDP without Commission or judicial review would violate Poseidon's procedural due process rights. Poseidon has acquired a fundamental vested right in the Coastal Commission's November 2007 CDP approval, as it has invested substantial money and resources in reliance on that final approval.<sup>42</sup> Case law is clear that important rights, such as a medical or other professional license or permit, cannot be suspended automatically upon a mere allegation or claim.<sup>43</sup> Because of its vested right, Poseidon is entitled to a hearing before a nonbiased decision maker before any suspension can occur.<sup>44</sup> Commission regulations should be interpreted in a manner which does not conflict with procedural due process rights, and therefore, automatic suspension should not be considered.

**V. POSEIDON RESPECTFULLY REQUESTS THAT THE EXECUTIVE DIRECTOR FIND THE REVOCATION REQUEST PATENTLY FRIVOLOUS AND WITHOUT MERIT OR CALENDAR THE REVOCATION HEARING AT THE COMMISSION'S NOVEMBER MEETING**

The burden is on the Opponents to meet the standard for revocation and suspension. The Opponents have failed to meet this burden and therefore the requests must be denied. If, however, the Executive Director decides to set a hearing on the Revocation Request, Poseidon requests that the request be set for hearing in November 2009, consistent with the requirements in the CCC Regulations. Specifically, CCC Regulations Section 13108(a) provides:

*"At the next regularly scheduled meeting, and after notice to the permittee and any persons the executive director has reason to know would be interested in the permit or revocation, the executive director shall report the request for revocation to the*

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<sup>42</sup> See *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1526 ("When an administrative decision affects a right which has been legitimately acquired or is otherwise vested, and when that right is of a fundamental nature from the standpoint of its economic aspect or its effect... then a full and independent judicial review of that decision is indicated because the abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction.").

<sup>43</sup> See, e.g., *Goat Hill Tavern*, 6 Cal.App.4th at 1525 ("If an administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence..."); *Raley v. California Tahoe Regional Planning Agency* (1977) 68 Cal.App.3d 965, 975; *Santa Monica Pines, Ltd. v. Rent Control Board* (1984) 35 Cal.3d 858, 866.

<sup>44</sup> Courts have also upheld this procedural due process right in other contexts (See, e.g., *Gray v. Superior Court* (2005) 125 Cal. App. 4th 629 (holding that professional licenses cannot be immediately suspended without due process, and a showing of danger to the public requiring immediate suspension).)

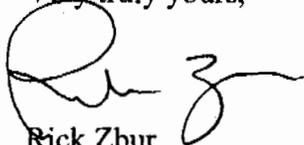
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commission with a preliminary recommendation on the merits of the request.” (Emphasis added.)

Since Opponents waited to submit the Revocation Request until late in the afternoon on October 9, 2009 (the last day of the Commission’s October meeting), the next regularly scheduled Commission meeting is from November 4-6 in Long Beach, California. If the Executive Director chooses to proceed with a revocation hearing, Poseidon requests that the matter be set for the November hearing in compliance with the CCC Regulations. For Commission staff’s convenience, Poseidon has attached as **Exhibit H** a complete notification list, and is prepared to send out a notification at Commission staff’s instruction.

In sum, Opponents have known about all issues in the Revocation Request since at least May 2009, and the request neither raises any new issues that were not already known, nor satisfies the three prongs for revocation set forth in the CCC Regulations. Accordingly, and for the reasons set forth above, the Revocation Request is a frivolous and completely meritless attempt to delay Poseidon’s Project, and we therefore request that you decline to set the Revocation Request for hearing. We also respectfully request that you deny the request for suspension, which has no basis in law or in fact. Finally, if the Executive Director determines that a revocation hearing is necessary, Poseidon respectfully requests that the hearing be scheduled in November 2009, as required by the CCC Regulations.

Very truly yours,



Rick Zbur  
of LATHAM & WATKINS LLP

Attachments

cc: Tom Luster  
Peter MacLaggan

# California Business Portal

Secretary of State DEBRA BOWEN

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<b>Corporation</b>		
COASTAL ENVIRONMENTAL RIGHTS FOUNDATION		
<b>Number:</b> C3117149	<b>Date Filed:</b> 10/17/2008	<b>Status:</b> active
<b>Jurisdiction:</b> California		
<b>Address</b>		
1140 S COAST HWY 101		
ENCINITAS, CA 92024		
<b>Agent for Service of Process</b>		
MARCO A GONZALEZ		
1140 S COAST HWY 101		
ENCINITAS, CA 92024		

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If the status of the corporation is "Surrender", the agent for service of process is automatically revoked. Please refer to California Corporations Code Section 2114 for information relating to service upon corporations that have surrendered.

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**

**SAN DIEGO REGION**

9174 Sky Park Court, Suite 100  
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<http://www.waterboards.ca.gov/sandiego>

**ORDER NO. R9-2009-0038  
AMENDING  
ORDER NO. R9-2006-0065 (NPDES NO. CA0109223)  
WASTE DISCHARGE REQUIREMENTS FOR  
THE POSEIDON RESOURCES CORPORATION  
CARLSBAD DESALINATION PROJECT  
DISCHARGE TO THE PACIFIC OCEAN VIA  
THE ENCINA POWER STATION DISCHARGE CHANNEL**

The California Regional Water Quality Control Board, San Diego Region (hereinafter Regional Board), finds that:

1. On August 16, 2006, the Regional Board adopted Order No. R9-2006-0065 (NPDES No. CA0109223) (Order No. R9-2006-0065) establishing waste discharge requirements for Poseidon Resources Corporation (Discharger or Poseidon) to discharge up to 57 million gallons per day (MGD) of a combined waste stream comprised of concentrated saline waste seawater and filter backwash wastewater from the Carlsbad Desalination Project (CDP) into the Pacific Ocean via the Encina Power Station (EPS) cooling water discharge channel. Intake source water from Agua Hedionda Lagoon (AHL) is to be drawn in through the existing EPS intake structure. The total flow rate of source water needed to operate the CDP at full production was determined to be 304 million gallons per day, in order to produce 50 MGD (MGD) of potable water. Of this source water, 107 MGD will be used for the production of 50 MGD of potable water (and 57 MGD of wastewater). The remaining 197 MGD of source water not used for production is needed as dilution water to comply with the salinity requirements of the NPDES Permit. This results in a total discharge flow rate of 254 MGD (57 MGD of wastewater and 197 MGD of dilution water).
2. Section 13142.5(b) of the California Water Code requires new or expanded coastal industrial facilities using seawater for cooling, heating, or industrial processing, to use the best available site, design, technology, and mitigation measures feasible to minimize the intake and mortality of all forms of marine life.
3. Section VI.C.2.e. of Order No. R9-2006-0065 requires Poseidon to submit for Regional Board approval, within 180 days of adoption, a Flow, Entrainment and Impingement Minimization Plan (Minimization Plan) that "shall assess the feasibility of site-specific plans, procedures, and practices to be implemented and/or mitigation measures to minimize the impacts to marine organisms when the CDP intake requirements exceed the volume of water being discharged by the EPS." The Order requires an approved Minimization Plan to ensure that the CDP complies with section 13142.5(b) of the Water

Code when the CDP is co-located with EPS, but CDP's intake requirements exceed the volume of water being discharged by EPS under power generation operations ("co-location operation for CDP benefit"). Co-location operation for CDP benefit can occur under conditions (1) when EPS is temporarily shut down or (2) when EPS is operating but its discharge volume is not sufficient to meet CDP's intake requirements.

4. If EPS permanently ceases operations and the Discharger proposes to independently operate the existing EPS seawater intake and outfall for the benefit of the CDP ("stand-alone operation"), it will be necessary to evaluate whether, under those conditions, the CDP complies with the requirements of Water Code section 13142.5(b). Additional review will be necessary in part because under stand-alone operations, the Discharger will have more flexibility in how it operates the intake structure and outfall and additional and/or better design and technology features may be feasible. The Discharger will be required to submit a new Report of Waste Discharge to the Regional Board for authorization to operate in stand-alone mode, and shall seek review under CWC section 13142.5(b) for such stand-alone operation, with permanent shut down of the EPS facility, within 90 days after EPS provides written notice to the California Independent System Operator of its intent to shutdown permanently all of its generating units.
5. The Discharger anticipates that there may be times when one or more units at EPS are temporarily shutdown and not operating the seawater intakes for power generation operations. As discussed in Findings 29 and 38, the Discharger proposes to implement certain technology and design features during times of temporary shutdown. It is possible that under prolonged, but not permanent, EPS shutdown, additional technology or design features to further reduce intake and mortality of marine organisms could become available for implementation. The Discharger will be required to submit a technical report to the Executive Officer for review and approval evaluating the feasibility of any additional design or technology features within 45 days of being notified by EPS that all generating units will be non-operational for power production, without seawater intake for power production purposes, and unavailable to be called upon by the California Independent System Operator to produce power for a period of 180 consecutive days or more. If the Discharger identifies additional measures that could be implemented under such conditions, the Executive Officer may require the Discharger to implement them as soon as reasonably practicable for the duration of the prolonged period of temporary shutdown.
6. On February 13, 2007, the Discharger submitted a draft Minimization Plan dated February 12, 2007, intended to comply with Order R9-2006-0065. On June 29, 2007, in response to Regional Board and interested persons' comments, the Discharger submitted a revised Minimization Plan, dated June 1, 2007. The Regional Board reviewed the revised Minimization Plan, and in a letter dated February 19, 2008, informed the Discharger that the revised Minimization Plan was incomplete and included a detailed listing of items that needed to be addressed before the Regional Board could approve the revised Minimization Plan.

7. On March 7, 2008, the Discharger submitted an updated version of the revised Minimization Plan, dated March 6, 2008.
8. On April 9, 2008, in a public meeting, the Regional Board adopted Resolution No. R9-2008-0039. The Regional Board determined that the revised Minimization Plan did not satisfy all of the requirements in Section VI.C.2.e. of Order No. R9-2006-0065, but conditionally approved the Plan subject to the conditions (1) that within six months, the Discharger submit an amended Minimization Plan that includes a specific proposal for mitigation of the impacts, by impingement and entrainment upon marine organisms resulting from the intake of seawater from Agua Hedionda Lagoon and (2) that the amended Plan address the items outlined in the February 19, 2008 letter to Poseidon and the following additional concerns:
  - a) Identification of impacts from impingement and entrainment;
  - b) Adequate monitoring data to determine the impacts from impingement and entrainment;
  - c) Coordination among participating agencies for the amendment of the Plan as required by Section 13225 of the California Water Code;
  - d) Adequacy of mitigation; and
  - e) Commitment to fully implement the amendment to the Plan.
9. Following the April 9, 2008 meeting, there was coordination among various state agency staff, including the Regional Board staff and the Discharger worked to develop the Marine Life Mitigation Plan (MLMP). The MLMP was heard by the Coastal Commission in August, 2008, and final language was agreed to between the Coastal Commission staff and the Discharger on or about November 7, 2008.
10. On November 18, 2008, the Regional Board received the MLMP, dated November 14, 2008, as an amendment to the March 6, 2008, Minimization Plan. The Discharger intended the MLMP to satisfy the conditions in Resolution No. R9-2008-0039.
11. On February 11, 2009, in a public meeting, the Regional Board was scheduled to consider whether the MLMP satisfied the conditions established in Resolution No. R9-2008-0039 or whether failure to satisfy the conditions rendered the Resolution inoperative by its own terms. At the commencement of the meeting, the Executive Officer identified a list of outstanding issues concerning the March 6, 2008 Minimization Plan, as supplemented by the MLMP. The outstanding issues were identified as follows: "(1) Placing Regional Water Board and its Executive Officer on equal footing, including funding, with Coastal Commission and its Executive Director, in the MLMP, while minimizing redundancies (e.g., only one Scientific Advisory Panel), with details of dispute resolution process to be worked out; (2) Reducing the number of sites to five, in consultation with the Coastal Commission, with the existing proviso that other sites within

the Regional Board boundaries could be added.; (3) Poseidon to provide the flow-proportioned calculations for Poseidon's impacts due to impingement, to help support the Board's determination that these impacts are *de minimis*.; and (4) Poseidon to provide a consolidated set of all requirements imposed to date by the various agencies."

12. The Regional Board heard public comment at the February 11, 2009 hearing, but with the concurrence of the Discharger, continued the matter to its April 8, 2009 meeting. The Regional Board directed staff to work with the Discharger to expeditiously address the list of the outstanding issues identified by the Executive Officer and further directed staff to prepare for Regional Board consideration a resolution or order approving the Flow, Entrainment, and Impingement Minimization Plan required by Order No. R9-2006-0065.
13. Following the February 11, 2009 meeting, Regional Board staff and the Discharger met on numerous occasions to discuss the outstanding issues. On March 9, 2009, the Discharger submitted a further revised Minimization Plan, including the MLMP, for Regional Board consideration. On March 27, 2009, the Discharger submitted revisions to the March 9, 2009 Minimization Plan. The March 9, 2009 Minimization Plan, as revised on March 27, is hereinafter referred to as the March 27, 2009 Minimization Plan.
14. The Regional Board reviewed the March 27, 2009 Minimization Plan to determine whether its implementation will result in the "use [of] the best available site, design, technology, and mitigation measures feasible to minimize the intake and mortality of all forms of marine life" under co-location operation for CDP benefit.

#### SITE

15. Chapter 2 of the March 27, 2009 Minimization Plan addresses identification of the best available site feasible for the CDP to minimize the intake and mortality of marine life under conditions of co-location operation for CDP benefit.
16. The CDP will be co-located with EPS and use EPS's existing intake and discharge facilities, which draw cooling water from AHL and discharge into the Pacific Ocean.
17. The Discharger has defined four fundamental project objectives for the CDP: (1) to provide a local and reliable source of potable water not subject to variations of drought or political or legal constraints; (2) to reduce local dependence on imported water; (3) to provide water at or below the cost of imported water supplies; and (4) to meet the CDP's planned contribution of desalinated water as a component of satisfying regional water supply planning goals.
18. Co-locating the CDP with EPS allows the CDP to use the existing EPS intake and discharge facilities. Using EPS's existing intake and discharge facilities allows the CDP to minimize the intake and mortality of marine life by reducing the amount of source water

required to be withdrawn directly from AHL for desalination purposes by the amount of water discharged by EPS.

19. By co-locating with the EPS, the CDP will use the wastewater stream discharged by the EPS as its first source of water. The discharge of the EPS wastewater to the Pacific Ocean is subject to R9-2006-0043, a NPDES permit issued to Cabrillo Power I LLC by the Regional Board. The Discharger's proposed beneficial reuse of EPS's discharge water is a form of conservation of water resources through water recycling expressly encouraged by the State of California.
20. The Discharger evaluated three sites in the City of Carlsbad that would accommodate a large desalination project. These sites include (1) other locations on the EPS property, (2) the Encina Water Pollution Control Facility, and (3) the Maerkle Reservoir.
21. The Discharger concluded that all three alternatives were found to be infeasible for the following reasons:
  - (1) Other locations within the Encina Power Station property: Alternative sites within the EPS property were infeasible because the power plant owner has reserved the remaining portion of the site to accommodate future power plant modifications, upgrades or construction of new power plant facilities
  - (2) Encina Water Pollution Control Facility: This site could only accommodate a desalination plant with a 10 MGD production capacity, due to the outfall constraints. Use of this site would also require the construction of an intake pipeline to convey source water from the power plant cooling canal; and
  - (3) Maerkle Reservoir: The public rights-of-way between the reservoir and the Pacific Ocean do not have sufficient space to accommodate an intake pipeline and concentrate line. Use of this site would also require the pumping of over 100 MGD of seawater to an elevation of 531 feet (compared to 70 feet at the proposed site) for processing. This area has also been zoned as "Open Space."
22. The Project EIR, certified by the City of Carlsbad on June 13, 2006, evaluated only alternative 2 above, and concluded the Encina Water Pollution Control Facility site would not be as effective as the proposed location in satisfying the objectives of the project. The EIR did not evaluate other locations within the EPS since other locations within the EPS were determined to be substantially the same as the proposed site.
23. The Discharger concludes that the proposed location for the CDP at the EPS (as previously approved by the Regional Board in NPDES Permit No. R9-2006-0065) is the best available site for the Project because there are no feasible and less environmentally damaging alternative locations.

24. The EPS site is the only site in reasonable proximity to the existing seawater intake and outfall, and to key delivery points of the water distribution system of the City of Carlsbad, the largest user of proposed desalinated water anticipated by the Discharger. The use of existing intake and discharge facilities at the EPS site avoids construction of a major new intake system and discharge facilities.
25. Under the scenario proposed in the Discharger's Report of Waste Discharge for Order No. R9-2006-0065 as described in Section II.B. of that Order, there are no better alternative and feasible sites available for the CDP. The Regional Board finds that the proposed site for the CDP is the best available site feasible under co-location operation for the benefit of CDP.

### DESIGN

26. Chapter 3 of the March 27, 2009 Minimization Plan addresses identification of the best available design feasible to minimize the intake and mortality of marine life under co-location operation for CDP benefit.
27. A key feature of the proposed design is the direct connection of the desalination plant intake and discharge facilities to the discharge canal of the power generation plant. This approach allows the CDP to use the power plant cooling water as both source water for the seawater desalination plant and as a blending water to reduce the salinity of the desalination plant concentrate prior to the discharge to the ocean. Under the conditions of co-location with the EPS, however, Poseidon has little control over the intake structure.
28. When EPS is producing power and is discharging 304 MGD or more of seawater for once-through cooling, the March 27, 2009 Minimization Plan concludes that the proposed desalination plant operation would cause a *de minimis* increase in entrainment and impingement of marine organisms. Under conditions of co-location operation for CDP benefit, the Discharger must comply with Water Code section 13142.5(b) and use best available design feasible to minimize incremental increases in intake and mortality of marine life for operation under these conditions. Based on flow data submitted by the Discharger, the EPS would have provided approximately 89% of the CDP required flow in 2008 indicating that the CDP would have been responsible for minimizing intake and mortality of the additional approximately 11% increment in impacts from EPS operations conducted for the benefit of CDP. The March 27, 2009 Minimization Plan concludes that under this condition, direct use of the EPS discharge and variable frequency drives on the desalination plant intake pumps will result in a substantial reduction in intake and mortality of marine life.
29. The March 27, 2009 Minimization Plan also concludes that additional design features will be employed to minimize intake and mortality of marine life when EPS is temporarily shut down. The CDP must comply with the best available design requirement in Water Code section 13142.5(b) when EPS is operating for the benefit of CDP (whether EPS is

temporarily shut down or not otherwise discharging sufficient volume of water to meet CDP's operational needs). Features that will be incorporated in the desalination plant design to reduce impingement, entrainment, and flow collection when EPS is temporarily shut down include operation of a modified (EPS) pump configuration to reduce both inlet (bar racks) and fine screen velocity, and ambient temperature processing. While the percentage of time EPS is temporarily shut down has not been predicted and the Discharger has not quantified the expected reduction in impingement and entrainment during operation under these conditions, it is reasonable to conclude that reductions in impingement and entrainment will occur when CDP implements these features.

30. Available information shows that under the conditions of co-location operation for CDP's benefit, the Discharger has little control over the intake structure and the corresponding intake pumps. Under the conditions of co-location operation, the existing intake meets the best available design criteria. The Regional Board finds that the proposed design for CDP operations is the best available design feasible under co-location operation for the benefit of CDP.
31. The Discharger indicates that the design features it will use under limited co-location operations would also serve as best available design under stand-alone conditions. As indicated above, the Regional Board is not considering the adequacy of design alternatives for stand-alone operating conditions at this time. Once EPS permanently shuts down and the CDP is operated as on stand-alone basis, the Discharger will have more flexibility in design implementation. It will be appropriate to undertake additional evaluation under CWC section 13142.5 at that time to determine whether any additional and/or superior design features are feasible for CDP stand-alone operations.

#### TECHNOLOGY

32. Chapter 4 of the March 27, 2009 Minimization Plan addresses identification of the best available technology feasible to minimize the intake and mortality of marine life under co-location operation for the CDP's benefit.
33. Because CDP will be co-located with the EPS, technological modifications to the existing intake channel to minimize the intake and mortality of marine life must be compatible with both EPS's and CDP's operations. In addition, the Amendment of Lease PRC 8727.1 [State Lands Commission lease with Cabrillo Power LLC I (EPS operator)] to authorize CDP's use of the intake and outfall recognized that entrainment and impingement minimization measures cannot interfere with, or interrupt ongoing power plant operations.
34. The Discharger analyzed and investigated a number of alternative seawater intake, screening, and treatment technologies prior to selecting the desalination plant intake, screening, and seawater treatment technologies planned for the CDP. When economic, environmental and technological factors are taken into account, the power plant intake

screening alternatives are not capable of being accomplished in a successful manner within a reasonable period of time.

35. The Discharger analyzed the following intake alternatives: (1) Subsurface intake (vertical and horizontal beach wells, slant wells, and infiltration galleries); (2) new open ocean intake; (3) Modifications to the existing power plant intake system; and (4) Installation of variable frequency drives (VFDs) on seawater intake pumps.
36. The Discharger compared screening technologies to identify the best available technology feasible including: (1) Fish net, acoustic and air bubble barriers upstream of the existing intake inlet mouth; (2) New screening technologies to replace the existing inlet screens (bar racks); and (3) fine vertical traveling screens.
37. Implementation of the alternatives associated with the modification of the existing power plant intake and screening facilities were infeasible because they would interfere with, or interrupt, power plant scheduled operations. Taking into account economic, environmental and technological factors, the power plant intake screening alternatives are not capable of being accomplished in a successful manner within a reasonable period of time.
38. The Discharger identified intake technologies it will employ to reduce intake and mortality of marine organisms during temporary or permanent shutdown of the EPS. The CDP intake pump station design will incorporate variable frequency drives to reduce the total intake flow for the desalination facility to no more than that needed at any given time, thereby minimizing the entrainment of marine organisms.
39. Under the conditions of co-location operations for CDP's benefit, the Discharger has little control over the intake structure and little flexibility in implementing different technologies. Under these circumstances, the Discharger has identified the best technologies feasible to minimize the intake and mortality of marine life at this time. The Regional Board finds that the proposed technology for the CDP is the best available technology feasible under co-location operation for the CDP benefit. Because different and/or better technologies may be feasible under stand-alone operations, the Regional Board will require evaluation of CDP's compliance with Water Code section 13142.5(b) under those conditions.

#### MITIGATION

40. Chapter 6 of the March 27, 2009 Minimization Plan describes mitigation measures associated with the CDP, incorporates the November 14, 2008 Marine Life Mitigation Plan previously submitted by the Discharger, and addresses identification of best mitigation feasible to minimize intake and mortality of marine life under conditions of co-location operation for CDP benefit. By attachment, Poseidon includes baseline studies of the existing marine system in the area that could be affected by the facility.

41. The MLMP sets forth a plan for mitigation and monitoring for impacts due to entrainment from the CDP as means of complying with Water Code section 13142.5(b). It was developed by the Discharger in consultation with multiple resource agencies including the Regional Board, and was approved by the California Coastal Commission (Commission) on August 6, 2008. Coastal Commission staff worked with the Discharger and the final language for the MLMP was approved by the Coastal Commission on December 10, 2008. The MLMP was written for stand-alone operation, and proposes phased implementation of up to 55.4 acres of wetland mitigation within the Southern California Bight. Phase I requires the creation of 37 acres, and Phase II requires an additional 18.4 acres which the Discharger may propose to eliminate or reduce if it proposes alternative mitigation, such as new entrainment reduction technology or mitigation credits for dredging.
42. The MLMP proposes mitigation to be selected from among 11 potential sites in southern California. These sites are Tijuana Estuary, San Dieguito River Valley, Agua Hedionda Lagoon, San Elijo Lagoon, Buena Vista Lagoon, Huntington Beach Wetland, Anaheim Bay, Santa Ana River, Los Cerritos Wetland, Ballona Wetland, and Ormond Beach. Additional sites may be incorporated if appropriate. The Minimization Plan clarifies that preference will be given to mitigation in the San Diego Region, to the extent feasible.
43. Within 10 months of receiving the Coastal Development Permit from the Commission, the Discharger must submit to the Commission, and the Regional Board, a list of the selected mitigation site or sites, and corresponding preliminary restoration plans, for review and agency approval. Within two years of issuance of the Coastal Development Permit for the CDP, the Discharger must submit a complete application to restore at least 37 acres of estuarine wetlands. Six months following the Regional Board's and Commission's approval of the selected sites and proposed restoration, pending necessary permits, the Discharger must begin wetland construction. The Discharger must submit similar plans for Phase II implementation, if Phase II implementation is required, within 5 years of receiving the Coastal Development Permit for Phase I implementation.
44. The MLMP also contains mitigation monitoring requirements, and criteria for performance standards similar to those required of Southern California Edison's mitigation for SONGS at San Dieguito lagoon. The MLMP also provides for the oversight of such monitoring by a scientific advisory panel, and commits to public availability of monitoring results.
45. The Regional Board considered multiple approaches to estimating impingement associated with the CDP's projected operations under co-located conditions as presented in the March 27, 2009 Minimization Plan. The estimates derived from the multiple approaches range from 1.56 kg/day to 7.16 kg/day of fish impinged. The Discharger contends that the appropriate estimate of impingement is 1.56 kg/day and contends that the estimate of 4.7 kg/day overstates the projected impingement associated with CDP's operations. The Discharger and Regional Board staff disagree as to whether, and to what extent, it is appropriate to exclude two days of very high impingement during the

2004-2005 sample year when projecting impingement. The Discharger refers to the data from the two very high impingement days as "outliers." Staff disagrees that the Discharger has adequately justified its characterization of the data as "outliers" and disagrees with the Discharger's proposed exclusion of the data from the estimate of future impingement. The Regional Board finds that it is unnecessary to resolve these disputes. The Regional Board finds that 4.7 kg/day is a reasonable, conservative estimate of impingement associated with CDP's projected operations under co-located conditions and notes that the Discharger has agreed to meet a fish productivity standard of 1,715.5 kg/year, derived from the estimate of 4.7 kg/day, in the mitigation wetlands.

