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2009 FEB -2 P 4: 41

February 2, 2009

BY HAND DELIVERY

San Diego Regional Water Quality Control Board Members

Chairman Richard Wright
Vice Chair David King
Eric Anderson
Wayne Rayfield
Kris Weber
Grant Destache
George Loveland
Gary Thompson
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Re: Regional Board Meeting of February 11, 2009
Agenda Item No. 6
Response to Staff Claim That Coastal Commission's Approved Inter-Agency
MLMP Fails To Contain A Specific Mitigation Proposal

Dear Chairman Wright, Vice Chair King and Members of the Regional Board:

I am litigation counsel for Poseidon, defending the lawsuit filed against the California Coastal Commission which attacks the Commission's decision regarding mitigation of potential entrainment and impingement impacts on marine life, including the Commission's decision to require and approve a Marine Life Mitigation Plan ("MLMP").

Your Regional Board staff, in their Staff Report Released On January 30, 2009, ("Executive Officer Summary Report for Item No. 6, undated, emailed to me by your staff counsel Catherine George Hagan on January 30, 2009) has objected to the MLMP approved by the Coastal Commission on August 6, 2008.

Your staff has attacked the Coastal Commission's approved MLMP (which Poseidon has submitted to the Board as soon as the Coastal Commission staff provided a final "as approved by the Commission" copy), because the Coastal Commission's approval "fails to include a mitigation alternative" and the staff argues that the MLMP is not a specific proposal for mitigation as required by Condition No. 3 of your April 2008 Resolution.

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Your staff arguments against the Commission-approved MLMP seem to be closely related, if not identical to the claims made by various groups attacking the Coastal Commission's decision to approve the Coastal Development Permit ("CDP") for the Poseidon Carlsbad Desalination, in San Diego Superior Court Case No. 37-2008-00075727-CU-WM-CTL now pending before Judge Hayes. In this case the opponents claimed that the Coastal Commission had "deferred" mitigation for marine life impacts and failed to adopt an enforceable and specific plan for mitigation.

The Coastal Commission, represented by the California Attorney General, has responded to these same arguments in the enclosed "Memorandum of Points and Authorities." On Pages 5 through 12 of the brief, the Coastal Commission makes clear that the Commission did not improperly defer the requirement for specific mitigation for marine life impacts, and that the Commission has approved a specific plan for mitigation, the MLMP, on August 6, 2008, and that this approval has not been challenged by the project opponents. The Commission's brief states that the Commission had "sufficient standards and conditions for the Plan" and notes that the mitigation plan was required to include "a similar approach and level of detailed information as required of Southern California Edison for mitigation of its San Onofre nuclear generating station."

For whatever reason, your staff has chosen to disengage from the "inter-agency" process for the MLMP which the Board required in its April resolution, and has now chosen to attack the Coastal Commission approved MLMP as insufficiently "specific" and not sufficient to insure adequate mitigation, echoing the arguments of the opponents who have chosen to sue the Coastal Commission.

We urge you to reject your staff's argument and find that the Coastal Commission approved MLMP meets the necessary standards to insure complete adequate mitigation for marine life impacts, just as set forth in the enclosed Coastal Commissions brief filed in the Superior Court.

Of course, several points should be noted. First, it should be noted that the opponents of the project have challenged the Coastal Commission's approval of the original CDP in November of 2007. They have failed to file any lawsuit against the Commission's approval of the MLMP on August 6, 2008. The enclosed brief deals with the lawsuit against the original permit. If any thing, this failure to challenge the MLMP as approved by the Commission should indicate that the opponents believe that the same MLMP which is before you on February 11th does provide a specific enforceable plan of mitigation.

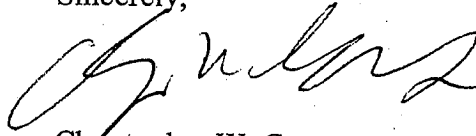
Second, I would also note that it was Poseidon which stressed that the Regional Board had primary jurisdiction over marine life mitigation issues, including entrainment and impingement. Poseidon urged the Board to move forward on its own to adopt the final plan for mitigation. We argued that the Board did not need to wait for or coordinate with the Coastal Commission as part of the approval of the MLMP. This position was rejected by the Board at its April 2008 meeting, at the urging of Regional Board staff. The Board's resolution required an inter-agency consultation process with the Coastal Commission. Several Board members

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expressed the concern that they wanted the Coastal Commission and other agencies to review and approve any MLMP, rather than have the Regional Board act on its own.

Having embraced the inter-agency process, it would not be appropriate to reject the MLMP that the Coastal Commission and State Lands Commissions have approved. The Board cannot simply reject the exact process which it previously required, over Poseidon's objection. If the staff had concerns about the MLMP, they should have been addressed to these two Commissions before they finalized their plan. The enclosed brief makes clear that the Coastal Commission did adopt a specific plan of mitigation for marine life.

Sincerely,



Christopher W. Garrett
of LATHAM & WATKINS LLP

Enclosure: (Coastal Commission Memorandum Filed By Attorney General)

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No fee pursuant to Government Code
Section 6103

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN DIEGO
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14 **SURFRIDER FOUNDATION et al.,**
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20 **POSEIDON RESOURCES**
(CHANNELSIDE) LLC et al.
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Petitioners,

v.

Respondent.

Real Parties in Interest.

37-2008-00075727-CU-WM-CTL

**RESPONDENT CALIFORNIA
COASTAL COMMISSION'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
FIRST AMENDED PETITION FOR
WRIT OF MANDAMUS**

Date: March 13, 2009
Time: 1:30 p.m.
Dept: 68
Judge: The Honorable Judith F. Hayes
Action Filed: 1/14/2008

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1 INTRODUCTION

2 Real Party in Interest Poseidon Resources (Poseidon) proposes to construct and operate a
3 seawater desalination facility (the Project) on the site of the Encina Power Station (EPS) adjacent
4 to Agua Hedionda Lagoon in the City of Carlsbad (Carlsbad). (68 AR 14077.¹) The Project will
5 use EPS's intake structure to draw in water. (*Ibid.*) The Project will produce approximately 50
6 million gallons of water per day (MGD) – enough to serve approximately 300,000 residents in
7 Carlsbad and elsewhere in San Diego County. (42 AR 9818.) Numerous entities, including
8 Respondent California Coastal Commission (Commission), Carlsbad, the San Diego Regional
9 Water Quality Control Board (Regional Board), and the California State Lands Commission
10 (State Lands), have reviewed and approved the Project.

