

CALIFORNIA COASTAL COMMISSION

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W6a

February 9, 2010

TO: Coastal Commissioners and Interested Parties

FROM: Alison J. Dettmer, Deputy Director
Tom Luster, Staff Environmental Scientist

SUBJECT: Addendum to R2-E-06-013 Revocation Request – Poseidon Resources
(Channelside) LLC – Carlsbad Desalination Facility

This addendum provides recommended modifications to the above-referenced January 28, 2010 Staff Report. The modifications, which are shown in ~~striketrough~~ and **bold underlined** text below, are relatively minor and do not change staff's recommendation that the Commission *deny* the revocation request. This addendum also includes:

- *Ex parte* forms
- February 8, 2010 letter from Coast Law Group on behalf of Environmental Groups
- February 3 and 4, 2010 letters from Latham & Watkins on behalf of Poseidon
- Additional correspondence received regarding the revocation request.

RECOMMENDED MODIFICATIONS

- Page 3, first full paragraph:

“Nonetheless, Commission staff determined that the Commission’s approval of Poseidon’s proposed emission reduction measure also relied on letters of support from the agencies cited above, and that the Commission’s decision would not have changed based on Poseidon providing complete or accurate information about the project’s effects on SWP-related emissions or about the role of CEQA in reducing emissions. **Those letters, which specifically supported Poseidon’s approach, recommended the Commission credit Poseidon for emission reductions associated with the project replacing a like amount of imported water supplies.** Although Commission staff concludes that Poseidon misrepresented or omitted material information related to its claimed reduction of imported water, staff also concludes that even if more accurate information had been provided to the Commission, it would not have required additional or different conditions on Poseidon’s permit **because of the strong support those letters provide for Poseidon’s proposed approach.** Staff therefore recommends the Commission *deny* the revocation request.”

- Page 3, Exhibits – the original list was numbered incorrectly. Replace the original list with the corrections shown below, and correspondingly correct the Exhibit numbers in the Findings:

“EXHIBIT 1: Coastal Development Permit E-06-013 December 8, 2009 Environmental Groups’ Request for Revocation (without attachments).

EXHIBIT 2: December 8, 2009 Environmental Groups’ Request for Revocation (without attachments)-January 13, 2010 Poseidon Response to Revocation Request (without attachments).

EXHIBIT 3: January 13, 2010 Poseidon Response to Revocation Request (without attachments)-Coastal Development Permit E-06-013.

EXHIBIT 4: Letters of Support for Poseidon’s GHG Approach.”

- Page 6, Footnote 4:

“In its January 13, 2010 response to the revocation request, and in a February 3, 2010 letter to Chairperson Neely, Chief Counsel Schmeltzer and Supervising Deputy Attorney General Jamee Patterson, Poseidon claims that the Coastal Environmental Rights Foundation (CERF) is not a proper party to the revocation request and should be removed as a party from the revocation proceeding under Section 13106 of the Commission’s regulations. Since the revocation request was also submitted by the Surfrider Foundation and the San Diego Coastkeeper, who each raise the same contentions as the Coastal Environmental Rights Foundation, these contentions are validly before the Commission. Although CERF was not registered as a business in California at the time of the Commission’s November 15, 2007 hearing, it is still a proper party to this revocation request. As the California Supreme Court held in Friends of Mammoth v. Bd. of Supervisors, an entity need not have been in existence for it to have proper standing to challenge the actions of a state or local agency. 8 Cal. 3d 247, 268 (1972) (where the underlying purposes of the exhaustion doctrine have been met, it “cannot be employed to bar a suit by a class not organized at the time of the administrative appeal.”). Here, the purpose of Section 13106 has been met, thus CERF is not barred from participating in the revocation proceeding. Nevertheless, to avoid the Commission focusing undue attention on this issue, CERF has withdrawn from participating in the revocation request, so the Commission need not consider Poseidon’s contentions on this issue.”

- Page 13, after bulleted paragraph:

“Finally, even if the Commission determines that all three elements of the test for revocation are met, it may still exercise its discretion to deny the revocation request. Cal. Code Regs. § 13108(d). Given that MWD asserts that on a long-term, average basis, the water produced by Poseidon will likely result in offsets from water MWD receives from the SWP, the Commission may determine that Poseidon’s misrepresentations do not warrant revocation. Thus, for this, or other considerations, the Commission may determine that it should act to deny the revocation request, even if the test for revocation is met.”

- Page 22, second paragraph:

“The key issue before the Commission is whether it would have made a different decision – i.e., would have denied the project or required additional or different conditions – had Poseidon: 1) described MWD’s intention to continue to take its full allocation of SWP water; 2) provided the MWD Agreement; or 3) correctly recognized that it was unlikely that any entity would be required to undertake a CEQA review for use of water “displaced” by the Poseidon project. Had the Commission known of the differences between Poseidon’s assertion that its project should “automatically” receive credits for SWP import reductions and MWD’s understanding that the Poseidon project is only likely to offset marginal water sources on an average long-term basis, or if the Commission had known of the MWD Agreement provision that allowed MWD to terminate its subsidy if the desalination project resulted in a reduction of its entitlement or usage of water imported from the SWP, it could have reached a different decision on the CDP. Similarly, had the Commission known that MWD’s deliveries from the SWP were governed by a long-term contract whose annual deliveries are not subject to CEQA review, it could have required Poseidon to directly account for its expected SWP emission reductions. However, it is not clear that the Commission would have made a different decision, given Poseidon’s presentation to the Commission of support from other entities for Poseidon’s proposed approach, including agencies specified in **Special Condition 10. The letters from the Air Board, an agency with expertise in Greenhouse Gas emission mitigation, and State Lands Commission (see Exhibit 4) specifically support Poseidon’s proposed approach. The letter from the Chair of the Air Board states: “For this project, we believe the amount of emissions reduction that should be required need not exceed the net impact; that is, the direct emissions and any new indirect emissions from the project, less emissions that would be associated with providing an equivalent amount from existing supplies.” The letter from the Chair of the State Lands Commission states: “In determining the amount of mitigation, the calculation should be based on the assumption that the water delivered to the contracting water agencies replaces water that the water agencies currently and in the future would received [sic] from Metropolitan Water District. The amount of mitigation is therefore the net not the gross power consumed.**

Further, and as noted previously, if the Commission was to determine that all three tests for revocation are met, it may still exercise discretion as to whether to deny the revocation request. In this instance, the Commission may also consider the recent information provided by the MWD asserting that Poseidon’s project will likely result in offsets on a long-term average basis.”

WEDNESDAY, ITEM 6A

DISCLOSURE OF EX PARTE COMMUNICATIONS

Name or description of project:

Revocation Request No. R2-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:

February 1, 2010 at 4:30 pm

Location of communication:

Phone

Type of communication:

Teleconference

Person(s) in attendance at time of communication:

Susan McCabe, Rick Zbur, Peter McLaggan, 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, but that Poseidon believes the request should be denied because none of the grounds for revocation have been met. Poseidon's representatives told me that they are therefore asking the Commission to adopt a substitute resolution that is different from what is provided in the Staff Report, which finds that none of the grounds for revocation have been met. Poseidon representatives stated that the project opponents incorrectly claim that a provision in MWD's Seawater Desalination Program (SDP) Agreement for the project, which protects MWD's imported water entitlements, shows that Poseidon provided inaccurate information to the Coastal Commission regarding the GHG Plan by asserting that the project would provide replacement water. The representatives provided a briefing booklet with excerpts from testimony at the August 6, 2008 hearing in which Poseidon's counsel clearly states that MWD could redirect water that the project replaces. In that hearing, Coastal staff confirmed the GHG Plan would not require MWD to forego water entitlements. The Commission approved the GHG plan with full knowledge that MWD would not relinquish their imported water entitlements or its right to redirect water the project has replaced. Nothing has changed since that approval. The Poseidon representatives covered the information provided in their briefing booklet, and concluded that there are no grounds for revocation because no "inaccurate, erroneous, or incomplete" information was submitted.

Date: February 1, 2010

Bonnie Neely, Commissioner: _____

Bonnie Neely

**FORM FOR DISCLOSURE
OF EX PARTE
COMMUNICATION**

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

February 3, 2010 - 11:00 a.m.

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

Commissioner Neely's Eureka Office

Person(s) initiating communication:

Maggy Herbelin, Local ORCA Representative

Person(s) receiving communication:

Commissioner Bonnie Neely

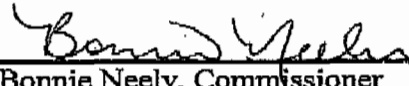
Name or description of project:

Poseidon Resources Revocation (W6a) - Revocation Request No. R2-E-06-013. 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. (TRL-SF)

Detailed substantive description of content of communication:
(If communication included written material, attach a copy of the complete text of the written material.)

Ms. Herbelin stated that ORCA is in opposition to the staff recommendation and requests denial of the permit and grant revocation. ORCA would like the Commission to request Poseidon to voluntarily recalculate the greenhouse gas emissions plan.

Date: February 3, 2010


Bonnie Neely, Commissioner

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

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

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

Coastal Commission Fax: 415 904-5400

WEDNESDAY, ITEM 6A

DISCLOSURE OF EX PARTE COMMUNICATIONS

Name or description of project:

Revocation Request No. R2-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:

February 2, 2010 at 11:30 am

Location of communication:

La Jolla

Type of communication:

In person meeting

Person(s) in attendance at time of communication:

Susan McCabe, Rick Zbur, Peter McLaggan

Person(s) receiving communication:

Pat Kruer

Detailed substantive description of the content of communication:

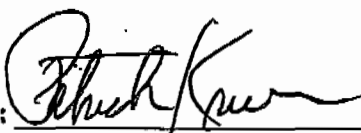
(Attach a copy of the complete text of any written material received.)

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, but that Poseidon believes the request should be denied because none of the grounds for revocation have been met. Poseidon's representatives told me that they are therefore asking the Commission to adopt a substitute resolution that is different from what is provided in the Staff Report, which finds that none of the grounds for revocation have been met. Poseidon representatives stated that the project opponents incorrectly claim that a provision in MWD's Seawater Desalination Program (SDP) Agreement for the project, which protects MWD's imported water entitlements, shows that Poseidon provided inaccurate information to the Coastal Commission regarding the GHG Plan by asserting that the project would provide replacement water. The representatives provided a briefing booklet with excerpts from testimony at the August 6, 2008 hearing in which Poseidon's counsel clearly states that MWD could redirect water that the project replaces. In that hearing, Coastal staff confirmed the GHG Plan would not require MWD to forego water entitlements. The Commission approved the GHG plan with full knowledge that MWD would not relinquish their imported water entitlements or its right to redirect water the project has replaced. Nothing has changed since that approval. The Poseidon representatives covered the information provided in their briefing booklet, and concluded that there are no grounds for revocation because no "inaccurate, erroneous, or incomplete" information was submitted.

Date:

2/3/10

Signature of Commissioner:



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

Name or description of the project: Agenda Item W.6.a.

Revocation Request No. R2-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. (TRL-SF)

Time/Date of communication: Friday, February 5th, 2010, 9:15 am

Location of communication: La Jolla

Person(s) initiating communication: Dave Grubb, Gabriel Solmer, Penny Elia for Coastkeeper, Surfrider, and CERF

Person(s) receiving communication: Patrick Kruer

Type of communication: Meeting

Oppose the staff recommendation to deny revocation. Support revocation.


Poseidon intentionally withheld information that resulted in an erroneous greenhouse gas mitigation calculation. This has resulted in Poseidon being required to offset only one-third of its almost annual 100,000 metric tons of carbon dioxide emissions.

Poseidon withheld the draft MWD contract from the Commission. Commission staff agrees with us, the information was withheld and was material. The staff report says it all. The only point of disagreement: whether the Commission would have voted to deny the permit or impose different conditions. Had the Commission known MWD would just re-allocate the Delta water, it wouldn't have allowed such huge energy offsets in Poseidon's mitigation plan.

Commission staff has requested that Poseidon voluntarily amend its permit to correct the errors. To date, Poseidon has refused to make the corrections – and the Commission cannot force them to do that.

If Poseidon agreed to work with staff to correct the erroneous GHG mitigation calculation, we would be willing to hold our Revocation Request in abeyance. But, Poseidon's unwillingness to work with the staff to correct the error leaves the Commission, and the public, no other choice.

Date: February 5, 2010


Patrick Kruer

WEDNESDAY, ITEM 6A

DISCLOSURE OF EX PARTE COMMUNICATIONS

Name or description of project:

Revocation Request No. R2-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:

February 1, 2010 at 10:30 am

Location of communication:

Phone

Type of communication:

Teleconference

Person(s) in attendance at time of communication:

Susan McCabe, Rick Zbur, Peter McLaggan, Anne Blemker

Person(s) receiving communication:

Dan Secord

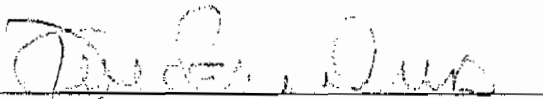
Detailed substantive description of the content of communication:

(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, but that Poseidon believes the request should be denied because none of the grounds for revocation have been met. Poseidon's representatives told me that they are therefore asking the Commission to adopt a substitute resolution that is different from what is provided in the Staff Report, which finds that none of the grounds for revocation have been met. Poseidon representatives stated that the project opponents incorrectly claim that a provision in MWD's Seawater Desalination Program (SDP) Agreement for the project, which protects MWD's imported water entitlements, shows that Poseidon provided inaccurate information to the Coastal Commission regarding the GHG Plan by asserting that the project would provide replacement water. The representatives provided a briefing booklet with excerpts from testimony at the August 6, 2008 hearing in which Poseidon's counsel clearly states that MWD could redirect water that the project replaces. In that hearing, Coastal staff confirmed the GHG Plan would not require MWD to forego water entitlements. The Commission approved the GHG plan with full knowledge that MWD would not relinquish their imported water entitlements or its right to redirect water the project has replaced. Nothing has changed since that approval. The Poseidon representatives covered the information provided in their briefing booklet, and concluded that there are no grounds for revocation because no "inaccurate, erroneous, or incomplete" information was submitted.

Date:

Signature of Commissioner:





1140 S. Coast Highway 101
Encinitas, CA 92024

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February 8, 2010

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

Via Electronic Mail

pdouglas@coastal.ca.gov
tluster@coastal.ca.gov

RECEIVED

FEB 09 2010

CALIFORNIA
COASTAL COMMISSION

Re: **Environmental Groups Support for Revocation Request (II)**
Carlsbad Desalination Project
Coastal Development Permit No. E-06-013
Item W6(a) (Revocation Request No. R2-E-06-013)

Dear Mr. Douglas:

Please accept this letter on behalf of Coastal Environmental Rights Foundation ("CERF"), San Diego Coastkeeper, and Surfrider Foundation (collectively "Environmental Groups"), in support of their Revocation Request for Poseidon's Coastal Development Permit ("CDP") for the Carlsbad Desalination Project ("Project").

As a preliminary matter, Poseidon for some reason feels it is meaningful to object to the participation of CERF in this revocation request. While we continue to believe CERF has standing to request revocation in the name of its individual members, for the sake of eliminating issues of contention at the revocation hearing, please accept this correspondence as CERF's formal withdrawal of its request. Of course, because Surfrider and Coastkeeper remain involved, this withdrawal has absolutely no impact upon the ultimate issue. In fact, Poseidon's focus on such red herring issues should be telling to Commissioners as they consider the company's veracity regarding the subject at hand.

It is our understanding that **Commission staff has made significant and repeated attempts to work with Poseidon to amend its CDP, but Poseidon has refused.**¹ Because Poseidon continues in its refusal to comply with the Coastal Act, and in direct response to Poseidon's intentional misrepresentation, Environmental Groups request the Commission revoke the Project's CDP as required by section 13105 of the Commission's regulations.

In the alternative, recognizing that the Commission may be reluctant to issue a full revocation of the CDP, we believe it would be appropriate for the commission to strenuously direct Poseidon to work with staff to develop a permit amendment containing a scientifically defensible baseline of greenhouse gas emissions from future avoided water imports that would result from the Project. While we believe Poseidon's failures to disclose critical information to the Commission warrants revocation, at the very least, should it be allowed to continue with the Project, Poseidon's greenhouse gas mitigation plan must be amended to reflect the realities

¹ After first learning Metropolitan Water District approved the final agreement on November 10, 2009, Coastal Commission Deputy Director Alison Dettmer sent a letter to Poseidon requesting its voluntary amendment of its CDP on November 13, 2009 (Attachment 1 of Environmental Groups' Revocation Request). Poseidon refused to do so by letter dated January 7, 2010. (Poseidon's Exhibit 1 to January 13, 2010 Letter).

evident upon full disclosure.

As detailed below, and as clearly outlined in the January 28, 2010 Commission Staff Report ("Staff Report"), Poseidon intentionally misrepresented and/or omitted material information in connection with its claimed reduction of imported water in its Energy Minimization and Greenhouse Gas Reduction Plan ("GHG Plan"). Environmental Groups received Poseidon's latest response to the Staff Report, and its appendices, the afternoon of Friday, February 5, 2010. Although Poseidon simply repeats much of its previous submissions, Environmental Groups make reference to the most recent documents to further illuminate the utter lack of substance in Poseidon's arguments.²

Please forward this correspondence to members of the Commission for matter W6(a) (Revocation Request No. R2-E-06-013 (Poseidon Resources, Carlsbad)) at the Commission's February 10, 2010 meeting.

I. Poseidon Intentionally Misrepresented and/or Omitted Material Information

Commission staff agree with Environmental Groups: **Poseidon intentionally misrepresented and/or omitted material information before the Commission.** Although Poseidon's rebuttal to Environmental Groups' revocation request was submitted prior to Commission's Staff Report, Poseidon's meritless defenses are addressed herein to supplement staff's analysis.³

A. The Commission Believed Poseidon, Not Dissenters

Importantly, Poseidon admits nothing changed between the 2005 draft agreement and the 2009 final agreement with Metropolitan Water District ("MWD").⁴ Poseidon thus acknowledges the material information, that MWD would not reduce imports from the State Water Project ("SWP"), was in existence at the time the Commission approved the CDP and the GHG Plan.⁵ Then, instead of admitting it withheld such information from the Commission, Poseidon attempts to subscribe knowledge of such facts to the Commission.⁶ However, Poseidon does not show it provided such information to the Commission, *because it did not*; nor that it did not mislead the Commission, *because it did*. Instead, **Poseidon seeks to prove its point by highlighting testimony from its opponents.**⁷

Poseidon quotes Commissioner Shallenberger for the proposition that the Commissioners knew well that MWD would continue to take all its SWP water, but fails to acknowledge **Commissioner Shallenberger voted against the GHG Plan.**⁸ The same is true for

² Poseidon's most recent letter, "Poseidon's Response to Staff Report, February 4, 2010" and Appendix C, "Poseidon's Correction of Factual Inaccuracies in the Staff Report" ("Poseidon's Appendix C").

³ Poseidon's Response to December 8, 2009 Permit Revocation Request, January 13, 2010 (Poseidon's Response").

⁴ Poseidon's Response to Staff Report, February 4, 2010, p. 4.

⁵ *Id.* at 2, 6, 10-13.

⁶ Poseidon's Response to Staff Report, February 4, 2010, pp. 1-3.

⁷ Poseidon's Response to Staff Report, February 4, 2010, p.3.

⁸ Poseidon's Response, p. 9; Poseidon's Response to Staff Report, February 4, 2010, p. 3; Poseidon's Appendix C, pp. 3-4.

Commissioner Wan.⁹ For the same proposition, Poseidon also quotes staff, who had great misgivings about the GHG Plan because they could not verify Poseidon's water would replace SWP water.¹⁰ Poseidon leaves out the critical fact that the Commission voted against the staff recommendation, choosing instead to take Poseidon's representations and assurances as the foundation for approval.

In essence, Poseidon argues the Commission concurred with staff and Environmental Groups back in 2008 – agreeing that not one drop less of SWP water would be pumped into Southern California because of the Project.¹¹ Unsurprisingly, Environmental Groups are shocked to learn the Commission has agreed with us all along.

What is surprising, however, is according to Poseidon, the Commission, knew all along the Project water was not replacement water, that it would instead **augment** MWD supplies, and still acted as if it was replacement water. Indeed, the Commission found the Project would not be growth inducing.¹² Poseidon's attorney was quick to remind the Commission of this fact at the August 2008 hearing.

In addition, this Commission determined that the project was not growth inducing. That was part of your findings. The requirement that Poseidon be assigned the mitigation for the replaced water is just not consistent with the determination that you have already made that the project is not growth inducing.¹³

In considering the Project's growth inducement and the GHG Plan, **the Commission found, upon Poseidon's urging, the Project water would replace SWP water.** According to Poseidon, however, the Commission secretly knew it would do no such thing.

In Poseidon's rewritten version of history, the Commission saw through Poseidon's misrepresentation, guessed the nature of omitted material information, and still approved Poseidon's illogical GHG Plan. In reality, however, the Commission disagreed with the minority dissenting Commissioners, with staff, and with Environmental Groups. Indeed, **if the Commission had agreed the SWP water would not be offset, it would not have allowed the offset in the GHG Plan.**

B. CEQA Does Not Contain a Misrepresentation Clause

Poseidon's alternative CEQA theory falls far short of plugging the holes in its story as well. Before addressing the substance, or lack thereof, of Poseidon's CEQA baseline theory, it is important to note, the Commission operates pursuant to the Coastal Act. When opining as to the limits of the Commission's authority to require the GHG Plan or any greenhouse gas emission offsets, Poseidon quickly points to the Coastal Act to define the boundaries of the

⁹ Poseidon's Response to Staff Report, February 4, 2010, p. 3; Poseidon's Appendix C, p. 4.

¹⁰ Poseidon's Response, p. 12; Poseidon's Appendix C, pp.2-3, 6

¹¹ *Id.*

¹² Final Adopted Findings for November 15, 2007 Approval, August 6, 2008, p. 92.

¹³ Coastal Commission Transcript, August 8, 2008, testimony by Rick Zbur, p. 166:4-9 (emphasis added).

Commission's purview.¹⁴

Perhaps not surprisingly at this point, Poseidon just as eagerly argues for outside guidance to support its evasion of the Coastal Act. On behalf of Poseidon, Mr. Zbur zealously argued for the Commission to look to CEQA rather than the Coastal Act.

What we have said is that Poseidon's customers, the water districts, have agreed to replace the water, and therefore that the water that is replaced, where that goes is speculative, but wherever it goes, CEQA will apply to require those people to mitigate it. So, our view is that the new users of the water should be responsible for the environmental mitigation of that. That is consistent with CEQA methodology.¹⁵

But CEQA explicitly states,

No provision of [CEQA] is a **limitation or restriction on the power or authority** of any public agency in the enforcement or administration of any provision of law which it is specifically permitted or required to enforce or administer, including, but not limited to, the powers and authority granted to the California Coastal Commission pursuant to [the Coastal Act]. To the extent of any inconsistency or conflict between the provisions of the California Coastal Act of 1976...and the provisions of this division, **the provisions of [the Coastal Act] shall control.**¹⁶

Thus, when CEQA conflicts with the Coastal Act, *the Coastal Act wins*. Poseidon's attempt to chip away at the Commission's authority through CEQA is unfounded. Because Poseidon's Project emits almost 100,000 metric tons of carbon dioxide annually, or almost 3 million metric tons over its 30-year life, the Commission may rightfully require Poseidon to offset all of those emissions. However, it is for the Commission to decide how much mitigation is required upon presentation of all relevant facts, not just those facts Poseidon in its sole judgment deems appropriate for consideration.

Moreover, not even CEQA supports Poseidon's theory. The Staff Report correctly notes, Poseidon knew all along no new CEQA review would be required.

Given that MWD is able to continue taking its full allocation of SWP water, without CEQA review, regardless of the amount of water produced by Poseidon, it is speculative to assume that CEQA would apply to the use of any of this water. Because the basis for Poseidon's assertions is questionable, one could infer that it was intentionally misrepresenting the nature of the required CEQA review.¹⁷

¹⁴ Before the Coastal Commission and various other entities, Poseidon continuously claims the GHG Plan was a voluntary measure bestowed upon the public by Poseidon. Coastal Commission Transcript, August 8, 2008, testimony by Rick Zbur, pp. 87-90:16-8. The Commission rightly set the record straight when it made clear the Coastal Act gave the Commission authority to impose Special Condition 10, and Poseidon was bound by it. *Id.*, testimony by Chief Counsel and Executive Director Douglas, at pp. 74-75:5-15, 21-1, 6-18.

¹⁵ Coastal Commission Transcript, testimony by Rick Zbur, August 8, 2008, p. 166:21-23.

¹⁶ Public Resources Code § 21174 (emphasis added).

¹⁷ Staff Report, p. 22.

Thus, pursuant to the Coastal Act or under CEQA, Poseidon knew its GHG Plan accounted for a SWP "offset" it would never achieve.

C. Poseidon Had a Duty to Provide Accurate and Complete Information

As alluded to in the Staff Report, Poseidon had a duty to disclose relevant information to the Commission in connection with its CDP and in satisfying conditions of the CDP.¹⁸ Whether Poseidon intentionally misrepresented or concealed material information, it violated the Commission's regulations.¹⁹ Implicit in section 13105, is a duty to disclose, which Poseidon violated.²⁰ In its most recent response to the Staff Report, Poseidon attempts, once again, to place the burden of providing the Commission with accurate and complete information upon everyone but itself.²¹

Moreover, as discussed above, Commission staff was fully aware and informed the Commission of the underlying facts that are the subject of the Revocation Request – namely that MWD would not relinquish its entitlements to imported water that the Project replaces from the SWP.²²

Poseidon's thus impugns staff's skepticism of Poseidon's GHG Plan to the Commission that voted against staff. Poseidon goes even further stating staff's assertions regarding their inability to validate the SWP offset Poseidon claimed in its GHG Plan meant staff knew of the 2005 agreement contract terms.²³ The truth is, however, **the 2005 agreement was never given to staff. Poseidon admits as much when it faults staff for not getting the document from Poseidon prior to project approval.**²⁴

Asserting the draft 2005 MWD agreement is a public document and staff never asked Poseidon for the agreement, Poseidon implies it never had a duty to disclose such information.²⁵ But it did. Moreover, as asserted to the contrary in the Staff Report:

¹⁸ Staff Report, p. 20.

¹⁹ "[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." *Lovejoy v. AT&T Corp.*, (2004) 119 Cal. App. 4th 151, 157-158 (quoting *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613).

²⁰ 14 CCR § 13105; "Concealment is a term of art which includes mere nondisclosure when a party has a duty to disclose. [Citations.]' (*Reed v. King* (1983) 145 Cal. App. 3d 261, 265.) Whether the disclosure was adequate to defeat a claim of concealment depends on the scope of the duty to disclose." *Lovejoy v. AT&T Corp.*, (2004) 119 Cal. App. 4th 151, 158.

²¹ Poseidon's Response to Staff Report, February 4, 2010, p. 6; Poseidon's Appendix C, pp. 5-6.

²² Poseidon's Appendix C, p. 6.

²³ *Id.*

²⁴ Poseidon's Response to Staff Report, February 4, 2010, p. 6; Poseidon's Appendix C, p. 8 ("Accordingly, Poseidon did not provide Commission staff with a copy of the July 2005 Required Contract Terms, or MWD's 2005 SDP agreement for the City [of] Long Beach...") (emphasis added).

²⁵ Poseidon's Appendix C, p. 8.

When Commission staff requested that Poseidon document its expected emission reductions, Poseidon initially agreed to provide the MWD agreement; however, Poseidon later provided only more general documentation from MWD that did not include the MWD agreement.²⁶

While Poseidon initially offered to verify the reduction by providing a copy of an MWD Agreement, it later modified its offer so as not to provide the MWD Agreement but to instead provide more general MWD documentation. It later submitted the July 2007 MWD letter mentioned above; however that letter did not reference the MWD Agreement's provisions.²⁷

Poseidon unilaterally decided to withhold the agreement from the Commission, **while only Poseidon knew of its contents**. It was Poseidon's duty to disclose the document to the Commission, and for the Commission to decide its relevance.

D. Poseidon Once Again Attempts to Rewrite History and Mislead the Commission

Rather than admitting Poseidon withheld the 2005 agreement because it did not want the Commission to know not one drop of water would remain in the Delta as a result of the Project, Poseidon claims the Commission: (1) did not need this agreement because it provided a letter from MWD showing the Project was entitled to a SWP energy offset; and (2) knew MWD would still take SWP water.²⁸ As explained above, this theory is nonsensical. However, the Commission should be offended by Poseidon's continued mischaracterization, and its complete inability to provide support for its new, post-hoc rationalization scheme:

In addition, Poseidon explained that it could not satisfy AB 32 criteria regarding reductions in emissions for imported water the Project replaces because that would require an agreement from MWD foregoing a portion of its entitlement to imported water from the SWP. As discussed throughout this response, Poseidon consistently explained to Commission staff that MWD would never relinquish these entitlements.²⁹

Poseidon has not one cite to the record (or anywhere else for that matter) to prove such assertions, because they are false. The above-quoted language sums up the whole reason Poseidon never provided the 2005 agreement terms: Poseidon knew MWD would never forego SWP water, and the viability of its GHG Plan depended on the promise that MWD was foregoing SWP water. Poseidon could not have stood before the Commission in 2008 and asked for a credit for water MWD would still receive. Moreover, Poseidon's single, oft-repeated citation to Rick Zbur's testimony to prove Poseidon's veracity is misplaced. As quoted above, Mr. Zbur stated "that the water that is replaced, where that goes is speculative", but Poseidon knew well where that water would go.³⁰ By the terms of the 2005 agreement and the final 2009

²⁶ Staff Report, p. 12.

²⁷ Staff Report, p. 21.

²⁸ Poseidon's Appendix C, pp. 9-10.

²⁹ Poseidon's Appendix C, p. 10.

³⁰ Coastal Commission Transcript, testimony by Rick Zbur, August 8, 2008, p. 166:21-22.

agreements, that water was required to continue to be pumped from the SWP to MWD.

Further, **Poseidon seems incapable of keeping its story straight.** It's most recent assertion that MWD meant in 2008, and clarifies now, that the Project water will replace future supplies that are transported via the SWP is a direct contradiction to its CEQA theory.³¹ For its proposition that "MWD has consistently maintained to the Commission that water delivered through the SWP and imported to the San Diego region would be offset by the implementation of the Project", Poseidon selectively quotes from the MWD's most recent letter to the Commission.³²

But Poseidon forgets to include: "[i]t is the demand for these additional supplies that is likely to be offset by the project."³³ Thus, MWD foresees reducing *future, additional supplies* being offset by the Project water, not current, existing supplies.

However, Poseidon has and continues to claim it is entitled to offset SWP electricity demand because of existing, baseline imports from SWP pursuant to CEQA.³⁴ Now Poseidon back-peddles and explains why it does not matter whether its Project water displaces current or future supplies "from the standpoint of combating global warming."³⁵ It seems Poseidon still cannot keep track of which story its telling the Commission.

II. The Commission Would Have Denied the Permit or Imposed Different Conditions

As detailed in the Staff Report, Poseidon misrepresented or omitted material information.³⁶ Staff is loath to guess whether the Commission *would* have acted differently had it been provided all the relevant information, and instead politely states accurate and complete information *could* have changed the course of events. Such staff deference is appropriate where the Commission has not yet acted, but in light of the record before the Commission, **it is clear Poseidon's misrepresentations were of the utmost importance and did make a difference.** The Commission's acceptance of Poseidon's GHG Plan was not pre-destined, and Poseidon's misrepresentations played the decisive role in the Commission's vote. Indeed, the taint of Poseidon's misrepresentation is evident throughout the record.

Staff notes the Commission relied on support for Poseidon's approach from other involved agencies in accepting Poseidon's GHG Plan in conformance with CDP special condition 10, and therefore, complete and accurate information from Poseidon may not have made any difference.³⁷ However, even if the Commission gave more weight to other agencies' support for Poseidon's approach than it did to Poseidon's misrepresentation, the outcome is the same ***because these other agencies also relied upon Poseidon's misrepresentation.***³⁸

³¹ Poseidon's Appendix C, p. 13; MWD and SDCWA Letter to Commission, January 20, 2010, p. 2.

³² Poseidon's Appendix C, p. 13.

³³ MWD and SDCWA Letter to Commission, January 20, 2010, p. 2.

³⁴ Poseidon Response, p. 7-10; Poseidon's Appendix C, p. 18-20.

³⁵ Poseidon's Appendix C, p. 14.

³⁶ Staff Report, p. 3.

³⁷ Staff Report, p. 13.

³⁸ Staff Report, Exhibit 4.

Commissioners should recall, the California Energy Commission's (CEC) Executive Director, Melissa Jones wrote a retraction to her first comment letter, which focused on the Project's growth inducing impacts. In her second letter, Ms. Jones made abundantly clear, after sending her initial letter, she had an opportunity to meet with representatives of Poseidon Resources.³⁹ This meeting with Poseidon was "informative and left [her] with clarifications and a better understanding of the [GHG Plan]."⁴⁰ As a consequence of this meeting, Ms. Jones retracted her first letter, and registered her support for Poseidon's approach to calculating GHG emissions.⁴¹ All of this was a direct result of a meeting with Poseidon. If Poseidon misrepresented material information before the Commission, it's hard to believe it presented the reluctant CEC Executive Director with complete and accurate information of a nature sufficient to induce such a retraction.

Another letter of support came from MWD itself.⁴² MWD warned, "[i]f the Project is not approved, regional demand for imported water will not be reduced by 56,000 acre-feet per year to be produced by the Project." Though MWD may have known this meant 56,000 acre-feet would go elsewhere in its service area, Poseidon interpreted this letter to support its misrepresentations before the Commission.

The Metropolitan Water District, in communications to the Commission on July 29 [2008], in a letter to Mr. Douglas, confirms that the project will reduce regional demand for imported water by 56,000-acre feet. In fact, the Metropolitan Water District is financing our customers participation in this program, to the tune of \$14 million per year, expressly because it will replace water demands on MWD...⁴³

Likewise, the letter from the Air Resources Board (ARB) registers support for the "net" emission reduction calculation, but does not opine as to whether this includes SWP offsets.⁴⁴ A letter from the Chief Deputy Director of the Department of finance also lends support for a "net" emission reduction calculation without reference to SWP offset, or whether Poseidon was providing "replacement" water.⁴⁵ These letters, standing alone, simply support a net emission reduction calculation, an approach staff also endorsed.

Staff concurs with Poseidon that the plan is to mitigate only for its net emissions. The difference is that Poseidon's plan, as currently proposed, does not allow for independent verification of its net emissions...Specifically, Poseidon is proposing emission reduction credits for offsetting water imports in the state water project.⁴⁶

Without Poseidon's misrepresentation, concurrence in the "net emissions" approach does not

³⁹ July 29, 2008 Letter from Melissa Jones to Chairman Krue and Chairman Chiang, p. 1 (Exhibit 4, p. 1).

⁴⁰ *Id.*

⁴¹ *Id.* at 2.

⁴² MWD General Manager, Jeffrey Lightlinger, July 29, 2008.

⁴³ Transcript, August 8, 2008, testimony by Peter MacLaggan, p. 83:3-8 (emphasis added).

⁴⁴ ARB Chairman Mary Nichols, August 5, 2008, p. 2.

⁴⁵ Anne Sheehan, Department of Finance, August 5, 2008, p. 1.

⁴⁶ Transcript, August 8, 2008, testimony by Commission scientist Tom Luster, p.69:6-10, 22-24

equate to endorsement of subtracting SWP emissions in the GHG Plan. Even if these letters could be construed as support for Poseidon's characterization of events, such support would have been premised on Poseidon's misrepresentations.

Another letter, from Lieutenant Governor Garamendi, expressed his view that the GHG emission calculation should be based on the assumption that Project water would replace water the agencies currently and in the future would receive from MWD.⁴⁷

The argument that the desalinization's [sic] plant water is new water is based upon the assumption that the replaced water would be used elsewhere in the MWD service area. Even if this were true, it is not the desalinization's plant [sic] to mitigate that new use. It is the responsibility of the entity that receives that water.⁴⁸

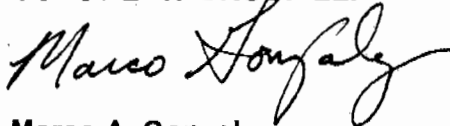
Garamendi apparently believed, as the Commission did, the Project water would not simply be rerouted to other MWD customers. Strikingly similar to words spoken by Poseidon, the Lieutenant Governor's letter surely was based on misplaced reliance on Poseidon's representations as such arguments are not made lightly before a sister agency.⁴⁹

III. Conclusion

Because Poseidon misrepresented and/or omitted material information before the Commission, which **would** have caused the Commission to either deny the permit or impose different conditions upon the project, Environmental Groups urge the Coastal Commission to revoke Poseidon's CDP. If the Commission is not inclined to revoke the CDP, we urge it to at the very least require Poseidon to work with staff to present a scientifically defensible baseline greenhouse gas emission figure and mitigation plan accurately reflecting information recently disclosed to the Commission and public.

Sincerely,

COAST LAW GROUP LLP



Marco A. Gonzalez

Attorney for San Diego Coastkeeper and
Coastal Environmental Rights Foundation⁵⁰

⁴⁷ Lieutenant Governor John Garamendi, July 31, 2008, p. 1.

⁴⁸ *Id.*

⁴⁹ Apparently Lieutenant Governor Garamendi had concerns about his support for Poseidon after approving the Project, writing to Poseidon on July 15, 2009, stating his opposition to approval of any more desalination plants in California before all options for treating wastewater are explored. Lieutenant Governor Garamendi, Letter to James Donnell of Poseidon, p. 2.

⁵⁰ Letter also submitted on behalf of the Surfrider Foundation.

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February 4, 2010

VIA FEDEX

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File No. 036182-0006

Re: Carlsbad Desalination Project, CDP No. E-06-013:
Response to Staff Report re Request for Revocation
R2-E-06-013

Agenda Item
W 6a

Dear Chairperson Neely and Honorable Commissioners:

On behalf of Poseidon Resources (Channelside) LLC ("Poseidon") we are responding to Coastal Commission staff's January 28, 2010 Staff Report regarding the above-referenced Revocation Request concerning the Carlsbad Desalination Project (the "Project"). While Poseidon agrees with the Staff Report's bottom-line recommendation to deny the Revocation Request, Poseidon emphatically disagrees with any finding that Poseidon intentionally withheld relevant information or supplied the Commission with inaccurate information. Poseidon hereby registers its strong protest with the Staff Report, which **not only mischaracterizes the administrative record, but fails to even mention the key evidence that refutes the Revocation Request's claims.** The Revocation Request itself is an apparent attempt to revisit the Commission's previous approval of the Project's Energy Minimization and Greenhouse Gas Reduction Plan ("GHG Plan") and its "net" emissions approach, and the Staff Report inaccurately conveys the history regarding those issues. In addition, the Staff Report's assertion that Poseidon withheld relevant information from the Commission is an accusation that Poseidon takes very seriously and which Poseidon categorically denies. Poseidon firmly believes the Staff Report's mischaracterizations of the record and its failure to consider the key evidence that refutes the Revocation Request's claims are serious deficiencies that are unfairly damaging to Poseidon's reputation.

The evidence in the administrative record fully, clearly and unambiguously refutes the Revocation Request's assertions that Poseidon withheld information, and shows Poseidon accurately informed the Commission at the GHG Plan hearing – and that the Commission understood – that Metropolitan Water District of Southern California ("MWD") would not reduce its water entitlements from the State Water Project ("SWP") in connection with the GHG Plan's implementation. Because the Commission clearly understood that MWD would not forego its water entitlements or its right to redirect imported water the Project replaces when it

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approved the GHG Plan, we respectfully request that the Commission deny the Revocation Request using the motion, supplemental language and substitute resolution provided in Appendices A and B hereto, which makes clear that the Revocation Request should be denied because none of the grounds for revocation have been met.