46. It is appropriate to establish a fish productivity requirement that must be achieved to compensate for projected impingement based on the estimate of 4.7 kg/day. Using this estimate, it is reasonable to establish 1,715.5 kg/year as the fish productivity requirement. This requirement will be considered a "Biological Performance Standard" under section 5.4.b. of the MLMP.
47. To demonstrate that the mitigation wetlands required by the MLMP achieve the fish productivity requirement of 1,715.5 kg/year as described in Section 6.2.1 of the Minimization Plan, the Discharger will conduct fish productivity monitoring pursuant to a Productivity Monitoring Plan (PMP). The Discharger will be required to submit a proposed PMP concurrently with the proposed Restoration Plan in section 2.0 of the MLMP for review by the Scientific Advisory Panel (SAP) established in the MLMP and review and approval by the Executive Officer. The measurement of productivity shall be conducted in accordance with the methodology used in Allen, "Seasonal Abundance, Composition, and Productivity . . .," Fishery Bulletin, Vol. 80, No. 4 1982, pages 769-790, and shall follow, but need not be limited to, Allen's methodologies as set forth on pages 771-773 and 779-783. Productivity monitoring shall be conducted once per month for a 13 month measurement period (per Allen's methodology), beginning four years after completion of the construction of the wetlands, with a review of the results by the SAP. For the purposes of determining fish biomass available to contribute toward the fish productivity requirement of 1,715.5 kg/year, the Discharger will use the accounting method set forth in a modification to the March 27, 2009 Minimization Plan approved by this Order in ordering paragraph 1.b. The SAP will review the proposed PMP for adequacy in design for the purpose of allowing the Regional Board to evaluate the Discharger's compliance with the fish productivity requirement. The PMP is subject to the framework established in Conditions B and C of the MLMP and to the Regional Board's corresponding authorities under Condition B for purposes of administration.
48. Once operations commence, it will be valuable to consider impingement over the course of a one year period per permit cycle to evaluate impingement impacts associated with CDP's operations. The Regional Board will require the Discharger to sample and report on impingement according to an impingement monitoring program (IMP) using the methods set forth in sections 9.3 and 10.2 of Attachment 4 (and Attachment C, referenced therein) to the March 27, 2009 Minimization Plan, excluding heat treatment

events.

49. Based upon the results of the IMP, the Executive Officer may determine that it is appropriate to adjust the fish productivity requirement of 1,715.5 kg/year upward or downward for the next permit cycle.
50. Although the CDP will rely on EPS discharge water for its source water to the extent it is available, the mitigation provided for in the Minimization Plan, incorporating the MLMP, as conditioned below is expected to fully offset projected entrainment and impingement losses for up to 304 MGD of source water withdrawn directly from the Agua Hedionda Lagoon under conditions of co-located operation. With these required modifications to the March 27, 2009 Minimization Plan, the Regional Board finds that the proposed mitigation for the CDP is the best available mitigation feasible for the CDP.

#### GENERAL

51. This Order amends Order No. R9-2006-0065 to require the Discharger to implement and comply with the March 27, 2009 Minimization Plan under co-location operations to benefit the CDP.
52. Implementation of the March 27, 2009 Minimization Plan will ensure that the CDP is in compliance with Water Code section 13142.5(b) under co-location operations to benefit the CDP.
53. Implementation of the March 27, 2009 Minimization Plan is not required by the federal Clean Water Act and does not represent an effluent standard or limitation within the meaning of section 1365 of the federal Clean Water Act [Title 33, Federal Water Pollution Control Act, section 505]. Failure to implement and comply with the Minimization Plan is not a violation subject to mandatory minimum penalties under section 13385, subdivision (h) or subdivision (i) of the Water Code, because it is not an "effluent limitation" as defined by Water Code section 13385.1, subdivision (c).
54. EPS's operations are regulated in part by Regional Board Order No. R9-2006-0043 (NDPES No. CA0001350) issued to Cabrillo Power I, LLC, on August 16, 2006. The Discharger's and EPS' use of the intake structure in accordance with Order No. R9-2006-0065, and the March 27, 2009 Minimization Plan during co-location operations to benefit the CDP, does not constitute "cooling water flow" as that term is used in Section V.B. of Order No. R9-2006-0043. Therefore, EPS need not comply with Section V.B, but shall continue to comply with Sections V.A and V.C. of Order No. R9-2006-0043, when operating the intake structure during co-location operations to benefit the CDP.
55. According to Section 13263(e) of the California Water Code, the Regional Board may, upon application by any affected person, or on its own motion, review and revise waste discharge requirements. Section 122.62(a) of title 40 of the Code of Federal Regulations

authorizes the reopening and modification of an NPDES permit based upon new information.

56. Order No. 2006-0065 is not being reopened for any other purpose than the revisions contained herein. Except as contradicted or superseded by the findings and directives set forth in this Order, all of the previous findings and directives of Order No. R9-2006-0065 remain in full force and effect.
57. This action supersedes Resolution No. R9-2008-0039, which considered an earlier version of the March 9, 2009 Minimization Plan, in its entirety. Resolution No. R9-2008-0039 has no ongoing force or effect.
58. This action is exempt from the requirement of preparation of environmental documents under the California Environmental Quality Act [Public Resources Code, Division 13, Chapter 3, Section 21000 et seq.] in accordance with Section 13389 of the California Water Code.
59. The Regional Board has notified all known interested parties of its intent to adopt Order No. R9-2009-0038.
60. At its public meeting on April 8, 2009, the Regional Board reviewed the March 27, 2009 Minimization Plan to determine whether its implementation will result in the "use [of] the best available site, design, technology, and mitigation measures feasible to minimize the intake and mortality of all forms of marine life" pursuant to CWC section 13142.5(b) when CDP is operated under co-located conditions for CDP benefit. After receiving and considering evidence and testimony concerning the March 27, 2009 Minimization Plan and adoption of Order No. R9-2008-0038, the Regional Board closed the public hearing on April 8, 2009. The Board continued the matter to May 13, 2009 for final decision to allow staff time to revise the Tentative Order consistent with individual board member comments and to prepare written responses to comments received throughout the proceeding for Regional Board consideration.
61. On May 1, 2009, a revised Tentative Order was circulated and mailed to interested persons. On May 8, 2009, interested persons were notified that a responsiveness summary prepared by Regional Board staff was posted on the Regional Board's website. The Regional Board has reviewed the responsiveness summary and concurs with the responses therein. The responsiveness summary is hereby incorporated as findings of the Regional Board.
62. The Regional Board in a public hearing on May 13, 2009 heard and considered all comments pertaining to the adoption of Order No. R9-2009-0038.
63. If during preparation of the final adopted documents the Executive Officer determines that minor, non-substantive corrections to the language of the adopted Order, including

the response to comments, are needed for clarity or consistency, the Executive Officer may make such changes, and shall inform the Board of any such changes.

THEREFORE, IT IS HEREBY ORDERED:

1. The March 27, 2009 Minimization Plan submitted pursuant to Provision VI.C.2.e. of Order No. R9-2006-0065 is hereby approved subject to the following conditions:

- a. Biological Performance Standard:

The March 27, 2009 Minimization Plan is amended at p. 6-10 to establish a biological performance standard (requirement) of fish productivity (i.e., the production of new fish biomass) of 1,715.5 kilograms (kg)/year to be achieved in the wetlands mitigation site(s) created or restored through the MLMP. A new row is added at the end of section 5.4 ("Post-restoration Monitoring and Remediation") with the following language inserted in column 3 as follows:

"5.4.b. ('Biological Performance Standards') 7. *Impinged Fish Productivity*. Commencing four years after construction of the wetlands has been completed, the Discharger shall demonstrate that the wetland site(s) achieve no less than 1,715.5 kg of fish productivity per year (as determined through the monitoring and accounting method set forth in section 6.5.1 of the Minimization Plan). The Executive Officer shall consider any adjustment to the biological performance standard/fish productivity standard proposed by the Discharger pursuant to section 6.5.2, and any other relevant information, in determining whether to adjust the standard of 1,715.5 kg/year for the next permit cycle. The Discharger may seek review of the Executive Officer's determination by an appeal to the Regional Board."

- b. Productivity Monitoring Plan. The March 27, 2009 Minimization Plan is amended at page 6-8 to add new section 6.5.1 that requires the Discharger to submit a proposed Productivity Monitoring Plan consistent with the Minimization Plan at section 6.2.1. as follows:

"The Discharger shall submit a Productivity Monitoring Plan (PMP) concurrently with the Wetland Restoration Plan required by Section 2.0 of the MLMP to the Scientific Advisory Panel (SAP) for review and to the Executive Officer for review and approval. The measurement of productivity shall be conducted in accordance with the methodologies used in Allen, "Seasonal Abundance, Composition, and Productivity . . .," Fishery Bulletin, Vol. 80, No. 4 1982, pages 769-790 (set forth in Attachment 7 of the March 27, 2009 Minimization Plan). Implementation of productivity monitoring in accordance with Allen's methodology shall be for the purpose of determining productivity, defined by Allen as rate of production of biomass per unit of time (measured in grams per

unit area per unit time) and shall follow, but need not be limited to, Allen's methodologies as set forth in pages 771-773 and 779-783. Monitoring shall be conducted once per month for a 13-month period beginning four years after completion of construction of the mitigation wetland site(s), and every fifth year thereafter. The Executive Officer, upon consultation with the SAP, may designate a different representative 13-month period. To the extent feasible, the 13-month period shall be coordinated to match the 12-month period set forth in 1.c.(1) below for impingement monitoring. The Discharger may propose modifications to or variations from Allen's productivity methodologies when it submits the PMP or through a subsequent proposed revision to the PMP. Any proposed revisions following initial approval of the PMP are also subject to review by the SAP and review and approval by the Executive Officer. If the Executive Officer, after consulting with the SAP, determines that the project is successful in meeting the biological productivity standard, the monitoring program may be waived.

The PMP shall describe the design and proposed implementation of the PMP, including a description of the proposed sampling timing, frequency, locations and methodology and shall describe the fish biomass available to contribute to the fish productivity requirement based on the following accounting:

- a. Most Commonly Entrained Lagoon Species: Gobies, Blennies, and Garibaldi;
- b. Most Commonly Entrained Ocean Species: White croaker, Spotfin croaker, Queenfish, Northern anchovy, California halibut;
- c. All Other Species: All other entrained and non-entrained fish.

The biomass from Lagoon, Ocean, and Other Species shall be deemed available to contribute to the annual fish productivity requirement in the following proportions: 0% (Most Commonly Entrained Lagoon Species); 88% (Most Commonly Entrained Ocean), and 100% (All Other Species).

Available Fish Biomass (i.e., biomass available to contribute to the annual fish productivity requirement) shall be calculated as follows:

Available Fish Biomass = (88% x Biomass of Most Commonly Entrained Ocean Species) + (100% x Biomass of All Other Species)

The PMP shall explain when and how baseline productivity will be assessed and the methods and frequency for evaluating productivity. The SAP will review the proposed PMP and make recommendations on design and implementation to the Executive Officer prior to approval.

The PMP is subject to the framework established in Conditions B and C of the MLMP and to the Regional Board's corresponding authorities under Condition B for purposes of administration. The Discharger agrees to fund the SAP's work in reviewing the proposed PMP (and any later proposed revisions thereto) and subsequent review of monitoring results when consulted by the Executive Officer, up to \$25,000 beyond the annual cap of \$100,000 established in the MLMP."

- c. Impingement Monitoring Program. The March 27, 2009 Minimization Plan is amended at page 6-8 to add new section 6.5.2 to require the Discharger to conduct impingement sampling at the EPS seawater intake and report results pursuant to an Impingement Monitoring Program (IMP) and pursuant to the additional reporting requirements established below.

(1) Compliance Schedule. Monitoring shall be conducted one day per week for 52 continuous weeks during the first 12 months after the CDP commences full operations that also occurs entirely within the next permit cycle. Thereafter, monitoring shall be conducted in the first year of each permit cycle. The Executive Officer may designate a different representative 12-month period prior to the commencement of CDP operations.

(2) Impingement Sampling. The Discharger shall sample impingement in accordance with the methodology described in Attachment 4 of the March 27, 2009 Minimization Plan (Sections 9.3 and 10.2, and Section 4.2 of Attachment C, referenced in both Sections 9.3 and 10.2) such that impingement monitoring shall be of fish and macroinvertebrates following the 2004-2005 sampling protocol, excluding the requirement for impingement sampling during heat treatment.

(3) Reporting. A report containing a detailed analysis of the fish impingement sampling data shall be submitted in hard copy and in an electronic copy in workable format (e.g. Word or Excel) to the Regional Board within 6 months after the sampling program is complete. The Discharger shall report all impingement data as follows:

(a) Impingement shall be adjusted to reflect the flow proportional approach, as described in and consistent with Proportional Approach 3-B of the March 27, 2009 Minimization Plan, unless the Regional Board determines that a different approach is appropriate and shall be used.

(b) Impingement shall not be proportionally adjusted in accordance with section c.3.(a) of this section when impingement results from a non-flow related event. Whether an event is non-flow related shall be determined by the Discharger in consultation with the Executive Officer and shall be based upon information provided by the Discharger about survey rainfall data, tide data, turbidity data,

salinity data, dredge operation status and unusual conditions within the lagoon or related to the EPS/CDP plant operations.

(c) The Discharger shall report all recorded data and provide a report that presents (i) a clear presentation of fish and invertebrate impingement at the shared intake for normal (non-heat treatment) operations during the sampled year; (ii) an analysis of impingement and flow volume; (iii) an analysis of the impingement and velocity; (iv) dates on which a modified pump configuration was in operation during the year sampled, if any; and (v) any other information deemed reasonable and necessary by the Executive Officer, and reasonably available to the Discharger, upon review of the report. The Discharger shall include in the report any proposed adjustment to the biological performance standard/fish productivity standard of 1,715.5 kg/yr for the next permit cycle.

2. Section VI.C.2.e in Order No. R9-2006-0065 is amended as follows:

On March 27, 2009, the Discharger shall submit submitted a Flow, Entrainment and Impingement Minimization Plan (March 27, 2009 Minimization Plan) within 180 days of adoption of the Order which was approved by the Regional Board on May 13, 2009. The approved Plan shall assess identifies the best available site, design, technology, and mitigation feasible to be used by the Discharger to minimize the intake and mortality of all forms of marine life during CDP operations the feasibility of site specific plans, procedures, and practices to be implemented and/or mitigation measures to minimize the impacts to marine organisms when the CDP is co-located with EPS. but the CDP intake requirements exceed the volume of water being discharged by the EPS and EPS operates its seawater intake and outfall for the benefit of the CDP. The Discharger shall implement and comply with the terms of the Minimization Plan as approved by the Regional Board. The plan shall be subject to the approval of the Regional Water Board and shall be modified as directed by the Regional Water Board. In the event that the EPS permanently ceases operations, and the Discharger proposes to operate the seawater intake and outfall independently for the benefit of the CDP as a stand-alone facility, additional review to determine whether the CDP complies with Section 13142.5 (b) of the Water Code will be required.

3. The following will be added as Section VI.C.2.f. in Order No. R9-2006-0065 as follows:

Within ninety days after the EPS provides written notice to the California Independent System Operator of its intent to shutdown permanently all of its generating units, the Discharger shall submit a Report of Waste Discharge to the Regional Board for authorization to operate in stand-alone mode with permanent shutdown of the EPS facility and shall seek review under California Water Code section 13142.5(b) for such stand-alone operation.

a. The conditions of Order No. R9-2006-0065, as amended by this Order, or as amended or replaced by subsequent orders, shall remain in force until the Regional Board takes final action on the Discharger's Report of Waste Discharge to operate in stand-alone mode.

4. The following will be added as Section VI.C.2.g. in Order No. R9-2006-0065 as follows:

After commencement of discharge from the CDP, the Discharger shall submit a technical report to the Regional Board Executive Officer within 45 days after the Discharger is notified by the EPS that all units at the EPS will be non-operational for power generation, without seawater intake, and unavailable to the California Independent System Operator to be called upon to produce power for a consecutive period of 180 days or more. The technical report shall include a detailed description of any feasible design or technology measures, in addition to those identified in the March 27, 2009 Minimization Plan for temporary shut down, that Poseidon will use to minimize the intake and mortality of all forms of marine life while EPS is in a period of prolonged temporary shutdown. Upon approval by the Executive Officer, Poseidon shall implement the additional minimization measures in accordance with the technical report as soon as practicable and for the duration of the prolonged temporary shutdown.

5. Table 12 in the Fact Sheet will be modified as follows:

Potential Issue	EIR Finding	EIR-Required Mitigation	Regional Board Analysis
Entrainment & Impingement	No Significant Impact. When operating in conjunction with EPS, the operation of CDP will not change EPS flows and flow velocities, nor cause additional impingement losses. Additional entrainment loss is ~ 0.01% to 0.28%. When operating independent of EPS, flow volume and velocity would be substantially reduced, meeting federal performance standards for impingement. Entrainment loss would range from 2% to 34% of that of EPS.	In the event the EPS were to permanently cease operations, and the Developer were to independently operate the existing EPS seawater intake and outfall for the benefit of the project, such independent operation will require CEQA compliance and permits to operate as required by then-applicable rules and regulations for the City and other relevant agencies.	The CDP is not subject to 316(b) regulations. To ensure compliance with California Water Code Section 13142.5(b) requirements <u>when the CDP is co-located with the EPS but the CDP intake requirements exceed the volume of water being discharged by the EPS and EPS operates for the benefit of the CDP.</u> <del>Provision VI.C.2.g of Order No. R9-2006-0065 requires the discharger to develop a plan to minimize entrainment and impingement, obtain</del>

		<p><u>Regional Board approval for the plan, and implement the plan. the discharger must implement and comply with the March 27, 2009 Flow, Entrainment and Impingement Minimization Plan approved by the Regional Board on May 13, 2009. If EPS ceases operations and the Discharger proposes to operate the seawater intake structure and outfall independently for the benefit of the CDP as a stand-alone facility, the Regional Board will require reevaluation of the requirements of Water Code section 13142.5(b).</u></p>
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6. Section VII.B.2.e in the Fact Sheet will be modified as follows:

e. Flow, Entrainment and Impingement Minimization Plan

The Discharger's Report of Waste Discharge assessed EPS cooling water flows over a 20.5-year period and concluded that historical EPS flows were sufficient to supply CDP intake flows and provide sufficient dilution water to insure that receiving water salinity is not adversely impacted. The Discharger also concluded that during temporary periods when power generation is suspended for maintenance, unheated EPS thru-flows would be adequate to supply CDP and provide sufficient dilution water to protect receiving water salinity. The Regional Water Board recognizes that future EPS flows may not follow historical trends. For this reason, the Regional Board requires the Discharger to implement and comply with the approved it is warranted to require the Discharger to prepare a Flow, Entrainment and Impingement Minimization Plan to ensure that the requirements of section 13142.5(b) of the Water Code are complied with when CDP's intake requirements exceed the volume of water being discharged by the EPS and EPS operates for the benefit of the CDP. ~~The Flow Minimization, Entrainment and Impingement Minimization Plan shall be submitted within 180 days of adoption of the Order.~~

~~The plan shall assess the feasibility of site-specific plans, procedures, and practices to be implemented and/or mitigation measures to minimize the impacts to marine organisms.~~

~~when the CDP intake requirements exceed the volume of water being discharge by the EPS. The plan shall be subject to the approval of the Regional Water Board and shall be modified as directed by the Regional Water Board.~~

7. **Section VII.B.4.b in the Fact Sheet will be modified as follows:**

b. California Water Code Section 13142.5(b) Applicability. Water Code Section 13142.5(b) requires industrial facilities using seawater for processing to use the best available site, design, technology, and mitigation feasible to minimize the intake and mortality of all forms of impacts to marine life. The CDP is planned to operate in conjunction with the EPS by using the EPS cooling water discharge as its source water. When operating in conjunction with the power plant, the desalination plant feedwater intake would not increase the volume or the velocity of the power station cooling water intake nor would it increase the number of organisms impinged and entrained by the Encina Power Station cooling water intake structure. Recent studies have shown that nearly 98 percent of the larvae entrained by the EPS are dead at the point of the desalination plant intake. As a result, a *de minimis* of organisms remain viable which potentially would be lost due to the incremental entrainment effect of the CDP operation. Due to the fact that the most frequently entrained species are very abundant in the area of the EPS intake, Agua Hedionda Lagoon and the Southern California Bight, species of direct recreational and commercial value would constitute less than 1 percent of all the organisms entrained by the EPS. As a result, the incremental entrainment effects of the CDP operation in conjunction with the EPS would not trigger the need for additional technology or mitigation to minimize impacts to marine life.

In instances when the CDP's intake requirements exceed the volume of water being discharged by EPS, the CDP will implement the approved Flow, Entrainment and Impingement Minimization Plan to comply with the requirements of Water Code section 13142.5(b) to use the best available site, design, technology and mitigation feasible to minimize the intake and mortality of marine life.

~~However, in In the event that the EPS were to cease operations, and the discharger were to independently operate the seawater intake and outfall for the benefit of the CDP, such independent or stand-alone operation will require additional Regional Board review to ensure that CDP operations comply with the requirements of pursuant to Water Code Section 13142.5(b) by employing any additional and/or better design or technology features that were not feasible when EPS was in operation. The Regional Water Board review and approval of the Flow Minimization, Entrainment and Impingement Minimization Plan will address any additional review required pursuant to Water Code Section~~

8. The following will be added as Section VII.B.2.f in the Fact Sheet:

f. Productivity Monitoring Plan

This Order modifies the March 27, 2009 Minimization Plan to add a Productivity Monitoring Plan component that will be used to evaluate whether the Discharger has achieved the annual fish productivity requirement of 1,715.5 kg/year established in the Minimization Plan.

Of the up to 55.4 acres of mitigation wetlands that the Discharger has agreed to create or restore to offset potential stand-alone entrainment, the Discharger explained that 49 acres (88%) are designated to mitigate for the entrainment of the most commonly entrained lagoon species (i.e., gobies, blennies and garibaldi), and 6.4 acres (12%) are designated to mitigate for the entrainment of the most commonly entrained ocean species (i.e., white croaker, northern anchovy, California halibut, queenfish, spotfin croaker) such that, therefore, all other species (i.e., other entrained and non-entrained species) present in the wetland are "available" to offset losses due to impingement. In order to be consistent with Section 6.2.1 of the March 27, 2009 Minimization Plan, the biomass of gobies, blennies and garibaldi shall be excluded from productivity calculations, and available fish biomass for productivity calculations shall be calculated as follows:

$$\text{Available Fish Biomass} = (88\% \times \text{Biomass of Most Commonly Entrained Ocean Species}) + (100\% \times \text{Biomass of All Other Species})$$

9. The following will be added as Section VII.B.2.g in the Fact Sheet:

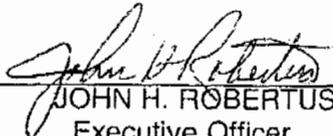
g. Impingement Monitoring Program

As issued on August 16, 2006, this Order did not require the Discharger to monitor for fish impingement. In conjunction with the approval of the March 27, 2009 Minimization Plan on May 13, 2009, the Regional Board determined that monitoring for impingement is necessary. The Order modifies the March 27, 2009 Minimization Plan to add a requirement to perform and report impingement pursuant to an Impingement Monitoring Program (IMP) over a one year period per permit cycle. The IMP provisions in the Minimization Plan establish the impingement monitoring requirements.

The objective of the impingement monitoring is to obtain periodic estimates of impingement levels at the shared intake when the CDP is in co-located operation with EPS. The results of the impingement monitoring will be used to evaluate whether the 1,715.5 kg/year fish productivity requirement should be adjusted in the next permit cycle.

The current CDP impingement projection of 1,715.5 kg/year is based on sampling conducted at EPS during 2004-05, prior to the operation of the CDP. Although the current projection was adjusted to account for a CDP flow of 304 MGD (in accordance with Proportional Approach 3-B of Attachment 5 to the March 27, 2009 Minimization Plan), a projection based on sampling conducted once the CDP is in operation may be more representative than the current projection.

I, John H. Robertus, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of a Order adopted by the California Regional Water Quality Control Board, on May 13, 2009.

  
\_\_\_\_\_  
JOHN H. ROBERTUS  
Executive Officer

P O S E I D O N R E S O U R C E S

May 5, 2009

Mr. Tom Luster  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105-2219

Re: Carlsbad Desalination Project Coastal Development Permit No. E-06-013:  
Response to Email re: Permit Amendment

Dear Tom:

I am writing to respond to your April 29, 2009 email concerning your suggestion that Poseidon consider submitting a Permit amendment application to the Coastal Commission to provide 11 acres of additional mitigation under Poseidon's Marine Life Mitigation Plan (MLMP) for the Carlsbad Desalination Project (Project).

