Public Comment
Desalination Amendments
Deadline: 8/19/14 by 12:00 noon

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www.SantaBarbaraCA.gov

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August 18, 2014

VIA E-MAIL [commentletters@waterboards.ca.gov]

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Comment Letter – Desalination Amendments

Dear Ms. Townsend:

The City of Santa Barbara ("City") appreciates the opportunity to submit this comment letter on the Desalination Amendments[1], the related Draft Staff Report ("Staff Report") and Draft Substitute Environmental Documentation ("SED"). This comment letter is based on the City's review of the proposed Desalination Amendments and related documents, its one-on-one meeting with the State Water Resources Control Board ("State Board") staff and on the information presented at the August 6 workshop.

The City is concerned that the Desalination Amendments, as proposed, will undermine its ability to use its existing Charles E. Meyer Desalination Facility (the "Existing Facility")[2] in accordance with the City's Long Term Water Supply Program ("LTWSP") and its General Plan to provide vitally needed water during current and future drought conditions. A fundamental problem with the Desalination Amendments is the manner in which the State Board has interpreted and seeks to apply Water Code section 13142.5(b) ("Section 13142.5(b)") to the Existing Facility. The City asks the State Board to revise the Desalination Amendments to address the comments contained in this letter. The City believes that revisions to the Desalination Amendments are legally required and vitally important to allowing the City to operate the Existing Facility during drought conditions as contemplated by the City's LTWSP. These revisions would also help the State Board achieve the goals stated on page 22 of the Staff Report to support the use of ocean water as a

[1] The full title of the proposed Desalination Amendments is "Proposed Amendments to the Water Quality Control Plan for Ocean Water in California Addressing Desalination Facility Intakes, Brine Discharges, and the Incorporation of Other Nonsubstantive Changes. For purposes of this comment letter, the City adopts the shortened version "Desalination Amendments" used by the State Board.

[2] The Staff Report on pages 13-15 properly designates the Charles E. Meyer Desalination Facility as one of the ten existing desalination facilities situated on the coast of California. The Facility is also included as an existing facility listed in both Table 2-1 and Figure 2-1. The City agrees with this characterization of the Facility and this comment letter therefore refers to the Charles E. Meyer Desalination Facility as the "Existing Facility". As explained in more detail below, Table 2-1 should more accurately list the status of the Existing Facility as "Standby" or "In Standby Mode" not as "Decommissioned".

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reliable supplement to traditional water supplies while protecting beneficial uses and promoting interagency collaboration regarding such facilities.

Based on comments made by several Board members at the August 6 workshop, there appears to be a recognition that the City's unique situation requires a unique approach. The City greatly appreciates and supports these comments, and will continue to work with State and Regional Board staff to work toward a solution. The City believes that a solution consistent with the "on the ground" facts and the history of the Existing Facility can be achieved. This comment letter, however, is necessarily based on the Desalination Amendments as currently proposed and, if implemented according to what seems to be their intent, the letter explains their potential effect on the City's ability to provide its residents with the water supplies long-planned for through the LTWSP. It is hoped that through continued discussion with the State and Regional Board the need for most of these comments by the City would be alleviated.

The City's comment letter is organized into four main parts. First, the letter describes the Existing Facility, its history and current status. This information is important because it establishes that since the early 1990s the Existing Facility has been and remains a fully permitted facility that is an important component the City's LTWSP. Second, the letter discusses the scope and history of Section 13142.5(b) and the law that applies to the State Board's interpretation and application of that statute. Third, the letter separately discusses the City's specific comments on the Desalination Amendments, the Staff Report and the SED. Fourth, the letter concludes with a brief summary of the reasons why the Existing Facility should not be subjected to the Section 13142.5(b) analysis contemplated by the proposed Desalination Amendments.

I.

THE EXISTING FACILITY, ITS HISTORY AND CURRENT STATUS

During the water supply crisis in the late 1980s and early 1990s, the City designed and constructed the Existing Facility as a supplemental water supply source that could be used during drought conditions. The Existing Facility is a reverse osmosis desalination plant using seawater as the feedwater for the system. Seawater is obtained through a screened seawater intake located 2,500 feet offshore. The intake pipe was fabricated by sleeving an existing abandoned outfall line with a polyethylene liner. The reverse osmosis plant and ancillary pumping, pre-treatment, and chemical storage facilities are located on City-owned land adjacent to the City wastewater treatment plant. Product water is injected into the City's water distribution system adjacent to the project site. Brine is disposed of by mixing the effluent from the City's wastewater plant and discharging through an existing outfall and diffusers located 8,700 feet offshore. A depiction of the components of the Existing Facility is contained in Exhibit "A".

As part of the planning, construction, permitting and operation of the Existing Facility, the City performed extensive analysis of the environmental impacts of the Existing Facility, including analysis of the best available site, design and technology options and mitigation measures feasible. In both 1991 and 1994, the City certified environmental impact reports ("EIR") for the Existing Facility.[3] As part of these EIRs or in conjunction with other permit requirements, the City conducted a wide variety of studies, including ocean monitoring related to brine discharges, other biological monitoring, and an analysis of subsurface seawater intake options.

For example, both the 1991 and 1994 EIRs analyzed eight alternative sites for a desalination facility. Sites considered included land adjacent to the Santa Barbara Airport, the More Mesa Natural Gas Complex, land adjacent to the Goleta Wastewater Treatment Plant, a site at the University of California, Santa Barbara Campus, land adjacent to the Ellwood Power Plant, Shoreline Park, Las Positas Park and East Beach.[4] The 1991 and 1994 EIRs also considered alternative desalination technologies including low-temperature-mechanical vapor distillation and obtaining feedwater using subsurface beach wells rather than a screened ocean intake. It was concluded that such alternative technologies were not feasible. Finally, the EIRs addressed impacts to marine life due to impingement and entrainment and found these impacts to be less than significant. The EIRs both concluded that the Existing Facility created the fewest environmental impacts, including impacts to marine life, and best meet the City's project objectives.

In addition to this environmental review, the City obtained and has maintained all required permits for the Existing Facility, including a Coastal Development Permit ("CDP") and a National Pollutant Discharge Elimination System ("NPDES") Permit.[5] In March of 1991, the Coastal Commission issued CDP 4-91-18 to the City for the construction and temporary operation of the desalination facility. In October of 1996, the Coastal Commission issued CDP 4-96-119 to the City for the permanent operation of the desalination facility. Notably, the staff report for CDP 4-96-119 expressly discusses impingement and entrainment and concludes that the design and technology used in the project fully address these issues. CDP 4-96-119 remains in place today and authorizes the operation of the Existing Facility.[6]

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[3] Concurrently with this comment letter, the City is submitting to the State Board a disk that contains the 1991 and 1994 EIRs, as well as other pertinent studies, reports and permits. This disk is incorporated herein by this reference and intended to be made a part of the record of these proceedings.

[4] See 1994 EIR, pages 8-7 to 8-16.

[5] The relevant permits are included on the disk submitted concurrently to the State Board.

[6] CDP 4-96-119 authorizes different scenarios for operation ranging from 3,125 AFY, to 7,500 AFY, to 10,000 AFY.

Similarly, in September of 1991, the Central Coast Regional Board issued Order No. 91-83 to the City, which allowed for the discharge of brine from the Existing Facility commingled with effluent from the City's El Estero Treatment Plant. In Finding 15 of Order No. 91-83, the Regional Board summarized the conclusions of the 1991 EIR and determined that the "proposed action is not expected to reduce water quality." The NPDES permit has been updated and reissued on a number of occasions (1992, 1996, 2004 and 2010). At all times, the NPDES permit has allowed for the operation of the Existing Facility and the discharge of brine commingled with the effluent from the El Estero Treatment Plant.