This letter focuses on the Staff Report's most significant inaccuracies and omissions; additional detailed responses are provided in Appendix C.

I. The Staff Report Fails to Address Key Testimony That Fully, Clearly and Unambiguously Refutes Revocation Claims

Despite the fact that Poseidon provided Commission staff with evidence from the Project's administrative record on three separate occasions that unequivocally shows the Commission approved the Project's GHG Plan with the full understanding that MWD would not relinquish its imported water entitlements from the SWP, the Staff Report fails to address any of that critical information. Failing to consider or even mention the key evidence that refutes the Revocation Request impugns Poseidon's integrity and is simply unfair. In contrast to the Staff Report's claims that Poseidon failed to disclose that MWD would continue to have its full allocation of SWP water, Poseidon's counsel specifically told the Commission:

Rick Zbur: "Staff asserts that Poseidon must offset the carbon from the imported water, because it cannot guarantee that it will not be used . . . **First point I wanted to address was Mr. [Minton's]¹ assertion that we have asserted that water will not be used in other places. That is actually not accurate. What we have said is that Poseidon's customers, the water districts, have agreed to replace the water, and therefore that the water that is replaced, where that goes is speculative, but wherever it goes, CEQA will apply to require those people to mitigate it . . . Another point that we wanted to address is the request by Mr. Massara that the AB32 criteria should apply to the energy reduction from replaced water. This is really the key issue related to the [gross]² versus net issue, and is the crux of what is before the Commission. Essentially what the staff does is they apply these vague principles to the replaced water, which in effect, would impose the [gross]³ requirements, because the principles would require that the replaced water have contractual agreements that the replaced water would be retired and not used by anyone.**" (Testimony of Rick Zbur, Reporter's Transcript of

¹ Mr. Jonas Minton's name was inaccurately transcribed here in the Reporter's Transcript of Proceedings as "Mitton."

² The word "growth" was inaccurately transcribed here in the Reporter's Transcript of Proceedings. Mr. Zbur used the word "gross" at the hearing.

³ The word "growth" was inaccurately transcribed here in the Reporter's Transcript of Proceedings. Mr. Zbur used the word "gross" at the hearing.

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Proceedings, GHG Plan Hearing, Aug 6, 2008, at pp. 92:5-7; 165:16-23, 166:10-19 (emphasis added).)

Based on Poseidon's testimony and submissions, and the testimony of Commission staff and the Project's supporters and opponents, the Commission's deliberations show the Commission understood that MWD would not relinquish its water entitlements or "retire" MWD's water imports from the SWP in the amount of water the Project replaces. Yet the absence of even a passing reference to the Commission's deliberations on this issue, which we again have excerpted below, represents a glaring and misleading omission from the Staff Report:

Commissioner Shallenberger: **"Metropolitan Water District is going to, and needs to, and has a right to take all of the water that is available to them out of the delta."** (Commissioner Shallenberger, Reporter's Transcript of Proceedings, GHG Plan Hearing, Aug. 6, 2008, at p. 222:15-17 (emphasis added).)

Commissioner Wan: "There are promises, but there aren't any contractual agreements, and therefore there is no certainty that they will really offset this water from the state water project. **And, as we have heard, in fact, it will probably be diverted to other uses . . .**" (Commissioner Wan, Reporter's Transcript of Proceedings, GHG Plan Hearing, Aug. 6, 2008, at p. 203:13-17 (emphasis added).)

Commissioner Scarborough: **"In essence, what I understand from a Resources perspective . . . is that, yes, Met will continue to receive that water. They are not going to turn the state tap off.** Other projects that will then need to use that water will then have to go through a process by which they get the okay to use that water. And, it is that new project that will then have to be in compliance with CARB and APCD, or whatever local district, on their greenhouse gas emission reductions for that project." (Commissioner Scarborough, Reporter's Transcript of Proceedings, GHG Plan Hearing, Aug. 6, 2008, at p. 225:1-9 (emphasis added).)

Based on this evidence, it is irrefutable that the Commission was aware in approving the GHG Plan that MWD would still have the right to its full water entitlements from the SWP, including the right to redirect imported water the Project replaces to other locations within MWD's service territory. MWD's July 2005 required contract terms for future Seawater Desalination Program ("SDP") agreements did not alter in any way what Poseidon directly conveyed to the Commission. That document, which simply required protection of MWD's imported water supplies,⁴ is fully consistent with what Poseidon told the Commission at the

⁴ MWD Board Action, dated July 12, 2005, authorizing Seawater Desalination Program Agreement with San Diego County Water Authority ("Water Authority"), at Attachment 2, p. 2.

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GHG Plan hearing.⁵ The evidence in the Commission's record unambiguously shows that Poseidon conveyed to the Commission the full significance of MWD's position regarding its imported water supplies – that MWD would not relinquish those supplies in connection with the Project. Thus, Poseidon did not withhold information or convey inaccurate information to the Commission regarding this issue because the Commission understood that "Met will continue to receive that water [from the State Water Project]"⁶ when it approved the GHG Plan.

II. Nothing in the SDP Agreement is Different than What Poseidon Told the Commission

The Staff Report also mischaracterizes the basis for the GHG Plan's water import reduction assumptions by repeatedly and inaccurately claiming that the basis of the GHG Plan's "net" emission approach was a reduction in "the amount of water MWD is entitled to or that it will take from its annual SWP allocation."⁷ That claim is erroneous and misleading. The GHG Plan's water import reduction assumptions have always been based on Poseidon's consistent and accurate representations to the Commission that the Project would result in direct, one-to-one replacement of imported water from MWD to the Project's nine local retail water agency customers ("Water Agencies"). Poseidon's submissions on this issue are well documented in the Staff Report, but the Report ignores that Poseidon consistently maintained that the reduction in imports would be to the Water Agencies and not a reduction in SWP allocation to MWD. For example, Poseidon's July 2008 proposed GHG Plan states:

"The proposed Project will supply 56,000 acre feet of water per year to the San Diego region. The Project will provide direct, one-to one replacement of imported water to meet the requirements of the participating water agencies, thus eliminating the need to pump 56,000 acre feet of water into the region."⁸

This reduction in imports to the Water Agencies remains fully consistent with MWD's November 10, 2009 SDP Agreement, which requires the Water Agencies to replace imported water from MWD with the Project's water in order for the Water Agencies to obtain MWD's \$250 per acre-foot financial incentive.⁹ MWD confirmed this point for the Commission's hearing on the GHG Plan,¹⁰ and recently confirmed it again. MWD explained in its January 20, 2010 letter to the Commission that the Project's replacement water "will result in an equal

⁵ See testimony of Rick Zbur, Reporter's Transcript of Proceedings, GHG Plan Hearing, Aug. 6, 2008, at pp. 92:5-7; 165:16-23, 166:10-19.

⁶ Commissioner Scarborough, Reporter's Transcript of Proceedings, State of California Coastal Commission, Aug. 6, 2008, at p. 225:1-9.

⁷ See, e.g., Staff Report, at p. 2.

⁸ Poseidon's July 2008 proposed GHG Plan, p. 15 (emphasis added).

⁹ See Letter from Rick Zbur to Coastal Commission, dated January 13, 2010, p. 12.

¹⁰ See Letter from MWD to Peter Douglas, dated July 29, 2008.

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demand reduction for both the Water Authority's and MWD's imported supplies" and that MWD would monitor the reduction through monthly accounting.¹¹

Thus, based on Poseidon's consistent submissions on this issue, confirmed and re-confirmed by MWD, and testimony at the GHG Plan hearing that shows the Commission understood MWD would not relinquish its imported water entitlements, there is no basis for Commission staff's assertion that a reduction in SWP allocation to MWD was a part of the GHG Plan. To the contrary, the record is abundantly clear that reductions to MWD's water entitlements were not a part of the GHG Plan the Commission approved. Therefore, nothing in MWD's SDP Agreement – which simply preserves MWD's right to its imported water entitlements – changes the basis underlying the Commission's GHG Plan approval in any way.

III. Staff Was Aware of the Terms in MWD's 2005 SDP Agreement Authorization

The Staff Report's claim that Commission staff was unaware of the terms in MWD's 2005 authorizations for the SDP agreements until it began investigating the Revocation Request is unsupportable and refuted by prior staff reports.¹² The November 2, 2007 staff report for the Project's Coastal Development Permit makes clear that Commission staff had deep knowledge of the terms in MWD's 2005 authorizations (all publicly available documents in the public record), which are the documents that confirmed only five water districts would be eligible for MWD's subsidy and also included the required contract term protecting MWD's imported water entitlements. For example, the 2007 staff report explained:

"[T]he MWD established the subsidy for use by its member agencies, all of which are public water districts, and selected just five of those public districts as being eligible for the subsidy. It has not yet been established that Poseidon may use these funds, either directly or indirectly, and such use may not represent a valid expenditure of public funds for a private entity."¹³

In addition, it is clear from the testimony at the Commission's GHG Plan hearing that Commission staff had reviewed documentation from MWD and understood that MWD would not relinquish its water entitlements. Commission staff told the Commission:

Commission Staff Sara Townsend: "Staff's review of the available information, and water agency planning documents, shows that Poseidon's project would not result in reduced emissions due to reduced water imports." (Testimony of Sara Townsend, Reporter's Transcript of Proceedings, State of California Coastal Commission, Aug. 6, 2008, at p. 70:11-14.)

¹¹ Letter from MWD and Water Authority to Peter Douglas, dated January 20, 2010, p. 2.

¹² See Staff Report, p. 2.

¹³ November 2007 Staff Report, p. 19 fn. 19.

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Commission Staff Tom Luster: "Met describes its desal program as allowing Metropolitan to redirect imports, not necessarily reduce them." (Testimony of Tom Luster, Reporter's Transcript of Proceedings, State of California Coastal Commission, Aug. 6, 2008, at p. 173:6-8.)

Based on Commission staff's familiarity with MWD's subsidy program for the SDP agreements, including staff's understanding that MWD had authorized only five water districts as eligible for this subsidy, the record does not support the claim that staff only recently learned of a required contract term that existed in the same 2005 authorizations that determined which water districts are entitled to the subsidy.

IV. Staff Did Not Ask Poseidon for MWD's 2005 SDP Agreement Contract Terms

Despite the Staff Report's claims that Poseidon withheld MWD's 2005 contract terms for the SDP Agreement, that document is a public document to which Poseidon was not a party, was in the public record for over three years when the Commission approved the GHG Plan, and Commission staff never asked Poseidon for a copy of those terms. Instead, Commission staff asked Poseidon for documentation that demonstrated the Project's emission reductions would meet AB 32 criteria. In response, Poseidon consistently advocated to Commission staff that emissions reductions associated with the Project's replacement of imported water should not be subject to AB 32 criteria, since those emissions are part of the Project's existing environmental baseline under CEQA. Poseidon therefore proposed providing the Commission with documentation from MWD showing that the Project would displace demand for MWD water imports on a one-to-one basis, which MWD did in its July 29, 2008 letter to Executive Director Douglas that explained "San Diego County will use 56,000 acre-feet per year less imported water upon Project start up."¹⁴ Accordingly, Poseidon did not provide Commission staff with a copy of the 2005 contract terms, or MWD's 2005 SDP agreement for Long Beach, because neither document contained a mechanism that ensured AB 32 compliance that would have been responsive to Commission staff's request.

In fact, whether MWD could guarantee that imported water the Project replaces would not be used for other uses, and therefore would comply with AB 32, was a key reason for the debate concerning whether the GHG Plan should require Poseidon to offset the Project's "gross" versus "net" GHG emissions. As demonstrated above, Poseidon explained to the Commission that MWD would not agree to give up its right to redirect water the Project replaces to other locations within its service territory, and the Commission approved the GHG Plan with that understanding. As a result, the Commission's approved GHG Plan does not require Poseidon to provide evidence that water import reductions from MWD satisfy AB 32 criteria – which is fully consistent with the fact that Poseidon did not provide Commission staff with any document showing AB 32 compliance for those reductions because no such document has ever existed.

¹⁴

Letter from MWD to Peter Douglas, dated July 29, 2008, p. 1.

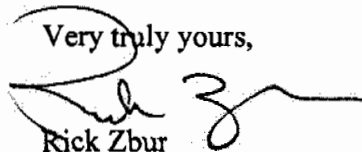
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V. Conclusion

Poseidon remains extremely disappointed in the Staff Report's omissions and mischaracterizations of the administrative record, the GHG Plan and the issues raised in the Revocation Request. The record and the evidence Poseidon provided to the Commission clearly and conclusively shows that the Commission approved the GHG Plan with the full understanding that MWD would not relinquish its imported water entitlements. Neither the 2009 SDP Agreement nor MWD's 2005 required contract terms change that understanding in any way. Accordingly, Poseidon has not intentionally supplied the Commission with inaccurate information, and we respectfully request that you deny the Revocation Request, **and adopt the substitute resolution attached as Appendix B**, because none of the grounds for revocation have been met.

Very truly yours,



Rick Zbur
of LATHAM & WATKINS LLP

Attachment

cc: Tom Luster; Peter MacLaggan

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Appendix A
Motion and Supplemental Statement

Based upon the evidence in the Commission's administrative record, information provided by Poseidon and the testimony before the Commission, Poseidon requests that the Commission deny the Revocation Request because the Commission finds that none of the grounds for revocation set forth in Section 13105 of the Commission's regulations have been met. Poseidon therefore requests that after the motion recommended by the Staff Report is made, which is reproduced below, the motion maker also enter the Supplemental Statement below into the administrative record:

Motion (from Staff Report): I move that the Commission grant revocation of Coastal Development Permit E-06-013.

Recommendation of Denial (from Staff Report): I recommend a NO vote on the Motion.

Supplemental Statement:

"After a review of the evidence in the Commission's administrative record, information provided by Poseidon and the testimony before the Commission, I am persuaded that none of the three elements required to find grounds for revocation under Section 13105 of the Commission's regulations have been met. Specifically, I am persuaded that Poseidon did not provide any inaccurate information, intentional or otherwise. Therefore, in making this motion, the staff is directed to substitute the "Resolution to Deny Revocation" in the Staff Report with the "Substitute Resolution to Deny Revocation" provided by Poseidon as Appendix C to its February [], 2010 submittal to the Commission, which is the yellow sheet."

These materials have been provided to Coastal Commission Staff

Appendix B

SUBSTITUTE RESOLUTION TO DENY REVOCATION:¹

The Commission hereby denies the request for revocation of the Commission's decision on Coastal Development Permit E-06-013 on the grounds that:

a) *~~There was no~~ Although there was intentional inclusion of inaccurate, erroneous or incomplete information in connection with the subject coastal development permit application, where the Commission finds that the accurate and complete information would ~~not~~ have caused the Commission to require additional or different conditions on the permit or deny the application.*

b) *There was no failure to comply with the notice provision of Section 13054 where the views of the person(s) not notified were not otherwise made known to the Commission and would have caused the Commission to require additional or different conditions on a permit or deny an application (14 Cal. Code of Regulations Section 13015).*

¹ Changes to the Staff Report's Resolution to Deny Revocation are shown in double underline and ~~strikethrough~~.

These materials have been provided to Coastal Commission Staff

APPENDIX C

Poseidon's Correction of Factual Inaccuracies in the Staff Report

Although Poseidon concurs with the Staff Report's recommendation that the Revocation Request be denied, the Staff Report is fraught with numerous inaccuracies and omissions, which require correction for the administrative record. In order to clarify the facts regarding the Revocation Request, this document recites those inaccuracies in detail and provides Poseidon's responses thereto. Furthermore, Poseidon emphatically disagrees with any finding that Poseidon intentionally withheld information or supplied the Commission with inaccurate information and believes that none of the grounds for revocation under Section 13105 of the Commission's Regulations ("CCC Regulations") have been met, as detailed in our prior letters and summarized below.

I. THE STAFF REPORT IGNORES THE KEY EVIDENCE IN THE RECORD SHOWING THAT THE COMMISSION UNDERSTOOD MWD WOULD NOT RELINQUISH ITS STATE WATER PROJECT ENTITLEMENTS

The Staff Report repeatedly and inaccurately asserts that Poseidon failed to inform the Commission that MWD would not relinquish any of its imported water entitlements in connection with the Commission's adoption of the "net" emission approach in the Project's GHG Plan. That is simply incorrect. The below statements made in the Staff Report mischaracterize and ignore the overwhelming evidence in the Commission's administrative record that unequivocally shows the Commission approved the Project's GHG Plan with the full understanding that MWD would not relinquish any of its water entitlements, including supplies from the State Water Project ("SWP"), in connection with the GHG Plan's implementation.

Statements in Staff Report that Ignore Poseidon's Disclosure that MWD Would Not Relinquish its Imported Water Entitlements:

Staff Report, p. 21. "Later, at the Commission's August 2008 hearing . . . Poseidon did not disclose that MWD did not intend to directly reduce its imports due to the water produced by Poseidon or that the MWD Agreement would allow it to terminate its subsidies if the Poseidon project resulted in a reduction of its entitlements or usage of imported water."¹

¹ The Staff Report makes several nearly duplicative misstatements regarding this issue. In the interest of brevity, this document recites the most representative misstatement in full and provides citations in this footnote to other key misstatements regarding this issue. In addition to the misstatement cited above, Poseidon refers the Commission to the following misstatements in the Staff Report: p. 2 (¶ 3, last sentence: "... Poseidon knew that such subsidies would be subject to agreements modeled on the 2005 MWD Agreement . . ."); p. 11 (¶ 1, last sentence: "Poseidon also did not disclose . . ."); p. 12 (¶ 3); p. 16 (¶ 4, last sentence: "Poseidon failed to disclose . . ."); p. 16 (¶ 5, first sentence: "Poseidon also failed to disclose . . ."); p. 17 (¶ 3, second sentence: "Commission staff's review shows that none of the cited documents [in Poseidon's January 13, 2010 letter] provide . . ."); p. 20 (¶ 1, first sentence: "Poseidon did not disclose to the Commission . . ."); p. 21 (¶ 1, first sentence: "Poseidon had opportunities to disclose . . .").

Poseidon's Response:

As described in detail in Poseidon's January 13, 2010 letter to the Coastal Commissioners and Executive Director Douglas, testimony at the August 6, 2008 hearing and Poseidon's prior written submissions both demonstrate that the Commission was fully aware that MWD would not relinquish any of its imported water entitlements – or the right to provide imported water the Project replaces to any location within MWD's service territory – when the Commission approved the Project's GHG Plan. This understanding was made clear on the record not only by Poseidon and the Commissioners, but also by Commission staff.

During the August 6, 2008 hearing, Poseidon's counsel told the Commission:

Rick Zbur: "Staff asserts that Poseidon must offset the carbon from the imported water, because it cannot guarantee that it will not be used . . . **First point I wanted to address was Mr. [Minton's]² assertion that we have asserted that water will not be used in other places. That is actually not accurate. What we have said is that Poseidon's customers, the water districts, have agreed to replace the water, and therefore that the water that is replaced, where that goes is speculative, but wherever it goes, CEQA will apply to require those people to mitigate it . . .** Another point that we wanted to address is the request by Mr. Massara that the AB32 criteria should apply to the energy reduction from replaced water. This is really the key issue related to the [gross]³ versus net issue, and is the crux of what is before the Commission. Essentially what the staff does is they apply these vague principles to the replaced water, which in effect, would impose the [gross]⁴ requirements, because the principles would require that the replaced water have contractual agreements that the replaced water would be retired and not used by anyone." (Testimony of Rick Zbur, Reporter's Transcript of Proceedings, GHG Plan Hearing, Aug 6, 2008, at pp. 92:5-7; 165:16-23, 166:10-19 (emphasis added).)

Commission staff understood that MWD would not forego its water entitlements:

Commission staff Tom Luster: "As you have heard several times today, the state water project will not necessarily reduce its electrical use or its emissions, due to Poseidon's project

² Mr. Jonas Minton's name was inaccurately transcribed here in the Reporter's Transcript of Proceedings as "Mitton."

³ The word "growth" was inaccurately transcribed here in the Reporter's Transcript of Proceedings. Mr. Zbur used the word "gross" at the hearing.

⁴ The word "growth" was inaccurately transcribed here in the Reporter's Transcript of Proceedings. Mr. Zbur used the word "gross" at the hearing.

....

Met describes its desal program as allowing Metropolitan to redirect imports, not necessarily reduce them. For example, Met's recent integrated water resources plan from 2004 -- which staff is adding to the record -- states that desal is expected to offset water use in one area of its service area, and allow it to send additional imported water to other parts of its service area." (Testimony of Tom Luster, Reporter's Transcript of Proceedings, GHG Plan Hearing, Aug. 6, 2008, at pp. 172:18-20; 173:6-12 (emphasis added).)

A member of the San Diego County Water Authority's ("Water Authority") Board of Directors confirmed that MWD would not forego its SWP entitlements:

Keith Lewinger: "Earlier, you heard Mr. Jonas Minton say, 'Well, that won't reduce the amount of water that the state water project delivers.' Well, he is right, but what he forgot to tell you was that the vast majority of the state water contractors are north of the Tehachipis . . . Water supplies from this agency will serve agencies who have contracted to purchase water from Poseidon, and it will replace imported water that would, otherwise, be pumped over the Tehachipis . . . " (Testimony of Keith Lewinger, Reporter's Transcript of Proceedings, GHG Plan Hearing, Aug. 6, 2008 at pp. 131:22-25; 132:1-2, 6-9 (emphasis added).)

Counsel for six of the nine local retail water agencies ("Water Agencies") contracting with Poseidon testified:

Michael Cowett: "The main point here is that the reason that these six agencies contracted to purchase desalted water is to replace imported water, not to increase their water supply, and that is subject to audit by the Metropolitan Water District . . . The project will mitigate for the incremental gas emissions needed to produce desalted water. If water uses in the San Joaquin Valley, or in other areas of California increase the supply of pumped water, we believe it is those users who should pay for the mitigation of that increase, not the customers who are buying the desalted water in San Diego." (Testimony of Michael Cowett, Reporter's Transcript of Proceedings, GHG Plan Hearing, Aug. 6, 2008, at pp. 156:13-17, 156:23-157:3.)

Various Coastal Commissioners confirmed that they understood and made clear for the full Commission that the approach Poseidon advocated in the GHG Plan did not require MWD to relinquish any water entitlements or prevent MWD from redirecting water the Project replaces to other locations:

Commissioner Shallenberger: "Metropolitan Water District is going to, and needs to, and has a right to take all of the water that is

available to them out of the delta.” (Commissioner Shallenberger, Reporter’s Transcript of Proceedings, GHG Plan Hearing, Aug. 6, 2008, at p. 222:15-17 (emphasis added).)

Commissioner Wan: “There are promises, but there aren’t any contractual agreements, and therefore there is no certainty that they will really offset this water from the state water project. **And, as we have heard, in fact, it will probably be diverted to other uses . . .**” (Commissioner Wan, Reporter’s Transcript of Proceedings, GHG Plan Hearing, Aug. 6, 2008, at p. 203:13-17 (emphasis added).)

Commissioner Scarborough: “In essence, what I understand from a **Resources perspective . . . is that, yes, Met will continue to receive that water. They are not going to turn the state tap off.** Other projects that will then need to use that water will then have to go through a process by which they get the okay to use that water. And, it is that new project that will then have to be in compliance with CARB and APCD, or whatever local district, on their greenhouse gas emission reductions for that project.” (Commissioner Scarborough, Reporter’s Transcript of Proceedings, GHG Plan Hearing, Aug. 6, 2008, at p. 225:1-9 (emphasis added).)

Commissioner Lowenthal: “Okay, and I also wanted to just make a couple of comments regarding the imported water from the State Water Project. **I think we all understand that Metropolitan has a contract for the amount that it does take annually . . .**” (Commissioner Lowenthal, Reporter’s Transcript of Proceedings, GHG Plan Hearing, Aug. 6, 2008, at p. 229:3-7 (emphasis added).)

Poseidon has presented this evidence to Commission staff on three separate occasions. First, in conjunction with a December 17, 2009 meeting with Commission staff, Poseidon provided staff with a binder of key evidence, including the above excerpts from the transcript to the August 6, 2008 hearing on the GHG Plan. Poseidon also included this evidence as exhibits to a letter it sent Commission staff on January 7, 2010 in response to staff’s November 13, 2009 letter requesting that Poseidon file an amendment to its Coastal Development Permit (“CDP”). Finally, Poseidon again submitted excerpts from this evidence to Commission staff as exhibits to its January 13, 2010 letter responding to the Revocation Request. The Staff Report, however, fails to address this key evidence.⁵

⁵ All of the documents discussed in this paragraph are hereby incorporated into this response by this reference.

II. THE STAFF REPORT INACCURATELY CLAIMS THAT COMMISSION STAFF WAS UNAWARE OF THE TERMS IN MWD'S 2005 AUTHORIZATIONS FOR ITS SDP AGREEMENTS UNTIL NOVEMBER 2009

The Staff Report claims that MWD's requirement that it not relinquish its water entitlements did not come to light until November 2009. This contention is refuted by evidence in the administrative record.

Statement in Staff Report Alleging that MWD's Requirement That it Not Relinquish its Water Entitlements Did Not Come to Light Until November 2009:

Staff Report, p. 10. "This 2005 Agreement came to light in November 2009 when the MWD approved a contract providing a subsidy of up to \$250 per acre-foot for water from Poseidon's project."

Poseidon's Response

The record does not support Commission staff's claim that this "2005 Agreement" did not "c[o]me to light" until the MWD Board's approval of the formal Seawater Desalination Program ("SDP") Agreement in November 2009. As Poseidon has noted in its prior submissions to the Coastal Commission, on July 12, 2005, the MWD Board of Directors ("MWD Board") authorized MWD staff to enter into SDP agreements with five of its member agencies, including the Water Authority. The Board's approval of each of the SDP agreement authorizations included a set of required contract terms (the "July 2005 Required Contract Terms"), which were to be used consistently in all of the subsequent SDP agreements.

Evidence in the administrative record demonstrates that Commission staff was aware of these 2005 authorizations at the Commission's November 15, 2007 hearing on the Project's CDP. The November 2, 2007 staff report for the Project's CDP makes clear that Commission staff had deep knowledge of the terms in MWD's 2005 authorizations:

There are also a number of initiatives at local or regional levels to support or research the potential for seawater desalination to provide part of an area's water supply. For example, Southern California's Metropolitan Water District (MWD), which represents most water agencies in coastal Southern California, established a program offering to its member agencies subsidies of up to \$250 for each acre-foot of desalinated seawater produced. The agencies eligible for this subsidy include the San Diego County Water Authority, Long Beach Water Department, Los Angeles Department of Water and Power, West Basin Municipal Water District, and the Municipal Water District of Orange County. The MWD has also provided about \$250,000 to its member agencies for desalination research[.]

(November 2007 Staff Report, p. 12.) The November 2007 Staff Report also states: "the MWD established the subsidy for use by its member agencies, all of which are

public water districts, and selected just five of those public districts as being eligible for the subsidy. It has not yet been established that Poseidon may use these funds, either directly or indirectly, and such use may not represent a valid expenditure of public funds for a private entity.” (November 2007 Staff Report, p. 19 fn. 19.)

In addition, it is clear from the testimony at the Commission’s GHG Plan hearing that Commission staff had reviewed documentation from MWD and understood that MWD would not relinquish its water entitlements. Commission staff told the Commission:

Commission Staff Sara Townsend: “Staff’s review of the available information, and water agency planning documents, shows that Poseidon’s project would not result in reduced emissions due to reduced water imports.” (Testimony of Sara Townsend, Reporter’s Transcript of Proceedings, GHG Plan Hearing, Aug. 6, 2008, at p. 70:11-14.)

Commission Staff Tom Luster: “Met describes its desal program as allowing Metropolitan to redirect imports, not necessarily reduce them.” (Testimony of Tom Luster, Reporter’s Transcript of Proceedings, GHG Plan Hearing, Aug. 6, 2008, at p. 173:6-8.)

Based on Commission staff’s familiarity with MWD’s subsidy program for the SDP agreements, including staff’s understanding that MWD had authorized only five water agencies as eligible for the subsidy, the record does not support the claim that staff only recently learned of a required contract term that existed in the same 2005 authorizations that determined which water districts are entitled to the subsidy. Moreover, as discussed above, Commission staff was fully aware and informed the Commission of the underlying facts that are the subject of the Revocation Request – namely that MWD would not relinquish its entitlements to imported water that the Project replaces from the SWP.

III. THE STAFF REPORT INACCURATELY CLAIMS THAT POSEIDON FAILED TO INFORM THE COMMISSION OF THE REQUIREMENT IN THE SDP AGREEMENT THAT MWD WOULD NOT RELINQUISH WATER ENTITLEMENTS AND INACCURATELY CLAIMS THAT POSEIDON INTENTIONALLY REFUSED TO PROVIDE STAFF WITH A SAMPLE SDP AGREEMENT

The Staff Report repeatedly and inaccurately asserts that Poseidon failed to inform the Commission of a provision in the MWD’s SDP Agreement with the Water Authority allowing MWD to terminate the Agreement if MWD’s rights to its own water entitlements are impacted by the Project. These assertions mischaracterize the history of the SDP Agreement. Moreover, the Staff Report claims that Poseidon intentionally refused to provide Commission staff with a sample SDP agreement between MWD and the City of Long Beach. This accusation takes the revisions Poseidon proposed to a July 11, 2008 memorandum regarding the GHG Plan and cited in the Staff Report out of context.

A. Statements in Staff Report Accusing Poseidon of Failing to Inform Commission Staff of the Requirement in the SDP Agreement that MWD Not Relinquish Its Water Entitlements:

Staff Report, p. 12. "Poseidon did not inform that Commission that this agreement allows MWD to terminate its subsidy if Poseidon's project causes MWD to lose its entitlements to, or reduce its usage of, water imported from the SWP or any other source. . . . Rather than providing the Commission with the MWD Agreement, Poseidon provided other information that did not clearly show MWD's intent to maintain its full entitlement and usage of imported water."

Staff Report, p. 16. "Poseidon also failed to disclose the 2005 MWD Agreement or its provision that allows MWD to terminate its subsidy if the project limits MWD's entitlements to import or use water from the SWP or other sources."⁶]

Poseidon's Response:

The above-cited statements in the Staff Report misconstrue the history of the SDP Agreement. As described above, on July 12, 2005, the MWD Board of Directors ("MWD Board") authorized MWD staff to enter into SDP agreements with five of its member agencies, including the Water Authority. These authorizations included the July 2005 Required Contract Terms, which were to be used consistently in all of the subsequent SDP agreements. Article 14 of the July 2005 Required Contract Terms states: "Metropolitan's Imported Water Entitlements. Protection of Metropolitan's imported water supplies as related to project implementation." These July 2005 Required Contract Terms did not constitute a formal agreement between MWD and the Water Authority. Instead, the July 2005 Required Contract Terms are in a memorandum documenting action taken by the MWD Board authorizing MWD staff to enter into SDP agreements with five of its member agencies, including the Water Authority, on behalf of the public agency participants in the Project.

The formal SDP Agreement between MWD, the Water Authority, and the Water Agencies was not approved by the Board until November 10, 2009. Notably, and contrary to the Staff Report's assertions, the July 2005 Required Contract Terms do not contain the precise language set forth in Section 13 of the SDP Agreement "that allows MWD to terminate its subsidy if the project limits MWD's entitlements to import or use water from the SWP or other sources." Accordingly, the Staff Report is

⁶ The Staff Report makes several nearly duplicative misstatements regarding this issue. In the interest of brevity, this document recites the most representative misstatement in full and provides citations in this footnote to other key misstatements regarding this issue. In addition to the misstatement cited above, Poseidon refers the Commission to the following misstatements in the Staff Report: p. 2 (¶ 3, last sentence: "... Poseidon knew that such subsidies would be subject to agreements modeled on the 2005 MWD Agreement . . ."); p. 11 (¶ 1, last sentence: "Poseidon also did not disclose . . ."); p. 16 (¶ 4, last sentence: "Poseidon failed to disclose . . ."); p. 17 (¶ 3, second sentence: "Commission staff's review shows that none of the cited documents [in Poseidon's January 13, 2010 letter] provide . . ."); p. 20 (¶ 1, first sentence: "Poseidon did not disclose to the Commission . . ."); p. 21 (¶ 1, first sentence: "Poseidon had opportunities to disclose . . .").

incorrect in stating that Poseidon failed to disclose this provision in the "2005 MWD Agreement" at the time the Commission considered both the CDP (November 15, 2007) and the GHG Plan (August 6, 2008).

Moreover, despite the Staff Report's claims that Poseidon withheld the July 2005 Required Contract Terms for the SDP Agreement, that document is a public document to which Poseidon was not a party, and had been in the public record for over two years when the Commission approved CDP and for over three years when the Commission approved the GHG Plan. The MWD Board's July 12, 2005 authorization was the only formal authorization concerning the SDP Agreement between MWD and the Water Authority that was available at the time of the hearing on the GHG Plan. The formal SDP Agreement, approved by the MWD Board on November 10, 2009 and which effectuates the intent of the July 2005 Required Contract Terms, was not available until well after the GHG Plan hearing.

Furthermore, Commission staff never asked Poseidon for a copy of the July 2005 Required Contract Terms. Instead, Commission staff asked Poseidon for documentation that demonstrated the Project's emission reductions would meet AB 32 criteria. In response, Poseidon consistently advocated to Commission staff that emissions reductions associated with the Project's replacement of imported water should not be subject to AB 32 criteria, since those emissions are part of the Project's existing environmental baseline under CEQA. Poseidon therefore proposed providing the Commission with documentation from MWD showing that the Project would displace demand for MWD water imports on a one-to-one basis, which MWD did in its July 29, 2008 letter to Executive Director Douglas that explained, "San Diego County will use 56,000 acre-feet per year less imported water upon Project start up." (July 29, 2008 Letter from Jeffrey Kightlinger to Peter Douglas, p. 1.) Accordingly, Poseidon did not provide Commission staff with a copy of the July 2005 Required Contract Terms, or MWD's 2005 SDP agreement for the City Long Beach, discussed further below, because neither document contained a mechanism that ensured AB 32 compliance that would have been responsive to Commission staff's request.

In fact, whether MWD could guarantee that imported water the Project replaces would not be used for other uses, and therefore would comply with AB 32, was the key reason for the debate concerning whether the GHG Plan should require Poseidon to offset the Project's "gross" versus "net" GHG emissions. As demonstrated above, Poseidon clearly explained to the Commission that MWD would not agree to give up its right to redirect water the Project replaces to other locations within its service territory, and the Commission approved the GHG Plan with that understanding. As a result, the Commission's approved GHG Plan does not require Poseidon to provide evidence that water import reductions from MWD satisfy AB 32 criteria – which is fully consistent with the fact that Poseidon did not provide Commission staff with any document showing AB 32 compliance for those reductions because no such document has ever existed.

In any event, Section 13 of the SDP Agreement approved by the MWD Board on November 10, 2009, only confirms the understanding Poseidon conveyed to the Commission that MWD will not relinquish any imported water entitlements in connection with the Project, and does not change any of the bases of the Commission's GHG Plan approval. MWD made this clear in its December 17, 2009 letter to Executive Director Douglas, which states that "Section 13's sole purpose is to protect Metropolitan's imported water supply rights and entitlements." (December 17, 2009 Letter from Jeffrey Kightlinger to Peter Douglas, p. 2.)

Based on the foregoing evidence, Poseidon's statements and testimony at the GHG Plan hearing that MWD would not relinquish its water entitlements in connection with the Project remain correct and accurate.

B. Statements in Staff Report Accusing Poseidon of Intentionally Refusing to Disclose an SDP Agreement Between MWD and the City of Long Beach

Staff Report, p. 11 & fn. 12. "Regarding the MWD Agreement, Poseidon deliberately chose not to provide it to the Commission, despite Staff's request that Poseidon document its asserted emission reductions,¹²

....

¹² Commission staff requested at a June 2008 meeting that Poseidon document its proposed emission reductions and Poseidon offered to provide this MWD Agreement. At the time of the Commission's review, there were five MWD agreements in place with different member agencies, each with identical provisions prohibiting projects from limiting MWD's right to imported water. A July 11, 2008 memo from Commission staff memorializing the meeting showed Poseidon initially offered an agreement (referred to in the memo as an MWD Contract). Poseidon later modified [the] memo to change its offer to more general documentation, which did not include the MWD Agreement or the provision."

Staff Report, p. 21. "While Poseidon initially offered to verify the reduction by providing a copy of an MWD Agreement, it later modified its offer so as not to provide the MWD Agreement but to instead provide more general MWD documentation."

Poseidon's Response:

The Staff Report incorrectly accuses Poseidon of deliberately withholding an SDP agreement between MWD and the City of Long Beach from Commission staff and then cites this incorrect accusation as evidence that Poseidon intentionally prevented the Commission from learning of the July 2005 Required Contract term protecting MWD's imported water supplies. These accusations mischaracterize the administrative record and take the revisions Poseidon proposed to the July 11, 2008 memorandum regarding the GHG Plan and cited in the Staff Report out of context.

As noted in detail above, Commission staff insisted that the Project's GHG Plan must be subject to AB 32 criteria, thus, in essence, requiring the Project to offset its "gross"

indirect GHG emissions. Under this approach, for Poseidon to obtain mitigation credit for the water the Project would replace from the SWP, Poseidon would have had to prove that the amount of imported water the Project replaces would no longer be imported into the region through verifiable and enforceable measures. In support of this approach, Commission staff asked Poseidon for documentation that demonstrated the Project's emission reductions would meet AB 32 criteria. The July 11, 2008 memo cited in the Staff Report reflects Commission staff's "gross" offset approach to the GHG Plan:

"As currently proposed, any emissions reductions that may occur from this element of the Plan cannot be verified. Staff recommends that Poseidon provide verification from the Metropolitan Water District of Southern California (MWD) or other sources showing this measure would meet the AB 32 criteria."

Poseidon explained to Commission staff that emissions reductions associated with the Project's replacement of imported water should not be subject to AB 32 criteria, since those emissions are part of the Project's existing environmental baseline under CEQA. Moreover, Poseidon explained that the Coastal Commission does not have the authority under the Coastal Act to impose a carbon neutral requirement on the Project.⁷ In addition, Poseidon explained that it could not satisfy AB 32 criteria regarding reductions in emissions for imported water the Project replaces because that would require an agreement from MWD foregoing a portion of its entitlement to imported water from the SWP. As discussed throughout this response, Poseidon consistently explained to Commission staff that MWD would never relinquish these entitlements.

The SDP agreement between MWD and Long Beach did not contain a mechanism that ensured AB 32 compliance that would have been responsive to Commission staff's request. Furthermore, the SDP agreement between MWD and Long Beach did not apply to Poseidon's Project, Poseidon was not a custodian of this agreement, and, in any case, the agreement was a part of the public record and easily accessible for review by Commission staff. Instead of providing Commission staff with this agreement, which was always available to staff and would not have satisfied staff's request, Poseidon proposed that it would submit to Commission staff documentation from MWD demonstrating that the water produced by the Project would replace an existing demand or prevent a new demand on MWD with respect to Poseidon's customers. On July 29, 2008, MWD submitted a letter to Executive Director Douglas providing such evidence. Accordingly, there is no basis for the Staff Report's assertions that Poseidon deliberately withheld the publicly available SDP agreement between MWD and the City of Long Beach to prevent Commission staff from learning of a provision in that agreement that protects MWD's imported water entitlements.

⁷ For further discussion on this issue, see Section IX of this response, *infra*.

