

Key Points of Poseidon's Proposed Order and Supplemental Findings

May 13, 2009 San Diego Regional Board Meeting, Item 11 – Poseidon Resources Corporation, Proposed Carlsbad Desalination Project (Order No. R9-2006-0065, NPDES No. CA0109223)

On April 8, 2009, the California Regional Water Quality Control Board (“Regional Board”) directed staff and Poseidon Resources Corporation (“Poseidon”) to work together to address the few remaining outstanding issues prior to the Regional Board’s final consideration of Poseidon’s Flow, Entrainment and Impingement Minimization Plan (“Minimization Plan”) at the May 13, 2009 hearing. Since that time, Regional Board staff have not presented a Proposed Order that completely documents the Regional Board’s determinations and deliberations regarding the proposed Carlsbad Desalination Project (“Project” or “CDP”) which have occurred over six separate Regional Board hearings.

Accordingly, Poseidon respectfully submits the attached Proposed Order and Supplemental Findings which fully capture the Regional Board’s thorough consideration of the Project and the Minimization Plan. Specifically, Poseidon’s Proposed Order and Supplemental Findings achieve the following key points:

- 1. Reaffirm the Regional Board’s Decision With Respect to Double Counting and Mitigation Acreage.** In summing up direction given by the Regional Board on April 8, 2009, Executive Officer John Robertus stated: “I will move on that action to craft the Tentative Order on the basis of 55 acres for entrainment and impingement.” Poseidon’s Proposed Order is consistent with this clear directive that the Board was rejecting the staff’s “double counting” argument and was accepting 55.4 acres as the proper amount of wetlands mitigation acreage needed to fully offset projected Project entrainment and impingement losses. The Board heard extensive testimony on April 8th as to “how fish should be counted” to get to the 1715.5 kg/day standard and the 55.4 acreage requirement. Part of Poseidon’s proposal included a method of accounting presented by Dr. Mayer and Chris Nordby. Poseidon’s Proposed Order clearly incorporates the fish counting methodology that was part of the 1715.5 kg/day standard and the 55.4 acreage determination. Staff’s attempt to change the fish counting method and reject the Mayer/Nordby approach in favor of some new method advocated by the staff (or to be created later by an unaccountable advisory group) ignores the Board’s stated instructions and is designed to increase the amount of acres required for mitigation.
- 2. Provide for Both Impingement Monitoring and Productivity Monitoring At the Mitigation Site.** The Board directed that the final order include a provision for monitoring of both the amount of impingement at the seawater intake system after the desalination plant goes into operation, and the amount of biological productivity of the wetlands mitigation for impingement. Staff’s Proposed Order defines monitoring in such general terms as to allow additional debate regarding staff’s “double counting” argument and the amount of acreage required. Poseidon’s Proposed Order and Supplemental Findings provide for explicit

impingement and productivity monitoring standards, including specific accounting standards according to the standards proposed by Poseidon's experts Nordby and Mayer, which will ensure the empirical verification of its impingement and demonstrate that the Project's mitigation fully offsets the impingement.

3. **Reflect the Regional Board's Decision As To the Appropriate Calculation to Use for Compensatory Impingement.** The Board concurred with Poseidon's commitment, on an interim basis until additional impingement monitoring data is collected pursuant to the Proposed Order, to produce up to 4.7 kg/day (1715.5 kg/year) of "available" fish biomass in the mitigation wetlands. Poseidon's Proposed Order and Supplemental Findings demonstrate a reasonable basis exists for concluding that the mitigation wetlands will produce more than 1715.5 kg/year of available fish biomass, which will more than fully offset potential stand-alone impingement.
4. **Keep the Record Closed To New Testimony.** The Board should not accept new comment letters or advocacy on the substantive issues before it, after the record closed on April 8, 2009. We do not believe the Board authorized the staff to conduct a new round of "interagency consultation." All agencies had the opportunity to submit comments on April 8th on all issues. Instead, the Board should be considering only those submissions and testimony regarding the appropriate order to reflect given by the Board on April 8, 2009.
5. **Include a Specific Definition of the Trigger for Stand-Alone Operations as Requested by Boardmember Rayfield Concerning Temporary Shutdown in Encina Power Station Operations.** Poseidon's Proposed Order at ¶ 5 defines the trigger for moving to "temporary shutdown" of the Encina Power Station as notification from EPS that all generating units will be non-operational for power production and unavailable to be called upon by the California Independent System Operator to produce power for a period of 180 consecutive days or more.
6. **Reaffirm the Board's Determination that Carlsbad is the Appropriate Site Under Water Code Section 13142.5(b).** With the Board's adoption of Order No. R9-2006-0065 in 2006 granting approval of the CDP, the Board previously determined that the EPS site was the appropriate site for the project under Water Code Section 13142.5(b). Poseidon's Proposed Order and Supplemental Findings confirm that upon complete retirement of EPS operations, this determination under Water Code Section 13142.5(b) would not be open for reconsideration.
7. **Present Legally Defensible Findings That Properly Respond to Criticism Advanced by Surfrider Foundation of the Regional Board's Position.** The Regional Board Staff is refusing to include complete legal findings to respond to specific attacks on the Board's decision at the April 8, 2009 hearing. Staff claims that providing a detailed set of written findings with a complete explanation of the Board's decision for the Board's consideration on May 13, 2009 would trigger the need for new comment periods and additional Board meetings. It is a

fundamental principle of administrative law that state agencies can and should explain in detail the basis for their decisions, and that providing such an explanation based on evidence presented at the hearing does not require additional comment periods. Thus, to adequately respond to anticipated legal challenges to the Board's decision, Poseidon's Proposed Order and Supplemental Findings contain a detailed set of written findings reflecting the essential rationale for the Board's decision, including specific findings regarding the infeasibility of alternative sites and the Board's interpretation of Water Code Section 13142.5(b).

- 8. Avoid Effort to Entangle this Board's Decision in New Issues Raised by Regional Board Staff.** Poseidon's Proposed Order and Supplemental Findings reject staff's attempts to undertake previously undisclosed issues raised for the first time since the April 8, 2009 hearing. As an example, through staff's Proposed Order, Poseidon would be required to perform impingement sampling during current periodic EPS heat treatment of the intake facilities. Because desalination plant operations do not require heat treatment of the existing intake and discharge facilities, it is inappropriate to require heat treatment monitoring from Poseidon and Poseidon's Proposed Order and Supplemental Findings exclude such a requirement. If Staff insists such data is necessary, it is more appropriate to obtain this information from EPS, which is the entity who controls the heat treatments.

We appreciate the Regional Board's consideration of these important issues and respectfully request that the Regional Board adopt Poseidon's Proposed Order and Supplemental Findings at its May 13, 2009 hearing.

Dated: April 30, 2009

Respectfully submitted,

LATHAM & WATKINS LLP

By _____
Christopher W. Garrett