Poseidon has not made any changes to the Project that we believe require such an amendment. Special Condition 7 of the Permit provides that *"No material changes within the coastal zone shall occur without a Commission-approved amendment to the coastal development permit unless the Executive Director determines that no amendment is necessary. Changes to the project requiring review for amendment would include changes in the physical, operational, or delivery capacity increases, or extension of water supply distribution pipelines beyond those shown on the final plans."* The Project remains consistent with the Project Description submitted as part of Poseidon's Permit application and the Coastal Commission's approval. Accordingly, we do not believe that any "material" change has occurred, and therefore no Permit amendment is required.

We understand that your inquiry regarding a Permit amendment to require additional mitigation acreage is related to an updated estimate of the Project's impingement impacts from 2.12 to 3.43 pounds of fish per day. As you are aware, when the Commission approved the Project, it found that when the Project operates under stand-alone conditions, the expected impingement of marine life would be *de minimis* and insignificant. (Adopted Findings—Coastal Development Permit Application E-06-013, Approved August 6, 2008, page 39 of 106.) Specifically, the Commission's Findings noted that the 2.12 pounds of fish per day estimate was *"less than the average daily consumption of an adult pelican (more than 2.5 pounds per day), which for this project the Commission considers de minimis and insignificant."*

The projected impingement impacts Poseidon provided to the Commission were based on data collected at the Encina Power Station seawater intake from June 1, 2004 to May 31, 2005 and set forth in the May 2007 Tenera Environmental Study. This study was submitted to the Coastal Commission in June 2007 as part of the Project's Revised Flow, Entrainment, and Impingement Minimization Plan, and it contained data concerning the total amount of impingement measured by Tenera during the study. The study data remains accurate to this date.

The 2.12 pounds per day impingement estimate was calculated based on the data in the Tenera Environmental Study, but the San Diego Regional Water Quality Control Board (Regional Board) determined on April 17, 2008 that the calculation produced a minor underestimation of the Project's impingement after reviewing the publicly available impingement data that Poseidon had provided in several previous submittals. On April 30, 2008, Poseidon provided Regional Board staff with a corrected impingement calculation – 3.43 pounds of fish per day – still less than the daily diet of an adult pelican<sup>1</sup>, which was one of the bases for the Commission's finding that the Project's impingement impacts would be *de minimis* and insignificant.

As Poseidon explained to the Regional Board at its hearing on April 8, 2009, while the updated estimate of the Project's daily impingement impacts is slightly higher than the earlier estimate, the 3.43 pounds per day estimate remains *de minimis*. This slight increase in the impingement estimate has not resulted in "physical, operational, or delivery capacity increases" to the Project that would require a Permit amendment.

Further, the Project's intake velocities remain consistent with the intake velocities provided to and analyzed by the Coastal Commission. In Poseidon's November 7, 2007 response to the Commission's Staff Report, Poseidon again confirmed that "*Poseidon has documented that the velocity of the water at the entrance to the bar racks is below 0.5 feet per second. Therefore the proposed operation would be consistent with what the U.S. EPA considers to be 'best available technology' for cooling water intakes.*" (Poseidon Resources, November 7, 2007 Response to Staff Report, Exh. A at p. 10.) Since no change to the intake velocities has occurred, no change to the Project requiring a Permit amendment is needed to address this issue.

As you are also aware, after receiving the updated impingement calculation, the Regional Board confirmed at its April 8, 2009 hearing that the mitigation acreage required under the MLMP approved by the Coastal Commission will fully compensate for all Project-related impingement and entrainment impacts and directed its staff to prepare a revised Flow, Entrainment and Impingement Minimization Plan that includes no more than the 55.4 acres of mitigation required by the Coastal Commission's MLMP. Since no Project change has occurred to address impingement, no Permit amendment is necessary.

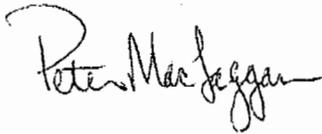
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<sup>1</sup> An adult pelican may eat up to 1.8 kg (3.78 pounds) of fish per day. See San Diego Zoo Animal Bytes, Pelican. Available at: [www.sandiegozoo.org/animalbytes/t-pelican.html](http://www.sandiegozoo.org/animalbytes/t-pelican.html)

Regarding the proposed site reconfiguration, we also believe that no Permit amendment is required to address design changes that will be submitted as part of the Project's final plans. The site reconfiguration involves minor modifications to the Project layout, including reductions to the Project's visible footprint due to the relocation of pipeline structures and consolidation of the Project's transformers, substation and solids handling facility with the desalination facility. Under the proposed reconfiguration, the Project remains within the environmental envelope that the Coastal Commission evaluated, and there has been no increase in the Project's "physical, operational or delivery capacity" that would require an amendment to the Permit.

For the foregoing reasons, Poseidon does not believe a Permit amendment is required at this time. If you would like to discuss these issues with us, please let us know a time that would be convenient for you so that we may schedule a call or meeting.

Sincerely,



Peter MacLaggan  
Poseidon Resources

cc:

Chairwoman Bonnie Neely  
Vice Chairman Dr. William A. Burke  
Commissioner Ben Hueso  
Commissioner Steve Blank  
Commissioner Steve Kram  
Commissioner Khatchik Achadjian  
Commissioner Sara Wan  
Commissioner Mary Shallenberger  
Commissioner Ross Mirkarimi  
Commissioner Larry Clark  
Commissioner Patrick Kruer  
Commissioner Dave Potter

RECEIVED

MAY 12 2009

LATHAM & WATKINS LLP  
SAN DIEGO

F I L E D  
Clerk of the Superior Court

MAY 7 2009

By: C. WALKER, Deputy

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Superior Court of the State of California  
County of San Diego

SURFRIDER FOUNDATION, a California non-profit public benefit corporation; PLANNING AND CONSERVATION LEAGUE, a California non-profit public benefit corporation, Petitioners,

vs.

CALIFORNIA COASTAL COMMISSION, a California public agency, Respondent.

POSEIDON RESOURCES (CHANNELSIDE) LLC, a Delaware limited liability company; POSEIDON RESOURCES CORPORATION, a Delaware corporation; POSEIDON WATER LLC, a Delaware limited liability company, et al., Real Parties In Interest.

Case No. 37-2008-00075727

STATEMENT OF DECISION

Judge: Judith F. Hayes  
Dept. C-68

The Court received into evidence the Administrative Record for the Carlsbad Desalination Project ("Project"), which was certified by Respondent California Coastal Commission ("Commission") and lodged with the Court. Poseidon submitted a Request for Statement of Decision prior to the start of the trial of Petitioners Surfrider Foundation and Planning and Conservation League's (collectively, "Petitioners") Petition for Writ of Mandamus. After reviewing the evidence in the Administrative Record and the briefs and supporting papers filed by the parties, and hearing the

1 arguments of counsel at oral argument on April 10, 2009, the Court rules as follows on the identified  
2 principal controverted issues.

3 **Enforcement of Water Code Section 13142.5(b)**

4  
5 The Commission proceeded in the manner required by law when it evaluated the Project's  
6 potential intake-related impacts for consistency with Coastal Act sections 30230 and 30231, and the  
7 Commission was not required to separately review the Project for compliance with Water Code section  
8 13142.5(b). Pursuant to Coastal Act section 30412(b), the Regional Water Quality Control Board, San  
9 Diego Region ("Regional Board") has primary jurisdiction to enforce water quality policies, such as  
10 Water Code section 13142.5(b), and the Commission was prohibited from taking "any action in  
11 conflict" with water quality determinations made by the Regional Board. Cal. Pub. Res. Code  
12 § 30412(b). In adopting the Project's NPDES Permit in 2006, the Regional Board determined that it  
13 would conduct any additional review needed under Water Code section 13142.5(b), and that such  
14 review would ensure the Project's conformity with all requirements of the Water Code. AR 6036,  
15 6067. Therefore, the Court finds that the Commission's express reliance on the Regional Board to  
16 ensure compliance with Water Code section 13142.5(b) was appropriate. AR 14043, 14071. Further,  
17 by conditioning Project construction on final Regional Board approval, through Special Condition 4,  
18 the Commission satisfied any obligations it had under Coastal Act section 30412(a). AR 14072,  
19 14049.

20 Petitioners state that the Commission is not permitted to enforce Water Code section  
21 13142.5(b) unless "the Regional Board has not previously acted on the project." Reply Brief, 4:21-22.  
22 There is no dispute that the Regional Board has already acted on the Project, and that the Regional  
23 Board's review is continuing. When it adopted the Project's NPDES Permit in 2006, the Regional  
24 Board required Poseidon to prepare a Flow, Entrainment & Impingement Minimization Plan  
25 ("Minimization Plan") to ensure compliance with Water Code section 13142.5(b) in situations when  
26 the Encina Power Station ("EPS") discharge is not providing all of the Project's intake water  
27 requirements, including when the Project is operating without concurrent EPS operation. AR 5974,  
28 6036, 6066-67. The Commission was prohibited from taking any action in conflict with the Regional  
Board's section 13142.5(b) review. Cal. Pub. Res. Code § 30412(b).

1 Coastal Act sections 30400 and 30401 further provide that it is "the intent of the Legislature to  
2 minimize duplication and conflicts among existing state agencies" and that "the commission shall not  
3 set standards or adopt regulations that duplicate regulatory controls established by any existing state  
4 agency." Cal. Pub. Res. Code §§ 30400, 30401. These sections make clear that the Legislature did not  
5 intend for the Regional Board and the Commission to make separate and potentially conflicting  
6 determinations regarding water quality compliance for the same project. The legislative history also  
7 confirms that the Water Boards have primary jurisdiction to enforce water quality measures, and that  
8 inter-agency duplication and conflict are to be avoided.

#### 9 **Applicability of Federal Clean Water Act Section 316(b)**

10 By its express terms, CWA section 316(b) applies only to "cooling water intake structures."  
11 AR 9853-54. In approving the Project's NPDES Permit, the Regional Board found that CWA section  
12 316(b) regulations are inapplicable to the Project, and the State Water Board's Scoping Document for  
13 Power Plant Cooling states that desalination plants are outside the scope of CWA section 316(b)  
14 issues. AR 6066, 6986-87, 9832, 9854-55. The Court holds that CWA section 316(b) does not apply  
15 to desalination plants such as the Project, and that it did not affect the Commission's review of  
16 Poseidon's Coastal Development Permit ("CDP") application.

#### 17 **Alternative Sites Under Water Code Section 13142.5(b)**

18 Because the Commission was not required to enforce section 13142.5(b), as stated above, the  
19 Commission was not required to evaluate alternative sites under Water Code section 13142.5(b) The  
20 Regional Board previously determined the Project site was acceptable when it approved the Project's  
21 NPDES Permit in 2006. Cal. Pub. Res. Code § 30412(b). As a condition of the NPDES Permit, the  
22 Regional Board imposed the Minimization Plan to assess the feasibility of "site-specific" plans,  
23 procedures, practices and mitigation measures to minimize intake and marine life mortality. In  
24 addition, the imposition of the Minimization Plan would address any "additional review" required by  
25 section 13142.5(b) when the Project intake requirements exceed the amount of water being discharged  
26 by the EPS. AR 5974, 6036, 6066-67, 9871. By requiring the Minimization Plan to minimize intake  
27 and mortality when the Project operates at the EPS site, including when it operates at the site without  
28

1 concurrent EPS operation, the Regional Board determined that the Project site was appropriate. The  
2 Commission appropriately did not interfere with the Regional Board's decision in this regard. Cal.  
3 Pub. Res. Code § 30412(b).

4  
5 **Submission of Entrainment Data Prior to Commission's Approval of the CDP**

6 The Commission did not improperly defer analysis of entrainment impacts, and its finding that  
7 Poseidon's implementation of the Marine Life Mitigation Plan ("MLMP") would fully mitigate any  
8 entrainment impacts was supported by substantial evidence.

9 Poseidon presented the Commission with extensive entrainment information prior to CDP  
10 approval. This information included an expert report summarizing the results of a 12-month  
11 entrainment study and assessing potential entrainment impacts, which was submitted along with  
12 Poseidon's revised Minimization Plan. AR 7388-95, 7056, 7216-17, 7236-38, 14081, 10919. The  
13 data collection for the expert study (undertaken from June 2004 - July 2005) followed Regional  
14 Board-approved protocols, which also were submitted to the Commission. AR 7076, 9826, 7455-58,  
15 7472-74, 9849-60, 7735, 14081. In addition, the Commission received information in the Project's  
16 EIR, including the Intakes Effect Assessment, supporting Carlsbad's determination that the Project  
17 will not cause any significant entrainment impacts under CEQA. AR 6991, 345-46, 351-60, 16877-  
18 937, *see also* 5834-38, 14061, 14081.

19 The Commission's findings and Special Condition 8's plain language confirm that the  
20 Commission reviewed the expert entrainment assessment and other data before concluding that the  
21 MLMP would mitigate any entrainment impacts and satisfy Coastal Act sections 30230 and 30231.  
22 AR 14050, 14081. Substantial evidence therefore supports the Commission's finding that the Project,  
23 including the MLMP, will protect, maintain, and restore biological and marine resources under the  
24 Coastal Act. "[T]he details of exactly how mitigation will be achieved under the identified measures  
25 can be deferred pending completion of a future study." *Cal. Native Plant Soc. v. City of Rancho*  
26 *Cordova*, 2009 Cal.App.LEXIS 430 at \*34-35. The fact that the entire extent and precise details of  
27 potential mitigation measures are not known does not undermine a conclusion that impacts can  
28 successfully be mitigated. *See Riverwatch v. County of San Diego*, 76 Cal.App.4th 1428, 1447 (1999).

1           Because the MLMP needed to be approved by the Commission prior to issuance of the CDP,  
2 the Commission retained discretion to impose additional mitigation not included in Poseidon's MLMP  
3 submission. AR 14099.

4           **"Deferred" Mitigation**

5           The Coastal Commission did not improperly "defer" mitigation through imposition of Special  
6 Condition 8 (SC-8), which required the Commission to approve the MLMP before the CDP could be  
7 issued. First, the CEQA deferred mitigation cases relied upon by Petitioners are inapplicable because  
8 Carlsbad, acting as lead agency under CEQA, already determined that the Project will not have any  
9 significant impacts on marine life. AR 345-46, 351-60. Because the MLMP is not a CEQA mitigation  
10 measure, there is no reason to evaluate SC-8 under CEQA's deferred mitigation principles.

11           Second, under the Coastal Act, the Commission has authority to impose "prior to issuance"  
12 mitigation conditions, like SC-8, that require subsequent Commission review and approval after a  
13 CDP is adopted but before it is issued. Cal. Code Regs. tit. 14, §§ 13057(c)(4), (5), 13158(e). The  
14 record demonstrates that it is common Commission practice to require such prior to issuance  
15 mitigation conditions. AR 11092-93, 13184, 13191-204. SC-8 required Commission approval of the  
16 MLMP before the CDP could be issued. Petitioners dispute that "prior to issuance" conditions are  
17 authorized by Coastal Act regulations and consistent with regular Coastal Commission practice.

18           Third, *Sundstrom v. County of Mendocino*, 202 Cal.App.3d 296 (1988) is inapposite because  
19 SC-8 requires subsequent Commission (rather than Staff) approval of the MLMP before the CDP may  
20 issue, so there was no improper delegation of the Commission's responsibilities to Staff, and because  
21 the Commission's review of the MLMP provided for further public participation and scrutiny. *C.f.*  
22 *Sundstrom*, 202 Cal. App. 3d at 308. The Commission's determination that any entrainment impacts  
23 would be fully mitigated by the MLMP – made after the Commission's review of an expert report  
24 summarizing Poseidon's entrainment study – is not an impermissible postponement of environmental  
25 review because the underlying entrainment study was completed in 2004-05, long before the  
26 Commission's approval of the CDP in 2007. AR 7390, 14050.

27           Fourth, even if CEQA's deferred mitigation standards did apply, the Court finds that SC-8  
28 satisfies those standards because it evidences the Commission's commitment to mitigating impacts,

1 and specifies the criteria that Poseidon was required to meet before the CDP could issue. *See Cal.*  
2 *Native Plant Soc. v. City of Rancho Cordova*, 2009 Cal.App.LEXIS 430 at \*34 (denying deferral claim  
3 where city determined the project would have an impact on habitat loss and imposed mitigation  
4 requiring preservation or creation of replacement habitat, off site, in a specific ratio to habitat lost as a  
5 result of the Project); *Endangered Habitats League, Inc. v. County of Orange*, 131 Cal.App.4th 777,  
6 794-96 (2005); *Defend the Bay*, 119 Cal.App.4th at 1275-76 (2004). It is undisputed that the  
7 Commission committed to fully mitigate any marine life impacts through imposition of SC-8, and that  
8 SC-8 prohibited issuance of the CDP unless the Commission found that the MLMP would ensure  
9 conformity with the Coastal Act. It is further undisputed, that SC-8 required the MLMP to mitigate to  
10 the maximum extent feasible any entrainment impacts through creation, enhancement or restoration of  
11 aquatic and wetland habitat and ensure long-term performance, monitoring and protection of the  
12 approved mitigation sites in accordance with Coastal Act sections 30230 and 30231. AR 14043,  
13 14099, 14103.

14 As Respondent points out, Petitioners' deferral claim also lacks a remedy. The MLMP was  
15 approved on August 6, 2008, but was not challenged by Petitioners or anyone else, so it is now final  
16 and its adequacy is no longer subject to judicial review.

17 **The Commission's "Override" Finding Was Appropriate Under Coastal Act section 30260**

18 The Commission properly concluded that the Project qualified for an "override" under Coastal  
19 Act section 30260 because substantial evidence indicates that: (1) alternative locations were infeasible  
20 and/or more environmentally damaging; (2) not approving the Project would adversely affect public  
21 welfare; and (3) adverse environmental affects are mitigated to the maximum extent feasible. AR  
22 14133-39. The Commission was required to make an override finding under section 30260 because  
23 the Commission determined that the Project's withdrawal of water from Agua Hedionda Lagoon,  
24 through the existing EPS intake, would constitute an "alteration" of the Lagoon that would not  
25 conform to Coastal Act section 30233(c). AR 14107. Non-conformity with section 30233(c) was the  
26 only reason the Commission was required to analyze "alternative locations" under section 30260, and  
27 the Commission's alternatives analysis properly considered alternative locations for the intake that  
28 would not withdraw water from the Lagoon. Because the Commission was not required to enforce

1 Water Code section 13142.5(b) for the Project, section 13142.5(b) did not apply to the Commission's  
2 alternative locations analysis.

3 By asserting without qualification that the Commission did not consider "any" alternative sites  
4 or locations for the Project, despite the fact that Poseidon clearly submitted alternative sites analyses to  
5 the Commission, the Court holds that Petitioners failed their burden under the substantial evidence test  
6 to lay out all favorable evidence supporting the Commission's alternative locations finding. Opening  
7 Brief, 13:3-4, 18:27, 19:3-4; AR 5874-77, 6987-89, 7067.

8 The record reflects that Poseidon submitted analyses to the Commission, at Staff's request,  
9 establishing that alternative sites were infeasible and/or more environmentally damaging than the  
10 Project. AR 5874-77, 6987-89, 7067. The Commission's findings regarding alternative locations  
11 incorporated these analyses by reference, which are therefore part of the Commission's findings and  
12 support its determination that alternative locations were infeasible or more environmentally damaging  
13 than the Project. AR 14133-34, 14088 n.69, 14089 n.71, 5875-76; *See McMillan v. Am. Gen. Fin.*  
14 *Corp.*, 60 Cal.App.3d 175, 183-84 (1976); *Towards Responsibility in Planning v. City Council*, 200  
15 Cal.App.3d 671, 683-84 (1988); *Save San Francisco Bay Ass'n v. San Francisco Bay Conserv. & Dev.*  
16 *Com.*, 10 Cal.App.4th 908, 927 (1992).

17 Petitioners concede in their Reply Brief that the record did include an assessment of alternative  
18 sites. However, Petitioners assert the Commission did not consider a "true" alternative site that did not  
19 use the existing EPS intake infrastructure. Reply Brief, 6 n.6. However, the record includes discussion  
20 of an alternative site evaluated in Poseidon's submission to the Commission and the EIR – the Encina  
21 Water Pollution Control Facility ("EWPCF") which expressly contemplated use of "a new intake  
22 structure [that] would be constructed offshore of the EWPCF." AR 1724, 544. Further, the  
23 Commission's alternatives analysis considered a wide variety of different locations for the intake that  
24 would not utilize the existing EPS intake infrastructure, including horizontal wells, vertical beach  
25 wells, slant wells, infiltration galleries and an offshore intake. AR 14044, 14068, 14088-91, 14103,  
26 14133-34, 5864-78, 9833-37, 9852-53, 9864-72, 8045-87, 8203-30, 6987-89, 14184-85, 545-46, 1421,  
27 1727-29, 13011-12, 10920-22.  
28

1           The Administrative Record demonstrates that the Commission sufficiently analyzed a reasonable  
2 range of alternative Project sites and alternative locations for the intake that would not utilize the exiting  
3 EPS intake infrastructure, in satisfaction of Coastal Act section 30260. Substantial evidence supports the  
4 Commission's finding that these alternative sites and locations were infeasible and/or more  
5 environmentally damaging than the Project.

6           The Commission analyzed three potential sites, which were detailed in Poseidon's written  
7 submissions to the Commission: (1) sites within the boundaries of the EPS, (2) the EWPCF site, and  
8 (3) the Maerkle Reservoir site. AR 5874-77, 6987-89, 7067. The first two sites were also included in  
9 the EIR, while the third was added during the CDP review process in response to Commission Staff's  
10 request for analysis of additional sites within the Project's service area. AR 5874-77. Substantial  
11 evidence in the record demonstrates that these are the only potentially feasible locations for the Project  
12 in its service area, and that the EPS is the only one of these sites that could feasibly meet Project  
13 objectives and minimize impacts. AR 5874-77. Petitioners do not contend otherwise.

14           Petitioners assert that the Commission should have considered un-specified alternative sites  
15 beyond Carlsbad. But substantial evidence supports the Commission's decision to limit its review to  
16 all potentially feasible sites within the Project's service area. The Commission need not consider sites  
17 that cannot achieve the basic Project goal. *In re Bay-Delta Programmatic Envtl. Impact Report*  
18 *Coordinated Proceedings*, 43 Cal.4th 1143, 165-66 (2008). Alternatives that cannot achieve the  
19 fundamental project purpose are "infeasible," and feasibility considerations should guide an agency's  
20 consideration of alternatives. *Id.*; *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553,  
21 561, 565 (1990); *see also Save San Francisco Bay Ass'n v. San Francisco Bay Conserv. & Dev. Com.*,  
22 10 Cal.App.4th 908, 929 (1992) (alternative sites analysis appropriately limited to waterfront sites in  
23 San Francisco Bay Area because it was unlikely that a broader search would have identified a site that  
24 could feasibly accomplish project's purpose).

25           The Project's basic purpose is to provide a local, reliable and drought-proof water supply to the  
26 City of Carlsbad and the San Diego area, in order to reduce local dependence on imported water, and  
27 to provide desalinated water at or below the cost of imported water supplies. AR 14054, 643, 1404-  
28 1405, 14057, 5857-58. The Project will supply 100% of Carlsbad's potable water requirements,

1 providing Carlsbad with approximately 21,000 AFY of desalinated water (out of a total output of  
2 56,000 AFY), and the Project's location is critical for servicing Carlsbad and surrounding water  
3 districts in North San Diego. AR 550, 5874. The Project's expected output of 50 million gallons per  
4 day ("MGD") is a central component of regional water supply planning, as the Project will provide  
5 approximately 10% of the desalinated water needed in California by 2030. AR 14057, 10153.

6 A Carlsbad locale is material to a project that will supply a significant percentage of its output  
7 to Carlsbad and satisfy 100% of Carlsbad's water needs. Substantial evidence supports the  
8 determination that siting the Project within its service area is central to Poseidon's ability to feasibly  
9 fulfill the Project's purpose of providing a local, drought-proof water source at or below the cost of  
10 imported water supplies. The record reflects that benefits of the Project site include its close proximity  
11 to the existing EPS intake and outfall and key delivery points of the distribution system of Carlsbad,  
12 the largest water user. AR 5874 and 5877. The location allows the Project to optimize the cost of  
13 delivery of the produced water and the environmental impacts associated with the construction and  
14 operation of the Project. *Id.* It also avoids the construction of new intake and discharge facilities,  
15 providing significant environmental and cost benefits. AR 5874.

16 Similarly, the quantity of water to be produced by a desalination plant is mandated by the  
17 Project's objectives. Producing sufficient water to satisfy Carlsbad's demand, the demand of other  
18 local agencies, and the Project's planned contribution of desalinated water as a component of regional  
19 water supplies are key objectives that could not be met with a scaled down project. AR 14054, 14057,  
20 5857-58. The administrative record indicates that a reduced output alternative (25 MGD) was  
21 considered but found insufficient to meet objectives with no environmental benefits. AR 5857-58,  
22 1729-32, 546. The Commission also found that replacing the Project with multiple smaller  
23 desalination facilities would result in far greater environmental impacts and costs, would not address  
24 the water needs of Carlsbad and the San Diego area, and would not conform to Coastal Act policies.  
25 AR 14089, 9833-35, 14184.

