

Amanda Halter
Direct Dial: (714) 755-2238
amanda.halter@lw.com

650 Town Center Drive, 20th Floor
Costa Mesa, California 92626-1925
Tel: +1.714.540.1235 Fax: +1.714.755.8290
www.lw.com

LATHAM & WATKINS LLP

FIRM / AFFILIATE OFFICES

Abu Dhabi	Munich
Barcelona	New Jersey
Brussels	New York
Chicago	Northern Virginia
Doha	Orange County
Dubai	Paris
Frankfurt	Rome
Hamburg	San Diego
Hong Kong	San Francisco
London	Shanghai
Los Angeles	Silicon Valley
Madrid	Singapore
Milan	Tokyo
Moscow	Washington, D.C.

VIA MESSENGER AND ELECTRONIC MAIL

February 2, 2009

California Regional Water Quality Control Board,
San Diego Region
Attn: John H. Robertus
Executive Officer
9174 Sky Park Court
San Diego, California

Re: Offer of Proof in Support of Request for Alternate Procedures at February 11, 2009 Regional Water Quality Control Board Hearing – Agenda Item No. 6

I. OPENING STATEMENT

Poseidon Resources Corporation (“Poseidon”) respectfully requests that the Regional Water Quality Control Board, San Diego Region, (“Regional Board”) restructure the proposed procedures for the February 11, 2009 hearing, as set forth in Board Meeting Agenda Notice, Note C and Catherine Hagan’s letter to Poseidon dated January 29, 2009, to ensure the protection of Poseidon’s due process rights, and to enable the Board members to make a fully informed, and impartial decision on the merits. The decision before the Regional Board affects the substantive rights of Poseidon and subjects Poseidon to material risk regarding the agency’s proposed findings of fact and conclusions of law. In the balance is the financing and timely construction of a \$300 million ocean water desalination plant that, once operational in late 2011 or early 2012, will produce enough potable water to serve the needs of approximately 300,000 San Diego residents. Staff’s adverse staff report and unwarranted reluctance to accept the same science and technical approaches that other California permitting authorities already have approved threaten to undermine this important project.

Poseidon is entitled to a full and fair opportunity to prepare and present its case, exercising the rights to offer its own witnesses and cross-examine Regional Board staff personnel who have been involved with Poseidon’s Flow, Entrainment and Impingement Minimization Plan (the “Minimization Plan”) and the proposed amendment to it called the Marine Life Mitigation Plan (the “Mitigation Plan”). Staff has been provided with all information needed to recommend that the Board approve these plans. But, the truncated, informal approach for the hearing recommended by staff is woefully inadequate for the Board to

LATHAM & WATKINS LLP

be apprised of the robust nature of the record before it, and the fact that all legitimate issues raised by staff have been answered fully. It will violate Poseidon's due process rights to conduct the hearing as staff propose; the Regional Board must modify the proceedings pursuant to this request.

II. DISCUSSION

A. The Time Allocated is Not Adequate

Ms. Hagan's January 29, 2009 letter states: "I anticipate recommending to the Chair that San Diego Water Board staff and Poseidon each be allotted 30 minutes for their respective presentations." She goes on to state that "given the limited and preliminary nature of the issue that will be before the San Diego Water Board on February 11, I believe that this more streamlined hearing approach comports with due process." Accordingly, under this recommendation, Poseidon might be limited to only 30 minutes to present its entire case at the hearing. For the following reasons, Poseidon objects to Ms. Hagan's recommendation and requests the Regional Board provide Poseidon with sufficient time to present its case:

1. It Will Take Time to Resolve the Fundamental Dispute between Poseidon and the Regional Board Staff Regarding the Adequacy of the MLMP

The issues before the Regional Board are complex and lengthy, and there is strong disagreement between Poseidon and the Regional Board staff as to the adequacy of Poseidon's plans. The Regional Board's decision has the potential to substantially and adversely impact Poseidon's substantive and legal rights. In order for the Regional Board to adequately perform its adjudicatory role, it must provide Poseidon sufficient time to present its case and develop a sufficient record for the Regional Board to make an unbiased and informed decision. Given the extensive record in support of Poseidon's plans, this simply cannot be done in 30 minutes.