IV. THE STAFF REPORT MISCHARACTERIZES THE GHG PLAN'S WATER IMPORT REDUCTION ASSUMPTIONS

The Staff Report mischaracterizes the basis for the GHG Plan's water import reduction assumptions by inaccurately claiming that the basis for the GHG Plan's "net" emissions approach was a reduction in "the amount of water MWD is entitled to or that it will take from its annual SWP allocation." (Staff Report, p. 2.) As demonstrated below, the Project's administrative record clearly shows that the basis for the GHG Plan's emission reductions associated with imported water the Project replaces concerned a reduction in imports to the San Diego Water Agencies – not a reduction to MWD's water allocation from the SWP. In addition, the Staff Report mischaracterizes a January 20, 2010 letter from MWD and the Water Authority to Executive Director Douglas as meaning that the Project will not result in a one-to-one reduction of imported water into the San Diego region and may only "potentially" reduce GHG emissions. Not only is Commission staff's interpretation of this letter misguided, but the administrative record is replete with evidence showing that the Project will result in both a one-to-one reduction of imported water into the region, as well as a corresponding reduction in GHG emissions.

A. Statement in Staff Report Mischaracterizing the GHG Plan's "Net" Emissions Approach:

Staff Report, p.2. "Thus, the Poseidon project will not reduce the amount of water MWD is entitled to or that it will take from its annual SWP allocation (which is the basis of Poseidon's emission reduction measure)."

Poseidon's Response:

This statement is erroneous and misleading. The GHG Plan's water import reduction assumptions have always been based on Poseidon's consistent and accurate representations to the Commission that the Project would result in direct, one-to-one replacement of imported water from MWD to the Project's nine local retail water agency customers. Poseidon's submissions on this issue are documented in the Staff Report,⁸ but the Staff Report ignores that Poseidon consistently maintained that the reduction in imports would be to the Water Agencies and not a reduction in SWP allocation to MWD. For example, Exhibit B to Poseidon's November 9, 2007 Response the Staff Report regarding the CDP application states:

"As stated by all Carlsbad desalination project water agency partners in letters to the State Lands Commission dated November 6 and November 7, 2007, that were provided to the Coastal Commission, water from the desalination plant will provide direct, one-for-one replacement of imported water to meet the requirements of their Urban Water Management Plans, thus eliminating the need to pump 56,000 acre feet of water into the region." (November 9, 2007 Letter from

⁸ See Staff Report, pp. 14-16.

Poseidon to Coastal Commission, at Exhibit B, p. 52 (emphasis added).)

Moreover, Poseidon's July 2008 proposed GHG Plan states:

"The proposed Project will supply 56,000 acre feet of water per year to the San Diego region. The Project will provide direct, one-to one replacement of imported water to meet the requirements of the participating water agencies, thus eliminating the need to pump 56,000 acre feet of water into the region." (Poseidon's July 2008 proposed GHG Plan, p. 15 (emphasis added).)

This language was incorporated into the GHG Plan approved by the Commission on August 6, 2008. Because the Project will replace water imported by the Water Agencies, the GHG Plan reduces Poseidon's emissions offset obligations for emissions that are avoided from the imported water the Project replaces. There is no text in the GHG Plan that in any way limits or restricts MWD's management of its imported water supply, or that requires MWD to relinquish any of its imported water entitlements. Accordingly, the above-cited statement in the Staff Report is misleading and inaccurate.

B. Statements in Staff Report Mischaracterizing MWD's Position that the Project Will Result in the Reduction in Imported Water into the San Diego Region:

Staff Report, p. 11. "[Poseidon] failed to explain to the Commission that any reduction in MWD's demand for imported water would result from MWD's possible reduced demand for 'marginal' sources of imported water, such as water exchanges, transfers, purchases, etc., instead of a one-for-one reduction in its use of its SWP allocation. . . . Therefore, while MWD believes that the Poseidon project is likely to result in a reduction of the volume of water imported into Southern California, such reductions will not be in a consistent, one-for-one manner, as Poseidon represented to the Commission."⁹

Poseidon's Response:

Instead of reading it as a whole, the Staff Report selectively quotes only portions of the joint letter dated January 20, 2010 from MWD and the Water Authority to Executive Director Douglas. By mischaracterizing this letter, Commission staff

⁹ The Staff Report makes several nearly duplicative misstatements regarding this issue. In the interest of brevity, this document recites the most representative misstatement in full and provides citations in this footnote to other key misstatements regarding this issue. In addition to the misstatement cited above, Poseidon refers the Commission to the following misstatements in the Staff Report: p. 2 (¶ 4, last two sentences: "Poseidon failed to explain to the Commission that the water it produces will in fact only 'displace' imported water if . . ."); p. 12 (¶ 4: "Poseidon did not disclose that those reductions were unlikely to take place on a yearly, one-for-one basis. These nondisclosures appear to be intentional."); p. 16 (¶ 4, last sentence: Poseidon failed to disclose to the Commission . . . that any reduction in imported water would only come through . . ."); p. 17 (¶ 3, last sentence: "Moreover, MWD itself states that water produced by the Poseidon project is only likely to reduce marginal water imports . . .").

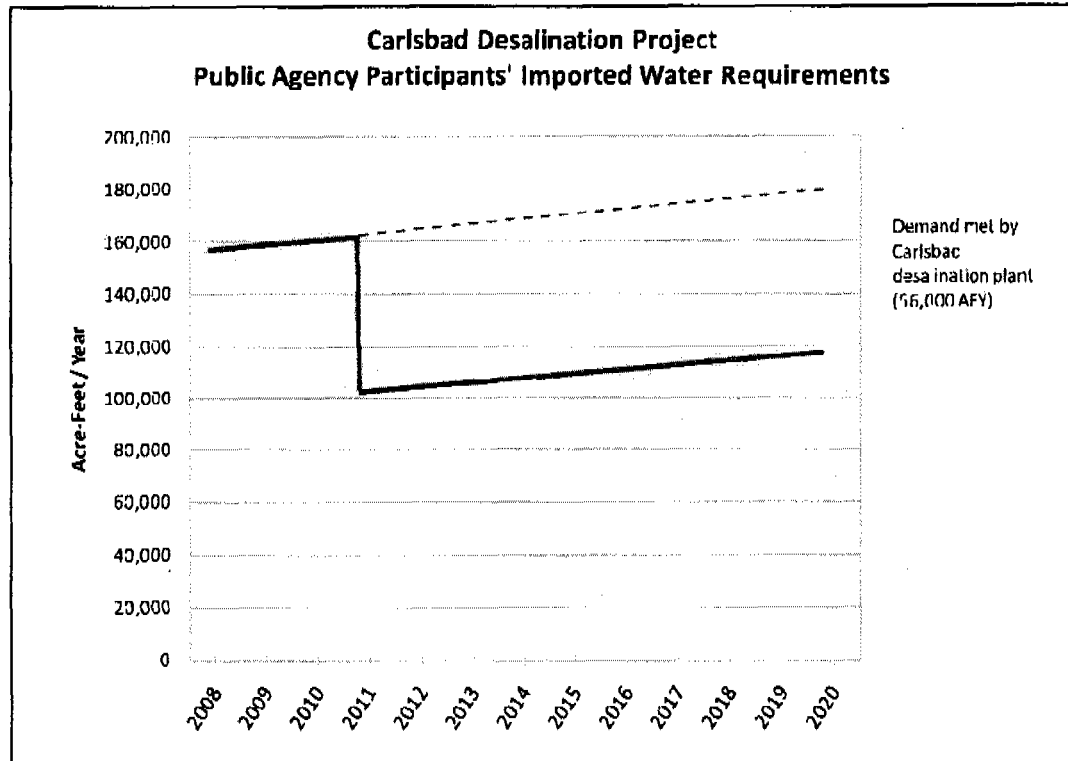
claims that that the Project will not result in a one-for-one reduction of water imported into the San Diego region through the SWP. Staff's contentions are inaccurate and not supported by the record. There is nothing in the January 20, 2010 letter that demonstrates that the Project will not result in a one-to-one reduction of imported water into the San Diego region. Contrary to the Staff Report, this letter does not state that water produced by the Project is "only likely to reduce marginal water imports and that such reductions will only be on an average, long-term basis." Indeed, the letter states that "[o]nce operating, the Carlsbad Project will result in an equal demand reduction for both the Water Authority's and MWD's imported supplies." (January 20, 2010 Letter from MWD and Water Authority to Peter Douglas, p. 2 (emphasis added).)

The Staff Report misreads the January 20, 2010 letter as meaning that the Project will not result in a one-for-one reduction from MWD's SWP imports. To the contrary, the January 20, 2010 letter states that "MWD supplements its SWP Table A Entitlement by pursuing transfers, exchanges, and other marginal supplies also transported through the SWP delivery system." (Emphasis added.) MWD has consistently maintained to the Commission that water delivered through the SWP and imported to the San Diego region would be offset by the implementation of the Project. MWD's July 29, 2008 letter to Executive Director Douglas was very clear that MWD would be reducing what Commission staff is calling "marginal" supplies:

"By net, we mean the difference in energy related emissions required for moving water through the State Water Project compared to operating the seawater desalination project. . . . Offsetting demand for imported water is a condition for receiving Metropolitan's financial incentives. Reduced demand will assist Metropolitan's ability to store wet-year water, improve operation flexibility and reduce requirements for dry-year transfers delivered through State Water Project infrastructure."

(July 29, 2008 Letter from Jeffrey Kightlinger to Peter Douglas, pp. 1-2 (emphasis added).) It is of no significance that demand will be reduced from these "marginal" supplies, as this water is imported through the SWP and requires electricity for pumping that is equivalent to or greater than that assumed in the GHG Plan. As discussed above, the GHG Plan does not contain any requirement for MWD to reduce or relinquish its entitlements to SWP imports. Furthermore, MWD requires that the Project demonstrate that the water offsets an equivalent amount of water imported from MWD (See July 29, 2008 Letter from Jeffrey Kightlinger to Peter Douglas, p. 1). MWD has confirmed through numerous communications it has provided the Commission before and after the August 6, 2008 hearing on the GHG Plan that the Project will result in a reduction of 56,000 AFY of less water delivered through the SWP. Accordingly, contrary to the inaccurate statements in the Staff Report, the Project will result in a one-to-one reduction in water imports into the San Diego region.

This conclusion is bolstered by a chart presented to the Commission at the hearing on the GHG Plan (replicated below), which clearly shows that the Project will result in a one-for-one offset of demand for imported water by the Water Agencies.



Legend

- **Red Line:** Imported Water Demand with Project Implementation
- **Blue-Dashed Line:** Imported Water Demand without Project

Moreover, from the standpoint of combating global warming, it does not matter whether MWD's reduction in demand occurs precisely at the same time as the production and delivery of the desalinated water or it is displaced in time; as long as there is an equivalent (one-for-one) reduction over the long-term. In its January 20, 2010 letter, MWD has confirmed that the long-term average reduction in imports would be the same as the delivery from the Project. MWD's mission is to meet the long-term demands of its member agencies. Absent the availability of the water supply from the Project, MWD has an obligation to develop the supplies necessary to serve those demands and, according to MWD, those additional supplies would need to be transported through the SWP.

As described in detail above, implementation of the Project will allow the Water Agencies to reduce their demand for imported water from MWD, the Commission understood that MWD would not reduce their water entitlements in connection with the Project, and the GHG Plan approved by the Commission does not limit or restrict MWD's management of its imported water supply or require MWD to

relinquish any of its imported water entitlements. Nevertheless, the joint letter from MWD and the Water Authority dated January 20, 2010 provides evidence that implementation of the Project would result in MWD and the Water Authority reducing their demand for imported water. Once the Project begins operating, “[t]his will allow MWD, on a long-term average basis, to reduce its need for expanded transfers and exchanges. Likewise, the Water Authority will reduce its need for marginal supplies, including transfers, due to the production of 56,000 acre-feet of local supplies annually by the Carlsbad project.” (January 20, 2010 letter from MWD and Water Authority to Peter Douglas, p. 2.)

C. Statement in Staff Report Incorrectly Alleging that GHG Emissions May Not Be Reduced:

Staff Report, p. 10. “It appears, therefore, that while Poseidon’s project will not automatically reduce SWP imports and thereby reduce emissions, MWD believes that it is likely to reduce MWD’s need for transfers or exchanges, on a long-term, average basis, thereby potentially resulting in reduced emissions. Whether emission reductions occur will depend in part on the relative costs of those sources compared to the cost of Poseidon’s water, the location of those sources and the amount of electricity needed (and GHG emissions generated) to deliver them to the MWD, the availability of storage for MWD supplies, and other factors.”

Poseidon’s Response:

This statement in the Staff Report insinuates that GHG emission reductions from the Project’s replacement of imported water may not occur as a result of the Project or may only potentially occur. This is a mischaracterization of the evidence. When the Project becomes operational, it will produce and deliver 56,000 acre-feet of water per year to the San Diego region. The Water Agencies have all signed 30-year “take if delivered” contracts, so they do not have an option to substitute a lower cost source of water for Poseidon’s deliveries.

MWD has asserted in its numerous submissions to the Commission that “[r]educed demand for imported water is a condition for receiving Metropolitan’s financial incentives. Reduced demand will assist Metropolitan’s ability to store wet-year water, improve operation flexibility and reduce requirements for dry-year transfers delivered through State Water Project infrastructure.” (July 29, 2008 Letter from Jeffrey Kightlinger to Peter Douglas, p. 2.) Moreover, MWD’s January 20, 2010 letter clarifies that the amount of energy required to deliver water from these sources is equal to or greater than that associated with water delivered under its SWP allocation. (See January 20, 2010 letter from MWD and Water Authority to Peter Douglas, p. 2 [“The purpose of the incentive is to make local projects more cost-effective compared to imported water supplies.”].) Accordingly, once the Project is operational and begins water deliveries to the Water Agencies, this will correspond to a reduction in water imports to the San Diego region, ultimately resulting in a reduction of GHG emissions.

V. THE STAFF REPORT MISINTERPRETS VARIOUS PROVISIONS OF THE SDP AGREEMENT

By narrowly reading the SDP Agreement and various provisions therein, the Staff Report incorrectly concludes that implementation of the Project will not replace water that would otherwise be imported by MWD to the San Diego region. In addition, the Staff Report misconstrues the method of calculating the incentives that MWD will provide to Poseidon's customers, the nine Water Agencies that are parties to the SDP Agreement, and in doing so it asserts that there will be no reduction in water imports into the San Diego region. As demonstrated below, Commission staff's reading of the SDP Agreement is contradicted not only by the Agreement itself, but also by the broader context of MWD's Seawater Desalination Program and the evidence in the administrative record.

A. Statement in Staff Report regarding "Eligible Yield":

Staff Report, p. 17. "The MWD Agreement also defined water that would be eligible for the subsidy – i.e., the 'eligible yield' – as water that would "augment" (not replace) imported water. . . . The MWD Agreement therefore specifies that in order for a project to be eligible for the subsidy, it must augment MWD's imported water supplies and not cause a reduction in those supplies."

Poseidon's Response:

The Staff Report reads the definition of "Eligible Yield" in Section 1.4 of the SDP Agreement incorrectly and out of context. The SDP Agreement defines "Eligible Yield" as "the amount of Desalinated Seawater actually delivered to an LRA's or Water Authority's local potable water distribution system from the Project in a Fiscal Year, excluding any Desalinated Seawater that Metropolitan reasonably determines will not augment water supply available to Metropolitan's service area, including Metropolitan's imported water." The use of the word "augment" in this definition does not mean that water produced by the Project will supplement water already imported to the region, rather than replace it, as suggested by Commission staff.

Instead, Section 1.4 of the SDP Agreement confirms that desalinated water supplies from the Project must displace demand otherwise placed on Metropolitan, or the desalinated water supplies will not qualify as "Eligible Yield" that is entitled to Metropolitan's financial incentives under SDP Agreement Sections 6 and 7. Section 1.4 must be read in context with the underlying purpose of the SDP, set forth in Recital O of the SDP Agreement, "**to provide financial incentives for seawater desalination projects that reduce demand for imported water supplies from Metropolitan through the State Water Project and Colorado River Aqueduct.**" (Emphasis added.) The definition of "Eligible Yield" also needs to be read in context with MWD's various communications with the Coastal Commission, which confirm that "[t]o receive the incentive, the Project must demonstrate that the water offsets an equivalent amount of water imported from Metropolitan" and that "[o]ffsetting demand for imported water is a condition for receiving Metropolitan's financial incentives." (July 29, 2008 Letter from Jeffrey Kightlinger to Peter Douglas, pp. 1-

2.) This finds further support in MWD and Water Authority's January 20, 2010 letter to Executive Director Douglas, which states that "MWD and the Water Authority will be monitoring the project through its monthly incentive payments for reported yield and MWD will verify the project's yield through a contractually required annual reconciliation process." (January 20, 2010 Letter from MWD and Water Authority to Peter Douglas, p. 3.)

In sum, the Staff Report's narrow reading of the term "augment" fails to take into account the larger context of the SDP Agreement, which shows that the Project must actually deliver additional water supply to MWD's customers for MWD to reduce its imported water supplies to those customers and provide them with financial incentives to purchase replacement water.

B. Statement in Staff Report regarding Calculation of Incentives:

Staff Report, p. 17 fn. 15. "15 The November 2009 MWD Contract, which is based on the 2005 Agreement, also describes how it will calculate the 'reasonable costs' costs for which the subsidy can be awarded. They include a project's costs for mitigation and may also include a project's 'net electrical energy' costs, which are defined as costs of energy purchases minus costs of energy recovered; however, they do not specify any SWP-related electricity reductions." (Staff Report, p. 17 fn. 15.)

Poseidon's Response

Here, the Staff Report incorrectly suggests that MWD did not take into consideration the avoided cost of SWP-related electricity reductions in determining the amount of financial incentive available under the SDP Agreement's incentive program and therefore that there will not be any reduction in SWP electricity use. However, evidence in the record demonstrates that these costs were considered in determining the amount of MWD's incentive.

With the implementation of the Project and the SDP Agreement, MWD will provide an incentive of up to \$250 per acre-foot ("AF") in order to realize the benefit of not having to develop other more costly supplies. Among the benefits MWD will receive due to its financial participation in the Project are avoided SWP-energy costs. As MWD has confirmed, this was taken into consideration in establishing the maximum amount of the financial incentive at \$250/AF. MWD's January 20, 2010 letter to Executive Director Douglas states that "[t]he incentive is based on MWD avoiding the following costs: . . . State Water Project (SWP) energy consumption for pumping imported supplies." (January 20, 2010 Letter from MWD and Water Authority to Peter Douglas).

In sum, the actual amount of funding available to the Water Agencies is determined by establishing the financial need to encourage the development of a local water supply, which is defined as is the positive difference between the cost of purchasing an acre-foot of treated water from MWD and the cost of the production and delivery of the local supply, up to \$250/AF.

VI. THE STAFF REPORT ERRONEOUSLY CLAIMS THAT POSEIDON HAS MISCHARACTERIZED THE DIFFERENCES BETWEEN ITS APPROACH TO THE GHG PLAN AND THE APPROACH PROPOSED BY COMMISSION STAFF

Statement from Staff Report:

Staff Report, p. 19 fn. 18. ^{“18} Regarding ‘net’ versus ‘gross’, Poseidon has mischaracterized the difference between its proposed approach and Commission staff’s approach as ‘net’ versus ‘gross’ – that is, a ‘net’ approach that accounts for both the increase and decrease in emissions caused by the project as opposed to a ‘gross’ accounting for just the increase. It appears, however, that all parties supported the ‘net’ approach. Poseidon’s approach differed from Commission staff’s primarily by how it accounted for the ‘net emissions’ – i.e., Poseidon asserted it should ‘automatically’ receive emission offsets from SWP reductions, whereas Commission staff recommended the Commission require Poseidon to document those reductions in determining its ‘net’ emissions, due largely to the uncertainty about whether those reductions would occur.”

Poseidon’s Response:

The Staff Report’s statement that Poseidon has mischaracterized the difference between its approach to the GHG Plan and the approach proposed by Commission staff is itself a mischaracterization. As described above, during Poseidon’s and Commission staff’s discussions regarding the GHG Plan, staff recommended that AB 32 principles for voluntary offsets, which apply to third party purchases of carbon offsets, should also apply to Project features such as wetlands mitigation and Project benefits such as emissions that will be avoided because the Project will displace its customers’ demand for imported water. This was in essence an approach that would have required the Project to offset its “gross” indirect GHG emissions from its electrical usage, without any up-front discount for emissions reductions resulting from Project features. Poseidon disagreed with this approach, and argued during the Commission’s consideration of the GHG Plan that under CEQA principles and State climate change policy the Project’s impacts must be analyzed by determining the environmental baseline, factoring in both increases and decreases in emissions caused by the Project, including Project features that result in the reduction of another entity’s energy use. (See Letter from Poseidon Resources to California Coastal Commissioners re: Energy Minimization and Greenhouse Gas Reduction Plan, dated August 2, 2008, pp. 3-5.)

Whether MWD could guarantee that imported water the Project replaces would not be used for other uses, and therefore would comply with AB 32, was the key reason for the debate concerning whether the GHG Plan should require Poseidon to offset the Project’s “gross” versus “net” GHG emissions. Poseidon argued, and the Commission ultimately agreed, that when assessing the Project’s GHG impacts, energy that would have been used to import water replaced by the Project would automatically be subtracted or “netted out” from the energy used by the Project.

Contrary to the Staff Report's assertions, Commission staff's contention that it supported Poseidon's "net" approach finds no support in the record.

VII. THE STAFF REPORT MISCONSTRUES THE APPLICATION OF CEQA PRINCIPLES UNDER THE "NET" APPROACH IN THE GHG PLAN ADOPTED BY THE COMMISSION

Statements in the Staff Report:

Staff Report, p. 20. "Regarding the contention that the continued imports would undergo CEQA review, this, too, appears to be speculation on Poseidon's part. MWD's deliveries from the SWP are governed by a long-term contract specifying the maximum amount of water MWD is entitled to each year, and the annual allotment of water provided each year. These mechanisms are not subject to CEQA review. In addition, Poseidon has not substantiated its claim that any water displaced by its project would be used in new or expanded projects, which could be subject to CEQA review, rather than being used by MWD's existing customers in a manner that likely would not be subject to CEQA review. As stated in its January 20, 2010 letter, MWD believes that it is likely to be able to reduce its reliance on finding marginal water supplies as a result of having Poseidon's water available; however, this will likely depend on many other factors, including the availability of such supplies, MWD's storage capacity for water not immediately used in its distribution system, and the cost of such supplies relative to the costs for Poseidon's water."¹⁰

Poseidon's Response:

The Staff Report mischaracterizes Poseidon's CEQA arguments in support of the "net" approach to the GHG Plan and are all based on the incorrect assumption that the Commission was not aware that MWD would not relinquish any of its imported water entitlements in connection with the Project. As stated in detail above, the Commission was made well aware at the August 6, 2008 hearing on the GHG Plan that MWD would not relinquish any of its entitlements. By challenging arguments that Poseidon raised in support of its "net" approach to the GHG Plan and stating that Poseidon is "intentionally misrepresenting the nature of the required CEQA review," Commission staff is improperly attempting to revisit the debate regarding whether Poseidon should be required to offset the Project's "gross" or "net" greenhouse gas

¹⁰ The Staff Report makes several nearly duplicative misstatements regarding this issue. In the interest of brevity, this document recites the most representative misstatement in full and provides citations in this footnote to other key misstatements regarding this issue. In addition to the misstatement cited above, Poseidon refers the Commission to the following misstatements in the Staff Report: p. 2-3 (¶ 5: "[I]t is not as clear as Poseidon claimed that water its project 'displaces,' but continues to be imported into Southern California, will be subject to CEQA review. . ."); p. 12 (¶ 1, second sentence: "Given that MWD is entitled to continue to import its full allocation of SWP water . . ."); p. 18 (¶ 1, second sentence: "Poseidon asserted that it would be 'speculative' to assume. . ."); p. 19 (¶ 3, first sentence: "[T]here does not appear to be support in the record for Poseidon's assertions that it was speculative to assume. . ."); p. 22 (¶ 1, second sentence: "Given that MWD is able to continue taking its full allocation of SWP water, without CEQA review, regardless of the amount of water produced by Poseidon, it is speculative to assume that CEQA would apply . . .").

emissions – which the Commission already considered and decided when it approved Poseidon’s “net” approach and rejected staff’s and the Project opponents’ “gross” approach.

Commission staff’s CEQA assertions are misguided. Poseidon never “asserted that it would be ‘speculative’ to assume the same amount of imported water would continue to be delivered from the SWP to MWD.” Poseidon stated that it is “speculative that water currently imported into the [San Diego] region, which would be replaced by the Project’s water, would be pumped into the region in the future for other uses.” (Letter from Poseidon Resources to Alison Dettmer and Tom Luster, January 7, 2010, p. 3.)

The Project will replace 56,000 acre-feet per year of water that, as a result, MWD would otherwise be providing to the San Diego region. Poseidon has consistently maintained that under CEQA principles, the appropriate method for assessing the Project’s impacts is to determine the net change in GHG emissions relative to existing conditions, factoring both increases and decreases in emissions caused by the Project. Because the Project will replace water for existing uses in San Diego County, emissions from energy used to supply water to those uses today is part of the “baseline.” However, CEQA principles do not require the Project to assess and account for impacts that would result if the 56,000 AFY of water replaced by the Project is ultimately imported to the San Diego region or somewhere else for another hypothetical use. Accordingly, for purposes of this Project, it is of no consequence that MWD is entitled to continue to import its full allocation of SWP water.

Just as the Project should not be responsible for mitigating emissions generated by energy usage by others, which is made possible because of the Project’s on-site energy minimization features that reduce energy usage, the Project should not be responsible for mitigating emissions that result from the displaced water being redirected to other uses. As Poseidon discussed in its August 2, 2008 letter to the Commission regarding the proposed GHG Plan, under Commission staff’s view, a water supply analysis in an EIR could not rely on a project’s commitment to employ water conservation features, such as low flush toilets, to reach a conclusion that the project would have a less than significant impact on GHG emissions. Instead, staff’s reading of CEQA and its “gross” emissions approach to the GHG Plan would require an EIR to demonstrate that the foregone water resulting from these conservation measures would not be used by some other hypothetical project. The GHG Plan proposed by Poseidon, supported by several state agencies, including the California Energy Commission and the California Air Resources Board (“CARB”), and ultimately approved by the Commission, did not subject the Project and its energy minimization features to the AB 32 criteria suggested by Commission staff. Such a position would frustrate resource conservation efforts and CEQA’s scheme of project-specific environmental review and mitigation of impacts.

VIII. POSEIDON DECLINED TO SUBMIT AN APPLICATION TO AMEND ITS CDP BECAUSE THE SDP AGREEMENT DID NOT CHANGE THE PROJECT AND THE COMMISSION'S ENFORCEMENT AUTHORITY HAD NOT BEEN TRIGGERED

Statement in Staff Report:

Staff Report, p. 9. "On November 13, 2009 Commission staff requested Poseidon address this project change by submitting an application to amend its CDP, but Poseidon declined."

Poseidon's Response:

Commission staff's November 13, 2009 letter incorrectly asserted that the MWD's approval of the SDP Agreement "has modified the project in a manner not consistent with the Coastal Commission's approval of the project's coastal development permit." As thoroughly explained in Poseidon's January 7, 2010 letter to Commission staff, Poseidon declined to amend its CDP because:

(i) the fact that MWD would not relinquish its rights to its imported water entitlements was a key issue the Commission considered in its evaluation and approval of the GHG Plan, and no inaccurate, incomplete or erroneous information was presented to the Commission regarding that issue;

(ii) MWD has consistently required in each of the SDP agreements it has entered into with its member agencies that it would not relinquish its imported water entitlements as a result of any desalination project, and MWD's position has not changed since the Commission considered the Project and its GHG Plan; and

(iii) Poseidon has not violated any term, condition or provision of its Permit or the GHG Plan.

(Letter from Poseidon Resources to Alison Dettmer and Tom Luster, dated January 7, 2010, p. 2.) Poseidon continues to believe that the approval of the SDP Agreement changes nothing about the Project or any of the assumptions underlying the GHG Plan.

IX. THE REVOCATION REQUEST IS MERITLESS, AS OPPONENTS HAVE NOT AND CANNOT SATISFY ANY OF THE REQUIREMENTS OF CCC REGULATIONS SECTION 13105(a)

Poseidon emphatically disagrees with any finding that Poseidon intentionally supplied the Commission with inaccurate information. The Revocation Request is a meritless and improper attempt to get the Commission to reconsider the "net" versus "gross" emissions debate regarding the GHG Plan – a debate that the Commission decided when it approved the GHG Plan containing Poseidon's "net" approach. Because of the impact to the permittee, the CCC Regulations set a very high standard for CDP revocation. Section 13105(a) of the CCC

Regulations requires the Project's opponents to prove (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. As Poseidon explained in detail in its January 13, 2010 letter to the Commission, and contrary to the Staff Report's erroneous conclusion, the Revocation Request fails to show that any of the grounds for revocation have been met.

As evidenced above, the Revocation Request does not demonstrate intent. Commission staff, the Project's opponents, and Poseidon expressly conveyed to the Commission at the GHG Plan hearing that MWD would not relinquish its imported water entitlements or give up its right to redirect imported water that the Project replaces to other locations within MWD's service territory. Moreover, the Revocation Request has not identified any inaccurate, erroneous or incomplete information. Both the Revocation Request and the Staff Report fail to address the overwhelming evidence in the Commission's administrative record showing that MWD would not relinquish its imported water entitlements and that Poseidon, MWD and others expressly conveyed that information to the Commission.

In addition, the Revocation Request does not show that the Commission would have reached a different result. The Revocation Request cannot meet this burden because the administrative record clearly shows that the Commission approved Poseidon's "net" emissions approach in the GHG Plan with the full knowledge that MWD would not forgo its imported water entitlements or limit its ability to redirect imported water the Project replaces. The fact that the SDP Agreement protects MWD's imported water entitlements would not alter the Commission's endorsement of the "net" approach in the GHG Plan. Moreover, even if the SDP Agreement did alter any of the GHG Plan's water import reduction assumptions, which it does not, Special Condition 10 of the CDP does not require that MWD relinquish any of its water entitlements, obligate Poseidon to demonstrate that the desalinated water produced by the Project results in a reduction of imported water to the San Diego region, or require Poseidon to offset the Project's "gross" GHG emissions. The Revocation Request can point to no evidence that shows that the Commission would have changed Special Condition 10's requirements in any way.

Finally, though Poseidon concurs with the Staff Report's conclusion that the Revocation Request does not make the required showing that the Commission would have reached a different result regarding the Project's CDP, Poseidon believes there is an additional basis that demonstrates why the Revocation Request fails to make this showing. That the Commission could not reach a different result is supported by Commission's lack of authority under the Coastal Act to impose a carbon neutral requirement on the Project, and the fact that the Coastal Act limits the Commission's authority to the imposition of energy minimization features. Poseidon has long made these assertions,¹¹ and continues to do so now.

The Commission's authority to impose GHG emissions standards or mitigation is limited to assuring that "new development shall be consistent with requirements imposed by an air

¹¹ See, e.g., Letter from Poseidon to Coastal Commission, dated Aug. 2, 2008, pp. 3-4; *id.* at Exhibit B, pp. 5-6.

pollution control district or the State Air Resources Board as to each particular development.” (Coastal Act § 30253(3).) Further, Coastal Act Section 30414(a) states:

“The provisions of [the Coastal Act] do not authorize the commission . . . to establish any ambient air quality standard or emission standard, air pollution control program or facility, or to modify any ambient air quality standard, emission standard or air pollution control program or facility which has been established by the state board or by an air pollution control district.”

AB 32 established that the regulation of GHG emissions constitutes an air pollution control program, gave exclusive authority over adoption and enforcement of that program to CARB, and neither CARB nor the San Diego Air Pollution Control District have adopted any such program that would apply to the Project. Accordingly, were the Commission to impose an offset requirement beyond Poseidon’s voluntary commitment¹² to offset its “net” emissions, its actions would violate the Coastal Act. Accordingly, Poseidon maintains that the Commission would not have reached a different result regarding the Project’s CDP and the GHG Plan – i.e. imposing a “gross” emissions requirement to the Project – because it could not do so under the Coastal Act.

In sum, based on the evidence in the administrative record and Poseidon’s submissions that conclusively show the grounds for revocation have not been met, Poseidon respectfully requests that the Commission deny the Revocation Request because none of the grounds for revocation have been met.¹³

¹² See, e.g., Letter from CARB to Coastal Commission, dated Aug. 5, 2008, p. 2.

¹³ This response hereby incorporates the entire administrative record from the Commission’s approval of the Project’s CDP and the Commission’s approval of the GHG Plan.

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LATHAM & WATKINS LLP

February 3, 2010

VIA FEDERAL EXPRESS

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Re: Carlsbad Desalination Project Coastal Development Permit No. E-06-013; Request for Revocation No. R2-E-06-013

Dear Chairperson Neely, Ms. Schmeltzer and Ms. Patterson:

We are writing on behalf of Poseidon Resources (Channelside), LLC ("Poseidon") with respect to the above-referenced Revocation Request concerning the Carlsbad Seawater Desalination Facility (the "Project"). At its meeting on February 10, 2010, the Coastal Commission will consider a Revocation Request submitted by Coastal Environmental Rights Foundation ("CERF"), Surfrider Foundation and San Diego Coastkeeper (collectively, the "Opponents"). On behalf of Poseidon, we respectfully request that Chairperson Neely consult with the Commission's Chief Counsel and Attorney General's Office prior to the commencement of the hearing to ensure that the Commission does not repeat the violation that occurred at the Commission's December 2009 hearing on the Opponents' previous revocation request by allowing CERF to appear before the Commission as a party to that revocation request. We also request that Ms. Schmeltzer and Ms. Patterson advise the Commission on this issue prior to the hearing. As discussed more fully below, CERF is not a proper party to the Revocation Request and therefore does not have standing to testify on behalf of the Opponents with a greater time allotment than members of the general public.

To protect the permittee's procedural rights during permit revocation proceedings and because of the importance of assuring that there are no violations of the Commission's regulations,

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**Agenda Item
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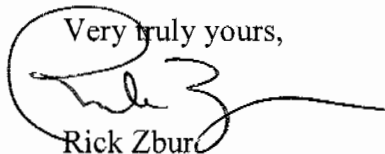
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it is critically important that the Coastal Commission strictly enforce the Commission's regulations with respect to which parties may initiate a revocation request and present such request during a hearing before the Commission. Accordingly, the question of CERF's standing must be addressed before commencement of the hearing because the Commission's regulations provide the Opponents with an opportunity to present the Revocation Request to the Commission before Poseidon may raise this issue in its rebuttal. In its written response to Opponents' previous revocation request, which the Commission heard at its December 2009 meeting, Poseidon also objected to CERF's standing and requested that the Commission dismiss CERF as a party. However, the Commission did not address this issue prior to the hearing. As a result, CERF presented to the Commission as a party to that revocation request, providing the Opponents an unfair advantage at the expense of Poseidon's procedural due process rights.¹

As we stated in prior submissions, we believe that CERF is not a proper party to the Revocation Request. Section 13106 of the Coastal Commission's Regulations 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. . . ." (Cal. Code Regs., tit. 14, § 13106.) As shown on the California Secretary of State's website (a printout of which is attached to this letter as **Exhibit A**), CERF 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. CERF is not a proper party to the Revocation Request because it did not exist at the time of those hearings, and thus could not have even had an "opportunity to fully participate" in those hearings. The Revocation Request must therefore be dismissed as to CERF, and CERF must not be permitted to testify at the hearing on behalf of the Opponents or otherwise provided more time to testify before the Commission than any other member of the general public.

Should you have any questions or if we can provide any additional information, please do not hesitate to contact me. Thank you for your attention and consideration of these issues.

Very truly yours,



Rick Zbur
of LATHAM & WATKINS LLP

Attachment

cc: California Coastal Commissioners
Tom Luster
Peter MacLaggan

¹ Poseidon has requested that Commission staff dismiss CERF as a party in its submissions to the Commission regarding the Opponents' first Revocation Request (R-E-06-013), which the Commission heard and denied on December 10, 2009, as well as its submissions to the Commission regarding the pending Revocation Request. In both instances, Commission staff has declined to dismiss CERF. Furthermore, the Commission permitted CERF to appear on behalf of the Opponents at the December 10, 2009 Commission hearing regarding the first Revocation Request, contrary to the requirements of the Coastal Commission's regulations.

These materials have been provided to Coastal Commission Staff

**Business Entities (BE)****Online Services**

- **Business Search**
- **Disclosure Search**
- **E-File Statements**
- **Mail Processing Times**

Main Page**Service Options****Name Availability****Forms, Samples & Fees****Annual/Biennial Statements****Filing Tips**
Information Requests
 (certificates, copies &
 status reports)
Service of Process**FAQs****Contact Information****Resources**

- **Business Resources**
- **Tax Information**
- **Starting A Business**
- **International Business Relations Program**

Customer Alert
 (misleading business
 solicitations)
Business Entity Detail

Data is updated weekly and is current as of Friday, January 29, 2010. It is not a complete or certified record of the entity.

Entity Name:	COASTAL ENVIRONMENTAL RIGHTS FOUNDATION
Entity Number:	C3117149
Date Filed:	10/17/2008
Status:	ACTIVE
Jurisdiction:	CALIFORNIA
Entity Address:	1140 S COAST HWY 101
Entity City, State, Zip:	ENCINITAS CA 92024
Agent for Service of Process:	MARCO A GONZALEZ
Agent Address:	1140 S COAST HWY 101
Agent City, State, Zip:	ENCINITAS CA 92024

* Indicates the information is not contained in the California Secretary of State's database.

- 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.
- For information on checking or reserving a name, refer to **Name Availability**.
- For information on ordering certificates, copies of documents and/or status reports or to request a more extensive search, refer to **Information Requests**.
- For help with searching an entity name, refer to **Search Tips**.
- For descriptions of the various fields and status types, refer to **Field Descriptions and Status Definitions**.

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Air Resources Board



Linda S. Adams
Secretary for
Environmental Protection

Mary D. Nichols, Chairman
1001 I Street • P.O. Box 2815
Sacramento, California 95812 • www.arb.ca.gov

Arnold Schwarzenegger
Governor

February 8, 2010

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

Re: Carlsbad Desalination Project

Dear Mr. Douglas:

On November 13, 2009, the California Coastal Commission staff requested that Poseidon Resources submit an amendment to the Carlsbad Desalination Project's Coastal Development Permit. I am in receipt of this request, and as State law charges the Air Resources Board (ARB) with implementing the Global Warming Solutions Act of 2006 (AB 32), I am providing you with the following comments.

ARB staff reviewed Poseidon Resources' Energy Minimization and Greenhouse Gas Reduction Plan (GHG Plan) in 2008 prior to the Commission's vote to accept Poseidon's voluntary reduction of the Project's "net" incremental GHG emissions as a condition to the desalination facility's Coastal Development Permit. Our August 5, 2008 letter to the Coastal Commission regarding the GHG Plan stated that "we believe the amount of emissions reduction that should be required need not exceed the net impact, that is, the direct emissions and any new indirect emissions from the project, less emissions that would be associated with providing an equivalent amount of existing supplies."

It was our understanding then, as it is now, that Poseidon's desalination facility would replace water that would otherwise be imported into the San Diego region by retail water agencies purchasing the Project's water, but it would not affect the Metropolitan Water District's imported water entitlements. As such, we do not believe that there have been any changes to the Project or the assumptions underlying Poseidon's GHG Plan, which would change the positions expressed in our August 5, 2008 letter.

Feel free to contact my office if you have any questions.

