

**REGIONAL WATER QUALITY CONTROL BOARD MEETING - APRIL 8, 2009**

Preliminary Unofficial Transcript of Regional Board Deliberations  
Prepared From Audio Recording of Hearing by Latham & Watkins LLP

- Chair: Okay, [inaudible]...I want to see who has questions of Staff.
- Mr. Destache: I just want to clarify that Items 1, 2 and 4 are answered consistently for you and to your satisfaction.
- Ms. Clemente: When you refer to Items 1, 2 and 4, what is this?
- Mr. Destache: Four items that were requested.
- Ms. Clemente: Oh, I would think so, yes.
- Mr. Destache: And Item 3 is the one we're specifically looking at and that's the organization plan
- Ms. Clemente: Well, I'd say that the data has been provided to our satisfaction, the impingement calculations that is. The outcome of that is what is left
- Mr. Destache: Correct.
- Ms. Clemente: That is what's left.
- Mr. Detach: Per Item 3.
- Ms. Clemente: Yes.
- Mr. Destache: I guess the question that I have regarding the staff report was that in your recommendation for the 3 items, the three specific ways that we can go forward on this project is to approve it the way it's submitted, to Item No. 2 which I didn't think was...
- Ms. Clemente: Require conservative estimate of mitigation with no monitoring.
- Mr. Destache: Correct. And Item No. 3, the question that I have for you is if in fact the Board took this direction in their action today, would that meet the requirement or meet to your satisfaction the monitoring required in a post implementation of the project. I don't know if I'm being 100 percent clear with my questions.
- Ms. Clemente: Okay. Let me see if I am understanding your question correctly. Item No. 3 as we put it, is to not only have additional requirements for monitoring of impingement coupled with monitoring productivity and matching those, so there's the study aspect of it. But we also believe that some mitigation should be required because otherwise based on Staff's position, we think

it's going to be difficult later on if we find that it's not meeting those requirements.

Mr. Destache: I didn't believe that Item 3 would allow for no mitigation.

Ms. Clemente: Okay, right so 3 is, so number 1 is as proposed, number 2 is just mitigation and number 3 is mitigation plus monitoring. Obviously, these are not the limit of all of the options put before us.

Mr. Destache: I understand, I understand it's per your testimony, or you're saying that these would be acceptable directions to go, there are a myriad of other ones that could in fact be. . . . Is it important to Staff to see what the long term possibilities of a mitigation is by using this project as a, on a go forward basis to look at what the mitigation of wetlands could produce because in everything that I've heard it's either we don't have enough empirical data or we're just guessing. And the reality is that the policy is [inaudible] in my opinion should be, we should get some empirical data so that we can make better decisions. And look forward to it. I think that if in fact if we move forward to approve this that we have to look at how do we continue to do mitigation analysis to get the empirical data that we need. Is that something that Staff would like to see happen?

Ms. Clemente: Yes, and as I pointed out in our staff report and in my presentation with this, if we got that information it would help the Board when Poseidon comes here to talk about phase 2 mitigation, it would also help the Board when Poseidon comes here to talk about stand-alone operations, and also as we heard today Desal may be this one may be precedential to other Desal projects – it would help the Board in that regards.

Mr. Destache: Okay with that being said, would the way the minimization plan was written today, we'd start out with 37 acres of wetland restoration or mitigation and would that be in your opinion a good place to start? Or should we start at 55 acres and work our way backwards from there?

Ms. Clemente: I think Staff's position is that we start with more than 55 acres.

Mr. Destache: While...I understand that but I'm looking at the minimization plan the way it's written today allowed for 55 acres. Okay, so you answered my question.

Chair: Mr. King

Mr. King: Yeah, following up on the same point with regards to No. 3, kind of the options we have during the scope, somewhat specific, but some question conceptual has anybody sat down to draft errata? That if we wanted to go the route of option No. 3 today, errata [inaudible] tentative order so that we could go that route today.

Chair: Mr. Wyels

Mr. Wyels: Thank you. I was actually going to speak up a little bit later but it seems like a good as time as any. This will probably be somewhat unpopular but as Mr. Garrett mentioned earlier in his presentation, your counsel Catherine and I have some recommendations for the Board in terms of process here. Answer to your question Mr. King is, "No." We haven't drafted a proposed order that takes into account the evidence that's come in since March 9, we also haven't had an opportunity to prepare a staff response to comments...to all of the comments that have come in up until today.

