



January 16, 2009

Mr. John Robertus
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA. 92123-4340
Via Electronic Mail

Supporting Document No. 6

RE: Closed Session of Ongoing Litigation, *Surfrider Foundation v. California Regional Water Quality Control Board -- San Diego Region, (Poseidon Resources, Real Party-in-Interest), Petition for Writ of Mandate. San Diego County Superior Court, Case No. 37-2008-00091983-CU-WM-CTL (filed September 2008)*

Dear Mr. Robertus,

Please accept these comments on behalf of San Diego Coastkeeper (Coastkeeper) in regards to Agenda Item 7.b., a closed session discussion of ongoing litigation, *Surfrider Foundation v. California Regional Water Quality Control Board—San Diego Region*. With Surfrider, Coastkeeper is also a plaintiff in this case. Although the Regional Board may discuss ongoing litigation during closed session, such discussion is limited to the litigation, and not to the merits of Poseidon's conformance with its NPDES Permit, or any conditions thereof.

The Regional Board conditionally approved Poseidon's Revised Flow, Entrainment, and Impingement Minimization Plan (Flow Plan) on April 9, 2008 in Resolution No. R9-2008-0039. Poseidon's amendments to its Flow Plan were due on October 8, 2008. Over one month after the deadline, on November 14, 2008, Poseidon submitted further documents, entitled Marine Life Mitigation Plan, (MLMP) in an effort to comply with the conditions of the April 9th approval. In response to the inadequacy of Poseidon's MLMP, the Regional Board sent correspondence to Poseidon indicating that the MLMP "fails to comply with the directives in the Resolution."¹ The letter goes on to state that, in light of the pending litigation, the matter will be discussed in closed session.² On December 9, 2008, Poseidon submitted a letter in response to the Regional Board December 2nd letter, explaining the delay in submission, and opining on the adequacy of the November 14th MLMP in satisfaction of the conditions of approval in Resolution No. R9-2008-0039.

Coastkeeper is therefore concerned that the upcoming closed session discussion at the Regional Board's January 21st meeting will not be strictly limited to those topics listed in the agenda as required, namely the pending litigation. Although the Regional Board is ultimately responsible for determining compliance with the aforementioned NPDES conditions of approval, this process must be vetted publicly, with opportunity for public review and comment, including a public hearing at which the Regional Board makes its final determination. The conditions of Resolution

¹ Letter from John Robertus to Peter McLaggen, Review of Proposed Poseidon Resources Carlsbad Desalination Plant Marine Life Mitigation Plan, Resolution No. R9-2008-0039, December 2, 2008, p.1.

² *Id.* at p.2.

No. R9-2008-0039 require Regional Board approval of any amendments to the Flow Plan, and thus the MLMP.³ The public must be given an opportunity to provide written and oral comments on any documents submitted by Poseidon for Regional Board approval, and any final action upon such submission must be taken at a noticed, open and public meeting.⁴

Coastkeeper urges the Regional Board to limit any closed session discussions to the pending litigation, and refrain from discussing the merits of Poseidon's MLMP or taking any action upon the MLMP. Coastkeeper intends to actively participate in the public review of Poseidon's conformance with its NPDES Permit and the conditions thereof. Additionally, we intend to submit both written and oral comments at a duly noticed, open and public meeting, if and when the Regional Board considers action upon Poseidon's MLMP.

Thank you for your time and consideration of our comments, we look forward to continued involvement in this matter.

Sincerely,



Livia Borak
Clinic Associate
San Diego Coastkeeper

cc:

Catherine Hagan, San Diego Regional Water Quality Control Board
Mike Porter, San Diego Regional Water Quality Control Board
Chiara Clemente, San Diego Regional Water Quality Control Board
Michelle Mata, San Diego Regional Water Quality Control Board

³ Resolution No. R9-2008-0039, #3, p.2.

⁴ Cal. Water Code § 183; 23 CCR 647.3; Gov. Code § 11120-11132

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