Yours truly,

Mary D. Nichols
Chairman

cc: Members, California Coastal Commission
Linda S. Adams, Secretary

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website: <http://www.arb.ca.gov>.

California Environmental Protection Agency

Sent: Tuesday, February 09, 2010 3:08 AM

To: Tom Luster

Subject: Make Poseidon Fully Offset Greenhouse Gases from Desal

Dear Chair Neely and Coastal Commissioners,

I am a citizen of California writing to urge you to compel Poseidon Resources to fully mitigate the greenhouse gas emissions that will result from the operation of the Carlsbad ocean desalination facility.

Californians are proud to be citizens of a State that is taking steps to reduce our greenhouse gas emissions. Global warming is already threatening our coasts from sea level rise, and threatening our precious marine life from ocean acidification.

But ocean desalination is far more energy demanding than even importing water from the Sacramento Delta ? the current most energy demanding alternative for water supplied to southern California. Poseidon promised they wouldn't exacerbate global warming. That is NOT a promise to reduce greenhouse gas emissions ? which is now State policy.

But to add insult to injury, now we discover that their promise of ?carbon neutrality? was based on incomplete and inaccurate calculations and withheld information.

As a Californian concerned about the environmental and economic vitality of our coast and ocean, I beg you to revoke the Poseidon-Carlsbad ocean desalination Coastal Development Permit until they can ensure ?carbon neutrality?, or compel Poseidon to work with your staff to amend the permit to accurately account for and offset the greenhouse gases resulting from this energy-intensive project.

Sincerely,

NOTE: Commission staff received this email from approximately 1200 people.

Tom Luster

From: Jonas Minton [JMinton@pcl.org]
Sent: Tuesday, February 09, 2010 8:00 AM
To: Tom Luster; Peter Douglas
Subject: Poseidon Agenda Item
Importance: High

Mr. Luster,

These are my comments and recommendation on the Poseidon item on the February 10, 2010 agenda.

Please allow me to briefly reiterate my qualifications. From 2000 to 2004 I was Deputy Director of the California Department of Water Resources. That is the state agency that operates the State Water Project and has contracts to deliver water to districts such as the Metropolitan Water District of Southern California. DWR is also the lead agency for compliance with the California Environmental Quality Act (CEQA) for State Water Project water deliveries. I also served as the Chair of the State of California's Desalination Taskforce.

The first point is that there is no requirement for new CEQA compliance for the Department of Water Resources to continue providing water to the Metropolitan Water District of Southern California. That is an ongoing project with no new discretionary approvals required. Therefore Poseidon is incorrect in alleging that carbon/greenhouse gas impacts of delivering that water will be analyzed.

Second, this situation does meet the criteria for revocation or imposition of different conditions:

- 1) That the applicant provided incomplete or false information; AND
- 2) That false or incomplete information was supplied intentionally; AND
- 3) That if the Commission had known of the information, it would have denied the permit or **imposed different conditions** (emphasis added).

The staff report demonstrates that Poseidon did provide incomplete information relevant to the decision. The record of repeated requests to Poseidon for information they withheld is sufficient evidence of intent.

The remaining question is if the Commission had known of the information, would it have denied the permit **or imposed different conditions**? It is arguable that based on all testimony received by the Commission it would have issued the permit.

However, there is overwhelming evidence in the record that the Commission intended the project to be fully "net carbon neutral." That can be seen in the Commission's requirement that Poseidon submit a plan for further Commission review and approval showing how it would meet that "net carbon neutral" standard. Therefore it is reasonable to conclude that if Poseidon had not intentionally withheld relevant information on lack of offsets, the Commission would have applied ensured that the plan would in fact be fully carbon neutral.

RECOMMENDATION:

The Commission should take one of two actions. The first option is to reopen its approval

2/9/2010

Poseidon's Energy Minimization and Greenhouse Gas Reduction Plan and require it to include actions for the project to be fully carbon neutral for the total energy use associated with its entire production and delivery of desalinated water.

If that is not procedurally possibly the Commission should revoke the permit with no prejudice against Poseidon resubmitting with an Energy Minimization and Greenhouse Gas Reduction Plan that would be fully carbon neutral for the total energy use associated with its entire production and delivery of desalinated water.

Thank you

Jonas Minton

Water Policy Advisor

Planning and Conservation League

Tom Luster

From: ryan tomkins [tomkinsrt@hotmail.com]

Sent: Monday, February 08, 2010 4:34 PM

To: Tom Luster

Subject: Stop the false accusations!

To Whom It May Concern:

I am writing this letter in response to the upcoming hearing about the proposed desalination plant in Carlsbad, CA. I have been following this project closely, and am alarmed at the level of false accusations being brought forward by opponents to this project. It appears that opponents will stop at no cost to hinder Poseidon's efforts to bring a much needed water supply to Southern California.

Poseidon is committed to building a desalination plant that is cost effective, and more importantly, environmentally friendly. While there is no solution to our water crisis that is 100% impact free, I believe this desalination plant is the closest thing possible.

I am tired of the continued false accusations made by parties without just cause. These parties are ignoring expert findings, and are promoting false information to the public.

I am 100% pro-environment, and am personally dedicated to the well being of our environment. I believe that without this plant, our precious rivers and deltas will dry, leaving countless ecosystems destroyed in the process.

Please put an end to these false accusations and ongoing hearings to stop the project. Southern California needs water, and needs it now. With our planet composed of nearly 2/3 water, it is time we tap this resource like many other countries have already done.

- Ryan Tomkins

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2/8/2010

Tom Luster

From: sshirley@umec.com
Sent: Monday, February 08, 2010 2:18 PM
To: Tom Luster
Subject: Desalination Plant

Dear Mr. Luster

Just stating our opposition of further delaying the Desalination Plant in Carlsbad. Rome burns will everyone fiddles. Our water problems in San Diego continue to mount and every project that might help to mitigate the problem is opposed by someone. Please allow this project to move forward.

Sincerely
Steve Shirley

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2/8/2010

Tom Luster

From: Cindy Ogg [juneogg@yahoo.com]

Sent: Monday, February 08, 2010 11:49 AM

To: Tom Luster

Cc: info@carlsbaddesal.com

Subject: Opposition to Revoke Permits for Carlsbad Desalination Project

I completely oppose the request to revoke the Carlsbad Desalination Project's permits, for any reason what-so-ever. The project has proved to be net carbon neutral among many other environmentally sound results.

Sincerely,

Cynthia Ogg

2/8/2010

Tom Luster

From: Ellman, Howard N. [hellman@buchalter.com]
Sent: Monday, February 08, 2010 8:58 AM
To: Tom Luster
Cc: update@carlsbaddesal.com
Subject: Request to Revoke Permit For Desal Plant

I understand that the Commission will be considering a request to revoke the permit for the Carlsbad desal plant at its meeting on 2/10. The request should be summarily rejected. With the long-term constraint on water supplies in the area that the plant will serve, the plant will perform a vital public service, wholly without regard to "growth" and "growth inducement," the rallying cry of those who make a profession out of opposing every constructive attempt to address serious societal problems.

The environmental impacts of the plant have been studied to death with full mitigation conditions imposed within the limits of what is practical, weighing the benefits and burdens. Prolonging the process serves no purpose whatsoever. Please reject the revocation request, and let the project finally proceed. Unless the Commission emphatically rejects such dilatory and repetitive attempts at obstruction of important projects, one wonders how we will ever solve the water supply and other problems that face this state in the current environment.

Thank you for your consideration.

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2/8/2010

Tom Luster

From: info@polycontrolsinc.com
Sent: Monday, February 08, 2010 8:36 AM
To: Tom Luster
Cc: update@carlsbaddesal.com
Subject: Carlsbad Desalination Project

Dear Sir:

I, a citizen of Carlabad, request the State Attorney General To Enforce Coastal Commission Regulations.

The desalination plant, which will have the capacity to produce 50-million-gallons-per-day of high quality drinking water. Once operational, the Carlsbad Desalination Project will provide enough drinking water to serve 300,000 residents annually.

Thank you for your attention.

Gary Evereklian

Tom Luster

From: Gerald Copeland [jerry.copeland@dibblecorp.com]

Sent: Monday, February 08, 2010 7:40 AM

To: Tom Luster

Cc: update@carlsbad-desal.com

Subject: Carlsbad Desalination Plant Permit

This is to advise you of my opposition to the request to revoke the desalination project's permit.

Gerald R. (Jerry) Copeland
Business Manager
Infrastructure

Dibble

Engineering

2220 C Street, Suite 110

San Diego, CA 92102

P 619-232-9378 F 619-232-9378

gerald.copeland@dibblecorp.com

www.dibblecorp.com

2/8/2010

Tom Luster

From: Kervin Krause [kckrause@gmail.com]
Sent: Sunday, February 07, 2010 9:29 PM
To: Tom Luster
Subject: Poseidon needs to Offset Greenhouse Gases from Desalination Plant

Dear Chair Neely and Coastal Commissioners,

I have been a citizen of Carlsbad, California for 13 years. I am writing you to compel Poseidon Resources to fully mitigate the greenhouse gas emissions that will result from the operation of the Carlsbad ocean desalination facility.

Californians are proud to be citizens of a State that is taking steps to reduce our greenhouse gas emissions. Global warming is already threatening our coasts from sea level rise, and threatening our precious marine life from ocean acidification.

But ocean desalination is far more energy demanding than even importing water from the Sacramento Delta ? the current most energy demanding alternative for water supplied to southern California. Poseidon promised they wouldn't exacerbate global warming. That is NOT a promise to reduce greenhouse gas emissions ? which is now State policy.

But to add insult to injury, now we discover that their promise of ?carbon neutrality? was based on incomplete and inaccurate calculations and withheld information.

As a Californian concerned about the environmental and economic vitality of our coast and ocean, I beg you to revoke the Poseidon-Carlsbad ocean desalination Coastal Development Permit until they can ensure ?carbon neutrality?, or compel Poseidon to work with your staff to amend the permit to accurately account for and offset the greenhouse gases resulting from this energy-intensive project.

Sincerely,

Kervin Krause
1220 Stratford Lane
Carlsbad, CA 92008

Tom Luster

From: George Hartt [George@HarttOfSD.com]
Sent: Saturday, February 06, 2010 8:00 PM
To: Tom Luster
Cc: 'Carlsbad Desalination Project'
Subject: Carlsbad Desalination Plant
Importance: High

Attention: California Coastal Commission

I am writing to express my disgust for the so-called "environmentalists" who are attempting to block the construction of a badly needed desalination facility in our state. I am pro-environment and have published several articles on recycling automotive plastics and chaired the SMC Automotive recycling when I was a VP of Technology at GenCorp Automotive/Reinforced Plastics Division. My team was the first to introduce recycled FRP in Corvette body parts. I also supervised the installation of intake water, two 11-foot diameter pipelines, at Desalination Plant #3 in Jeddah, Saudi Arabia (there were 3 more on the drawing board at the time). I mention these not to brag but to state that I am a professional with credentials far superior to the idiots claiming to be pro-environment. They don't know what is good for them! Where else are we going to get water from?

Thank you and for God's sake send these folks to the Mojave Desert so they develop a better appreciation for water.

George Hartt, REALTOR®, PhD, e-PRO, SFR,

DRE: 01736007

Independent UnFranchise® Owner/Real Estate & Web Consultant

www.HarttOfSD.com (760) 420-8425 George@HarttOfSD.com

Would you feel comfortable introducing me to people you care about who could use my help?

Tom Luster

From: Depend On Me [dependonme2@hotmail.com]
Sent: Saturday, February 06, 2010 11:10 AM
To: Tom Luster
Cc: update@carlsbaddesal.com; dependonme2@hotmail.com
Subject: City of Carlsbad desalination (Opposed to Revocation)

February 6, 2010

To whom it may concern,

My name is Don Palmer and as a 43 year City of Carlsbad resident, I want to state that I am for the construction of the Desalination Plant.

I want our city and the world to be able to use ocean water, as drinking and general use water, as our government seems to have a problem capturing enough rain water to supply its citizens needs.

Please don't allow these protesters to revoke this noble project, which is the ***obvious solution*** to all of our water needs.

Don Palmer

Tom Luster

From: William Carroll [William.J.Carroll@mwhglobal.com]

Sent: Saturday, February 06, 2010 11:41 AM

To: Tom Luster

Cc: update@carlsbaddesal.com

Subject: The Carlsbad Desalination Project

Commission Members:

This is to express my opposition to the California Environmental Rights Foundation's (CERF) right to appear before your Commission's Board meeting in Oceanside on February 10 in an attempt to have the Carlsbad Desalination Plant's permit revoked. I am a citizen of Carlsbad and have spent my career in Environmental Engineering. I am the Chairman Emeritus of the engineering firm MWH, and we have been involved in desalination projects around the world. My personal belief is that this plant will be of major benefit to the region and these benefits greatly outweigh the minimal impact it will have on the environment. While I can not speak for them in this case, I am a member of the U. S. National Academy of Engineering, the Academy of Engineering of the Russian Federation, the Pan American Academy of Engineering and the Past National President of the American Society of Civil Engineers, The American Academy of Environmental Engineers, and the World Federation of Engineering Organizations which consisted of 12 million engineers from 80 countries., I am listing these organizations not to impress you, but to underline the validity of my opposition to the CERF position.

Thank you for your consideration.

William J Carroll

2315 Rue des Chateaux

Carlsbad, CA. 92008

Tom Luster

From: Craig Ohman [craigohman@gmail.com]

Sent: Saturday, February 06, 2010 10:01 AM

To: Tom Luster

Subject: RE: the Desal plant in Carlsbad

To whom it may concern,

I understand that the California Coastal Commission is meeting in Oceanside and will be hearing a request from opponents to revoke the Coastal Development Permit issued to the project in November 2007.

I can't believe these people are causing so much trouble on a project that can do nothing but help our community.

Please refuse to honor their request. I believe it to be ridiculous and a huge waste of time and money.

We surely appreciate all your hard work on behalf of our community.

Thank you,

Craig & Sandy Ohman

Property owner, Carlsbad, Ca.

858-350-5900

craigohman@gmail.com

2/8/2010

Tom Luster

From: Carlton Thor [carltonthor@mac.com]
Sent: Friday, February 05, 2010 8:22 PM
To: Tom Luster
Cc: Carlsbad Desalination Project; info@carlsbaddesal.com
Subject: we oppose the request to revoke the carlsbad desalination project's permit

To whom it may concern:

We support the Carlsbad Desalination Project. Please do not revoke the project's permit. Millions of dollars would be wasted and our water sources continue to dry up faster than "our" budgets. We support the Carlsbad Desalination Project.

Thank you,

Carlton Thor
2348 Summerhill Dr.
Encinitas, CA 92024
760.213.4884

Tom Luster

From: Lily Bhattacharya [drswati@roadrunner.com]

Sent: Friday, February 05, 2010 7:18 PM

To: Tom Luster

Cc: update@carlsbaddesal.com

We are writing to express we oppose the request to revoke the desalination project's permit.

Thanks for hearing us.

Lily Bhattacharya PsyD and

Arati Bhattacharyya MD

www.Drlily2010.com

2/8/2010

Tom Luster

From: Hjordis Parker [aiczako@sbcglobal.net]

Sent: Friday, February 05, 2010 7:01 PM

To: Tom Luster

Cc: Carlsbad Desalination Project

Subject: Desalination Project

Dear Sirs,

I want to express my strong opposition to CERF's request to revoke the desalination project's permit.

This malevolent obfuscation has gone on too long!

Respectfully, Adam Czako (Carlsbad resident for 19 years)

2/8/2010

Tom Luster

From: jeff edwards [hondared@rock.com]

Sent: Friday, February 05, 2010 5:41 PM

To: Tom Luster

Subject: Carlsbad Desalination Project

To Whom It May Concern,

I cannot attend the Coastal Commission's February 10th hearing in Oceanside. This is a short note to the Coastal Commission expressing my opposition to the request to revoke the desalination project's permit.

Poseidon has made an unprecedented, voluntary commitment that the Carlsbad Desalination Project will be the first large-scale infrastructure project in the state to be net carbon neutral. Not satisfied, opponents are trying to manipulate the Coastal Commission's legal authority over air quality emissions in order to burden the project with unnecessary mitigation requirements.

The first request was rejected by a super majority of the Coastal Commission. Coastal Commission staff is recommending denial of this second revocation request. This second request is patently frivolous and without merit. It is a clear abuse of the Coastal Commission's process and a waste of the Commission's time and its taxpayer-funded budget.

Thank you for all of your time.

Jeff Edwards

--



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SIGN UP NOW AT ROCK.COM AND GET 1GB OF STORAGE!**

Tom Luster

From: Douglas Moore [spartacus92007@yahoo.com]
Sent: Friday, February 05, 2010 5:38 PM
To: Tom Luster
Cc: info@carlsbaddesal.com
Subject: Desalination Plant

California Coastal Commission;

After reading today that the CCC is going to hold yet another meeting to attempt to derail the efforts to bring a clearly needed desalination plant to Carlsbad, I feel compelled to write to you to voice my demand as a taxpayer, that you put an end to the absurd obstructionist behavior you are engaging.

Clearly the t's have been crossed and the i's dotted, after 7 years of legal wrangling.

At some point your taxpayer funded efforts have simply got to begin to resemble efforts that are in the best interest of San Diego residents. Drinking water is a substantial impending problem in this county, and threatens to become a tragic problem in the years to come.

There are smart people working at the CCC and I suggest that you begin to employ that resource in your dealings with Poseidon Resources.

Trust me, if for some absurd reason you are able to thwart the solutions provided by Poseidon, and the highly predictable water shortage becomes an even more dire situation affecting San Diego residents, your commission will be held directly responsible for the travesty, and rightly so.

Stop your nonsense and use the brains that San Diego taxpayers assume you have.

Doug Moore
2516 Manchester Ave
Cardiff by the Sea, Ca 92007

760-479-2110

Tom Luster

From: Ronald Stein [rstein@PTSstaffing.com]
Sent: Friday, February 05, 2010 4:51 PM
To: Tom Luster
Subject: Opposition to the request to revoke the desalination project's permit

We're nearing the time when we will be totally dependent on foreign countries for our energy needs. And now, with California running out of water to provide for our continuing population growth, we are in desperate need to access the great Pacific ocean to enhance what little water mother nature provides.

It's taken us decades, under both Democratic and Republican leadership, to get to where we're at, i.e., our collective "choice" among our 350 million citizens for the USA to be dependent on crude oil from foreign countries, most of which don't like the USA. That choice is costing us about \$600 billion a year, a heavy price to transfer that much of our wealth each year, for the privilege of importing foreign oil and burning it to meet our thirst for energy.

We can continue our choice to send \$600 billion offshore every year, or choose to develop proven Pacific, Gulf, and Atlantic coastal reserves, and Anwar reserves in the USA and keep those billions of dollars and jobs here in the USA while we further prepare for the transition to alternatives. Everyone seems concerned about the carbon footprint of the world, yet our choice continues to let the other foreign countries develop their resources, with less stringent environmental controls than those in CA and the USA, control the carbon footprint of the world.

Two large refineries (one at Yanbu and one at Jabail) 400MBPD modern, full conversation refineries (with chemicals production) producing USA market quality fuels (very low sulfur and aromatics) are in the process of moving forward in Saudi Arabia. Each complex is grass roots and estimated to cost \$12B apiece. One in partnership with ConocoPhillips and one with Total – \$6 Billion investment for the oil companies in refined products destined for export to European and US markets. That's approximately 2500-3000 construction jobs at each site for 3 years. On-going employment once operational is expected to be 1200 employees and 800-1000 contractors.

US refining is not only in decline, it could eventually lose control of the hydrocarbon liquid fuels markets in the Americas as well as continue to send more US\$ overseas.

I would hate to see "water" follow the same choice of our citizens, to rely on foreign countries for our water needs and not use our own resources for unlimited supplies of water.

Ronald Stein
Tustin, CA

949-268-4023

rstein@PTSstaffing.com

Tom Luster

From: Thomas Yellich [terramartom@yahoo.com]
Sent: Friday, February 05, 2010 4:49 PM
To: Tom Luster
Cc: Carlsbad Desalination Project
Subject: The Desalination plant

To whom it may concern,

As a 40 + year resident of Carlsbad, and Oceanside I am 100% in favor of Carlsbad using Ocean water through the Desalination process to help Carlsbad, and the surrounding cities. I am an environmentalist as well, but see an urgent need to use Ocean water to replenish an exhausted Colorado River that is drying up. Stop with the Bullshit and let the plant start working. You are wasting precious time and money that could have seen this plant up and running years ago.

Thomas Yellich, and My Thi Tran, Husband & Wife
1888 E. Pointe Ave
Carlsbad, CA. 92008
Rich Monk - www.richmonk31.blogspot.com

Tom Luster

From: Sandy Sanford [golfogey@sbcglobal.net]
Sent: Friday, February 05, 2010 4:28 PM
To: Tom Luster
Cc: info@carlsbaddesal.com
Subject: Carlsbad Desalination Plant

Dear Sir:

I object to the organizations who continue to object to subject plant. Let's get on with the development of subject plant. I truly believe that we in California need many more such plants.

Thank you.

(signed) W. D. Sanford, San Marcos, Calif

2/8/2010

Tom Luster

From: Timothy Casey [timothycasey@hotmail.com]

Sent: Friday, February 05, 2010 4:19 PM

To: Tom Luster

Subject: The Carlsbad Desalination Project

To Whom It May Concern:

This has to stop! How much longer are you going to continue to hear these accusations allow opponents to successfully delay, or at least create doubt, about the Carlsbad Desalination Project? The fact is that our water is growing less reliable and more expensive by the day. Seawater desalination continues to grow more and more cost competitive and is relied on heavily in other parts of the world. Poseidon has already committed to reasonable pricing as well as previously-unheard of environmental mitigation measures. It's as if the opponents keep moving the goal line in that respect. Poseidon commits to some mitigation measure that the opponents request, and then the opponents claim later that it wasn't enough.

Please stop entertaining these false accusations toward Poseidon and allow it to finish construction of the desalination plant in Carlsbad. The public is tired of waiting for the water!

Tim Casey

Your E-mail and More On-the-Go. Get Windows Live Hotmail Free. [Sign up now.](#)

Tom Luster

From: Jack Cumming [jbcumming@aol.com]

Sent: Friday, February 05, 2010 4:15 PM

To: Tom Luster

Subject: Support Carlsbad Desalination Project

I live and work in Carlsbad Village, just 1.7 miles from the proposed Carlsbad desalination facility. I have no connection, economic or otherwise, with Poseidon, NRG, etc. other than my standing as a resident of Carlsbad. I strongly support applicant's petition.

The absurd delays have made a mockery of the Coastal Commission's charge. It's evident that Coastal Commission staff has an agenda that may be advanced by the location of the staff office.

The mounting costs incurred by the Commission's tolerance for obstructionism and irrational environmentalism undermine our credibility as a State that is able to manage its own affairs.

It's high time that the Commission spoke with authority to make clear that the debate is ended; the decision has been made; and that it's time for the citizenry to come together in support of the common effort.

Water is essential to human life. We have a sufficient supply off our shores to the West. Let's tap it and get on with trying to restore our State to the promise that it once evinced.

John B Cumming

2855 Carlsbad Blvd N116

Carlsbad, CA 92008

310-821-0282

Tom Luster

From: Robinsnest7211@aol.com
Sent: Friday, February 05, 2010 4:15 PM
To: Tom Luster
Cc: update@carlsbaddesal.com
Subject: Carlsbad Desalination Plant

I cannot believe that yet another organization, probably run by the same lawyer, is contesting the Poseidon Resources project. It is obvious that we are in desperate need of water in Southern California and the project should go forward without further delays. Please do not entertain any more requests from these disruptive environmental organizations.

Judith Robbins
Rancho Santa Fe

2/8/2010

Tom Luster

From: Eileen Murphy [murphyeileen555@gmail.com]

Sent: Friday, February 05, 2010 4:04 PM

To: Joseph Geever; Marco Gonzales; Tom Luster

Subject: The comment I am going to give on Wed. 2/13 at the Revocation item of Poseidon Resources of CC meeting at Carlsbad

Good Morning Commissioners. My name is Eileen Murphy and I live in HB

I am speaking today about item 6a Revocation of Poseidon's CDP in Carlsbad. One of the most serious threats to our coast is the rising sea level which is primarily caused by greenhouse gases and global warming.

Please stand up today for AB32 which was passed as a means to mitigate the effects greenhouse gases have on our lives and our planet.

Poseidon Resources, a privately owned company and San Diego Water Authority a public agency have circumvented and avoided AB32's provisions and therefore their CDP should be revoked.

Poseidon's claim of carbon neutrality is false. One glaring example of their duplicity is their claim that "Poseidon water will replace the imported water from Metropolitan Water District ." The Formal agreement states that "Poseidon's water must NOT be considered replacement water."

The CDP should be revoked.

Thank you for allowing me to speak

--

Go Obama!
Eileen..

2/8/2010

Tom Luster

From: Tom Workman [ographic@roadrunner.com]

Sent: Friday, February 05, 2010 3:53 PM

To: Tom Luster

Subject: Carlsbad Desalination Plant

I am totally against any further attempt to hold up the progress of the subject project !!!!!

The individuals that are taking these actions should be subject financial liability!!!

Tom Workman

Carlsbad resident

2/8/2010

Tom Luster

From: Mary Stedham [marystedham@cox.net]

Sent: Friday, February 05, 2010 3:47 PM

To: Tom Luster

Cc: update@carlsbaddesal.com

Subject: Please let them built the desal plant

To whom it may concern,

The plant is a bright spot in this terrible economy for us. My husband has basically been out of work for over 2 years as have many other union electricians. Where else are we going to get water from? The plant will put back more than it takes from the ocean. Have some thought about San Diego's economy and future. Mary Stedham

2/8/2010

Tom Luster

From: Spotten, Russell [russell.spotten@akzonobel.com]
Sent: Friday, February 05, 2010 3:44 PM
To: Tom Luster
Cc: update@carlsbaddesal.com
Subject: Opposition to the "request to revoke" the permit for the Carlsbad desalination project

Dear sir;

I will be unable to attend the hearing scheduled for Feb 10, however, please know that this project has my full support. It is unthinkable that any entity would be attempting, at this late stage, to impede the progress of this important new source of fresh water.

Best regards,

Russell Spotten
Market Manager - Water/Wastewater
International Paint, LLC
O: 805-434-1113
C: 805-207-3015
F: 805-434-1114
russell.spotten@akzonobel.com

Tom Luster

From: John Marshall [johnlcg@gmail.com]**Sent:** Friday, February 05, 2010 3:41 PM**To:** Tom Luster**Cc:** info@carlsbaddesal.com**Subject:** Carlsbad Desal Plant Development Permit

Hello: I am writing as a Carlsbad resident to express my contempt for the continuous efforts to oppose the construction of the Desal facility, most recently by a group calling themselves CERF. This group may not have the right to lobby for a revocation of the permit to build the plant, so I am surprised that a hearing is even being held. Especially so, since the project's developer has been through a process that has taken over 10 years.

I lived for a time in a small town in CO, although since 1947 I have been a Californian, for better or worse. While in that small town, 15k folks in a county of about 45k folks, I became familiar with the 'non-profit de jour', many which were formed by their 'executive directors' for the purpose of supporting themselves, disguised as efforts to advance some alleged public benefit. In this small town, there were over 200 non-profits and a good number of them had overlapping agendas and more often than not, wasted the public's money by parsing or misinterpreting the law, looking for ways to obstruct and delay good and necessary projects.

The Carlsbad Desal plant is a good and necessary project. The developers have earned the right to build and benefit from it and those of us that live in cities that have subscribed to their water, deserve to be able to purchase the water at market rates as promised.

Today we face a crisis of confidence in government at many levels. It would be a big step in the right direction to see the CA Coastal Commission drop the gavel and one last and final time and let the project go forward without further distraction and waste of money. Enough time has passed to make this probably the most studied and perhaps improved as part of that process, project of it's kind. It is worthy of being a template for later efforts here in CA and in other parts of the country.

So please, do not revoke the permit for this project.

Sincerely,

John Marshall
6935 Amber Lane
Carlsbad, CA 92009

2/8/2010

Tom Luster

From: James Selover [jselover@roadrunner.com]
Sent: Friday, February 05, 2010 3:39 PM
To: Tom Luster
Cc: Carlsbad Desalination Project
Subject: DeSal Project Support

As a scientist and environmentally concerned citizen of Carlsbad I support the proposed desal plant and object to the current request to revoke the desalination project's permit!

James Selover, PhD

Tom Luster

From: 8317509379 [8317509379@messaging.nextel.com] on behalf of 8317509379
@messaging.nextel.com
Sent: Friday, February 05, 2010 3:25 PM
To: Tom Luster
Subject: Carlsbad Desal

Please do not allow opponents to stop construction. Thank You, Clint Miller.

Tom Luster

From: JDroubay@lviservices.com
Sent: Friday, February 05, 2010 3:21 PM
To: update@carlsbaddesal.com
Cc: Tom Luster
Subject: Re: Call to Action!

THE PURPOSE OF THIS LETTER IS TO VOICE MY STRONG OPPOSITION TO THOSE WISHING TO DERAIL THIS PROJECT.

THE PROJECT HAS FOLLOWED AN EXHAUSTIVE ENVIRONMENTAL DUE DILIGENCE PROCESS, AND HAS CLEARED EVERY HURDLE OFFERED BY SOUND SCIENCE.

THOSE OPPOSING THE PROJECT ARE EITHER MISINFORMED, OR SIMPLY CHOOSE TO OPPOSE ALL DEVELOPMENT WITHOUT CONSIDERATION OF ITS MERIT.

ENOUGH IS ENOUGH. MOVE ON.

Jeff Droubay
Vice President / Southern California
LVI Facility Services
2121 W. Crescent Ave.
Suite C
Anaheim, CA 92801
Phone: 714-533-8784
Fax: 714-533-8210
Cell: 213-494-0922
24 Hour Emergency Response Nationwide 800-283-2933

From: "Carlsbad Desalination Project" <update@carlsbaddesal.com>
To: "Jeff Droubay" <jdroubay@lviservices.com>
Date: 02/05/2010 03:06 PM
Subject: Call to Action!

Tom Luster

From: b b [sandiegodesal@gmail.com]
Sent: Friday, February 05, 2010 2:44 PM
To: Tom Luster
Subject: Approve Desalination

Dear Chair Neely and Coastal Commissioners,

I am a citizen of California writing to urge you to deny the request to revoke the CDP for the Carlsbad Desalination Project. San Diego NEEDS this project!

b b
2
San Diego, CA 92101

Dear Jeff:

Despite the fact that construction of the Carlsbad Desalination Plant is underway, opponents of seawater desalination have chosen to continue obstructing the facility's progress, and more importantly, our region's ability to produce a new supply of water.

On Wednesday, February 10th, the California Coastal Commission is meeting in Oceanside and will be hearing a request from opponents to revoke the Coastal Development Permit issued to the project in November 2007.

If this sounds familiar it's because the same handful of opponents unsuccessfully attempted to have the plant's permit revoked in December. The first request was rejected by a super majority of the Coastal Commission. Coastal Commission staff is recommending denial of this second revocation request.

The request is patently frivolous and without merit. It is a clear abuse of the Coastal Commission's process and a waste of the Commission's time and its taxpayer-funded budget.

This time around, opponents are improperly using the Coastal Act Regulation's permit revocation process to revisit the Commission's previous approval of Poseidon's Energy Minimization and Greenhouse Gas Reduction Plan. Poseidon has made an unprecedented, voluntary commitment that the Carlsbad Desalination Project will be the first large-scale infrastructure project in the state to be net carbon neutral. Not satisfied, opponents are trying to manipulate the Coastal Commission's legal authority over air quality emissions in order to burden the project with unnecessary mitigation requirements.

To add insult to injury, the revocation proceedings are being spearheaded by the California Environmental Rights Foundation (CERF), a newly-created organization that does not have the legal standing under Coastal Act regulations to initiate revocation proceedings. Earlier this week we asked the state Attorney General and the Coastal Commission to bar CERF from participating in the revocation proceedings. [Click here to see more details.](#)

If you cannot attend the Coastal Commission's February 10th hearing in Oceanside, please consider emailing (and copy us) a short note to the Coastal Commission expressing your opposition to the request to revoke the desalination project's permit to tluster@coastal.ca.gov.

Thank you for all of your support and we will continue to keep you informed of the progress of the plant's construction.

This message was delivered because you subscribed to the Carlsbad Desalination Project interest list and asked to receive email messages from us.

To remove yourself from the interest list, please send an email to info@carlsbaddesal.com with "Unsubscribe" in the subject line.

We invite you to read our privacy policy.

The Carlsbad Desalination Project
501 W. Broadway, Suite 2020
San Diego, CA 92101
Phone: (619) 595-7802 | Fax: (619) 595-7892

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For more information please visit <http://www.ers.ibm.com>

This email was sent to jdroubay@lviservices.com.

Paid for by Poseidon Resources.

Click here to Unsubscribe.
To unsubscribe via postal mail, please contact us at:
CompleteCampaigns.com Attn: Unsubscribe
3635 Ruffin Road, Third Floor San Diego, CA 92123

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Tom Luster

From: Clervil Heraux [clervil@archerstreetventures.com]
Sent: Thursday, February 04, 2010 10:07 AM
To: Tom Luster
Subject: Dont do the Poseidon Desal project

Dear Chair Neely and Coastal Commissioners,

I am a citizen of California writing to urge you to not to move forward with the Poseidon desal project. Desal plants are very - very expensive. Corrosive to the land, water and the plant itself.

With California's declining budget this is not a project we should even be talking about. There are other more beneficial ways to supply our citizens with water. For instance Atmospheric Water Generation. These systems can be run on any power source, on the grid, solar or wind but even better why not all three. With the right combination of Solar, Wind and battery back up systems this type of plant could potentially power itself, create water and supply FREE electricity to the nearby homes and businesses. A win - win wouldn't you say???

I would be more then happy to talk about my ideas and show you our products that can make this happen. My name is Clervil Heraux and my company is called Archer Street Ventures. Please call or email me so we can discuss this in detail.

Sincerely,

Clervil Heraux
Archer Street Ventures
clervil@archerstreetventures.com
714-269-4239

Clervil Heraux
311 s archer
anaheim, CA 92804

6a.W

David E. Hamilton
5401 Kenilworth Drive
Huntington Beach, CA 92649
Phone: (714) 840-8901
E-mail: dehamilton@earthlink.net

February 3, 2010

California Coastal Commission
c/o: Tom Luster
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219
Fax: (415) 904-5400

RECEIVED

FEB 03 2010

CALIFORNIA
COASTAL COMMISSION

Re: Revocation of Poseidon Resources' CDP in Carlsbad, CA

Dear Commissioners,

The gravest threat to California's coast is sea level rise caused by global climate change. Sea level rise is primarily a result of increased green house gases (GHGs) in our atmosphere. AB32 legislation was passed as a means to mitigate the effects of and greatly lessen the production of GHGs. If AB32 is going to any meaning and positive impact, it is up to private enterprises, public agencies, and, especially, state regulators to uphold the provisions of AB32. Poseidon Resources, as a private enterprise, and the San Diego Water Authority (SDWA), as a public agency, has used convoluted reasoning and semantic jujitsu to purposely circumvent and avoid AB32's provisions. Therefore, Poseidon's CDP should be revoked.

Poseidon's claim of carbon neutrality to comply with AB32 for its Carlsbad desalination project is as specious as its claim that Poseidon-produced water will replace the imported water provided by Metropolitan Water District (MWD) to local retail agencies (LRAs). According to the formal Agreement between MWD, SDWA, and the LRAs, water produced by Poseidon is *not* to be construed for *any* reason as replacement water. Despite this formal Agreement Poseidon continues to use the "replacement" claim in its formulation of carbon neutrality. Also, despite this formal Agreement SDWA is using verbal tricks and obfuscation to skirt the terms it formally agreed to. Such claims should not be sustained by the Coastal Commission.

I respectfully request that the CDP for Poseidon Resources' Carlsbad desalination project be revoked until such time that these issues are resolved and true compliance with AB32 can be assured. Please consider my request. Thank you.

Regards,

David E. Hamilton
California Homeowner &
Director, *Residents for Responsible Desalination (R4RD)*



City of Carlsbad

Office of the Mayor

January 22, 2010

RECEIVED

JAN 27 2010

CALIFORNIA
COASTAL COMMISSION

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

Re: Support for Carlsbad Desalination Project

Dear Chairwoman Neely:

On behalf of the City of Carlsbad, I would like to submit my comments on the Revocation Request filed on 12/8/09 against the Carlsbad Desalination Project by Surfrider Foundation, San Diego Coastkeeper and Coastal Environmental Rights Foundation. I believe the request has been filed solely with the intent to delay project construction and squander the Developer's and Commission's time and resources in revisiting a matter which has already been reviewed extensively.

As one of the conditions of the Coastal Development Permit, Poseidon Resources submitted a voluntary Energy Minimization and Greenhouse Gas Reduction Plan (GHG Plan). The plan utilizes 'net' rather than 'gross' greenhouse gas emission offsets, which is based on the one-for-one reduction of water imports from Metropolitan Water District (MWD) into San Diego County that the desalination facility will provide. The Coastal Commission staff and board reviewed and approved this plan in 2008 with the understanding that MWD would not be required to amend their water entitlements from the State Water Project despite the subsequent reduction in demand from San Diego County. Evidence in the administrative record illustrates the components of this plan were understood and accepted by Poseidon, its public agency partners, the Commissioners and Staff Members.

The opposition's claim that the Seawater Desalination Program Agreement between MWD and the San Diego County Water Authority has affected the net emission offsets is a calculated and intentional misinterpretation of the agreement, designed to bolster their case against the project. There is no truth to their claim and the GHG Plan has not been - nor does it need to be - altered. Additionally, opponents have not demonstrated any intention on the part of Poseidon Resources to mislead or delude the Commission with inaccurate information - which alone disqualifies their revocation request.



During the past six years, the project has gained every approval and permit needed for construction from numerous public agencies. The opposition to this project has repeatedly challenged those legitimate approvals and is now desperately grasping at straws to block this project by making a second revocation request for its Coastal Development Permit. The project's sound science and strong environmental credentials have resulted in every challenge being denied by the courts for lack of merit. This revocation request deserves that same fate.

On behalf of the citizens of Carlsbad, I urge your board to deny the permit revocation request against Poseidon Resources at your February 11, 2009 hearing and allow this project to get back on track.

Thank you.



CLAUDE A. "BUD" LEWIS
Mayor, City of Carlsbad

cc:

Governor Arnold Schwarzenegger
Assembly Speaker Karen Bass
Senate President Pro Tem Darrell Steinberg
Vice Chair Mary Shallenberger
Commissioner William A. Burke
Commissioner Khatchik Achadjian
Commissioner Steve Blank
Commissioner Richard Bloom
Commissioner Ross Mirkarimi
Commissioner Brooks Firestone
Commissioner Steve Kram
Commissioner Patrick Kruer
Commissioner Adi Liberman
Commissioner Suja Lowenthal
Commissioner Karen Scarborough
Commissioner Mark Stone
Commissioner Sarah Gurney
Commissioner Meg Caldwell
Commissioner Esther Sanchez
Commissioner Dan Secord
Commissioner April Vargas

Commissioner Sara Wan
Commissioner James Wickett
Commissioner Connie Stewart
Commissioner Sharon Wright
Commissioner Mike Chrisman
Commissioner Brian Baird
Commissioner Paul Thayer
Commissioner Gail Newton
Commissioner Dale Bonner
Commissioner James Bourgart
Commissioner Gregg Albright
Mr. Tom Luster
Mr. Peter Douglas



EMERALD PLAZA

402 West Broadway, Suite 1000
San Diego, California 92101-3585

Tel 619.544.1300
www.sdchamber.org

January 21, 2010

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

RE: Carlsbad Desalination Project, Revocation Request #R-E06-013

Dear Chairwoman Neely:

Since its founding in 1870, the San Diego Regional Chamber of Commerce has been involved in local issues and regional economic development. One of the Chamber's top priorities in 1870 was to bring fresh drinking water to San Diego residents. 140 years later, our region is still struggling to meet its water needs and the Chamber has now become an advocate for creating our own locally-produced, drought-resistant water supply through the Carlsbad Desalination Project.