Presently, Poseidon and Regional Board staff dispute whether the plans meet the conditions of the Regional Board's April 9, 2008 Resolution conditionally approving the Minimization Plan ("April Resolution"). Attached is a list of issues staff have identified. The staff report incorrectly characterizes Poseidon's Mitigation Plan as "fundamentally flawed." In contrast, Poseidon is confident that the plan fully satisfies the mitigation requirement of California Water Code Section 13142.5 and the conditions set forth in the April Resolution. This represents a fundamental disagreement. It will require significant time at the hearing to build a proper record as to the basis of this disagreement, while offering each party a full and fair opportunity to be heard.

2. Sufficient Time is Required to Adjudicate the Multiplicity of Facts in Dispute

Poseidon will need time to develop a record on the many issues at hand, including, without limitation, whether: (1) the interagency process required by the Regional Board has produced a result that is acceptable to the agency (as it was for the California Coastal Commission and the State Lands Commission, among other agencies); (2) a "specific proposal

LATHAM & WATKINS LLP

for mitigation,” See April Resolution, required Poseidon to select a single site by now; (3) the proposed wetlands mitigation is adequate; (4) the data used to evaluate potential impingement at the future plant are sound and sufficient for this purpose; (5) staff’s concerns set forth in its February 19, 2008 letter have been addressed. Thirty minutes will not be sufficient time for Poseidon to have a meaningful opportunity to present a record on the issues before the Board.

3. The Regional Board Must Provide Poseidon Sufficient Time to Elucidate the Record

Presently, there is a lack of clarity and transparency in the record. It will take a considerable amount of time for the Regional Board to sort through the issues and hone in on the key, relevant information. Throughout this process, Regional Board staff have been unwilling to communicate with Poseidon regarding staff’s specific concerns with Poseidon’s plans. Poseidon has attempted repeatedly to engage staff in a dialogue to narrow and focus the issues in order to address them without the need for a formal hearing. Staff were not willing to engage in such a process, leaving more issues for resolution on February 11, 2009 than otherwise would need be the case.

It will take time to sort through these issues and establish a meaningful record of all relevant information, yet the Regional Board’s ability to perform its adjudicatory function in a manner consistent with due process will require that each party be given sufficient time to present its case so that such a record is established.

4. The MLMP is Ripe for Regional Board Approval

In contrast to Ms. Hagan’s point of view that the February 11 hearing is “limited” and “preliminary” and therefore does not require formal procedural safeguards, Poseidon confidently believes that final approval of the MLMP is appropriate. The decision before the Regional Board is not preliminary, but the culmination of two years of back-and-forth negotiations and planning between the Regional Board and Poseidon to develop plans that meet the requirements of Water Code Section 13142.5(b). The sufficiency of these plans has been developed fully for Board disposition and approval. Because the February 11 hearing is anything but preliminary, the Regional Board should provide Poseidon with formal procedural safeguards, including, but not limited to, a meaningful opportunity to be heard on the merits.

Poseidon has significant legal and substantive rights at stake warranting the procedural safeguards guaranteed by due process. Until these approvals are secured, Poseidon will not be able to proceed with construction of the mitigation site(s). Also, without these approvals, Poseidon’s plans to build a \$300 million desalination plan likely will be impeded. Accordingly, Poseidon is entitled to a full and fair opportunity to present its case, exercising the rights to offer its own witnesses and to cross-examine those agency personnel involved in this action, in particular those who participated without objection in the interagency process during which the MLMP was developed at the direction of the Regional Board. To suggest that this could be done in 30 minutes is not realistic.

