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August 21, 2018

BY EMAIL

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

Re: Feasibility of Subsurface Intakes at the Proposed Seawater Desalination Plant at Huntington Beach

Dear Ms. Smythe:

We write on behalf of Poseidon Resources (Surfside) LLC ("Poseidon") in response to California Coastkeeper Alliance's ("Coastkeeper") July 9, 2018 letter to the Santa Ana Regional Water Quality Control Board ("Regional Board") regarding the sufficiency of the findings of the Independent Scientific Technical Advisory Panel ("ISTAP") that subsurface intakes are not feasible for the proposed Huntington Beach Desalination Plant ("Project"). Coastkeeper erroneously claims that the ISTAP's findings regarding the infeasibility of subsurface intakes are flawed and cannot be relied upon by the Regional Board in making its Water Code section 13142.5(b) determination for the Project. To the contrary, the ISTAP's comprehensive evaluation of and conclusions regarding subsurface intakes more than satisfy any requirement in section 13142.5(b) to determine whether subsurface intakes are feasible for the Project. Furthermore, Coastkeeper ignores that the City of Huntington Beach's 2005 Recirculated Environmental Impact Report and 2010 Subsequent Environmental Impact Report, as well as the California State Lands Commission's 2017 Supplemental Environmental Impact Report similarly conclude that subsurface intakes are infeasible for the Project. As explained below, the Regional Board may properly rely on these findings in its evaluation of the Project.

The Ocean Plan Amendment ("OPA") implements procedures for the Regional Board to analyze the best available site, design, technology, and mitigation measures feasible to minimize adverse impacts to aquatic life at new or expanding desalination facilities. These regulations assist the Regional Board in implementing Water Code section 13142.5(b), which 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.

Although the Water Code does not define "feasible," the Fourth Appellate District has held that "feasible" as used in section 13142.5(b) has the same meaning as "feasible" in the California Environmental Quality Act ("CEQA"). (See *Surfrider Foundation v. Regional Water Quality Control Board* (2012) 211 Cal.App.4th 557, 582.) As such, "feasible" in the Water Code context means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (*Id*. at 582 [citing Pub. Resources Code, § 21061.1].) Indeed, in *Surfrider*, the court upheld the Regional Board's consideration of economic factors and project purpose and need in its section 13142.5(b) determination for Poseidon's Carlsbad Desalination Plant. (*Id*. at 582-583.) The State Water Resources Control Board endorsed this definition when adopting the OPA, explaining:

> Feasible for the purposes of Chapter III.M [of the OPA] is defined as capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors. (Public Resources Code § 21061.1; § 30108). The factors in Chapter III.M.2.d.(1)(a)i [i.e., geotechnical data, hydrogeology, benthic topography, oceanographic conditions, presence of sensitive habitats, presence of sensitive species, energy use for the entire facility; design constraints (engineering, constructability), and project life cycle cost] should also be considered by the regional water board when determining subsurface feasibility.[1]

Coastkeeper also erroneously alleges that the OPA "provides an analytical framework for regulating proposed desalination facilities to ensure the selection of appropriate sites, facility designs, and control technologies in the first instance, *with mitigation measures available only after such selections have been made*." (emphasis added) The *Surfrider* decision also confirms that Coastkeeper's interpretation is incorrect. There, the Court confirmed that the set of measures described in the OPA—i.e., "site, design, technology, and mitigation measures"—is to be read collectively, and no one measure is more important than another. (*Surfrider*, *supra*, 211 Cal.App.4th at 576-577.)

Far from being a "technology-forcing" statute as Coastkeeper claims,[2] section 13142.5(b) simply requires that the Regional Board take a holistic approach to analyzing a proposed desalination facility and potential alternatives. Courts have defined a "technology-forcing"

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[1] State Water Resources Control Board, Final Staff Report Including the Final Substitute Environmental Documentation (May 6, 2015) at p. 69.

[2] Coastkeeper's attempt to analogize California Water Code section 13142.5(b) to Clean Water Act section 316(b) is unavailing. Section 13142.5(b) includes several factors, including site, design, and mitigation measures, for the overall evaluation of site selection and ability of the project to minimize impacts to marine life resulting from intakes. In contrast, section 316(b) is expressly limited to a consideration of "the best technology available for minimizing adverse environmental impact." (Clean Water Act, § 316, subd. (b).)

statute as requiring the regulated entity to use the best feasible technology or inducing the entity to develop superior technology not necessarily in existence at the time the regulation was promulgated. (See *Union Elec. Co. v. EPA* (1976) 427 U.S. 246, 257; *Am. Coatings Assn. v. S. Coast Air Quality Mgmt. Dist.* (2012) 54 Cal.4th 446, 466-467.) Here, section 13142.5(b) is not "technology-forcing" in that way. There is no requirement in the Water Code or elsewhere that requires the use of subsurface intakes in every instance.[3] Nor does the statute require the development of new technology, as the statute explicitly provides for the use of the "best ***available*** . . . technology."