We are greatly disappointed that opponents of seawater desalination have filed yet another request to revoke the Carlsbad Desalination Project's Coastal Development Permit. We find this current revocation request more frivolous than the one the Commission denied on a 9-3 vote in December.

The administrative record is clear that the project's Energy Minimization and Greenhouse Gas Reduction Plan (GHG Plan), adopted by the Commission in August 2008, does not require that the Metropolitan Water District of Southern California (MWD) import less water into Southern California. The 50 million gallons per day of desalinated water produced by the project will replace one-for-one supplies, which are currently imported from Metropolitan Water District (MWD) into San Diego County, allowing MWD to redirect that water to other regions or agencies in need.

Furthermore, the data included in the GHG Plan was never predicated on the idea that this project would reduce or restrict MWD's ability to import water from the State Water Project (SWP). Clearly, any other agencies requesting increased water supplies would be responsible for the mitigation of that water's impact to the environment - not Poseidon Resources. Therefore, there has been no change to the GHG Plan and no reason for the Commission to request a permit amendment or to further consider this frivolous revocation request. The opponents have not shown anywhere in their request that the standards for revocation have been met.

We believe that opponents of the project have exhausted their appellate opportunities and are now operating with improper motive. On behalf of the Chamber and our Board of Directors, I urge you to deny the revocation request at the February 11 hearing and allow the Carlsbad Desalination Project to move forward.

Sincerely,

A handwritten signature in black ink, reading "Ruben Barrales". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

Ruben Barrales
President & CEO

RB:av

cc:

Governor Arnold Schwarzenegger
Assembly Speaker Karen Bass
Senate President Pro Tem Darrell Steinberg
Vice Chair Mary Shallenberger
Commissioner William A. Burke
Commissioner Khatchik Achadjian
Commissioner Steve Blank
Commissioner Richard Bloom
Commissioner Ross Mirkarimi
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Commissioner Sharon Wright
Commissioner Mike Chrisman
Commissioner Brian Baird
Commissioner Paul Thayer
Commissioner Gail Newton
Commissioner Dale Bonner
Commissioner James Bourgart
Commissioner Gregg Albright
Mr. Tom Luster
Mr. Peter Douglas



RECEIVED

JAN 25 2010

CALIFORNIA
COASTAL COMMISSION

January 2010

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:

I'm writing once again on behalf of the Carlsbad Desalination Project and asking for your leadership in ensuring this project moves forward.

I am on the board of the Agua Hedionda Lagoon Foundation, a non-profit organization dedicated to the long-term health and vitality of the Agua Hedionda Lagoon, marsh, wetlands and watershed area. Our commitment to the Carlsbad Desalination Project has remained steady over the past eleven years since it was first proposed in 1998. The Agua Hedionda Lagoon is man-made and maintained only through periodic dredging. The desalination project will contribute to the conservation and enhancement of the lagoon through its pledge to preserve a clean and healthy lagoon for the decades to come. Poseidon Resources has also agreed to dedicate up to 20 acres of beach and lagoon-front land for public access and recreation as well as for expanding scientific research opportunities in conjunction with Hubbs-SeaWorld Research Institute.

My board has expressed concern over the legal challenges that continue to be made to the Commission's approval of the Carlsbad Desalination Project. Last month, your Commission correctly denied the revocation request from Surfrider Foundation, San Diego Coastkeeper and Coastal Environmental Rights Foundation. Their efforts have been fruitless because of their lack of evidence. An unbiased review of the administrative record will clearly show that this latest challenge is frivolous and should be dismissed as well.

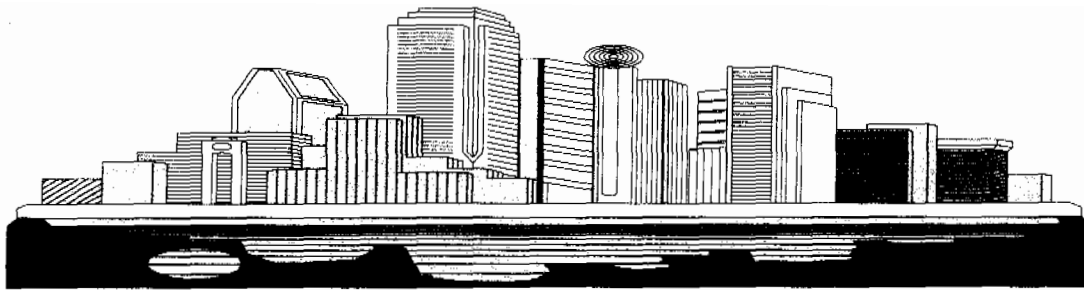
Poseidon Resources has already begun construction activities on this project, compliant with all conditions imposed upon it, and should be allowed to continue. On behalf of the board and members of the Agua Hedionda Lagoon Foundation, I request your cooperation and assistance in this matter. Please vote to deny this Coastal Development Permit Revocation Request at your February 11th meeting.

Respectfully,

Eric Munoz, Past President and Current Boardmember
Agua Hedionda Lagoon Foundation

cc:

Vice Chair Mary Shallenberger
Commissioner William A. Burke
Commissioner Khatchik Achadjian
Commissioner Steve Blank
Commissioner Richard Bloom
Commissioner Ross Mirkarimi
Commissioner Brooks Firestone
Commissioner Steve Kram
Commissioner Patrick Kruer
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Commissioner Dale Bonner
Commissioner James Bourgart
Commissioner Gregg Albright
Governor Arnold Schwarzenegger
Assembly Speaker Karen Bass
Senate President Pro Tem Darrell Steinberg
Mr. Peter Douglas
Mr. Tom Luster



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

January 15, 2010

RECEIVED

JAN 25 2010

**CALIFORNIA
COASTAL COMMISSION**

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

Re: Deny Permit Revocation Request - Carlsbad Desalination Project

Dear Chairwoman Neely:

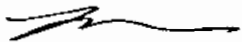
I'm writing this letter on behalf of my organization, the San Diego County Building and Construction Trades Council, which advocates on behalf of thousands of workers in the region.

In 2005, the Council signed a Project Labor Agreement with Poseidon Resources for the construction of the Carlsbad Desalination Plant. It is almost five years later and we still eagerly await the day we can get to work. This shovel-ready project will create 2,100 jobs and generate \$170 million in spending during its construction. These are difficult times for the construction industry and a project of this magnitude will be an economic boon for local workers and companies, as well as for local and state governments which will benefit from increased tax revenues.

The recession has only worsened in the past two years and government officials from President Barack Obama on down have stated that our country needs large-scale infrastructure construction projects to be implemented immediately to get our economic engines revving again. The Carlsbad Desalination Project will jump start our local economy and put over two thousand skilled tradesmen back to work. Now is not the time to be adding roadblocks to this project!

We need these jobs and we need the water this project will create for San Diego. It is that simple. The opponents' request to revoke the project's Coastal Development Permit is frivolous and without merit and should be unilaterally dismissed by the executive director. On behalf of the thousands of men and women we represent on the San Diego County Building and Construction Trades Council, I respectfully request that you deny the permit revocation request for Poseidon Resources' Carlsbad Desalination Project and help us put our members back to work.

Sincerely,



Tom Lemmon

San Diego County Building and Construction Trades Council

cc:

Vice Chair Mary Shallenberger
Governor Arnold Schwarzenegger
Assembly Speaker Karen Bass
Senate President Pro Tem Darrell Steinberg
Commissioner William A. Burke
Commissioner Khatchik Achadjian
Commissioner Steve Blank
Commissioner Richard Bloom
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Commissioner Mike Chrisman
Commissioner Brian Baird
Commissioner Paul Thayer
Commissioner Gail Newton
Commissioner Dale Bonner
Commissioner James Bourgart
Commissioner Gregg Albright
Mr. Peter Douglas
Mr. Tom Luster



San Diego
Regional
Economic
Development
Corporation

RECEIVED

JAN 25 2010

**CALIFORNIA
COASTAL COMMISSION**

January 19, 2010

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

Re: Opposition to Revocation Request, Carlsbad Desalination Project

Dear Chairwoman Neely:

The San Diego Regional Economic Development Corporation strongly supports construction of the Carlsbad Desalination Project. We congratulate the California Coastal Commission for the thorough public hearing conducted on this project and your careful analysis of the facts in granting appropriate permits.

UDC was disappointed that project opponents have chosen to file additional lawsuits and regulatory challenges even after your extensive public project review process. Every day of delay in building this project hurts San Diego's ratepayers as they drive up the costs of project development and jeopardizes our already constricted long term water supply.

In this specific case, it is important to note that direct green-house gas emissions are already zero. To reduce indirect emissions to the same zero level, the project has voluntarily adopted an Energy Minimization and Greenhouse Gas Reduction Plan with energy-efficient equipment, solar power, and carbon offsets.

The request to revoke the project's Coastal Development Permit fails to meet any of the permit revocation requirements under the Coastal Act. The San Diego Regional Economic Development Corporation strongly encourages the Commission to reject the revocation request at your February 11th hearing.

Sincerely,

A handwritten signature in dark ink, appearing to read "A. Poat".

Andrew L. Poat
Vice President of Public Policy
San Diego Regional Economic Development Corporation

530 B Street
Seventh Floor
San Diego
CA 92101

Ph: 619-234-8484

Fax: 619-234-1935

www.sandiegobusiness.org

cc:

Governor Arnold Schwarzenegger
Assembly Speaker Karen Bass
Senate President Pro Tem Darrell Steinberg
Vice Chair Mary Shallenberger
Commissioner William A. Burke
Commissioner Khatchik Achadjian
Commissioner Steve Blank
Commissioner Richard Bloom
Commissioner Ross Mirkarimi
Commissioner Brooks Firestone
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Commissioner Sharon Wright
Commissioner Mike Chrisman
Commissioner Brian Baird
Commissioner Paul Thayer
Commissioner Gail Newton
Commissioner Dale Bonner
Commissioner James Bourgart
Commissioner Gregg Albright
Mr. Tom Luster
Mr. Peter Douglas

January 19, 2010

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

RECEIVED

JAN 25 2010

CALIFORNIA
COASTAL COMMISSION

Dear Chairwoman Neely:

As a former member of the Carlsbad City Council and the Seawater Desalination Stakeholders Group, I have been directly involved with the Carlsbad Desalination Project for nearly a decade. In all that time, the message hasn't changed: the project is environmentally sound and we need this water today. The message hasn't changed for project opponents either. Despite their perfect record of losing every project hearing, appeals hearing and court case, they continue their efforts to stall construction and increase project costs.

Their latest effort to circumvent due process through the revocation process is just as transparent and misguided as their previous failed attempts. The Commission's standards for revocation are comprehensive. They require the opponent to plainly demonstrate that (1) Poseidon has submitted false or inaccurate information; (2) Poseidon did this with intention; and (3) the permit would have not been issued or would have been altered if this information had been correct. However, the opponents have brought no new evidence to their appeal and they haven't demonstrated there are grounds for a revocation of the Coastal Development Permit. In fact, one of the applicants, Coastal Environmental Rights Foundation, wasn't even in existence at the time of the original permit approval and shouldn't even be a party to this action.

Nothing I have read in the opponents' request convinces me their argument has any validity or that this long-decided issue should be reopened for consideration. I hope the Members of the Commission can also see through these frivolous claims and will deny the revocation request at your February 11 hearing where the item is being discussed. Thank you for your time and attention to this matter.

Respectfully



The Honorable Julie Nygaard

CC:

Governor Arnold Schwarzenegger
Speaker Karen Bass
Senate President Pro Tem Darrell Steinberg
Vice Chair Mary Shallenberger
Commissioner William A. Burke
Commissioner Khatchik Achadjian



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 • Website: www.sdfarmbureau.org

RECEIVED

JAN 21 2010

**CALIFORNIA
COASTAL COMMISSION**

January 19, 2010

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

Re: Deny Permit Revocation Request – Carlsbad Desalination Project

Dear Chairwoman Neely:

I have personally written and testified before the Coastal Commission numerous times in support of the Carlsbad Desalination Project over the past three years. It is disappointing to have to continue to engage the Commission on a permit that was issued to the project over two years ago simply because project opponents were unhappy with the outcome of the Commission's deliberations.

The same project opponents have now brought forward a second permit revocation request, this one even more frivolous than the first. Accusing an applicant of providing the Commission with false and misleading information is a very serious accusation and opponents must be held accountable for substantiating such an allegation.

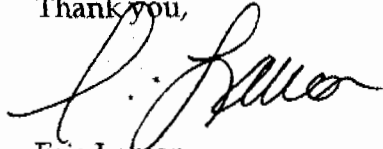
The administrative record, and my recollection of the hearing, is very clear. The revocation request is unwarranted and without merit. Poseidon's desalination project and associated GHG Plan have not changed in any way since the Coastal Commission's approval in August 2008. To the contrary, MWD's imported water protection requirements and Poseidon's commitments to offset 100% of its "net" or incremental increase in greenhouse gas emissions above baseline conditions were clear at the time the Coastal Commission adopted the GHG Plan.

After more than six years in the permitting process, this project has received every agency approval needed and withstood numerous legal challenges, appeals and lawsuits by project opponents. They continue to argue against the project with absurd allegations in a never-ending attempt to postpone, obfuscate and undermine. Due

process has already demonstrated that this project is worthy of your support and should be allowed to proceed to construction without further delays.

San Diego County's farmers appreciate your commitment to addressing California's water crisis and your support for the Carlsbad Desalination Project. We urge you to deny the requested revocation at your February board meeting in Oceanside.

Thank you,



Eric Larson

Executive Director of the San Diego County Farm Bureau

cc:

Vice Chair Mary Shallenberger
Commissioner William A. Burke
Commissioner Khatchik Achadjian
Commissioner Steve Blank
Commissioner Richard Bloom
Commissioner Ross Mirkarimi
Commissioner Brooks Firestone
Commissioner Steve Kram
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Commissioner Dale Bonner
Commissioner James Bourgart
Commissioner Gregg Albright
Governor Arnold Schwarzenegger
Speaker Karen Bass
Senate President Pro Tem Darrell Steinberg
Mr. Peter Douglas
Mr. Tom Luster



San Diego County
**Taxpayers
Association**

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JAN 21 2010

CALIFORNIA
COASTAL COMMISSION

Targeting Waste • Promoting Efficiency

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January 18, 2010

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

RE: Carlsbad Desalination Project

Dear Chairwoman Neely:

As President and CEO of the San Diego County Taxpayers Association, I'm writing this letter in support of the Carlsbad Desalination Project and asking you to deny the second revocation request filed against its Coastal Development Permit (CDP).

Poseidon's project will replace imported water on a one-for-one basis, but this will not alter MWD's ability to import water from the State Water Project. This fact was known to both the opponents and Staff prior to the adoption of the GHG Plan and was the subject of extensive debate during the August 2008 hearing. What MWD chooses to do with their surplus 50 million gallons per day is up to them and under the California Environmental Quality Act (CEQA) the entities in receipt of that water will be wholly responsible for mitigating the impacts of importing that water.

The opponents' request for revoking the permit should be dismissed without delay at your February 11 hearing.

Sincerely,

Lani Lutar
President and CEO

CC: Governor Arnold Schwarzenegger
Assembly Speaker Karen Bass
Senate President Pro Tem Darrell Steinberg
Vice Chair Mary Shallenberger
Commissioner William A. Butke
Commissioner Khatchik Achadjian

Commissioner Steve Blank
Commissioner Richard Bloom
Commissioner Ross Mirkarimi
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Commissioner Paul Thayer
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Commissioner Dale Bonner
Commissioner James Bourgart
Commissioner Gregg Albright
Mr. Peter Douglas
Mr. Tom Luster



THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA



San Diego County Water Authority

January 20, 2010

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

RE: Questions Regarding the Carlsbad Seawater Desalination Project and Imported Water Demand

Dear Mr. Douglas:

We have received questions from Coastal Commission staff (attached) regarding the Carlsbad Project and Metropolitan Water District of Southern California's (MWD) imported water supplies. We are writing to confirm that on a long-term average basis, the project is expected to reduce MWD's and the San Diego County Water Authority's demand for imported water in an amount equal to the project's production. This is similar to the regional benefit from new recycling projects, groundwater recovery projects and water use efficiency gains developed under MWD's and the Water Authority's longstanding local resource and conservation programs.

Background: MWD's regional long-term Integrated Resource Plan (IRP) sets targets for the development of new local supplies and conservation in order to increase regional reliability by reducing Southern California's reliance on imported water supplies. Meeting IRP targets and lessening the need for more imported water is the fundamental purpose of MWD's and the Water Authority's conservation programs as well as the MWD Local Resource Program (LRP), which requires participating recycling and groundwater recovery projects to offset imported water demands.

For example, recycled water used to irrigate a park previously supplied by potable water would be eligible for LRP incentives, while desalinated water used to irrigate a park previously supplied by recycled water would not be eligible. Likewise, treated recycled water discharged into a creek without being used as a municipal supply or used in irrigation projects specifically created as a disposal system would not be eligible. Desalinated groundwater used as a potable supply in MWD's service area would be eligible. Any local project water used outside MWD's service area would fail to reduce demands on MWD, and would therefore be ineligible.

The LRP projects developed by MWD's member agencies, including the Water Authority and its member agencies, have been reducing the region's reliance upon imported water since the 1980s and currently generate about 200,000 acre-feet per year of local supplies.

The Carlsbad Project is an integral part of the Water Authority's water resource planning. The Water Authority's Urban Water Management Plan includes 56,000 acre-feet per year from the Carlsbad project as a new supply, permanently reducing the region's demand for imported water.

Seawater Desalination Program: MWD's Seawater Desalination Program (SDP) incentive program is modeled after the LRP, and includes the same offset requirements. Metropolitan's 2001 Request for Proposal for local SDP states:

"Project production for any beneficial use must replace an existing demand or prevent a new demand on MWD's imported supplies."

Like the LRP, MWD's financial incentive for the SDP provides up to \$250 per acre-foot of produced water for up to 25 years. The purpose of the incentive is to make expensive local projects more cost-effective compared to imported water supplies. The incentive is based on MWD avoiding the following costs:

- Acquisition of new imported supplies such as transfers and exchanges;
- State Water Project (SWP) energy consumption for pumping imported supplies;
- Treating imported supplies; and
- MWD distribution system expansions.

Imported Water Rights and Entitlements: As MWD described in a prior communication, MWD's SDP agreement with the Water Authority and their local retail agencies includes a provision protecting MWD's imported water rights and entitlements. Given current shortage conditions, we expect MWD to take its full SWP and Colorado River rights and entitlements for the foreseeable future. However, MWD supplements its SWP Table A entitlement by pursuing transfers, exchanges, and other marginal supplies also transported through the SWP delivery system. It is the demand for these additional supplies that is likely to be offset by the project.

Imported Water Offset: The Water Authority service area is dependent on imported water supplies. Once operating, the Carlsbad Project will result in an equal demand reduction for both the Water Authority's and MWD's imported supplies. This will allow MWD, on a long-term average basis, to reduce its need for expanded transfers and exchanges. Likewise, the Water Authority will reduce its need for marginal supplies, including transfers, due to the production of 56,000 acre-feet of local supplies annually by the Carlsbad Project.

Mr. Peter Douglas
January 20, 2010
Page 3

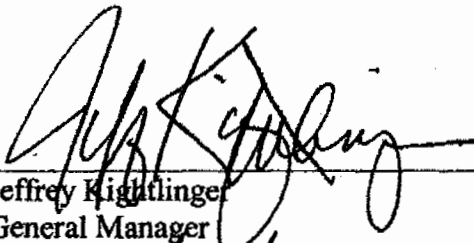
Monitoring: MWD and the Water Authority will be monitoring the project through its monthly incentive payments for reported yield and MWD will verify the project's yield through a contractually required annual reconciliation process.

We appreciate the opportunity to answer your staff's questions. If you need any additional information, please contact Mr. Warren Teitz at MWD at (213) 217-7418 or via e-mail at wteitz@mwdh2o.com, or Mr. Robert Yamada at the Water Authority at (858) 522-6744 or via e-mail at ryamada@sdewa.org.

Sincerely,

METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

By:

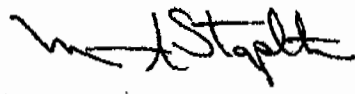

Jeffrey Kightlinger
General Manager

Date:

1/20/10

SAN DIEGO COUNTY WATER
AUTHORITY

By:


Maureen Stapleton
General Manager

Date:

1/19/10

cc:

Governor Arnold Schwarzenegger
Assembly Speaker Karen Bass
Senate President Pro Tem Darrell Steinberg
Vice Chair Mary Shallenberger
Commissioner William A. Burke
Commissioner Khatchik Achadjian
Commissioner Steve Blank
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Commissioner Brian Baird
Commissioner Paul Thayer
Commissioner Gail Newton
Commissioner Dale Bonner
Commissioner James Bourgart
Commissioner Gregg Albright
Mr. Peter Douglas
Mr. Tom Luster
Mr. Peter M. MacLaggan



January 15, 2010

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

RECEIVED

JAN 20 2010

**CALIFORNIA
COASTAL COMMISSION**

Re: Carlsbad Desalination Project – Denial of Revocation Request

Dear Chairwoman Neely:

I'm writing today in regards to your February 11th hearing in Oceanside where you will be voting on yet another unjustified permit revocation request against 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 grow the economic base of North County. In 2007, my Council voted to endorse the Carlsbad Desalination Project because we see it as a proactive solution to our region's overreliance on imported water supplies.

It is clear this permit revocation request is simply another red herring by the opposition to delay this project. This project was vetted thoroughly and approved by the Commission and numerous other regulatory agencies. Poseidon has demonstrated time and again its project will have minimal impact on the environment and provided comprehensive mitigation measures for those few impacts, including the voluntary Energy Minimization and Greenhouse Gas Reduction Plan. Please do not give any credence to opponent's baseless accusations and grandstanding; it is time for this project to move forward. The Coastal Development Permit was correctly issued by the Commission and the grounds for revocation do not exist.

On behalf of the Board and members of the San Diego North Economic Development Council, I respectfully ask the Commission to deny the revocation request against the Carlsbad Desalination Project.

Sincerely,

Gary Knight
President & CEO
North County Economic Development Corporation



SAN DIEGO NORTH

Economic Development Council

cc:

Governor Arnold Schwarzenegger
Speaker Karen Bass
Senate President Pro Tem Darrell Steinberg
Vice Chair Mary Shallenberger
Commissioner William A. Burke
Commissioner Khatchik Achadjian
Commissioner Steve Blank
Commissioner Richard Bloom
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Commissioner Gregg Albright
Mr. Peter Douglas



January 18, 2010

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

Re: Deny Carlsbad Desalination Project Permit Revocation Request

Dear Chairwoman Neely:

I represent 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. They strive to achieve a balanced relationship between environmental protection, public health and economically sustainable growth.

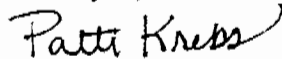
On behalf of the IEA, I'm writing today in support of the Carlsbad Desalination Project and asking that the Commission dismiss the latest revocation request filed by long-time opponents San Diego Coastkeeper, Surfrider Foundation, and Coastal Environmental Rights Foundation.

I personally attended the August 2008 Coastal Commission hearing and believe that this revocation request is nothing more than an improper attempt to revisit a policy determination already made by the Commission that the project should offset its "net" not "gross" indirect greenhouse gas emissions. Poseidon's project will replace imported water from MWD on a one-for-one basis but that does not affect or change MWD's ability to import water from the State Water Project.

As such, this revocation request is patently frivolous and without merit. Moreover, opponents of seawater desalination are wasting the Commission time and taxpayer money by harassing Poseidon Resources. These attacks on a project that has passed every permitting and regulatory test need to stop.

On behalf of the members of the Industrial Environmental Association, I ask you to deny the permit revocation request for Poseidon Resources' Coastal Development Permit at your February 11, 2010 meeting.

Thank you,



Patti Krebs
Industrial Environmental Association

cc:

Vice Chair Mary Shallenberger
Commissioner William A. Burke
Commissioner Khatchik Achadjian
Commissioner Steve Blank
Commissioner Richard Bloom
Commissioner Ross Mirkarimi
Commissioner Brooks Firestone
Commissioner Steve Kram
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Commissioner Gail Newton
Commissioner Dale Bonner
Commissioner James Bourgart
Commissioner Gregg Albright
Governor Arnold Schwarzenegger
Speaker Karen Bass
Senate President Pro Tem Darrell Steinberg
Mr. Tom Luster
Mr. Peter Douglas



January 13, 2010

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

Dear Chairwoman Neely:

On behalf of The Flower Fields®, I submit this letter regarding our support for the Carlsbad Desalination Project. Located in Carlsbad, the Flower Fields® is the only working ranunculus field in the world which is open to the public. It has been an important part of Carlsbad's local heritage for over 60 years and attracts over 150,000 visitors annually.

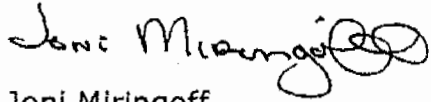
As like most agricultural operations in drought-stricken San Diego, we are heavily reliant on irrigation water to keep our fields watered and our flowers healthy. Without Metropolitan Water District's discounted agricultural program, many small family-owned farms wouldn't be able to afford to stay in business. Unfortunately, the drastic 30% cutback to our supplies, coupled with rising water rates, has made these past few years extremely difficult for the entire agricultural industry in San Diego County.

We are counting on the new water supplies from the Carlsbad Desalination Project and we eagerly await its planned 2012 opening. Unfortunately, despite the six years of permit hearings, there appears to be yet another delay on the horizon. The project opponents have cooked up another scheme to try to overturn the project's permits. This latest ploy involves attacking Poseidon's voluntary Energy Minimization and Greenhouse Gas Reduction Plan which was accepted by the Commission in 2008. The Surfrider Foundation and San Diego Coastkeeper were present at the hearing where the plan was discussed and already had the opportunity to present their case. The other party to this revocation request, Coastal Environmental Rights Foundation, was not in existence at the time of the project's approval and legally should not be a participant in this request.

The Commission made the right decision in 2008 and we are depending on you to do so again. There is no evidence the Energy Minimization and Greenhouse Gas Reduction Plan has changed and no reason to amend the Coastal Development Permit issued to this project. The project opponents have not demonstrated that Poseidon intentionally submitted invalid information to the Commission and, thus, have not met the basic requirements of a permit revocation.

On behalf of The Flower Fields® and hundreds of small farms in San Diego County, I offer our full endorsement of the Carlsbad Desalination Project and urge you deny the request to revoke its Coastal Development Permit.

Thank you,



Joni Miringoff
The Flower Fields®

cc:

*Vice Chair Mary Shallenberger
Commissioner William A. Burke
Commissioner Khatchik Achadjian
Commissioner Steve Blank
Commissioner Richard Bloom
Commissioner Ross Mirkarimi
Commissioner Brooks Firestone
Commissioner Steve Kram
Commissioner Patrick Kruer
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Commissioner Dale Bonner
Commissioner James Bourgart
Commissioner Gregg Albright
Governor Arnold Schwarzenegger
Speaker Karen Bass
Senate President Pro Tem Darrell Steinberg
Mr. Tom Luster
Mr. Peter Douglas*

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400
TDD (415) 597-5885



W6a

Filed:	December 8, 2009
Staff:	Tom Luster – SF
Staff Report:	January 28, 2010
Hearing Date:	February 10, 2010

STAFF REPORT: REQUEST FOR REVOCATION

APPLICATION NUMBER: R2-E-06-013

APPLICANT: Poseidon Resources (Channelside)
LLC/Cabrillo Power II LLC

PROJECT LOCATION: Site of Encina Power Plant, adjacent to Agua Hedionda Lagoon, in the City of Carlsbad, San Diego County.

PROJECT DESCRIPTION: Construct and operate a 50 million gallon per day seawater desalination facility.

PERSONS REQUESTING REVOCATION: Surfrider Foundation, San Diego Coastkeeper, and the Coastal Environmental Rights Foundation.

SUMMARY OF STAFF RECOMMENDATION

On November 15, 2007, the Commission granted to Poseidon Resources (Channelside) LLC (“Poseidon”) Coastal Development Permit (“CDP”) E-06-013 to construct and operate a seawater desalination facility on the site of the Encina Power Station, adjacent to Agua Hedionda Lagoon, in the City of Carlsbad. One of the Commission’s key concerns in its review of the project was the adverse coastal resource effects caused by project-related greenhouse gas (“GHG”) emissions. The Commission found that the electricity needed to operate the facility would produce a significant amount of GHG emissions that would adversely affect a number of coastal resources. However, Poseidon characterized its project as being “net carbon neutral”, and stated that it would fully mitigate for its project’s net GHG emissions. Poseidon offered a proposed *Climate Action Plan* in which the single largest mitigation measure, representing about two-thirds of its total net emission reductions, was that the project be automatically credited with a decrease in GHG emissions resulting from a one-for-one reduction in State Water Project (“SWP”) water imports to the region. Poseidon also asserted that if, despite the project’s water production, those water imports continued, those continued imports would be subject to review and mitigation through CEQA.

Commission approval of the project CDP required the facility to be “net carbon neutral” and required Poseidon to submit a plan for further Commission review and approval showing how it would meet that standard. The Commission later approved an *Energy Minimization and Greenhouse Gas Reduction Plan* (the “Plan”) that considered the comments of the California Air Resources Board and the State Lands Commission and that required Poseidon to implement various measures to ensure the project was “net carbon neutral”. In approving the Plan, the Commission required Poseidon to directly account for other emission reduction measures, but automatically credited Poseidon with these asserted reductions from reduced SWP imports.

The above-referenced Environmental Groups request that the Commission revoke Poseidon’s CDP, based primarily on a contention that Poseidon intentionally misrepresented that its project would be “net carbon neutral” and that the project would result in one-for-one emission reductions from the SWP. This revocation request focuses on whether Poseidon provided the Commission with complete and accurate information with respect to how its “net” GHG emissions should be calculated.

In investigating this revocation request, Commission staff learned that a 2005 MWD agreement included a provision prohibiting desalination projects from reducing MWD’s entitlements or usage of water imported from the SWP or any other sources. The Poseidon project is dependent on its customers obtaining a subsidy from MWD, and Poseidon knew that such subsidies would be subject to agreements modeled on the 2005 MWD Agreement, but it failed to provide such agreement to the Commission.

MWD’s allocation of SWP water is determined based on its rights to such water as laid out in a long-term contract with DWR, which is valid through 2035. As MWD explained in a January 20, 2010 letter, it anticipates continuing to take its full SWP entitlements and allotments for the foreseeable future, due to current water shortage conditions in Southern California. MWD also explained in this letter that it also seeks other sources of water – e.g., transfers, exchanges, and other “marginal” water supplies – and on a “long-term average basis”, the Poseidon project is likely to reduce its need to supplement its SWP allocation through these supplies. Thus, the Poseidon project will not reduce the amount of water MWD is entitled to or that it will take from its annual SWP allocation (which is the basis of Poseidon’s emission reduction measure), but it may, on an average, long-term basis, result in a reduction in MWD’s need for expanded transfers and exchanges. Poseidon failed to explain to the Commission that the water it produces will in fact only “displace” imported water if MWD is able to reduce its reliance on marginal water supplies that it obtains through the SWP. Poseidon’s representations to the Commission asserted that there would be a reliable, one-for-one reduction in water imported to Southern California through the SWP as the result of Poseidon’s project, but this does not appear to be the case.

In addition, given that MWD will continue to import its full allocation of SWP water, regardless of the impact of Poseidon’s project, and that it is entitled to such water under a long-term contract with DWR, it is not as clear as Poseidon claimed that water its project “displaces,” but continues to be imported into Southern California, will be subject to CEQA review. There is no evidence that the water MWD will continue to import to Southern California will be used solely for “new” or “expanded” uses, as Poseidon claimed, rather than fulfilling MWD’s existing obligations that it has not fulfilled due to the ongoing water shortage. As a result, and contrary to

Poseidon's claims, there is not clear evidence that CEQA will apply to require mitigation for the GHGs emitted by the "additional" 56,000 acre feet of water pumped into Southern California after Poseidon's project begins operations.

Nonetheless, Commission staff determined that the Commission's approval of Poseidon's proposed emission reduction measure also relied on letters of support from the agencies cited above, and that the Commission's decision would not have changed based on Poseidon providing complete or accurate information about the project's effects on SWP-related emissions or about the role of CEQA in reducing emissions. Although Commission staff concludes that Poseidon misrepresented or omitted material information related to its claimed reduction of imported water, staff also concludes that even if more accurate information had been provided to the Commission, it would not have required additional or different conditions on Poseidon's permit. Staff therefore recommends the Commission *deny* the revocation request.

EXHIBITS

EXHIBIT 1: Coastal Development Permit E-06-013.

EXHIBIT 2: December 8, 2009 Environmental Groups' Request for Revocation (without attachments).

EXHIBIT 3: January 13, 2010 Poseidon Response to Revocation Request (without attachments)

EXHIBIT 4: Letters of Support for Poseidon's GHG Approach

STAFF NOTE – REVOCATION REGULATIONS

The California Code of Regulations, Title 14, Division 5.5, Section 13105(a) states that the grounds for the revocation of a coastal development permit (or permit amendment) are as follows:¹

Grounds for revocation of a permit shall be:

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 deny an application;

The three elements of Section 13105(a) that must be satisfied before a permit can be revoked are:

- 1) That the applicant provided incomplete or false information; AND
- 2) That false or incomplete information was supplied intentionally; AND
- 3) That if the Commission had known of the information, it would have denied the permit or imposed different conditions.

¹ The Commission's regulations at Section 13105(b) provide additional grounds for revocation based on inadequate notice; however, the Environmental Groups do not request revocation based on these grounds. Section 13105(b) states: "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 (14 Cal. Code of Regulation Section 13105)."

Because of the impact on a permittee, the grounds for revocation are narrow, and are confined to information in existence at the time of the Commission's action. The rules of revocation do not allow the Commission to have second thoughts on a previously-issued permit based on information that comes into existence after the granting of a permit, no matter how compelling that information might be. Similarly, a violation of the Coastal Act or the terms and conditions of a permit, or an allegation that a violation has occurred, are not grounds for revocation.

Revocation of a permit removes a previously granted permit. Even if a permit is vested – i.e., the permittee has started construction of the project – if the Commission revokes the permit, the permittee is required to stop work and, if wishing to continue, to reapply for a new permit for the project. Section 13108 of these regulations establish that, if at a public hearing the Commission finds that grounds for revocation exist, it may revoke the permit.² It may also determine that additional investigation is necessary and continue the matter to a future hearing.³

TABLE OF CONTENTS

I. STAFF RECOMMENDATION.....	5
II. FINDINGS AND DECLARATIONS	6
A. Revocation Request.....	6
B. Project Approval Background.....	7
C. Analysis of Revocation Contentions	10
1. Grounds For Revocation #1: Did the Applicant Provide Incomplete or False Information?	13
2. Grounds for Revocation #2: Was the Inaccurate or Incomplete Information Supplied Intentionally?	20
3. Ground for Revocation #3: If the Commission Had Known of the Information, Would It Have Denied the Permit or Imposed Different Conditions?	22
D. Conclusion and Recommendation	22

² Section 13108(a) of these regulations state that the revocation request is to be heard at the next regularly scheduled meeting. Staff received the revocation request on December 8, 2009, and on December 14, 2009, both Poseidon and the Environmental Groups agreed to a February 2010 hearing.

³ Section 13108(c) states: "*The commission shall ordinarily vote on the request at the same meeting, but the vote may be postponed to a subsequent meeting if the commission wishes the executive director or the Attorney General to perform further investigation.*"

I. STAFF RECOMMENDATION

Staff recommends that the Commission determine that no grounds exist for revocation.

MOTION:

I move that the Commission grant revocation of Coastal Development Permit E-06-013.

The staff recommends a **NO** vote on the motion. Failure of this motion will result in denial of the request for revocation and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO DENY REVOCATION:

The Commission hereby denies the request for revocation of the Commission's decision on Coastal Development Permit E-06-013 on the grounds that:

- a) Although there was intentional inclusion of inaccurate, erroneous or incomplete information in connection with the subject coastal development permit application, the Commission finds that the accurate and complete information would not have caused the Commission to require additional or different conditions on the permit or deny the application.*
- b) There was no failure to comply with the notice provision of Section 13054 where the views of the person(s) not notified were not otherwise made known to the Commission and would have caused the Commission to require additional or different conditions on a permit or deny an application (14 Cal. Code of Regulations Section 13105).*

II. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares as follows:

A. REVOCATION REQUEST

On December 8, 2009, the Surfrider Foundation, San Diego Coastkeeper, and Coastal Environmental Rights Foundation (collectively “Environmental Groups” or “Groups”) filed with the Commission a joint request to revoke the Commission’s approval of CDP E-06-013. The Environmental Groups’ stated grounds for revocation are summarized below and are provided in full in Exhibit 2.⁴

The Environmental Groups contend that Poseidon intentionally withheld accurate and complete information from the Commission and that the Commission would have placed different conditions on the CDP or denied the application had Poseidon disclosed accurate and complete information. The Environmental Groups’ specific contention is that Poseidon asserted to the Commission that its project should be credited for greenhouse gas (“GHG”) emission reductions from reducing State Water Project (“SWP”) water imports while not disclosing to the Commission that a 2005 agreement from the Metropolitan Water District (“MWD”) showed that a project such as Poseidon’s would be prohibited from interfering with MWD’s ability to import water from the SWP or other sources. The Groups contend that had Poseidon disclosed this agreement (“MWD Agreement”) to the Commission, the Commission would have likely placed different conditions on the CDP or denied the permit.

In a January 13, 2010 letter (see Exhibit 3), Poseidon responds to the Environmental Groups’ contention.⁵ Poseidon does not dispute that it did not provide the MWD Agreement to the Commission, but contends that the Environmental Groups’ revocation request meets none of the three tests of Section 13105(a). Poseidon claims that the Commission was “fully aware” that the MWD would not relinquish its ability to import available water, and that Poseidon’s proposed approach, adopted by the Commission, was consistent with CEQA principles, given that any continued imports that may occur would be subject to CEQA review and mitigation. Thus, Poseidon claims that if it were required to mitigate for its GHG emissions without obtaining credit for reduced emissions from the imported water its project would replace, that there would be “double mitigation” for such “replaced” water, given that both Poseidon and any new or expanded user would be required to mitigate for its impacts.

⁴ In its January 13, 2010 response to the revocation request, Poseidon claims that the Coastal Environmental Rights Foundation is not a proper party to the revocation request and should be removed as a party from the revocation proceeding under Section 13106 of the Commission’s regulations. Since the revocation request was also submitted by the Surfrider Foundation and the San Diego Coastkeeper, who each raise the same contentions as the Coastal Environmental Rights Foundation, these contentions are validly before the Commission.

⁵ Poseidon also provided a January 7, 2010 letter in response to Commission staff’s request that Poseidon submit a CDP amendment application to address this GHG mitigation issue. Many of the two letters’ contentions and responses are similar, and Poseidon’s January 13 letter incorporates the January 7 letter by reference.