LATHAM & WATKINS LLP

5. The Regional Board Must Provide Poseidon Adequate Time to Be Heard to Preserve the Impartiality of the Proceeding

Due process requires that each party be given a full and fair opportunity to be heard. Due process also requires that the adjudication be presided over by an informed and neutral decision maker. If the very limited procedures proposed by staff are used, Poseidon will be deprived of both of these fundamental due process rights because it will have insufficient time to inform the Board and insufficient time relative to the amount staff have been given to speak with the Board.

The Regional Board has already provided Regional Board staff with an unequal amount of time to present its case. In addition to normal contact with the Regional Board, staff have held two closed door meetings with the Regional Board regarding the April Resolution, one on December 10, 2008 and one on January 21, 2008. Regional Board staff claimed that the meeting would only discuss pending litigation filed by Surfrider and San Diego Coastkeeper against the Regional Board and not the adequacy of the MLMP in meeting the conditions of the April Resolution. The subject matter of the pending litigation, however, is inextricably intertwined with the issue before the Regional Board on February 11. It is impossible, therefore, to discuss one without the other. During these meetings, Regional Board staff had the opportunity to present its findings and express its opinions regarding the MLMP to the Board. In contrast, Poseidon has been given no such exposure to the Regional Board. Accordingly, Poseidon has not been provided a full and fair opportunity to present its case. This is a violation of due process that can only be remedied by providing Poseidon sufficient time at the February 11 hearing to present its case.

Furthermore, the Regional Board staff's extensive involvement with the Regional Board casts doubt on the impartiality of the decision maker. In general, the Regional Board is likely to show a tendency in favor of Regional Board staff opinions. When the Regional Board gives Regional Board staff exclusive and unfettered attention behind closed doors, as is the case here, the Regional Board's inherent bias is substantially magnified. To counterbalance this substantial risk of impartiality will require nothing less than providing Poseidon with a full, fair and equal opportunity to be heard at the hearing. Due process requires that, at a minimum, Poseidon be given sufficient time to present its case.

Poseidon accordingly requests that the Board set aside four hours for presentation of our witnesses and to cross-examine Regional Board staff. This time would be in addition to 30 minutes for opening and closing arguments and does not include the time provided the Regional Board staff, or time permitted interested persons to comment on the matter, nor does this include the time for Regional Board members to ask any questions they may have of witnesses.

B. Additional Time Is Required for Poseidon to Present Evidence in Support of its Plans

Poseidon intends to use the additional time to present evidence in support of its plans. The kind of evidence involved with this matter requires oral development and articulation. While Poseidon has appreciated the opportunity to submit public written comment on these issues, written comment is not a sufficient vehicle to afford due process. Poseidon intends to call

witnesses, and also to cross-examine the Regional Board staff that have been involved with the review and development of Poseidon's plans. These witnesses include scientific experts who will testify about the entrainment and impingement issues and the methodologies used to determine the appropriate mitigation acreages.

Witnesses Poseidon may call to testify include without limitation:

1. Dr. David Mayer, Ph.D. – Dr. Mayer and his team applied scientific methods to calculate mitigation requirements. His work was peer reviewed by Dr. Pete Raimondi at the direction of the Coastal Commission, and also by the Commission's Science Advisory Panel. This review occurred after the April Regional Board meeting. Dr. Mayer will bring the Board up to date on the evolution of the Mitigation Plan, and also will address its conservative nature and assumptions. He also will address how impingement largely was addressed as part of the Minimization Plan, while the Mitigation Plan has focused on entrainment.
2. Chris Nordby – Mr. Nordby is very familiar with mitigation opportunities throughout the region and will report on those opportunities. He also will address the introduction of performance measures into the Mitigation Plan, measures of success imposed by the Coastal Commission, and discussed during the interagency proceedings in which Regional Board staff participated. These performance measures are based on Southern California Edison's successful San Dieguito Lagoon mitigation project, and provide plan location flexibility that was not included in the proposal when last before the Regional Board in April 2008. Mr. Nordby also will testify as to the fish that will be produced under the mitigation project, offsetting any impingement loss from stand-alone desalination operations.
3. Dr. Scott A. Jenkins, Ph.D. – Dr. Jenkins has studied the Agua Hedionda watershed and the potential impacts of freshwater runoff on the marine character of the Lagoon during the period in which the biological data used for the impingement and entrainment study were collected. Dr. Jenkins can address staff's concern that these data may have been "skewed" by atypical amounts of rainfall.
4. Expert on the Adequacy of Mitigation – Given the importance of this issue, we may call an expert who has not been involved to date with this project, but who can offer peer review comment. While we believe the record is robust without such additional peer review, the Board may appreciate this extra level of comfort.

