

**May 12, 2009**

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Via Electronic Mail

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**RE: Proposed Order NO. R9-2006-0065, NPDES No. CA 0109223**  
**Poseidon Resources Corporation Carlsbad Desalination Project**  
Flow, Entrainment and Impingement Minimization Plan  
Environmental Group Objections

Dear Mr. Robertus and Ms. Clemente:

On behalf of San Diego Coastkeeper and the Surfrider Foundation, please accept the following objections regarding Regional Board procedures and Poseidon submissions for the Board's May 13, 2009 consideration of Poseidon's proposed Flow, Entrainment, and Impingement Minimization Plan for the Carlsbad Desalination Facility.

1. The Revised EOSR limits comments to the changes to the Tentative Order after the Regional Board's April 8, 2009 meeting, to be submitted by May 6, 2009. (Revised EOSR, p.1) However, the Regional Board prepared the Revised EOSR, errata, and a Revised Tentative Order after the May 6<sup>th</sup> deadline. As such, the formal deadline for comments on these documents should have been extended, and the public notified that it was appropriate to comment on documents disclosed after the official close of the comment period.
2. The Findings for the 2006 NPDES Permit state, "The Regional Water Board review and approval of the Flow Minimization, Entrainment and Impingement Minimization Plan will address any additional review required pursuant to Water Code Section 13142.5(b)." (Order No. R9-2006-0065, Attachment F, p. F-50) The Minimization Plan does not address stand-alone operations and the Regional Board specifically reserves consideration of stand-alone operations at a future date, subject to the "trigger." (Revised Tentative Order, dated May 6, 2009, p. 2) The Regional Board has provided no basis for now refusing to conduct the required stand-alone analysis at this point, except to state the "Discharger will have more flexibility in how it operates the intake structure and outfall and additional and/or better design and technology features may be feasible." (*Id.*) However, the flexibility afforded the Discharger once EPS shuts down does not prevent analysis of design or technology features at this point.
3. The Regional Board now reserves only the right to review design or technology features once EPS shuts down. (*Id.*) However, the Regional Board analysis of stand-alone operations cannot be restrained to only some of the Porter-Cologne elements. PC § 13142.5(b).

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4. The Regional Board's finding that the EPS site was the "best available site feasible to minimize the intake and mortality of all forms of marine life pursuant to Section 13142.5(b) under conditions of co-location operation for the benefit of CDP" in 2006 as a "separate and independent basis for a determination that the CDP has complied with 13142.5(b) for co-location operation" is unsupported by the record and mischaracterizes the Regional Board's determination. (Response to Comments, p.9; Order No. R9-2006-0065, Attachment F, p. F-49-50) The Regional Board did not find the co-located operation at EPS for the benefit of CDP to be the best site. *Id.* Although the Regional Board did not make an explicit finding as to site, the most that can be inferred from the 2006 Findings is that, when EPS provides enough water to support CDP operations, no additional impingement results and entrainment impacts are de minimis. (Order No. R9-2006-0065, Attachment F, p. F-49-50) No conclusion regarding co-location operation for CDP benefit was made, as Porter-Cologne compliance during such conditions (as well as during stand-alone operations) was to be determined through the Minimization Plan. (*Id.*) In light of the Regional Board's other findings at the time of NPDES Permit issuance, such a reading is unsupported. The Regional Board found EPS flows were greater than 304 MGD 99 percent of the time. (Order No. R9-2006-0065, Attachment F, p. F-6)

5. The Regional Board's alternative position that the Minimization Plan and supporting documents constitute a separate and new determination as to the best site under co-located operations is similarly unsupportable. (Response to Comments, p.9) The Regional Board cannot, without notice, opportunity to comment, or explanation change its position as to the determination of best site under co-located operations after the close of the comment period. Further, this argument amounts to a post-hoc rationalization of a previous approval.

6. The Regional Board imposed section VI.C.2.(e) of the NPDES Permit to require a plan to "minimize entrainment and impingement." (*Id.* at F-19) The current Minimization Plan does not meet this requirement.

7. The determination as to best site under stand-alone operations, must be made before project construction, or Poseidon faces the possibility of relocating the CDP to an entirely new location which allows for new or different design or technology measures. The 2006 NPDES Permit specifically called for section 13142.5(b) stand-alone analysis in the Minimization Plan. (Order No. R9-2006-0065, Attachment F, p. F-49-50) Because this document was to be submitted 180 days after permit issuance, the regulatory intent is clear: analysis and approval of section 13142.5(b) compliance measures before construction of the project. (Order No. R9-2006-0065, Section VI.C.2.(e)) Recognizing that the EPS shutdown is imminent, the Regional Board's analysis of such compliance measures is even more pressing than it was in 2006.