11 The Commission determined the Project, with conditions, is consistent with the California
12 Coastal Act of 1976 (Pub. Resources Code, §§ 30000-30900²; “Coastal Act”), including its
13 requirement to minimize the intake (or entrainment) of marine organisms. The Commission
14 determined the scope of the Project’s entrainment impacts based on substantial evidence in the
15 record and found that alternatives that would avoid or further reduce entrainment were either
16 infeasible or more environmentally damaging. The Commission required compensatory
17 mitigation for the Project’s unavoidable impacts. The Commission found that with this
18 mitigation the Project will be fully consistent with the Coastal Act’s marine life protection
19 policies. Petitioners contend the Commission improperly deferred determination and mitigation
20 of the Project’s impacts, but the Commission determined the impacts before approving the Project
21 and required Poseidon to submit and obtain the Commission’s approval of its mitigation plan
22 before the Commission will issue its permit, thereby avoiding any deferral issues.

23 Petitioners devote a large portion of their brief to federal Clean Water Act section 316(b)
24 (33 U.S.C. § 1326(b)) and section 13142.5 of the Porter-Cologne Water Quality Control Act
25 (Water Code § 13142.5), even though they admit section 316(b) does not apply to the Project and
26

27 ¹ “AR” refers to the Commission’s Administrative Record. Citations are in the form
28 “[vol. #] AR [page #].”

² Statutory citations are to the Public Resources Code unless otherwise indicated.

1 the Regional Board, not the Commission, has primary responsibility to enforce section 13142.5.
2 Disregarding Petitioners' misplaced procedural arguments, the Commission agrees with the
3 substance of their argument: that the Commission must first require the Project to minimize the
4 intake and mortality of marine life (i.e., minimize entrainment), before requiring compensatory
5 mitigation. Contrary to Petitioners' arguments, the Commission did this, though it did so
6 pursuant to the Coastal Act rather than pursuant to the federal Clean Water Act or the Porter-
7 Cologne Act, provisions that are the responsibility of the Regional Board to enforce.

8 STATEMENT OF FACTS

9 Poseidon applied to the Commission for a coastal development permit for the Project in
10 August 2006. Poseidon submitted voluminous materials in support of its application (AR vols. 1-
11 3) and provided additional information and analysis in response to requests from Commission
12 staff. (AR vols. 26-33.) Initially, the Project will use water that EPS pumps to cool its power
13 plant for the desalination process. However, because EPS intends to shut down the plant in the
14 future, the Commission analyzed the Project based on its stand-alone operation. (58 AR 14042.)

15 The Commission held a lengthy public hearing on the Project on November 15, 2007. (46
16 AR 10852-11176.) Based on the evidence before it, the Commission approved the Project, but
17 imposed numerous conditions to ensure consistency with the Coastal Act. (46 AR 11173-11174.)

18 The Commission determined the Project's unavoidable entrainment impacts will be
19 approximately equivalent to the biological productivity of 37 acres of lagoon habitat based on
20 study results submitted by Poseidon. (58 AR 14080-14086; 30 AR 7211-7238, 31 AR 7239-7262,
21 7389-7395.) The Commission determined alternatives to avoid or further reduce entrainment
22 were either infeasible or more environmentally damaging. (58 AR 14087-14092.) To mitigate
23 the Project's entrainment impacts, the Commission imposed Special Condition 8, which required
24 Poseidon, prior to issuance of the permit, to submit a full copy of its entrainment study and obtain
25 Commission approval of a Marine Life Mitigation Plan that includes "to the maximum extent
26 feasible" mitigation that creates, enhances or restores aquatic and wetland habitat. (58 AR 14050.)
27 The Commission also required Poseidon to submit documentation showing final approval for
28 construction and operation from Carlsbad, the Regional Board, the California Department of

1 Health Services, the National Marine Fisheries Service, and the U.S. Fish and Wildlife Service.
2 (58 AR 14049.) The Commission found with these and other conditions the Project will be fully
3 consistent with the Coastal Act's marine life protection policies. (58 AR 14103-14104.)

4 Because the Commission's approval of the Project differed from staff's recommendation of
5 denial (12 AR 2505-2592), the Commission needed to adopt revised findings reflecting its action.
6 (Cal. Code of Regs., tit. 14, § 13096(b).) The Commission considered draft revised findings on
7 June 12, 2008 (51 AR 12231-12353), but determined they did not accurately reflect its decision.
8 (55 AR 13431-13522.) Commission staff amended the revised findings (56 AR 13525-13657),
9 and the Commission adopted them on August 6, 2008. (58 AR 14038.)

10 The Commission held a public hearing to consider the mitigation plan required by special
11 condition 8 on August 6, 2008. (Com.'s Request for Judicial Notice (RJN), Ex. A.) The
12 Commission approved the plan, and no one challenged it.

13 Other agencies reviewed and approved permits for the Project before the Commission acted
14 on it. Carlsbad certified an EIR and issued a conditional use permit to Poseidon in June 2006. (2
15 AR 335-339.) Carlsbad determined that the Project will not have a significant impact on the
16 marine environment due to impingement, entrainment, or discharge operating in conjunction with
17 EPS or as a stand-alone facility. (2 AR 340-360; see Petitioners' Opening Brief (OB) at 3, lines
18 19-21.) Carlsbad evaluated various alternatives to the Project, including an alternative location,
19 alternative intakes and a reduced capacity alternative, before certifying the EIR. (3 AR 544-546.)