LATHAM & WATKINS^{LLP}

5. Peter MacLaggan – Mr. MacLaggan, Project Manager for Poseidon, has been very involved with the process of working with the technical team and responding to staff's questions and comments. He would provide testimony on this process and his and the team's efforts to respond to staff each and every step of the way. He also can explain the submittal of the Mitigation Plan on November 14, 2008, after final wording from the Coastal Commission became available.
6. Chris Garrett, Esq., Latham & Watkins – As outside counsel for Poseidon, Mr. Garrett has participated in the interagency process, including the important meeting at Agua Hedionda Lagoon on May 1, 2008, where Regional Board staff pointed the mitigation planning towards sites other than Agua Hedionda. Mr. Garrett would provide testimony on the interagency proceedings.
7. Outside Counsel for Poseidon regarding the Coastal Commission Proceedings – It also may be useful for the Board to hear directly from counsel to Poseidon for the Coastal Commission proceedings, since the Mitigation Plan changed materially during the Commission's review of it over the summer of 2008.

C. Poseidon Must Be Able to Cross-Examine Witnesses and Question Regional Board staff in Order to Receive a Full and Fair Opportunity to Be Heard

Poseidon requests the opportunity to engage in uninterrupted, reasonable discourse with and questioning of the Regional Board staff and other persons who present evidence at the February 11 hearing because the Board's decision will affect the substantive and legal rights of Poseidon. Given the multiplicity of issues in dispute, the lack of transparency in the record and the undue influence Regional Board staff has had on the Regional Board, due process requires that Poseidon be allowed to cross-examine witnesses presenting evidence and question relevant Regional Board staff. This is a fundamental procedural safeguard and is necessary to ensure that Poseidon receives a full and fair opportunity to be heard by a neutral and detached decision maker.

As discussed in Poseidon's January 26, 2009 letter regarding Poseidon's Statement of Procedural Objections and Request for Alternate Procedures, the relevant regulations for Regional Board adjudicatory proceedings include cross-examination of witnesses and redirect and recross-examination. Cal. Code of Regs. Tit. 23 § 648.5(b). Although these procedures are generally permissive, they are necessary in this case to ensure Poseidon's due process rights. The right of cross-examination is a fundamental aspect of any adjudication. If the Regional Board staff or other designated parties (or any other person) puts forth evidence at the hearing, Poseidon must be permitted the opportunity to cross-examine its witnesses and experts, both to test its credibility and to determine the bases for witnesses' positions.

Poseidon intends to question Regional Board staff in order to establish each staff person's respective involvement in Poseidon's plans. The lack of transparency that has occurred to date

LATHAM & WATKINS LLP

places Poseidon in the position of having to ask various agency personnel that Poseidon, on information and belief, assert may have had a material role in the development of the MLMP. Such personnel include, without limitation, Chiara Clemente, John Robertus, Mike Porter and Eric Becker.

Poseidon will question these (or other) staff members on various aspects of the Minimization Plan and the MLMP, including the findings, the Staff Report and the internal agency activities related to the Minimization Plan and MLMP. Poseidon intends to investigate various assertions made by the Regional Board staff, to clarify their bases and avoid ambiguities. Poseidon also intends to probe Regional Board staff on communications received from third parties, including Surfriider Foundation and San Diego Coastkeeper.