Mr. Wyels: So I'm jumping the gun a little bit here but at the end of the day I'm going to be recommending that the Board allow staff time to do those two things which is to prepare a written response to the comments which is required under the federal regulations and also to propose revisions to the draft order. It would at least take into account the evidence and establish findings and countless evidence that we've received since March 9. It would be helpful to let the staff to hear the Board Members individual thoughts as far as you formed them today [inaudible] assistance in drafting proposed order to bring back to you. I'll just mention we haven't had any request today to keep the commentary open and so because of that I would suggest that the Board consider at the end of the day closing the public record and just sending it back to staff and take the existing evidence, make the first response to comments then revisions to riders.

Chair : If we close the hearing and if substantive changes are made, in staff recommendations, we have to open it back...

Mr. Wyels: No. What I'm recommending is that you actually not accept any new evidence after today. Staff will be proposing to you wouldn't constitute any new evidence so it would just be an opportunity for you to actually take an action that's consistent with what the Board wants to do.

Chair: Mr. Thompson.

Mr. Thompson: That last comment about not accepting any new evidence almost tells me, that number one you can't accept any accept any rebuttals to Dr. Raimondi on what was presented by Poseidon concerning their analysis or it sounds to me like you can't accept anything that might rebut the mitigation or additional mitigation that our staff is recommending. I'm not clear on this, it doesn't make a lot of sense to me. Now here's the problem. We seem to be going in a cycle here about extending this decision and keeping something new comes up we'll argue science until we're blue in the face but if some point in time it does have to end, but it sounds like we end it today for comment and then make a decision maybe at the next meeting, I'll be honest with you I'm opposed to that. How do you address the

comments without getting additional input from not only the applicant here but even the opposition. And how do we know what the real answer is. I don't understand it.

Mr. Wyels:

Sir, well you're right. There is a tension and certainly we're trying to avoid putting the Board in a position where getting sort of a constant do-loop where everybody is allowed to respond to everybody's previous comments and the Board has to continue to pull out more responses to each response. What I am suggesting though, are that number one just as a matter of this Board taking action, we do under the federal regulations that requirement act to responses and comments and a lot of the comments we didn't receive until frankly today or the last couple of days so the staff hasn't had the opportunity to write those responses to comments.

But I recommended earlier when I said I was going to recommend earlier that the Board not allow no new evidence to come in. Certainly if the Board would like to have Dr. Raimondi come back and respond to the things that have been said, certainly if the board would like to have anybody to have more opportunity to come back and provide more information that is absolutely within the Board's purview. I'm sensing a sense of fatigue in terms do-loop and I'm suggesting to you that if the Court prefers to cut off the addition of new evidence you have the opportunity to do that.

Chair:

Are there any questions or comments? I guess Mr. Thompson, I heard your latter point. I do think that having continued this before we really have zeroed in on primary issues and I think Staff and Poseidon have just done a marvelous job of helping focus this Board on the issues. I don't know at the last meeting if we were focused enough to make a decision. I think we are getting pretty close to that. I do appreciate all of the hard work of Staff and Poseidon have done in getting us to this point, so, patience, patience, patience. Mr. Loveland.

Mr. Loveland:

I would agree with counsel that it's a good time to end the hearing and end the act. As I look at these alternatives and the staff report that was written, I'm inclined to focus in on Option No. 3. I think it offers the opportunity to move forward and this is a precedential action. I expect while there are several underway throughout the state already. There will be more in San Diego County as well I'm sure. We've got to try and get it right.

Mr. Loveland:

I think this gives us an opportunity to go forward and learn. At the same time taking appropriate action that takes into account the best available information that we have right now and develop a program for monitoring of the impingement entrainment losses and the productivity of the mitigation. And make those appropriate changes as circumstances change when and if it becomes a stand-alone operation which everybody seems to agree is headed in that direction. We've got an opportunity to do that, so I

would like to see us move to close the hearing today and direct staff to come back with the responses that we need and their suggestions and recommendations with regard to how we will provide for those things in [inaudible].

Chair: Mr. Rayfield

Mr. Rayfield: Thank you. I agree fully with Mr. Loveland. I think at this time to close the public hearing. I think we should move forward on Option No. 3. I would add just a couple of points to the points that you have already made for us. On the staff we accept Option 3. I think the staff should come back to us with some specific measures. The thing I like about Option 3 is that it is performance based or performance standard based. But I think we ought to know what those standards might be and how they might be applied.

One other point, I think the item raised by Mr. Gonzales, the trigger, when do you move from co-operation to stand-alone operation might also be addressed at that point. I don't think it's when the power plant takes zero flow but I'm not sure that the way Mr. Gonzalez suggested it when desal plant takes more than 50 percent of the flow for three months is also the appropriate time, but I do think we need to be definitive on what triggers the stand-alone operation for the desal plant hence coming back to this Board. And I'm wondering if staff thinks they might be able to suggest something within the framework of Option 3 to define that point.

Chair: Is that a question to staff. We need a response. Ms. Clemente? Mr. Rayfield I think was asking a question of staff.

