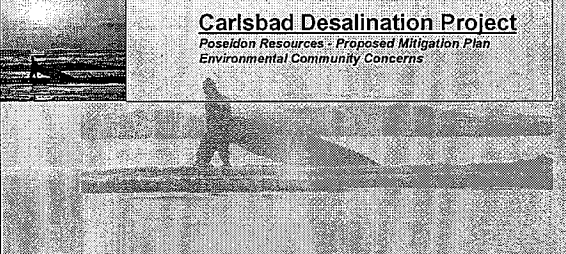
  
Regional Water Quality Control Board  
February 11, 2009  
Marco A. Gonzalez

**Carlsbad Desalination Project**  
*Posidon Resources - Proposed Mitigation Plan  
Environmental Community Concerns*



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**Our Request**

- Don't Be Bullied – Listen to Staff
- Consider Precedential Value
- Understand Project History
- Respect Legal Framework
- Do the Right Thing

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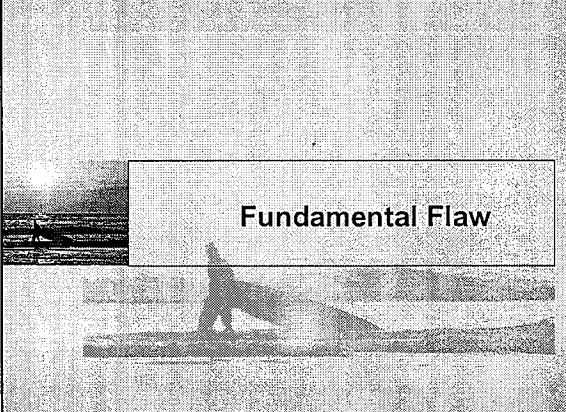
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**Fundamental Flaw**

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### Legal Requirement

#### Porter-Cologne § 13142.5(b)

The desalination plant shall use:

- Best available site to minimize intake and mortality of marine life.
- Best available design to minimize intake and mortality of marine life.
- Best available technology to minimize intake and mortality of marine life.
- Best available mitigation measures feasible to minimize intake and mortality of marine life.

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### Poseidon's Version

3/2/08 Letter, Appendix Vol. 2, p.19

Portion Revisions March 7, 2008 Response  
San Diego Regional Water Quality Control Board Letter dated February 19, 2008  
p.19: 62-10323water

1. The Plan does not yet integrate all the elements of the secondary requirements of California Water Code (CWC) Section 13142. The proposed project only includes "mitigation", while the entire CWC Section 13142.5(b) also requires that discharge implement best available technology and mitigation measures. The Plan does not appear to include technology measures for the intake structure to reduce birdcatchment and coral/sea urchin.

Response: Water Code Section 13142.5(b) requires industrial facilities using seawater for processing to use the best available site, design, technology, and mitigation feasible to minimize impacts to marine life. The Plan has been reorganized so to sequentially analyze the steps that have been taken by Poseidon to address each of these provisions:

- Chapter 2 identifies best available site feasible to minimize Project related impacts to marine life;
- Chapter 3 identifies best available design feasible to minimize Project related impacts to marine life;
- Chapter 4 evaluates identifies best available technology feasible to minimize Project related impacts to marine life;
- Chapter 5 quantifies the unavoidable impacts to marine life; and
- Chapter 6 identifies best available mitigation feasible to minimize Project related impacts to marine life.

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**"Minimize Intake" v. "Minimize Impact"**  
*What's the Difference?*

- Wrong Standard Applied
- CWA §316(b) requires "location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impacts."
- Why has Poseidon been applying a CWA 316(b) standard when we've all agreed the Project is governed by PC 13142.5?
  - 316(b) only applies to cooling water = limited applicability
  - "minimizing impacts" seems to allow "after the fact" = more liberal application
  - But, "best technology available for minimizing adverse environmental impacts" has been interpreted to preclude compensatory mitigation - *Riverkeeper* case.
  - "Minimizing intake and mortality of marine life" is necessarily more restrictive, requiring changes in the Project site, design, technology, and pre-impact mitigation.