26 A desalination project separately proposed for Dana Point by the Municipal Water District of  
27 Orange County is not a feasible alternative site for this Project. AR 2294. The record establishes that  
28 the Dana Point project would serve Orange County, rather than Carlsbad/San Diego, and that it will

1 only output 15 MGD of desalinated water. AR 2296. Moreover, the Commission specifically  
2 considered the Dana Point site, but rejected it because its slant well technology is infeasible for the  
3 Project. AR 14088-89, 8046, 5864-67, 9833-35. Petitioners conceded that Dana Point is not an  
4 alternative site for this Project and would at best provide a framework for analyzing sub-surface  
5 intakes in Carlsbad. AR 2500. Petitioners also conceded that slant wells proposed in Dana Point are  
6 not feasible in the Carlsbad area.

7 Petitioners' failure to point to other viable alternative sites that could potentially meet Project  
8 objectives provides further support for finding that the Commission's alternative locations analysis was  
9 sufficient. *See Save San Francisco Bay*, 10 Cal.App.4th at 922, 929-30; *Save Our Residential*  
10 *Environment v. City of W. Hollywood*, 9 Cal.App.4th 1745, 1754 (1992).

11 The Commission's alternatives analysis was not limited to alternative sites. The Commission  
12 also considered alternative locations to draw in the needed seawater for desalination, such that the  
13 existing EPS intake would not be used. AR 14044. The Commission evaluated alternative intakes  
14 including horizontal wells, vertical beach wells, slant wells, infiltration galleries and an offshore  
15 intake. These alternatives were found to be infeasible and more environmentally damaging than the  
16 Project. AR 14044, 14068, 14088-91, 14103, 14133-34, 5864-78, 9833-37, 9852-53, 9864-72, 8045-  
17 87, 8203-30, 6987-89, 14184-85, 545-46, 1421, 1727-29, 13011-12, 10920-22. Petitioners do not  
18 contest these findings.

19 Substantial evidence supports the Commission's finding that alternative locations were infeasible  
20 or more environmentally damaging under Coastal Act section 30260, based on the Commission's review  
21 of alternative sites and intake locations.

22 Petitioners do not present any argument challenging the Commission's finding that denial of  
23 the CDP would adversely affect public welfare, and such an argument is therefore waived. Further,  
24 substantial evidence supports the Commission's finding that denial of the CDP would adversely affect  
25 public welfare by raising water costs and denying the public an important and reliable water resource,  
26 and because the Project is a necessary and integral part of the region's water portfolio. *E.g.*, AR 14138-  
27 39, 14134, 14056-57.  
28

1           Petitioners' challenge to this finding is based on their argument that the Commission failed to  
2 consider the feasibility of alternative locations for the Project. As stated above, the feasibility of  
3 alternative sites was adequate. Further, the record includes substantial evidence that impacts will be  
4 mitigated to the maximum extent feasible through imposition of Special Conditions 4, 8, 9, 10, 11, 12,  
5 13, 14, 15, 16, and 17. AR 14134, 14045.

6           **Requests For Judicial Notice**

7  
8           RPI's Request for Judicial Notice of Legislative History of the Coastal Act and Water Code  
9 section 13142.5, which was not opposed, is granted in its entirety. Legislative history is a proper  
10 subject of judicial notice under Evidence Code section 452(c). *Kaufman & Broad Communities, Inc.*  
11 *v. Performance Plastering, Inc.*, 133 Cal.App.4th 26, 31-37 (2005). The legislative history of the  
12 Coastal Act and Water Code section 13142.5 is relevant because Petitioners claim that the  
13 Commission failed to enforce Water Code section 13142.5, while Respondent and RPIs contend that  
14 the Commission was not required to do so pursuant to Coastal Act section 30412(b).

15           RPI's Request for Judicial Notice of the Transcript of the August 6, 2008 Coastal Commission  
16 Hearing regarding approval of the MLMP is granted in its entirety. The Certified Transcript is relevant  
17 to the Court's evaluation of Petitioners' "deferred" mitigation claim because it establishes that the  
18 Commission approved the MLMP on August 6, 2008, prior to issuance of the CDP, in satisfaction of  
19 Special Condition 8. The Certified Transcript is a proper subject of judicial notice pursuant to  
20 Evidence Code section 452(h), because it contains matters that are not reasonably subject to dispute  
21 and are capable of immediate and accurate determination by resort to sources of reasonably  
22 indisputable accuracy. *See Bravo Vending v. City of Rancho Mirage*, 16 Cal.App.4th 383, 405-06  
23 (1993); *Almond v. County of Sacramento*, 276 Cal.App.2d 32 (1969).

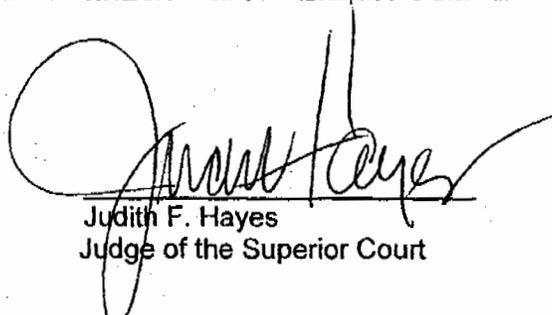
24           ///  
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1 Respondent's Request for Judicial Notice of the Commission's Revised Condition Compliance  
2 Findings regarding approval of the MLMP is granted in its entirety. The findings are an appropriate  
3 subject for judicial notice pursuant to Evidence Code section 452(c), which authorizes judicial notice  
4 of the "[o]fficial acts" of state agencies. The findings are relevant to the Court's evaluation of  
5 Petitioners' "deferred" mitigation claim because they establish that the Commission approved the  
6 MLMP on August 6, 2008, prior to issuance of the CDP, in satisfaction of Special Condition 8.

7  
8 For the foregoing reasons, Petitioners' Petition for Writ of Mandamus is denied.

9 **IT IS SO ORDERED.**

10  
11 Date: MAY 07 2009

12   
13 Judith F. Hayes  
14 Judge of the Superior Court  
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**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
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**RESPONSIVENESS SUMMARY  
INCLUDING RESPONSES TO COMMENTS**

**ORDER NO. R9-2009-0038  
AMENDING**

**ORDER NO. R9-2006-0065 (NPDES NO. CA0109223)  
WASTE DISCHARGE REQUIREMENTS FOR  
THE POSEIDON RESOURCES CORPORATION  
CARLSBAD DESALINATION PROJECT  
DISCHARGE TO THE PACIFIC OCEAN VIA  
THE ENCINA POWER STATION DISCHARGE CHANNEL**

The Carlsbad Desalination Project (CDP) has been subject to extensive regulatory process before this agency and other resource agencies, and the March 27, 2009 Flow, Entrainment and Impingement Minimization Plan has been considered in several iterations at four public meetings before the Regional Board, with substantial public comment. Substantial additional comments regarding the details of the Regional Board's proposed decision were received in February, March and April of 2009, including at the public hearing held on April 8, 2009. To fully respond to this additional public comment, to provide a detailed explanation for the bases for the Board's decision on this matter, and to provide citations to the evidence upon which the Board has based its decision, the California Regional Water Quality Control Board, San Diego Region (hereinafter Regional Board) staff have prepared the following summary of significant issues and responses to comments submitted throughout the course of this proceeding as follows:

**Summary of Significant Issues  
Description of the CDP**

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Staff endeavored to create a Responsiveness Summary that is as complete as possible. Due to the volume of comments received by the Regional Board, however, staff focused on the most significant issues and comments. In addition, staff attempted to minimize redundant responses to similar comments, which resulted in some minor inconsistencies in the corresponding responses, and, in some cases, a response of "comment noted." In those situations, the reader should also review the responses to similar comments for the full context of the response. Finally, many of the most recent comments were received too late for substantive written responses. The most significant of those comments will be responded to orally by staff at the Board Meeting.

Responsiveness Summary and Responses to Comments  
Order No. R9-2009-0038

system. The Pm ratio is calculated by dividing (a) the number of larvae that are entrained in a water intake system by (b) the number of larvae in the same water body that are subject to entrainment (i.e., entrainable).

Tenera Environmental ("Tenera") collected entrainment samples in AHL as part of its entrainment and impingement study. Based on the entrainment data derived from sampling at the EPS intake, Tenera estimated the proportional entrainment mortality (Pm) of the most commonly entrained larval fish living in AHL by applying the ETM to the data. To estimate the CDP's potential entrainment, Tenera computed the values based on a total flow rate of 304 MGD. Tenera concluded that the entrainment effect of the Project's stand-alone operation would influence 36.8 acres of Agua Hedionda Lagoon (i.e., APF = 36.8 acres). The ETM results presented in the Minimization Plan incorporated the assumptions of 100% mortality of all marine organisms entering the intake and that species are evenly distributed throughout the entire depth and volume of the water body.

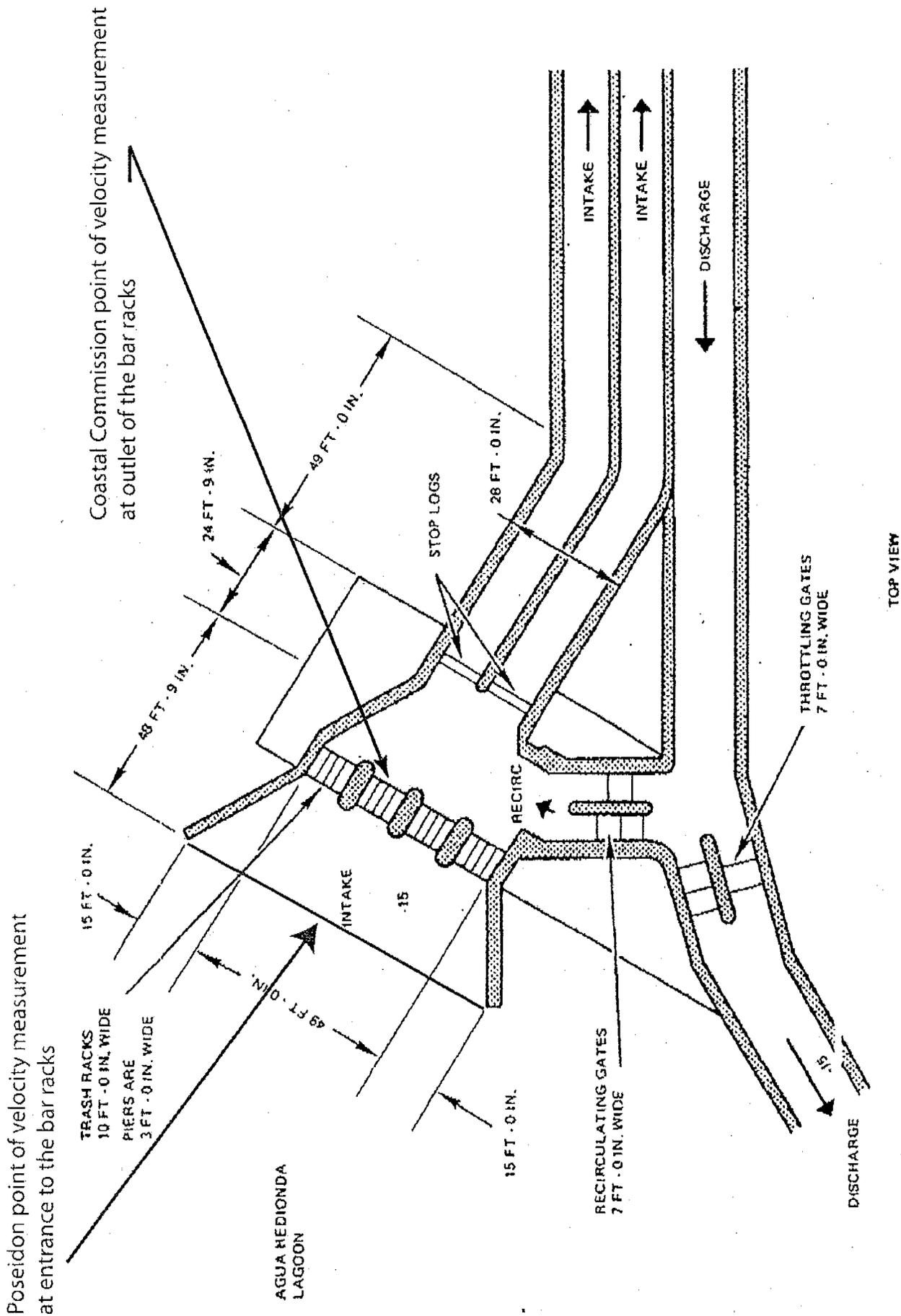
In March 2008, the Discharger provided a copy of its entrainment study to the Coastal Commission as required by Special Condition 8 of the CDP's Coastal Development Permit. Coastal Commission staff forwarded the study to Dr. Pete Raimondi for his review and recommendations. Dr. Raimondi provided the initial results of his review and recommendations to the California Coastal Commission (CCC) in April 2008. In consultation with Dr. Peter Raimondi, the CCC evaluated the data provided by Poseidon, and determined it appropriate to apply an 80% confidence interval to the APF results, resulting in 49 acres of mitigation. For impacts to nearshore ocean waters, the CCC imposed an additional 6.4 acres of wetland mitigation, on the basis that wetland habitat would be ten times more productive than nearshore habitat. The CCC concluded that 55.4 acres of wetland mitigation, to be implemented in two phases (an initial 37 acres, followed by an additional 18.4 acres), would adequately compensate for entrainment impacts for operation of the CDP at 304 MGD.

After reviewing Tenera and Dr. Raimondi's work, the Coastal Commission concluded that by creating or restoring up to 55.4 acres of estuarine wetlands, the Discharger "will ensure the project's entrainment-related impacts will be fully mitigated and will enhance and restore the marine resources and biological productivity of coastal waters..." (Condition Compliance Findings for Special Condition 8, Marine Life Mitigation Plan, November 21, 2008, (approved December 10, 2008), p. 19 of 19.)

No new entrainment data has been generated since evaluation by the CCC. Therefore, it is appropriate for the Regional Board to rely on the CCC's findings with regards to the adequacy of mitigation for entrainment impacts

### **Impingement**

Like the entrainment projection, the CDP's impingement projection was calculated using data collected pursuant to the EPS's Regional Board-approved 316(b) Impingement Mortality and Entrainment Characterization Study plan. Tenera collected 52 impingement samples on a weekly basis from June 24, 2004 to June 15, 2005.



**Figure 1.** San Diego Gas & Electric Encina Intake Structures (prepared by SDG&E, Figure No. 3.1-3).

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September 14, 2009

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Hon. Members of the City Council  
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File No. 038182-0001

Re: City Council Agenda Item #12 - Response to Coast Law Group Letter

Dear Hon. Mayor and Council Members:

We represent Poseidon Resources in the development of the Carlsbad Desalination Plant ("CDP" or "Project"). We appreciate the opportunity to respond to the August 19, 2009 letter from Coast Law Group ("CLG"). What is notable about the letter, and the continuous legal objections raised by Mr. Gonzalez and his ever-changing group of clients, is that these comments raise no credible environmental issues. CLG and its clients have stated that they are not opposed to desalination. Therefore, the obvious question that arises from this letter is what alternative are the opponents trying to achieve? Furthermore, the letter requests that the City study issues that have already been thoroughly analyzed and fully vetted by multiple regulatory jurisdictions and the Courts. It is obvious that the goal of the opponents at this stage is not to create a better Project or help the City to better analyze the Project; the goal is simply to kill the Project through delay.

We believe that the City of Carlsbad ("City") has followed the correct course under the California Environmental Quality Act ("CEQA") in the drafting of an Addendum to the Final Environmental Impact Report ("FEIR") for your consideration, and believe that your staff and consultants have done an excellent and thorough job evaluating the minor and immaterial revisions to the Project. We request that the City approve the Addendum and minor permit amendments and allow this Project to move forward to serve the water needs of Carlsbad and the surrounding San Diego region.

**I. RESPONSE TO COMMENTS**

**A. The City Has Provided the Public with Adequate Opportunity for Project Review**

CLG contends that there has been "little to no opportunity to review the City's Addendum and supporting documents." However, consistent with City policy, the staff report was posted via the City web site the Friday before the Planning Commission hearing. Specifically, the City provided the staff report on August 13, 2009 and the Addendum was

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posted on August 14, 2009. In addition, as noted in the Planning Commission hearing notice, additional documents were available from City staff by request. Contrary to CLG's contention that this has been a "truncated" process, the Project has been and continues to be reviewed using the same processes as other projects in the City of Carlsbad. CLG has had ample opportunity over the past several years since the first Project approvals in 2006 to work with the City to change its review processes, should it have desired. Having chosen instead to cry foul at the last minute, the City should not consider this improper argument.

CLG also complains that "the Addendum cross references relevant sections of the FEIR, requiring additional review of the massive FEIR for comparison." This criticism is remarkable considering that CLG has had over three years to review the FEIR since its certification in 2006, and CLG has been the law firm of record challenging the Project on four separate occasions, including a lawsuit challenging certification of the FEIR. (See Exhibit A, 2006 Petition for Writ of Mandate.) CLG also unsuccessfully challenged the California State Lands Commission's reliance on the FEIR. (See Exhibit B, SLC Tentative Decision.) It therefore appears disingenuous that CLG would now contend that it is not familiar with the Project FEIR, and would need significant additional time to review it. The FEIR has also been continuously available to CLG at the Carlsbad City Clerk's office and on the Poseidon website at [www.carlsbad-desal.com](http://www.carlsbad-desal.com) for over three years. If Project opponents have failed to avail themselves of the opportunity to review the document in the last three years, the applicant and the City should not be held accountable for their sloth.

Nonetheless, the Addendum prepared by the City is hardly "voluminous." The Addendum is 47 pages long and the staff report is 21 pages. In addition, City staff have done an excellent job of presenting the amended permit documents in strikeout-underline text to allow the reader to quickly ascertain the changes that have been made in all documents.

CLG contends City process is an "inappropriate and illegal evasion of public review and comment requirements of CEQA." But City staff have followed CEQA Guideline § 15164(c) which clearly states: "An addendum need not be circulated for public review but can be included in or attached to the final EIR or adopted negative declaration." CLG's statement simply ignores the applicable regulations governing CEQA.

Further, CLG's statement that the City has followed a "predetermined approval process for the Carlsbad Desalination Project at every level of review," is insulting to the City Council, Planning Commission and City Staff. The City has spent over 10 years evaluating desalination and over 3 years reviewing this specific Project before it was approved in 2006. The City also required dozens of Project concessions and conditions during its 2006 approval process. The City staff has now made a thorough review of the minor reconfiguration of the Project, and the Planning Commission recommended approval of staff's findings. We hope that the City Council will agree that the amendments constitute minor and immaterial changes that should be approved without delay.

Finally, many of the issues addressed in the CLG letter are neither new nor specific to this process. These same arguments were raised by the same environmental groups before the City Council in 2006, and subsequently in front of the San Diego Regional Water Quality

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Control Board ("Regional Board"), the California Coastal Commission ("CCC") and the California State Lands Commission ("SLC"). Therefore the contention that "it is unreasonable to expect the public to provide anything resembling meaningful comment within such a short time frame," is ridiculous at best. The Project has undergone 15 public hearings with over 73 hours of public testimony; produced four lawsuits; hundreds of pages of legal briefs; and thousands of pages of comments and responses by the opponents and proponents of the Project. To contend that this Project has not been amply reviewed by the public is insincere at best.

B. The City is Not Required to Prepare a SEIR

CLG argues that substantial changes to the Project and in the circumstances surrounding the Project require preparation of a supplemental or subsequent EIR ("SEIR"). CLG provides no legal basis and no legal authority in support of this statement. CLG is either ignorant of the legal authority or is intentionally providing false and misleading statements to the City Council, making the substance of the entire letter suspect.

To clarify, CEQA Guideline § 15164(a) states that, "the lead agency shall prepare an addendum to a previously certified EIR if some changes or additions are necessary but none of the conditions described in Section 15162 calling for the preparation of a subsequent EIR have occurred." Both CEQA § 21166 and its analog Guidelines § 15162 provide that a SEIR may not be prepared in the absence of the following: (1) substantial changes to the project, (2) substantial changes to the project circumstances, or (3) new information of substantial importance. (CEQA § 21166; Guidelines §§ 15162(a), 15163(a).)<sup>1</sup> Specifically, Guidelines § 15162(a) states:

When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

<sup>1</sup> References to Pub. Res. Code § 21000 *et seq.*, are preceded by "CEQA" and followed by the section number, and references to 14 Cal. Code of Regs. § 15000 *et seq.*, are preceded by "CEQA Guidelines" and followed by the section number.

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(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:

(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

(B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

(C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or

(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

(CEQA Guidelines § 15162(a); accord CEQA § 21166.)

The Addendum prepared by the City exhaustively reviews eleven areas of environmental concern and finds that none of the conditions described in CEQA Guideline § 15162 have occurred. This analysis confirms that the Addendum is capturing the minor and immaterial changes to the Project which do not result in any new or increased significant effects analyzed in the FEIR. As such, the City's decision to prepare an Addendum to the FEIR instead of a SEIR is supported by substantial evidence.

In addition, the CLG letter states that "several agencies have reviewed the Project and found the FEIR inadequate." Not so. CLG has been involved in each of these agency proceedings and either does not understand what occurred during those proceedings or is deliberately playing fast and loose with the truth. Each of the agencies who have reviewed the Project, including the CCC, Regional Board, and SLC, have all relied upon the Project FEIR in making their own findings of approval. (See Exhibit C, Final CCC Findings at 29; Exhibit D, Regional Board Order No. R9-2009-0038 at ¶ 22; Exhibit E, SLC Calendar Item 55, at 22.) None of the agencies found the FEIR inadequate.

Judge Judith Hayes of the San Diego Superior Court recognized this fact in *Surfrider Foundation et al. v. State Lands Commission*, stating in the Tentative Decision that, "The Regional Board, Coastal Commission and State Lands approvals each recognized the FEIR's

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determination that the Project would not have significant marine life impacts under CEQA.”  
(See Exhibit B, SLC Tentative Decision.)

CLG also inaccurately contends that actions by these agencies have “supplement[ed] the document with new information” which “reveal the Project’s significant negative impacts.” The various agency processes have not revealed any new “negative impacts” under CEQA. Indeed, in *Surfrider Foundation et al. v. State Lands Commission*, the Court’s Tentative Decision found:

No agency determined that the Project would have significant marine life impacts pursuant to CEQA. Instead, the reviewing agencies imposed mitigation measures according to their respective responsibilities under separate statutory schemes which employ different standards of review than CEQA’s “significant impact” threshold. [ ] The Regional Board, Coastal Commission and State Lands imposed additional conditions on the Project, outside of CEQA, to maximize environmental protection.

(See Exhibit B, SLC Tentative Decision at 7; see also Exhibit C, Final CCC Findings at 46 [“Although the Final EIR found the project would cause no significant entrainment impacts pursuant to CEQA, the Commission finds that the project’s entrainment impacts will require mitigation to ensure conformity to Coastal Act Sections 30230 and 30231.”]; Exhibit D, Regional Water Quality Control Board Order No. R9-2009-0038 at ¶ 52 [“Implementation of the March 27, 2009 Minimization Plan will ensure that the CDP is in compliance with Water Code section 13142.5(b) under co-location operations to benefit the CDP.”].)

It is important to note that none of the agencies chose to prepare a SEIR, choosing instead to rely on the City’s certified FEIR to make their respective approvals. (Exhibit E, SLC Calendar Item 55, at 22 [“Preparation of a supplemental or subsequent EIR would therefore not appear to be permitted under Section 15162 of the CEQA Guidelines.”].)

Furthermore, contrary to CLG’s letter, the State Water Resources Control Board’s *Proposed Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling* has no bearing on the Project. The State Water Resources Control Board’s public hearing notice on the policy notes: “The proposed Policy establishes technology-based standards to implement federal Clean Water Act section 316(b).” (Exhibit W, State Water Resources Control Board Notice.) CLG made the same unsuccessful argument in *Surfrider Foundation et al. v. California Coastal Commission* and is fully aware of the Court’s determination that Clean Water Act § 316(b) does not apply to desalination facilities. The final decision in the case states:

By its express terms, CWA section 316(b) applies only to “cooling water intake structures.” [ ] In approving the Project’s NPDES Permit, the Regional Board found that CWA section 316(b) regulations are inapplicable to the Project, and the State Board’s Scoping Document for Power Plant Cooling states that desalination plants are outside the scope of CWA section 316(b) issues. [ ]

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The Court holds that CWA section 316(b) does not apply to desalination plants such as the Project[.]

(Exhibit F, Final CCC Statement of Decision at 3.) CLG's comment is simply a regurgitation of an argument that has been addressed and settled by the courts and is thus barred under the doctrine of res judicata. (*Fed. of Hillside and Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202 [internal citations omitted].)

Finally, it appears that CLG is once again trying to mischaracterize the record regarding the alleged shutdown of Encina Power Station (EPS). Notwithstanding CLG's continued assertions to the contrary, there is no "planned shutdown" of EPS. This issue was clearly addressed in the recent proceedings before the Regional Board. In approving Order No. R9-2009-0038, the Regional Board properly found that although the shutdown of three out of five of the EPS power generation units has been proposed as part of the Carlsbad Energy Center project, such proposal has not been certified by the California Energy Commission and "it is speculative at this time to determine whether the project will be approved" by the CEC and constructed following any such approval. (Exhibit G, Regional Board RTC #50 at 51-52.) Even if that project were approved and constructed, and the three EPS units were shut down, two units with a total intake capacity of 633 MGD would remain online and could provide sufficient discharge to satisfy the Project's needs. (*Id.*) In addition, a Cabrillo representative testified to the State Lands Commission in October 2007 that two of the EPS units would continue to operate "indefinitely" and cannot be shut down unless Cal-ISO determines they are no longer needed for grid stability. (Exhibit H, Excerpt from SLC Transcript at 153; Exhibit C, Final CCC Findings, at 14.) CLG's continued attempts to blur the record are without merit.