Ms. Clemente: Yeah, I just heard.

Chair: Okay. All right. And while you're talking about that, staff is moving towards some variation of fine tuning of Option 3. They are going to make some suggestions. Is that appropriate Mr. Wyels?

Mr. Wyels: Yeah. Let me see if I can address a couple of things here. Number one is Option Number 3. I think the first time most of us heard about this was this morning when staff was presenting it orally. I do think that looking at the language that the discussion debate has been about impingement much more so than entrainment, the second line for first [inaudible] impingement and entrainment. So it might be a good idea to get a sense from the Board whether you're satisfied with the currently proposed mitigation plan for entrainment and really what the issue here is to focusing on, you want the staff to focus on is impingement, number one.

Number 2, just a process issue, I am not suggesting to the Board to actually take a vote today as to what to do, rather we're just asking for

some direction from the Board Members so the staff can go back and redraft as narrowly as possible those changes that would be appropriate to the order and to the findings that were proposed to the Board.

And lastly in response to Mr. Rayfield's question, if I understood it correctly, please correct me if I'm wrong, the question was whether the trigger point for determining essentially that Poseidon needs to come back with a new minimization plan is properly set at complete cessation of operations by Encina Power Station. And your question was whether that can somehow be incorporated into Option Number 3?

Mr. Rayfield: Well, I don't think that was exactly what I was trying to say. What I was trying to say is I think we need to determine what that trigger point is. And, in a way, I think it needs to be included in Option 3 because that defines the length of time that that the minimization plan would be in effect. It is only in effect, as I understand, where we are kind of leaning now, during the period of time that the power plant and the desal plant are operating jointly.

Mr. Wyels: That is correct. That issue really isn't on the table. I think that's for in-house.

Mr. Rayfield: No, but that does define then how long this tentative order would be in effect.

Mr. Wyels: Correct.

Mr. Rayfield: So that's why I was coupling that point.

Chair: Ms. Clemente, I just want to be clear that No. 3 also includes the 50 some acres mitigation, you did say the adopted tentative order, I assume you closed the 55 acres?

Ms. Clemente: I just want to make a point of clarification. I'm not sure where this language came from. But that's not the same thing that I said in testimony, so if I could have a minute.

Chair: You mean what was distributed was not?

Female: What's on the screen is not what Ms. Clemente stated in her presentation and that I distributed to you is not exactly the same, so why don't we take a moment to have a few additional copies and we can have some more made and put on the screen so that everyone can comment on the same language.

Chair: All right. Let's take a very brief break – a five minute break.

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Chair: OK. Board members. I assume you have some questions to staff regarding the . . . particularly number three (3) and then, also Mr. Wyels and Ms. Hagan, I assume you have some guidance for us. Why don't you talk first and then we'll hear from Mr. Thompson and get his question next up.

Mr. Wyels: Thank you. I . . . yeah, I think there is, unfortunately, a fair amount of confusion here. And just . . . what I think we're struggling with and what staff's struggling on behalf of the Board's struggling with is, "what kind of direction might be appropriate to give to the staff if the Board's not going to act today so the staff can be prepared to bring the facts to the Board for the Board's consideration.

What's up on the screen right now is three (3) different options that the staff put together. I don't know that . . . you'll have to ask them about whether they actually recommend any of them in particular. One thing that I think we were talking about just before the break was the idea of having the existing MLMP requirement of 55.4 acres and then, on top of that, the idea that one of two things was she heard from both Poseidon and Coastkeeper earlier today. One option would be to have an additional, essentially, a new requirement in the Board's Permit FB. That there be monitoring of the mitigation area to determine whether it's producing 1,715 kg/year of biomass, excluding those three (3) particular species. And, if it's not, then Poseidon would be obligated to do whatever it needs to do under the Board's authority to simply enforce that as a performance standard.

The other option was . . . that was discussed was rather than fixing a performance standard at 1,715 kg/yr rather . . . but monitoring of the impingement and as that monitoring actually gives us . . . the Board empirical data as to what the biomass does actually impinge. Then the monitoring would be adjusted . . . excuse me, the mitigation would be adjusted to account for impingement losses. So, those are two (2) things the Board might be thinking about before members might want to give staff their own individual clauses which, at this point, on . . . going back to Mr. Rayfield's point about the trigger for the, essentially, for the life of this minimization plan, and whether it's appropriate to use complete cessation of the Encina Power Station. I don't know have if we have a great answer. I think, maybe, the idea was for staff to go back and think some more about whether there was some intermediate trigger that would be appropriate to use . . . something that would happen prior to Encina shutting down entirely. You know . . . if the other Board members want to give us their thoughts on whether it is a worthwhile exercise for staff to go through, they certainly can do that.