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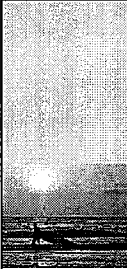
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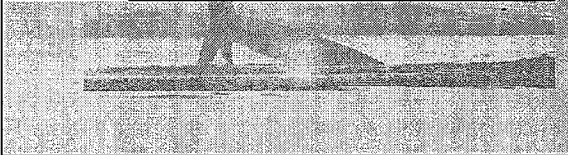
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**Project History**




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**History: Carlsbad and Regional Board**

- **City of Carlsbad: CEQA Approval**
  - June 2006
  - Co-located plant with EPS
  - "Stand alone" circumstance not reasonably foreseeable
  - No significant impact from I & E when co-located
- **Regional Board: NPDES Approval**
  - August 2006
  - Co-located plant with EPS
  - Stand alone plant would require additional CEQA review
  - Flow, Impingement, Entrainment Plan required if EPS flows insufficient to support plant
    - Feasibility analysis required for site specific plans to mitigate entrainment impacts
  - Original EPS flow estimation quickly proven invalid
    - First Flow Plan submitted February, 2007
  - Appeal to State Board dismissed because approval not for a stand alone facility

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### History: CEC and CCC

- **California Energy Commission: EPS Application**
  - September 2007
  - EPS applies to replace power plant and eliminate OTC
  - Stand alone plant no longer speculative
- **California Coastal Commission: CDP**
  - November 2007
  - Conditional approval of stand alone project
    - Required site-specific information in MLMP
    - Claimed RWQCB responsible for PC §13142.5
    - Staff recommendation of denial overridden

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### History: MLMP Difficulties, RWQCB

- **Jan. – Apr. 2008: MLMP Refinement**
  - San Dieguito Lagoon Proposal
    - Expressly opposed by So. Cal. Edison
    - Disfavored by JPA, require extensive CEQA
  - Poseidon Adopts SCE Multi-Location Model
    - Severe derivation from CCC Special Condition
    - SCE was CCC precedent, but not CCC's idea
- **RWQCB: "Conditional Approval!"**
  - April 2008
  - Resolution reflects Flow Plan was but a plan to create a plan.
  - Required amendment "containing a specific mitigation alternative."
  - Was essentially meaningless, other than a statement of general support for compensatory mitigation framework.
  - Conditional approval currently subject of litigation.

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### History: CCC and SLC

- **California Coastal Commission: Revised Findings and MLMP Approval**
  - August 2008
  - Abandoned Special Condition requiring specificity
  - Required up to 55.4 acres of mitigation
  - Adopted MLMP with SCE multi-site model under Coastal Act
  - Reaffirmed reliance on RWQCB for PC §13142.5
  - Approval currently subject of litigation
- **State Lands Commission: Tidelands Lease Approval**
  - August 2008
  - No SEIR prepared
  - Relied on 2006 CEQA determination of no significant impact
  - Incorporated CCC findings and required 42.5 acres of mitigation
  - Staff admitted current MLMP has no performance criteria
  - Admitted MLMP was but a plan to create a plan
  - Relied on future review and approval by CCC and RWQCB of specific site(s)
  - Approval currently subject of litigation

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## Conclusions

- Correct PC § 13142.5 standard has never been applied.
- CCC and SLC relying on RWQCB to apply PC § 13142.5.
- April 2008 RWQCB "Conditional Approval" required information on specific site or sites.
- Adoption of CCC's "wait and see" approach not allowable under PC § 13142.5.
- Resolution R9-2008-0039 condition not satisfied, NPDES Permit invalid for intake and discharge until litigation resolved and final MLMP with site specific information produced.

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## Questions?



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