C. The City Has Thoroughly Evaluated All Project Alternatives

CLG claims that the additional regulatory agencies that reviewed the Project "imposed various mitigation measures to address the newly discovered and significant marine life impacts of the Project." Acknowledging the Addendum's finding that these conditions were imposed based on different statutory regimes such as the California Coastal Act and Water Code, CLG then nonsensically argues that these additional mitigation requirements "signal the need to prepare subsequent CEQA documentation evaluating the feasibility of alternative intakes in light of the significance of the Project's impacts."

This argument ignores the thorough analysis of alternative intakes performed by the City during the original approvals in 2006 and included in the FEIR. A feasibility analysis of alternative intakes including beach wells, infiltration galleries, and seabed filtration systems is found at Appendix C of the FEIR. The City Council reviewed this analysis and found with respect to beach wells that the "siting, construction and operation of 100 wells would not be practical and could result in potentially significant impacts depending on the locations of the wells. Therefore, this design alternative is infeasible." (Exhibit X, 2006 City Council Findings of Fact at Section 5.3.) With respect to horizontal beach wells, the City Council found that the "[s]iting of 25 beach wells along 4 miles of the Carlsbad beaches would likely result in significant unmitigable impacts to visual resources and recreation. In addition, temporary impacts to biological resources would also likely be significant. Therefore, this design

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alternative is not feasible.” (*Id.* at 58.) In addition, infiltration galleries were found to be infeasible because “the estimated depth for each well would be approximately 30 feet, over an approximately 4-mile stretch of beach, requiring the removal and disposal of extensive quantities of earth material and resulting in potentially significant temporary impacts to biological resources.” (*Id.* at 58.) Finally, the City Council found that, “because of the infeasibility and/or significant temporary and permanent impacts resulting from the design alternatives that are available, the co-located EPS intake is the best means of obtaining source water for the Project.” (*Id.* at 59.)

The CCC similarly reviewed and dismissed alternative intake options during its approval of the Coastal Development Permit for the Project. (*See* Exhibit C, Final CCC Findings at 47-51.) The Regional Board also echoed this alternative analysis when it approved Order NO. R9-2009-0038:

“The Discharger analyzed the following intake alternatives: (1) Subsurface intake (vertical and horizontal beach wells, slant wells, and infiltration galleries); (2) new open ocean intake; (3) Modifications to the existing power plant intake system; and (4) Installation of variable frequency drives (VFDs) on seawater intake pumps. The Discharger compared screening technologies to identify the best available technology feasible including: (1) Fish net, acoustic and air bubble barriers upstream of the existing intake inlet mouth; (2) New screening technologies to replace the existing inlet screens (bar racks); and (3) fine vertical traveling screens. Implementation of the alternatives associated with the modification of the existing power plant intake and screening facilities were infeasible because they would interfere with, or interrupt, power plant scheduled operations. Taking into account economic, environmental and technological factors, the power plant intake screening alternatives are not capable of being accomplished in a successful manner within a reasonable period of time. The Discharger identified intake technologies it will employ to reduce intake and mortality of marine organisms during temporary or permanent shutdown of the EPS. The CDP intake pump station design will incorporate variable frequency drives to reduce the total intake flow for the desalination facility to no more than that needed at any given time, thereby minimizing the entrainment of marine organisms. Under the conditions of co-location operations for CDP’s benefit, the Discharger has little control over the intake structure and little flexibility in implementing different technologies. Under these circumstances, the Discharger has identified the best technologies feasible to minimize the intake and mortality of marine life at this time. The Regional Board finds that the proposed technology for the CDP is the best available technology feasible under co-location operation for the CDP benefit.”

(*See* Exhibit D, Regional Board Order No. R9-2009-0038 at 8.)

Furthermore, the Regional Board found:

With regard to alternative intakes, the CDP’s hydro-geologic studies confirm that none of the alternative intakes evaluated are capable of delivering the 304 MGD of seawater needed for environmentally safe operation of the CDP. Furthermore, the quality of the

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water available from the subsurface intake would be untreatable due to an extremely high salinity level, excessive iron, and high suspended solids. The Coastal Commission found, and the Regional Board agrees, that alternative intakes that might avoid or minimize environmental impacts are infeasible or would cause greater environmental impacts.

(See Exhibit G, Regional Board Responsiveness Document at 138.)

Notably, over the course of four lawsuits challenging the Project, CLG has failed to provide one single alternative to the approved intake system that can feasibly bring water to the facility.

D. The Project Does Not Result in Increased Growth Inducement Impacts

CLG contends that the FEIR "did not discuss growth inducing impacts to any level of detail." This is simply incorrect. The FEIR provided an extensive analysis of the Project's potential for growth inducement at FEIR section 9.0 and the City Council ultimately found that, although the Project would not cause direct growth inducement, a possibility of indirect growth inducement was considered a potentially significant impact. The City further found that:

Desalinated seawater is already considered in regional growth analyses conducted by SANDAG, as contained in its 2004 Regional Comprehensive Plan, and in demand projections by the CWA as contained in its 2003 RWFMP. The Project will not supply water in excess of what is already anticipated to meet future projected needs. The Project will not cause significant direct growth-inducing impacts. However, City recognizes that replacement of imported water supplies with locally produced desalinated water supplies could have the effect of making the imported water supplies that are displaced by the desalinated water supplies available for other use. Determination of the specific potential indirect growth inducing effects outside of the Project's service area would require speculation that is beyond the scope of the environmental analysis for the Project. Therefore, City considers the possibility of indirect regional growth inducement a potentially significant effect and finds that there is no feasible mitigation for this potential impact.

(Exhibit X, FEIR Findings, Section 4.2.)

It should be noted that since the certification of the FEIR, SANDAG has updated their demographic projections to show that growth projections in San Diego County remain almost unchanged and long-term growth projections for Carlsbad have actually decreased. (Exhibit I, *SANDAG Regional Growth Forecast, June 2004 / SANDAG 2030 Regional Growth Forecast Update, July 2008*)

CLG also states that the San Diego County Water Authority is "now planning" construction of a 150 MGD desalination plant which would add to the cumulative growth

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inducing impacts of the Project. As noted above, the City has already found the indirect growth inducing impacts of the Project potentially significant. In addition, the San Diego County Water Authority has only performed a feasibility study to determine the feasibility of building a desalination plant on the Camp Pendleton Marine Corps Base. The Water Authority has adopted no formal schedule for this project or its construction; therefore any attempt to determine the cumulative impacts of the project would be merely speculative and beyond the scope of the environmental analysis for the Project. (CEQA Guidelines § 15145; *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1137.)

E. Impacts to Geology and Soils Have Not Increased

CLG alleges that the “potential for erosion will increase due to proposed undergrounding of additional Project components, as well as increase in the size of the delivery pipelines.” CLG can provide no evidence to support this argument because it is, quite simply, a fact free statement.

The Addendum specifically states:

Erosion potential for the revised Project would be similar and slightly reduced compared to what was evaluated in the FEIR at both a direct and cumulative level. Reductions in erosion potential are due to the reduced length of pipeline and associated grading. In addition, the mitigation measures relating to erosion control identified in the FEIR are also applicable to the revised Project.

(Addendum, at 26.)

The Addendum also states, “[t]he total pipeline length will be reduced from 17.4 miles to approximately 16.2 miles (a 7% reduction) and will reduce the amount of earthwork required by 333,001 cubic yards of cut/fill. This would result in a 56% reduction in grading.”

F. Project Noise Will Not Increase

CLG additionally alleges that the installation of the new pipelines will result in increased noise impacts, stating that this is a special concern for those residential areas along Linda Vista and 9<sup>th</sup> Streets. Again, CLG provides no evidence for its statement and the thorough analysis of the Addendum proves its falsity.

The Addendum states that, in regards to new pipelines in residential areas such as Linda Vista and 9<sup>th</sup> Street in the City of San Marcos: “As discussed in the FEIR, pipeline construction is anticipated to cause significant noise impact to surrounding residences and the same conditions to comply with all appropriate noise regulations will remain for the proposed Project.” (Addendum, at 34.) As discussed in the FEIR, “the construction activities would comply with the local jurisdictions’ noise ordinance for allowable hours,” (FEIR at 4.9-8.) and therefore will not cause significant impacts. Because all proposed construction will comply with local noise ordinances, including construction in new residential areas, there will not be any new or greater impacts than what was already analyzed in the FEIR.

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In fact, given that the Project revisions will result in less overall pipeline length and thus, less total construction time, it is likely that the Project noise impacts will only decrease from those analyzed in the FEIR.

Notably, Poseidon held a workshop in the City of San Marcos and sent over 1800 notices to effected residents in the area of the proposed pipeline. Clifton Williams, Land Use Analyst with Latham & Watkins, attended the meeting and reported that no concerns about construction noise were raised at that meeting, and residents in the area were supportive of the Project.

G. Traffic Impacts Will Not Increase

In what rapidly appears to becoming a pattern, CLG again provides a statement with no fact basis by claiming that the new pipeline installation will result in increased traffic impacts. CLG also intimates that the City has been untruthful in compiling the Addendum by questioning the finding that the Project revisions will result in a reduction of cut/fill hauling.

CLG, however, seems not to have read the Addendum. The Addendum acknowledges an increase in total earthwork at the plant but notes that less earth will be hauled from the site due to the site reconfiguration:

While the total earthwork of the proposed Project is anticipated to increase from approximately 61,940 cubic yards to 68,500 cubic yards, due to the opportunity for increased on-site reuse of the cut/fill, the actual volume of earthwork to be removed from the site will decline from 55,746 CY to approximately 21,000 CY. Based upon an average haul truck capacity of 20 CY per trip, this approximate reduction of 34,746 CY of earth corresponds to a reduction of approximately 1,737 haul trucks leaving the site.

(Addendum, at 34.)

Under the quantitative analysis of the Addendum, it is clear that traffic impacts from dirt-hauling trucks will actually decrease under the minor Project revisions.

H. Public Utilities Use Will Not Increase

CLG argues that, "[b]y operating at the FEIR's 'historical extreme' more frequently (and continuously upon EPS shutdown) the Project will require more energy to operate to draw 304 MG of water instead of 104 as anticipated." This statement is also incorrect.

First, as noted in Section B, *supra*, there is no planned shutdown of EPS. Any attempts by CLG to argue the contrary are simply mischaracterizations of the record. Moreover, there is no indication that the Project will be operating at the FEIR's "historical extreme" more frequently. In fact, EPS would have provided 89% of the Project's intake requirements in 2008, an amount certainly sufficient to meet its regular needs. (Exhibit G, Regional Board Responsiveness Summary at 2.)

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Second, even assuming the CDP will operate in standalone mode, the standalone energy use of the Project is within the scope of the energy use already analyzed in the FEIR and found not to be significant. As part of the CCC and SLC approval process, the Project was required to create an Energy Minimization and Greenhouse Gas Reduction Plan ("GHG Plan"). The GHG Plan required an evaluation of the average daily energy use of the Project, which included stand alone operation of the CDP with independent operation of the EPS intake pumps. (See Exhibit J, GHG Plan at Table-2.) Table-2 of the GHG Plan shows that average daily energy use for the Project in stand-alone conditions (with the operation of the EPS intake pumps) will be 31.32 MWh in the Project's baseline design, and 28.08 MWh in the high efficiency design (*Ibid.*)

The FEIR described the Project's average annual energy use as 29.76 MWh for average daily operation of the desalination facility, and provided a maximum daily energy use for the CDP of 35.5 MWh. (FEIR, at 4.11-17.) Importantly, these energy use estimates did not include operation of the EPS intake pumps. In addition, the FEIR notes that an additional 0.55 MWh would be required for the operation of the Oceanside pump station. (*Ibid.*) Therefore the FEIR analyzed a total average daily energy use of 30.31 MWh and a maximum daily energy use of 36.05MWh for CDP operation.<sup>2</sup>

The FEIR analyzed the impact of the maximum daily energy use of 36.05 MWh and found:

It is not anticipated that the increase in energy demand and consumption would require expansion of or improvements to existing facilities within the ISO controlled electricity grid that could result in significant environmental effects. Therefore, impacts to energy resources and facilities are considered to be less than significant.

(FEIR, at 4.11-21.)

Accordingly, the GHG Plan shows that average daily operation of the CDP in standalone operation will be only 1 MWh above the average daily energy use analyzed in the FEIR and far below the maximum daily energy use analyzed for the significance determination. Furthermore, in the high efficiency design, the CDP would actually use *less* energy while operating the EPS intake pumps in stand alone operation than was analyzed in the certified FEIR. Therefore the energy use of the CDP with the operation of the EPS intake pumps is within the scope of the Project already evaluated in the FEIR and will not cause a significant or increased impact to the environment.

I. The Project is Properly Located at the EPS Site

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<sup>2</sup> Under the Project revisions, the Oceanside pump station has since been eliminated from the Project.

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CLG complains that the Project is no longer coastal dependent and should be relocated to an inland location because the "Project's intake of seawater, whether via the existing power plant intake or otherwise, does not require location of the physical desalination plant on the coast."<sup>3</sup>

As an initial matter, the CCC expressly found that the Project is "coastal dependent" in its approval of the Project's Coastal Development Permit, and that determination is now final and unchallengeable. (See Exhibit C, Final CCC Findings at 93.) In addition, CLG's statement suffers from a lack of logic. Despite 6-plus years of administrative and environmental review, 15 public hearings, over 73 hours of public testimony and countless pages of supporting data, all of which rely on the Project's co-location with the EPS, CLG is now demanding that the CDP be moved off of the EPS site to some unknown and unstudied inland location. Remarkably, CLG has not offered a proposed alternative site, nor explained how the seawater necessary for Project operations would be transported to the alternate inland location without incurring significant environmental impacts over and beyond those contemplated for the current Project. As such, CLG's demand must be taken for what it is: a simple attempt to overturn the hard work and dedication that no less than four public agencies have committed to this project over the last 6 years.

Moreover, the argument that alternatives have not been thoroughly analyzed blatantly ignores the previous comprehensive analysis of alternative locations found in both the FEIR and subsequent Poseidon submittals to the CCC. (See FEIR, at 6-1 - 5; Exhibit K, Poseidon Resources November 30, 2006 Response to CCC's September 28, 2006 Request for Additional Information at 41-44.)<sup>4</sup> Poseidon analyzed both the Encina Water Pollution Control Facility (EWPCF) and Maerle Reservoir as potential Project alternative site locations; however, the analyses demonstrated that both alternate locations would not be feasible. The EWPCF would only accommodate a 10 MGD desalination plant due to outfall constraints; inadequate to satisfy even the City of Carlsbad's demand. The EWPCF would also have significant environmental and cost implications due to required construction of a water conveyance pipeline. (Exhibit K, Poseidon Resources November 30, 2006 Response to CCC's September 28, 2006 Request for Additional Information at 42.) Likewise, Maerle Reservoir is located 10.6 miles east of the proposed site. Insufficient space exists in the public rights-of-way between this site and the ocean to accommodate the needed pipelines, and it would be extremely disruptive to construct pipelines outside exiting rights-of-way. Substantial construction and operating costs would also result from piping and pumping seawater to this location, increasing water costs by 20%. This option would also conflict with land use designations. (Exhibit K, Poseidon Resources November 30, 2006 Response to CCC's September 28, 2006 Request for Additional Information

<sup>3</sup> It is unclear what CLG was referring to by titling this section of the comment letter, "Aesthetic and Coastal-Related Impacts Have Increased." CLG's comment does not state how or why "aesthetic and coastal-related impacts have increased" from the original to the revised Project.

<sup>4</sup> CLG cannot claim ignorance of the existence of this document as it was a part of the administrative record and referenced throughout the briefing in the *Surfrider Foundation et al. v. California Coastal Commission* case.

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at 42-44.) It is clear that EPS is the only one of these locations that could feasibly meet Project objectives while also minimizing impacts.

Disregarding this analysis, the CLG letter claims that the Project can be moved because the Project's connection to the SDCWA pipeline system enables movement of Project water throughout the County. While this is a true statement, water deliveries will also be made directly to the Carlsbad Municipal Water District, the Vallecitos Water District and the City of Oceanside at other connection points along the proposed pipeline route. These connections are marked as Flow Control Facilities ("FCF") on the pipeline maps included with the approval documents. These connection points are necessary to ensure efficient water delivery to the nine local water agencies that have entered into 30-year contracts with Poseidon to purchase 100% of Project capacity. (See Exhibit L, Water Agencies Comment Letter.)

Additionally, the City of Carlsbad has the option to take 100% of its water supply from the CDP and has required connections that are separate from those for the SDCWA. As noted in the City Staff Report for the Project modifications:

The City Council's strategic goal on water supply states: Ensure, in the most cost-effective manner, water quality and reliability to the maximum extent practical, to deliver high quality potable water and reclaimed water incorporating drought resistant community principals.

(Staff Report, at 3.) To this end, the City of Carlsbad has sought a diversification of its water supply, separate and distinct from the SDCWA, to ensure the reliability of the City's water supply. Due to the direct connections to the municipal systems, the CDP will provide drinking water to the City of Carlsbad, City of Oceanside, and the Vallecitos Water District service area, even in the event of a catastrophic shut down of or reduction in supplies from the SDCWA aqueduct system due to earthquake or regulatory issues.

The placement of the CDP in Carlsbad at the EPS site is vital to the City and surrounding jurisdictions. Locating the facility at the EPS site fulfills the major Project objectives stated in the FEIR, which include:

1. To provide a local source of potable water to supplement imported water supplies available to the City of Carlsbad and the San Diego region.
2. To improve water supply reliability for the City of Carlsbad and the San Diego region.
3. To improve water quality for the City of Carlsbad and the surrounding communities.

(FEIR, Section 3.5 at 3-30.) In addition, the EPS property is zoned PU-Public Utility, which specifically allows for desalination plants, and therefore is an appropriate site for the CDP.

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The primary focus of the Project has always been to bring a safe, reliable, drought proof water source to the City of Carlsbad, which requires location of the facility on the coast of the City of Carlsbad. The Court acknowledged this fact in *Surfrider Foundation et al. v. California Coastal Commission*, holding:

A Carlsbad locale is material to a project that will supply a significant percentage of its output to Carlsbad and satisfy 100% of Carlsbad's water needs. Substantial evidence supports the determination that siting the Project within its service area is central to Poseidon's ability to feasibly fulfill the Project's purpose of providing a local, drought-proof water source at or below the cost of imported water supplies. The record reflects that benefits of the Project site include its close proximity to the existing EPS intake and outfall and key delivery points of the distribution system of Carlsbad, the largest water user. [ ] The location allows the Project to optimize the cost of delivery of the produced water and the environmental impacts associated with the construction and operation of the Project. [ ] It also avoids the construction of new intake and discharge facilities, providing significant environmental and cost benefits.

(Exhibit F, Final CCC Statement of Decision at 9.) CLG cannot now ignore this finding.

J. Air Quality / Global Warming Impacts Have Not Increased

CLG states that the Project will "contribute to increased regional GHG emissions." To the extent that CLG is alleging that further environmental review is required to analyze the Project's GHG emissions, CLG is re-asserting an argument that has long been reviewed and dismissed.

Global warming is not a new phenomenon and governments have been aware of the effect of GHG emissions on global warming for over a decade. The Addendum provides a thorough review of the significant body of work available on global climate change prior to the approval of the Project, and to avoid repeating this analysis, we hereby incorporate pages 14 to 18 of the Addendum by reference. (See also Exhibit M, Assembly Bill 1493 (Pavley) (July 22, 2002); Exhibit N, Executive Order S-3-05 (June 1, 2005); Exhibit O, California Climate Action Team Report to Governor Schwarzenegger and the California Legislature, Executive Summary (March 2006); Exhibit P, IPCC Third Assessment Report (2001); Exhibit Q, California Consumer Power and Conservation Financing Authority, California Energy Resources Conservation and Development Commission, and California Public Utilities Commission, Energy Action Plan, May 2003; Exhibit R, Pacific Institute, Climate Change and California Water Resources: A Survey and Summary of the Literature, July 2003; Exhibit S, *Natural Resources Defense Council v. Reclamation Board* (Super. Ct., Sacramento County, issued Apr. 28, 2007, Case No. 06 CS 01228.); Exhibit T, *American Canyon Cmty. United for Responsible Growth v. City of Am. Canyon* (Super. Ct. Napa County, issued May 22, 2007, Case No. 26-27462).) In addition, former Vice President Al Gore's book *Earth in the Balance*, was published

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in January of 1993 and the subsequent movie *An Inconvenient Truth* was released on May 24, 2006 simultaneously with a book by the same title. (See Exhibit U, Copyright Page of *Earth in the Balance*.)

The legislative actions and scientific studies outlined in the Addendum and incorporated here demonstrate that post-2006 legislative actions and scientific studies are not “new information” or a “changed circumstance” regarding climate change because they merely confirm information that was widely available before the June 2006 certification of the FEIR. (See *No Oil, Inc. v. City of L.A.* (1987) 196 Cal.App.3d 223, 234 n.8 (study prepared before EIR was certified but submitted to City after certification of EIR was not “new information” under Pub. Res. Code § 21166).)

Furthermore, this issue has already been litigated in *Surfrider Foundation et al. v. State Lands Commission*. There, the Court’s Tentative Decision found:

[I]nformation regarding greenhouse gas (“GHG”) emissions is not “new information” under CEQA § 21166 because it was widely known and available long before certification of the FEIR in June 2006. (See, e.g., *Massachusetts v. EPA* (2007) 549 U.S. 497, 507-14 [discussing numerous legislative and executive actions prior to 2006 which addressed GHG emissions and global climate].) Petitioners’ argument that the legislative enactment of Assembly Bill 32 (“AB32”) in September 2006 and Senate Bill 97 (“SB97”) constitute “changed circumstances”, i.e., the California Legislature’s acknowledgment of impacts of global warming upon the State, fails because California adopted GHG regulations several years before the adoption of AB32 and SB97, through enactment of AB1493 in 2002 to regulate GHG emissions from cars and trucks, and the issuance of Executive Order No. S-3-05, in June 2005, which established the exact emissions targets that were later incorporated into AB32. The adoption of AB32 and SB97 does not constitute “changed circumstances” requiring preparation of an SEIR. Further, the threat of global warming is not “new information” that was not known or knowable when the FEIR was certified in 2006. [ ] Petitioners’ claim that the SLC’s “CEQA responsibilities” required preparation of an SEIR ignores the fact that this is not a new project involving whether or not CEQA review of climate change is required in the first instance; instead, this case only involves whether or not an SEIR is permitted under CEQA § 21166. Global warming does not constitute the requisite “new information” or “changed circumstances” triggering the need for an SEIR, as noted above.

(Exhibit B, SLC Tentative Decision at 9-10.) Because no facts or conditions have changed since the Court’s Tentative Decision in *Surfrider Foundation et al. v. State Lands Commission*, the doctrine of res judicata will bar any further attempt by the environmental groups to re-argue this

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issue. (*Fed. of Hillside and Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202.)

To the extent that CLG is alleging that the Project global warming impacts have increased since the FEIR was certified in 2006, this argument ignores the Project's commitment to become the first industrial facility in the state of California to have *zero* net indirect GHG emissions. As noted by the Addendum:

The California Coastal Commission approved the Project subject to the condition, among others, that the CCC approve an Energy Minimization and Greenhouse Gas Reduction Plan (GHG Plan) at a subsequent hearing. Poseidon's plan for the assessment, reduction and mitigation of GHG emissions establishes a protocol for identifying, securing, monitoring and updating measures to eliminate the Project's net carbon footprint.

(Addendum, at 15.)

The GHG Plan is attached here for the City's review. (See Exhibit J, GHG Plan.) Under the GHG Plan, the Project will not cause or contribute to any increase in GHG emissions because the GHG Plan includes numerous energy-minimization features and results in the reduction to zero of the Project's net indirect GHG emissions. To ensure the Project's emission reductions will be certain, verifiable and reduced to zero, the GHG Plan will require application of CCAR/CARB methodology to determine GHG emissions, purchase of offsets/renewable energy credits to fully reduce Project indirect GHG emissions to zero, and submission of annual reports to the SLC to demonstrate compliance. (See Exhibit C, Final CCC Findings at 75-90.) Each public agency that has reviewed the GHG Plan has confirmed that the GHG Plan will result in net carbon neutrality and fully mitigate any effects of the Project's indirect GHG emissions on coastal resources. (See Exhibit V, CCC Findings on GHG Plan at 22.) We would note that the CCC's findings on this point were not challenged by Petitioners in the CCC case and Petitioners did not challenge the CCC's GHG Plan approval, thereby implicitly conceding the Plan will result in net carbon neutrality.

K. Mandatory Significance Findings are Inapplicable

Without explanation or evidentiary support, CLG alleges that global warming and marine life impacts result in a mandatory finding of significance pursuant to CEQA Guidelines § 15065(a). This issue was directly addressed by the Court in *Surfrider Foundation et al. v. State Lands Commission*. The Court's Tentative Decision found:

CEQA § 15065 is inapplicable. Section 15065 establishes the circumstances [ ] where an EIR is required. Any claim that § 15065 required an SEIR must fail because the requisite "substantial change" under CEQA § 21166 has not been established."