20 The Regional Board reviewed and approved an NPDES permit pursuant to the federal
21 Clean Water Act and the Porter-Cologne Water Quality Control Act for the Project in August
22 2006. (26 AR 5953-6071; 58 AR 14070-14071.) The NPDES permit requires Poseidon to
23 submit a Flow, Entrainment and Impingement Minimization Plan that assesses the feasibility of
24 site-specific plans, procedures, and practices and/or mitigation measures to minimize the impacts
25 to marine organisms when the Project's intake requirements exceed the volume of water
26 discharged by EPS. (26 AR 5974, 6036, 6065-6066.) The NPDES permit states that the
27 Regional Board will determine through its review of this plan whether the Project conforms to
28

1 Water Code section 13142.5(b). (58 AR 14071; 26 AR 6067.) The Regional Board determined
2 the Project “is not subject to 316(b) regulations.” (26 AR 6036, 6066.)

3 The Regional Board conditionally approved the entrainment plan on April 9, 2008. (11 AR
4 2422-2426.) Petitioner Surfrider Foundation and another entity filed a petition with the State
5 Board, challenging the NPDES permit. (58 AR 14071.) The State Board dismissed the petition,
6 finding it failed “to raise substantial issues that are appropriate for review.” (*Ibid.*)

7 State Lands also had to approve a lease for the Project because the intake and outfall
8 structures are located on state tidelands. (58 AR 14069.) EPS has an existing lease for the
9 structures, but Poseidon needed to amend the lease to allow use for desalination. (58 AR 14070.)
10 The Commission’s decision requires Poseidon to submit proof of a lease from State Lands before
11 the Commission will issue the permit. (58 AR 14048.)

12 Petitioners filed a petition challenging the Commission’s approval of the Project and
13 amended it to also challenge the Commission’s approval of revised findings. Petitioners filed
14 separate petitions for writs of mandate challenging the State Lands’ and Regional Board’s
15 decisions that this Court will subsequently hear. Petitioners did not challenge the Commission’s
16 approval of Poseidon’s mitigation plan.

17 OVERVIEW OF THE COASTAL ACT

18 Any person undertaking development within the coastal zone first must generally obtain a
19 coastal development permit. (§ 30600, subd. (a).) Because Carlsbad does not have a certified
20 local coastal program for the area in question, Poseidon applied to the Commission for a permit.
21 (§§ 30600, subd. (c), 30601.) Chapter 3 of the Coastal Act (§§ 30200-30265.5) contains the
22 standards by which the Commission reviews proposed development. (§ 30200, subd. (a).) If the
23 Commission finds the development conforms to Chapter 3 of the Coastal Act, then it “shall” issue
24 a coastal development permit. (§ 30604, subd. (a).)

25 The Commission found the Project, with conditions, conforms to the Coastal Act and
26 approved the permit. (See Section I, *post.*) Because neither Clean Water Act section 316(b) nor
27 Water Code section 13142.5 is part of the Coastal Act’s Chapter 3 standards, the Commission
28 may not deny a permit based on nonconformity with those sections. (See Section II, *post.*)

1 . . . shall be maintained and, where feasible, restored through, among other means, minimizing
2 adverse effects of . . . and entrainment” (§ 30231.)

3 **A. The Commission Determined The Project Will Impact Approximately 37**
4 **Acres Of Habitat Based On Substantial Evidence In The Record.**

5 The Commission found the Project’s anticipated entrainment will result in a loss of
6 productivity equal to approximately 37 acres of Agua Hedionda Lagoon’s habitat. Entrainment
7 occurs when small organisms, such as plankton, fish eggs or larvae, are pulled into an open-water
8 intake. (58 AR 14080.) The Commission based its finding on the results of an entrainment study
9 undertaken by Poseidon. (58 AR 14081; 30 AR 7211-7238; 31 AR 7239-7262, 7389-7396.)³

10 Determining an intake’s entrainment requires a study that includes water sampling over the
11 course of a year and then applying a modeling approach, of which the Empirical Transport Model
12 (ETM) is the most accepted. (58 AR 14080.) Poseidon conducted a study in 2004-2005 using
13 Regional Board approved protocols for sampling and analysis. (58 AR 14081; 31 AR 7389-
14 7396.) Poseidon provided a technical memorandum summarizing the results of the study and its
15 Flow, Entrainment, and Impingement Minimization Plan to the Commission. (58 AR 14081; 30
16 AR 7211-7238; 31 AR 7239-7262, 7389-7396.) The results showed that the Project’s water
17 withdrawals will entrain an average of about 12% of goby, blenny and garibaldi larvae in Agua
18 Hedionda and smaller percentages of other fish larvae. These species come from about 253 acres
19 of Agua Hedionda’s open water habitat and 49 acres of its mudflat/tidal channel habitat. Under
20 the ETM and other modeling approaches, entrainment will cause a loss of productivity equal to
21 approximately 37 acres of the lagoon’s open water and mudflat/tidal channel habitat. (58 AR
22 14081.)

23 Petitioners contend the Commission did not have sufficient information to determine the
24 Project’s entrainment impacts and therefore improperly deferred such analysis. (OB at 15-16.)

25 _____
26 ³ The Commission also found the Project will impinge approximately 2.12 pounds of fish
27 per day, less than the average daily consumption of an adult pelican. (58 AR 14079.)
28 Impingement occurs when fish or other organisms are caught on an intake’s screening system and
are either killed or injured. (*Ibid.*) The Commission found this impact de minimis. (*Ibid.*)
Petitioners do not challenge this finding.

1 Petitioners cite to a statement by staff to support their claim. (OB at 15, line 25, citing 12 AR
2 2534.) But the Commission disagreed with its staff and found that the results of the study and
3 additional information provided by Poseidon were sufficient, and the Commission's findings do
4 not include the cited language. (56 AR 13574.) Moreover, to ensure Poseidon's study accurately
5 assesses the Project's entrainment impacts, the Commission imposed Special Condition 8 that
6 requires Poseidon to provide a full copy of its study for further Commission review and approval
7 prior to issuance of the permit. (58 AR 14081.)