8. The Response to Comments document provided by the Regional Board on May 8, 2009 reads largely as an excerpt from Poseidon's Response to Comments provided to the Regional Board on May 7, 2009. (Regional Board Staff Responsiveness Summary ("Response to Comments")) Although these comments were formally submitted on May 7<sup>th</sup>, previous versions were submitted to Regional Board staff and counsel as early as April 8<sup>th</sup>, 2009. (Latham and Watkins letter accompanying Poseidon's Proposed Response to Comments, May 7, 2009) As mentioned in our previous submissions, Poseidon's preparation of staff's Response to Comments is contrary to public policy, and prejudicial to the public. Moreover, Poseidon's request to enter its version of the Response to Comments into the administrative record and have them considered by the Regional Board shows Poseidon's failure to heed the public

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comment restrictions dictated by the Board. This 200-page document amounts to a comment letter on all issues presented to the Board, with virtually no time for the public to digest and respond. (See, Poseidon's Proposed Response to Comments) We object to inclusion of this document in the administrative record and object to its use as the basis of staff's Response to Comments.

9. Poseidon's and staff's reliance on and citation to *Voices of Wetlands v. California State Water Resources Control Board* is inappropriate, unpersuasive, and suspect. (Response to Comments, p. 14; Poseidon's Proposed Response to Comments, p. 23.) Because it is currently being reviewed by the California Supreme Court, the case is not considered applicable precedent and citation as such is improper. Further, there is no evidence in the record to suggest that the Regional Board or staff relied upon this case in conducting a review of the Minimization Plan.

10. The Regional Board's reliance on Coastal Commission findings, approvals, and permits is an abuse of discretion. (Response to Comments, p.8-9) Poseidon has argued throughout the permitting and judicial review process that the Regional Board has primary jurisdiction in interpretation and imposition of Porter-Cologne section 13142.5(b) requirements. The Regional Board's wholesale adoption of the Coastal Commission's findings is an abdication of the Regional Board's responsibility under the Water Code, and of its permitting authority. In light of the Coastal Commission's clarification of its approval and admonishment that the Regional Board's Revised Tentative Order is in conflict with the Coastal Commission's decisions, such reliance is also unsupported and misplaced. (See also, attached Statement of Decision, *Surfrider Foundation v. California Coastal Commission*, San Diego Superior Court Case No. 37-2008-00075727, indicating Court's expectation that all Porter-Cologne related issues would be addressed by the Board upon approval of the Flow Plan.)

11. The Regional Board's reliance on the Coastal Commission's findings and entrainment mitigation is also suspect in light of the Regional Board's refusal to address Dr. Raimondi's review of the MLMP for Regional Board purposes. (Response to Comments, p. 11) Dr. Raimondi performed the Coastal Commission's independent mitigation review and considered Poseidon's impingement calculations, assessment, and mitigation measures inaccurate, leading to "double-counting."

12. As previously noted by Environmental Groups, the Regional Board's continued failure to decide the amount and significance of impingement impacts resulting from CDP operations is an abuse of discretion. (Response to Comments, p.5)

13. The Regional Board's reliance on Poseidon's stated objectives to constrain its analysis pursuant to section 13142.5(b) is an abuse of discretion. (Response to Comments, p.6-8) Not only are Poseidon's project objectives an inappropriate standard for Porter-Cologne analysis, they are newly and recently injected arguments proposed by Poseidon for inclusion into the administrative record.

14. The Regional Board's failure to acknowledge federal caselaw interpreting federal Clean Water Act standards that implicate and guide Regional Board Porter-Cologne analysis is arbitrary and capricious. (Response to Comments, p. 15; See also, State Water Resources Control Board memorandum regarding *Riverkeeper* litigation, dated May 6, 2009, attached

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hereto.) The Regional Board further fails to provide any basis for such a position. (*Id.*)

15. The Regional Board's analysis and interpretation of section 13142.5(b) is a new analysis, provided by Poseidon, which has not been vetted publicly, and has only been presented after the close of the comment period as a post hoc rationalization. (Response to Comments, p.13-14. See also, Poseidon's Proposed Response to Comments, p. 22-23.)

Thank you for your careful consideration of these and all prior comments submitted on behalf of the Environmental Groups. While we endeavor not to repeat comments previously made, please note that we reserve the right in subsequent appeals and litigation to revive and rely upon all such arguments, and our willingness not to repeat ourselves does not mean we acquiesce nor in any way agree with the Regional Board's resolution of such matters previously identified.

Sincerely,

**COAST LAW GROUP LLP**

  
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