The process for obtaining the CDPs from the Coastal Commission and the NPDES permits from the Regional Board were very open and public processes in which multiple stakeholders participated and provided comment. Stakeholders who played an active role in the permitting process included, among others, Coastkeeper and Heal the Ocean. Although both the Coastal Commission and the Regional Board discussed issues associated with the seawater intake, and although the 1991 and 1994 EIRs analyzed available site, design, technology and mitigation issues, there is no evidence in the record that the City has found that the Coastal Commission, the Regional Board or stakeholders ever expressly referred to Section 13142.5(b) or appeared to believe that the statute or any part of it had any application to the Existing Facility.

Between March and June of 1992, the City successfully operated the Existing Facility. Even before then, in June of 1991, the City voters elected to make desalination a permanent part of the City's water supply portfolio. In July of 1994, consistent with the direction of the voters, the City added the Existing Facility to the City's LTWSP. The Existing Facility has remained an permanent part of the City's LTWSP since 1994 and is also part of the City's General Plan. In fact, both the LTWSP and the General Plan were updated in 2010-11 through an extensive public process and the Existing Facility remains a part of these plans.

On or about August 20, 1996, the Santa Barbara City Council instructed staff to take steps to place the Existing Facility in standby mode in accordance with a long-term standby program for the Facility.[7] In accordance with City Council direction, the long-term standby program was designed to ensure activation of the plant as required by the LTWSP. Although in standby mode, the Existing Facility therefore remains an important water supply option for the City and is intended to be used when required by the LTWSP. Since 1996, the City has spent over $2.2 million dollars maintaining the components of the Existing Facility so that it

[7] There is a common misperception that the City "sold off" the components of the Existing Facility. This is not true. In accordance with its long-term standby program, the City has maintained the pumps, check valves, screens, piping and other components of the Existing Facility that is owns in order to re-deploy them quickly in accordance with the LTWSP. Certain perishable materials (RO membranes) and some of the equipment sized to provide a regional water supply were indeed sold but most of the key components of the Existing Facility are available to be re-deployed if necessary. However, as stated at the public workshop, the City intends to update the screen technology to modern standards as part of the re-deployment of the facility.

would be available when needed, and the City has also commissioned studies to determine the cost and time needed to place the facility back into production.

In May of 2014, the Santa Barbara City Council authorized City staff to take steps to prepare the Existing Facility to be taken out of standby mode and placed back into production mode in accordance with the LTWSP. This action was taken due to the unprecedented nature of the current statewide drought, and the City's need to be prepared to bring the Existing Facility back into production mode to ensure reliable drought supplies should the dry weather persist through additional years. These steps are ongoing, and the City would like to have the Existing Facility ready for use if the drought continues. However, the proposed Desalination Amendments, and the State Board's interpretation of Section 13142.5(b), create significant concerns for the City and appear to undermine the City's efforts to use the Existing Facility for its intended purpose. This comment letter seeks to explain why, based on the facts and the law, the Existing Facility should not be treated as a "new" or "expanded" facility that is subject to Section 13142.5(b).

II.

SECTION 13142.5(b), ITS APPLICATION TO THE EXISTING FACILITY AND THE NATURE OF THE STATE BOARD'S PROPOSED ACTION

Page 21 of the Staff Report explains that the Desalination Amendments are intended to, among other things, "clarify" the State Board's authority over desalination facility intakes and discharges and to provide guidance to the regional water boards regarding the determination required by Section 13142.5(b). As State Board staff explained at the workshop, the State and Regional Boards do not typically regulate intakes (as opposed to discharges) and many ocean water intakes exist to which the State and Regional Boards' legal authority does not extend. Through the Desalination Amendments, the State Board is seeking to interpret Section 13142.5(b) and explain how and when it should be applied. This proposed action implies that the applicability of Section 13142.5(b) to municipal desalination facilities is not readily apparent and needs to be clarified. At least as applied to the Existing Facility, the City has concerns about the State Board's interpretation and application of Section 13142.5(b).

Section 13142.5(b) was adopted in 1976 as part of the California Coastal Act, which incorporated some, but not all, of the policy recommendations contained in the Coastal Plan. On its face, Section 13142.5(b) does not appear to apply to facilities such as the Existing Facility. Based on its plain language, Section 13142.5(b) only applies when two conditions are satisfied. First, it only applies to a "new or expanded coastal powerplant or other industrial installation". Although not defined in Section 13142.5(b), the legislative history of the Coastal Act focuses on the siting of powerplants and liquefied natural gas facilities along the coast.[8] In fact, Section 13142.5(a) and (f) speak separately to municipal facilities such as

[8] See, for example, Senate Committee on Natural Resources and Wildlife Analysis of SB 1277, page 2.

treatment plants, thus indicating that the Legislature knew how to distinguish between industrial installations and municipal facilities.[9] At best, it is not clear that the Legislature intended a municipal desalination facility to fall within the ambit of an "industrial installation" and it does not appear that the State and Regional Board originally understood the statute to apply to such facilities.

Second, Section 13142.5(b) only applies when a qualifying facility uses "seawater for cooling, heating, or industrial processing . . . ." Again, the plain language appears to focus on the use of seawater as a part of the operations of a coastal powerplant or other industrial installation. Nothing on the face of the statute or in the legislative history appears to suggest an intent to treat the use of seawater for municipal water supply purposes as a use of seawater by an industrial installation as part of its industrial processing.

The legislative history of the Coastal Act, including Section 13142.5(b), also indicates that no new duties are required of the State Board to implement the provisions of the bill.[10] This appears to undermine the interpretation of Section 13142.5(b) as creating new authority for the State and Regional Boards to regulate facilities such as the Existing Facility. It appears that the regional boards shared this original view of Section 13142.5(b) and did not immediately apply it directly to municipal desalination facilities. It is the City's understanding that it has only been more recently with facilities such as the Poseidon facility in Carlsbad that Section 13142.5(b) has been applied to desalination facilities. Unlike the Existing Facility, the Poseidon facility is co-located with a coastal powerplant, thus potentially triggering Section 13142.5(b). In Surfrider Foundation v. California Regional Water Quality Control Board, San Diego Region (2012) 211 Cal.App.4th 557 ("Surfrider Foundation"), the Court of Appeal assumed, without any analysis, that Section 13142.5(b) applied to the co-located facility. The City is unaware of any case that has analyzed and upheld the application of Section 13142.5(b) to a municipal desalination facility that is not co-located with a coastal powerplant.

Presumably, the confusion regarding the applicability of Section 13142.5(b) is driving the State Board's desire to "clarify" its authority over desalination facility intakes and to provide guidance to the regional water boards on how and when to apply Section 13142.5(b). In seeking to interpret Section 13142.5(b), the State Board is bound by certain legal principles of statutory interpretation. Because Section 13142.5(b) is not an authorization from the Legislature to "make law", the State Board cannot interpret Section 13142.5(b) in ways that conflict with the plain language of the statute or apply it in ways that are fundamentally at odds with the statute's intent. Ultimately, how the State Board elects to interpret Section 13142.5(b) will be subject to independent review by the courts. (Yamaha

[9] Section 13142.5(f) even provides that this "section shall not apply to industrial discharges into publicly owned treatment works." Notably, Table 2-1 of the Staff Report makes a similar distinction between facilities used for "industrial processing" and those for "municipal/domestic" purposes.

[10] See, for example, Ways and Means Staff Analysis to SB 1277, page 4.

Corporation of America v. State Board of Equalization (1998) 19 Cal.4th 1, 3-4; Waterkeepers Northern California v. State Water Resources Control Board (2002) 102 Cal.App.4th 1448, 1458.) Only the courts can ultimately determine when and where Section 13142.5(b) applies and what it means.