8 **B. The Commission Determined The Project Minimizes Entrainment To The**
9 **Maximum Extent Feasible And That Alternatives To Further Minimize Or**
10 **Avoid Entrainment Were Infeasible Or Would Have Greater**
11 **Environmental Impacts.**

11 The Commission determined that alternatives to the Project to further minimize or avoid
12 entrainment were infeasible or would have greater environmental impacts. Contrary to
13 Petitioners' claim that the Commission improperly allowed compensatory mitigation in lieu of
14 requiring Poseidon to minimize the Project's impacts, the Commission first determined the
15 Project minimized entrainment to the maximum extent feasible. "The standard approach for
16 identifying, selecting, and implementing appropriate mitigation for project impacts is to first
17 *avoid* the impacts, to then *minimize* the impacts, and finally to *compensate* for the impacts that
18 remain." (58 AR 14086.) Mitigation sequencing, as this approach is known, is consistent with
19 Petitioners' demand that the Commission minimize entrainment and impingement before
20 evaluating compensatory mitigation. (OB at 9-13.)

21 The most direct way to avoid entrainment effects is, if feasible, to use an alternative intake
22 structure that avoids those effects. (58 AR 14087.) Certain types of intakes may avoid
23 entrainment by drawing in water through an overlying layer of sand. (*Ibid.*) Substantial evidence
24 in the record supports the Commission's determination that such alternatives were not feasible or
25 would cause greater environmental harm.

26 Carlsbad analyzed the feasibility and environmental impact of several types of alternative
27 intake systems in the Project EIR. Carlsbad concluded "that the use of horizontal wells, vertical
28 beach wells and infiltration galleries in lieu of the project's proposed use of the power plant

1 intake system was either infeasible and/or had greater environmental impacts than the proposed
2 project.” (58 AR 14088.)

3 The Commission separately evaluated the four main subsurface intake systems, vertical
4 beach wells, Raney-type wells, slant-drilled wells, and infiltration galleries, and determined these
5 alternatives were economically and environmentally infeasible. (58 AR 14087-14091.) Feasible
6 means “capable of being accomplished in a successful manner within a reasonable period of time,
7 taking into account economic, environmental, social, and technological factors.” (§ 30108.)

8 The proposed alternatives would result in greater environmental impacts than the Project
9 for a number of reasons: (1) construction of the intake systems would destroy coastal habitat; (2)
10 the numerous intake collector wells would cause the loss of public use of coastal land due to their
11 location on the beach; and (3) their construction would create negative traffic, noise, and air
12 pollution impacts. The Commission also found the alternative intake systems were infeasible at
13 the project site due to site-specific geologic and/or water quality conditions, which would render
14 the water untreatable. (58 AR 14091.)

15 Poseidon provided evidence that alternative intakes were economically infeasible as well.
16 The subsurface water intakes would raise the anticipated cost of desalinated water from
17 Poseidon’s current estimate of \$950 per acre-foot to \$1300 per acre-foot. (58 AR 14088 & n. 69.)
18 The Commission found these costs were prohibitive. (58 AR 14091.)

19 The Commission also evaluated whether moving the intake into coastal waters from the
20 lagoon would reduce entrainment and whether the Project could route the high-salinity discharge
21 to the sanitary sewer system to reduce the amount of water drawn in for dilution purposes. (58
22 AR 14091-14092.) The Commission determined these alternatives were infeasible. An ocean
23 intake would potentially affect a greater diversity of organisms than those affected by the existing
24 intake (58 AR 14091, n. 79) and would cost about \$150 million (58 AR 14091). Routing the
25 discharge to the sewer system was infeasible because the sewer system cannot handle this type
26 effluent. (58 AR 14092.)

27 The Commission found alternatives to the Project to reduce entrainment were infeasible or
28 more environmentally damaging, and substantial evidence in the record supports its findings.

1 **C. After Finding the Project Uses All Feasible Methods to Minimize Its**
2 **Entrainment Effects, the Commission Evaluated and Required**
3 **Compensatory Mitigation; The Commission Did Not Improperly Defer**
4 **Approval of the Mitigation Plan.**

5 The third step in mitigation sequencing is compensatory mitigation – that is, mitigation
6 creating, restoring, or enhancing the same or similar types of habitats as those a project would
7 adversely affect. (58 AR 14092.) Contrary to Petitioners’ argument, the Commission did not
8 permit compensatory mitigation in lieu of requiring Poseidon to minimize entrainment. (OB at
9 10.) Rather the Commission considered and required compensatory mitigation only after
10 determining the Project minimized entrainment to the maximum extent feasible and that no
11 feasible alternatives existed to further reduce the Project’s impacts. (58 AR 14092 [“Poseidon’s
12 proposal is using all feasible methods to minimize or reduce its entrainment impacts. Even so,
13 project operations will result in ongoing substantial entrainment impacts that require
14 compensatory mitigation . . .”].) Case law specifically recognizes the Commission’s authority to
15 require off-site mitigation to ensure consistency with Coastal Act policies. (*La Costa Beach*
16 *Homeowners’ Assn. v. California Coastal Com.* (2002) 101 Cal.App.4th 804, 815-817.)

17 Poseidon submitted a proposed Coastal Habitat Restoration and Enhancement Plan for the
18 Commission’s consideration. (58 AR 14093.) The plan described seven possible mitigation
19 options at various locations in Agua Hedionda and elsewhere in northern San Diego County.
20 (*Ibid.*) Staff raised concerns regarding the plan, and the Commission determined not to adopt it
21 as part of its initial approval. Instead, the Commission required Poseidon to submit “for further
22 Commission approval a revised Plan that fully documents Poseidon’s entrainment study,
23 identifies specific mitigation measures, implementation criteria, monitoring measures, and other
24 standard mitigation plan elements . . . [to] ensure[] that the Plan will provide adequate mitigation
25 for Coastal Act conformity.” (58 AR 14093.) The Commission further required the mitigation
26 “to include a similar approach and level of detailed information” to that required of Southern
27 California Edison for mitigation of San Onofre’s impacts. (58 AR 14096.)