D. The Regional Board Must Designate Poseidon and Regional Board Staff as Parties

Ms. Hagan's letter states that the Regional Board will not be naming parties at the February 11 hearing because it will be of a "limited" and "preliminary nature." As discussed previously, Poseidon believes that the February 11 hearing is anything but limited and preliminary. It is because Poseidon has so much at stake on February 11 that the Regional Board must designate parties. As discussed in Poseidon's letter regarding its statement of procedural objections and request for alternate procedures, the Regional Board's designation of parties is essential to preserving an orderly and efficient proceeding and to securing the relevant information necessary to make the correct determination.

Failure to designate parties, or the designation of more than the Regional Board staff and Poseidon as parties, will result in a disorderly proceeding and unnecessary delay and will convolute the material issues. If the Regional Board does not designate parties, it will substantially prejudice Poseidon's case and jeopardize Poseidon's due process right to be heard.

E. The Regional Board Should Hold a Pre-hearing Conference to Bring Structure and Efficiency to the February 11 Hearing

A pre-hearing conference is necessary to produce an orderly and efficient adjudicatory proceeding. Poseidon requests a pre-hearing conference to discuss the necessary length of the hearing, as well as hearing procedures, including timing of examination, cross-examination, and closing, etc. If the Regional Board chooses not to hold a pre-hearing conference, significant amounts of time will be wasted deliberating over and explaining the ground rules for the proceeding. The ensuing proceeding will be unnecessarily unwieldy and awkward. This will waste Regional Board's time and impair the Regional Board's ability to ascertain relevant facts, which, in turn, will prejudice Poseidon's case. To prevent a disorderly proceeding, Poseidon requests that the Regional Board hold a pre-hearing conference.

III. THE PROCEEDINGS MUST BE MODIFIED IN ORDER TO PROTECT POSEIDON'S CONSTITUTIONAL RIGHT TO DUE PROCESS

Constitutional due process fundamentally consists of two aspects: notice and a right to be heard. The “fundamental requisite of due process of law is the opportunity to be heard.”¹ “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”²

Without additional time to be heard and the right to cross-examine, Poseidon will not have a substantive “opportunity” to present its case. A sham hearing, or even a hearing that does not give adequate opportunity for Poseidon to present its case is the same as no hearing at all. The U.S. Constitution guarantees that the opportunity to be heard be meaningful.³

The Regional Board’s decision on February 11 could substantially impair Poseidon’s legal rights. Consequently, Poseidon has a heightened due process right that requires a higher degree of care and consideration by the Regional Board.⁴ In Goldberg v. Kelly,⁵ a case where the government tried to strip an individual of valuable property rights, the U.S. Supreme Court imposed the following requirements on governmental entities regarding the nature of the required hearing:

1. Timely and adequate notice detailing the reasons for proposing action;
2. An effective opportunity to defend by confronting any adverse witnesses;
3. An opportunity to present arguments and evidence orally;
4. Allowing the recipient to retain an attorney if desired;
5. Basing a conclusion as to the decision solely on the legal rules and evidence adduced at the hearing;

¹ Grannis v. Ordean, 234 U.S. 385, 394 (1914). See also Green v. Lindsey, 456 U.S. 444, 449-50 (1982).

² Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

³ See Matthews v. Eldridge, 424 U.S. 319, 333 (1972) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”) (citations omitted).

⁴ See Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) (“What procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been effected by governmental action.”).

⁵ Goldberg v. Kelly, 397 U.S. 254 (1970).

LATHAM & WATKINS LLP

6. A statement of reasons for the determination indicating the evidence relied on;
and
7. An impartial decision maker.


As stated previously, Poseidon has real and substantial rights at stake at the February 11 Regional Board hearing, including property rights. It will not prejudice the Regional Board to allow Poseidon to put on witnesses, present evidence, and to cross-examine the staff regarding the provisions development of the MLMP. With a substantial property interest at stake for Poseidon and a minimal burden on the Regional Board, constitutional principles mandate that Poseidon's due process rights be fully protected, not merely swept aside by inadequate procedures.

IV. CONCLUSION

For the foregoing reasons, Poseidon respectfully request that the Board modify the February 11 hearing procedures in accordance herewith.

