



169 Saxony Road
Suite 204
Encinitas, CA 92024

Tel 760-942-8505
Fax 760-942-8515

Website: www.clgllp.com

February 10, 2009

Mr. John Robertus
Executive Officer
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Via Electronic Mail

RE: Carlsbad Desalination Project
February 11, 2009, Agenda Item 6
Environmental Groups' Response to Applicant's Comments

Dear Mr. Robertus:

Coast Law Group LLP represents the Surfrider Foundation and San Diego Coastkeeper (Environmental Groups) in matters pertaining to the proposed Carlsbad Desalination Project (CDP). The record on the CDP contains a substantial number of documents previously submitted by the Environmental Groups detailing the failure of the Regional Board to appropriately consider and apply Porter-Cologne section 13142.5 to the CDP. To no avail, we have repeatedly sought to have the Board and Poseidon consider the requirement to minimize the "intake" of marine life, yet Poseidon has instead succeeded in replacing this correct standard with a requirement to minimize marine life "impacts."¹ As a result of the misapplication of this standard, no site where sub-surface intakes are potentially feasible have been considered, and the project should not be considered in compliance with its NPDES permit and state law.

The Regional Board's attorneys have been copied on a legal brief recently submitted in litigation against the California Coastal Commission which details the distinction between these two standards, and dictates the appropriate interpretation of Porter-Cologne. Because our concerns have been made previously, and are appropriately already before the Board, this correspondence is intended as a response to the extensive documentation recently provided to the Board by Poseidon and its attorneys. Because much of this material was not conveyed directly to Coast Law Group, and was posted to the Board's website after the close of the official comment period, it would have been impossible to provide this rebuttal previously.

Procedural Issues

Poseidon has expressed concern that the February 11, 2009 hearing should not be an adjudicative hearing, and if it is, only the Regional Board and Poseidon should be considered "designated parties." (Supporting Document No. 28) The Environmental Groups have reviewed the Regional Board's response to Poseidon's procedural objections (Supporting Document No. 42), and generally agree with the contents thereof. Nonetheless, this correspondence should be

¹ In its most recent submissions to the Board, Poseidon seeks to bootstrap its prior analysis into the correct standard, but compare Poseidon Appendix vol. 2, p. 19 of 380 (Poseidon's March 7, 2008 letter to Board, characterizing section 13142.5 as requiring minimization of impacts to marine life) with Appendix vol. 1, p. 16 of 21 (Poseidon's proposed Resolution of Approval, repeatedly seeking findings and conclusions regarding minimization of "intake").

considered a formal objection to the requests of Poseidon, and we hereby note submission under separate cover the Environmental Groups' Motion for Designated Party Status.

We also note that Poseidon has submitted a document entitled, "Poseidon's Suggested Additional Steps To Be Taken By Board As Part Of Its Hearing On Agenda Item No.6 To Make A Final Decision On February 11th." In this document, Poseidon seeks additional time to present evidence, cross-examine witnesses, and provide rebuttal testimony should formal adjudicative proceedings take place on February 11th.

In response, the Environmental Groups propose either (a) we be afforded the same procedural safeguards as Poseidon with respect to submission of evidence and cross examination of witnesses, or (b) the matter be postponed and a pre-hearing conference set for resolution of designated party requests and establishment of procedures for a future hearing. Consistent with prior Board action on the remediation of contaminated sediments in San Diego Bay, the Environmental Groups would consider it similarly appropriate in this instance to refer the entire matter to a neutral third party for mediation.

To the extent the Board adheres to its staff attorney's recent representation that formal adjudicative processes will not be used at the February 11th hearing, the Environmental Groups reiterate their request for ten minutes to present arguments and evidence to the Board.

Poseidon's "Straw Man" Argument

In its response to the Board Staff's notice of hearing and Executive Officer's Report, Poseidon expresses discomfort with the notion that the Regional Board would require identification of a specific site or sites where the proposed compensatory mitigation for the CDP will actually take place.

Poseidon characterizes the staff's comments as though the Board suddenly does not approve of Poseidon considering multiple sites in the current iteration of its MLMP. This is the "straw man" which Poseidon sets up, only to knock it down with the claim that the Regional Board and its staff acquiesced to a multi-location MLMP earlier in the process. In multiple documents, Poseidon and its attorneys go into great depth regarding the timeline of events leading up to approval of the MLMP by the Coastal Commission, and including the multi-agency meetings and communications where the multi-location MLMP framework was purported to have been discussed in the presence of Board staff. (See, e.g. Supporting Document 12, Letter from Latham and Watkins, dated January 21, 2009). All of this is intended to create the perception that the Board is reversing some prior direction to, and relied upon by, Poseidon.

In essence, what Poseidon is saying is that Regional Board staff should have much earlier made its concerns known, and because it had allegedly not done so, to require any specificity of Poseidon now would constitute undue prejudice, not to mention preclude Poseidon from saving San Diego County from the drought. This argument misses the point entirely.

The Environmental Groups support the Board Staff's position that while it may have been appropriate to consider a multi-location MLMP at an earlier point in the permitting process, it is not inconsistent to require actual selection of a site, *or sites*, as a prerequisite to final Flow Plan approval. At no point in the record, including the volumes of material submitted and cited by

Poseidon, does the Board or its staff appear to limit Poseidon from selecting multiple sites as alleged. Instead, as clearly noted in the Executive Officer's Summary Report, the conditional approval of Poseidon's earlier multi-location Flow Plan proposal required Poseidon to return within 180 day with a more specific mitigation plan:

The Plan shall assess the **feasibility of site specific plans, procedures, and practices to be implemented** and/or mitigation measures to minimize the impacts to marine organisms when the CDP intake requirements exceed the volume of water being discharged by the EPS.