28 Petitioners contend the Commission inappropriately deferred review of the Plan. (OB at
16-18.) To the contrary, the Commission specified sufficient standards condition for the Plan (58

1 AR 14050, 14093, 14096 [mitigation must include “a similar approach and level of detailed
2 information” as required of Southern California Edison for mitigation of its San Onofre nuclear
3 generating station]. (*See Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275;
4 *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 794.) Moreover,
5 the condition requires submission and approval of the Plan by the Commission before the
6 Commission will issue the permit. The wording of the condition is important for two reasons.
7 First, it requires approval from the Commission at a public hearing, not from an employee or
8 another agency. Thus, the Commission retained its full discretion to ensure the Plan meets the
9 Coastal Act’s requirements and assured the Plan would be subject to public scrutiny. Second, the
10 condition requires the Commission’s approval *before* the Commission will issue a permit to
11 Poseidon. Thus, the mitigation would be final and subject to challenge by interested parties
12 *before* the permit issued and construction began.

13 The cases relied upon by Petitioners are distinguishable. None of the cited cases involved a
14 mitigation plan that went back to the decision-making body prior to issuance of the permit.
15 Rather, in the cases cited, the decision-making body delegated its review authority to the
16 applicant in the case of *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225
17 Cal.App.3d 872 or to its staff for review and approval in the case of *Sundstrom v. County of*
18 *Mendocino* (1988) 202 Cal.App.3d 296. In *Sundstrom*, the court held that delegating approval of
19 the mitigation to staff would improperly avoid public review and agency scrutiny of potential
20 environmental impacts. Such concerns do not exist here because the condition requires approval
21 of the mitigation by the Commission at a public hearing before the Commission issues the permit,
22 thereby assuring public scrutiny of the mitigation and assuring approval of the mitigation is not a
23 post hoc rationalization.

24 The Commission sought guidance from its chief counsel and executive director at the
25 hearing on this issue and carefully crafted the condition to avoid improper deferral of mitigation:
26 “Under the *Sundstrom* case, administrative approval is not sufficient. The way staff has set this
27 up has [Poseidon] come back directly to [the Commission] to make sure that the Commission
28 agrees that the impacts are sufficiently mitigated prior to issuance of the permit.” (46 AR 11092.)

1 The Commission specifically rejected Poseidon's recommendation that the Commission delegate
2 approval of the mitigation plan to the executive director or the Regional Board. (See, e.g., 46 AR
3 11082, 11092.)

4 The Commission's Chief Counsel also explained that "prior to commencement of
5 construction" (rather than "prior to issuance of the permit") was insufficient because the permit
6 would issue before the mitigation was defined for the Commission and the public. (46 AR
7 11092.) The Executive Director pointed out that the condition was similar to what the
8 Commission had required of other applicants: "[T]his Commission has, in the past, . . . imposed
9 conditions that require a plan for mitigation, and even though you didn't know it at the time that
10 you approved it, at least you had the certainty that that plan would come back to you for approval
11 before you issue the permit . . ." (46 AR 11092-11093.)

12 With the wording of the condition, Poseidon, not Petitioners or the public, bore the risk of
13 the Commission's conditional approval, and Poseidon voiced such concern at the hearing:
14 "[T]his [condition] basically leaves open what the protocol might look like. It doesn't give
15 Poseidon any certainty, in terms of what the number looks like, and what the mitigation costs
16 would be, and would require us to come back to the Commission, which we think is an open-
17 ended requirement." (46 AR 11087.) In contrast, Petitioners bore no risk because if they were
18 dissatisfied with the mitigation, they could challenge it before the permit would issue.

19 Moreover, no remedy is available any longer to Petitioners. If their petition was granted,
20 the matter would be remanded to the Commission for consideration of the mitigation. However,
21 this already occurred, and Petitioners did not challenge the Commission's adoption of the
22 mitigation plan. On August 6, 2008, the Commission held a public hearing and approved
23 Poseidon's mitigation plan. (RJN, Ex. A.) Neither Petitioners nor anyone else challenged the
24 Commission's approval of the mitigation plan, and it is now final. (*Ibid.*)

25 Petitioners' claim that the Commission improperly deferred the calculation of the impacts
26 and any subsequent mitigation would be "contrive[d]" rings false as Petitioners had an
27 opportunity to challenge the mitigation and did not. If Petitioners thought the mitigation was
28 insufficient or a post hoc rationalization, their remedy was to challenge the mitigation plan.

1 Petitioners also contend that deferral of the mitigation plan “eliminat[ed] from
2 consideration a variety of avoidance measures and alternatives including location, capacity,
3 design, and even approval of the Project itself.” (OB at 18.) To the contrary, the Commission
4 undertook these analyses as part of its initial approval; Petitioners simply disagree with the
5 Commission’s findings.

6 The Commission notes Petitioners do not challenge the Commission’s findings regarding
7 consistency with Coastal Act sections 30230 and 30231, and therefore they have waived such
8 challenge. Instead Petitioners’ argument regarding entrainment turns entirely on Clean Water Act
9 section 316(b) and Water Code section 13142.5. Because, as discussed in Section II *post*, these
10 sections do not apply, the Commission’s decision should be affirmed.

11 **II. THE COMMISSION’S GOVERNING LEGISLATION IS THE COASTAL ACT, NOT WATER**
12 **CODE SECTION 13142.5 OR FEDERAL CLEAN WATER ACT SECTION 316(B).**

13 Petitioners contend that the Commission was required to implement section 13142.5 of the
14 Water Code. Not so. The Regional Board has primary responsibility for the coordination and
15 control of water quality. The Commission has secondary responsibility for water quality and
16 cannot modify, adopt conditions, or take any action in conflict with the Regional Board’s action
17 regarding water quality. (§30412, sub. (b).) Specifically, the Regional Board is responsible for
18 insuring that a project complies with section 13142.5, subdivision (b) which provides that “for
19 each new or expanded coastal powerplant or other industrial installation using seawater for
20 cooling, heating, or industrial processing, the best available site, design, technology, and
21 mitigation measures feasible shall be used to minimize the intake and mortality of all forms of
22 marine life.” The Commission is required to implement the Coastal Act’s Chapter 3 policies
23 regarding the protection of coastal resources, but does not have the authority to deny or condition
24 permits based on non-Coastal Act requirements. (§§ 30200, subd. (a), 30604, subd. (a).) The
25 Coastal Act policies include requirements to protect the marine environment: section 30230
26 requiring marine resources be maintained, enhanced and where feasible restored and section
27 30231 requiring the biological productivity and quality of coastal waters be maintained and where
28 feasible restored by minimizing the adverse effects of entrainment. (See section I, *ante*.) The