Dated: February 2, 2009

LATHAM & WATKINS LLP
Paul N. Singarella (Bar No. 155393)
Amanda Halter (Bar No. 254084)

By 
Amanda Halter
Attorneys for POSEIDON
RESOURCES CORPORATION

List of Issues Raised by Regional Board

02/19/08 Letter	
<p>From: John Robertus, Executive Officer, San Diego Regional Water Quality Control Board To: Peter MacLaggan, Senior VP Poseidon Resources Corporation</p>	
1.	The Plan does not yet integrate all the elements of the statutory requirements of California Water Code (CWC) Section 13142. The proposed project only includes "mitigation", while the statute CWC Section 13142.5(b) also requires that dischargers implement best available technology and mitigation measures. The Plan does not appear to include technology measures for the intake structure to reduce impingement and entrainment (I&E).
2.	The Plan provides an evaluation of impacts based upon one year of data, 2004-05 with record rainfall, but does not explicitly evaluate the on-going impacts from Poseidon's operations.
3.	The Carlsbad desalination project's (CDP) listing of impacts appears to omit specific impacts to target invertebrates.
4.	The proposed mitigation project does not appear to account for all pertinent impacts resulting from impingement of invertebrates, entrainment of invertebrates, discharges of brine, etc.
5.	The CHREP did not identify and evaluate the possible mitigation projects located within the same watershed, prior to proposing the out of watershed mitigation in San Dieguito Lagoon. The best mitigation for impacting the lagoon would be to replace lost functions by restoring current upland acreage to the historic wetland condition, or by creating new wetlands where there were none historically.
6.	The proposed <u>mitigation ratio</u> of 1.1:1.0 isn't fully supported. The Plan should be revised to include an evaluation of other mitigation options that may be available within the watershed. The proposed mitigation ratio appears inadequate in light of several factors generally considered by the Regional Board:
a.	The proposed mitigation project is located within a different watershed (the San Dieguito Lagoon) instead of the Agua Hedionda Lagoon. A higher ratio may be appropriate for this project because the referenced mitigation project is out-of-kind (i.e., discharger is not actually replacing the lost resources and functions).
b.	It is not clear that the proposed one-time mitigation is adequate to compensate for the long-term ongoing impacts to beneficial uses, resources, and functions present in Agua Hedionda Lagoon.
c.	The mitigation project is for restoration of coastal wetland habitat, rather than the lagoon habitat impacted by the operation of the CDP.
7.	Poseidon might benefit from convening a joint meeting with the resources agencies (including California Dept Fish and Game, US Fish and Wildlife Service, Army Corps of Engineers, National Marine Fisheries) to discuss the impacts to beneficial uses, resources, and functions by the proposed project, and on the preferred mitigation project so they can discuss agency concerns/comments.
8.	The assessment should address the seasonal and/or daily variations in <u>impingement</u> impacts.
9.	The assessment needs to include results of an <u>impingement</u> study for <u>target invertebrates</u> . Table 3.2 includes only results for fish during 2004-05.
10.	The assessment states that: "The total amount of <u>impinged organisms</u> for the individual sampling events is presented in Table 3-2" (p.19). The Plan, however, does not clearly identify individual sampling events. The interpretation of the results is hampered by the absence of a presentation of results for impinged organisms (including invertebrates) with dates, times, and flow rates of sampling events.
11.	The assessment states that, "The daily biomass of <u>impinged</u> fish during normal operations is 0.96 kgs/day (1.92 lbs/day) for an intake flow of 304 MGD" (p.19). The text discussion should clarify how this figure is determined and how the total impingement results were adjusted to an intake flow of 304 MGD. Also, there is a conversion discrepancy since 0.96 kgs converts to 2.12 lbs, not 1.92 lbs as indicated in the Plan.
	The assessment of impacts from entrainment assessment appears to include larval fish but does not clearly include impacts to fish eggs and invertebrates. It is the understanding of the Regional Board that the 2004-05 study was to include monitoring of (at least) entrained Cancer crab megalops and lobster larvae, but the assessment does not appear to include these data. Also, it is unclear that