The proposed Desalination Amendments seek to define the term "existing facility" in a way that would convert a facility that exists into a "new" facility subject to Section 13142.5(b) simply because certain determinations may not have been formally made by the regional water board at the time of permitting of the facility. Such an approach appears to be fundamentally at odds with the plain language of Section 13142.5(b) and the statute's intent. Such an approach would also undermine the goals of supporting the use of ocean water as a reliable supplement to traditional water supplies while protecting beneficial uses and promoting interagency collaboration since it could prevent the use of an existing facility and undo the interagency collaboration that led to the existing permitting of the facility. The City believes that the approach that is more consistent with Section 13142.5(b) would be, at a minimum, to consider facilities that have been constructed and are permitted as existing facilities not subject to Section 13142.5(b). The State Board could then apply its interpretation of Section 13142.5(b) prospectively to newly developed facilities.

III.

Specific Comments on Desalination Amendments, Staff Report and the SED

With this factual background and legal framework in mind, the City submits the following specific comments on the Desalination Amendments, the Staff Report and the SED.

1. Specific Comments on Desalination Amendments.

1.1 Section III.D.5.(b)(1)-(2) (page 22)[11] and Section III.L.1.a (page 27-28): The State Board's general approach to the application of Section 13142.5(b) is inconsistent with the language and purpose of the statute. In many ways, the State Board has turned the language of Section 13142.5(b) on its head. The State Board is applying the statute to municipal desalination facilities that supply potable water and that are not traditional industrial installations using seawater for cooling, heating, or industrial processing. At the same time, the State Board is not applying the section, as was noted by staff during the public workshop, to other traditional industrial facilities. In accordance with III.L.1.a and III.D.5.(b)(1)-(2), the Desalination Amendments and the State Board's interpretation of Section 13142.5(b) only apply to specified desalination facilities.

[11] The page citations contained in this comment letter refer to the redlined version of the Ocean Plan included as Appendix A to the Staff Report.

The State Board's interpretation and application of Section 13142.5(b) to facilities such as the Existing Facility appears to exceed the State Board's legal authority. The plain language of Section 13142.5(b) applies to each "new or expanded coastal powerplant or other industrial installation using seawater for cooling, heating, or industrial processing". The plain language of the statute does not apply to municipal desalination facilities that use seawater for municipal water supply, not for cooling, heating or industrial processing. In fact, until recently, the regional water boards did not apply Section 13142.5(b) to municipal facilities. It is true that in the Surfrider Foundation case the Court of Appeal assumed, without any analysis, that Section 13142.5(b) applied to a desalination facilities that was designed to provide potable water for domestic use. However, that case involved a desalination facility that was co-located with a coastal powerplant that used seawater for cooling. In addition, the parties to the case did not dispute the application of Section 13142.5(b). Therefore, while the Surfrider Foundation case provides important insights into the meaning of some of the words used in Section 13142.5(b), it does not support the State Board's general approach to the application of Section 13142.5(b) in the Desalination Amendments.

At a minimum, the State Board's approach to Section 13142.5(b) is a significant interpretive change that should only be applied, if at all, prospectively. Certain existing municipal desalination facilities, such as the Existing Facility, were permitted without express findings under Section 13142.5(b) because the regional boards appear to have applied the plain language of the statute and did not interpret that section as applying to municipal facilities. That original approach is more consistent with the express language of the statute and consistent with the original intent of the provision. The State Board's new reading of the statute is inconsistent with the express language and purpose of the statute, and the State Board's authority to take this approach is questioned.

1.2 Section III.L.1.a (page 28): The temporary waiver provisions for emergency declarations should be clarified. As explained by staff in the one-on-one meeting and in the workshop, this provision was originally intended to apply to earthquakes or similar natural disasters where desalinated water could supply an immediate, short-term water supply. However, staff at the public workshop acknowledged that it could apply to drought declarations. The City recommends that the provisions be amended to expressly include drought declarations. In addition, at least for drought relief purposes, it is recommended that the waiver be automatic and not subject to the Executive Director's discretion. The Desalination Amendments should provide that when the Governor declares a state of emergency based on drought conditions, the Desalination Amendments are waived during that period for desalination facilities that are operating to serve as a critical short term water supply. Otherwise, it will be difficult to quickly bring such critical short term water supply facilities into production mode and their operations in critical periods will be subject to delays. The better approach is to make the waiver automatic when a declaration occurs. The Desalination Amendments could specify the facilities to which this automatic waiver applies.

1.3 Section III.L.1.b.(1) (page 28): The Desalination Amendments seek to define the term "existing facility" (a term not found in Section 13142.5(b)) to apply Section 13142.5(b) to facilities which currently exist and which are not "new" or "expanded" "industrial installations" as used in Section 13142.5(b). The State Board lacks the legal authority to interpret state statutes in ways which conflict with the express terms of the statute. Facilities that exist and have permits to operate cannot reasonably be considered "new" or "expanded" as those terms are used in Section 13142.5(b). To the extent a definition of "existing facility" is required, that definition should include all currently permitted facilities which have commenced construction or operations in reliance on previously issued permits. It is suggested that the State Board simply list the existing facilities reflected on pages 13-15 (including Table 2-1 and Figure 2-1) of the Staff Report in the Desalination Amendments as "existing facilities" or as facilities to which Section III.L..2 does not apply. It is noted that the Existing Facility is treated in the Staff Report as an existing facility but is treated differently under the definition of "existing facility" in the Desalination Amendments.

1.4 Section III.L.1.b.(1) (page 28): The definition of "existing facility" should not exclude existing facilities "for which a regional board did not make a determination of the best site, design, technology, and mitigation measures feasible, pursuant to Water Code section 13142.5, subdivision (b)." Existing facilities should be defined as facilities that have commenced construction or operations in reliance on previously issued permits. The Existing Facility should be expressly included in this definition. At a minimum, existing facilities should include facilities for which the regional board made or could have made implied findings regarding the best available siting, design, technology and mitigation feasible or for which those determinations could be deemed to have been made. Even if an express finding under Section 13142.5(b) was not made, previously permitted facilities should not be subject to Section III.L.2 if the history and record reflects that the board and the discharger assessed issues associated with the best available siting, design, technology and mitigation measures feasible. As was mentioned during the public workshop, the State Board could allow the regional board to determine that the CEQA review for the project was the equivalent of a Section 13142.5(b) determination. This approach is particularly appropriate given that regional boards did not expressly apply Section 13142.5(b) in the past to municipal facilities because they apparently did not believe it applied to such facilities.

1.5 Section III.L.1.b.(2) (page 28): Greater clarity should be provided regarding the defined term "expanded facilities". As currently drafted, the term is ambiguous and possibly subject to broad interpretation inconsistent with the express language and intent of Section 13142.5(b). More specific thresholds for "increases" in the amount of seawater used or "changes" in design or operation should be included. As written, it would cover "any" increase or change which "could" increase intake or mortality of marine life. This might be interpreted as capturing any increase or change, however small, because most increases or changes "could" in theory have some increase in intake or mortality. More specific language is needed to prevent all changes from falling within the definition of the

term "expanded facilities". The State Board should also consider express exclusions for maintenance or improvement activities that apply new technology or maintain proper operations of the facility. Without such an exclusions, and without more clarity in this definition, activities that are required or that improve operations might be captured by this definition. This is particularly true because many of these maintenance activities are already authorized by existing permits. This approach might also address the comments made during the public workshop about "life of the project" and "improved technology" issues. A more specific definition of "expanded facilities" could provide an incentive to use improved technology when repair or maintenance activities occur by preventing such technology improvements from triggering the definition of "expanded facilities" and a new round of Section 13142.5(b) analysis.