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(Exhibit B, SLC Tentative Decision at 5.) Likewise, as noted above in Section B, *supra*, there have been no "substantial changes" or "new information" as a result of the minor Project modifications that are sufficient to require the preparation of a SEIR. CEQA Guideline § 15065 is therefore equally inapplicable here.

L. Cumulative Impacts are Fully Analyzed

Cumulative impacts related to the I-5 widening, Coastal Rail Trail, LOSSAN Rail Corridor, CECP, and Agua Heidionda Sewer Line and Lift Station, are fully analyzed by the Addendum. (Addendum, at 39-41.) The CLG letter provides no information or evidence to support its assertion that the project's listed will "constitute substantially changed circumstances surrounding the Project which will involve new or increased significant environmental impacts."

M. There is No Potential Increased Production Capacity

CLG's contention that the CDP intends to increase production capacity is false. The Addendum provides specific information as to the reasons for the reconfiguration of the CDP, as well as the increase in the size of the product water storage tank and certain pipelines. (See Addendum, at 4-10.) The Planning Commission Staff Report also provides information regarding these modifications. (Staff Report, at 3-6, 10-14.) CLG is manufacturing a theory of supposed increased production capacity without any supporting evidence.

With regard to the subsurface product water storage tank, the increase in size of the tank was done at the request of the Carlsbad Municipal Water District. As noted in the Staff Report, the increase in storage capacity will "allow for more time to modify water service deliveries to the City of Carlsbad in the event the Project is required to shut down. The new tank continues to be underground, but will provide an additional 30 minutes for the Carlsbad Municipal Water District to compensate for a change in water delivery if the plant were to shut down, therefore enhancing the health and safety of the system." (Staff Report, at 13.)

CLG's assertion that the intake capacity is being increased is similarly false and has no basis in fact. The intake pipeline was originally proposed as a 72" pipeline and continues to be a 72" pipeline in the revised Project. (See Staff Report, Attachment 7a "Site Plan," and Attachment 7b "Site Plan".) No increase in intake is proposed.

With regard to the discharge pipeline, the Addendum clearly states: "The discharge pipeline would increase from a 48 to 72 inch diameter. This increase in pipeline size is necessary to achieve full plant production capacity during initial start up and testing for the periods following service interruptions." (Addendum, at 7.)

The Project approved in 2006 was a 50 MGD seawater desalination plant and the reconfigured Project remains a 50 MGD seawater desalination plant. As noted in the Addendum: "All components of the desalination plant, including all on-site and off-site Project elements, are proposed to be sized and built to accommodate and deliver 50 MGD of product water." (Addendum, at 4.) There is no change to the operational capacity of the CDP and no plans to change the capacity.

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N. The Project Does Not Exceed Development Standards / Lot Coverage

CLG's comment is unclear but appears to state that the Project does not meet the PDP lot coverage standard. The area covered by the PDP is the approximately 95 acre EPS site. The CDP and appurtenant facilities has a lot coverage of 3% of the EPS. As shown in the PDP, the CDP plus EPS area does not exceed the 50% lot coverage standard.

O. An Amendment to the Project's Coastal Development Permit is Not Required

The minor and immaterial revisions to the Project's configuration, including to the Project's intake and discharge pipes and storage tank capacity, are all within the environmental envelope analyzed by the CCC when it approved Poseidon's Coastal Development Permit on November 15, 2007. None of those revisions will affect the CCC's determinations regarding the Project's consistency with the applicable policies of the Coastal Act. Further, Poseidon understands from its communications with Coastal Commission staff that staff has reviewed the Planning Commission's August 19, 2009 Resolutions recommending approval of the proposed Project, and that Commission staff has concluded that the revised Project presented in those Resolutions are consistent with the Project's Coastal Development Permit and will not require a Permit amendment.

P. Cumulative Impacts

CLG states that the "addendum fails to identify significant additional projects within the proposed revised pipeline routes." But the letter fails to identify even one of these supposed "significant additional projects." The question arises as to how CLG knows about "significant additional projects," but cannot list a single project in its letter.

Q. The City is Not Relying on a "Claim of Benefits" in Preparing the Addendum

Despite CLG's claims, the City is not relying on "net benefit to any future redevelopment of the EPS" as a reason to prepare the Addendum, instead of a SEIR. As noted in the Addendum, the City appropriately applied CEQA Guidelines §§ 15162, 15163 and 15164 to determine if an Addendum was the appropriate CEQA document for review of the revised Project. (Addendum, Section 2.0.) The Addendum further states that it "memorializes in detail the City's reasoned conclusion that their revised Project as described in Section 4.0 does not create the conditions requiring the preparation of a Subsequent or Supplemental EIR pursuant to State CEQA Guidelines, sections 15162 and 15163." (Addendum, Section 11.0.) CLG is simply misrepresenting the standard upon which the City has based its decision to prepare an Addendum.

R. Wildlife Impacts

In yet another unsupported challenge to the Project, CLG claims that "the alignment of the project buildings may provide new or enhanced perching opportunities for foraging raptors" because the Project site includes a stopover for migrating waterfowl. CLG cites no factual evidence that would support an argument that this could be seen as a potentially significant impact that should be analyzed in the Addendum or FEIR. Moreover, the existing condition is

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an oil storage tank at a height of approximately 42 feet. The CDP will not exceed 35 feet and therefore will diminish perching opportunities.

S. Incomplete Staff Report

Comment is noted. Poseidon has also requested that staff complete the sentence on page 3 of the report.

T. The FEIR and Addendum Analyze All Project Impacts

The FEIR and Addendum provide an analysis of all Project impacts regardless of political jurisdiction. The FEIR and Addendum clearly indicate that pipelines will cover several jurisdictions and analyzes impacts throughout the pipeline route. As noted in the Addendum, the length of the product water delivery pipeline is being reduced from 17.4 miles to 16.16 miles which will reduce overall construction impacts. In addition, the Project is required to follow all construction rules of each jurisdiction, and to prepare construction plans for each phase of pipeline construction. Therefore all impacts from the construction of pipelines, regardless of political jurisdiction, have been addressed.

II. CONCLUSION

Thank you for the opportunity to respond to these comments. As noted at the Planning Commission meeting, these comments appear to be devoid of real environmental issues and are intended to delay the approval process. CLG's comments are neither new or novel and have been raised multiple times at every level of review. Importantly, the courts have consistently found in favor of the approving agencies.

We therefore ask that the City approve the Addendum and minor revisions to the Project, so that construction may commence on this important source of water to the San Diego area.

Sincerely,

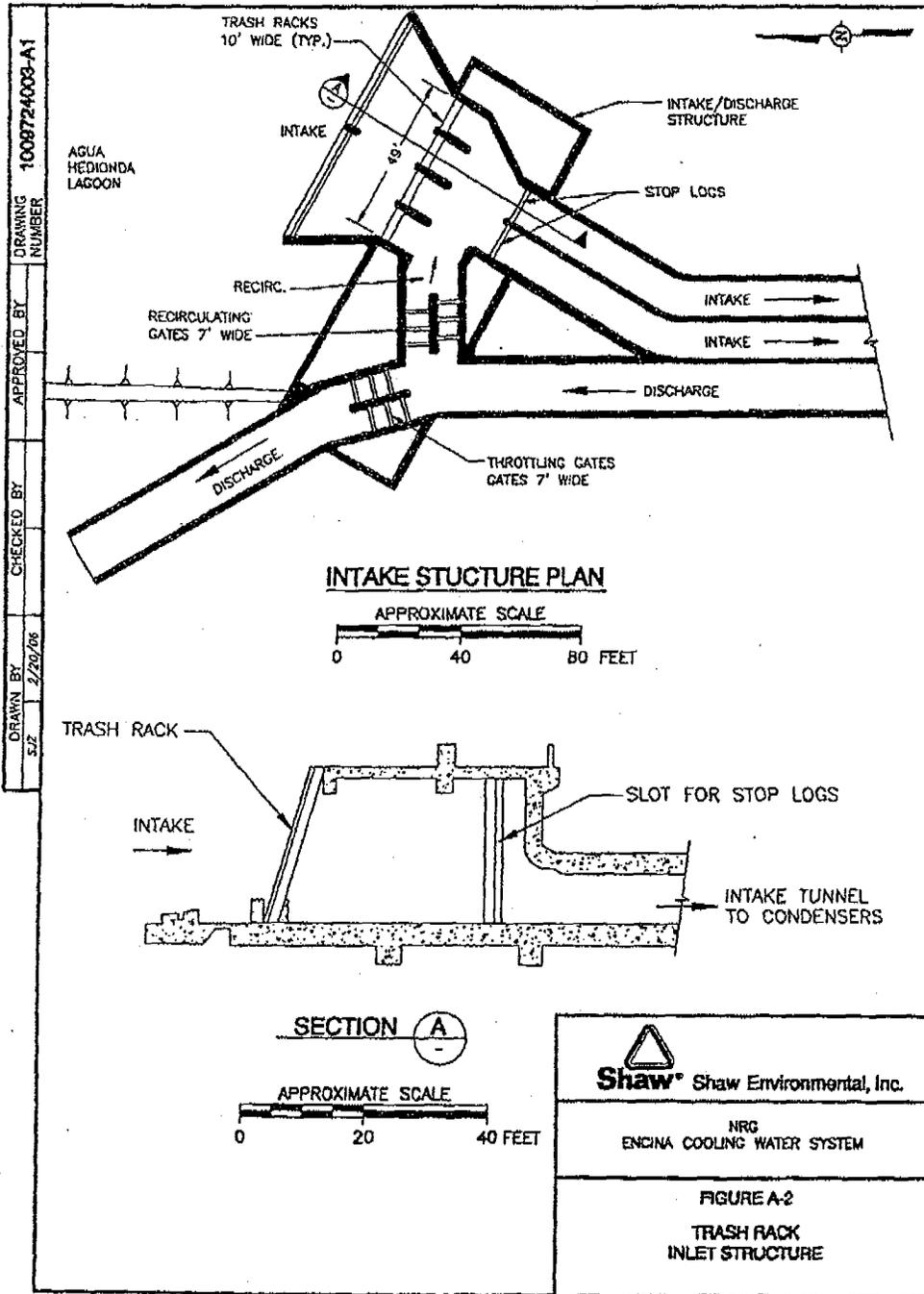
 on behalf of:

Christopher W. Garrett  
of LATHAM & WATKINS LLP

cc: City Manager  
City Attorney  
City Planning Director

COASTAL COMMISSION  
NOTIFICATION LIST FOR  
COASTAL DEVELOPMENT PERMIT  
NO. E-06-013

**[OMITTED]**



DISCLOSURE OF EX PARTE COMMUNICATIONS

---

**Name or description of project:**

Revocation Request No. R-E-06-013 (Poseidon Resources, Carlsbad) Request by Surfrider Foundation, San Diego Coastkeeper, and Coastal Environmental Rights Foundation to revoke permit E-06-013 granted to Poseidon Resources to construct and operate a 50 million gallon per day seawater desalination facility at site of Encina Power Plant, adjacent to Agua Hedionda Lagoon, in City of Carlsbad, San Diego County.

**Date and time of receipt of communication:**

November 30, 2009 at 1:00 pm

**Location of communication:**

Phone

**Type of communication:**

Teleconference

**Person(s) in attendance at time of communication:**

Susan McCabe, Peter MacLaggan, Rick Zbur, Anne Blemker

**Person(s) receiving communication:**

Bonnie Neely

**Detailed substantive description of the content of communication:**

(Attach a copy of the complete text of any written material received.)

I received a briefing from the Poseidon Resources representatives in which they informed me that they are in agreement with the staff recommendation to deny the revocation request. They explained the narrow grounds for revocation under the Commission's regulations and refuted each of the three main contentions raised by the parties requesting revocation. They acknowledged that there was a calculation error with regard to expected impingement effects, but explained that the acknowledged miscalculation was not raised by the revocation request and that there was no intentional withholding of information. They also explained that Poseidon voluntarily offered an additional 11 acres of wetland restoration in response to the staff's request. Another contention deals with how intake velocities were measured. However, staff has noted that intake velocities can be measured at several locations and Poseidon's submittals were accurate and consistent in their approach to and location of velocity measurements. Although staff misinterpreted the measurement location consistently cited by Poseidon, staff has determined that there was no intent on the part of the applicant to provide "inaccurate, erroneous or incomplete information." Finally, with regard to the contention that Poseidon intentionally misstated its expected potable water production levels, Poseidon's representatives indicated that there is no basis for that contention and pointed out that they are not seeking a capacity increase and any such increase would require Coastal Commission review and approval as an amendment to the project.

Date: Nov. 30, 2009

Signature of Commissioner: \_\_\_\_\_

*Bonnie Neely*

DISCLOSURE OF EX PARTE COMMUNICATIONS

Name or description of project:

Revocation Request No. R-E-06-013 (Poseidon Resources, Carlsbad) Request by Surfrider Foundation, San Diego Coastkeeper, and Coastal Environmental Rights Foundation to revoke permit E-06-013 granted to Poseidon Resources to construct and operate a 50 million gallon per day seawater desalination facility at site of Encina Power Plant, adjacent to Agua Hedionda Lagoon, in City of Carlsbad, San Diego County.

Date and time of receipt of communication:

December 2, 2009 at 12:00 pm

Location of communication:

La Jolla

Type of communication:

In person

Person(s) in attendance at time of communication:

Susan McCabe, Peter MacLaggan, Rick Zbur

Person(s) receiving communication:

Pat Krueger

Detailed substantive description of the content of communication:

(Attach a copy of the complete text of any written material received.)

I received a briefing from the Poseidon Resources representatives in which they informed me that they are in agreement with the staff recommendation to deny the revocation request. They explained the narrow grounds for revocation under the Commission's regulations and refuted each of the three main contentions raised by the parties requesting revocation. They acknowledged that there was a calculation error with regard to expected impingement effects, but explained that the acknowledged miscalculation was not raised by the revocation request and that there was no intentional withholding of information. They also explained that Poseidon voluntarily offered an additional 11 acres of wetland restoration in response to the staff's request. Another contention deals with how intake velocities were measured. However, staff has noted that intake velocities can be measured at several locations and Poseidon's submittals were accurate and consistent in their approach to and location of velocity measurements. Although staff misinterpreted the measurement location consistently cited by Poseidon, staff has determined that there was no intent on the part of the applicant to provide "inaccurate, erroneous or incomplete information." Finally, with regard to the contention that Poseidon intentionally misstated its expected potable water production levels, Poseidon's representatives indicated that there is no basis for that contention and pointed out that they are not seeking a capacity increase and any such increase would require Coastal Commission review and approval as an amendment to the project.

Date:

Signature of Commissioner:



RECEIVED

DEC 07 2009

CALIFORNIA  
COASTAL COMMISSION

**FORM FOR DISCLOSURE  
OF EX PARTE  
COMMUNICATIONS**

Name or description of project, LCP, etc.: Item T19a Revocation Request No. R-E-06-013 (Poseidon Resources, Carlsbad)

Date and time of receipt of communication: 12/1/09, 2:30 pm

Location of communication: Board of Supervisor's Office, Santa Cruz, California

Type of communication: In person meeting and teleconference

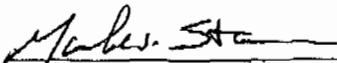
Person(s) initiating communication: Susan McCabe  
Rich Zbur  
Peter MacLaggan

Person(s) receiving communication: Mark Stone

Detailed substantive description of content of communication:  
(Attach a copy of the complete text of any written material received.)

The attorney stated that there are three elements that the petitioner must meet: a. that Poseidon provided inaccurate information to the Commission, b. it was done intentionally, and c. the correct information would have led to a different decision. They feel that the petitioners have not made their case. There was an issue with an incorrect calculation related to impingement numbers provided at the hearing. Evidently there was an error in division that was made. The real number would have been 2 to 4 times higher than was reported. This mistake was discovered at a hearing before the Regional Board. The petitioners claim that there was misinformation given because in calculating the corrected number, Poseidon threw out the high and low data points. Poseidon counters that these numbers were never provided to the Commission. Poseidon voluntarily agreed to add 11 acres to their mitigation project to account for the increased impingement. There also is an issue with respect to where the velocity of the intake water was measured. They feel that the Commission staff acknowledges that they misunderstood the original statement and that Poseidon has been consistent in their assertions all along. There also is a claim as to the intended capacity of the plant. Poseidon points out that if they want to increase their capacity above the permitted numbers, then they will need to come in for a permit amendment.

Date: 12/1/09

Signature of Commissioner: 

EX PARTE COMMUNICATIONS

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**Name of project:** Revocation Request No. R-E-06-013 (Poseidon Resources, Carlsbad)  
**Date and time of receipt of communication:** November 30, 2009 at 10:00 am  
**Location/Type of communication:** Phone/Teleconference  
**Persons in attendance:** Susan McCabe, Peter MacLaggan, Rick Zbur, Anne Blemker  
**Person receiving communication:** Steve Blank

**Detailed substantive description of the content of communication:**

Poseidon Resources and their representatives told me they are in agreement with the staff recommendation to deny the revocation request.

We spent most of the call talking about the impingement rate and specifically how Poseidon versus the Commission staff calculated intake velocities. The claim from Poseidon was that the intake flow velocity that would not exceed 0.5 fps. The Commission's staff interpreted Poseidon's commitment to be a maximum 0.5 fps water flow speed *directly in front of the bar racks at the point of impingement, consistent with EPA guidance* and therefore impingement impacts would be *de minimis*.

Poseidon's response was that it has been consistent throughout the proceedings that the project's intake 0.5 fps water flows would be measured 20' seaward of the intake bar racks, and that Commission staff had made the wrong assumption.

We discussed that if we all had been looking at Exhibit 5, Intake Diagram, which had not been available at the Commission hearing, and Poseidon provided in October of 2009, this conversation would have been clearer.

**Date:** 12/2/09

**Signature of Commissioner:**

A handwritten signature in black ink, appearing to be "S. Blank", written over a light gray grid background.

**EX PARTE COMMUNICATIONS**

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**Name of project:** Revocation Request No. R-E-06-013 (Poseidon Resources, Carlsbad)  
**Date and time of receipt of communication:** December 4, 2009 at 4:30 pm  
**Location/ Type of communication:** Phone Call  
**Person in communication:** Rick Zbur  
**Person receiving communication:** Steve Blank

**Detailed substantive description of the content of communication:**

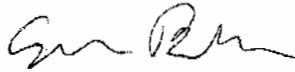
Mr. Zbur called to clarify items that were discussed in our earlier telephone call.

Specifically, Mr. Zbur informed me that the diagram that depicts the project's intake structure - Exhibit 4 in the staff report - was submitted to the Coastal Staff on June 1, 2007, and again in March 2008, prior to the Commission's consideration of the mitigation requirements that would be necessary under the Flow, Entrainment and Impingement Minimization Plan.

Mr. Zbur also answered my earlier question regarding intake velocities. He explained that Poseidon has consistently provided accurate information in that it has consistently maintained that the intake velocity "at the entrance to the bar racks" is .5fps. He indicated that the bar racks themselves are about 20 feet from the entrance, and that the velocity at that point is estimated to be .92 fps at the midpoint of the tidal cycle.

**Date:** Saturday, December 5, 2009

**Signature of Commissioner:**



# FORM FOR DISCLOSURE OF EX PARTE COMMUNICATIONS

Name or description of project, LPC, etc.: TH9A: REVOCATION REQUEST  
# R-E-06-015; POSEIDON

Date and time of receipt of communication: 12/15/2009; APPROX 10:00 A.M.

Location of communication: 1935 AVENIDA DE ORD, OCEANSIDE

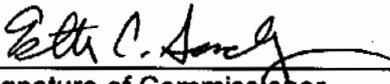
Type of communication (letter, facsimile, etc.): MEETING (LESS THAN 5 MINS)

Person(s) initiating communication: TOM LEMMON, SAN DIEGO  
BUILDING TRADES COUNCIL

Detailed substantive description of content of communication:  
(Attach a copy of the complete text of any written material received.)

I MET AND TALKED BRIEFLY WITH TOM LEMMON,  
DURING AN UNRELATED EVENT, FOR LESS THAN 5  
MINUTES. HE ADVISED ME THAT HE WAS WORKING  
WITH POSEIDON ON A PROJECT LABOR AGREEMENT.  
HE FURTHER INDICATED THE NEED FOR MORE JOBS  
FOR SAN DIEGO REGIONAL FAMILIES.  
MIR. LEMMON NOTED HE UNDERSTOOD MY CONCERN  
ABOUT ENVIRONMENTAL ISSUES.

12/15/2009  
Date

  
Signature of 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 proceeding and provide the Executive Director with a copy of any written material that was part of the communication.

DISCLOSURE OF EX PARTE COMMUNICATIONS

Name or description of project:

Revocation Request No. R-E-06-013 (Poseidon Resources, Carlsbad) Request by Surfrider Foundation, San Diego Coastkeeper, and Coastal Environmental Rights Foundation to revoke permit E-06-013 granted to Poseidon Resources to construct and operate a 50 million gallon per day seawater desalination facility at site of Encina Power Plant, adjacent to Agua Hedionda Lagoon, in City of Carlsbad, San Diego County.

Date and time of receipt of communication:

December 3, 2009 at 12:30 pm

Location of communication:

Phone

Type of communication:

Teleconference

Person(s) in attendance at time of communication:

Susan McCabe, Rick Zbur

Person(s) receiving communication:

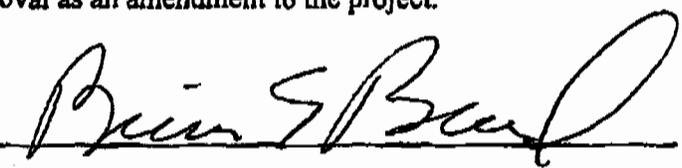
Brian Baird

Detailed substantive description of the content of communication:

(Attach a copy of the complete text of any written material received.)

I received a briefing from the Poseidon Resources representatives in which they informed me that they are in agreement with the staff recommendation to deny the revocation request. They explained the narrow grounds for revocation under the Commission's regulations and responded to each of the three main contentions raised by the parties requesting revocation. They acknowledged that there was a calculation error with regard to expected impingement effects, but explained that the acknowledged miscalculation was not raised by the revocation request and that there was no intentional withholding of information. They also explained that Poseidon voluntarily offered an additional 11 acres of wetland restoration in response to the staff's request. Another contention deals with how intake velocities were measured. However, staff has noted that intake velocities can be measured at several locations and Poseidon's submittals were accurate and consistent in their approach to and location of velocity measurements. Although staff misinterpreted the measurement location consistently cited by Poseidon, staff has determined that there was no intent on the part of the applicant to provide "inaccurate, erroneous or incomplete information." Finally, with regard to the contention that Poseidon intentionally misstated its expected potable water production levels, Poseidon's representatives indicated that there is no basis for that contention and pointed out that they are not seeking a capacity increase and any such increase would require Coastal Commission review and approval as an amendment to the project.

Date: 12/7/09

Signature of Commissioner: 

THURSDAY, ITEM 9A

DISCLOSURE OF EX PARTE COMMUNICATIONS

---

**Name or description of project:**

Revocation Request No. R-E-06-013 (Poseidon Resources, Carlsbad) Request by Surfrider Foundation, San Diego Coastkeeper, and Coastal Environmental Rights Foundation to revoke permit E-06-013 granted to Poseidon Resources to construct and operate a 50 million gallon per day seawater desalination facility at site of Encina Power Plant, adjacent to Agua Hedionda Lagoon, in City of Carlsbad, San Diego County.

**Date and time of receipt of communication:**

December 8, 2009 at 8:30 am

**Location of communication:**

Phone

**Type of communication:**

Teleconference

**Person(s) in attendance at time of communication:**

Rick Zbur, Susan McCabe

**Person(s) receiving communication:**

Dan Secord

**Detailed substantive description of the content of communication:**

(Attach a copy of the complete text of any written material received.)

I received a briefing from the Poseidon Resources representatives in which they informed me that they are in agreement with the staff recommendation to deny the revocation request. They explained the narrow grounds for revocation under the Commission's regulations and refuted each of the three main contentions raised by the parties requesting revocation. They acknowledged that there was a calculation error with regard to expected impingement effects, but explained that the acknowledged miscalculation was not raised by the revocation request and that there was no intentional withholding of information. They also explained that Poseidon voluntarily offered an additional 11 acres of wetland restoration in response to the staff's request. Another contention deals with how intake velocities were measured. However, staff has noted that intake velocities can be measured at several locations and Poseidon's submittals were accurate and consistent in their approach to and location of velocity measurements. Although staff misinterpreted the measurement location consistently cited by Poseidon, staff has determined that there was no intent on the part of the applicant to provide "inaccurate, erroneous or incomplete information." Finally, with regard to the contention that Poseidon intentionally misstated its expected potable water production levels, Poseidon's representatives indicated that there is no basis for that contention and pointed out that they are not seeking a capacity increase and any such increase would require Coastal Commission review and approval as an amendment to the project.