List of Issues Raised by Regional Board

<p>sampling followed a protocol approved by the Regional Board as stated (p.22).</p>
<p>12. The Plan does not clearly identify the supporting data or an explanation of underlying assumptions and calculations that were used to estimate proportional mortality values for larval fish as presented (p.23) in the Plan. Therefore, the Regional Board could not objectively evaluate the validity of the estimated proportional entrainment mortality (12.2%) presented in the Plan.</p>
<p>13. Impacts are based upon the few most commonly entrained (most abundant) species. It is unclear how much more severe impacts may be when populations are small.</p>
<p>14. The Regional Board has the following comments regarding the estimated number of lagoon acres impacted, as presented in the plan since:</p>
<p>a. The estimate of the number of lagoon acres used by the three most commonly entrained species is based on a 2000 Coastal Conservancy Inventory (Table 4-2, p.23). It is unclear if this document is accurate or appropriate for the purpose of determining such an important component of the area of habitat production forgone (APF). The reference document (Attachment 4, Table 2), includes the footnote caveat "... This information is not suitable for any regulatory purpose and should not be the basis for any determination relating to impact assessment or mitigation." An accurate delineation of lagoon habitats should be used for this critical component of the APF.</p>
<p>b. The estimate of the number of lagoon acres used by the three most commonly entrained species appears to exclude salt marsh and brackish/freshwater acreage (p.23). Excluding these intertidal habitats may result in the analysis underestimating this component of the APF.</p>
<p>c. The calculation of the APF (p.23) appears to use values for mortality and lagoon acreage that are not fully supported.</p>
<p>d. The text should be revised to include a clear explanation of how the estimated lagoon acreage for commonly entrained species was adjusted to include only impacts associated with operations of CDP, rather than impacts from operation of the Encina Power Station.</p>
<p>15. The evaluation concludes that the small fraction of marine organisms lost to entrainment would have "no effect on the species' ability to sustain their population" and goes on to describe the natural rates of high mortality (p. 24). But the argument that that there are "excess" larvae appears to omit an important consideration. Besides contributing to marine food webs, the naturally high production of larvae serves as a buffer against catastrophic and cumulative impacts to populations. These are important 'ecological services' that must not be taken lightly or given away without adequate mitigation.</p>
<p>16. The Regional Board prefers that the evaluation of the impact be presented as a rate (loss of x-amount of organisms per year, or impact/year). The proposed mitigation is a fixed amount (\$3 to \$4 million). It seems unlikely that a fixed amount would adequately compensate for a loss that is a rate over multiple, future years. It appears more likely that a proposed fixed amount really only accounts for mitigation for just one year of operation. The Regional Board may find a fixed amount to be acceptable, provided that:</p>
<p>a. The average annual impact could be reasonably determined and reasonably translated into a dollar amount, and that amount (or correct share) is paid every year of operation - but that is not what is proposed in the Plan or the CHREP.</p>
<p>b. A fixed amount might also be reasonable if the CDP mitigates its share by increasing lagoon acreage via restoration or creation. Such in-kind mitigation would (if functional) replace the productivity lost to the operation of the COP, and the impact would be fully mitigated.</p>

List of Issues Raised by Regional Board

April 4, 2008 Technical Memo

From: Chiara Clemente, Senior Environmental Scientists, Central Watershed Unit

To: John Robertus, Executive Officer, San Diego Regional Water Quality Control Board

1. The proposed plan does not describe a process for agency approval of the calculations and variables used to assess impacts from impingement and entrainment.
2. The proposed mitigation process does not clearly identify the method for the final selection and agency concurrence of the preferred mitigation alternative.
3. There is insufficient sampling data to accurately determine the impacts of impingement and entrainment.
4. The proposed process seems to favor a pre-determined outcome (i.e. mitigation in San Dieguito Lagoon). Other mitigation alternatives (e.g. kelp bed enhancement and artificial reef construction) should be considered and evaluated equally as viable mitigation possibilities.