1.6 Section III.L.1.c (page 28): See comments 1.1-1.3 above. Section III.L.2 should not apply to facilities that have been constructed or operated in accordance with previously issued permits. At a minimum, facilities that have been constructed and operated should not be subject to a new analysis under Section II.L.2. An abbreviated determination that relies on prior reports, assessment or CEQA determinations should apply to such facilities.

1.7 Section III.L.1.f (page 29): The consultation provisions of the Desalination Amendments blur the lines of decision making authority and undermine the statutory structure regarding challenges to regional board actions. They also threaten to create delay in the regional boards' processes, as regional boards are prohibited from making final determinations until consultation occurs. Rather than streamlining the process, the consultation provisions will create multiple layers of decision making. If the goal is to provide direction to the regional boards to implement Section 13142.5(b), the Desalination Amendments should establish the framework and the regional boards should implement the framework, subject to State Board oversight through the petition process.

1.8 Section III.L.2.a.(1) (page 29): The State Board's general approach to Section 13142.5(b) places too much of a burden on the regional boards to "conduct" the analysis rather than allowing the discharger to prepare the analysis and supporting reports and submit them for regional board review and approval. The approach places too much of a burden on regional boards and will prove unworkable in practice. It will lead to long delays and will overburden the already overburdened boards. From the workshop, it appears that the State Board's intent is that the discharger will prepare the analysis and submit it for regional board review. It is recommended that the language in this section better reflect this intent. In addition, the nature of the Regional Board's action should be more fully explained. Because Section 13142.5(b) addresses intakes (not discharges) in a way that is very different than the Regional Board's authority under the Clean Water Act, it may be appropriate to have the determination made separately from the NPDES permit.

1.9 Section III.L.2.a.(1) (page 29): See comment 1.7 above regarding consultation. The consultation provisions will only add to the burden on staff and delay the process.

1.10 Section III.L.2.a.(2) (page 29): The proposed separate and independent analysis of the "best" site, design, technology and mitigation measures is impractical and inconsistent with the statute. First, this section drops the key words "best available" and "feasible" from the analysis. Section 13142.5(b) requires an analysis of the "best available" site, design, technology and mitigation measures "feasible". In Surfrider Foundation, the Court of Appeal upheld the San Diego Regional Board's use for Section 13142.5(b) purposes of CEQA's definition of "feasible", which is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors." The State Board should include a feasibility analysis as part of its approach and should use CEQA's definition of the term. Second, the statutory factors cannot be viewed in isolation, but must be viewed in combination. Therefore, rather than an independent and separate analysis, the factors should be balanced to achieve the "best available" combination of factors that are "feasible". This approach is consistent with the judicial guidance from Surfrider Foundation and the express language of the statute. For example, in Surfrider Foundation, the Court stressed that the statute describes a "set of measures" which collectively reduce both intake and mortality of marine life. The Court further explained that the statute does not require that each measure individual minimize intake and mortality. Viewing each measure in isolation first appears inconsistent with this guidance from the Court.

1.11 Section III.L.2.a.(4) (page 30): The role of other agencies should be clarified. This process should result in one set of measures that meets or is consistent with the requirements of all applicable agencies. Involving multiple agencies without ultimately establishing one set of measures will undermine the streamlining goals of the Desalination Amendments and will ultimately cause unnecessary delay and confusion. The City recognizes that the State Board cannot control the activities and final decisions of other agencies. However, consistent with the goal of promoting interagency collaboration, the State Board should work to establish a framework for true interagency collaboration that results in one set of measures, not multiple "bites at the apple".

1.12 Section III.L.2.a.(5) (page 30): The "future events" provisions are too broadly written. These issues should be left to project specific decisions and the unique situations of each project. As written, the provisions appear to authorize reopener provisions that undermine regulatory certainty. The State Board should either delete these provisions or make them specific to limited situations where reopener may be required.

1.13 Section III.L.2.b.(1) (page 31): This section does not address site conditions. Rather, it addresses water supply planning documents that are unrelated to the site. This provision, particularly the last sentence, should be deleted. The City understands the comments made at the public workshop that design capacity should not be "gamed" to

exclude the feasibility of subsurface facilities, but the ability of subsurface facilities to achieve needed capacity within a balanced water supply portfolio should be a consideration.

1.14 Section III.L.2.d.(1).(a).(i) (page 33): The State Board should not mandate the use of subsurface intakes. Rather, the regional boards should consider the full range of factors contained in Section 13142.5(b) and determine the "best available" combination of factors that are "feasible" to minimize intake and mortality. The pros and cons of subsurface intakes should be weighed against the pros and cons of other options. As written, the Desalination Amendments ignore the impacts of subsurface facilities and only focus on the impacts of other approaches. This is inconsistent with the statute and a full balancing of all factors. This need for a full balancing of factors should consider the type and duration of use of the facility. For a facility that may only be used intermittently, the balance may be different than for a facility that is used at all times.

1.15 Section III.L.2.d.(1).(a).(ii) (page 33): This section should be deleted or clarified significantly. Any required combination of surface and subsurface intakes should be reasonable and "feasible." The State Board should consider establishing more specific percentages or thresholds of reasonability. Also, this section should not apply to existing facilities that use surface intakes already. This provision, coupled with the broad definition of "expanded facilities", creates concerns about how the mandate for use of subsurface intakes might apply to existing facilities that use screened intakes.

1.16 Section III.L.2.d.(1).(c).(ii) (pages 33-34): The City supports the use of intake screens of 1.0 mm or larger. The City does not support the use of intake screens less than 1.0 mm because there is a lack of scientific data to support screen sizes smaller than 1.0 mm. Based on the information presented at the public workshop by West Basin, screen size below 1.0 mm are subject to fouling that actually increases the through screen velocity and potentially increases the likelihood of impingement. There also does not appear to be a statistically significant reduction in entrainment for reducing screen size lower than 1 mm, even though the statement was made at the workshop that "small is better". Screen sizes of 1.0 mm or larger appear to be a reasonable approach that takes into account operational realities.

1.17 Section III.L.2.d.(2).(a) (page 34): The phrase "that would otherwise be discharged to the ocean, unless the wastewater is of suitable quality and quantity to support domestic or irrigation uses" should be deleted or qualified. This phrase as written could be interpreted to negate the preferred technology of commingling brine with wastewater because almost all wastewater could be made suitable for domestic or irrigation uses but there might not be an economically feasible option to reuse that wastewater. This approach also does not take into account changes in technology and/or regulatory restrictions on the use of wastewater for domestic or irrigation purposes. The City recognizes that Water Code section 106 declares that the use of water for domestic and irrigation purposes are the highest uses of water, and the City does recycle its wastewater as feasible. Deleting or

modifying this phrase would accommodate the preferred technology of commingling brine with wastewater without undermine the policy reflected in Water Code section 106.

1.18 Section III.L.2.e.(1).(a) (page 37): The 36 month entrainment study, the additional sampling using a 200 micron mesh and the 90 percent confidence level all appear excessive and not based on science. A 12 month study using 335 micron mesh size and a 50 percent confidence level are standard.

1.19 Section III.L.2.e.(3).(b).(ii) (page 39): Mitigation requirements should be fixed and not ongoing. Mitigation for entrainment between 200 and 335 microns should not be required.

1.20 Section III.L.2.e.(3).(c) (page 39): The mitigation plan should consolidate mitigation requirements of all applicable agencies and should be used by the agencies for all mitigation requirements.

1.21 Section III.L.3.c (page 41): The requirements for an alternative salinity receiving water limitation study appear excessive. Is a 36-month baseline required? The species identified for the WET tests should not be mandatory; species found in the area in question should be used.