**Date:**

**Signature of Commissioner:**

  
415 357-3889

Th 9a

COMMITTEES

CHAIR, BUDGET AND FISCAL REVIEW  
 CHAIR, BUDGET AND FISCAL REVIEW  
 SUBCOMMITTEE #5  
 CHAIR, JOINT LEGISLATIVE BUDGET  
 JOINT LEGISLATIVE AUDIT  
 JOINT PAIRS, ALLOCATION &  
 CLASSIFICATION  
 LABOR AND INDUSTRIAL RELATIONS  
 PUBLIC EMPLOYMENT AND RETIREMENT

# California State Senate

SENATOR

**DENISE MORENO DUCHENY**

FORTIETH SENATE DISTRICT

SELECT COMMITTEES

CHAIR, CALIFORNIA-MEXICO  
 COOPERATION  
 CHAIR, COLORADO RIVER  
 STATE SCHOOL FACILITIES  
 BOARDS  
 CALIFORNIA WORKFORCE  
 INVESTMENT  
 STATE PUBLIC WORKS



December 9, 2009

Chairwoman Bonnie Neely  
 California Coastal Commission  
 Board of Supervisors  
 825 Fifth Street, Room 111  
 Eureka, CA 95501

Re: Carlsbad Desalination Project/Poseidon Resources  
 Revocation Request No. R-E-06-013

Dear Chairwoman Neely:

I am writing to express my opposition to the Coastal Development Permit revocation request against the Carlsbad Desalination Project under consideration at your December 10, 2009 board meeting.

I represent thousands of constituents in the South Bay who are customers of Sweetwater Authority, which has entered into a 30-year agreement with Poseidon Resources to purchase 2,400-acre feet annually of high-quality, desalinated drinking water. This water will contribute to Sweetwater's goal of increasing locally produced water supplies to 70% of their total resources, an astonishing number when one considers that San Diego imports almost 90% of its water.

The Carlsbad Desalination Project is as an excellent example of what the private sector and government can accomplish when they work cooperatively toward innovative solutions to our regional issues. Regretfully, a small group of environmental activists has challenged this eco-friendly project repeatedly. Their arguments are either unsubstantiated or contrary to the evidence already before the Commission in the Project's administrative record.

The Commission staff has made a strong recommendation to deny the revocation request; I agree with staff and urge you to deny the revocation request.

CAPITOL OFFICE  
 SIATF CAPITOL, ROOM 5035  
 SACRAMENTO, CA 95814  
 TEL (916) 651-4040  
 FAX (916) 327-3522

CHULA VISTA OFFICE  
 627 3RD AVENUE, SUITE A-1  
 CHULA VISTA, CA 91010  
 TEL (619) 409-7690  
 FAX (619) 409-7688

IMPERIAL VALLEY OFFICE  
 1224 STATE STREET, SUITE D  
 FL CENTRO, CA 92243  
 TEL (760) 335-3442  
 FAX (760) 335-3444

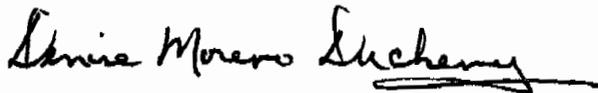
COACHELLA VALLEY OFFICE  
 53 990 ENTERPRISE WAY SUITE 14  
 COACHELLA, CA 92236  
 TEL (760) 398-6442  
 FAX (760) 398-6470



Chairwoman Neely  
12/4/09  
Page 2 of 2

I have endorsed the Carlsbad Desalination Plant and truly appreciate the support the Commission has shown this project in the past. Once again, I respectfully request you deny the revocation request and allow this project to begin construction.

Sincerely,



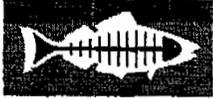
DENISE MORENO DUCHENY  
State Senator, 40th District

DMD/jmh/kc

CC:

Vice Chairman Dr. William A. Burke  
Commissioner Esther Sanchez  
Commissioner Steve Blank  
Commissioner Khatchick Achadjian  
Commissioner Sara Wan  
Commissioner Steve Kram  
Commissioner Mary Shallenberger  
Commissioner Larry Clark  
Commissioner Patricia Krueger  
Commissioner Kirkarimi  
Commissioner Mike Stone  
Commissioner Jim Wickett  
Commissioner Phil Vargas  
Commissioner David Cord  
Commissioner David Idwell, JD  
Commissioner Adi Lerman  
Commissioner Sharon Wright  
Commissioner Glade Gurney  
Commissioner Brooks Firestone  
Commissioner Suja Lowenthal  
Commissioner Mike Chrisman  
Commissioner Karen Scarborough  
Mr. Tom Luster  
Mr. Peter Douglas  
Governor Arnold Schwarzenegger  
Assembly Speaker Karen Bass  
Senate President Pro Tem Darrel Steinberg

Th 9a



Heal the Bay

1444 9th Street  
Santa Monica CA 90401

ph 310 451 1500  
fax 310 496 1902

info@healthebay.org  
www.healthebay.org

December 8, 2009

California Coastal Commission  
25 Fremont Street, Suite 2000  
San Francisco, California 94105-2219  
Fax: 415-904-5400

**RE: Support for Revocation Request of Permit R-E-06-013 (Poseidon Resources, Carlsbad),  
December 2009 meeting**

Dear Commissioners:

Please accept this letter on behalf of Heal the Bay regarding the Poseidon Carlsbad Desalination Project (CDP). Heal the Bay is a southern California-based environmental non-profit representing over 12,000 members.

**We support the request for revocation of the CDP's permit by the Surfrider Foundation, San Diego Coastkeeper and the Coastal Environmental Rights Foundation.** We understand the Coastal Commission staff has pre-determined, in a "settlement agreement" reached in September, 2009, that based on current information available, there were no grounds for revocation. We disagree and hope the terms of the settlement agreement do not prejudice your consideration of this request and the grounds for revocation stated below.

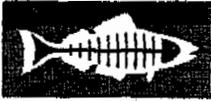
Section 13105 of the California Code of Regulations for "Revocation of Permits." *14 CCR Section 13104, et seq.* defines the "grounds" for consideration of a Request for Revocation:

*Intentional inclusion of inaccurate, erroneous, or incomplete information in connection with a coastal development permit application, where the commission finds that accurate and complete information would have caused the commission to require additional or different conditions on a permit or deny an application.*

As detailed in the case layed out by Surfrider Foundation, San Diego Coastkeeper and the Coastal Environmental Rights Foundation:

- Poseidon intentionally included inaccurate, erroneous and or incomplete information during the proceedings that, had the information been fully disclosed, would have required, at a minimum, different conditions of approval;
- The public has been denied an opportunity to fully participate in the original proceedings by reason of Poseidon's submittal of this inaccurate information; and
- The information submitted in the Request for Revocation is significant and clearly merits revocation of the Permit.

Allowing Poseidon to continuously bend the rules sets a dangerous precedent and undermines the authority and charge of the Commission to protect coastal resources. We believe it is extremely important for the Commission to emphasize its commitment to require applicants to **fully** comply with a permit's



Heal the Bay

1444 9th Street  
Santa Monica CA 90401

ph 310 451 1500  
fax 310 496 1902

info@healthebay.org  
www.healthebay.org

conditions of approval that are the result of a public process and final Commission majority vote.

Finally, in a state where the foundation of our economic activity is fueled by the health of our coastal resources, and in a state leading the nation in a strong commitment to sustainable energy, there is no question that California has the right and responsibility to move past the antiquated sea-water intake technology proposed for use by Poseidon in its co-location with Encina Power Plant. Coastal power plants using this intake technology are permitted to withdraw more than 16 billion gallons of cooling water off of the California Coast daily and kill an estimated 79 billion fish and other marine life annually.<sup>1</sup> The State Water Resources Control Board is currently in the final stages of approving its policy to phase out the use of once-through-cooling for power generating activities on the California Coast. Poseidon's proposed project would continue the use of this technology that has been recognized by multiple federal and state agencies—the U.S. Environmental Protection Agency, California Energy Commission, Ocean Protection Council, and State Lands Commission—as causing significant, ongoing devastation to our valuable marine resources.<sup>2</sup>

**We support the request for revocation of the CDP's permit by the Surfrider Foundation, San Diego Coastkeeper and the Coastal Environmental Rights Foundation.**

Thank you for your careful consideration of this issue.

Sincerely,

Sarah Sikich  
Coastal Resources Director

Charlotte Stevenson  
Staff Scientist

<sup>1</sup> State Water Resources Control Board, *Scoping Document: Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling* (March 2008) p.1. ("2008 Scoping Document"). Available at: [http://www.waterboards.ca.gov/plans\\_policies/docs/coastal\\_estuarine/scope\\_doc031808.pdf](http://www.waterboards.ca.gov/plans_policies/docs/coastal_estuarine/scope_doc031808.pdf).

<sup>2</sup> Clean Water Act Section 316(b); California Energy Commission *Issues and Environmental Impacts Associated with Once-Through Cooling at California's Coastal Power Plants: Staff Report*. (2005) Available at: [www.energy.ca.gov/2005publications/CEC-700-2005-013/CEC-700-2005-013.PDF](http://www.energy.ca.gov/2005publications/CEC-700-2005-013/CEC-700-2005-013.PDF). Accessed 9.29.09 ("Issues and Environmental Impacts Associated with OTC"); California State Lands Commission, *Resolution of the California State Lands Commission Regarding Once-Through Cooling in California Power Plants* (adopted April 17, 2006); California Ocean Protection Council, *Resolution Regarding the Use of Once-Through Cooling Technologies in Coastal Waters* (adopted April 20, 2006). Available at: <http://www.opc.ca.gov/2006/04/resolution-of-the-california-ocean-protection-council-regarding-the-use-of-once-through-cooling-technologies-in-coastal-waters/> Accessed 9.29.09 ("OPC Resolution").

Th 9a

Assembly  
California Legislature

COMMITTEES  
VICE CHAIR, INSURANCE  
EDUCATION  
TRANSPORTATION  
JOINT LEGISLATIVE AUDIT

STATE CAPITOL  
P.O. BOX 942549  
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DISTRICT OFFICE  
1910 PALOMAR POINT WAY, SUITE 108  
CARLSBAD, CA 92008  
(760) 929-7998  
FAX (760) 929-7999



MARTIN GARRICK  
ASSISTANT REPUBLICAN LEADER  
ASSEMBLYMEMBER, SEVENTY-FOURTH DISTRICT

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DEC 09 2009

CALIFORNIA  
COASTAL COMMISSION

December 7, 2009

The Honorable Bonnie Neely  
Chairwoman  
California Coastal Commission  
Board of Supervisors  
825 Fifth Street, Rm 111  
Eureka, CA 95501

*Re: Carlsbad Desalination Project – Denial of Revocation Request R-E-06-013*

Dear Chairwoman Neely:

I wish to submit this letter in support of the Carlsbad Desalination Project, a public-private partnership between Poseidon Resources and the City of Carlsbad.

This important water infrastructure project will benefit thousands of my constituents in the cities of Carlsbad, Del Mar, Encinitas, Escondido, Oceanside, San Diego, San Marcos, Solana Beach, and Vista. The project developers will assume all risks associated with the financing, development, construction and operation of the project, resulting in a project that fully protects our taxpayers. The investment we are making today will go a long way toward creating a more diverse, reliable water supply for California.

After more than a decade of planning, analysis and permit hearings, the Carlsbad Desalination Project is finally preparing to begin construction within the next few months. It is no surprise that opponents are making one last attempt to block this project by filing a permit revocation request with the Commission. However, your board's decision to issue a Coastal Development Permit (CDP) was based on accurate and factual information and should be sustained.

This project has been the object of intense environmental review over many years and has been determined to pose no significant adverse impacts on the environment. It will also restore 58 acres of sensitive coastal habitat in San Diego and provide a much needed new water supply to over 300,000 San Diego residents.

Th 9a

STATE CAPITOL  
SACRAMENTO CA 95814  
(916) 651 4038  
(916) 446-7392 FAX

DISTRICT OFFICES  
1910 PALOMAR POINT WAY  
SUITE 105  
CARLSBAD, CA 92008  
(760) 831-2455  
(760) 931 2477 FAX

27126A PASEO ESPADA  
SUITE 1621  
SAN JUAN CAPISTRANO, CA 92675  
(949) 489-9998  
(949) 489-8354 FAX

December 7, 2009

# California State Senate

SENATOR  
MARK WYLAND  
THIRTY-EIGHTH SENATE DISTRICT



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CALIFORNIA  
COASTAL COMMISSION

- COMMITTEES
- BUSINESS & PROFESSIONS VICE-CHAIR
- LABOR & INDUSTRIAL RELATIONS VICE-CHAIR
- APPROPRIATIONS
- BUDGET & FISCAL REVIEW
- EDUCATION
- GOVERNMENTAL ORGANIZATION
- VETERANS AFFAIRS

The Honorable Bonnie Neely  
Chairwoman, California Coastal Commission  
Board of Supervisors  
825 Fifth Street, Rm 111  
Eureka, CA 95501

Re: *Carlsbad Desalination Project -- Denial of Revocation Request R-E-06-013*

Dear Chairwoman Neely:

I wish to submit this letter in support of the Carlsbad Desalination Project, a public-private partnership between Poseidon Resources and the City of Carlsbad.

This important water infrastructure project will benefit thousands of my constituents and all risks associated with the financing, development, construction and operation of the project will be borne by the project developers, resulting in a project that fully protects our taxpayers. The investment we are making today will go a long way toward creating a more diverse, reliable water supply for California.

After more than a decade of planning, analysis and permit hearings, the Carlsbad Desalination Project is finally preparing to begin construction within the next few months. It is no surprise that opponents are making one last attempt to block this project by filing a permit revocation request with the Commission. However, your board's decision to issue a Coastal Development Permit (CDP) was based on accurate and factual information and should be sustained.

This project has been the object of intense environmental review over many years and has been determined to pose no significant adverse impacts on the environment. It will also restore 58 acres of sensitive coastal habitat in San Diego and provide a much needed new water supply to over 300,000 San Diego residents.

I applaud your leadership in facilitating the development of desalination facilities in California and I urge you to deny Revocation Request R-E-06-013 at your next meeting.

Sincerely,

MARK WYLAND  
Senator, 38<sup>th</sup> District

Th 9a



# San Diego County Water Authority

4677 Overland Avenue • San Diego, California 92123-1233  
(858) 522-6600 FAX (858) 522-6568 www.sdcwa.org

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CALIFORNIA  
COASTAL COMMISSION

December 7, 2009

**Chairwoman Bonnie Neely**  
**California Coastal Commission**  
**Board of Supervisors**  
**825 Fifth Street, Room 111**  
**Eureka, CA 95501**

**MEMBER AGENCIES**

- Carlsbad Municipal Water District
- City of Del Mar
- City of Escondido
- City of National City
- City of Oceanside
- City of Poway
- City of San Diego
- Fallsbrook Public Utility District
- Hahn Water District
- Olivenstein Municipal Water District
- City Water District
- Padua Dam Municipal Water District
- Camp Pendleton Marine Corps Base
- Rainbow Municipal Water District
- Rancho Municipal Water District
- Rincon del Diablo Municipal Water District
- San Diego Gas & Electric Water District
- Santa Fe Irrigation District
- South Bay Irrigation District
- Valencia Water District
- Valley Center Municipal Water District
- Vista Irrigation District
- Yuma Municipal Water District

**Re: Carlsbad Desalination Project/Coastal Development Permit  
Revocation Request #R-E-06-013**

**Dear Chairwoman Neely:**

On behalf of the Board of Directors for the San Diego County Water Authority, I am writing to encourage your continued support and advocacy for the Carlsbad Desalination Project. Specifically, I wish to urge your Commission to deny Revocation Request #R-E-06-013 at your December 10 public hearing.

The Carlsbad Desalination Project is essential to our region's ability to achieve its goal of water supply diversification. Given our state's escalating water crisis, we believe that the facility needs to come online as soon as possible to protect and diversify our region's water supply. Desalination is a key element of the Water Authority's Urban Water Management Plan, which identifies a need for 56,000 acre-feet per year of seawater desalination, as well as Metropolitan Water District's 2004 Integrated Resources Plan and the California Department of Water Resources' Water Plan Update.

The Water Authority, Governor Schwarzenegger, and every member of San Diego's state legislative and congressional delegations have endorsed the Carlsbad Desalination Project because we all recognize its tremendous value to water reliability and the regional economy.

We ask that you uphold the Coastal Development Permit your Commission approved in November 2007. We appreciate your leadership role in addressing California's water crisis and we strongly encourage the Commission to follow staff's recommendation to deny the revocation request.

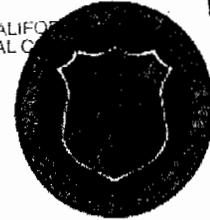
Sincerely,

**Maureen A. Stapleton**  
**General Manager**

*A public agency providing a safe and reliable water supply to the San Diego region*

DEC 09 2009

Th 9a



December 7, 2009

Chairwoman Bonnie Neely  
California Coastal Commission  
Board of Supervisors  
825 Fifth Street, Room 111  
Eureka, CA 95501

Re: Carlsbad Desalination Project – Revocation Request No. R-E-06-013

Dear Chairwoman Neely:

As members of the San Diego Desal Partners, we are writing to request your support for the Carlsbad Desalination Project in the matter of Coastal Development Permit Revocation Request No. R-E-06-013.

Formed in 2007, the San Diego Desal Partners is comprised of nine San Diego County public water agencies working together to advance the Carlsbad Desalination Project. The Project will produce 56,000 acre feet of locally-produced, drought-proof water annually that will diversify our water portfolio and help reduce San Diego County's dependence on imported water from the State Water Project.

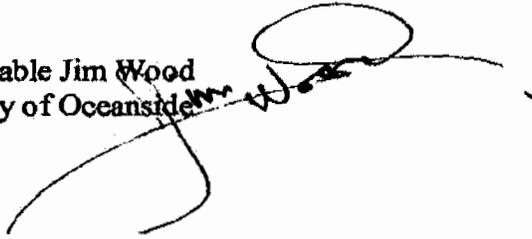
After a decade of planning and exhaustive review, the Project has now received regulatory approval from every required public agency, including the Regional Water Quality Control Board, State Lands Commission and California Coastal Commission, and has officially broken ground. Our customers have anxiously awaited the construction of this critical infrastructure project.

We are alarmed by the recent request to revoke the project's Coastal Development Permit (CDP) filed by San Diego Coastkeeper, Surfrider Foundation, and Coastal Environmental Rights Foundation. However, to revoke a permit requires that opponents prove three elements:

- 1) The applicant intentionally submitted inaccurate, erroneous or incomplete information to the Commission;
- 2) The information submitted was in fact inaccurate, erroneous or incomplete; and
- 3) The Commission would have required additional or different conditions or denied the CDP had accurate and complete information been submitted.

President, Santa Fe Irrigation District

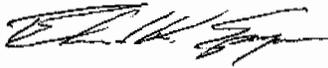
The Honorable Jim Wood  
Mayor, City of Oceanside



Diana Towne

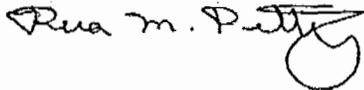
Ms. Diana L. Towne

President, Rincon del Diablo Municipal Water District



Mr. Edmund K. Sprague

President, Olivenhain Municipal Water District



Mr. Rua M. Petty

President, Rainbow Municipal Water District



Ms. Trish Hannan

President, Vallecitos Water District

CC:

Vice Chairman Dr. William A. Burke

Commissioner Esther Sanchez

Commissioner Steve Blank

Commissioner Khatchick Achadjian

Commissioner Sara Wan

Commissioner Steve Kram

Commissioner Mary Shallenberger

Commissioner Larry Clark

Commissioner Patrick Kruer

Commissioner Ross Mirkarimi

CAPITOL OFFICE:  
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SACRAMENTO, CA 95814  
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DISTRICT OFFICE:  
2445 5TH AVENUE, SUITE 200  
SAN DIEGO, CA 92101  
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FAX (619) 648-3144

# California State Senate

SENATOR  
CHRISTINE KEHOE  
THIRTY-NINTH SENATE DISTRICT



- STANDING COMMITTEES:
- APPROPRIATIONS, CHAIR
  - BANKING, FINANCE AND INSURANCE
  - BUDGET AND FISCAL REVIEW
  - ENERGY, UTILITIES AND COMMUNICATIONS
  - LOCAL GOVERNMENT
  - NATURAL RESOURCES AND WATER
  - TRANSPORTATION AND HOUSING
- MEMBER:
- LEGISLATIVE LESBIAN, GAY, BISEXUAL AND TRANSGENDER CAUCUS
  - LEGISLATIVE WOMEN'S CAUCUS

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CALIFORNIA  
COASTAL COMMISSION

December 7, 2009

Chairwoman Bonnie Neely  
California Coastal Commission  
Board of Supervisors  
825 Fifth Street, Room 111  
Eureka, CA 95501

Re: Carlsbad Desalination Project, Coastal Development Permit Revocation Request  
#R-E-06-013

Dear Chairwoman Neely and Board Members:

The Coastal Commission has been asked to revoke a conditional Coastal Development Permit (CDP) approved in November 2007, the approval of those conditions in July 2008, and the issuance of a construction permit in November 2009 for Poseidon Resources.

Construction of the desalination plant in Carlsbad will provide an important water resource to the San Diego region. During my eight years on the San Diego City Council, four years in the State Assembly and now about to begin my sixth year in the State Senate, I know how important it is for the region to diversify its water supply. My experience as chair of the Senate Committee on Energy, Utilities and Communication and a long time member of the Senate Natural Resources Committee has validated that desalination has an important role in assuring our state a reliable water source.

I urge you and the members of the Coastal Commission to deny the CDP revocation request. California is beginning its fourth year of drought. The Poseidon Desalination Plant offers an important water source to our San Diego region.

Sincerely,

*Christine Kehoe*  
CHRISTINE KEHOE  
Senator, 39<sup>th</sup> District  
CC: Peter Douglas

STATE CAPITOL  
P.O. BOX 942849  
SACRAMENTO, CA 94249-0078  
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FAX (916) 319-2178

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7144 BROADWAY  
LEMON GROVE, CA 91945  
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FAX (619) 462-0078

# Assembly California Legislature



COMMITTEES  
ACCOUNTABILITY AND  
ADMINISTRATIVE REVIEW  
HEALTH  
HIGHER EDUCATION  
JOBS, ECONOMIC DEVELOPMENT,  
AND THE ECONOMY

**MARTY BLOCK**  
ASSEMBLYMEMBER, SEVENTY-EIGHTH DISTRICT

**RECEIVED**

DEC 07 2009

CALIFORNIA  
COASTAL COMMISSION

December 3, 2009

Chairwoman Bonnie Neely  
California Coastal Commission  
Board of Supervisors  
825 Fifth Street, Room 111  
Eureka, CA 95501

Regarding: Support for Poseidon Resources and Carlsbad Desalination Project  
Agenda Item 9, December 10, 2009

Dear Chairwoman Neely:

For the past year, I have represented the diverse communities of the 78<sup>th</sup> Assembly District, including San Diego, Chula Vista, Bonita, Lemon Grove, and Spring Valley. As a member of the State Assembly, I work tirelessly to represent my district and provide strong leadership for policy changes which benefit all Californians and improve our most critical services. Most recently, fixing our state's water supply system has come to the forefront as one of the biggest challenges facing our government.

California is currently faced with drought, legal challenges which restrict pumping in the Sacramento-San Joaquin Bay Delta, and long-standing infrastructure issues. While much needs to be done to improve our statewide water storage and delivery systems, we also need to look to local solutions which can improve reliability and guarantee our constituents safe, affordable and abundant water supplies. I believe firmly the Carlsbad Desalination Project is one such solution. Desalination will diversify our water supplies and make our region less susceptible to emergencies and shortages.

The Carlsbad Desalination Project has long since proven its environmental credentials through years of study and analysis, an award-winning pilot plant, and a Marine Life Mitigation Plan which goes far beyond what the law requires. Unfortunately, last-minute delay tactics by opponents have put the project's construction schedule and financing at risk. The opponents request to revoke the project's permit is frivolous and unsubstantiated; their motivation is not to improve the project but to delay it to the point of extinction.

I respectfully urge you to deny the revocation request.

Sincerely,

A handwritten signature in black ink that reads "Marty Block".

**MARTY BLOCK**  
State Assemblymember, 78<sup>th</sup> District

STATE CAPITOL  
P.O. BOX 942849  
SACRAMENTO, CA 94249-0079  
(916) 319-2079  
FAX (916) 319-2179

DISTRICT OFFICE  
678 THIRD AVENUE SUITE 105  
CHULA VISTA, CA 91910  
(619) 409-7979  
FAX (619) 409-9270

# Assembly California Legislature



**MARY SALAS**  
ASSEMBLYMEMBER, SEVENTY-NINTH DISTRICT

### COMMITTEES

- CHAIR
  - VETERANS AFFAIRS
- MEMBER
  - HEALTH
  - JOBS, ECONOMIC DEVELOPMENT, AND THE ECONOMY
  - WATER, PARKS AND WILDLIFE
  - SELECT COMMITTEE ON BIOTECHNOLOGY

December 3, 2009

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CALIFORNIA  
COASTAL COMMISSION

California Coastal Commission  
Chairwoman Bonnie Neely  
Board of Supervisors  
825 Fifth Street, Room 111  
Eureka, CA 95501

**Re: Carlsbad Desalination Project – Deny Revocation Request No. R-E-06-013**

Dear Chairwoman Neely and Members of the Board:

As an elected official since 1996, I have worked tirelessly to improve the quality of life throughout my communities. I represent the 79<sup>th</sup> Assembly District for the State of California which includes the South Bay cities of Imperial Beach, Chula Vista, National City, Coronado and parts of San Diego.

Unfortunately, the South Bay has not always had access to the same resources and opportunities as the rest of the region. That is why I'm especially pleased to endorse the Carlsbad Desalination Project, which will distribute water throughout San Diego County; ensuring my constituents in the South Bay will have as much access to project benefits as residents in North County. It is important to me that the project will also help Sweetwater Authority, which serves 79<sup>th</sup> District residents, to reach their goal of increasing their drought tolerant supplies to 36% by 2010.