List of Issues Raised by Regional Board

April 9, 2008 Resolution Poseidon shall...	
1.	Submit to the Regional Board Executive Officer, for approval by the Regional Board, an amendment to the Plan that includes a specific proposal for mitigation of the impacts, by impingement and entrainment upon marine organisms resulting from the Intake of seawater from Agua Hedionda lagoon, as required by Section VI.C.2(e) of Order No. R9-2006-0065;
2.	Resolve the concerns identified in the Regional Board's February 19, 2008 letter to Poseidon Resources
3.	Resolve the following additional concerns;
a.	Identification of impacts from impingement and entrainment;
b.	Adequate monitoring data to determine the impacts from impingement and entrainment
c.	Coordination among participating agencies for the amendment of the Plan as required by Section 13225 of the California Water Code
d.	Adequacy of mitigation; and
e.	Commitment to fully implement the amendment to the Plan

List of Issues Raised by Regional Board

April 30, 2008 Email

From: Chiara Clemente, Senior Environmental Scientists, Central Watershed Unit

To: Peter MacLaggan, Senior VP Poseidon Resources Corporation

1. Based on our review of the entrainment assessment in the Plan, it appears that the assessment...
 - a. characterizes larval concentration in entrained water using in-plant samples, i.e., two, 24-hour samples collected near the CDP intake in the EPS discharge stream on June 10, 2004 and May 19, 2005;
 - b. characterizes larval concentration in source water using source water samples, i.e., thirteen, 24-hour sample events per station collected at four lagoon (L1-4) and five nearshore (N1-5) stations, monthly from June 10, 2004 through May 19, 2005;
 - c. does not draw upon the monthly samples taken in the lagoon near the entrance to the EPS intake structure (station E1); and,
 - d. therefore, is for CDP/EPS co-operation rather than CDP stand-alone operation.

Is this understanding correct? Do you concur that the entrainment assessment provided in the Plan is for co-operation rather than stand-alone operation?

2. Based on our review of the impingement assessment in the Plan, it appears that the daily biomass of impinged fish (0.96 kgs/day) may have been incorrectly calculated.
 - a. Attachment 2 appears to present counts and weights of impinged organisms found during each of the 24-hour sample events conducted weekly from June 24, 2004 through June 15, 2005, i.e., 52 sample events, each representing 24-hour impingement;
 - b. Table 5-1 appears to present - not annual count and weight totals prorated to 304 MGD as indicated by the caption - but rather line totals (by taxa) of the counts and weights from Attachment 2, i.e., Table 5-1 appears to present 52-day totals with no adjustment for flow on the day of sampling, no interpolation for the days between sample events, and no prorating to 304 MD; and,
 - c. therefore, calculation of the daily biomass of impinged fish by dividing the un-interpolated, un-prorated Table 5-1 total weight (351,672 grams) by 365 days appears to be in error.

Is the above staff interpretation correct? If not, then could you please let me know which of the above statements regarding Attachment 2 and/or Table 5-1 is wrong, and why?

List of Issues Raised by Regional Board

02/19/09 Hearing: Executive Officer Summary Report

1. Staff remains concerned that the MLMP fails to satisfy a number of conditions in the Resolution, such as the requirement
 - a. to submit adequate data on impingement of organisms and
 - b. to propose adequate mitigation
2. Staff's overarching concern, which remains unsatisfied, is that the MLMP fails to include a specific mitigation alternative as the Board required. Instead, it sets forth a process and criteria for evaluating 11 independent mitigation site options. The Resolution conditions approval of the Plan on the timely submittal of a specific mitigation alternative for Regional Board approval. Staff continues to believe that a specific mitigation alternative is a critical element in order to properly evaluate whether the functions of the proposed mitigation will match those lost from impingement and entrainment. Poseidon's MLMP is fundamentally flawed in that it fails to fulfill this condition.