1.22 Definition of "Brine Mixing Zone" (page 44-45): The last two sentences of this definition should be deleted, as they negate or undermine the purpose and intent of a mixing zone. Standard definitions of mixing zones should apply regarding acute toxicity.

1.23 Definition of "Desalination Facility" (page 45): This definition does not address or explain how public facilities that are providing potable water for domestic use are treated as industrial facilities subject to Section 13142.5(b).

1.24 Definition of "Seawater" (page 49): This definition is too broad and might capture inland desalination facilities that are not covered by Section 13142.5(b).

1.25 Definition of "Subsurface" (page 50): This definition is too broad, particularly the phrase that subsurface includes "beneath the surface of the earth inland from the ocean." As written, this would appear to be a limitless definition that could include all of planet earth.

1.26 Appendix G: (page G-22): The economic analysis fails to assess actual cost increases to facilities such as the Existing Facility that have been permitted and operated but to which the Desalination Amendments might apply. The study assumes a zero cost increase which does not appear supportable if the Desalination Amendments require the City to engage in a full Section 13142.5(b) analysis (including possible new mitigation).

1.27 Appendix G (page G-31): The economic analysis underestimates the capital costs for subsurface facilities because it assume that no pretreatment will be required. This is not supported in all cases. In general, the study underestimates the costs of subsurface intakes.

1.28 Appendix G (page G-31-32): The economic analysis should assess whether the Desalination Amendments constitute an unfunded state mandate that requires a subvention of funds from the state. As the documents admit, the Desalination Amendments do not implement federal requirements. The purported authority for the Desalination Amendments is state law, and the State Board's interpretation of Section 13142.5(b) appears to represent a new program or higher level of service imposed on public agencies. The overall costs to the State to implement this program should be assessed in light of this unfunded state mandate requirement.

2. **Staff Report.**

2.1 Chapter 2.3 (page 13-15): This portion of the Staff Report properly characterizes the Existing Facility as an existing facility. This approach in the Staff Report should be carried over into the Desalination Amendments. Although Table 2-1 and Figure 2-1 properly treat the Existing Facility as being one of the existing coastal desalination facilities in California, the status of the Existing Facility in Table 2-1 should be changed from "decommissioned" to "standby" or to "in standby mode." In August of 1996, the Santa Barbara City Council directed the City's public works director to initiate a long-term standby program for the Existing Facility which would ensure activation of the plant as required by the LTWSP. The City is currently considering taking the facility out of standby mode and placing it back into production mode. Therefore, Table 2-1 should reflect the status of the facility as "standby" or "in standby mode". The City has expended over $2.2 million dollars since 1996 maintaining the components of the Existing Facility so that upon a determination of the City Council to take the facility out of standby mode (as is now pending in the face of the unprecedented state-wide drought conditions) a minimal amount of repair work would be needed to place the facility back into production relatively quickly.

2.2 Chapter 6.2 (page 28-29): This portion of the Staff Report must be revised to more fully explain the State Board's legal authority to interpret and seek to apply Section 13142.5(b) to municipal desalination facilities that supply domestic potable water, especially those facilities—such as the Existing Facility—designed to operate in drought conditions. Nothing in Section 13142.5(b) directly applies to such facilities, but the Staff Report concludes without any citation to specific legal support that Section 13142.5(b) "gives the State Water Board authority to regulate intakes from new or expanded desalination facilities." A full discussion of the express language of the statute should be provided, as well as a discussion of the one relevant judicial interpretation of the statute. Such an analysis will demonstrate that the express terms of Section 13142.5(b) have no direct application to facilities such as the Existing Facility. While, as was the case in Surfrider Foundation and as may also be the case with Section 316(b) of the Clean Water Act, desalination facilities that

are co-located with coastal powerplants may fall within the regulatory scope, facilities such as the Existing Facility do not.

2.3 Chapter 8.1.1 (page 40-43): See comment 2.2 above. This section of the Staff Report must be revised to more fully explain the State Board's legal authority to interpret and seek to apply Section 13142.5(b) to municipal desalination facilities that supply domestic potable water, especially facilities—such as the Existing Facility—designed to operate in drought conditions.

2.4 Chapter 8.2 (page 43-44): This section of the Staff Report should explain the State Board's legal authority to define terms such as "new" or "expanded" and to define terms such as "existing" that are not used in the statute. This section should also explain the State Board's legal authority to apply these new definitions to a facility such as the Existing Facility that has been designed, constructed and fully permitted since the early 1990s.

2.5 Chapter 8.3.3 (page 57-58): The legal support for categorizing all desalination facilities as "industrial installations" should be provided. It is also noted that the statute only applies to "industrial installations" that use seawater for "cooling, heating or industrial processing." An explanation of how a facility that provides a water supply for domestic use in drought conditions qualifies as the use of seawater for "industrial processing" should be provided.

2.6 Chapter 8.6.2.1 (page 83-84): This portion of the Staff Report should be revised to reflect that the Desalination Amendments designate commingling with wastewater as a preferred approach. The analysis in this portion of the Staff Report appears to undermine this preferred approach.

3. **SED.**

As the State Board correctly acknowledges, it is exempt from certain aspects of CEQA compliance pursuant to its status as a certified regulatory program. (Pub. Res. Code, § 21080.5, Cal. Code of Reg., tit. 14 ["State CEQA Guidelines"], § 15251(g); Cal. Code Regs., tit. 23, § 3720 et seq.) Accordingly, it is appropriate for the State Board to use an SED instead of preparing an EIR. (San Joaquin River Exch. Contractors Water Auth. v. SWRCB (2010) 183 Cal.App.4th 1110, 1125.) However, the State Board must still comply with all of the specialized CEQA requirements outlined in California Code of Regulations, section 3720 et seq. and all of those aspects of CEQA outside the scope of the exemption for certified regulatory programs, including CEQA's policy goals and substantive standards. (State CEQA Guidelines, § 15250; City of Arcadia v. SWRCB (2006) 135 Cal.App.4th 1392, 1422; Env'l Protection Info. Ctr. v. Johnson (1985) 170 Cal.App.3d 604, 616; Californians for Native Salmon & Steelhead Assn. v. Dept. of Forestry (1990) 221 Cal.App.3d 1419, 1422.)

Accordingly, CEQA's basic policy goal to "[i]nform governmental decision makers and the public about the potential, significant environmental effects of proposed activities" still applies. (State CEQA Guidelines, § 15002(a)(1).) SEDs, like EIRs, achieve this objective by, among other things, eliminating or minimizing a proposed action's significant effects by identifying reasonable alternatives and mitigation measures. In assessing the impact of a proposed project on the environment, an agency normally examines the changes in existing environmental conditions in the affected area that would occur if the proposed activity is implemented. (San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App.4th 645, 660.) In evaluating the significance of environmental effects of a project, the lead agency must consider direct and reasonably foreseeable indirect physical changes in the environment that may be caused by the project. (Pub. Res. Code, § 21065; Citizens for Responsible & Open Gov. v. City of Grand Terrace (2008) 160 Cal.App.4th 1323, 1333.)