B. PROJECT APPROVAL BACKGROUND

COMMISSION REVIEW

CDP Approval: On November 15, 2007, the Commission granted to Poseidon Resources (Channelside) LLC (“Poseidon”) Coastal Development Permit (“CDP”) E-06-013 to construct and operate a seawater desalination facility on the site of the Encina Power Station, adjacent to Agua Hedionda Lagoon, in the City of Carlsbad.

One of the Commission’s key concerns in its review of the project was the adverse coastal resource effects caused by project-related GHG emissions. Seawater desalination is a relatively energy intensive source of water,⁶ and the electricity needed to produce desalinated water can produce significant amounts of GHG. The Commission found that the electricity needed to operate the facility would produce from about 60,000 to 90,000 tonnes (or about 130 million to 200 million pounds) of GHG emissions annually⁷ and that those emissions would adversely affect a number of coastal resources. However, Poseidon characterized its project as being “net carbon neutral”, and stated that it would fully mitigate for the net GHG emissions resulting from the facility’s operations.⁸ In October 2007, Poseidon offered a proposed *Climate Action Plan* in which the single largest proposed mitigation measure, representing about two-thirds of its total mitigation, was Poseidon’s proposal that its project be credited with the decrease in GHG emissions resulting from a one-for-one reduction in SWP water imports to the region.⁹

⁶ See, for example, California Sustainability Alliance, *The Role of Recycled Water in Energy Efficiency and Greenhouse Gas Reduction*, produced for the California Public Utilities Commission, May 2, 2008.

⁷ See Commission Final Adopted Findings, page 3. This amount is expected to change each year, and presumably decline, as existing power sources are replaced with sources that emit fewer or no GHG emissions.

⁸ “Net carbon neutral” generally refers to a broader range of emissions and mitigation measures than are addressed in Poseidon’s Plan and usually includes both direct and indirect emissions resulting from a project. However, the vast majority of this project’s emissions are the indirect emissions resulting from Poseidon’s use of electricity generated and purchased to operate the facility. For purposes of the Commission’s review – in these Recommended Findings, in its Final Adopted Findings for the project CDP, and in its approval of Poseidon’s Plan – “net carbon neutral” refers only to those indirect emissions and to the mitigation measures meant to “zero out” those emissions.

⁹ The plan stated that Poseidon’s expected production of 56,000 acre-feet of water each year would use about 250,000 megawatt-hours of electricity, which would produce about 61,000 tonnes of annual GHG emissions. Poseidon asserted that it should receive credit for reducing SWP imports by the same 56,000 acre-feet of water each year, which would reduce SWP electricity use and its GHG emissions by about 47,200 tonnes. Poseidon proposed to offset the net remaining 13,800 tonnes of emissions through other measures, including purchasing renewable energy credits, providing carbon sequestration through reforestation, etc.

The expected GHG emissions are based in part on the average “emission rate” of the generating sources used by the electricity provider. For example, electricity generated by a natural gas-powered facility generally has a lower GHG emission rate than a coal-powered facility – roughly several hundred pounds of emissions per megawatt-hour versus two thousand pounds per megawatt-hour. Renewable energy sources generally have an emission rate at or close to zero. A provider’s average emission rate changes as its generating sources change – for example, through new technology or by using a different mix of sources due to plant shutdowns, seasonal differences, etc. Annual emission rates for various providers are certified by the California Climate Action Registry. At the time of the Commission’s review, Poseidon’s provider, San Diego Gas & Electric, had an average emission rate of about 780 pounds per megawatt-hour and the SWP’s rate was somewhat lower.

In approving the project CDP, the Commission found that project-related GHG emissions adversely affected a number of coastal resources. As stated in the Commission's Final Adopted Findings (at page 75):

“The global heating, sea level rise, and ocean acidification resulting from greenhouse gas emissions affects public access (Coastal Act Sections 30210-30214), recreation (Sections 30212.5, 30213, 30220-30222), marine resources (Sections 30230-30231), wetlands (Sections 30231, 30233), ESHA (Section 30240), agriculture (Sections 30241-30242), natural land forms (30251), and existing development (Sections 30235, 30253).”

The Commission also found in approving the project that the project would be inconsistent with Coastal Act Section 30233(c) due to its effects on wetlands, but that this inconsistency could be “overridden” through application of Coastal Act Section 30260 because the project was a coastal-dependent industrial facility. One of the tests of that section requires the Commission to determine that the project's adverse environmental effects are mitigated to the maximum extent feasible. As stated in its Findings, the Commission concluded that the project met this test in part due to the requirement that Poseidon “submit to and obtain from the Commission approval of a revised Energy Minimization and Greenhouse Gas Reduction Plan that results in reduction in electrical use and reduction or offset of greenhouse gas emissions associated with the project's operations to the maximum extent feasible through Poseidon's agreement that the project will be net carbon neutral.”

To bring the project into conformity with the Chapter 3 policies of the Coastal Act, the Commission required Poseidon to meet 17 Special Conditions included in the CDP (see Exhibit 1). The Commission did not accept Poseidon's proposed *Climate Action Plan* but instead required through **Special Condition 10**¹⁰ that Poseidon submit for additional Commission review and approval an *Energy Minimization and Greenhouse Gas Reduction Plan* (the “Plan”) that was to include measures to ensure the facility operations would be “net carbon neutral”. As stated in the Findings (at pages 89-90):

“Poseidon's revised plan shall establish that the project will avoid, minimize, or mitigate adverse impacts to a wide range of coastal resources, including public access, recreation, marine resources, wetlands, ESHA, agriculture, natural land forms, and existing development associated with its minimized and mitigated energy consumption. Based on the above, the Commission finds that the project, as conditioned, will conform to Coastal Act provisions related to minimizing energy use and mitigating any adverse effects on coastal resources from greenhouse gas emissions.”

¹⁰ **Special Condition 10** states:

***Energy Minimization and Greenhouse Gas Reduction Plan:** PRIOR TO ISSUANCE OF THE PERMIT, the Permittee shall submit to the Commission a Revised Energy Minimization and Greenhouse Gas Reduction Plan that addresses comments submitted by the staffs of the Coastal Commission, State Lands Commission and the California Air Resources Board. The permit shall not be issued until the Commission has approved a Revised Energy Minimization and Greenhouse Gas Reduction Plan after a public hearing.*

Approval of Energy Minimization and Greenhouse Gas Reduction Plan: On August 6, 2008, pursuant to the Final Adopted Findings and **Special Condition 10** of the CDP, the Commission approved Poseidon's *Energy Minimization and Greenhouse Gas Reduction Plan*. A key component of the Plan, and the measure that accounted for the majority of project-related emission reductions, was Poseidon's proposal that its project be "automatically" credited with a decrease in GHG emissions resulting from the SWP reducing its water imports to the region. Poseidon asserted that it should receive credit for reducing MWD's imports from the SWP by the same amount of water Poseidon produced each year, which would thereby reduce SWP's electricity use and its GHG emissions.

In approving the Plan, the Commission accepted Poseidon's characterization that the SWP reduction was a "project-related measure" that should not be subject to independent review.¹¹ The Commission's Findings state, at pages 11-12, that "[t]he Commission is satisfied that these project-related measures will reduce the GHG emissions attributable to the project and that they therefore should be included in the calculations used to determine the project's net GHG emissions." The Findings also acknowledge letters supporting this approach from the Chair of the California Air Resources Board and the Chair of the State Lands Commission, pursuant to **Special Condition 10**, as well as letters from the Executive Director of the California Energy Commission and the General Manager of the MWD (see Exhibit 4).

As part of Plan approval, the Commission required Poseidon to submit an annual report that provides a direct accounting of other emission reduction measures, though not the SWP-related measure. For this SWP measure, the Plan assumes the reductions will occur. Poseidon's emission reduction "credit" will be based each year on the amount of water the project produces and the emissions associated with that production as compared to the emissions caused by the SWP pumping an equal amount of water from Northern California to the MWD service area. At the time of the Commission's review, this "credit" would have represented about 47,000 tonnes of GHG emissions, or about two-thirds of Poseidon's expected emissions.

MWD APPROVAL OF SUBSIDY FOR POSEIDON

On November 10, 2009, the MWD approved a contract with member agencies that have agreed to purchase water from Poseidon's project. The contract, based on MWD's Seawater Desalination Program, provides a subsidy of up to \$250 per acre-foot for purchase of Poseidon's water. It also includes a provision meant to protect MWD's ability to import water, consistent with the 2005 MWD Agreement. This November 2009 MWD contract approval brought to light the 2005 Agreement and its provision allowing MWD to terminate the subsidy if the project impaired MWD's ability to import or use its full water entitlement. This raised Commission staff concern that the project would no longer be "net carbon neutral" and would not adequately mitigate its GHG emissions. On November 13, 2009 Commission staff requested Poseidon address this project change by submitting an application to amend its CDP, but Poseidon declined. On December 8, 2009, the Environmental Groups filed their revocation request.

¹¹ The Commission's Adopted Findings at pages 3-4 state that "project-related measures identified in the Plan are used to calculate the project's net GHG emissions and therefore are not subject to the CARB, CCAR, or Air District requirements for offsetting the net GHG emissions."

C. ANALYSIS OF REVOCATION CONTENTIONS

The revocation contention states Poseidon's assertion that the project would be "net carbon neutral", which was based largely on GHG emission reductions from reduced SWP imports, was an intentional misrepresentation. In support of this assertion, the Environmental Groups point to the undisclosed 2005 MWD Agreement that allows MWD to terminate the Agreement if its entitlements or usage of imported water supplies are reduced due to the production of desalinated water. Poseidon relied on its customers' ability to obtain similar agreements from MWD for its project to be economically viable. Thus, the 2005 Agreement explicitly ensures that MWD's full entitlement to imported water will be maintained, regardless of the new water produced through a desalination project. This Agreement was part of an MWD program on which Poseidon was relying during the Commission's review. This 2005 Agreement came to light in November 2009 when the MWD approved a contract providing a subsidy of up to \$250 per acre-foot for water from Poseidon's project. The contract was between the MWD and several of its member agencies and provided the subsidy to those agencies towards the cost of Poseidon's water. This subsidy is part of the MWD's Seawater Desalination Program, which it established in 2004 to provide incentives for local water supplies.

Recent letters from the MWD and the San Diego County Water Authority (SDCWA) provide some clarification as to the role of the MWD Agreement and Poseidon's project. A December 17, 2009 letter from MWD confirms that the above-referenced 2005 MWD Agreement includes the provision prohibiting covered projects from reducing MWD's ability to import water, and states that the provision's "sole purpose is to protect Metropolitan's imported water supply rights and entitlements", including those provided through its contract for SWP water supplies. A January 20, 2010 MWD/SDCWA letter states:

"As MWD described in a prior communication, MWD's SDP agreement with the Water Authority and their local retail agencies includes a provision protecting MWD's imported water rights and entitlements. Given current shortage conditions, we expect MWD to take its full SWP and Colorado River rights and entitlements for the foreseeable future. However, MWD supplements its SWP Table A entitlement by pursuing transfers, exchanges, and other marginal supplies also transported through the SWP delivery system. It is the demand for these additional supplies that is likely to be offset by the project."

It appears, therefore, that while Poseidon's project will not automatically reduce SWP imports and thereby reduce emissions, MWD believes that it is likely to reduce MWD's need for transfers or exchanges, on a long-term, average basis, thereby potentially resulting in reduced emissions. Whether emission reductions occur will depend in part on the relative costs of those sources compared to the cost of Poseidon's water, the location of those sources and the amount of electricity needed (and GHG emissions generated) to deliver them to the MWD, the availability of storage for MWD supplies, and other factors.

The record before the Commission shows that Poseidon consistently characterized its project as being “net carbon neutral”, due largely to crediting the project with emission reductions from reduced SWP imports. This was the largest of Poseidon’s proposed and approved mitigation measures, representing about two-thirds of its expected “net” emission reductions. Regarding the MWD Agreement, Poseidon deliberately chose not to provide it to the Commission, despite Staff’s request that Poseidon document its asserted emission reductions,¹² and Commission questions about Poseidon’s assertion that it should “automatically” receive credit for the reductions.¹³ Poseidon also did not disclose to the Commission that the MWD Agreement allowed MWD to terminate its subsidy if its project caused MWD to reduce its imports or usage from the SWP or other water sources.

Further, Poseidon did not fully describe to the Commission that MWD would continue to have its full allocation of SWP water to which it is entitled under a long-term contract with the Department of Water Resources (“DWR”), regardless of the amount of water produced by Poseidon. It failed to explain to the Commission that any reduction in MWD’s demand for imported water would result from MWD’s possible reduced demand for “marginal” sources of imported water, such as water exchanges, transfers, purchases, etc., instead of a one-for-one reduction in its use of its SWP allocation. As stated in the January 20, 2010 MWD/SDCWA letter, these agencies believe that the Poseidon project will allow it to reduce its need for such marginal imports “on a long-term average basis.” Therefore, while MWD believes that the Poseidon project is likely to result in a reduction of the volume of water imported into Southern California, such reductions will not be in a consistent, one-for-one manner, as Poseidon represented to the Commission.

¹² Commission staff requested at a June 2008 meeting that Poseidon document its proposed emission reductions and Poseidon offered to provide this MWD Agreement. At the time of the Commission’s review, there were five MWD agreements in place with different member agencies, each with identical provisions prohibiting projects from limiting MWD’s right to imported water. A July 11, 2008 memo from Commission staff memorializing the meeting showed Poseidon initially offered an agreement (referred to in the memo as an MWD Contract). Poseidon later modified to memo to change its offer to more general documentation, which did not include the MWD Agreement or the provision.

The relevant portion of the memo is shown below, with Commission staff’s original language in regular text and Poseidon’s changes in strikethrough and underline.

From July 11, 2008 memo to Peter MacLaggan from Tom Luster:

“Page 15, Avoided Emissions from Displaced Imported Water:

Commission staff: As currently proposed, any emissions reductions that may occur from this element of the Plan cannot be verified. Staff recommends that Poseidon provide verification from the Metropolitan Water District of Southern California (MWD) or other sources showing this measure would meet the AB 32 criteria.

Poseidon: Will provide staff with ~~MWD’s Contract with Long Beach to provide an example of available verification data~~documentation from MWD demonstrating that the water produced by the Project would replace an existing demand or prevent a new demand on MWD with respect to Poseidon’s customers.”

¹³ See August 6, 2008 Commission hearing transcript, pages 226-29.

Poseidon also asserted to the Commission that even if the water its project “displaced” continued to be pumped into Southern California, it would only be for “new or expanded” uses, so those uses would be subject to CEQA procedures and required to mitigate for GHGs produced by importation of such water. Given that MWD is entitled to continue to import its full allocation of SWP water, regardless of how much water is produced by the Poseidon project, it is unclear that CEQA would, in fact, apply to MWD’s continued distribution of such water to its existing customers. Despite what it represented to the Commission, it is speculation on Poseidon’s part that such water would be used solely for new or expanded uses that would be subject to CEQA.

APPLYING THE THREE-PART TEST OF SECTION 13105(A)

Commission staff reviewed the record available to the Commission during its November 2007 review and approval of Poseidon’s CDP and its August 2008 review and approval of Poseidon’s *Energy Minimization and Greenhouse Gas Reduction Plan*. Poseidon’s characterization of relevant project components during those Commission’s reviews are applied to Section 13105(a)’s three-part test and summarized below, followed by a more detailed analysis:

- **Ground for Revocation #1 – Did the applicant provide incomplete or false information?:** Poseidon did not disclose to the Commission the full nature of MWD’s rights to SWP water allocations or that the Poseidon project’s claimed reductions in imported water are not expected to be on an automatic, one-for-one basis. Poseidon also did not disclose the MWD Agreement, although Poseidon was relying on its customers’ ability to obtain substantially similar agreements from MWD. Thus Poseidon did not inform that Commission that this agreement allows MWD to terminate its subsidy if Poseidon’s project causes MWD to lose its entitlements to, or reduce its usage of, water imported from the SWP or any other source. The Agreement shows that MWD would maintain its full imported water entitlements and allotments, but Poseidon still described as “speculative” whether imports would continue. Rather than providing the Commission with the MWD Agreement, Poseidon provided other information that did not clearly show MWD’s intent to maintain its full entitlement and usage of imported water.
- **Ground for Revocation #2 – Was the inaccurate or incomplete information supplied intentionally?:** Despite questions and discussion by the Commission, staff, and the public about how and whether the project would actually reduce SWP imports, Poseidon did not disclose the above-referenced MWD Agreement or that MWD would to continue to have its full allocation of SWP water so that any reductions in imported water would not necessarily take place on an automatic, one-for-one basis. When Commission staff requested that Poseidon document its expected emission reductions, Poseidon initially agreed to provide the MWD Agreement; however, Poseidon later provided only more general documentation from MWD that did not include the MWD Agreement. When asked by the Commission about “automatically” crediting Poseidon’s project with the SWP reductions, Poseidon did not disclose that those reductions were unlikely to take place on a yearly, one-for-one basis. These nondisclosures appear to be intentional. With regards to Poseidon’s CEQA assertions, it is unclear from the record whether Poseidon intentionally mischaracterized the role of CEQA processes in determining whether emissions from continued SWP imports would be subject to separate review and mitigation.

- **Ground for Revocation #3 – If the Commission had known of the information, would it have denied the permit or imposed different conditions?:** As shown in its Final Adopted Findings, the Commission based its project approval in part on requiring the facility to be “net carbon neutral”. The Commission required Poseidon to directly account for other GHG emission reduction measures, but not the purported SWP-related reductions, and without those reductions, the project will not be “net carbon neutral”. In approving Poseidon’s Plan, the Commission relied on Poseidon’s above-referenced characterizations of the expected SWP reductions and on Poseidon’s CEQA-related assertions, and also relied on the letters of support from the other involved agencies. Had the Commission fully understood MWD’s water allocation entitlements and process for water importation and distribution, on which Poseidon was relying, the Commission could have either imposed different conditions or denied the project. However, the Commission also relied on the aforementioned support from other involved agencies, which was a specific requirement of **Special Condition 10**, and served as the basis for the Commission’s decision. Therefore, complete or accurate information about the SWP emission reductions would likely not have altered the Commission’s reliance on those letters and its resulting decision.

The application of the three Section 13105(a) tests is provided in more detail below.

1. GROUNDS FOR REVOCATION #1: DID THE APPLICANT PROVIDE INCOMPLETE OR FALSE INFORMATION?

As noted above, one of the key issues during Commission consideration of the CDP was whether project-related GHG emissions would result in adverse effects to coastal resources and be inconsistent with Coastal Act policies. Poseidon characterized its project operations as “net carbon neutral”, based largely on its contention that the project would reduce, on a one-for-one basis, SWP water pumping to the region, which would thereby reduce the SWP’s GHG emissions. Poseidon also described several CEQA-related provisions that would apply, should the “displaced” water continue to be imported. Poseidon submitted several documents in support of its contention, which the Commission cited in its Findings.¹⁴

¹⁴ The Commission’s Final Adopted Findings, at page 85, refer to several of these documents in support of the Commission’s decision to approve the project:

“In its October 21, 2007 memorandum, Exhibit D to its November 9, 2007 letter to the Commission, and in its presentation to the Commission at the November 15, 2007 hearing, Poseidon presented its proposal to offset or reduce the proposed project’s energy use and greenhouse gas production so that the facility’s operations would be net carbon neutral. Poseidon states that it will develop a Climate Action Plan that (1) would ensure the project minimizes energy consumption in compliance with Coastal Act Section 30253(4), and (2) would render the project net carbon neutral.”

POSEIDON’S CHARACTERIZATIONS REGARDING SWP EMISSION REDUCTIONS

Poseidon’s relevant characterizations about reducing SWP emissions included those provided below:

November 2007 Commission CDP Hearing:

- **Poseidon’s November 2007 proposed *Climate Action Plan*:** Prior to the Commission’s CDP hearing, Poseidon submitted a November 2007 proposed *Climate Action Plan* that included mitigation measures it stated would result in “net carbon neutral” project operations. This proposed plan stated, at page 4:

*“One major source of carbon reductions results from the fact that the Project is introducing a new, local source of water into the San Diego area; water that will displace imported water from the State Water Project (SWP) – a system with its own significant energy load and related carbon emissions. **For every acre-foot of SWP water that is replaced by water from the proposed project, 3.4 MWh of energy use is avoided, along with associated carbon emissions.**”* [emphasis added.]

- **Poseidon’s November 9, 2007 *Response to Staff Report*:** Before the Commission’s CDP hearing, Poseidon provided its *Response to Staff Report*, which stated, at page 52:

“The Carlsbad facility will supply 56,000 acre-feet of water per year to the San Diego region, water that would otherwise have to be pumped into the region through either the State Water Project or the Colorado River Aqueduct.”

Exhibit B of that letter included Poseidon’s responses to specific sections of the staff report, and provided Poseidon’s further assurances that its project would decrease imported water supplies to the region. At page 52 of that document, Poseidon responded to a statement by Commission staff that “Poseidon’s project does not ensure a decrease in imported water supplies to the San Diego Region” by stating:

*“This is not correct. The Carlsbad facility will supply 56,000 acre-feet of water per year to the San Diego region, water that would otherwise have to be pumped into the region through either the State Water Project or the Colorado River Aqueduct. As stated by all Carlsbad desalination project water agency partners in letters to the State Lands Commission dated November 6 and November 7, 2007, that were provided to the Coastal Commission, **water from the desalination plant will provide direct, one-for-one replacement of imported water** to meet the requirements of their Urban Water Management Plans, thus eliminating the need to pump 56,000 acre feet of water into the region. See Poseidon Resources Corporation. Letter to Paul Thayer Re: Desalination Project's Impact on Imported Water Use, November 8, 2007. including attachments from eight water agencies. Conversely, if the project is not approved the demand for imported water by the eight public water agencies will increase by 56,000 AF/Y starting in 2010.”* [emphasis added.]

- **Poseidon’s November 15, 2007 Handout to the Commission:** A handout Poseidon provided to the Commission at the CDP hearing stated, on pages 29 and 30:

“Measuring Energy Use: The project will supply 56,000 AFY that would otherwise have to be pumped from California State Water Project (SWP) – energy savings 3.4 mWh/AF” [emphasis added.]

“ Measuring the Carbon Footprint: ...The project will supply 56,000 AFY that would otherwise have to be pumped from California State Water Project (SWP) – with corresponding reduction in carbon emissions of 47,240 metric tons of CO₂ per year.” [emphasis added.]

August 2008 Commission Hearing on Energy Minimization and Greenhouse Gas

Reduction Plan: Poseidon later provided similar documentation and testimony for the August 2008 Commission review and approval of Poseidon’s proposed Plan, including:

- **Poseidon’s July 3, 2008 letter to the Commission:** In preparing for the August 2008 hearing at which the Commission would consider the proposed plan, Poseidon stated in a letter to the Commission that its proposed Plan “ensures that all net indirect Greenhouse Gas (“GHG”) emissions from the Project will be offset” and that “The Plan Appropriately Credits Avoided Carbon Emissions from the 56,000 Acre-Feet That Will No Longer Be Imported to the San Diego Region.” The letter also stated, “[w]hen the Project is built, it will result in an increase in energy use due to the electricity that will be purchased from SDG&E to operate the desalination facility, and a decrease in energy use because the Project’s water will replace water that would otherwise have been imported from the SWP to the Project’s customers”, and “if all indirect GHG emissions from the Project are zeroed out by its avoided emissions and carbon offsets, the Project will not increase net GHG emissions relative to existing conditions and there will be no adverse impact.”
- **Poseidon’s July 2008 proposed plan:** In this proposed plan, which accompanied the above letter, Poseidon based its proposed emission reduction on fully replacing the pumping needed to move imported water from Northern California to the MWD service area. The plan states, at pages 13-14:

“Avoided Emissions from Displaced Imported Water: Another source of Avoided Emissions will result from the Project’s introduction of a new, local source of water into the San Diego area; water that will displace imported water now delivered to Customers from the State Water Project (SWP) – a system with its own significant energy load and related carbon emissions... The proposed Project will supply 56,000 acre-feet of water per year to the San Diego region. The Project will provide direct, one-to-one replacement of imported water to meet the requirements of the participating water agencies, thus eliminating the need to pump 56,000 acre feet of water into the region.” [emphasis added.]

- **Poseidon Testimony at August 2008 hearing:** At the hearing, Poseidon referred to another MWD letter of July 29, 2008 and stated (see August 6, 2008 hearing transcript, pages 91-92):

“[t]he replacement of the imported water is not only reasonably anticipated, but it has been confirmed by MWD – and here is the language in their letter. They have committed to provide Poseidon’s customers – the water district – with a financial incentive. Receipt of that financial incentive requires the water district to demonstrate that they are replacing an equivalent amount of water from MWD. MWD’s program will also verify and audit to insure that the water is replaced.”

The cited letter also states:

“Metropolitan believes it is appropriate for the Project’s GHG Plan to be based on offsetting net carbon emissions because San Diego County will use 56,000 acre-feet per year less imported water upon Project start up. By net, we mean the difference in energy related emissions required for moving water through the State Water Project compared to operating the seawater desalination project.”

At the hearing, and in response to questions about whether the Commission should require in the Plan that Poseidon account for the SWP-related emission reductions, Poseidon requested the Commission adopt its proposed approach that would “automatically reduce” water foregone from the SWP as part of its emission reductions (see August 6, 2008 hearing transcript, page 228).

POSEIDON’S NONDISCLOSURE OF THE MWD’S AGREEMENTS

During the Commission’s review of both the CDP and Plan, Poseidon did not fully describe the MWD’s process or entitlements for importing water to Southern California or the 2005 MWD Agreement, and did not explain how MWD obtains water through the SWP or that MWD’s long-term contract with DWR establishes how much water MWD is able to import. That contract provides MWD with a water “entitlement”, or maximum annual amount of SWP water, and an “allotment”, which is the amount MWD is to receive each year (through 2035) based on water availability. These aspects of MWD’s deliveries are not affected by Poseidon’s project. As explained in the January 20, 2010 MWD/SDCWA letter to the Commission, MWD expects to continue taking the full allocation of water to which it is entitled under its contract with DWR. Poseidon failed to disclose to the Commission that MWD would continue to be supplied with its full allocation of SWP water and that any reduction in imported water would only come through possible reductions in MWD’s demand for “marginal” water sources.

Poseidon also failed to disclose the 2005 MWD Agreement or its provision that allows MWD to terminate its subsidy if the project limits MWD’s entitlements to import or use water from the SWP or other sources. This Agreement includes the following provision:

“The Parties agree that this Agreement shall terminate forthwith if Metropolitan reasonably determines that as a result of Water Authority’s or LRA’s action or support, Metropolitan is required by any statute or administrative order, court, or other entity to

reduce, defer, or exchange entitlement to or reduce usage of Colorado River water, State Water Project water, or other water supplies Contracted for by Metropolitan as a result of expected or actual production of the Desalinated Seawater by the Project.”

The MWD Agreement also defined water that would be eligible for the subsidy – i.e., the “eligible yield” – as water that would “augment” (not replace) imported water. Section 1.4 of the MWD Agreement states:

*“‘Eligible Yield’ shall mean the amount of Desalinated Seawater actually delivered to an LRA’s or Water Authority’s local potable water distribution system from the Project in a Fiscal Year, **excluding any Desalinated Seawater that Metropolitan reasonably determines will not augment water supply available to Metropolitan’s service area, including Metropolitan’s imported water.**”* (emphasis added)

The MWD Agreement therefore specifies that in order for a project to be eligible for the subsidy, it must augment MWD’s imported water supplies and not cause a reduction in those supplies.¹⁵

Although Poseidon states in its January 13, 2010 response to the revocation request that it provided “complete and accurate information regarding MWD’s continuing right to use its imported water entitlements after the Project commences operations”, Commission staff’s review shows that none of the cited documents provide this MWD Agreement’s unequivocal statement that MWD could terminate the subsidy if the project caused MWD to reduce its entitlement or usage of imported water. This provision, in conjunction with a full understanding of MWD’s intention to maintain its full water entitlements and allotments, would have been important considerations for the Commission to determine whether Poseidon’s project should automatically receive credit for reducing SWP-related emissions. Disclosure would have also clarified several other elements of Poseidon’s proposed approach. For example, although the above-referenced July 2008 MWD letter seems to suggest MWD would be reducing its SWP imports due to the project, disclosure of this MWD Agreement provision would have shown that the project would not necessarily reduce those imports. Moreover, MWD itself states that water produced by the Poseidon project is only likely to reduce marginal water imports and that such reductions will only be on an average, long-term basis.

Poseidon also states in its January 17, 2010 response to the “incomplete information” contention that the MWD agreements have “consistently required” MWD’s imported water entitlements not be relinquished. While it is correct that this has been a consistent requirement of these agreements, Poseidon did not provide the Commission with those agreements, which resulted in the Commission acting on Poseidon’s project based on incomplete information.

¹⁵ The November 2009 MWD Contract, which is based on the 2005 Agreement, also describes how it will calculate the “reasonable costs” costs for which the subsidy can be awarded. They include a project’s costs for mitigation and may also include a project’s “net electrical energy” costs, which are defined as costs of energy purchases minus costs of energy recovered; however, they do not specify any SWP-related electricity reductions.

POSEIDON’S ADDITIONAL CEQA-RELATED CHARACTERIZATIONS OF ITS EXPECTED CREDITS FOR EMISSION REDUCTIONS

Along with the its characterizations that the project would reduce SWP pumping and emissions and would be “net carbon neutral” due to those reductions, Poseidon offered several additional explanations in support of its expected credits for those reduced emissions, based largely on contentions related to CEQA principles or procedures. For example, Poseidon asserted that it would be “speculative” to assume the same amount of imported water would continue to be delivered from the SWP to MWD, and that if water that was supposedly displaced by the Poseidon project was still delivered to Southern California, any necessary GHG mitigation would be identified through CEQA review and would be the responsibility of users of that water. Poseidon further described its proposal as appropriate under a CEQA baseline approach, which recognized the need to account for “net” rather than “gross” emissions. These characterizations, however, generally do not accurately describe the role of CEQA on the purported SWP import reductions.

Regarding “speculative” deliveries, for example, Poseidon stated in its July 3, 2008 letter to the Commission:

“It is speculative to predict whether some or all of the replaced water would still be imported to the San Diego region after implementation of the Project. However, even assuming the replaced water does continue to be imported into the region, the question before the Commission is whether it has the authority under California law to require Poseidon to mitigate the GHG emissions associated with those water imports for uses separate and entirely unrelated to the Project or whether the purchasers of that water should be responsible for mitigating those emissions.”

Regarding mitigation by other users, for example, Poseidon stated at the August 2008 hearing, (see August 6, 2008 hearing transcript, pages 92-93):

“If water continues to be pumped to Southern California from the state water project, it would be for new or expanded uses. Those new uses would be required under CEQA to address the impacts of importing the new water... According to staff’s proposal, Poseidon would need to offset carbon emissions associated with imported water it is replacing, but since only new or expanded projects would be using this imported water, and those projects are required to mitigate the carbon impacts under CEQA, staff’s proposal would result in double mitigation for the same impacts.”¹⁶

¹⁶ Poseidon similarly stated in its November 9, 2007 letter to the Commission:

“If the replaced water is pumped into the region for other uses, then the associated carbon emissions from such pumping should be and is the responsibility of those other uses. Any other result would be an unfair and unwarranted ‘double counting’ of carbon emissions, requiring Poseidon to offset emissions caused by other activities not associated with their operations.”

At the August 2008 hearing, Poseidon also cited CEQA in responding to public comments that MWD had not confirmed a reduction of pumping from the SWP.¹⁷ Poseidon stated (on pages 165-66 of the transcript):

“What we have said is that Poseidon’s customers, the water districts, have agreed to replace the water, and therefore that the water that is replaced, where that goes is speculative, but wherever it goes, CEQA will apply to require those people to mitigate it... In addition, this Commission determined that the project was not growth inducing. That was part of your findings. The requirement that Poseidon be assigned the mitigation for the replaced water is just not consistent with the determination that you have already made that the project is not growth inducing.”

Poseidon also characterized its “net” emissions approach as being based on a CEQA baseline approach requiring mitigation for “net” rather than “gross” emissions,¹⁸ and stated that this approach “is consistent with CEQA in that it does not require MWD to relinquish water entitlements in the amount of water the Project replaces, and instead places the obligation of providing mitigation for emissions associated with importing the replacement water into other parts of MWD’s service territory on hypothetical future users of that water.” Poseidon also stated in its August 2, 2008 letter to the Commission:

“When the Project is built, it will result in an increase in energy use due to the electricity that will be purchased from SDG&E to operate the desalination facility, and a decrease in energy use because the Project’s water will replace water that would otherwise have been imported to the Project’s customers. Under CEQA principles, the Project’s impact should be assessed by considering the net contribution of GHG emissions relative to the existing baseline, factoring in both increases and decreases in energy use the Project will cause.”

As noted previously, there does not appear to be support in the record for Poseidon’s assertions that it was speculative to assume that the volume of water MWD imported into Southern California would be directly reduced, on a one-for-one basis, due to Poseidon’s project.

¹⁷ For example, from the August 6, 2008 hearing transcript, public comment from Mr. Jonas Minton, pages 96-97:

“You have received a letter from the Metropolitan Water District indicating that they consider that the water supply from the Carlsbad project to be an offset. But, a very careful reading of that letter does not indicate that they will reduce their pumping of water all the way from northern California to Southern California. This is the one very important reason: San Diego is not their only customer. Even if San Diego did not take the water, Metropolitan is required by its act, its organic act, to provide water supplies to its other customers in Southern California...”

¹⁸ Regarding “net” versus “gross”, Poseidon has mischaracterized the difference between its proposed approach and Commission staff’s approach as “net” versus “gross” – that is, a “net” approach that accounts for both the increase and decrease in emissions caused by the project as opposed to a “gross” accounting for just the increase. It appears, however, that all parties supported the “net” approach. Poseidon’s approach differed from Commission staff’s primarily by how it accounted for the “net emissions – i.e., Poseidon asserted it should “automatically” receive emission offsets from SWP reductions, whereas Commission staff recommended the Commission require Poseidon to document those reductions in determining its “net” emissions, due largely to the uncertainty about whether those reductions would occur.

Poseidon did not disclose to the Commission the provision of the MWD Agreement that allows MWD to terminate its subsidy if the desalination project results in a reduction of MWD's entitlements or usage of SWP water. This provision shows that MWD anticipates that continued imports are likely and that emission reductions are therefore unlikely. MWD recently stated in its January 2010 letter that it is likely to be able to offset some of its marginal water supplies due to the Poseidon project, but it still intends to take its full allocation of SWP water, even after the Poseidon project is operating.

Regarding the contention that the continued imports would undergo CEQA review, this, too, appears to be speculation on Poseidon's part. MWD's deliveries from the SWP are governed by a long-term contract specifying the maximum amount of water MWD is entitled to each year, and the annual allotment of water provided each year. These mechanisms are not subject to CEQA review. In addition, Poseidon has not substantiated its claim that any water displaced by its project would be used in new or expanded projects, which could be subject to CEQA review, rather than being used by MWD's existing customers in a manner that likely would not be subject to CEQA review. As stated in its January 20, 2010 letter, MWD believes that it is likely to be able to reduce its reliance on finding marginal water supplies as a result of having Poseidon's water available; however, this will likely depend on many other factors, including the availability of such supplies, MWD's storage capacity for water not immediately used in its distribution system, and the cost of such supplies relative to the costs for Poseidon's water.

2. GROUNDS FOR REVOCATION #2: WAS THE INACCURATE OR INCOMPLETE INFORMATION SUPPLIED INTENTIONALLY?

Neither the Coastal Act nor the Coastal Commission regulations define the term "intent" for purposes of determining whether an applicant has intentionally submitted inaccurate, erroneous or incomplete information to the Commission. The law related to fraudulent misrepresentation, however, explores the definition of intent in the context of misrepresentation of facts, which is what is at issue in a revocation hearing. As a result, this area of law is instructive to the Commission when it considers a revocation request.

One element of a claim for fraudulent misrepresentation is the intent to defraud or induce reliance. *Cicone v. URS Corporation* 183 Cal. App. 3d 194, 200 (1986). In establishing this element, "the only intent by a defendant necessary to prove a case of fraud is the intent to *induce reliance*. Moreover, liability is affixed not only where the plaintiff's reliance is intended by the defendant but also where it is *reasonably expected* to occur." *Lovejoy v. AT&T Corp.* (2001) 92 Cal. App. 4th 85, 93 (2001). (emphasis in original). Thus, a defendant may be liable for fraud even for unanticipated reliance by a plaintiff. *Id.* at p. 94. In addition, a party's intent to induce reliance may be inferred from his or her failure to disclose facts as required by statute. *Lovejoy v. AT&T Corp.* 119 Cal. App. 4th 151 (2004). Thus, the Commission may infer that Poseidon intentionally submitted inaccurate, erroneous or incomplete information if it finds that Poseidon failed to disclose facts as required by the Coastal Act.

At several points during the Commission's review of both the CDP and the Plan, questions were raised by the Commission, Commission staff, and the public as to whether Poseidon's project would result in actual SWP emission reductions, and Poseidon had opportunities to disclose its understanding of MWD's water entitlements and intention to continue to take its full SWP allocation or the provision in the MWD Agreement that allows MWD to terminate the Agreement if the project reduces its entitlements or usage of SWP water. For example, as explained in footnote 12 above, Commission staff worked with Poseidon and several agencies after the Commission's November 2007 CDP approval to develop a plan that would conform to the Commission's Findings and **Special Condition 10**. Commission staff requested Poseidon verify its various proposed emission reduction measures, including the asserted emission reductions from reduced SWP imports. While Poseidon initially offered to verify the reduction by providing a copy of an MWD Agreement, it later modified its offer so as not to provide the MWD Agreement but to instead provide more general MWD documentation. It later submitted the July 2007 MWD letter mentioned above; however that letter did not reference the MWD Agreement's provisions.

Later, at the Commission's August 2008 hearing, several Commissioners, Commission staff, and members of the public raised doubt as to whether Poseidon's project would reduce SWP emissions. During Commission deliberation about this particular measure, Commissioners asked Poseidon about providing independent verification of the SWP reduction, but Poseidon requested that it be allowed to automatically receive credit for the reduction (see August 6, 2008 hearing transcript, pages 226-29). Poseidon referenced the July 29, 2008 MWD letter, and asserted that this letter confirmed the project would reduce regional demand for imported water by 56,000 acre feet (see August 6, 2008 hearing transcript, pages 82-83). Again, however, Poseidon did not disclose that MWD did not intend to directly reduce its imports due to the water produced by Poseidon or that the MWD Agreement would allow it to terminate its subsidies if the Poseidon project resulted in a reduction of its entitlements or usage of imported water.

The Commission's record and other documents clearly show that during the Commission review, Poseidon was relying on the subsidies its customers could obtain through a mechanism similar to the 2005 MWD Agreement. For example, a November 9, 2007 letter from Poseidon to the Commission states that the June 22, 2007 MWD letter confirmed MWD's intent to provide the project with the subsidy subject to the 2005 Agreement and made available through MWD's Seawater Desalination Program. Poseidon's July 3, 2008 letter to the Commission also refers to Poseidon's reliance on this program and states that "[t]he MWD rebate and audit system contribute to the substantial evidence in the record establishing that the Project's water will in fact replace imported water."¹⁹

¹⁹ Commission staff review of this revocation request also produced other documents showing that Poseidon was relying on this MWD Agreement and subsidy during or before the Commission's review. These include minutes from SDCWA meetings (e.g., December 6, 2001 and September 26, 2002) describing Poseidon's involvement in a possible project with SDCWA and Poseidon's and SDCWA's reliance on the MWD subsidy.