Now, I have no idea if I've answered any of your questions.

Chair: Mr. Thompson? No. I thank you. You've offered some good guidance. So, it just needs some more clarification. We need to offer some more guidance, I guess, to staff.

Mr. Thompson: Yeah. Just a couple of questions because it's still not clear what number three (3) really says. Because I wrote a note this morning Ms. Clemente presented earlier that Alternative #3, which is that one up there, required a periodic monitoring as indicated. In addition to 11 to 18 additional acres above the 55 acres that's currently in the plan. That's what she said. Is that what that means?

Chair: Ms. Clemente?

Ms. Clemente: That was what I had intended by our recommendation and that's reflected in this . . . the last sentence that says, this could result in a decrease of mitigation acreage required by decreasing the confidence limit.

Chair: OK. So, what Alternative #3 really means, because it doesn't specifically say that, is that there would be additional monitoring required in addition to ensuring we meet the 1,715 requirement. And, on top of the 55 acres that's currently in the plan, we would have to give . . . provide . . . require them to provide an additional 11 to 18 acres, but it doesn't say that. But that is what that means?

Ms. Clemente: That is correct. And the rationale behind this . . . I tried to explain it earlier . . . is that basically . . .

Mr. Thompson: I understand the rationale.

Ms. Clemente: OK.

Mr. Thompson: I just want to make sure that's what it says because I don't think that's what the Board thought when they read that. So, I wanted to be clear on that.

Now, my second question is: Is there . . . there's reference to the fact that all this monitoring that we're asking for, Poseidon had indicated that it's already in the MLMP limit. I've read it again but I can't find it . . . but we're saying it's not, they're saying it is. Can somebody explain to me exactly what monitoring already is in the plan that they're required to do and why that won't provide us the information we need to give this monitoring that we're asking for here?

Ms. Clemente: The MLMP has performance measures that are largely based on wetland vegetation, habitat, that sort of thing. Again, indirect measures. And what they attempt . . . their success criteria is to match it within 95% to

reference wetlands, not to the impacts that they do. And that's great success criteria for, again, fill mitigation; but I don't think that's appropriate here.

Mr. Thompson: So, up until this whole point in time . . . We just . . . We just . . . Was that a change they made in the document from when it was submitted back in March of '08 as far as what they were proposing concerning how they were going to monitor the wetlands and everything else? Or is that a change they wrote into the document just within the last couple of weeks?

Ms. Clemente: That was a document that was submitted in November.

Mr. Thompson: But we're just now addressing that?

Ms. Clemente: Yes.

Mr. Thompson: Why are we waiting 'til now just to address that? Why didn't we hear about that back in February that that was a concern?

Ms. Clemente: I don't think that we had concerns that that was a bad measure. I think we believed that that's a measure, a bad measure, for impingement impacts.

Mr. Thompson: Well, but we didn't say that, in fact. OK. Thank you.

Chair: OK. Board members, guidance, direction to staff. Mr. Wyels?

Mr. Wyels: Maybe I can help respond to Mr. Thompson. The issue about double-counting the allot [inaudible], Poseidon did have a change which we received March 27th of this year in which they were proposing to use this 1,715 kilograms as a performance measure, performance standard for mitigation, not the monitoring, but for mitigation, for impingement impacts, That is new. And that is what we've, essentially, been talking about. Whether that is or that would meet the mitigation requirement is already a component of the minimization plan or not. If the Board thinks that something along this line is appropriate to include, we'll take that as direction and actually put that into the revised permit which we'll bring back to the Board. It's currently not in there. Does that help answer the question?

Mr. Wyels: It really . . . The question really is not about the monitoring so much as the discussion today was more about the mitigation of . . .

Mr. Thompson: Well, that alternative is more . . . as much on monitoring in addition to mitigation as it is on what's been said. I understand that point. But, in reality, we have a situation here where now we have an alternative that says, they're going to provide 11 to 18 additional acres over and above the 55 plus this additional monitoring that seems to be a big issue now. And I'm just trying to understand why it wasn't an issue before because if, in

fact, monitoring was an issue for impingement, you know, that should've been brought up a long time ago if it wasn't identified correctly in there to begin with. And now, it seems like, all of a sudden, it's a huge issue. And, I guess, I'm having trouble with that; but I'll leave that alone for now. I mean I want to hear what the rest of the Board says; but I'm glad the clarification comes out that Alternative #3 really means that we would require them to provide 11 to 18 acres of mitigation on top of what they've already proposed in the order, including all this monitoring and everything else, if we accept that. And I honestly don't think that my colleagues on the Board thought that . . . I'll let them decide for themselves. But . . .