While a substitute environmental review document is exempt from some of the formatting and procedural requirements of EIRs, ultimately it must include the same types of basic environmental information that an EIR would. (Friends of Old Trees v. Dept. of Forestry & Fire Protection (1997) 52 Cal.App.4th 1383, 1393; Laupheimer v. State (1988) 200 Cal.App.3d 440, 462.) For example, the SED must still: (1) describe the proposed project; (2) disclose and analyze potentially significant adverse project-specific environmental impacts; (3) consider cumulative impacts; (4) discuss alternatives and mitigation measures that could reduce or eliminate the project's significant impacts; (5) be made available for review and comment by the public and other agencies; and (6) be justified based on specific benefits, including economic, social, or other conditions. (Pub. Res. Code, § 21080.5(d)(3); State CEQA Guidelines, § 15252(a); Sierra Club v. State Bd. of Forestry (1994) 7 Cal.4th 1215, 1229; Ebbetts Pass Forest Watch v. Dept. of Forestry & Fire Protection (2008) 43 Cal.4th 936, 943; Katzeff v. Dept. of Forestry & Fire Protection (2010) 181 Cal.App.4th 601, 608; County of Santa Cruz v. State Bd. of Forestry (1998) 64

Cal.App.4th 826, 830.) Just as for EIRs, the conclusions of substitute environmental documents must be based on scientific and other empirical evidence. (Ebbetts Pass, supra, at 957-958; Joy Rd. Area Forest & Watershed Assn. v. Dept. of Forestry & Fire Protection (2006) 142 Cal.App.4th 656, 677; Mountain Lion Coalition v. Fish & Game Com. (1989) 214 Cal.App.3d 1043, 1047.) As described in the comments below, the SED is legally deficient because it does not satisfy these basic requirements.

3.1 Project Description: The SED fails to present a stable and fixed project description. Rather than describing the project as the proposed Desalination Amendments and assessing the environmental impacts of that project, the SED merely assesses the pros and cons of desalination. A fixed project description must be used that reflects the changes made by the Desalination Amendments to the Ocean Plan and then the impacts of those changes must be assessed. In particular, the environmental impacts associated with applying the Desalination Amendments to a facility such as the Existing Facility must be analyzed.

3.2 Air Quality: The SED does not assess the air quality impacts resulting from its preference for subsurface intakes. Such intakes will have an increased power demand that will create larger air quality impacts. Also, the air quality impacts associated with construction of subsurface intakes should be assessed.

3.3 Biological Resources: The SED does not assess the biological resource impacts resulting from its preference for subsurface intakes. Such impacts from the construction and operation of such intakes should be assessed.

3.4 Geology and Soils: The SED does not consider that placement of subsurface intakes involves risks associated with geologic hazards that would be caused by the project because it requires the use of subsurface intakes. These impacts must be analyzed. More generally, the environmental impacts associated with mandatory subsurface intakes must be assessed. As written, the SED merely assumes without analysis that surface intakes are superior and have fewer impacts than surface intakes.

3.5 Greenhouse Gases: The GHG analysis only identifies construction impacts, not operational impacts. Because the SED acknowledges that alternatives would require substantially more energy usage, thus increasing GHG emissions, the SED must also analyze operational impacts.

3.6 Noise: The project's preference for subsurface intakes will result in additional pumping noise which is not currently analyzed. Noise impacts due to additional pumping at subsurface intakes must be assessed.

3.7 Recreation: The SED fails to address impacts to recreational beach use, limitations on recreational fishing or impacts to boat anchoring from construction,

operation and maintenance of subsurface intake systems. These impacts are a direct or indirect result of the project and must be analyzed.

3.8 Transportation and Traffic: The SED fails to assess the increased traffic associated with subsurface intake construction that will be a direct or indirect result of the project.

3.9 Utilities and Service Systems: The SED fails to assess the increased power required to operate the subsurface intakes that will be required by the project.

3.10 Alternatives: In an SED, the Regional Board is required to include "[a]n analysis of reasonable alternatives," which must include "the exploration of feasible less damaging alternatives to the proposed . . . project." (Cal. Code Regs., tit. 23, § 3777(b)(3); Friends of the Old Trees, supra, 52 Cal.App.4th at 1403-1405; Env'l Protection Info., supra, 170 Cal.App.3d at 610.) The State Board should include an alternative under which facilities such as the Existing Facility would not be treated as a "new or expanded coastal powerplant or other industrial installation using seawater for cooling, healing or industrial processing . . ."

IV.

CONCLUSION

Since the early 1990s, desalination has been an integral part of Santa Barbara's long term water supply planning. Over the years, the City has spent millions of dollars to design, permit, construct, temporarily operate and then maintain the Existing Facility in standby mode as part of the City's balanced water supply portfolio. In this process, the City and applicable regulatory bodies have assessed the environmental impacts of the Existing Facility, including analyzing issues such as the best available site, design, technology and mitigation measures feasible to apply to the Existing Facility.

The City is now facing the type of long-term drought conditions that the Existing Facility was designed, permitted, constructed and maintained in standby mode to address. The City has started the process to consider moving the Existing Facility back into production mode in accordance with its LTWSP. If the drought conditions continue, the Existing Facility will need to play the vital supplemental water supply role that the City has always envisioned for it and for which it was built. The City's ability to use the Existing Facility should not be undermined by the Desalination Amendments, which has as one of its stated goals to support the use of ocean water as a reliable supplement to traditional water supplies while protecting beneficial uses.

For all the reasons expressed in this comment letter, the City asks the State Board to revise the Desalination Amendments to allow the City to use the Existing Facility as contemplated in its LTWSP.

Very truly yours,

Rebecca J. Bork
Director, Pubic Works
City of Santa Barbara

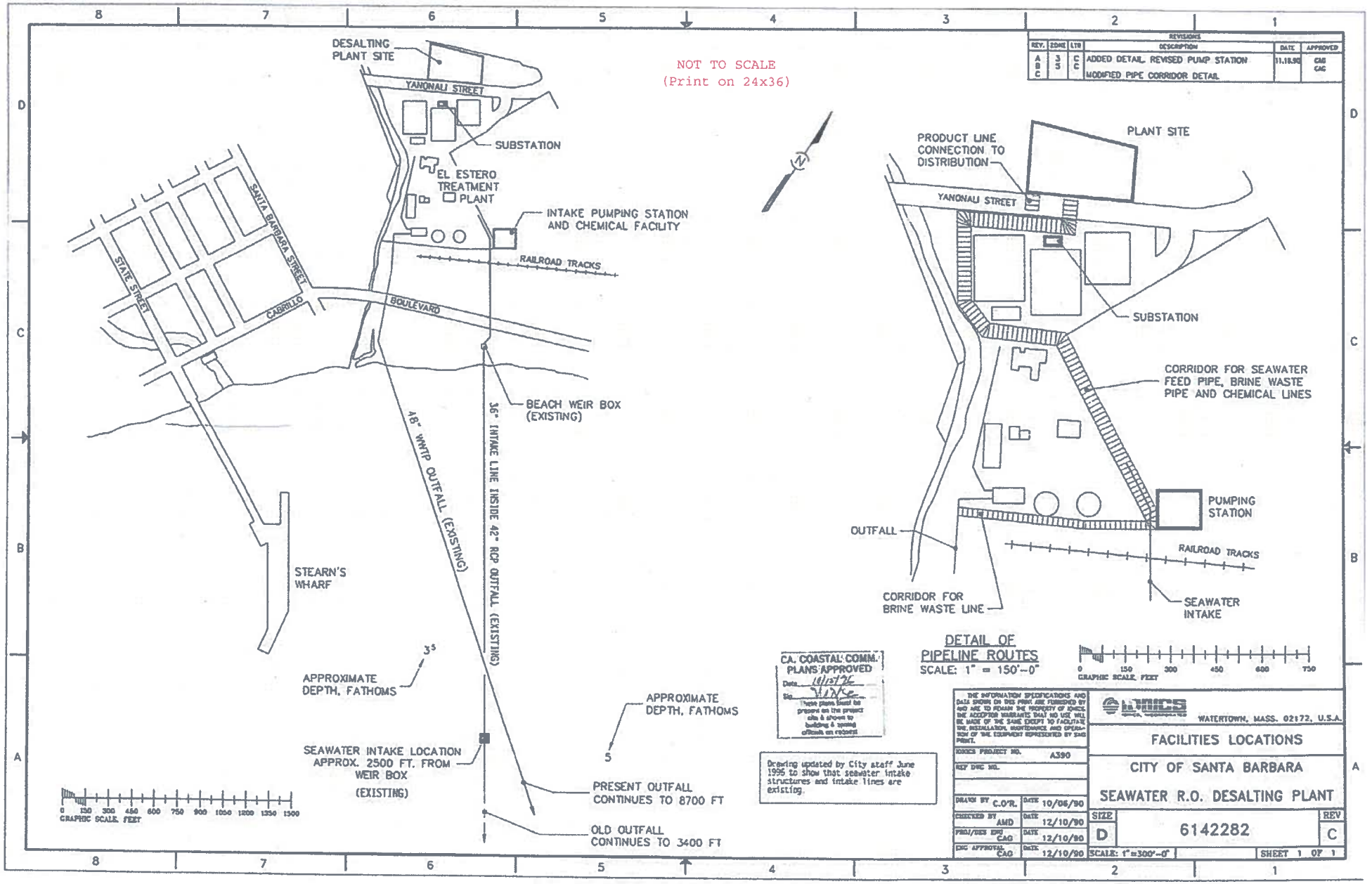
Attachment(s): Exhibit A - Depiction of Existing Facility and Components