Desalination is a widely-used and proven technology which can help San Diego withstand the long-term challenges of global warming, drought and environmental issues. The Carlsbad facility has been designed to be environmentally-responsible, energy-efficient and sustainable. It has undergone years of scrutiny and analysis, withstood numerous legal challenges, and is finally on the verge of breaking ground.

I'm proud to support this innovative project and I know it will bring a new, much needed source of water for San Diego. I ask you to continue your support of the Carlsbad Desalination Project and reject Revocation Request No. R-E-06-013.

Sincerely,

MARY SALAS  
Assemblymember, 79<sup>th</sup> District



# City of Carlsbad

Office of the Mayor

December 2, 2009

California Coastal Commission  
Bonnie Neely, Chair  
Board of Supervisors  
825 Fifth Street, Rm 111  
Eureka, CA 95501

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CALIFORNIA  
COASTAL COMMISSION

Re: In support of Carlsbad Desalination Project

Dear Chairwoman Neely:

As Mayor of the City of Carlsbad, I am writing to request your support for the Carlsbad Desalination Project. Since 1998, Carlsbad has been working on a public-private partnership with Poseidon Resources to build the Carlsbad Desalination Project. The project will supply all of Carlsbad's water and about 10% of San Diego County's overall needs -- at no additional costs to taxpayers. We believe this project provides San Diego with the most dependable, cost-effective and sustainable water source to augment our imported supplies.

The Carlsbad Desalination Project has garnered support from numerous elected officials, business and community organizations, and the citizens of San Diego County who recognize that it is far more than just a water supply project. It will facilitate multiple environmental preservation and enhancement projects, including the dedication of valuable coastal lands for public recreation and scientific research, the creation of 66 acres of new coastal wetlands, and the long-term stewardship of the adjacent Agua Hedionda Lagoon, a rare environmental and recreational treasure. The project will also be an economic booster with the creation of thousands of jobs and millions in revenues for our region.

During the past six years, the project has gained every approval and permit needed for construction from myriad public agencies, including yours. The opposition to this project has repeatedly challenged those valid approvals and is now desperately grasping at straws to block this project by making a revocation request for its Coastal Development Permit.

However, your standards for revocation require the opponents to prove the following three components: (1) that the applicant intentionally submitted inaccurate, erroneous or incomplete information to the Commission; (2) that the information submitted is in fact inaccurate, erroneous or incomplete; and (3) that the Commission would have required additional or different conditions or denied the CDP had accurate and complete information been submitted.

Poseidon had only a single unintentional inaccuracy in their impingement data which was still de minimis once corrected and for which Poseidon voluntarily agreed to provide additional acres of wetlands restoration. The opponents' arguments, as they have in the past, simply do not meet the minimum standards for revocation and should be dismissed summarily. Your staff recognizes this and has also recommended that their request be denied.

On behalf of the City Council and citizens of Carlsbad, I urge your board to deny the permit revocation request against Poseidon Resources at your December 10, 2009 hearing.

Thank you.

CLAUDE A. "BUD" LEWIS  
Mayor





# City of Carlsbad

## Office of the City Council

December 3, 2009

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CALIFORNIA  
COASTAL COMMISSION

Chairwoman Bonnie Neely  
California Coastal Commission  
Board of Supervisors  
825 Fifth Street, Room 111  
Eureka, CA 95501

Re: Coastal Development Permit Revocation Request #R-E-06-013

Dear Chairwoman Neely:

Almost 30 years ago, I was elected to the Carlsbad City Council and immediately became involved in water and environmental issues. I have since had the honor of working with SANDAG, San Diego County Water Authority, CalCoast, American Coastal Coalition, San Diego Water Agencies Association, and the Batiquitos Lagoon, Buena Vista Lagoon Agua Hedionda Lagoon Foundations. From my perspective, I have always believed that good government needs to be proactive, regional, and long-term in its planning, which is why I have endorsed the Carlsbad Desalination Project.

In 1998, the City of Carlsbad began working on a public-private partnership with Poseidon Resources to build this critical water infrastructure facility, which will sustainably meet all of Carlsbad's water supply needs and distribute water throughout the San Diego region.

Over a decade of testing and analysis was performed to corroborate the project's data, determine its impingement and entrainment impacts, and develop suitable mitigation plans to address these impacts. In the past six years, numerous state and local agencies reviewed the project, listened to over 80 hours of public testimony at 15 hearings, and finally, issued permits and approvals for this well-documented and thoroughly scrutinized project. The Coastal Commission was one of those agencies that properly reviewed and approved this project, issuing a Coastal Development Permit in November 2007, approving its conditions in August 2008, and finally issuing a construction permit in November 2009.

Throughout this permitting process, project opponents have been given multiple opportunities to present their case against the project. The bottom line is that they have been unable to convince any board or judge of the merit of their arguments and have lost numerous lawsuits and legal appeals. As a last-ditch effort, they have filed a request to revoke the Coastal Development Permit. But their request is unsubstantiated and it does not meet the standards of your Commission for a revocation; it is simply another chance to delay the project from beginning construction.

Based on the above information, and the good work of your own staff, I ask you to please deny this request to revoke the Coastal Development Permit on December 10.

Respectfully,

  
ANN J. KULCHIN  
Mayor Pro Tem





December 2, 2009

Chairwoman Bonnie Neely  
California Coastal Commission  
Board of Supervisors  
825 Fifth Street, Room 111  
Eureka, CA 95501

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DEC 07 2009

CALIFORNIA  
COASTAL COMMISSION

Re: Revocation Request R-E-06-013/Carlsbad Desalination Project,

Dear Chairwoman Neely:

Since 1923, the Carlsbad Chamber of Commerce has been working to promote a favorable business climate at the local, state and federal levels. We make certain the business perspective is heard on a variety of critical issues which affect our local economy. The Chamber represents more than 1,700 business members which together employ over 35,000 employees.

The Chamber believes developing an environmentally responsible solution to the region's water needs is vital to achieving the goal of water reliability. To that end, our board and members have written and testified at numerous public hearings on behalf of the Carlsbad Desalination Project during the past six years. During this time, the project has rightly received regulatory approval from every necessary public agency and is scheduled to begin construction in early 2010.

However, the Chamber is gravely concerned project opponents are attempting to delay the construction groundbreaking. Opponents, including Surfrider Foundation, San Diego Coastkeeper, and Coastal Environmental Rights Foundation, have filed a request to revoke the Coastal Development Permit (CDP) issued by your agency. This request is based simply on a small computation error from one of Poseidon's consultants. Simply put, the only inaccuracy in all of Poseidon's volumes of data is a single impingement estimate of 3.43 versus 2.12 pounds of fish per day. This is the difference between the daily diets of one pelican and two pelicans.

Poseidon has conceded this error and added an additional 11 acres of wetlands restoration as mitigation. To argue this error was intentional - and that a discrepancy of 1.31 pounds of fish per day is reason enough to halt this project - is simply outlandish. In fact, Commission staff is in full agreement with this assessment and has recommended denial of their request.

This project is a win-win for the City of Carlsbad, the project developers and all the San Diegans who will benefit from this new water supply. On behalf of my board and members, I ask for your cooperation in the matter of denying the request to revoke the CDP permit for the Carlsbad Desalination Project.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ted Owen".

Ted Owen  
President and CEO



# FARM BUREAU SAN DIEGO COUNTY

1670 East Valley Parkway, Escondido CA 92027-2409  
Phone: (760) 745-3023 • Fax: (760) 489-6348  
E-mail: [sdcfb@sdfarmbureau.org](mailto:sdcfb@sdfarmbureau.org) • Website: [www.sdfarmbureau.org](http://www.sdfarmbureau.org)

December 2, 2009

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CALIFORNIA  
COASTAL COMMISSION

Chairwoman Bonnie Neely  
California Coastal Commission  
Board of Supervisors  
825 Fifth Street, Room 111  
Eureka, CA 95501

Re: Carlsbad Desalination Project and Poseidon Resources

Dear Chairwoman Neely:

On behalf of the San Diego County farm community, which includes more than 5,000 farmers producing over \$1.5 billion in crops annually, I am writing you in support of the Carlsbad Desalination Project.

Small family farms make up the majority of our industry and have proven to be the most vulnerable to the lack of water reliability and price increases of the past few years. Many farmers have been forced to reduce the amount of acreage planted or convert land to non-agricultural uses. Sadly, many of these businesses won't be able to remain economically competitive and may be forced to sell their land, threatening much of San Diego's agricultural heritage and open space. Considering a large percentage of the country's produce is grown in California, this could have repercussions on our nation's food supplies and costs for many years to come.

We believe it is imperative for San Diego to develop cost-certain, locally-produced water supplies that can supplement our diminished imported supplies. We have endorsed the Carlsbad Desalination Project because it is the only viable solution for increasing supplies in our region within the next few years. However, the anticipated operation date of 2012 can only be achieved if the last remaining obstacle to construction - the permit revocation request - is removed in a timely manner.

San Diego County's farm community appreciates your commitment to addressing the state's water crisis and your support for the Carlsbad Desalination Project. We urge you to deny the requested revocation at your December 10<sup>th</sup> board meeting and help our region move one step forward to a drought-resistant, home-grown water supply.

Thank you

Eric Larson  
Executive Director, San Diego County Farm Bureau



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CALIFORNIA  
COASTAL COMMISSION

California Coastal Commission  
Chairwoman Bonnie Neely  
Board of Supervisors  
825 Fifth Street, Suite 111  
Eureka, CA 95501

RE: Carlsbad Desalination Plant

Dear Chairwoman Neely:

I represent The Flower Fields® in Carlsbad, CA, the only working ranunculus field in the world which is open to the public, and I am writing you in support of the Carlsbad Desalination Project.

The Flower Fields® has been an important part of Carlsbad's local heritage for over 60 years and attracts over 150,000 visitors each season. With the dry weather conditions our region has experienced in the past few years, irrigation water has been a necessity for the survival of our operations.

As participants in Metropolitan Water District's discounted agricultural program, we have endured 30% water restrictions due to California's overall decline in water supplies. This is the first time in the program's 14-year history that agricultural users have been ordered to cut water usage. Without a doubt, the water cutback to the agricultural communities is having an extremely negative effect on our operations and that of many of our farming neighbors.

One of the few options our region has is to diversify and increase the local water supplies through desalination. Poseidon Resources' Carlsbad Desalination Project has been well-planned and has undergone rigorous testing to ensure water quality and environmental safety. Your Commission rightfully issued a Coastal Development Permit after thorough examination of project documents, numerous public hearings and more than 20 hours of public testimony. You did your due diligence throughout the process and there is no merit to opponents' request for the permit to be revoked.

A reliable and affordable water supply is crucial to the survival of The Flower Fields and hundreds of small farming businesses in San Diego. On behalf of The Flower Fields®, I offer our full support of the Carlsbad Desalination Project and urge you deny the request to revoke its Coastal Development Permit.

Sincerely,



Joni Miringoff  
The Flower Fields®

cc:

Vice Chairman Dr. William A. Burke  
Commissioner Esther Sanchez  
Commissioner Steve Blank  
Commissioner Khatchick Achadjian  
Commissioner Sara Wan  
Commissioner Steve Kram  
Commissioner Mary Shallenberger  
Commissioner Larry Clark  
Commissioner Patrick Kruer  
Commissioner Ross Mirkarimi  
Commissioner Mark Stone  
Commissioner Jim Wickett  
Commissioner April Vargas  
Commissioner Dan Secord  
Commissioner Meg Caldwell, JD  
Commissioner Adi Liberman  
Commissioner Sharon Wright  
Commissioner Sarah Glade Gurney  
Commissioner Brooks Firestone  
Commissioner Suja Lowenthal  
Commissioner Mike Chrisman  
Commissioner Karen Scarborough  
Mr. Tom Luster  
Mr. Peter Douglas  
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Assembly Speaker Karen Bass  
Senate President Pro Tem Darrel Steinberg

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CALIFORNIA  
COASTAL COMMISSION



*Leaders of Environmental Responsibility*

December 2, 2009

Chairwoman Bonnie Neely  
California Coastal Commission  
Board of Supervisors  
825 Fifth Street, Room 111  
Eureka, CA 95501

*Re: Support for Carlsbad Desalination Project*

Dear Chairwoman Neely:

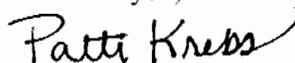
I'm writing you today on behalf of the Industrial Environmental Association (IEA), an organization that promotes environmental responsibility and compliance. Our members represent a variety of industries including manufacturing, engineering, consulting, energy, biotech and waste management. We strive to achieve a balanced relationship between environmental protection, public health and economically sustainable growth.

The IEA believes an affordable and reliable supply of water is imperative to the future of San Diego's industrial community, which provides jobs for thousands of San Diegans. This project will provide up to 10% of our county's water supply, protecting our region against long-term droughts and responsibly diversifying our water resources. For these reasons, we endorsed the Carlsbad Desalination Project in 2000 and have testified on its behalf many times in front of the California Coastal Commission and other public agencies, all of which have approved this project.

As a last-ditch effort, opponents are once again attempting to derail this badly-needed project by filing a permit revocation request. Their arguments haven't held up in court or at countless public hearings, and this request should also be dismissed. The Carlsbad Desalination Project has already spent six years in the permitting process and should not be forced to endure additional delays.

On behalf of San Diego's industrial community and the members of the Industrial Environmental Association, I ask you to deny the permit revocation request for Poseidon Resources' Coastal Development Permit at your December 10th meeting

Thank you,



Industrial Environmental Association



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CALIFORNIA  
COASTAL COMMISSION

December 1, 2009

California Coastal Commission  
Chairwoman Bonnie Neely  
Board of Supervisors  
825 Fifth Street, Rm. 111  
Eureka, CA 95501

***Re: Support for Carlsbad Desalination Project/Poseidon Resources***

Dear Chairwoman Neely:

The Agua Hedionda Lagoon Foundation was created in 1990 to promote conservation, restoration and enhancement of the Agua Hedionda Lagoon, marsh, wetlands and watershed area. We strive to protect sensitive land through acquisition or other means and promote balanced recreational and commercial uses that ensure the long-term health and vitality of the lagoon.

For over the past decade, the Foundation has been a strong supporter of the Carlsbad Desalination Project because we understand this project will be instrumental to the long-term preservation and enhancement of the Agua Hedionda Lagoon. Poseidon Resources' efforts will ensure the lagoon will continue to provide a sanctuary for marine life as well as a clean, safe lagoon for the public to enjoy for future generations, while providing a sustainable water supply to the region. The dedication of 20 acres of land along the lagoon and beach for public use by Poseidon Resources are priceless gifts which will enhance and increase public access and recreation opportunities for the community-at-large.

Unfortunately, despite approximately 2,190 days of review and 80 hours of public testimony, the project is being subjected once again to challenges from a small group of environmental opponents who have repeatedly failed to prevail in a factual-based landscape. Surfriider Foundation, San Diego Coastkeeper and Coastal Environmental Rights Foundation have been unsuccessful at previous Commission hearings and in court, and now, they have turned to the revocation strategy. However, the request to revoke the Coastal Development Permit issued by the Commission does not satisfy even the minimum standards for revocation that have been established by the board.

As Past President and current Board Member of the Agua Hedionda Lagoon Foundation, I respectfully ask the members of the California Coastal Commission to deny Coastal Development Permit Revocation Request R-E-06-013 at your December 10, 2009 meeting.

Respectfully,



Eric Muñoz, Past President and Current Board Member  
Agua Hedionda Lagoon Foundation

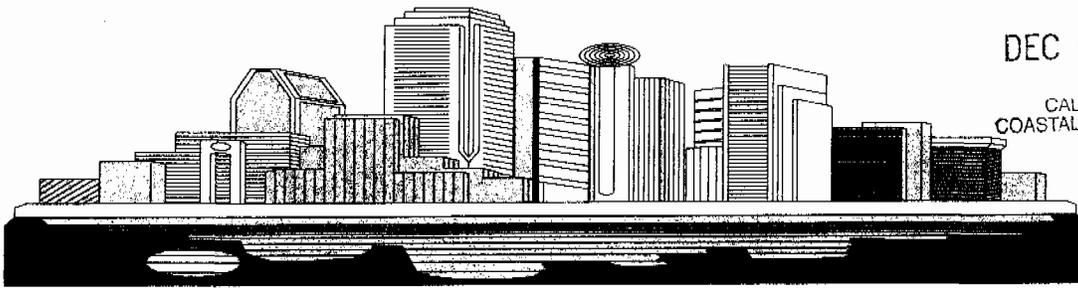
cc:

*Vice Chairman Dr. William A. Burke*  
*Commissioner Esther Sanchez*  
*Commissioner Steve Blank*  
*Commissioner Khatchick Achadjian*  
*Commissioner Sara Wan*  
*Commissioner Steve Kram*  
*Commissioner Mary Shallenberger*  
*Commissioner Larry Clark*  
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*Commissioner Brooks Firestone*  
*Commissioner Suja Lowenthal*  
*Commissioner Mike Chrisman*  
*Commissioner Karen Scarborough*  
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*Assembly Speaker Karen Bass*  
*Senate President Pro Tem Darrel Steinberg*

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COASTAL COMMISSION



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**San Diego County Building & Construction Trades Council, AFL-CIO**

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December 2, 2009

Chairwoman Bonnie Neely  
California Coastal Commission  
Board of Supervisors  
825 Fifth Street, Room 111  
Eureka, CA 95501

Re: Support for Poseidon Resources/Carlsbad Desalination Project

Dear Chairwoman Neely:

I'm writing today to request the Commission's denial of the Coastal Development Permit Revocation Request [#R-E06-013] for Poseidon Resources' Carlsbad Desalination Project.

The San Diego County Building and Construction Trades Council strives to improve the health, job safety, and economic conditions of our members and workers in the San Diego region. Our organization has joined in partnership with Poseidon Resources for the construction of the Carlsbad Desalination Plant. Our Project Labor Agreement guarantees this critical water infrastructure project will be built by highly-skilled labor from within San Diego County. This project will bring 2,100 jobs and \$170 million in economic stimulus during the 2-year construction period. The region and its workers will also benefit from an estimated \$36 million in annual spending once the plant is operational in 2012.

The San Diego County Building and Construction Trades Council is proud to be a part of the team which will be bringing a much needed, new water supply to San Diego. We ask you to consider the importance of this project to the region and help us to move forward to construction by denying the permit revocation request.

Respectfully,



Tom Lemmon

San Diego County Building and Construction Trades Council

cc:

Vice Chairman Dr. William A. Burke

Commissioner Esther Sanchez

Commissioner Steve Blank

Commissioner Khatchick Achadjian

Commissioner Sara Wan

Commissioner Steve Kram

Commissioner Mary Shallenberger

Commissioner Larry Clark

Commissioner Patrick Kruer

Commissioner Ross Mirkarimi

Commissioner Mark Stone

Commissioner Jim Wickett

Commissioner April Vargas

Commissioner Dan Secord

Commissioner Meg Caldwell, JD

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Commissioner Sharon Wright

Commissioner Sarah Glade Gurney

Commissioner Brooks Firestone

Commissioner Suja Lowenthal

Commissioner Mike Chrisman

Commissioner Karen Scarborough

Mr. Tom Luster

Mr. Peter Douglas

Governor Arnold Schwarzenegger

Assembly Speaker Karen Bass

Senate President Pro Tem Darrel Steinberg



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San Diego, California 92101-3585  
Tel 619.544.1300  
www.sdchamber.org

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CALIFORNIA  
COASTAL COMMISSION

December 2, 2009

Ms. Bonnie Neely, Chairwoman  
California Coastal Commission  
~~Board of Supervisors~~  
825 Fifth Street, Room 111  
Eureka, CA 95501

Dear Chairwoman Neely:

San Diego's economy is bolstered by job-producing agricultural and biotech/high tech industries, all of which depend on a reliable water supply. New regulations and restrictions on imported water, coupled with prolonged drought conditions across the state, have burdened our region with water rationing and price increases. The San Diego Regional Chamber of Commerce strongly believes that our County must invest in our water infrastructure and develop locally-produced water sources so that we do not continue our excessive reliance on imported supplies.

We have endorsed the Carlsbad Desalination Project which will produce approximately 10% of our region's water, supplanting water we currently import from drought-stricken regions. On behalf of the Chamber and our Board of Directors, I am writing to reiterate our support for the Carlsbad Desalination Project and request that the Coastal Commission deny the pending Coastal Development Permit (CDP) revocation request [No. R-E-06-013].

Project opponents, Surfrider Foundation, San Diego Coastkeeper, and Coastal Environmental Rights Foundation, have not demonstrated in their request that the single minor inaccurate calculation submitted - then later corrected - by Poseidon in any way complies with the established standards for revocation. The Chamber agrees wholeheartedly with the Coastal Commission staff which has recommended dismissal of the request.

As such, the San Diego Regional Chamber of Commerce respectfully urges you to deny the opponents' revocation request on December 10 and help move this project forward to construction and a new locally-produced, drought-proof water source for San Diego,

Sincerely,

A handwritten signature in black ink that reads 'Ruben Barrales'.

Ruben Barrales  
President & CEO



# SAN DIEGO NORTH

## Economic Development Council

December 1, 2009

Chairwoman Bonnie Neely  
California Coastal Commission  
Board of Supervisors  
825 Fifth Street, Rm 111  
Eureka, CA 95501

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CALIFORNIA  
COASTAL COMMISSION

**Re: Carlsbad Desalination Project – # R-E-06-013**

Dear Chairwoman Neely:

This letter is in regards to your December 10th meeting where you will be voting on a permit revocation request (Revocation Request #R-E-06-013) for Poseidon Resources' Carlsbad Desalination Project.

I am the President and CEO of the San Diego North Economic Development Council, a coalition of private and public sector organizations working together to sustain and carefully grow the economic base of North County. Our members include businesses, chambers of commerce, health organizations, local governments and educational institutions. Together, we work to attract new businesses, promote economic sustainability, and improve the quality of life in North County.

The Council voted in 2007 to endorse and promote the Carlsbad Desalination Project because we recognize the value of having a cost-certain, locally-produced water source in Carlsbad. Because of the predominance of agriculture in North County, our region is especially vulnerable to the recent restrictions in water deliveries from the Sacramento-San Joaquin Delta and seawater desalination must be a central component of the region's water supply strategy. Additionally, the project will bring a tremendous economic boost to the region during construction and will generate much-needed tax revenues and increased local spending once operational.

Dozens of elected officials, business and labor organizations, and taxpayers throughout California have all fought hard to make this project a reality. Over the past six years, the City of Carlsbad, San Diego Regional Water Quality Control Board, California State Lands Commission, Metropolitan Water District of Southern California and your California Coastal Commission have all validated this project by approving construction and operation permits and financial support.

This landmark project is now poised to begin construction within the next few months. However, if the permit revocation request is not dismissed immediately, it could put the project's financing in jeopardy and forestall construction indefinitely. The request is



meritless and simply recycles the same, tired arguments that opponents have been making unsuccessfully for the past ten years.

On behalf of the San Diego North Economic Development Council and our members, I offer our full support of the Carlsbad Desalination Project and ask you to deny the revocation request at your December hearing.

Sincerely,

*Gary Knight*

Gary Knight  
President & CEO  
San Diego North Economic Development Council

cc:

Vice Chairman Dr. William A. Burke  
Commissioner Khatchick Achadjian  
Commissioner Steve Blank  
Commissioner Meg Caldwell, JD  
Commissioner Mike Chrisman  
Commissioner Larry Clark  
Commissioner Brooks Firestone  
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Mr. Tom Luster  
Mr. Peter Douglas  
Governor Arnold Schwarzenegger  
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San Diego County  
**Taxpayers  
Association**

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December 3, 2009

Chairwoman Bonnie Neely  
California Coastal Commission  
Board of Supervisors  
825 Fifth Street, Room 111  
Eureka, CA 95501

Re: Opposition to Revocation Request No. R-E-06-013 (Poseidon Resources, Carlsbad)

Dear Chairwoman Neely:

I am the President and CEO of the San Diego County Taxpayers Association (SDCTA), a non-profit, non-partisan organization, dedicated to promoting accountable, cost-effective and efficient government. For the past 65 years, our organization has saved the region's taxpayers millions of dollars, as well as generated information to help educate the public regarding how their tax dollars are being spent by local government.

For many years, SDCTA has recognized the value of the Carlsbad Desalination Project to the region's ratepayers and has advocated on its behalf. This public-private partnership will create a new water supply that is reliable, locally-produced and cost-certain at no risk to ratepayers. The project will generate 2,100 construction jobs and critical revenues for local governments including \$2 million in annual property tax for the next 30 years, as well as \$10.4 million in sales tax during construction and \$2.9 million per year thereafter. Additionally, the project will provide a substantial public gift of 20 acres of land along Carlsbad's coastline and the Agua Hedionda Lagoon for recreation, research and public access.

This project has long since proven its worth and earned every necessary permit and regulatory approval required. However, project financing cannot be completed until the coastal development permit revocation request filed by project opponents, San Diego Coastkeeper, Surfrider Foundation and Coastal Environmental Rights Foundation, is dismissed.

We urge you to support the Carlsbad Desalination Project by denying the permit revocation request at your board meeting on Thursday, December 10th.

Sincerely,

Lani Lutar  
President and CEO

(continued on next page)