Regarding Poseidon's CEQA assertions, it is unclear on what basis Poseidon claimed that any use of water "displaced" by the Poseidon project would be for a new or expanded use, subject to CEQA requirements. Given that MWD is able to continue taking its full allocation of SWP water, without CEQA review, regardless of the amount of water produced by Poseidon, it is speculative to assume that CEQA would apply to the use of any of this water. Because the basis for Poseidon's assertions is questionable, one could infer that it was intentionally misrepresenting the nature of the required CEQA review. The evidence does not definitively show, however, that such statements were intentional misrepresentations.

3. GROUND FOR REVOCATION #3: IF THE COMMISSION HAD KNOWN OF THE INFORMATION, WOULD IT HAVE DENIED THE PERMIT OR IMPOSED DIFFERENT CONDITIONS?

The key issue before the Commission is whether it would have made a different decision – i.e., would have denied the project or required additional or different conditions – had Poseidon: 1) described MWD's intention to continue to take its full allocation of SWP water; 2) provided the MWD Agreement; or 3) correctly recognized that it was unlikely that any entity would be required to undertake a CEQA review for use of water "displaced" by the Poseidon project. Had the Commission known of the differences between Poseidon's assertion that its project should "automatically" receive credits for SWP import reductions and MWD's understanding that the Poseidon project is only likely to offset marginal water sources on an average long-term basis, or if the Commission had known of the MWD Agreement provision that allowed MWD to terminate its subsidy if the desalination project resulted in a reduction of its entitlement or usage of water imported from the SWP, it could have reached a different decision on the CDP. Similarly, had the Commission known that MWD's deliveries from the SWP were governed by a long-term contract whose annual deliveries are not subject to CEQA review, it could have required Poseidon to directly account for its expected SWP emission reductions. However, it is not clear that the Commission would have made a different decision, given Poseidon's presentation to the Commission of support from other entities for Poseidon's proposed approach, including agencies specified in **Special Condition 10**.

D. CONCLUSION AND RECOMMENDATION

The Commission finds that the non-disclosed MWD Agreement was part of the complete and accurate information needed to determine the project's Coastal Act conformity. The Commission also finds that Poseidon intentionally withheld the MWD Agreement. Poseidon's assertions about the role of CEQA in determining necessary mitigation were also speculative and potentially incorrect, though the record does not indicate whether these assertions were intentional. However, based on its reliance on the aforementioned letters of support from involved agencies, the Commission finds it would not have imposed additional or different conditions or denied the project had the Agreement been provided. Therefore, the Commission finds that the revocation request does not meet all three grounds for revocation.



COASTAL ENVIRONMENTAL RIGHTS FOUNDATION



December 8, 2009

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Via Electronic Mail
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RE: Poseidon/City of Carlsbad Desalination Project
Second Request for Revocation of Coastal Development Permit
Application E-06-013

Please accept this (second) request for revocation ("Request") of Poseidon Resources (Channelside) LLC's (Poseidon) Coastal Development Permit (CDP), Application E-06-013, on behalf of Surfrider Foundation, San Diego Coastkeeper, and Coastal Environmental Rights Foundation (collectively "Environmental Groups"). Environmental Groups request the Coastal Commission revoke the existing CDP. 14 CCR § 13104.

As detailed below, based upon Poseidon's intentional submission of inaccurate, incomplete, or erroneous information, adequate grounds for revocation exist. Environmental Groups therefore request a full hearing before the Commission on the Request.

I. Background

Poseidon's proposed project is a seawater desalination facility to be constructed and operated at the site of the Encina Power Station ("EPS") in Carlsbad, San Diego County.¹ The Carlsbad Desalination Project ("Project") will withdraw about 304 million gallons per day (MGD) of water from Agua Hedionda Lagoon. The Project was originally proposed to co-locate with EPS. The Project will require 104 MGD of the EPS discharge to produce 50 MGD of potable water. The remaining 200 MGD are needed to dilute the Project's brine discharge, a byproduct of the desalination process.

In 2001, the Metropolitan Water District approved a Seawater Desalination Program to, among other things, promote and provide financial incentives for seawater desalination.² In 2005, MWD authorized an agreement between MWD and the San Diego County Water Authority ("SDCWA") for development of seawater desalination.³ This agreement contained standard contract conditions, to be incorporated into a final agreement once Poseidon completed environmental review documentation.⁴

¹ EPS is a once-through cooling (OTC) power plant that uses water to cool its generators. It draws in water from Agua Hedionda Lagoon, which passes "once-through" the power plant, absorbs heat from the generators, and is discharged thereafter. Coastal Commission Final Adopted Findings for CDP Approval, August 6, 2008, n. 23-25.

² November 10, 2009 MWD Board Meeting, Attachment 2.

³ November 10, 2009 MWD Board Meeting, p. 1.

⁴ November 10, 2009 MWD Board Meeting, Attachment 3, p. 3.

EXHIBIT NO. 1

APPLICATION NO.

B2-E-06-013

California Coastal Commission

On November 14, 2007, against staff and the Executive Director's recommendation, the Commission approved the CDP for the Project.⁵ In addition to standard conditions of approval, the Commission imposed 17 special conditions upon the Project through the CDP.⁶ Specifically, pursuant to Coastal Act sections 30253(4), the Commission imposed a special condition, requiring an Energy Minimization and Greenhouse Gas Reduction Plan ("GHG Plan"). The Commission found the Project would result in an estimated 61,000 to 90,000 metric tons of carbon dioxide equivalent per year.⁷

Because the Commission voted against the recommendation of staff, new findings were required. 14 CCR 13096(c). Commission staff and Poseidon disagreed about the Commission's basis for approval, necessitating staff's preparation of five different versions of the findings before final approval.⁸ On August 6, 2008, the Commission approved findings for its November 14, 2007 CDP approval. The Commission also approved the GHG Plan at the August 6th meeting. As the Commission made revisions to Poseidon's GHG Plan as submitted, the Commission approved final findings for its August 6, 2008 decision on December 10, 2008.⁹

On November 10, 2009, MWD approved an agreement with all water districts contracted to purchase Project product water.¹⁰ The executed agreement contains a provision terminating the agreement if MWD is required to reduce, defer, or exchange entitlement to or usage of imported water supplies as a result of the Project water.¹¹ Because the November 2009 agreement is an embodiment of the 2005 contract terms, Poseidon knew at the time of CDP and GHG Plan approval its Project water would not offset any imported water.

At the time the GHG Plan was approved, Poseidon was required to offset the Project's "net" GHG emission, as opposed to the "gross" emissions. Poseidon represented its water was replacement water, offsetting imports from MWD, in both 2007 at the time of the initial CDP approval and in 2008 when the Commission approved the GHG Plan. However, the 2001 MWD Seawater Desal Program and final subsidy agreement signed in November 2009 evidence the supplemental nature of the Project product water.

⁵ November 2, 2007 Coastal Commission Recommended Findings, p.3; <http://www.coastal.ca.gov/meetings/mtg-mm7-11.html>

⁶ Coastal Commission Final Adopted Findings for CDP Approval, August 6, 2008, p. 8-13.

⁷ Coastal Commission Final Adopted Findings for CDP Approval, August 6, 2008, p. 3; <http://www.coastal.ca.gov/meetings/mtg-mm8-8.html>

⁸ Findings prepared: on February 21, 2008 for hearing on March 5, 2008; on April 24, 2008 for hearing on May 8, 2008; on May 22, 2008 for hearing June 12, 2008; on July 17, 2008 for hearing on August 6, 2008; on August 5, 2008 as an addendum to July 17, 2008 findings.

⁹ <http://www.coastal.ca.gov/meetings/mtg-mm8-12.html>

¹⁰ <http://edmsidm.mwdh2o.com/idmweb/cache/MWD%20EDMS/003702264-1.pdf>; Board Action, November 10, 2009.

¹¹ Draft SDP Agreement No. 70025, October 29, 2009. p. 21 (Environmental Groups have not been able to obtain the final version of the agreement, but understand the draft to be the same as the final agreement approved on November 10, 2009)

Therefore, Poseidon's GHG Plan is no longer accurate or adequate. More importantly, Poseidon's intentional submission of inaccurate, incomplete, and/or erroneous information to that extent requires CDP revocation, as detailed below.

II. Request for Revocation and Initial Review

Section 13105 of the Commission's regulations 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.

14 CCR 13105 (emphasis added). Additional regulations further clarify parties who may submit a Request for Revocation and the process for initial review of the Request. Eligibility to Request Revocation:

Any person who did not have an opportunity to fully participate in the original permit proceeding by reason of the permit applicant's intentional inclusion of inaccurate information or failure to provide adequate public notice as specified in section 13105 may request revocation of a permit by application to the executive director of the commission specifying, with particularity, the grounds for revocation.

14 CCR 13106 (emphasis added). In regard to initial review:

The executive director shall review the stated grounds for revocation and, unless the request is patently frivolous and without merit, shall initiate revocation proceedings. The executive director may initiate revocation proceedings on his or her own motion when the grounds for revocation have been established pursuant to the provisions of Section 13105.

Id. As detailed below, the grounds for revocation are easily met. Poseidon intentionally included inaccurate, erroneous and/or incomplete information during the proceedings before the Commission that, had information been fully disclosed, would have required at a minimum different conditions of approval. Environmental Groups have been denied an opportunity to fully participate in the original proceedings by reason of Poseidon's submittal of this inaccurate, erroneous, and/or incomplete information.¹² The information, detailed in this Request for Revocation is significant—it cannot be dismissed as "patently frivolous and without merit". Therefore, the Executive Director, in accordance with the clear language of the Commission's regulations, must initiate revocation proceedings.¹³

¹² Environmental Groups provided both written and oral testimony throughout the Commission's review of the CDP, and participated at the Commission's November 14, 2007 and August 6, 2008 hearings on the matter. Environmental Groups also have a revocation request currently pending before the Commission regarding the Project's impingement impacts, velocity calculations, and capacity.

¹³ The term "shall" in the regulations is commonly interpreted to limit the discretion of the decisionmaker. It is effectively an affirmative order.

III. Applied Elements Of The Request For Revocation

Detailed below are specifics related to Poseidon's intentional submittal of information, mandating a revocation hearing.

1. Intentionally Withheld Accurate and Complete GHG Data

The Coastal Act and recent statewide developments related to global warming informed and mandated the Commission's review of the Project's energy consumption and resultant GHG emissions. During CDP review, the Commission found the Project's contribution to global warming attributable to its energy use would impact coastal resources:

The global heating, sea level rise, and ocean acidification resulting from greenhouse gas emissions affects public access (Coastal Act Sections 30210-30214), recreation (Sections 30212.5, 30213, 30220-30222), marine resources (Sections 30230-30231), wetlands (Sections 30231, 30233), ESHA (Section 30240), agriculture (Sections 30241-30242), natural land forms (30251), and existing development (Sections 30235, 30253).¹⁴

Indeed, the Project is more energy intensive than any other water supply option.¹⁵

However, at the time of GHG Plan approval, Poseidon argued against the Commission staff suggestion to require offset of all of the Project's emissions because "the Project [would] produce 56,000 AFY of desalinated water that [would] directly replace, on a one-for-one basis, water that would have been imported to the Project's customers from the State Water Project."¹⁶

In response to Commission staff's suggestion, Poseidon intentionally submitted inaccurate, erroneous, and/or incomplete information regarding the Project's GHG emissions. Poseidon's repeated assertions, and MWD's complicit involvement, regarding the Project's offset of imported water were made with the full knowledge no such offset would occur. Indeed, in 2005, the MWD entered into a Seawater Desalination Program agreement with the SDCWA which outlined the basic contract terms, including protection of MWD's imported water supply related to Project implementation.¹⁷

By failing to provide the Commission and the public with accurate information, necessary for both meaningful analysis and true evaluation of the Project under the Coastal Act, Poseidon impeded the public's ability to fully participate in the original permit proceedings. 14 CCR § 13106. Further, had Poseidon presented the Commission information that was not incomplete, inaccurate, and/or erroneous,

¹⁴ Coastal Commission Final Adopted Findings for CDP Approval, August 6, 2008, p. 75.

¹⁵ Coastal Commission Final Adopted Findings for CDP Approval, August 6, 2008, p. 75.

¹⁶ Poseidon Resources Letter to Commission Re GHG Plan, August 2, 2008, pp. 4-5.

¹⁷ MWD and SDCWA Seawater Desalination Program Basic Contract Terms, Attachment 2 of MWD July 12, 2005 Board Action, p. 8-12.

it would have denied the application, or alternatively imposed different or additional conditions upon the CDP. 14 CCR 13105.

a. Poseidon Intentionally Provided Inaccurate Information Regarding the Project Water Intended Use

In November 2009, Poseidon signed a contract with MWD for a \$250 per acre-foot subsidy under the MWD Seawater Desalination Program.¹⁸ The agreement contains the following termination provision: "Metropolitan has right to terminate agreement if: (iii) Operation of the project impairs Metropolitan's existing water supply entitlements."¹⁹ This language mirrors that of the MWD agreement with the SDCWA in 2005, requiring "protection of Metropolitan's imported water supplies as related to project implementation."²⁰

Thus, Poseidon and MWD knew in 2007, at the time of CDP approval, and in 2008 at the time of GHG Plan approval, the Project water would never replace MWD imported water. Nonetheless, Poseidon claimed its water would replace imported water on a one-for-one basis.²¹ Poseidon Vice President, Peter MacLaggan maintained at the November 2007 hearing:

The water is to be provided at a guaranteed price throughout that 30-year term, at a price not to exceed what [the water districts] would have paid for the imported water that they no longer require. All water will be appropriated for public use...This water supply will result in a one-for-one replacement of imported water purchases for these agencies, or by these agencies...²²

The GHG Plan presented to the Commission and approved in 2008 also relied on the Project's offset of imported water.²³ Poseidon's GHG Plan detailed the reduction in State Water Project water being conveyed to the SDCWA due to such offset.²⁴ The Project's GHG emissions were thus reduced from nearly 100,000 metric tons to 30,000 metric tons of carbon dioxide equivalent.²⁵

Poseidon further pointed to MWD's ability to audit the individual water districts to purchase water from Poseidon, and MWD's letter to Executive Director Peter Douglas as support for its contention regarding offsets. The July 29, 2008 MWD letter stated "[o]ffsetting demand for imported water is a condition for receiving [MWD's] financial incentives" and therefore MWD and Poseidon recommended net carbon neutrality as the appropriate mitigation measure.²⁶

¹⁸ <http://edmsidm.mwdh2o.com/jdmweb/cache/MWD%20EDMS/003702264-1.pdf>; Board Action, November 10, 2009.

¹⁹ MWD Proposed Agreement Terms, November 10, 2009, Attachment 2, Project-specific term 3.b.iii.

²⁰ MWD and SDCWA Seawater Desalination Program Basic Contract Terms, Attachment 2 of MWD July 12, 2005 Board Action, p. 8-12.

²¹ Poseidon Resources Letter to Commission Re GHG Plan, August 2, 2008, p. 5.

²² Peter MacLaggan Testimony November 14, 2009; Court Reporting Services, p.56.

²³ Poseidon's GHG Plan, July 30, 2008; pp. 13-14.

²⁴ *Id.*

²⁵ Poseidon's GHG Plan, July 30, 2008; p. 32 (Table 1).

²⁶ MWD Letter to Peter Douglas, July 29, 2008, p.2.

Both Poseidon and MWD's intentional misrepresentation of the 2005 agreement terms at the time of CDP approval and GHG Plan approval constitute submission of inaccurate, incomplete, and/or erroneous information. The 2005 MWD agreement terms directly contradicted Poseidon's promise to offset imported water supplies. The 2009 MWD agreement now affirms what Environmental Groups and Commission staff knew at the time of CDP approval – Poseidon's Project would provide surplus rather than replacement water.

b. The Commission Relied on Poseidon and MWD's Representations of Offsets to Establish Baseline Conditions for Project GHG Emissions

The July 30, 2008 GHG Plan is premised on the offset of State Water Project water, equivalent to annual emissions of approximately 67,000 metrics tons of carbon dioxide equivalent.²⁷ Poseidon defended these calculations though it knew MWD would not reduce its supply of imported water due based upon production of Project water. Indeed, the 2005 MWD general contract terms forbade interference with MWD imported water supplies.²⁸

Nonetheless, Poseidon opined its water would provide a "one-for-one" offset of imported water before the Commission at all relevant hearings. Such promises became the basis for the Commission's approval of the GHG Plan offset for a "net" carbon-neutral Project, as opposed to a truly carbon neutral Project. Indeed, the Commission's Deputy Director recently sent a letter to Poseidon reflecting this concern:

As you know, the Commission's approval last year of Poseidon's [GHG Plan] provided Poseidon with emission credits for reduced water imports, based in part on Poseidon's characterization that its facility would result in MWD importing less water to Southern California. However, with this new agreement in place, import reduction is no longer a part of Poseidon's project, and therefore requires a modification in the approved GHG Plan.²⁹

The Commission's reliance on Poseidon's intentional submission of incomplete, inaccurate, and/or erroneous information regarding its offset of imported water and GHG emissions thus necessarily impacted the Commission's approval of the CDP and its imposition of mitigation measures. At the very least, Poseidon would have been required to offset all GHG emissions attributable to the Project – not a calculation excluding energy consumption attributable to State Water Project imports. Poseidon's CPD must therefore be revoked.

IV. Environmental Groups Pursue This Request with Due Diligence

The MWD agreement was signed on November 10, 2009. This request is submitted less than one month after the MWD decision, approving the terms of the agreement. A separate revocation request is currently

²⁷ Poseidon's GHG Plan, July 30, 2008; pp. 13-14; see also, Findings to support the GHG Plan approval, <http://documents.coastal.ca.gov/reports/2008/12/W16b-12-2008.pdf>

²⁸ MWD and SDCWA Seawater Desalination Program Basic Contract Terms, Attachment 2 of MWD July 12, 2005 Board Action, p. 8-12.

²⁹ Letter from Alison Dettmer, Deputy Director, Commission Energy, Ocean Resources, and Federal Consistency Division to Poseidon, November 13, 2009.

pending before the Commission, to be heard at the December Commission hearing. This request is filed in time for scheduling at the next available Commission hearing in January 2010.

In addition, Environmental Groups also believed the Commission would require Poseidon to submit a CDP amendment in response to the 2009 MWD agreement. Such reliance was based in part on the Commission's letter to Poseidon on November 13, 2009. Environmental Groups have recently learned Poseidon will not be submitting a permit amendment application.

Therefore, Environmental Groups pursue this request with due diligence.

V. Conclusion

In conclusion, the elements of a Revocation Request have been met:

- Poseidon intentionally provided incomplete, inaccurate, and/or erroneous information in connection with its Coastal Development Permit; and
- That information, had it been disclosed, would have led to different conditions placed on approval of the CDP, or resulted in denial of the application.

Further, the omission of such information resulted in Environmental Groups' denial of the opportunity to "fully participate in the proceedings." 14 CCR § 13106. Given the above facts and circumstances, the Executive Director may not find this Request for Revocation "patently frivolous and without merit." 14 CCR § 13106. The Director must proceed with a revocation hearing and suspend the CDP until such hearing. 14 CCR § 13107.

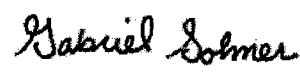
Respectfully Submitted,

SURFRIDER FOUNDATION



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SAN DIEGO COASTKEEPER

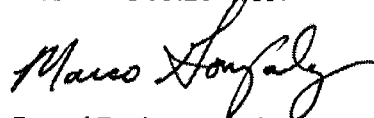


Gabriel Solmer
Legal Director
Gabe@sdcoastkeeper.org

Attachments:

1. Coastal Commission Letter to Poseidon, November 13, 2009
2. MWD October 2009 Draft Agreement with Member Agencies
3. November 10, 2009 MWD agenda item documents
4. August 6, 2008 GHG Plan submissions:
<http://documents.coastal.ca.gov/reports/2008/8/W5a-8-2008.pdf>
5. MWD 2005 Action re agreement with SDCWA

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January 13, 2010

VIA FEDEX AND EMAIL

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Re: Carlsbad Desalination Project (Coastal Development Permit No. E-06-013):
Response to December 8, 2009 Permit Revocation Request

Dear Chairperson Neely, Honorable Commissioners, and Mr. Douglas:

On behalf of Poseidon Resources (Channelside), LLC ("Poseidon"), we are responding to the December 8, 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 and San Diego Coastkeeper (the "Opponents"). As discussed in detail in this submittal and in Poseidon's January 7, 2010 letter to Alison Dettmer and Tom Luster (which is attached hereto as Exhibit 1¹), Opponents' assertions have no merit and are contrary to the overwhelming evidence in the Project's administrative record.

Opponents' claims are based entirely on their misreading and misunderstanding of a Seawater Desalination Program ("SDP") Agreement for the Project approved by the Metropolitan Water District of Southern California ("MWD") on November 10, 2009, as well as required terms for the Agreement that MWD approved in July 2005 (the "July 2005 Required Contract Terms"). Opponents admit the SDP Agreement merely memorialized the July 2005 Required Contract Terms, which required MWD to preserve its own imported water entitlements,² and then fail to acknowledge that the Coastal Commission approved the Project's

¹ Poseidon's January 7, 2010 letter to Alison Dettmer and Tom Luster ("January 7, 2010 Letter") responds to Commission staff's November 13, 2009 letter requesting that Poseidon submit a permit amendment application to modify its Energy Minimization and Greenhouse Gas Reduction Plan ("GHG Plan"), and is incorporated as part of this response by this reference.

² Revocation Request, p. 5.

EXHIBIT NO. 2

APPLICATION NO.

R2-E-06-013

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Energy Minimization and Greenhouse Gas Reduction Plan ("GHG Plan") with the full understanding that MWD would not forgo its imported water entitlements or its right to redirect imported water the Project replaces to other locations within MWD's service territory. As nothing has changed regarding this issue since the Commission approved the GHG Plan, and the Project's customers still must reduce their water imports from MWD under the SDP Agreement, Opponents' Revocation Request is nothing more than a sham to delay the Project, force Poseidon to bear significant additional expense responding to frivolous claims, and to improperly force the Commission to use its scarce time and resources to revisit an issue (i.e. "gross" v. "net" GHG offsets) it already decided. For those reasons and the other numerous reasons set forth below, the Revocation Request should be deemed frivolous and denied.

The Revocation Request Is Patently Frivolous And Without Merit

On its face, the Revocation Request is "patently frivolous and without merit", and as such, no revocation hearing before the Commission is necessary or required.³ The Coastal Commission's regulations (the "CCC 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.⁴ 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 conduct whatsoever, intentional or otherwise, 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 or shown how the Commission could have reached a different result. By failing to show 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 should not initiate revocation proceedings.

The Grounds For Revocation Have Not Been Met

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

³ See CCC Regulations § 13106.

⁴ See CCC Regulations § 13105, subd. (a).

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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 of a permit."⁵

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."⁶ 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 cited a single fact to support that any of the grounds for revocation of the CDP have been satisfied.⁷

A. Opponents Have Not and Cannot Satisfy Any of Section 13105(a)'s Elements

Section 13105(a) of the CCC Regulations is divided into three elements: (i) intentional inclusion; (ii) of inaccurate, erroneous or incomplete information in connection with a coastal development permit application; (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. 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. As discussed in detail in Section II(A) below, Opponents do not cite to a single piece of evidence that demonstrates in any way that Poseidon intentionally provided the Commission with inaccurate, erroneous or incomplete information regarding the Project's GHG emissions or MWD's imported water entitlements. As demonstrated in Poseidon's January 7, 2010 Letter to the Commission (Exhibit 1), Poseidon and MWD consistently maintained during the Commission's GHG Plan approval process that MWD would

⁵ See CCC Regulations § 13107; Section III, below.

⁶ CCC Regulations § 13106 (emphasis added.)

⁷ The Revocation Request focuses solely on the revocation grounds contained in CCC Regulations Section 13105(a). Since Opponents do not assert any defects in noticing the Project's CDP as governed by CCC Regulations Section 13105(b), there are no grounds for revocation of Poseidon's CDP based on those issues.

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not relinquish any imported water entitlements in connection with the Project or give up the right to redirect imported water the Project replaces to other locations. The Opponents cannot show that Poseidon intended to convince the Commission otherwise. Failure to demonstrate intent is a fatal defect to the Revocation Request, and thus the Executive Director should find it to be patently frivolous and without merit.

2. No Inaccurate, Erroneous or Incomplete Information. As discussed in detail in Section II(B) below, Opponents have falsely claimed that Poseidon submitted inaccurate, erroneous and/or incomplete information to the Commission, *but have not provided a single fact to support their claims.* Contrary to Opponents' assertions, and as shown in Poseidon's January 7, 2010 Letter, Poseidon provided the Commission with accurate and complete information regarding how the Project's desalinated water would offset corresponding demand for water imports into the San Diego region, and about how MWD would not relinquish any imported water entitlements in connection with the Project or give up the right to redirect imported water the Project replaces to other locations. There are no facts supporting a finding that any of this information is inaccurate, and thus the Executive Director should find the Revocation Request to be patently frivolous and without merit.

3. No Different Result. As discussed in detail in Section II(C) below, Opponents also have not made the required showing that the Commission would have reached a different result regarding the Project's CDP. Opponents cannot make this showing because (i) the record shows the Commission had full knowledge that MWD would not relinquish any of its imported water entitlements when the Commission approved the Project's GHG Plan; and (ii) even if the SDP Agreement did alter any of the GHG Plan's water import reduction assumptions, which it does not, CDP Special Condition 10 does not address the GHG Plan's specific contents, including MWD's water supply entitlements or the Project's GHG offset requirements. As the Revocation Request has not and cannot overcome the burden of showing that the Commission would have required additional or different conditions on the CDP or denied the application (or even would have changed the GHG Plan's content), the Executive Director should find the request patently frivolous and without merit.

B. The Opponents Made the Revocation Request with Improper Motive

In addition to failing to satisfy their administrative burden in the Revocation Request, Opponents' request also should 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. . . ."⁸ 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 require Poseidon to submit a CDP amendment in response to the 2009 MWD Agreement."⁹ Opponents

⁸ *Avila v. Continental Airlines, Inc.* (2008)165 Cal.App.4th 1237, 1262.

⁹ Revocation Request, p. 7.

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also admit that when they learned that Poseidon “would not be submitting a permit amendment application,”¹⁰ it pursued the Revocation Request. As Commission staff is aware, revocation of a CDP is only appropriate where specific regulatory requirements have been satisfied.

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’ filed their Revocation Request only after Commission staff recommended that the Commission deny Opponents’ prior revocation request filed on October 8, 2009, demonstrates that Opponents are only seeking to delay or stop the Project and not to inform the Commission of some alleged intentional misrepresentation or inaccuracy by Poseidon (which would be impossible since no such intentional misrepresentation or inaccuracy 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 also should find that 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. For the following reasons, the Revocation Request fails to demonstrate that any of the three required grounds have been satisfied.

A. Opponents Have Not Demonstrated Intent

While the Revocation Request claims that “Poseidon intentionally submitted inaccurate, incomplete and erroneous information regarding the Project’s GHG emissions”,¹¹ *Opponents do not cite to a single piece of evidence that demonstrates such intent*. Instead, the Revocation Request inaccurately claims that statements Poseidon and MWD made to the Commission regarding how the Project’s desalinated water would offset demand for imported water in the San Diego region are inconsistent with an unrelated contract term included in MWD’s November 10, 2009 SDP Agreement with the San Diego County Water Authority (“Water Authority”) and nine local retail water agencies (“LRAs”), as well as in the MWD’s July 2005 Required Contract Terms for the SDP Agreement, both of which protect MWD’s own imported water entitlements.¹² As demonstrated below and detailed in Poseidon’s January 7, 2010 Letter

¹⁰ *Id.*

¹¹ Revocation Request, p. 4.

¹² On July 12, 2005, the MWD Board authorized MWD staff to enter into SDP agreements with five of its member agencies, including the Water Authority. The Board’s approval of each of the agreements included a set of required contract terms (the “July 2005 Required Contract Terms”) to be used consistently in all of the agreements. Article 14 of the July 2005 Required Contract Terms states: “Metropolitan’s Imported Water Entitlements. Protection of Metropolitan’s imported water supplies as related to project implementation.” Section 13 of the SDP Agreement

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(**Exhibit 1**), Commission staff, the Opponents, Poseidon and MWD expressly conveyed to the Commission at the Commission's GHG Plan hearing that MWD would not relinquish its imported water entitlements in connection with the Project or give up its right to redirect imported water the Project replaces to other locations within MWD's service territory.¹³

Thus, Poseidon and MWD's statements are fully consistent with MWD's July 2005 Required Contract Terms that require "[p]rotection of Metropolitan's imported water supplies as related to project implementation," and with the SDP Agreement that memorializes and implements that requirement. Since the record clearly shows that Poseidon explained MWD's consistent position on its imported water entitlements to the Commission at the Commission's GHG Plan hearing, the Opponents have not and cannot demonstrate intent. As this is a required finding under CCC Regulations Section 13105(a), and it has not been met, the Executive Director cannot determine that this ground for revocation exists.

B. Opponents Have Not Identified Any Inaccurate, Erroneous Or Incomplete Information

As summarized in Section I(2) above, the Revocation Request does not demonstrate the "*inclusion of inaccurate, erroneous or incomplete information in connection with . . .*" Poseidon's CDP application.¹⁴ Opponents falsely claim that Poseidon submitted inaccurate, erroneous or incomplete information regarding the Project's GHG Plan and the reduction in GHG emissions the Project would achieve by replacing imported water that the Water Authority would otherwise receive from MWD. However, the Opponents ignore the overwhelming evidence in the Commission's administrative record showing that:

- (i) the "net" emissions approach in the GHG Plan – for which Poseidon advocated and which the Commission ultimately approved – is consistent with CEQA principles in that it does not require MWD to relinquish water entitlements in the amount of water the Project replaces, and instead places the obligation of providing mitigation for emissions associated with importing the replaced water into other parts of MWD's service territory on hypothetical future users of that water;
- (ii) the fact that MWD would not relinquish its rights to its imported water entitlements or its ability to direct imported water the Project replaces to other

implements and memorializes Article 14 of the July 2005 Required Contract Terms and permits MWD to terminate the SDP Agreement if it reasonably determines that:

[A]s a result of Water Authority's or LRA's action or support, Metropolitan is required by any statute or administrative order, court, or other entity to reduce, defer, or exchange entitlement to or reduce usage of Colorado River water, State Water Project water, or other water supplies contracted for by Metropolitan as a result of expected or actual production of the Desalinated Seawater by the Project.

¹³ See January 7, 2010 Letter, pp. 7-9, 15-16.

¹⁴ CCC Regulations § 13105, subd. (a).

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locations within MWD's service territory was a key issue the Commission considered when it approved Poseidon's "net" emissions approach in the GHG Plan without restricting MWD's rights to its imported water entitlements; and

- (iii) MWD has consistently required in each of the SDP agreements it has entered into with its member agencies that it would not relinquish its imported water entitlements as a result of any desalination project, and MWD's position has not changed since the Commission considered the Project and the GHG Plan.

This evidence is presented in explicit detail in Sections I and II of the January 7, 2010 Letter,¹⁵ and is hereby incorporated into this letter. Nevertheless, we take this opportunity to revisit some of the key facts which support the conclusion that Opponents have not demonstrated that Poseidon intentionally submitted inaccurate, incomplete, or erroneous information to the Commission.

1. The Coastal Commission Approved The GHG Plan With Full Knowledge That MWD Would Not Contractually Relinquish Any Water Entitlements.

Testimony at the GHG Plan hearing and Poseidon's prior written submissions demonstrate that Poseidon provided complete and accurate information to the Commission regarding MWD's continuing right to use its imported water entitlements after the Project commences operations. Prior to the Commission's approval of the GHG Plan, Poseidon argued that emissions reductions from the Project's replacement of imported water must be analyzed by determining the "net" change in GHG emissions relative to existing conditions, or the "baseline", factoring in both increases and decreases in emissions caused by the Project.¹⁶ Poseidon explained that existing emissions associated with energy used to pump 56,000 acre-feet of water per year into the San Diego Region that the Project's water will replace are part of the existing "baseline", and thus should be "netted-out" when determining the Project's GHG emissions because that water will no longer be pumped to the Project's customers once the Project is operating.¹⁷ Poseidon also argued that this "net" approach is appropriate under CEQA because (i) it is speculative that the replaced water would be pumped into the region; and (ii) even if the replaced water is pumped into the region, the associated carbon emissions from such pumping should be the responsibility of the uses that require the water to be imported.¹⁸

¹⁵ See January 7, 2010 Letter, pp. 2-17.

¹⁶ See *id.*, pp. 7-9.

¹⁷ See Letter from Poseidon to Coastal Commission, Aug. 2, 2008, pp. 4-5. Various state agencies, including the Air Resources Board, California Energy Commission, and Department of Finance, as well as the Lieutenant Governor supported the "net" approach. See January 7, 2010 Letter, pp. 10-11 and Exhibits C-F thereto. MWD and the Water Authority further supported this approach. See Letter from MWD to Peter Douglas, dated July 29, 2008, at p.1, attached to January 7, 2010 Letter as Exhibit M; Letter from San Diego County Water Authority to Coastal Commissioners, dated July 24, 2008, at p. 1, attached to January 7, 2010 Letter as Exhibit N.

¹⁸ See January 7, 2010 Letter, p. 8.

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Commission staff and the Opponents argued, however, that Poseidon should be responsible for offsetting the Project's "gross" GHG emissions, which included emissions associated with the imported water the Project replaces, because Poseidon could not guarantee that the replaced water would no longer be imported into MWD's service territory for another use.¹⁹ Commission staff and the Opponents asserted that Poseidon should only be allowed to reduce this "gross" emissions requirement for the imported water if Poseidon could show that the reduction measure was verifiable and enforceable under AB 32 criteria – such as through a contractual agreement from MWD relinquishing its imported water entitlements.²⁰ After considering all of the arguments on this issue, the Commission approved Poseidon's "net" approach in the GHG Plan, and did not require MWD to relinquish any of its water entitlements.²¹

In its presentation to the Commission at the GHG Plan hearing, Poseidon corrected inaccurate information provided by certain Project opponents and made clear that the "net" approach is appropriate under CEQA, and that Poseidon's proposed GHG Plan would not affect MWD's ability to redirect water the Project replaces to other locations within MWD's service territory:

Rick Zbur: "Staff asserts that Poseidon must offset the carbon from the imported water, because it cannot guarantee that it will not be used. . . . If water continues to be pumped to Southern California from the State Water Project, it would be for new or expanded uses. Those new uses would be required under CEQA to address the impacts of importing the new water. . . [S]ince only new or expanded projects would be using this imported water, and those projects are required to mitigate the carbon impacts under CEQA, staff's proposal would result in double mitigation for the same impacts.

....

First point I wanted to address was Mr. Mitton's assertion that we have asserted that water will not be used in other places. That is actually not accurate. What we have said is that Poseidon's customers, the water districts, have agreed to replace the water, and therefore that the water that is replaced, where that goes is speculative, but wherever it goes, CEQA will apply to require those people to mitigate it.

So, our view is that the new users of the water should be responsible for the environmental mitigation of that. That is consistent with CEQA methodology. That is consistent with -- we have assurances that the attorney general will enforce that.

¹⁹ See *id.*, pp. 4-7.

²⁰ *Id.*

²¹ See *id.*, pp. 11-13.

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In addition, this Commission determined that the project was not growth inducing. That was part of your findings. The requirement that Poseidon be assigned the mitigation for the replaced water is just not consistent with the determination that you have already made that the project is not growth inducing.

Another point that we wanted to address is the request by Mr. Massara that the AB32 criteria should apply to the energy reduction from replaced water. This is really the key issue related to the [gross]²² versus net issue, and is the crux of what is before the Commission. Essentially what the staff does is they apply these vague principles to the replaced water, which in effect, would impose the [gross]²³ requirements, because the principles would require that the replaced water have contractual agreements that the replaced water would be retired and not used by anyone. That effectively would not allow – it effectively imposes the [gross]²⁴ requirement . . . Each of the agencies that are responsible for the implementation of AB 32 have supported Poseidon's ability to take credit for the replaced water . . .²⁵

Poseidon advanced these same arguments in its written submissions to the Commission.²⁶

During their deliberations concerning the Project's GHG Plan, various Coastal Commissioners confirmed that they understood and made clear for the full Commission that the "net" approach that Poseidon advocated in the GHG Plan did not require MWD to relinquish any water entitlements or prevent MWD from redirecting water the Project replaces to other locations.²⁷ For example:

- Commissioner Shallenberger: "Metropolitan Water District is going to, and needs to, and has a right to take all of the water that is available to them out of the delta."²⁸
- Commissioner Scarborough: "In essence, what I understand from a Resources perspective -- indeed we are arguing within our family as well -

²² The word "growth" was inaccurately transcribed here in the Reporter's Transcript of Proceedings. Mr. Zbur used the word "gross" at the hearing.

²³ The word "growth" was inaccurately transcribed here in the Reporter's Transcript of Proceedings. Mr. Zbur used the word "gross" at the hearing.

²⁴ The word "growth" was inaccurately transcribed here in the Reporter's Transcript of Proceedings. Mr. Zbur used the word "gross" at the hearing.

²⁵ Testimony of Rick Zbur, Reporter's Transcript of Proceedings, State of California Coastal Commission, Aug 6., 2008, at pp. 92:5-17; 93:3-6; 165:16-166:21, 166:23-167:1 (emphasis added).

²⁶ See Letter from Poseidon to Coastal Commission, Aug. 2, 2008, at Exhibit B: Response to Staff Report, pp. 8-9.

²⁷ See January 7, 2010 Letter, at pp. 9-10.

²⁸ Testimony of Commissioner Shallenberger, Reporter's Transcript of Proceedings, State of California Coastal Commission, Aug. 6, 2008, at p. 222:15-17.

- is that, yes, Met will continue to receive that water. They are not going to turn the state tap off. Other projects that will then need to use that water will then have to go through a process by which they get the okay to use that water. And, it is that new project that will then have to be in compliance with CARB and APCD, or whatever local district, on their greenhouse gas emission reductions for that project.”²⁹

Following the Commission’s deliberations, the Commission approved the GHG Plan containing the “net” approach that Poseidon proposed by a ten to two vote. Because the Project will displace imported water by the Project’s nine LRA customers, the GHG Plan reduces Poseidon’s emissions offset obligations in the amount of GHG emissions that are avoided from imported water the Project replaces.³⁰ Notably, there is no text in the GHG Plan that in any way limits or restricts MWD’s management of its imported water supply, or that requires MWD to relinquish any of its imported water entitlements. Accordingly, there is no foundation for any claim that the Commission did not understand, or was not fully aware of this issue when the Commission approved the GHG Plan, and the record shows that Poseidon did not submit any inaccurate, incomplete, and/or erroneous information to the Commission.³¹

2. The Requirement In The SDP Agreement That MWD Not Relinquish Water Entitlements Has Not Changed Since The GHG Plan’s Approval.

The Revocation Request bases its claim of inaccurate, erroneous and/or incomplete information on Opponents’ own inaccurate understanding of a provision contained in MWD’s July 2005 Required Contract Terms for all SDP agreements that protects MWD’s imported water entitlements, which MWD implemented and memorialized in its November 10, 2009 approval of the SDP Agreement with the Water Authority and nine LRAs. Specifically, Opponents incorrectly conclude that because the SDP Agreement allows MWD to terminate the Agreement if MWD’s rights to its own water entitlements are impacted by the Project, then the Project must be providing “surplus rather than replacement water” to the San Diego region.³² However, contrary to the Opponents’ flawed understanding, the SDP Agreement only confirms what Poseidon clearly conveyed to the Commission – that MWD would not relinquish its imported

²⁹ Testimony of Commissioner Scarborough, Reporter’s Transcript of Proceedings, State of California Coastal Commission, Aug. 6, 2008, at p. 225:1-9.