cc: Helene Schneider, Mayor, City of Santa Barbara
James L. Armstrong, City Administrator, City of Santa Barbara
Paul Casey, Assistant City Administrator, City of Santa Barbara
Ariel P. Calonne, City Attorney, City of Santa Barbara
Sarah J. Knecht, Assistant City Attorney, City of Santa Barbara
Shawn Hagerty, Esq.

Exhibit "A"

[Depiction of Existing Facility and Components - Attached]

EXHIBIT A


NOT TO SCALE
(Print on 24x36)
DESALTING PLANT SITE
YANONALI STREET
SUBSTATION
EL ESTERO TREATMENT PLANT
INTAKE PUMPING STATION AND CHEMICAL FACILITY
RAILROAD TRACKS
SANTA BARBARA STREET
STATE STREET
CABRILLO BOULEVARD
BEACH WEIR BOX (EXISTING)
48" WWTP OUTFALL (EXISTING)
36" INTAKE LINE INSIDE 42" RCP OUTFALL (EXISTING)
STEARN'S WHARF
APPROXIMATE DEPTH, FATHOMS
35
APPROXIMATE DEPTH, FATHOMS
5
SEAWATER INTAKE LOCATION APPROX. 2500 FT. FROM WEIR BOX
(EXISTING)
PRESENT OUTFALL CONTINUES TO 8700 FT
OLD OUTFALL CONTINUES TO 3400 FT
0 150 300 450 600 750 900 1050 1200 1350 1500
GRAPHIC SCALE FEET
PRODUCT LINE CONNECTION TO DISTRIBUTION
PLANT SITE
YANONALI STREET
SUBSTATION
CORRIDOR FOR SEAWATER FEED PIPE, BRINE WASTE PIPE AND CHEMICAL LINES
PUMPING STATION
OUTFALL
RAILROAD TRACKS
CORRIDOR FOR BRINE WASTE LINE
SEAWATER INTAKE
DETAIL OF PIPELINE ROUTES
SCALE: 1" = 150'-0"
0 150 300 450 600 750
GRAPHIC SCALE FEET
CA. COASTAL COMM. PLANS APPROVED
Date 11/25/96
These plans must be present on the project site & shown to building & zoning officials on request
Drawing updated by City staff June 1995 to show that seawater intake structures and intake lines are existing.
REVISIONS
REV. | ZONE | LTR | DESCRIPTION | DATE | APPROVED
A | 3 | C | ADDED DETAIL, REVISED PUMP STATION | 11.18.96 | CAG
B | 3 | C | MODIFIED PIPE CORRIDOR DETAIL | | CAG
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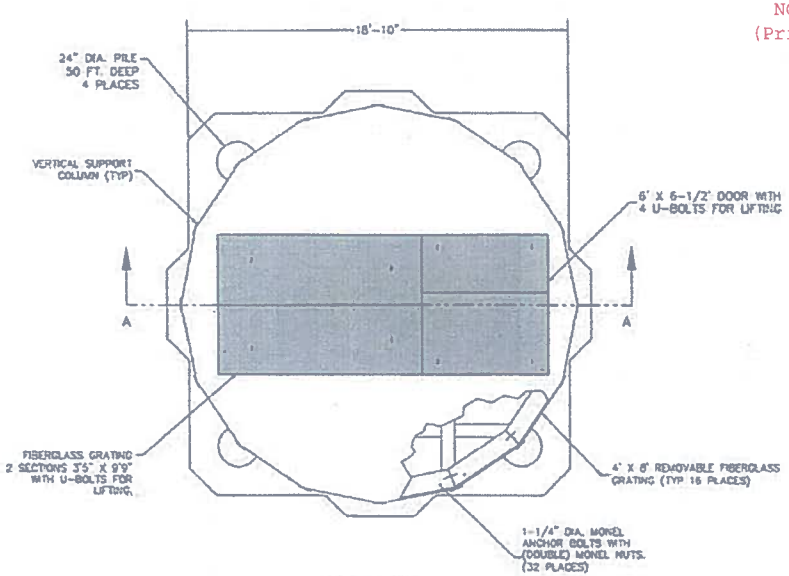
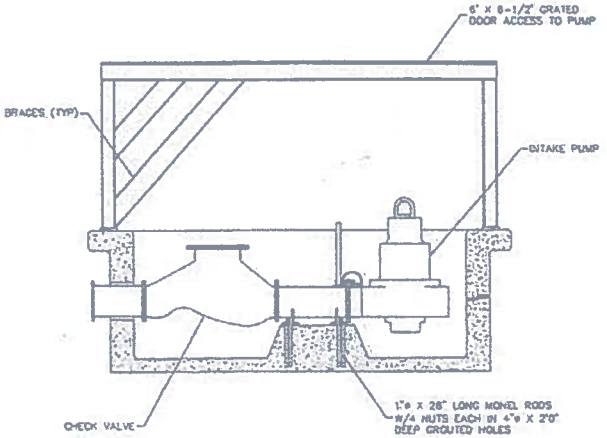
IONICS PROJECT NO. A390
REF DWG NO.
DRAWN BY C.O'R. DATE 10/05/90
CHECKED BY AMD DATE 12/10/90
PROJ/DES ENG CAG DATE 12/10/90
ENG APPROVAL CAG DATE 12/10/90
IONICS
WATERTOWN, MASS. 02172, U.S.A.
FACILITIES LOCATIONS
CITY OF SANTA BARBARA
SEAWATER R.O. DESALTING PLANT
SIZE D
6142282
REV C
SCALE: 1"=300'-0"
SHEET 1 OF 1

NOT TO SCALE
(Print on 24x36)

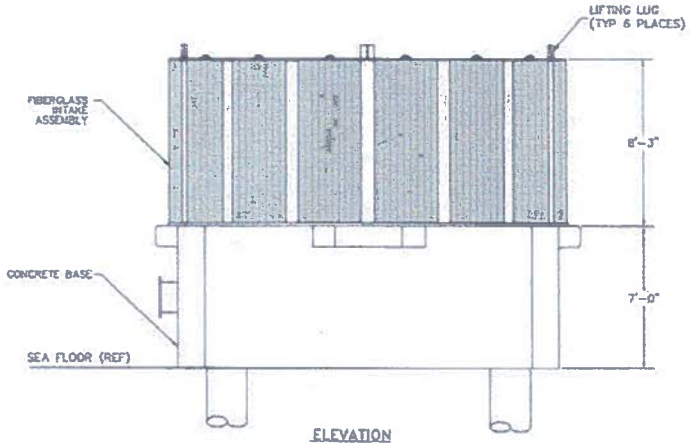
REVISIONS					
REV.	ZONE	LTR	DESCRIPTION	DATE	APPROVED
-			ORIGINAL ISSUE		



PLAN VIEW



SECTION A-A



ELEVATION

NOTES:
1. TWO INTAKE STRUCTURES, EACH AS SHOWN, ARE INSTALLED. REFER TO URS DRAWINGS #E6143569 S1, E6143570 S-2, E6143571 S-3 FOR LOCATION AND BASE DETAILS.
2. REFER TO IMCO DWGS. 95-9071 (1-8) FOR DETAILS OF THE FIBERGLASS ASSEMBLY.