1 Commission relies on Water Code section 13142.5 as guidance in applying the Coastal Act's
2 policies. (58 AR 14073.)

3 The Legislature adopted Water Code section 13142.5 at the same time as the Coastal Act,
4 and Petitioners request the Court to take judicial notice of a portion of the bill's legislative history.
5 The legislative history supports the Commission's interpretation of these sections, not Petitioners',
6 and confirms the water boards' primary role in enforcing the Water Code's water quality policies,
7 of which section 13142.5 is a part:

8 The [State Water Resources Control Board] retains primary jurisdiction
9 over water rights and water quality The Porter-Cologne Act is
10 amended by adding state policies with respect to water quality as it relates
11 to the coastal marine environment.

11 (Petitioners' RJN, Ex. 23, at p. 3.)

12 A 2004 Commission report on desalination and the Coastal Act discussed the roles of the
13 regional boards and the Commission:

14 The Coastal Commission often works with the Regional Boards to
15 coordinate review when there is shared jurisdiction of proposed projects.
16 Although the State and Regional Boards operate primarily under the
17 California Water Code while the Coastal Commission acts pursuant to the
18 Coastal Act, there are several areas of shared responsibility and common
19 requirements. For example, both the Commission and the Boards are
20 directed to maintain and restore coastal waters, although the focus and
21 implementation of each agency in carrying out this directive may differ.
22 Additionally, Section 30412 of the Coastal Act establishes common
23 policies for the Commission and the State and Regional Boards and also
24 recognizes some of the different aspects of their jurisdiction.

20 (12 AR 2690.)

21 Because Water Code section 13142.5 and Coastal Act section 30231 contain similar
22 requirements, e.g. that projects minimize the intake and mortality (or entrainment) of marine life,⁴

23
24 ⁴ Petitioners argue that the Commission must minimize entrainment in the first instance
25 rather than minimize the impacts of entrainment. (OB at 11-13.) It is not clear what distinction
26 Petitioners intend by this. Entrainment is a function of the amount of water taken in as opposed
27 to impingement which is a function of velocity. Thus, in order to minimize entrainment – or by
28 extension to minimize the impacts of entrainment – a project must minimize its intake of water or
marine organisms. The Commission analyzed various alternative intake systems that, if feasible,
could reduce entrainment (see Section I.B *ante*), but determined they were infeasible. In any
event, as discussed above, section 30231 specifically requires “minimizing adverse *effects* of
entrainment.” (Emphasis added.)

1 the potential for conflicts arises. The Legislature addressed the issue by providing that the
2 Commission “shall not . . . take any action in conflict with any determination” by the state or
3 regional board “in matters relating to water quality.” (§30412, subd. (b).) However, this same
4 provision further states: “Except as provided in this section, nothing herein shall be interpreted in
5 any way either as prohibiting or limiting the [C]ommission . . . from exercising the regulatory
6 controls over development pursuant to [the Coastal Act] in a manner necessary to carry out [the
7 Coastal Act].”

8 Petitioners’ argument that the Commission, as well as the Regional Board, must apply and
9 interpret Water Code section 13142.5 is inconsistent with the plain language of Coastal Act
10 section 30412 and could lead to unnecessary and potentially insurmountable conflicts. In contrast,
11 the Commission interprets these provisions to mean (as they say) that the Regional Board has
12 primary responsibility to apply and interpret the water quality policies of Water Code section
13 13142.5 and that the Commission will not directly apply Water Code section 13142.5 but will use
14 it as guidance in applying the Coastal Act’s requirements. In addition, if necessary to protect the
15 marine environment in a manner consistent with Coastal Act sections 30230 and 30231, the
16 Commission may require mitigation beyond that required by the water boards. A condition
17 requiring additional mitigation would not “conflict” with a regional board’s action because an
18 applicant could comply with both requirements. In this case, however, the agencies did not
19 impose contradictory mitigation requirements, so the Court need not address the issue.

20 The Commission’s findings address the application of Water Code section 13142.5 and the
21 Coastal Act policies to the Project. They provide:

22 Poseidon’s use of the power plant intake structure . . . would be subject to
23 [Water Code section 13142.5] and would cause the same type of
24 entrainment and impingement impacts both the Clean Water Act and the
25 Porter-Cologne Act require be avoided and minimized. At this time, the
26 [Regional Board] is processing a plan to regulate Poseidon’s use of the
27 power plant intake structure for desalination purposes. This plan is
28 described in more detail in Section 4.5.1 of these Findings. In addition,
the Commission retains full authority to ensure the project’s consistency
with the Coastal Act’s marine resources protection policies through
imposition of Special Condition 8, which provides that Poseidon shall
submit a Marine Life Mitigation Plan for Commission review and
approval.

1 (58 AR 14063.) Thus, the Commission agrees with Petitioners that Water Code section 13142.5
2 applies to the Project, but disagrees that it abused its discretion by not interpreting and applying
3 its provisions. Rather, the Commission properly deferred to the Regional Board regarding
4 application of Water Code section 13142.5 and conditioned its approval on the Regional Board's
5 final approval of the NPDES permit which "will address any additional review required pursuant
6 to Water Code Section 13142.5." (58 AR 14071.) But, at the same time, the Commission
7 retained and exercised its full discretion to assure the Project's consistency with the Coastal Act.

8 Petitioners also spend a significant portion of their brief arguing that, even though section
9 316(b) does not apply directly to desalination projects, section 13142.5 should be interpreted
10 consistently with section 316(b). As explained above, this argument is irrelevant to the
11 Commission's decision about how to implement Coastal Act requirements. In addition,
12 Petitioners fail to acknowledge that section 13142.5 applies to a much broader range of industrial
13 projects than just power plants. Although power plants may use cooling water in a variety of
14 ways – or may not rely on water for cooling purposes at all – some industrial uses, including
15 desalination, inherently involve the continuous intake of water.