Mr. Wyels: No. I'm sorry. In fact . . . I just . . . I think it's confusing and probably very unhelpful to refer to anything as Option #3. You've heard Poseidon say earlier that they can live with Option #3; they could and probably meant something different than what's on the Board, as well. So, in terms of the Board members giving some directions to staff, it might be helpful if you actually spelled out what you had in mind rather than characterizing it as some particular option.

Chair: Mr. Rayfield? Why don't you clarify.

Mr. Rayfield: OK. Well, I too thought Option #3 meant that roughly 55 acres in mitigation. And if we were to go with that Option #3, that's where I would start. And that's why I think we want the additional monitors to say, "is that or is that not adequate and should it be adjusted upward or possibly downward?" It seems to me it can go in either direction and that's the way I would interpret it; but . . . and when I asked earlier for specific performance measures, I was really thinking about performance measures geared to impingement and whether or not we're properly mitigating for that. So, it wasn't the wetland measures, it was measurements regarding impingement. And . . . So that's the way I interpreted that and that's the way I feel we ought to direct the staff.

Starting at 55 acres and focusing clearly on performance measures for . . . the effects or impact of impingement

Chair: I agree with that. I have some confusion about this notion of acreage being decreased or increased, It seems to me that once you have the acreage set aside, you're not going to decrease only increase.

Mr. Rayfield: Probably true. But I think one of the important issues in all of this is: we are, in a way, setting a precedent, here, and we have competing views of experts and this is an ideal data collection opportunity to figure out what really needs to be done in the future. And I happen to think that there's a great deal of benefit in that. To the entire state.

Chair: Mr. Robertus? Will you clarify or help . . .

Mr. Robertus: I'll attempt to clarify something and then question which you had. The Option #3, as I understood Chiara Clemente's comment is that we'll start with the 55.4 acres. A consideration would be to add 11 to 18 acres to include the impingement impact. But, probably, reduce the confidence level to 80% it would essentially reduce the impact back down to 55.4. Is that correct?

Voice: No.

Mr. Robertus: That is not correct. Would you clarify what you meant by reducing the confidence level to 80% and what that . . . how that reference in your last sentence could result in the increase of mitigation. Does the 80% mean adding the 11 to 18 acres and that would give you the 80%?

Mr. Robertus: That is correct?

Mr. Robertus: Then there's another . . . A question I have is: Does the monitoring that is contemplated as additional monitoring in Option #3 include continued monitoring to measure the actual impingement values in the increase?

Ms. Clemente: Yes. And I would like for it not just to be numbers; but, . . . Yes, the monitoring would be to measure the impingement values and the intake as well as the mitigation . . . not the impingement and mitigation productivity of the mitigation. But, I also want to make sure that it be not just in terms of kilograms but in terms of species and numbers.

Chair: I will clarify with board members what was just said monitoring would include monitoring not just in mitigation production in the wetlands, in the wetlands acreage, but also continuing to monitor to build on the database we are working with now to determine what the acreage should be.

Chair: That's my understanding of it . . . Yeah . . .

Mr. Rayfield: That's . . . that's mine, too. And I have . . . I find myself in agreement with Dr. Jenkins. I don't think the confidence level is very meaningful in this context at all. We just don't know enough. So, I wouldn't . . . personally, I'm not persuaded by 50% or 85% or 95% confidence level. I think we have to mitigate for whatever the effects of the impingement are. And that's why I think its so important to have the performance measures.

Chair: Mr. Loveland. And then Mr. Destache. Let's see if we can bring this to some closure.

Mr. Loveland: I think Mr. Rayfield. It's the safest thing . . . is how I feel about what the direction should be. One point of clarification, you talked about, maybe, the decrease is moot because you wouldn't see a decrease. I actually don't think that it is moot because if we're going to do this based on actuals, do the monitoring and make decisions based on what actually happens, if we

find out that it is more productive. I'm not holding out a great deal of hope for that, but should it be, then I think there should be a move to release some of that for remedial mitigation perhaps. What if in 20 years from now or 50 years from now the plant wants to increase the [inaudible], then some of that could be remedial mitigation. So, I don't think decreasing is moot . . . and although it's unlikely, I'm not going to . . .

The other thing is . . . the comment just now about not being just kilograms but, rather, species: I'm a little bit skeptical of that because how many species are there? And what's the ratio? And how would you propose to . . . you can set . . . if there's 20 species, you can set a requirement for each one and if one fails, does it fail the whole thing? I'm not convinced that that's the best approach.

Chair: Ms. Clemente? Did you want to respond to that? No? If you have a response to . . .

Ms. Clemente: Sorry.

Chair: . . . Mr. Loveland's comment about . . . it had to do with the variety of species, monitoring for species and varieties . . .

