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January 19, 2018

**BY EMAIL**

Hope A. Smythe  
Executive Officer  
Santa Ana Regional Water Quality Control Board  
3737 Main Street, Suite 500  
Riverside, CA 92501-3348

Re: Marine Life Mitigation for the Huntington Beach Desalination Plant

Dear Ms. Smythe:

I write on behalf of Poseidon Resources (Surfside) LLC (“Poseidon”). We understand that the Santa Ana Regional Water Quality Control Board (“Regional Board”) has requested documentation from Poseidon to support a finding that Poseidon’s Marine Life Mitigation Plan for the Bolsa Chica Wetland Restoration and Inlet Maintenance (“Bolsa Chica MLMP”) qualifies as an acceptable mitigation measure under the California Ocean Plan’s Desalination Amendment (“Desal Amendment”). The Desal Amendment and relevant case law confirm that the Bolsa Chica MLMP clearly qualifies as a mitigation measure.

The Bolsa Chica Ecological Reserve (“Bolsa Chica”) is an approximately 1,341-acre coastal estuary in Huntington Beach adjacent to the proposed Huntington Beach Desalination Plant (“Project”). Previous restorations of the site included the construction and opening of the Full Tidal Basin (“FTB”) and restoration of 317 acres of habitat, which requires tidal exchange to function and provide ecological value to marine fish. However, since these previous restorations, the Bolsa Chica inlet has nearly closed and tidal exchange is muted due to shoaling inside the inlet, resulting in a smaller volume of ocean water exchanged during the tidal cycle, a narrower tidal range, and lowered wetland functions. Additionally, the 200 acres of muted tidal areas that are connected to the FTB do not adequately drain, causing lowered water quality in these areas.

As the State Lands Commission (“SLC”) found in the 2017 Final Supplemental Environmental Impact Report (“FSEIR”) for the Outfall/Intake Modifications & General Lease – Industrial Use (PRC 1980.1) Amendment for the Seawater Desalination Project at Huntington Beach,<sup>1</sup> “inlet maintenance will be necessary in order to sustain the tidally influenced habitats

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<sup>1</sup> Available at <http://www.slc.ca.gov/Info/CEQA/Seawater.html>.

within Bolsa Chica.” See FSEIR, Appendix F3 at 17. “Without continued maintenance dredging, the inlet is likely to close completely and the benefits of the restoration lost.” *Id.* If the inlet closes, the FTB would be effectively isolated from the ocean and unable to provide habitat for coastal marine fish and the muted tidal areas would suffer degradation. *Id.* at 17-18.

The Bolsa Chica MLMP will maintain the inlet and prevent the inlet from closing. Thus, the Bolsa Chica MLMP will ensure complete restoration and maintenance of tidal action to Bolsa Chica wetlands to support estuarine and coastal fish populations. Inlet maintenance is part of the overall restoration plan and is an essential feature of assuring that the full tidal basin continues to function as planned. Inlet maintenance has been recognized by regulatory agencies, including the state’s Regional Water Quality Control Boards and the Coastal Commission, as vital to coastal wetland restoration and they have provided credit to parties for completing such work. FSEIR at 18.

#### **A. The Bolsa Chica MLMP Satisfies the Desal Amendment Mitigation Requirements**

The Bolsa Chica MLMP satisfies the Desal Amendment’s mitigation requirements. First, the Bolsa Chica MLMP is a “mitigation project” under Chapter III.M.2.e. Second, the Bolsa Chica MLMP provides mitigation to contribute to California’s Marine Protected Areas (“MPA”) network, which is recognized as acceptable and preferred mitigation in the State Water Resources Control Board’s Final Staff Report and Substitute Environmental Document for the Desal Amendment, adopted May 6, 2015 (“Desal Amendment Staff Report”).