16 In any event, the Commission complied with the underlying substance of Petitioners'
17 argument, that is, that the Commission must first require Poseidon to minimize the impacts of the
18 Project before requiring compensatory mitigation. (See section I, *ante.*) But the Commission did
19 this pursuant to its obligation to implement Coastal Act requirements, not pursuant to other
20 statutes that other agencies are responsible for implementing.

21 **III. THE PROJECT IS CONSISTENT WITH SECTION 30260 OF THE COASTAL ACT**
22 **BECAUSE ALTERNATIVE LOCATIONS FOR THE PROJECT ARE INFEASIBLE OR**
23 **MORE ENVIRONMENTALLY DAMAGING; DENIAL OF THE PROJECT WOULD**
24 **ADVERSELY AFFECT PUBLIC WELFARE, AND THE PROJECT'S ADVERSE**
25 **ENVIRONMENTAL EFFECTS ARE MITIGATED TO THE MAXIMUM EXTENT FEASIBLE.**

26 The Coastal Act includes policies that acknowledge the limited amount of coastal land in
27 California, the need for certain activities to be located on the coast, and the public's interest in
28 having land available for those activities and uses. (12 AR 2624; § 30001.2⁵.) One such policy,

⁵ Section 30001.2 reads: "The Legislature . . . finds and declares that, notwithstanding the fact electrical generating facilities . . . and coastal-dependent developments . . . may have

(continued...)

1 section 30260, encourages coastal-dependent industrial facilities to locate at existing industrial
2 sites even if they are inconsistent with other Coastal Act policies provided: (1) alternate locations
3 are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the
4 public welfare; and (3) adverse environmental effects are mitigated to the maximum extent
5 feasible. The Commission found the Project met 30260's three-part test.

6 **A. Alternative Locations Are Infeasible Or More Environmentally Damaging.**

7 Section 30260 requires that alternative locations to the Project be infeasible or more
8 environmentally damaging. The record contains substantial evidence that the only available
9 alternative locations meeting Project objectives are infeasible or more environmentally
10 damaging.⁶

11 The Commission properly limited its alternatives analysis to those that can achieve the
12 Project's basic objectives. (*In re Bay-Delta Programmatic EIR Coordinated Proceedings* (2008)
13 43 Cal.4th 1143, 1165-1166.) Case law interpreting the California Environmental Quality Act
14 (§§ 21000-21178; "CEQA"), which may provide guidance in interpreting the Coastal Act (see
15 *Bolsa Chica Land Trust v. Superior Ct.*, *supra*, 71 Cal.App.4th at p. 506), provides that an agency
16 need only evaluate "a range of reasonable alternatives to the project or to the location of the
17 project, *which could feasibly attain the basic objectives of the project.*" (Cal. Code of Regs., tit.
18 14, §15126(d) [emphasis added]; *Citizens of Goleta v. Board of Supervisors* (1990) 52 Cal.3d 553
19 [holding an agency need not consider inland alternatives for a proposed oceanfront hotel].)

20 The Project's objectives include "providing a local and reliable source of water, reducing
21 local dependence on imported water, and providing water at or below the cost of imported water
22 supplies" for Carlsbad and the San Diego region. (58 AR 14054, 7 AR 1460.) The benefits of

23 _____
24 (...continued)

25 significant adverse effects on coastal resources . . . , it may be necessary to locate such
developments in the coastal zone in order to ensure that inland as well as coastal resources are
preserved and that orderly economic development proceeds within the state."

26 ⁶ The Court properly looks to the "whole record" to determine whether substantial
evidence exists to support the Commission's findings. (Code of Civ. Proc., § 1094.5, subd. (c);
27 *Sierra Club v. California Coastal Com.*, *supra*, 19 Cal.App.4th 547.) Here, the record contains
substantial evidence that alternative locations were not feasible, and the Commission referenced
28 such evidence in its findings. (58 AR 14088, n. 69, 14089, n. 71.)

1 the Project site include its close proximity to the seawater intake, outfall and key delivery points
2 of the distribution system of Carlsbad, the largest user of the water. (26 AR 5874.) The location
3 allows the Project to optimize the cost of delivery of the produced water and the environmental
4 impacts associated in the construction and operation of the Project. (*Ibid.*)

5 Locations outside the vicinity of Carlsbad and the water distribution system could not meet
6 these objectives. “[O]nly three possible sites in the City of Carlsbad . . . could accommodate a
7 project of this nature”: (1) EPS; (2) the Encina Water Pollution Control Facility (EWPCF), and
8 (3) the Maerkle Reservoir. (30 AR 7068.) Carlsbad’s EIR evaluated alternative sites at EPS and
9 the EWPCF location. Carlsbad rejected the site at EWPCF because size limitations of the outfall
10 pipeline would limit the capacity of the desalination plant to 10 MGD. The alternative “would
11 not alleviate any significant unavoidable impacts associated with the proposed project” and would
12 not meet operational objectives. (7 AR 1420-1421.) Carlsbad also studied a No Project/No
13 Development Alternative, a Modified Intake Design Alternative and a Reduced Project Capacity
14 Alternative. (7 AR 1420.)

15 Poseidon provided information to the Commission establishing the Maerkle Reservoir is
16 financially and environmentally infeasible for a number of reasons, including the lack of available
17 right-of-way for the necessary piping and the costs associated with pumping the water to an
18 elevation of 531’ rather than 70’. (26 AR 5874-5877.) Construction and additional operation
19 costs render the site infeasible, and it would provide “no measurable benefit to the public or the
20 environment.” (26 AR 5875.)