³⁰ The quote Opponents use in the Revocation Request from Poseidon Vice President Peter MacLaggan is fully consistent with the Commission’s decision. Mr. MacLaggan stated that the Project’s “water supply will result in a one-for-one replacement of imported water purchases for these agencies or by these agencies.” (Revocation Request, p. 5.) The Project will continue to result in a one-for-one replacement of imported water purchases by the LRAs, and the Opponents have not cited to any evidence that shows otherwise.

³¹ Furthermore, the Commission adopted revised findings regarding its approval of the GHG Plan on December 10, 2008, which confirmed that Poseidon would be required to offset only its “net” emissions. See January 7, 2010 Letter, pp. 11-13.

³² Revocation Request, p. 6.

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water entitlements or its right to redirect imported water the Project replaces to other locations within MWD's service territory.³³

The Revocation Request also fails to recognize that MWD's approval of the SDP Agreement does not change in any way any of the Commission's bases for approving the GHG Plan. The MWD Board's final approval of the SDP Agreement on November 10, 2009, which the Revocation Request admits "mirrors that of the MWD agreement with the SDCWA in 2005, requiring 'protection of Metropolitan's imported water supplies as related to project implementation,'"³⁴ did not change MWD's water import reduction obligations, the obligations of any of the other parties to the SDP Agreement or Poseidon's obligations under the GHG Plan approved by the Commission. As discussed above and in detail in Poseidon's January 7, 2010 Letter, the Commission approved the GHG Plan on August 6, 2008 with the complete understanding that, while the Project would result in water import reductions by the LRAs, MWD would not relinquish any imported water entitlements.³⁵ Because nothing has changed, there is no merit to any claim by the Opponents that the Commission did not have complete and accurate information before it regarding MWD's ability to use its water entitlements or redirect imported water the Project replaces when the Commission approved the GHG Plan.

MWD's General Manager also confirmed in a December 17, 2009 letter to Executive Director Douglas that the SDP Agreement protects MWD's rights to its imported water entitlements consistent with the July 2005 Required Contract Terms, which is also consistent with Poseidon's testimony and prior submissions to the Commission:

"In 2005, Metropolitan authorized agreements with the SDCWA and four other member agencies that included a uniform provision to protect Metropolitan's water rights and entitlements. This provision appears as Section 13 of the draft SDP Agreement. . . . Section 13's sole purpose is to protect Metropolitan's imported water supply rights and entitlements."³⁶

It is because the July 2005 Required Contract Terms already had been approved at the time of the Coastal Commission hearing on the GHG Plan and that Article 14 of those Terms required all SDP agreements to protect MWD's imported water supplies, which Poseidon believed could not be altered, that Poseidon, MWD, the Water Authority and the LRAs all acknowledged during the Commission's proceedings on the GHG Plan that MWD would not contractually relinquish its imported water entitlements.³⁷ Commission staff also conveyed this

³³ See January 7, 2010 Letter, pp 7-9.

³⁴ Revocation Request, at p. 5.

³⁵ See, e.g., January 7, 2010 Letter, pp. 9-13.

³⁶ See December 17, 2009 Letter from Jeffrey Kightlinger to Peter Douglas, attached to January 7, 2010 letter as Exhibit H (emphasis added).

³⁷ See, e.g., *id.*, pp. 15-16.

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same information to the Commission in its arguments against Poseidon's GHG Plan during the August 6, 2008 hearing:

Commission staff Tom Luster: "As you have heard several times today, the state water project will not necessarily reduce its electrical use or its emissions, due to Poseidon's project

....

Met describes its desal program as allowing Metropolitan to redirect imports, not necessarily reduce them. For example, Met's recent integrated water resources plan from 2004 -- which staff is adding to the record -- states that desal is expected to offset water use in one area of its service area, and allow it to send additional imported water to other parts of its service area."³⁸

We also understand that Opponents wrongly believe that the definition of "Eligible Yield" in Section 1.4 of the SDP Agreement demonstrates that the Project's water is not replacing water that would have otherwise been imported to the San Diego region. The SDP Agreement defines "Eligible Yield" as "the amount of Desalinated Seawater actually delivered to an LRA's or Water Authority's local potable water distribution system from the Project in a Fiscal Year, excluding any Desalinated Seawater that Metropolitan reasonably determines will not augment water supply available to Metropolitan's service area, including Metropolitan's imported water." Opponents incorrectly claim that the use of the word "augment" in this definition indicates that water produced by the Project will supplement water already imported to the region, rather than replace it.

Section 1.4 of the SDP Agreement confirms that desalinated water supplies from the Project must displace demand otherwise placed on Metropolitan, or the desalinated water supplies will not qualify as "Eligible Yield" that is entitled to Metropolitan's financial incentives under SDP Agreement Sections 6 and 7. This understanding is supported by Recital O of the SDP Agreement, which provides that MWD established the Seawater Desalination Program "to provide financial incentives for seawater desalination projects that reduce demand for imported water supplies from Metropolitan through the State Water Project and Colorado River Aqueduct."³⁹ The Opponents' narrow reading of the term "augment" fails to take into account

³⁸ Testimony of Tom Luster, Reporter's Transcript of Proceedings, State of California Coastal Commission, Aug. 6, 2008, at p. 172:18-20; 173:6-12.

³⁹ This understanding finds further support in a letter from MWD's General Manager to the Commission's Executive Director, dated July 29, 2008, which states that "water agencies receiving desalinated supplies from the Project must demonstrate that the water offsets an equivalent amount of water imported from Metropolitan." Letter from MWD to Peter Douglas, dated July 29, 2008, at p.1, attached to the January 7, 2010 Letter as Exhibit M. In addition, MWD's 2001 Request for Proposals for its Seawater Desalination Program states: "Project production for any beneficial use must replace an existing demand or prevent a new demand on Metropolitan's imported supplies."

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the larger context of the SDP Agreement, which shows that the Project must actually deliver additional water supply to Metropolitan's customers for Metropolitan to reduce its imported water supplies to those customers and provide them with financial incentives to purchase the replacement water.

In light of the significant evidence in the record that the Commission was fully aware that MWD would not relinquish its imported water entitlements at the time it approved the GHG Plan, and the fact that nothing has changed since MWD approved the July 2005 Required Contract Terms to protect its rights to those entitlements, the Opponents have failed to demonstrate in any way that Poseidon submitted inaccurate, incomplete, or erroneous information to the Commission.

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

The 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 meet this burden because the record clearly shows that the Commission approved Poseidon's "net" emissions approach in the GHG Plan with the full knowledge that MWD would not forgo its imported water entitlements or limit its ability to redirect imported water the Project replaces. Moreover, as discussed above, nothing has changed with respect to the requirement that desalinated water supplies from the Project displace demand otherwise placed on Metropolitan in order for those supplies to qualify for the financial incentives provided under the SDP Agreement. Accordingly, the fact that MWD's SDP Agreement with the Water Authority and the LRAs protects MWD's imported water entitlements would not alter the Commission's endorsement of the "net" approach in the GHG Plan.

Further, even if the SDP Agreement did alter any of the GHG Plan's water import reduction assumptions, which it does not, Section 10 of the CDP only requires the approval of an Energy Minimization and Greenhouse Gas Reduction Plan and does not place restrictions or limitations on the assumptions to be used in that plan. More specifically, Special Condition 10 does not require that MWD relinquish any of its water supply entitlements, obligate Poseidon to demonstrate that the desalinated water produced by the Project results in a reduction of imported

See MWD Seawater Desalination Program Request for Proposals, November 2001, attached to the January 7, 2010 Letter at Exhibit L.

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water to the San Diego region, or require Poseidon to offset the Project's "gross" GHG emissions. Instead, Special Condition 10 states:

PRIOR TO ISSUANCE OF THE PERMIT, the Permittee shall submit to the Commission a Revised Energy Minimization and Greenhouse Gas Reduction Plan that addresses comments submitted by the staffs of the Coastal Commission, State Lands Commission and the California Air Resources Board. The permit shall not be issued until the Commission has approved a Revised Energy Minimization and Greenhouse Gas Reduction Plan after a public hearing.

Commission staff proposed this language to the Commission in its Staff Report regarding the November 15, 2007 hearing on the CDP, and the Commission adopted it verbatim when it approved the CDP.

Opponents can point to no evidence that shows the Commission would have altered Special Condition 10's requirements in any way. Accordingly, since the Opponents cannot meet the burden of proof under the third element of CCC Regulations Section 13105(a) for either the CDP or the GHG Plan, the Revocation Request must be denied.

III. 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. As discussed in Sections I and II above, there are no grounds that support revocation of 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.⁴⁰ Case law is clear that important rights, such as a medical or other

⁴⁰ 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

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professional license or permit, cannot be suspended automatically upon a mere allegation or claim.⁴¹ Because of its vested right, Poseidon is entitled to a hearing before a nonbiased decision maker before any suspension can occur.⁴² 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.

IV. COASTAL ENVIRONMENTAL RIGHTS FOUNDATION DOES NOT HAVE STANDING

Poseidon believes that Coastal Environmental Rights Foundation ("CERF") is not a proper party to the Revocation Request. Section 13106 of the CCC Regulations 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 2), CERF 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, CERF is not a proper party to the Revocation Request because it did not exist at the time of those hearings, and thus could not have even had an "opportunity to fully participate" in those hearings. Thus, we request that the Revocation Request be dismissed as to CERF.

V. CONCLUSION

In sum, the evidence from the Commission's administrative record conclusively shows that Poseidon and MWD consistently maintained to the Commission that, while the Project's water supply would result in the replacement of imported water purchases by the Project's customers, MWD would not relinquish its imported water entitlements or limit its ability to redirect water the Project replaces to other locations within MWD's service territory. The Revocation Request provides no new information that shows Poseidon's testimony and submissions on this issue were inaccurate, incomplete or erroneous in any way. Moreover, the Revocation Request is an improper attempt to revisit the debate concerning whether Poseidon should be required to offset the Project's "gross" or "net" greenhouse gas emissions – a debate which was settled when the Commission approved Poseidon's "net" approach in the GHG Plan

decision is indicated because the abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction.").

⁴¹ 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.

⁴² 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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and rejected staff's and Opponents' "gross" approach.⁴³ 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. Finally, we also respectfully request that you deny the request for suspension, which has no basis in law or in fact.

Very truly yours,

Handwritten signature of Rick Zbur, with the initials "wps" written to the right of the signature.

Rick Zbur
of LATHAM & WATKINS LLP

Attachments

cc: Governor Arnold Schwarzenegger
President Pro Tempore Darrell Steinberg, California State Senate
Speaker Karen Bass, California State Assembly
Senator Dennis Hollingsworth, California State Assembly
Senator Christine Kehoe, California State Assembly
Senator Mark Wyland, California State Assembly
Senator Denise Moreno Duchen, California State Assembly
Assemblymember Kevin Jeffries, California State Assembly
Assemblymember Nathan Fletcher, California State Assembly
Assemblymember Mimi Walters, California State Assembly
Assemblymember Martin Garrick, California State Assembly
Assemblymember George Plescia, California State Assembly
Assemblymember Lori Saldana, California State Assembly
Assemblymember Joel Anderson, California State Assembly
Assemblymember Marty Block, California State Assembly
Assemblymember Mary Salas, California State Assembly
Secretary Lester Snow, Natural Resources Agency
Andrew Sienkiewich, Metropolitan Water District
Ken Weinberg, San Diego County Water Authority
Alison Dettmer
Tom Luster
Peter MacLaggan

⁴³ As noted above and in footnote 17, various state agencies, including the Air Resources Board, California Energy Commission, and Department of Finance, as well as the Lieutenant Governor, MWD, and the Water Authority all supported the "net" approach.

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400



November 3, 2009
Permit: E-06-013

COASTAL DEVELOPMENT PERMIT

On November 15, 2007, by a vote of 9-3, the California Coastal Commission granted to Poseidon Resources Coastal Development Permit #E-06-013, subject to the attached standard and special conditions, for development consisting of:

Seawater desalination facility and associated pipelines.

The development is located at and near the Encina Generating Station in the City of Carlsbad, San Diego County.

Issued on behalf of the Coastal Commission on November 3, 2009.

PETER DOUGLAS
Executive Director

A handwritten signature in black ink, appearing to read "Alison J. Dettmer".

By: ALISON J. DETTMER
Deputy Director
Energy, Ocean Resources, and Federal Consistency Division

EXHIBIT NO. 3

APPLICATION NO.

R2-E-06-013



California Coastal Commission

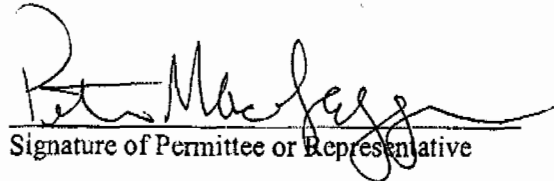
Acknowledgment:

The undersigned permittee acknowledges receipt of this permit and agrees to abide by all terms and conditions thereof.

The undersigned permittee acknowledges that Government Code Section 818.4, which states in pertinent part, that: "A public entity is not liable for injury caused by the issuance... of any permit..." applies to the issuance of this permit.

IMPORTANT: THIS PERMIT IS NOT VALID UNLESS AND UNTIL A COPY OF THE PERMIT WITH THE SIGNED ACKNOWLEDGMENT HAS BEEN RETURNED TO THE COMMISSION OFFICE (14 Cal. Admin. Code Section 13158(a).)

11/3/09
Date


Signature of Permittee or Representative

STANDARD CONDITIONS

- 1) **Notice of Receipt and Acknowledgment:** This permit is not valid until a copy of the permit is signed by the Permittee or authorized agent, acknowledging receipt of the permit and the acceptance of the terms and conditions, and is returned to the Commission office.
- 2) **Expiration:** Construction activities for the proposed project must be initiated within two years of issuance of this permit. This permit will expire two years from the date on which the Commission approved the proposed project if development has not begun. Construction of the development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made at least six months prior to the expiration date.
- 3) **Interpretation:** Any questions of intent or interpretation of any condition will be resolved by the Executive Director of the Commission (hereinafter, "Executive Director") or the Commission.
- 4) **Assignment:** The permit may be assigned to any qualified person, provided the assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
- 5) **Terms and Conditions Run with the Land:** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittee to bind all future owners and possessors of the subject property to the terms and conditions.

SPECIAL CONDITIONS

- 1) **Liability for Costs and Attorneys Fees:** The Permittee shall reimburse the Coastal Commission in full for all Coastal Commission costs and attorneys fees – including (1) those charged by the Office of the Attorney General, and (2) any court costs and attorneys fees that the Coastal Commission may be required by a court to pay – that the Coastal Commission incurs in connection with the defense of any action brought against the Coastal Commission, its officers, employees, agents, successors and assigns challenging the approval or issuance of this permit. The Coastal Commission retains complete authority to conduct and direct the defense of any such action against the Coastal Commission.
- 2) **Proof of Legal Interest:** PRIOR TO ISSUANCE OF THE PERMIT, the Permittee shall provide for Executive Director review and approval documentation of the Permittee's legal interest in all property within the coastal zone needed to construct and operate the project, including:
 - Lease(s) from the California State Lands Commission for structures on state tidelands. Any conflicts between conditions of the lease(s) and those adopted by the Coastal Commission shall be presented to the Coastal Commission for resolution.
 - Lease(s) or other forms of approval from the power plant owner allowing the Permittee to use portions of the power plant site and Agua Hedionda Lagoon.
 - Lease(s) or other forms of approval from the City of Carlsbad and other local governments for the project's water delivery pipelines.

- 3) **Lease and Deed Restriction:** PRIOR TO ISSUANCE OF THE PERMIT, the applicant shall provide to the Executive Director for review and approval documentation demonstrating that the applicant has executed and recorded against its leasehold interest(s) in the property governed by this permit a lease restriction (in which any private owner of the fee interest in such property shall join or to which it shall agree to be bound), in a form and content acceptable to the Executive Director (a) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the Property, subject to terms and conditions that restrict the use and enjoyment of the Property; and (b) imposing all of the Special Conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the Property. The restriction shall include a legal description of the Property. It shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the Standard and Special Conditions of this permit shall continue to restrict the use and enjoyment of the Property so long as either this permit or the development it authorizes – or any part, modification, or amendment thereof – remains in existence on or with respect to the Property.
- 4) **Other Approvals:** PRIOR TO COMMENCEMENT OF CONSTRUCTION, the Permittee 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 City of Carlsbad, the Regional Water Quality Control Board, the California Department of Health Services, the National Marine Fisheries Service, and the U.S. Fish and Wildlife Service, or documentation showing that these approvals are not needed.
- 5) **Assumption of Risk and Waiver of Liability:** The Permittee acknowledges and agrees, on behalf of itself and all successors and assigns: (i) that the project site may be subject to hazards from seismic events, liquefaction, storms, waves, floods and erosion; (ii) to assume the risks to the Permittee and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) that any adverse effects to property caused by the permitted project shall be fully the responsibility of the landowner.
- 6) **Limits of Development:** This permit authorizes the construction and operation of the Poseidon Carlsbad Desalination Project and associated infrastructure as described in the project description of this staff report, as clarified and modified by these conditions.
- 7) **Final Plans:** PRIOR TO COMMENCEMENT OF CONSTRUCTION, the Permittee shall submit to the Executive Director for review and approval final plans for the project components located in the coastal zone. The Permittee shall undertake development in accordance with the approved plans and any changes shall be reported to the Executive Director. No material changes within the coastal zone shall occur without a Commission-approved amendment to this 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.

- 8) **Marine Life Mitigation Plan:** PRIOR TO ISSUANCE OF THE PERMIT, the Permittee shall submit to and obtain from the Commission approval of a Marine Life Mitigation Plan (the Plan) that complies with the following:
- a) Documentation of the project's expected impacts to marine life due to entrainment and impingement caused by the facility's intake of water from Agua Hedionda Lagoon. This requirement can be satisfied by submitting a full copy of the Permittee's Entrainment Study conducted in 2004-2005 for this project.
 - b) To the maximum extent feasible, the mitigation shall take the form of creation, enhancement, or restoration of aquatic and wetland habitat.
 - c) Goals, objectives and performance criteria for each of the proposed mitigation sites. It shall identify specific creation, restoration, or enhancement measures that will be used at each site, including grading and planting plans, the timing of the mitigation measures, monitoring that will be implemented to establish baseline conditions and to determine whether the sites are meeting performance criteria. The Plan shall also identify contingency measures that will be implemented should any of the mitigation sites not meet performance criteria.
 - d) Requires submittals of "as-built" plans for each site and annual monitoring reports for no less than five years or until the sites meet performance criteria.
 - e) Defines legal mechanism(s) proposed to ensure permanent protection of each site -- e.g., conservation easements, deed restriction, or other methods.

The Permittee shall comply with the approved Plan. Prior to implementing the Plan, the Permittee shall submit a proposed wetlands restoration project that complies with the Plan in the form of a separate coastal development permit application for the planned wetlands restoration project.

- 9) **Change in Seawater Withdrawal:** If at any time during the life of the project Poseidon proposes or is required to withdraw more than an average flow of 304 MGD of seawater, it must obtain first an amendment to this permit.
- 10) **Energy Minimization and Greenhouse Gas Reduction Plan:** PRIOR TO ISSUANCE OF THE PERMIT, the Permittee shall submit to the Commission a Revised Energy Minimization and Greenhouse Gas Reduction Plan that addresses comments submitted by the staffs of the Coastal Commission, State Lands Commission and the California Air Resources Board. The permit shall not be issued until the Commission has approved a Revised Energy Minimization and Greenhouse Gas Reduction Plan after a public hearing.
- 11) **Public Access Enhancements:** PRIOR TO COMMENCEMENT OF OPERATIONS, Poseidon shall cause to be dedicated, in accordance with the City of Carlsbad's Precise Development Plan PDP 00-02, the below-described parcels of land. The dedications shall be in the form of easements, title transfers, and/or deed restrictions, whose purpose is to further Coastal Act goals of maximizing public access and recreational opportunities along the coast in the South Carlsbad Coastal Resource Redevelopment Area and maintaining, restoring and enhancing marine resources. The four sites are:
- Fishing Beach: public access and parking easement in favor of the City of Carlsbad covering approximately 2.4 acres of land along the west shore of Agua Hedionda Lagoon.

- Bluff Area: approximately 10.2 acres of land on the west side of Carlsbad Boulevard opposite the power plant, which shall be dedicated in fee title to the City of Carlsbad for recreational and coastal access uses.
- Hubbs Site: approximately 2 acres of land along the north shore of Agua Hedionda Lagoon to be used for a fish hatchery, aquatic research, and public access, which shall be deed restricted to uses such as fish hatchery, aquatic research, and trails.
- South Power Plant Parking Area: an access easement over approximately 0.3 acres of land on the east side of Carlsbad Boulevard near the south entrance of the power plant that shall be dedicated to the City of Carlsbad for public parking.

12) Dredging: This permit does not authorize dredging that may be needed to maintain flows to the desalination facility's intake structure. The Permittee shall submit separate coastal development permit applications for proposed dredging operations.

13) Visual Resources: PRIOR TO COMMENCEMENT OF CONSTRUCTION, the Permittee shall submit to the Executive Director for review and approval a Screening Plan. Desalination plant exterior mechanical equipment and facilities, including tanks, heating, air conditioning, refrigeration equipment, plumbing lines, duct work and transformers, shall be screened from view on all sides visible to the public. The design and material used for screening shall be architecturally compatible with the building.

14) Lighting Plan: PRIOR TO COMMENCEMENT OF CONSTRUCTION, the Permittee shall submit a Lighting Plan to the Executive Director for review and approval. Exterior lighting for the desalination facilities shall serve the purpose of operations, security and safety only. The Lighting Plan shall demonstrate that project lighting is shielded from surrounding areas, and that only the minimum amount of lighting required for safety purposes is provided to avoid adverse effects on surrounding areas. In general, lighting fixtures shall be shielded downward and away from the ocean, Lagoon and adjacent properties. Construction of the desalination plant and related facilities and improvements shall be in conformance with the approved plan.

15) Construction Plan: PRIOR TO COMMENCEMENT OF CONSTRUCTION, the Permittee shall submit to the Executive Director for review and approval a Construction Plan. The Construction Plan shall identify the specific location of all construction areas, all staging areas, and all construction access corridors in site plan view in the coastal zone. The Plan shall identify any expected disruptions to public access to the shoreline and shall include measures to avoid, minimize, or mitigate for those disruptions.

The Plan shall also identify the type and location of erosion control/water quality best management practices that will be implemented during construction to protect coastal water quality, including the following:

- Silt fences, or equivalent apparatus, shall be installed at the perimeter of the construction areas to prevent construction-related runoff and/or sediment from entering the dunes and/or the Pacific Ocean.
- Grading and land alteration outside of the approved construction zone is prohibited.

- Equipment washing, refueling, and/or servicing shall not take place on the beach or sandy dune area. All construction equipment shall be inspected and maintained at an off-site location to prevent leaks and spills of hazardous materials at the project site.
- The construction site shall maintain good construction housekeeping controls and procedures (e.g., clean up all leaks, drips, and other spills immediately; keep materials covered and out of the rain (including covering exposed piles of soil and wastes); dispose of all wastes properly, place trash receptacles on site for that purpose, and cover open trash receptacles during wet weather; remove all construction debris from the beach).
- All erosion and sediment controls shall be in place prior to the commencement of construction as well as at the end of each workday. A copy of the approved Construction Plan shall be kept at the construction job site at all times and all persons involved with the construction shall be briefed on its content and meaning prior to commencement of construction. The Permittee shall notify the Executive Director at least three working days in advance of commencement of construction, and immediately upon completion of construction. The Permittee shall undertake construction in accordance with the approved Construction Plan. Any proposed changes to the approved Construction Plan shall be reported to the Executive Director. No material changes to the approved Construction Plan shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is necessary.

16) Storm Water Pollution Prevention Plan: PRIOR TO COMMENCEMENT OF

CONSTRUCTION, the Permittee shall submit for Executive Director review and approval a Storm Water Pollution Prevention Plan (SWPPP). At minimum the SWPPP shall include the following Best Management Practices (BMPs):

- Gravel bags, silt fences, etc. shall be placed along the edge of all work areas as determined appropriate by the City's construction inspector in order to contain particulates prior to contact with receiving waters.
- All concrete washing and spoils dumping will occur in a designated location.
- Construction stockpiles will be covered in order to prevent blow-off or runoff during weather events.
- A pollution control education plan developed by the General Contractor and implemented throughout all phases of development and construction.
- Severe weather event erosion control materials and devices shall be stored onsite for use as needed.

17) Water Quality Technical Report: PRIOR TO COMMENCEMENT OF

CONSTRUCTION, the Permittee shall submit for Executive Director review and approval a Water Quality Technical Report as specified in the City of Carlsbad Standard Urban Stormwater Mitigation Plan (April 2003) (Carlsbad SUSMP) for the post construction desalination facility, prepared by a licensed Civil Engineer, which shall include plans, descriptions and supporting calculations. The Storm Water Management Plan shall incorporate all feasible Best Management Practices (BMPs) designed to reduce, to the maximum extent practicable, the volume, velocity and pollutant load of stormwater leaving the developed areas of the site. The plan shall include the following criteria:

- Post-Development peak runoff rates and average volumes shall not exceed pre-development conditions.

- Runoff from all parking areas, turnouts, driveways and other impermeable surfaces (e.g., roofs) shall be collected and directed through a system of structural BMPs including vegetated and/or gravel filter strips or other media filter devices or other equivalent means. The filter elements shall be designed to 1) trap sediment, particulates and other solids and 2) remove or mitigate contaminants through infiltration and/or biological uptake. The drainage system shall also be designed to convey runoff in excess of this standard from the developed site in a non-erosive manner.
- Provisions for maintaining the drainage and filtration systems so that they are functional throughout the life of the approved development. Such maintenance shall include the following: 1) the drainage and filtration system shall be inspected, cleaned and repaired prior to the onset of the storm season, but not later than September 30th each year and 2) should any of the project's surface or subsurface drainage/filtration structures fail or result in increased erosion, the applicant/landowner or successor-in-interest shall be responsible for any necessary repairs to the drainage/filtration system and restoration of the eroded area.
- A drainage system approved by the City Engineer to ensure that runoff resulting from 10-year frequency storms of 6 hours and 24 hours duration under developed conditions, are equal to or less than the runoff from a storm of the same frequency and duration under existing developed conditions. Both 6-hour and 24-hour storm durations shall be analyzed to determine the detention basin capacities necessary to accomplish the desired results.

The Permittee shall implement and maintain the Plan for the life of the project.

R2-E-06-013

Poseidon Resources (Channelside) LLC

EXHIBIT 4

Letters of Support

CALIFORNIA ENERGY COMMISSION

1515 NINTH STREET
SACRAMENTO, CA 95814-8512
www.energy.ca.gov



July 29, 2008

Patrick Kruer, Chairman
California Coastal Commission
North Central Coast District
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

John Chiang, Chairman
California State Lands Commission
100 Howe Ave Suite 100 South
Sacramento, CA 95825-8202

Re: Carlsbad Seawater Desalination Project CDP Application No. E-06-013
Energy Minimization and Greenhouse Gas Reduction Plan

Dear Chairman Kruer and Chairman Chiang:

After sending you both my July 18, 2008 letter regarding Poseidon's Carlsbad Desalination Project's *Energy Minimization and Greenhouse Gas Reduction Plan* (Plan), as revised July 3, 2008, I had an opportunity to meet with representatives of Poseidon Resources. The meeting, which occurred on July 23, 2008, was informative and left me with clarifications and a better understanding of the Plan. Consequently, by this letter, I wish to retract the comments in my July 18, 2008 letter.

First, it is notable that the Poseidon Project demonstrates that desalination of ocean and brackish water is becoming an important component of the state's strategy to meet its water needs. Indeed, the Energy Commission has long studied ocean and brackish water desalination and invested in research to improve technologies and address issues associated with desalination. The Poseidon Project is consistent with our efforts to improve the efficiency and environmental effects of desalination and lower its costs to customers. Towards those ends, the project and the plan for mitigation are laudable.

At the July 23, 2008 meeting, representatives of Poseidon Resources and I discussed the desalination project, the City of Carlsbad's environmental impacts report (EIR), and the comments in my July 18, 2008 letter. Subsequently, Poseidon Resources sent me additional information and a letter on July 25, 2008, further amplifying what we had discussed. Based on clarifying information and further consideration of the environmental review done on the project, I am persuaded that Poseidon's commitment

EXHIBIT NO. 4

APPLICATION NO.

R2-E-06-013



California Coastal Commission

Chairman Patrick Krueger
Chairman John Chiang
July 29, 2008
Page 2

to offset 100 percent of its "net" or incremental increase in greenhouse gas emissions above baseline conditions is reasonable under the California Environmental Quality Act (CEQA). Indeed, the approach is consistent with how the Energy Commission, itself, analyzes the significance of impacts under CEQA, for example, in its power plant licensing cases.

More specifically, I understand the "baseline" under CEQA is typically the existing conditions as of the start of environmental analysis of the project. Accordingly, Poseidon's Plan to mitigate the carbon emissions from the increase in electricity required to deliver the project's water to customers, as compared with the "baseline" of current electricity required to serve those customers with State Water Project water, is supportable by the Energy Commission. Any implication in the Energy Commission's comments that Poseidon should further mitigate impacts yet to be ascertained from the diversion of State Water Project water for use elsewhere is not intended. Poseidon's Plan to mitigate the project's indirect impacts, as discussed, appropriately focuses on what is reasonably foreseeable, which is what I understand CEQA requires in an environmental analysis.

Finally, Poseidon's point about both the City's and the Coastal Commission's environmental analyses concluding the project would not cause growth inducing impacts is salient. In deference to the City's EIR and the Coastal Commission's substantiated conclusions, I accept the point. Please consider the comments in my July 18, 2008 letter regarding the project's growth-inducing impacts as having been withdrawn. Understandably, such comments fuel unnecessary speculation of impacts, which departs from the reasonably foreseeable impacts that Poseidon proposes to mitigate. Moreover, the Plan for mitigation represents an approach acceptable to the permitting agencies. The Energy Commission, with no evidence to contradict the Plan, takes no issue with it.

The representatives I met with also informed me that Poseidon has applied to become a member of the Climate Action Registry and is committed to following the accounting protocols for reporting emissions and reductions. Compliance with the accounting protocols enhances the credibility of Poseidon's Plan. I see Poseidon's membership with the Registry as an important step, not only in implementing the Plan, but also in supporting the role of the Registry in furthering the accountability of emissions reductions used to meet the state's goals under AB'32.

Chairman Patrick Kuer
Chairman John Chiang
July 29, 2008
Page 3

We appreciate the efforts of Poseidon Resources to address our concerns and those of your staff to consider the points we have raised regarding this important project. If you have any questions, please contact me at (916) 654-4996.

Sincerely,



MELISSA JONES
Executive Director

cc: Paul D. Thayer, Executive Officer, SLC
Peter M. Douglas, Executive Director, CCC
Mike Chrisman, Secretary for Resources
Jackalynne Pfannenstiel, Chairman, California Energy Commission
Pat Peraz, Assistant Director, California Energy Commission
Lorraine White, Senior Water-Energy Lead, California Energy Commission
Cynthia Bryant, Governor's Office of Planning and Research
Walter Winrow, President and COO, Poseidon Resources
Peter MacLaggan, Senior Vice President, Poseidon Resources



MWD

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Executive Office

July 29, 2008

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

Dear Mr. Douglas:

Carlsbad Desalination Project's Energy Minimization and Greenhouse Gas Reduction Plan

The Metropolitan Water District of Southern California (Metropolitan) and the San Diego County Water Authority are statewide leaders in water conservation, recycling, and brackish groundwater desalination. However, in addition to these demand management achievements, our resource strategy benefits from other progressive actions including seawater desalination. Metropolitan's responsibility to the public is to manage future challenges including population growth, climate change impacts, increased uncertainty in the Bay-Delta, and earthquake disruptions to imported water pipelines.

The proposed Carlsbad Seawater Desalination Project (Project) would help secure supply reliability in Southern California by mitigating against these uncertainties. Metropolitan has previously supported and continues to support the project.

Metropolitan has committed to providing incentives of \$250 per acre-foot for locally-developed seawater desalination supplies that offset the demands for imported supplies, up to \$14 million annually to support the Project. To receive the incentive, water agencies receiving desalinated supplies from the Project must demonstrate that the water offsets an equivalent amount of water imported from Metropolitan.

Coastal Commission staff have questioned if it is appropriate for the Carlsbad Desalination Project's proposed Energy Minimization and Greenhouse Gas Reduction Plan (GHG Plan) to account for the fact that seawater desalination would lessen the need for additional water to be imported into the region. Metropolitan believes it is appropriate for the Project's GHG Plan to be based on offsetting net carbon emissions because San Diego County will use 56,000 acre-feet per year less imported water upon Project start up. By net, we mean the difference in energy related emissions required for moving water through the State Water Project compared to operating the seawater desalination project.

Mr. Peter Douglas

Page 2

July 29, 2008

Offsetting demand for imported water is a condition for receiving Metropolitan's financial incentives. Reduced demand will assist Metropolitan's ability to store wet-year water, improve operational flexibility and reduce requirements for dry-year water transfers delivered through State Water Project infrastructure. If the Project is not approved, regional demand for imported water will not be reduced by the 56,000 acre-feet per year to be produced by the Project.

The conditions placed on the Carlsbad Desalination Project set an important precedent for seawater desalination development in California. In that light, Metropolitan supports the Project's GHG Plan, which we believe will achieve carbon neutrality by offsetting the Project's net greenhouse gas emissions.

Thank you for considering our comments.

Yours truly,



Jeffrey K. Hightinger
General Manager

WAT:tw

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cc: Ms. Maureen A. Stapleton
General Manager
San Diego County Water Authority
4677 Overland Avenue
San Diego, CA 92123

Mr. Peter M. MacLaggan
Poseidon Resources Corporation
501 West Broadway, Suite 840
San Diego, CA 92101



Air Resources Board



Linda S. Adams
Secretary for
Environmental Protection

Mary D. Nichols, Chairman
1001 I Street • P.O. Box 2815
Sacramento, California 95812 • www.arb.ca.gov

Arnold Schwarzenegger
Governor

August 5, 2008

Mr. Patrick Kruer, Chairman
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

Re: Carlsbad Desalination Project-Poseidon Resources
Energy Minimization and Greenhouse Gas Reduction Plan

Dear Chairman Kruer:

State law charges the Air Resources Board (ARB) with implementing the Global Warming Solution Act of 2006 (AB 32). AB 32 requires ARB to develop a plan to achieve reductions in emissions based on projected growth in the population and economy of the State. According to the Draft Scoping Plan we released in June, California needs to achieve 169 million metric tons CO₂ equivalent (MMTCO₂E) reduction from a projected 596 MMTCO₂E business-as-usual (BAU) case to meet the Legislative mandate to return to 1990 levels by 2020. The Draft Scoping Plan provides a preliminary recommendation for achieving these reductions through a mix of regulatory measures, including market mechanisms.

Working with the Governor's Office of Planning and Research, ARB is also examining the thresholds of significance and appropriate mitigation measures that can be applied under the California Environmental Quality Act (CEQA) to address new projects. We are also working with local and regional government organizations to address the role of land use and transportation planning in meeting our climate goals. These discussions are ongoing; nevertheless, it is important to address new projects while recognizing that relevant policies are still under development.

As part of our efforts to reduce GHG emissions, ARB is working with other agencies to seek opportunities to improve the efficiency and GHG impact of our State water supply. We will continue to evaluate options, including appropriate sector-wide policies for new water development projects. This evaluation will include the appropriate mechanisms for providing GHG credits for displacing existing water supplies.

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website: <http://www.arb.ca.gov>.

California Environmental Protection Agency

Mr. Patrick Kruer, Chairman
August 5, 2008
Page 2

ARB staff has reviewed Poseidon Resources' Energy Minimization and Greenhouse Gas Reduction Plan (Plan). We appreciate their voluntary pledge to reduce their contribution to greenhouse gas (GHG) emissions. Since there are minimal direct emissions associated with the project, the primary contribution is from indirect emissions associated with electricity use.

For this project, we believe the amount of emissions reduction that should be required need not exceed the net impact; that is, the direct emissions and any new indirect emissions from the project, less emissions that would be associated with providing an equivalent amount from existing supplies.

Thank you for this opportunity to comment on this matter before the Commission. If you have any questions, please call Mr. Robert D. Fletcher, Chief, Stationary Source Division, at (916) 324-8167 or via email at rfletche@arb.ca.gov.

Sincerely,

/s/

Mary D. Nichols
Chairman

cc: Mr. John Chiang, Chairman
California State Lands Commission
100 Howe Avenue, Suite 100 South
Sacramento, CA 95825-8202

Ms. Cindy Tuck
Undersecretary
California Environmental Protection Agency

Mr. Robert D. Fletcher, Chief
Stationary Source Division



LIEUTENANT GOVERNOR JOHN GARAMENDI

July 31, 2008

Patrick Krueger, Chairman
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: Poseidon Desalinization Project

Dear Chairman Krueger:

There appears to be confusion over the issue of achieving a carbon neutral desalinization project. I want you to know my views on this issue.

I believe that the greenhouse gas emission resulting from the project should be mitigated. In determining the amount of mitigation, the calculation should be based on the assumption that the water delivered to the contracting water agencies *replaces* water that the water agencies currently and in the future would receive from Metropolitan Water District (MWD). The amount of mitigation is therefore the net not the gross power consumed.

The argument that the desalinization's plant water is new water is based upon the assumption that the replaced water would be used elsewhere in the MWD service area. Even if this were true, it is not the desalinization's plant to mitigate that new use. It is the responsibility of the entity that receives that water. Furthermore, the most likely scenario is that the replaced water will stay in the river as ordered by the federal courts.

Sincere

Signature on File

JOHN GARAMENDI
Lieutenant Governor

cc: Paul Thayer, State Lands Commission



DEPARTMENT OF
FINANCE
OFFICE OF THE DIRECTOR

ARNOLD SCHWARZENEGGER, GOVERNOR
STATE CAPITOL ■ ROOM 1145 ■ SACRAMENTO CA ■ 95814-4998 ■ WWW.DOF.CA.GOV

August 5, 2008

Mr. Patrick Kruer, Chairman
California Coastal Commission
North Central Coast District
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Dear Chairman Kruer:

As the Department of Finance representative on the State Lands Commission (SLC), I am writing the about the Poseidon Desalinization Project currently pending before the California Coastal Commission. Specifically, I would like to address the sponsor's greenhouse gas mitigation plan.

During the SLC's hearing last October in San Diego, the sponsors of the project committed to our Commission that the project would be "carbon neutral". Needless to say as the Schwarzenegger administration's representative on the SLC, such a commitment is critical in meeting the goals of AB 32, the California Global Warming Solutions Act of 2006.

However, since the time of our meeting, there has been much discussion as to how "carbon neutral" should be interpreted. While one perspective is that the project should mitigate all the greenhouse gas emissions from the electricity required to serve those current water customers in the San Diego region, such an approach is beyond what the sponsors proposed and a more stringent standard than seems equitable under the circumstances. Poseidon has agreed to mitigate its "net" or incremental increase in greenhouse gas emissions for this project. This approach is consistent with practice under the California Environmental Quality Act (CEQA) and appears appropriate to satisfy permit conditions. At our meeting in October, SLC directed staff to provide additional information on this issue which we will consider at our August 22nd meeting.

This desalinization project is an historic opportunity for the State of California to meet two critical environmental goals; an additional source of water to meet our growing demand and a real reduction in greenhouse gas emissions. Thank you for your consideration.

Sincerely,



Anne Sheehan
Chief Deputy Director

cc: Paul Thayer, SLC