In addition, the use of similar wetlands restoration was found to be acceptable mitigation under Water Code section 13142.5(b) in a published Court of Appeal opinion, *Surfrider Foundation v. California Regional Water Quality Control Board, San Diego Region* (2012) 211 Cal.App.4th 557. There, the court considered a marine life mitigation plan calling for wetlands restoration to mitigate impacts from Poseidon’s Carlsbad Desalination Plant. Under the plan at issue in that case, Poseidon agreed to restore up to 55.4 acres of estuarine wetlands in Southern California for the purpose of creating a habitat in which fish populations will increase and thereby offset the marine life mortality caused by operation of the desalination facility. *Id.* at 566-67. The court agreed that wetlands restoration is a proper type of mitigation under section 13142.5(b), noting that Webster’s Third New International Dictionary defines “mitigation” as “abatement or diminution of something painful, harsh, severe, afflictive, or calamitous.” *Id.* at 577. Based on this definition, the court concluded “the compensatory measure of creating additional marine life habitat in Southern California’s coastal wetlands can be defined as mitigation.” *Id.* Given the similarity of the mitigation project here, the same result should be reached.

#### **1. The Bolsa Chica MLMP Is a Restoration Project**

Chapter III.M.2.e of the Desal Amendment explains that mitigation “is the replacement of all forms of marine life or habitat that is lost due to the construction and operation of a desalination facility.” The Regional Board must ensure that the owner or operator “fully mitigates for the operational lifetime of the facility and uses the best available mitigation

measures feasible to minimize intake and mortality of all forms of marine life.” Subject to Regional Board approval, “the owner or operator may choose” whether to mitigate pursuant to completing a mitigation project (Chapter III.M.2.e(3)), pursuant to a fee-based mitigation program (Chapter III.M.2.e(4)), or through a combination of both.

Under Chapter III.M.2.e(3) of the Desal Amendment, the owner or operator must submit a Mitigation Plan outlining the mitigation project objectives, work plan, maintenance plan, and monitoring requirements, among other elements. Mitigation must be accomplished through “expansion, restoration or creation” of kelp beds, estuaries, coastal wetlands, natural reefs, MPAs, or other projects that mitigate for intake and mortality of marine life associated with the facility. *See* Desal Amendment Chapter III.M.2.e(3)(b)(i). Additionally, the owner/operator must demonstrate that the project fully mitigates for intake-related marine life mortality “by including expansion, restoration, or creation of habitat based on the [area of production foregone (“APF”)] acreage,” the project’s production area must overlap with the facility’s source water body, and the project must fully mitigate for discharge- and construction-related marine life mortality projected. *Id.* at Chapter III.M.2.e(3)(b)(ii)-(iv). Further, the Regional Board may permit “out-of-kind mitigation for mitigation of open water or soft-bottom species.” *Id.* at Chapter III.M.2.e(3)(b)(v).

In July 2016—eighteen months ago—Poseidon provided the Regional Board with its proposed Bolsa Chica MLMP that met the aforementioned requirements. At the same time, Poseidon provided the Regional Board with an updated comparison of the selected Southern California tidal wetlands as potential sites for mitigation of impacts associated with the Project (Appendix RR to the Project’s application). Appendix RR evaluated twelve different sites in Southern California and determined that the proposed Bolsa Chica site best met California Water Code section 13142.5(b) and the Desal Amendment’s mitigation requirements. The Regional Board had a fulsome opportunity to review the Bolsa Chica MLMP, and shared it with the Regional Board’s neutral third party reviewers in the summer of 2017. The Regional Board did not inform Poseidon that they had any concerns about the efficacy of the Bolsa Chica MLMP at that time.

As described above, the Bolsa Chica MLMP provides for the restoration and maintenance of the tidal inlet to the Bolsa Chica wetlands. The previous restoration benefits of the Bolsa Chica wetlands are threatened by shoaling of the tidal inlet such that tidal exchange is reduced and the inlet could potentially close placing at risk of loss the existing benefits from the restoration activities. The Bolsa Chica MLMP was prepared in accordance with the Desal Amendment, and meets every requirement for mitigation projects.

We understand that Regional Board staff have expressed concern that the Bolsa Chica MLMP may be considered an “enhancement” and not an “expansion, restoration, or creation of habitat.” This is a distinction without a difference—the Bolsa Chica MLMP is a “restoration” plan. The Bolsa Chica MLMP will improve the current and future conditions of the Bolsa Chica wetlands to improve the wetlands and keep the inlet open to produce greater biological productivity, restoring the wetlands to their past, more productive condition. Additionally, the Bolsa Chica MLMP explicitly calls for the “*restoration* and maintenance of tidal action” to the Bolsa Chica wetlands, which will “assure long-term and effective tidal action to support

estuarine and coastal fish populations.” Bolsa Chica MLMP at 1; *see also id.* (“Poseidon will undertake the **restoration** through either a fee-based agreement with the [SLC] and/or through a lease agreement to undertake **the restoration actions proposed in this MLMP.**”); *id.* at 4 (“Poseidon is proposing to undertake **restoration** and maintenance of the tidal inlet. . . .”); *id.* at 6 (“The proposed activity relates to the **restoration** and maintenance of tidal flows. . . .”).