21 The Commission also evaluated an alternative that would have addressed the inconsistency
22 that led to the application of section 30260 in the first place. It is important to recognize that the
23 Commission did not find the Project inconsistent on entrainment grounds or other issues raised by
24 Petitioners. Rather, the Commission found that the Project is not wholly consistent with section
25 30233(c), which limits alteration of 19 identified wetlands, including Agua Hedionda Lagoon, “to
26 very minor incidental public facilities, restorative measures, [or] nature study.” The Commission
27 found that the Project’s alteration of the Lagoon was not an allowable use. (58 AR 14107,
28

1 14110.) But, because the Project is a coastal-dependent industrial facility,⁷ the Commission
2 applied section 30260. (58 AR 14108.) The Commission determined that moving the intake pipe
3 out of the lagoon into coastal waters, while it would alleviate the inconsistency with section
4 30233(c), would be more environmentally damaging. (58 AR 14091.)

5 Petitioners contend the Commission's decision must be overturned because alternate
6 locations coupled with alternate technology are feasible. (OB at 14-15.) The record establishes
7 otherwise. "To keep the [alternative intake] structures out of the tidal zone and avoid visual
8 impacts on the beach, the wells would have to be located inland. There are no suitable locations
9 along the coast of Carlsbad to locate 20 to 25 wells inland along a strip that extends 4 miles in
10 parallel to the shore – all of the available land is either dedicated open space or private residential
11 property that is completely built out and densely populated." (26 AR 5870.)

12 Petitioners contend the Commission judged alternatives on the basis of their being both
13 infeasible *and* more environmentally damaging and cite to a single sentence in the findings to
14 support this contention. (OB at 19; 58 AR 14133) To the contrary, the Commission's full
15 discussion of the project alternatives shows the Commission applied the proper standard and
16 found "these alternatives are infeasible." (58 AR 14087.)

17 Substantial evidence in the record supports the Commission's finding alternative locations
18 for the Project are infeasible.

19 **B. Denial Of The Project Would Adversely Affect Public Welfare.**

20 The Commission found denial of the Project would adversely affect public welfare. (58 AR
21 14134-14139.) The Commission recognized "that the San Diego region is clearly in need of
22 reliable and local water sources" (58 AR 14139), and the Project will "provide an important and
23 much-needed source of potable water for Southern California." (58 AR 14056.) Desalination is a
24 necessary and integral part of the region's water portfolio in light of the looming "water crisis."

25 _____
26 ⁷ "Coastal-dependent development or use" means "any development or use which require
27 a site on, or adjacent to, the sea to be able to function at all." (§30101.) Section 30260 provides
28 that "[c]oastal-dependent industrial facilities shall be encouraged to locate or expand within
existing sites and shall be permitted reasonable long-term growth where consistent with this
division." The Commission determined the Project is coastal-dependent. (58 AR 14133.)

1 (58 AR 14056, 14139.) “There is a convergence of warnings that California’s water supply will
2 continue to shrink. Climate change brought on by global warming could disrupt weather patterns,
3 leaving the state vulnerable to punishing drought. . . . If 2008 offers hydrologic conditions similar
4 to those of [2007], some significant sources of water for Southern California may not be
5 available.” (58 AR 14056.) State water officials temporarily turned off pumps that send water
6 from the Sacramento-San Joaquin Delta to San Diego to protect endangered species; the
7 Metropolitan Water District provided notice that it would cut agricultural water deliveries by 30%
8 beginning in 2008 and warned of water rationing if drought conditions continued. (58 AR 14056-
9 14057.) State, regional and local water plans all confirm that the “immediate and pressing water
10 needs are so great, that they cannot be met by conservation and recycled water alone and that a
11 substantial investment in seawater desalination, including the [P]roject, is required.” (58 AR
12 14057.) “The [P]roject is a central component of state, regional and local water supply planning
13 to meet already-identified demand.” (*Ibid.*)

14 The Commission also found the Project will provide significant public access and
15 recreation amenities. Poseidon agreed to dedicate approximately 15 acres to Carlsbad to be used
16 for public access and recreation. (58 AR 14112.) The Commission imposed special condition 11
17 to ensure dedication of these sites prior to operation of the Project. (58 AR 14050-14051.)

18 **C. The Project’s Adverse Environmental Effects Are Mitigated To The**
19 **Maximum Extent Feasible.**

20 The Commission found that the Project as conditioned mitigates its impacts to the
21 maximum extent feasible. (58 AR 14134.) The Commission found the Project “meets this test of
22 Section 30260 through imposition of Special Conditions 4 (Other Agency Approvals), 8 (Marine
23 Life Mitigation Plan), 9 (Seawater Withdrawal), 10 (Energy Minimization and Greenhouse Gas
24 Reduction Plan), 16 (Storm Water Pollution Prevention Plan) and 17 (Water Quality), which,
25 among other protections, impose requirements that Poseidon implement mitigation measures that
26 will minimize potential adverse environmental effects to the maximum extent feasible.” (*Ibid.*)
27 These conditions require Poseidon (1) to submit to and obtain from the Commission approval of a
28 revised Marine Life Mitigation Plan . . . that will mitigate to the extent feasible project-related

1 impacts to marine life; (2) submit to and obtain from the Commission approval of a revised
2 Energy Minimization and Greenhouse Gas Reduction Plan that results in reduction in electrical
3 use and reduction or offset of greenhouse gas emissions associated with the project's operations
4 to the maximum extent feasible through Poseidon's agreement that the project will be net carbon
5 neutral; and (3) submit separate coastal development permit applications to the Commission for
6 future dredging of the Lagoon so the Commission can ensure that future dredging is consistent
7 with the Coastal Act. (*Ibid.*) "Together, these and the other Special Conditions, ensure the
8 project will mitigate to the maximum extent feasible the project's adverse effects on coastal
9 resources." (*Ibid.*)

10 Petitioners do not object to any of the specific mitigation measures. Rather, they simply
11 incorporate and rehash their argument regarding alternative locations. (OB at 20.) As discussed
12 in Sections I.B and III.A *ante*, the Commission properly determined no feasible project
13 alternatives or project locations exist.

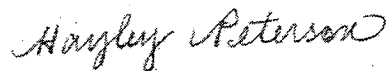
14 CONCLUSION

15 For the reasons set forth above, the Commission respectfully requests the Court deny the
16 Petition for Writ of Mandate.

17 Dated: January 30, 2009

Respectfully Submitted,

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