Ms. Clemente: With regards to that last comment; there's a hundred (100) different species from day to day. We just want them to monitor it, not . . . we're not asking them to match every species in terms of mitigation. But, we're asking them to collect the data in terms of numbers, species, age, etc., so we can make an educated comparison of the two. Otherwise, we've just got a bucket of fish.

Mr. Loveland: I would agree. Do you have some sense of what the criteria for making an evaluation would be?

Ms. Clemente: Actually, that's what the Scientific Advisory Panel is for. That is part of the marine life . . . MLMP is their panel of experts that can provide much more of an educated opinion than I would.

Chair: Mr. Destache?

Mr. Destache: I'll defer to Mr. Loveland. He can . . . be asking questions.

Chair: Is there enough . . . guidance . . . Just a minute. I just want to check with staff. The comments from Mr. Loveland, Mr. Rayfield and Mr. Thompson inadequate? Do you need more?

Mr. Destache: Well, I think that if that other Board members are content to let us follow their direction. it's probably enough . . . let me just point out to Mr. Loveland. In the current phase . . . that is . . . if the Board members will approve the MLMP, there wouldn't be an opportunity to decrease the

acreage below the 55.4 acres. That acreage was imposed by the Coastal Commission for the purpose of the entrainment.

So, although this will come back to the Board at some point in the future when either Encina shuts down entirely or some other trigger that the Board might approve next month, at that point the Board could certainly reevaluate and, maybe, could convince the Coastal Commission that a lower amount of increases is appropriate. I wouldn't expect to see any change in terms of the decrease in the 55.4. in this case.

Mr. Thompson: And I think that's a valid point. But with respect to the impingement, maybe 55 acres or 64 acres or 35 acres is the right number and, therefore, it could be decreased in that regard, and maybe not for the other ?. So, it could be reused in a different way.

Mr. Wyels I understand.

Chair: Before I . . . before we hear from Poseidon, any other comments?

Male Voice: Just as a process question: how soon can we re-address this . . . I understand the requirements. If, in fact, we do table it today, how soon could we get back to this and I am a little disappointed I was hoping to be able to make a decision on this today. I understand the circumstances; but, I'd like to get to this as soon as possible.

Chair: I understand. I think everybody would like to get this done as quickly as possible. But to answer your question: What we're talking about is if the Board amenable to it is having the staff do the response to comments, come up with some proposed revisions consistent with the discussion today, we'll answer. . . put that out for a 10-day stakeholder meeting act notice requirement. We wouldn't have to take any new evidence. You know, we should expect some comments on the actual language, the wording of the language, and we certainly should be able to have that with staff here . . . but by the next Board meeting, which is May 13<sup>th</sup>.

Chair: Thanks, okay

Mr. Destache: Mr. Chairman?

Chair: Mr. Destache.

Mr. Destache: Just one other clarification does that meet our public notice requirements under Federal law also?

Mr. Wyels: Yes, it does, the idea is that all the evidence is in everything that we are talking about here is the range of things that are in front of the Board and have been in front of the public and nobody is asking for additional time to comment on the evidences we've received so far today.

Chair: Mr. King?

Mr. King: I'd like to ask if Mr. Wyels could take a crack at summarizing the way you have been able to process all these different comments and you seem to have an understanding of what our direction is right now and one more crack at commenting on our own direction after we hear it read back to us.

Mr. Wyels: Fair enough, I'll give it a shot. I'm not sure we are hearing unanimity in terms of views here but I guess I would simply, sort of, and again making it clear that you are all free to change your minds after you look at it and this isn't in any kind of a final decision either individually or collectively but it sounds like the sense of at least the majority of the board members that have spoken so far is that (1) we close the hearing today and not take any new evidence, (2) the staff would be directed to go back and respond to all the comments that have been received up until now for the Board's review; (3) the staff would be proposing revisions to the proposed order that was submitted on March 9th.

Here's the [inaudible] of your question, Mr. King, is that those revisions then as I understood things, would essentially be focused on imposing some form of additional mitigation for these recently identified impingement impacts that mitigation could take one of two approaches, I think I was hearing, in general preference toward a more fixed performance standard. What was proposed by Poseidon was 1,715 kilograms per year of fish production.

Alternatively, they could take the approach of a more open-ended mitigation requirement dependent upon what the impingement monitoring shows. Those, just to reiterate, either one of those alternatives would be on top of the existing 55.4 acreage mitigation requirement for entrainment.

And then there is an open question about taking a look back and seeing whether there is some trigger that's appropriate rather than complete cessation of operations by the Encina Power Station and whether we should be looking at something that could happen sooner than that point in time but would still make sense from a prospective of reasonably the desalination plant having control over an intake so they could modify design and technology, but also taking into account the amount of water that they are going to have to bring in through the intakes with an excess of what is being needed by the Power Station.