(Executive Officer's Summary Report, p. 2, quoting Section VI.C.2(e) of Order No. R9-2006-0065, emphasis added).

Clearly, Board's conditional approval in April, 2008, was not intended to allow Poseidon to come back for yet another conditional approval, as it is now doing. Poseidon seeks approval of its Flow Plan upon the condition that it select an appropriate site from the list, and achieve broadly described (and non site-specific) criteria, all subject to future agency approval. Simply put, the Regional Board has no assurance achievement of the mitigation obligation will be feasible until a site is (or sites are) actually selected. This fact was accurately captured in the prior conditional approval, and holds true today.

A quick review of the Coastal Commission process is instructive. On November 15, 2007, the Commission conditionally approved Poseidon's Coastal Development Permit. Special Condition 8 required:

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.

(Coastal Commission Conditional Approval, November 15, 2008, Special Condition 8, emphasis added).

Clearly, the original conditional approval by the Coastal Commission required Poseidon to come back with a plan containing significant specificity. Poseidon originally responded with a claim that it would create the required acreage in conjunction with Southern California Edison's San Dieguito Lagoon Restoration Project. Edison quickly indicated its opposition to Poseidon's plan, and the San Dieguito Joint Powers Authority clarified that a lengthy CEQA process would be required before feasibility of additional restoration in that valley could be assessed. Subsequently, Poseidon developed and sought approval for its multi-site, non-specific MLMP patterned off of Edison's decades-old mitigation plan for impacts from the San Onofre Nuclear

Generating Station. Casting aside its previous requirement for specificity in Special Condition 8, the Coastal Commission approved Poseidon's plan in August, 2008. And it did so in part with the assurance that the Regional Board would have final say on the Flow Plan and compliance with Porter-Cologne section 13142.5.

The Environmental Groups agree with the proposition that it would be improper to approve Poseidon's Flow Plan without the selection of the site or sites where mitigation will take place. And while this does not mean we have abandoned our position that compensatory mitigation is illegal in the first instance, at the very least, the Board and the public should be able to critically assess the location(s) where the mitigation project will take place. How do we know any of the 11 candidate sites contain appropriate opportunity to achieve the 55+ acres of mitigation that may be required? Given the extent of upland buffer required, coupled with the narrative criteria for baseline condition (comparable to Agua Hedionda habitat), it is reasonable to be skeptical that one or more of these sites will prove feasible. As such, it is perfectly appropriate to require such information prior to Flow Plan approval.

Given that this is the first large desalination facility proposed for California, and as such sets a precedent for the rest of the state (indeed, it is already being cited as precedent for Poseidon's proposed Huntington Beach desalination plant), the Regional Board must be able to thoroughly review the site specific mitigation proposal before construction of the plant commences. Anything less amounts to a deferral of mitigation responsibility which is illegal under California law.

Poseidon's Flip Flops Regarding Agency Jurisdiction

In ongoing litigation, both the Coastal Commission and Poseidon are emphatic that the Regional Board is the sole agency with discretion to assess compliance with Porter-Cologne 13142.5. (See e.g. Coastal Act section 30412, which Poseidon claims precluded the Commission from taking any action inconsistent with a future action by the Regional Board). Poseidon has taken this position in numerous letters and reports to the Coastal Commission, and as noted above, utilized this argument to secure conditional approvals of the MLMP from the Coastal Commission and State Lands Commission.

Amazingly, now Poseidon argues against any substantive review of the Flow Plan, but rather, encourages the Regional Board to rely on the Coastal Commission's approval of the MLMP under the Coastal Act. (See Supporting Document 32, Latham and Watkins comment letter on MLMP, dated January 26, 2008). Poseidon's strategy could not be more clear – it is willing to say or do whatever necessary to get its plant constructed, regardless of whether its promises of mitigation can or will ever be accomplished. Once constructed, the numerous water agencies that have contracted for the desalinated water will be in a position to claim significant reliance upon Poseidon's product as a reason not to require more onerous or more expensive mitigation measures. Poseidon's "build now, mitigate later" scheme is unprecedented before this Regional Board, and cannot be legally endorsed.

The Regional Board Should Support it's Staff

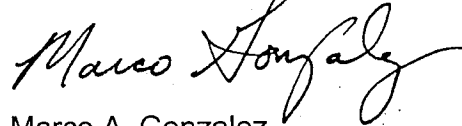
At virtually every stage of CDP review by staff of the Coastal Commission, State Lands Commission, and the Regional Board, significant legal and practical flaws have been identified. Recognizing the gravity of precedent to be set by this project, the staff at these agencies have sought to carefully vet all aspects of the CDP, including the mitigation plans. And rather than respond with a project that appropriately considers alternative locations where sub-surface intakes could be implemented, or with a MLMP that specifies exactly where and how the mitigation will be implemented, Poseidon has turned to lobbying, public relations/media spin, and political support to get the CDP approved. This is the reason why there are lawsuits pending against all three state agencies.

There is no credible reason to believe staff from all three agencies have ulterior motives, or are doing anything more than their prescribed jobs. The Regional Board should draw a hard line at this point, which with the exception of litigation, is one of the last opportunities to ensure the CDP will even be plausibly legal. To require anything less than specificity in the selection of mitigation sites and performance criteria to ensure full compensation for production foregone due to entrainment impacts would be a travesty to the coast, and a blemish on the record of the Regional Board.

The Environmental Groups respectfully request that the Regional Board declare the NPDES no longer effective due to Poseidon's failure to meet conditions of its approval, and require Poseidon to resubmit an application for a stand-alone facility with detailed alternatives analysis and mitigation proposal.

Sincerely,

COAST LAW GROUP LLP



Marco A. Gonzalez
Attorney for San Diego Coastkeeper
and the Surfrider Foundation