It should be noted that the terms “expansion, restoration and creation” are not defined in the Desal Amendment, the Desal Amendment Staff Report, or the Substitute Environmental Document for the Desal Amendment. We understand the Regional Board staff may be relying on the U.S. Army Corps of Engineers’ definition of restoration. To this end, the Bolsa Chica MLMP also satisfies the U.S. Army Corps of Engineers’ definition of restoration. The Army Corps defines wetlands “restoration” as: “the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.” 33 C.F.R. § 332.2. Re-establishment results in “rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions” whereas rehabilitation results in “a gain in aquatic resource function, but does not result in a gain in aquatic resource area.”

The Bolsa Chica MLMP fits squarely within the definition of restoration, as the goal of the ongoing maintenance is to return Bolsa Chica to its prior, more productive condition following previous restorations. The Bolsa Chica MLMP will restore the 200 acres of muted tidal areas (improving water quality in these areas) and ensure that the wetland functions remain high. In addition, the Bolsa Chica MLMP will result in an overall gain in aquatic resource area as compared to the conditions that occur when the inlet is closed by providing “supportive physical habitat for coastal marine organisms, access to heterogeneous habitat types used for cover and foraging, a nutrient base to support a productive food web, establishment and sustainability of an extensive eelgrass habitat, and high quality rearing habitat for larval and juvenile life stages for fish.” *See* Bolsa Chica MLMP at 6.

## 2. The Bolsa Chica MLMP Contributes to California’s MPA Network

The Desal Amendment Staff Report states that “[a]nother in-kind mitigation alternative for desalination facilities is for the owner or operator of the Desalination facility to contribute to California’s MPA network.” *See* Desal Amendment Staff Report, § 8.5.2. Mitigation projects that expand “or increase the quality and productivity within a MPA may provide compensatory biological productivity for operational impacts associated with desalination.” *Id.* The Desal Amendment in turn states that “[m]itigation projects that increase or enhance the viability and sustainability of all forms of marine life in [MPAs] are preferred, if feasible.” Desal Amendment Chapter III.M.2.e(4)(c).

The Bolsa Chica MLMP is a mitigation project that “increase[s] the quality and productivity within a MPA.” The Bolsa Chica Basin includes two MPAs, Bolsa Bay State Marine Conservation Area and the Bolsa Chica Basin State Marine Conservation Area.<sup>2</sup>

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<sup>2</sup> *See* <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=105396&inline>.

Additionally, the South Coast Regional Stakeholder Group Identified Rationale for Bolsa Bay State Marine Conservation Area is to “protect nursery habitat and estuarine ecological process. Designation [as an MPA] achieves protection and representation of a tidally influenced coastal wetland while allowing shore-based fishing in areas designated by the ecological reserve manager.”<sup>3</sup> The Bolsa Chica MLMP increases the quality and productivity of the Bolsa Chica Basin, providing the important mitigation contemplated by the Desal Amendment Staff Report.

#### **B. The Bolsa Chica MLMP Fully Mitigates the Project’s Marine Life Impacts**

The Bolsa Chica MLMP also constitutes mitigation under any definition of the term because, as a practical matter, the Bolsa Chica MLMP fully compensates for the Project’s impacts on the marine environment. Substantial evidence shows that the Bolsa Chica MLMP will provide years of environmental benefits to more than mitigate the Project’s impacts for the life of the Project. In fact, the FSEIR noted that “impacts to special-status species from diffuser entrainment, including those associated with MPAs, would be less than significant” with implementation of the Bolsa Chica MLMP. *See* FSEIR at 4-67.