CA. COASTAL COMM. PLANS APPROVED
Date _____
By _____
These plans must be present on the project site & shown to building & zoning officials on request.

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IMCO WATERTOWN, MASS. 02172, U.S.A.

INTAKE STRUCTURE ASSEMBLY

CITY OF SANTA BARBARA
SEAWATER RO DESALTING PLANT

ISSUED PROJECT NO.	A390		
REF DWG NO.	6142283		
DRAWN BY L. COLEMAN	DATE 2 JULY 98	SIZE D	6153778 REV —
CHECKED BY	DATE		
PROD/DES ENG	DATE		
ENG APPROVAL	DATE	SCALE: 3/8"=1'-0"	FILE: 6153778 SHEET 1 OF 1

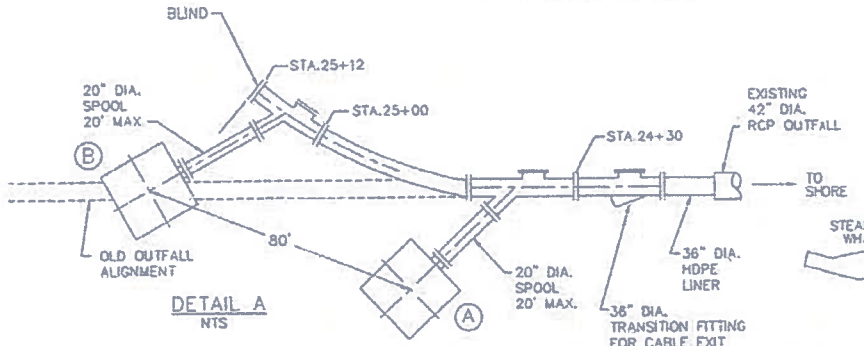
NOT TO SCALE
(Print on 24x36)

REVISIONS					
REV.	ZONE	LTR	DESCRIPTION	DATE	APPROVED
–			ORIGINAL ISSUE		

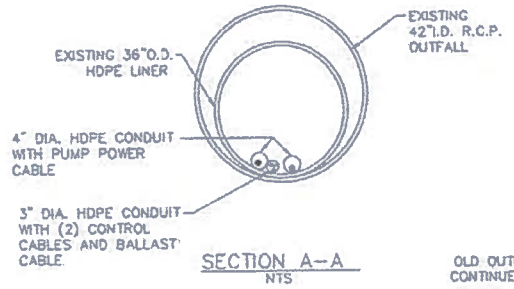
INTAKE COORDINATES

1. LAT. 34° 24' 28"
   LONG. 119° 40' 44"
2. LAT. 34° 24' 27"
   LONG. 119° 40' 44"

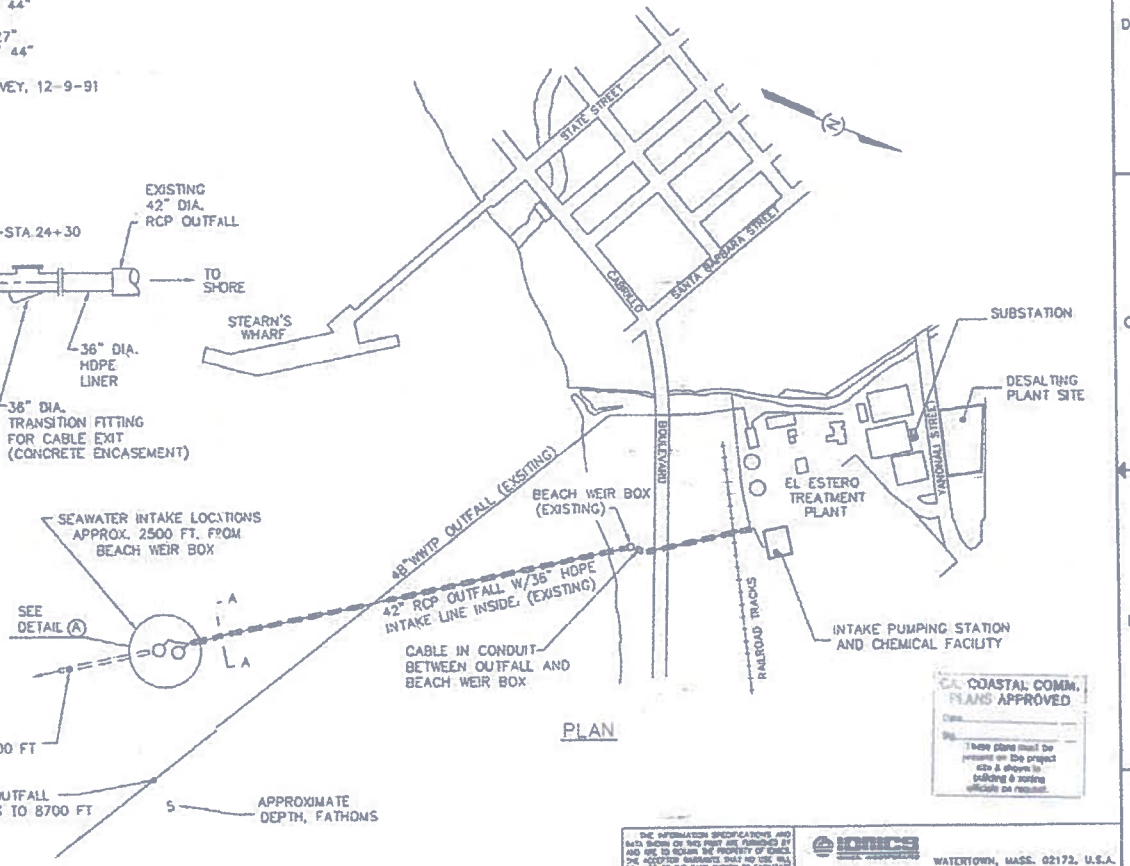
REF. MN&S SURVEY, 12-9-91



DETAIL A
NTS



SECTION A–A
NTS



PLAN

COASTAL COMM. PLANS APPROVED
Date
By
These plans must be present on the project site & shown to building & zoning officials on request.

NOTES

1. FOR FURTHER DETAILS OF INTAKE STRUCTURE REFER TO U.R.S. DRAWINGS, SHEETS E6143568, E6143569, AND IMCO DRAWINGS 95907–1 TO 6.
2. FOR FUTHER DETAILS OF ELECTRICAL INSTALLATION REFER TO DRAWINGS D6144130.

0 150 300 450 600 750 900 1050 1200 1350 1500
GRAPHIC SCALE, FEET

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IOMEGA WATERTOWN, MASS. 02172, U.S.A.

SEAWATER INTAKE

CITY OF SANTA BARBARA
SEAWATER RO DESALTING PLANT

IOMEGA PROJECT NO	A390	
REF DWG NO.	6144288	
DRAWN BY	L. COLEMAN	DATE 2 JULY 96
CHECKED BY		DATE
PROJ/DES ENG		DATE 7-10-96
ENG APPROVAL		DATE

SIZE D | 6153777 | REV –
SCALE: – | FILE: 6153777 | SHEET 1 OF 1