Chair: And did your comments also include this notion of monitoring the productivity of the mitigation sites?

Mr. Wyels: Yes, thank you. Yes there was also some discussion about...there would need to be mitigation monitoring for these impingement impacts, whether its monitoring to determine whether this fixed amount of 1715 kilograms

per year is being met or its open-ended that whether more equivalent production....equivalent to what's actually being impinged is being achieved. You're right.

And then there's also, the last issue was sort of independent of the mitigation requirement. The requirement of monitoring for impingement for the purposes of just developing more data for the future.

Chair: Thank you. Mr. Garrett, are you prepared to comment briefly, or Mr. Singarella?

Mr. Garrett: I'm prepared to speak.

Chair: If you could speak rather briefly.

Mr. Garrett: Yes, with all due respect to the process, I think there is still some open-ended items that I think the Board members should be very careful to make sure are closed up with [inaudible] (cough) described. I think I heard the staff say that entrainment monitoring....to say entrainment as opposed to impingement monitoring was.....that it is no longer included, they have taken entrainment monitoring out of the proposal. Then secondly, the monitoring that's going to take places of two types. The monitoring we feel is already in the plan on page 6-6, Section 6.2.1, the monitoring for the productivity of the site and on that we believe that the plan we submitted require us to monitor the productivity of the site and measure the amount of biomass and characterize it so that its biomass by species above and beyond the entrained species. That was our plan all along. Mr. Wyels says it's a new thing. We added it because we thought the staff was concerned about double counting and it was to make it clear we never proposed to double count. And so that's the site monitoring.

The monitoring at the plans of what our actual impacts are, which is the second type of monitoring we talked about, which we didn't really have a chance to discuss, I just would mention. I said earlier that we didn't want to do it because we felt it was open-ended and we still have problems because you have to translate it into what our impacts are. And the power plant will be there. The Board hasn't been required to monitor the power plant. However, we've talked, we would like to do monitoring of impingement once we start operations. The monitoring should be for a year. One year out of five and we would start with the first year. Would be for use in future permit proceeding. We would monitor to include both the weight and the species, just as was done with the monitoring that the Board established for the 2004/2005 cycle for Tenera.

And it would be once a week as well, just for 24 hour.....24 hour period for that year. So that would be the site monitoring and obviously you can have many different types of monitoring but I think its important to

specify that particular type of monitoring. Its like the monitoring that the Board required from EPS in 2004/2005. And I mentioned that that's for use in future permit proceedings. We don't feel that we're going to be in operation before we're in the next permit cycle. So we won't have monitoring data for you for the next permit cycle but, for the permit cycle after that you would have it available to them to adjust the amount of impingement.

What I think is important for the Board to clarify their order is whether it's a free floating thing. So like every week if the data came back differently would we have to go back out and get more wetlands or not. We think you should at least fix it for each permit cycle.

For the first permit cycle it should be the 1715 number that we set. But obviously, if the monitoring shows a greater level of impact or a lesser level of impact then you could change it with each permitting cycle and it certainly could be used for other projects up and down the state and you should recognize again that you're not going to get the data for just us, it will be for EPS and a lot of the questions that you had today about how you translate the data set will still be there but work....it won't be our flow it would be EPS' flow as well, but we could go through all those processes. I would suggest that since the staff said they liked the process that got to the 4.7 kilograms per day and we agreed to that. That the process that translates the monitoring data into a calculation of our flow proportion impact that resulted in the 4.7 would be the same process that you would apply to the data for the monitoring that you would come up with.

And again, I covered the point about the, we agreed that we would be measuring both the weight and the fish type. And the monitoring of our projects.....of our impacts which would be due the first year out of every 5 would be used for each permit cycle to adjust our mitigation for impingement. And I think I heard again it wasn't quite clear and I thought Mr. Wyels maybe had said something different then what I heard the Board saying. That at least for the start, our target, what we have to go out and build when we start construction and get started on is the 55 acres that specified in the MLMP and that's what we're starting for, at least until the next permit cycle.

Chair: That's my understanding of it.

Mr. Wyels: Yes, Mr. Garrett is correct. Catherine informed me that I mis-spoke. What I was really talking about was 55.4 acres Poseidon believes they will achieve this productivity of 1715 within that 55.4 acres, if it turns out that they're incorrect. There would have to be additional acreage. But if they are correct they would not have to do additional acreage.

Chair: Mr. Gonzalez – just briefly ....