Poseidon proposed the Bolsa Chica MLMP to “mitigate for an estimated APF of 40.3 acres for the total operational marine life impacts of the Project.” Bolsa Chica MLMP at 4. The Bolsa Chica MLMP concludes that at least 199 acres of habitat will be restored due to its implementation; or five-times the habitat area impacted by the operation of the desalination Project. *Id.* at 6. “The goal of compensatory mitigation calculated using APF is to replace the production forgone that results from operation of the proposed diffuser, thereby ensuring that there is no net productivity loss once mitigation is taken into consideration.” FSEIR at 4-65. The FSEIR notes that APF mitigation “is considered fully compensatory when it is (1) created or restored in a way that is representative of the affected source water body, and (2) when the restored habitat can operate at a similar level of productivity to comparable natural habitat for the life of the project.” *Id.* at 4-66. The Bolsa Chica MLMP meets these requirements because it will provide “supportive physical habitat for coastal marine organisms, access to heterogeneous habitat types used for cover and foraging, a nutrient base to support a productive food web, establishment and sustainability of an extensive eelgrass habitat, and high quality rearing habitat for larval and juvenile life stages for fish.” *See* Bolsa Chica MLMP at 6. Funding for the existing restoration and inlet maintenance is insufficient to continue and the SLC has requested that a source of funding be found for inlet maintenance “that will allow for estuarine and coastal fish populations to be sustained as well as supporting other wildlife benefits.” *Id.* The Bolsa Chica MLMP meets this need.

Under the Bolsa Chica MLMP, Poseidon must demonstrate that the Bolsa Chica restoration meets specified performance standards and monitoring requirements. For instance, tidal mounding of the average low tide elevations cannot exceed 0.5 feet for nine months following dredging events, beaches must be wider than 50 feet, and the area of eelgrass cannot drop below 90 percent of its current acreage. *See* Bolsa Chica MLMP at 27. Poseidon must also perform tidal, beach, and eelgrass monitoring for as long as the desalination plant is in operation. *See id.*

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<sup>3</sup> *See* <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=98205>.

at 28. Poseidon will collect and analyze tidal data, collect beach profile survey data annually as well as measure beach width monthly, and monitor eelgrass every other year to determine its extent and distribution. *Id.*

**C. Interpreting Mitigation to Exclude “Enhancement” Would Conflict with the Water Code**

Even if the Regional Board does not agree that the Bolsa Chica MLMP is a “restoration” project, there is no statutory basis for distinguishing between “restoration” and “enhancement” projects, when either project would fully mitigate for a desalination plant’s entrainment impacts.

As a statute, Water Code section 13142.5(b) controls over the Ocean Plan. Section 13142.5(b) provides: “For each new or expanded coastal powerplant or other industrial installation using seawater for cooling, heating, or industrial processing, the best available site, design technology, and mitigation measures feasible shall be used to minimize the intake and mortality of all forms of marine life.” All that section 13142.5(b) requires is that the Project utilize feasible mitigation measures to minimize the impact on marine life. There is no preference for “restoration” over “enhancement” within section 13142.5(b), nor is either term defined in the Ocean Plan.

To the extent that a regulation is inconsistent with a statute, the regulation is ultra vires. *Cal. Sch. Bds. Ass’n v. State Bd. of Educ.* (2010) 191 Cal.App.4th 530, 544. Accordingly, it is imperative that the Regional Board ensure that the Desal Amendment is interpreted consistent with the Water Code. Any action otherwise would be unlawful. Poseidon has shown, based on the analysis in the FSEIR, that the Bolsa Chica MLMP, whether considered “enhancement,” “rehabilitation,” “restoration,” or some other term, completely mitigates the Project’s impacts to marine life. It would be arbitrary for the Regional Board to interpret the Bolsa Chica MLMP as not qualifying as mitigation based on a distinction that does not appear anywhere in the Water Code.

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Poseidon appreciates the Regional Board staff’s continued attention to this important matter. Given staff’s plan to release the draft order for the Project in March, it is imperative that the Regional Board finalize its approach toward the Bolsa Chica MLMP as soon as possible. Please let us know as soon as possible if the Regional Board requires additional information from Poseidon to make its Water Code section 13142.5(b) determination.

Sincerely,

*Christopher Garrett*

Christopher W. Garrett  
of LATHAM & WATKINS LLP

*by JKR*

cc: Jennifer Lucchesi, State Lands Commission  
Scott Maloni, Poseidon Resources