Mr. Gonzalez: I'm Marco Gonzalez on behalf of Surfrider and Coast Keeper just speaking to these issues. We agree that if there's going to be some specific impingement data acquired that it needs to be reflective of the CDP operations independent of the EPS that there needs to be some flow weighted calculations attributed to it. Importantly, this pushing off to future permit cycles, the ability to go back and add on mitigations, the question then becomes one of temporal loss. Obviously, you're having the losses during the monitoring, but then coming back later and trying to account for it. So, as long as it's clear that if you're doing something like that, that it might mean that you're going to get more acres than the biomass that you're trying to replace because you also have to replace for temporal loss. One of the other things that needs to be certain is in the measurement of productivity of the wetlands in the scenario for the impingement for the impinged fish is staff needs to be certain that they give direction that you can't always just go into a wetland and measure biomass and say here is the productivity because productivity is a snapshot of time. So impingement data is collected as how many fish do you lose per day whereas when you come into a wetland you don't produce a certain amount of fish per day and you produce them based on their life cycles, and there needs to be some mechanism for equating that in this context.

Chair: I think staff would figure it out or our experts would figure it out. Okay. Are we ready to close the hearing.

Mr. Rayfield: I think you should close the hearing. Yes. Just want to comment on one thing. I don't think a year long of monitoring is enough. I worry about that we could have seasonal or a some kind of crazy thing going on that just upsets that year. So I personally would be more comfortable when we're trying to reach that steady state condition. The year may not have a full year of operation of the plant or something unless you're defining that year as the first 12 months of full operation. So I'd just like staff and Poseidon to look at that question.

Chair: Okay, anything else? Mr. Thompson?

Mr. Thompson: There are a number of recommendations and scenarios that Poseidon just put out concerning monitoring process and program and what not. Did you get those captured? Is that gonna be an issue for staff and staff would agree to that? I don't want to be fighting for over this at the next board meeting and I'd like to know based on what they said if those are gonna be considerations that staff would recommend approval on. Because where we stand right now we have basically what staff recommended today was disapproval of this project. I would expect that any the additional mitigation above what they proposed would kill this project. I want to

make sure that when we come back next month we're clear on exactly what we are going to do and then we'll decide if its okay as a board, but I also want to make sure that Poseidon's recommendations, if you will, are fully considered and vetted to the point that if we are going to say no that doesn't work, there better be some better definitive reasons why what they proposed as far as monitoring doesn't work because I'm gonna go back to the very first question I asked earlier today "what standards are we using? Are they industry acceptable and are they quantifiable and it was admitted that there aren't any.

Chair: Ms. Clemente. Mr. Thompson is a great adherent of my philosophy which in life is to reduce uncertainty. (laughter)

Ms. Clemente: I have been down this road before and in light of that, I don't feel comfortable saying everything looks great and or we have concerns since just heard this in the last five minutes. And I want to add to that again this is what the context of the science advisory panel is to setup a monitoring program like that and to whip one up together in five minutes and ask me if I have any problems I prefer not to speak on that.

Chair: Mr. Thompson, I think we are pretty close.

Mr. Thompson: I know I know. Thank you for indulging me.

Mr. Robertus: Mr. Chairman I'd like to comment on this.

Chair: Mr. Robertus?

Mr. Robertus: On the issue of monitoring fortunately there's a little more flexibility, I believe I can say yes I understand the concerns [inaudible] and we could craft language that will go into the monitoring section of the tentative order. My concern is that I can craft the findings that this Board can evidence; findings are the critical basis for the decision. As Chiara has pointed out there will be a technical review committee or group of people that would be overseeing this process and the frequency, and the number of kilograms, those issues I am confident those can be worked out. I want to clarify that the points that Mr. Wyels has made on the basis of the 55 acres being the structure for the mitigation acreage for both the impingement and the entrainment is a guidance point primary guidance point. So in the structure of the tentative order; I am then charged to come up with findings based on what the testimony and the scientific information I have at my disposal. To craft that tentative order accordingly. If that is not your intention, to give me that guidance, I would like to know at this point.

Chair: I think that's our intention.

Mr. Robertus: I will move on that action to craft the tentative order on the basis of the 55 acres for entrainment and impingement. And I will endeavor to work with Poseidon to make sure of the monitoring of both the productivity of the acreage and the monitoring of the impingement is structured in a way that is clear.

Man 5: I think that Mr. Loveland, I think it was you that indicated that this is precedent setting and we want to make certain we covered everything. I think we have done a pretty good job. I think we came a long ways since the last time we dealt with this. And I know there are some concerns about us not making much headway. I think this is a huge step forward and we are almost there. A little more patience and we'll be there. So unless there are any objections I'll close the hearing. This will be back before us in May, May 13<sup>th</sup> meeting. Again I would like to thank Poseidon and the folks in the environmental community and especially staff I have say staff have worked night and day on this and it just yoman's duty male or female just done a marvelous job. Thank you very much. Okay, thank you all.