When the draft OPA was being considered by the State Board, one of the key issues addressed by the Board was the use and definition of the term "feasible" within the Amendment. As a result, the definition of "feasible" was added to Appendix I to confirm that the term as used in the Ocean Plan followed exactly the definition used under CEQA:

> FEASIBLE for the purposes of chapter III.M, shall mean capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors.

(Ocean Plan, Appendix I, page 54.)

Based on the plain language of the Ocean Plan, there are five factors of feasibility: (1) timing; (2) economic; (3) environmental; (4) social; and (5) technological. While Coastkeeper claims that an infeasibility findings requires that a potential alternative mitigation measure or alternative fail ***each*** of these five factors, Coastkeeper's argument is again fully refuted by the Court of Appeal's decision in *Surfrider*. There, the Court confirmed that an alternative may properly be rejected under Water Code section 13142.5(b) if the alternative is found to be infeasible under ***any*** of the five factors. (*Surfrider, supra*, 211 Cal.App.4th at 581-584 [finding that site and technology alternatives could be rejected for failure to meet economic and environmental factors].)

Contrary to the Coastkeeper July 9th Letter, the OPA did not establish so-called "feasibility criterion" that limited the type or nature of factors or criteria that the Regional Board can and must consider in apply Water Code section 13142.5(b). The claim that only certain factors may be considered, but not other factors such as "aquifer drawdown" leading to damage to drinking water aquifers, or "performance reliability" which would cause a facility to breakdown and be unable to operate on an ongoing basis, is an inaccurate statement of the law.

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[3] Indeed, when adopting the OPA, the State Water Resources Control Board noted that "requiring subsurface intakes as the only intake technology may result in overly-restrictive conditions that effectively eliminate desalination as an option for some communities. In addition, Porter-Cologne specifically allows mitigation to factor into site selection. A facility that can show that their siting, design, technology, and mitigation measures minimize marine life mortality should be able to proceed with alternative intake methods." See State Water Resources Control Board, Final Staff Report Including the Final Substitute Environmental Documentation (May 6, 2015) at p. 69.

The claim flatly conflicts with the governing statute, caselaw interpreting the statute, and the definition contained in the OPA itself.

As demonstrated by the analysis in the 2005 REIR, 2010 SEIR, 2012 NPDES permit, 2017 SEIR, the detailed ISTAP reports, and the subsequent report from the Well Investigation Team,[4] subsurface intake wells are infeasible—economically and technically—for numerous reasons and, therefore, under the OPA, a subsurface intake is not required. For example, the ISTAP evaluated nine different subsurface intake technologies, as well as analyzed different project scales.[5] Based on the Coastal Act's definition of "feasibility"—which is identical to CEQA's[6]—the ISTAP concluded that subsurface intakes ***would not be technologically feasible*** due to:

(a) local hydrologic conditions that would result in adverse impacts to the environment, such as moving contaminants seaward and damaging local wetlands;

(b) performance risks;

(c) decimating critical freshwater aquifers;

(d) sensitivity to sea level rise;

(e) poor geochemistry; and

(f) constructability issues.[7]

Contrary to Coastkeeper's contentions, the ISTAP did evaluate the technological feasibility of various subsurface intake designs (including vertical intake wells, radial wells, slant wells, horizontal directional drilling, and water tunnels) and nonetheless concluded they were infeasible.

The ISTAP also appropriately evaluated the economic feasibility of specific potentially technologically feasible subsurface intakes and concluded that the options were not economically viable at the Project site within a reasonable timeframe due to high capital costs. In addition, the ISTAP found that a smaller capacity facility would not render subsurface intakes feasible, as there is a demonstrated need for a 50 million gallons per day desalination plant in Orange

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[4] At the conclusion of Phase 1 of the ISTAP Process, the Coastal Commission and Poseidon agreed to form a Well Investigation Team to develop additional information about the potential effects of using slant wells to provide source water for the Project.

[5] See ISTAP, Final Report: Technical Feasibility of Subsurface Intake Designs for the Proposed Poseidon Water Desalination Facility at Huntington Beach, Calif. at pp. 14, 17-18 (Oct. 2014) ("ISTAP Phase 1 Report"), available at: https://ftp.waterboards.ca.gov/ (Appendix F to Poseidon: Application_Appendices.zip).

[6] Compare Public Resources Code, § 30108, with Public Resources Code, § 21061.1.

[7] ISTAP Phase 1 Report, at pp. 17-18.

County.[8] Further, as the ISTAP explained, the construction costs of subsurface technologies do not decrease in a linear fashion when the size of the facility is reduced.[9] Indeed, reducing the scale of the Project would not render subsurface intakes feasible, but it would hinder local water agencies' ability to obtain a reliable local source of water for their constituents.

We understand the Regional Board is still conducting its analysis of Poseidon's application, and we appreciate the Regional Board's thoughtful due diligence. We disagree with Coastkeeper that the Regional Board cannot rely on the ISTAP's findings and believe their analysis is legally flawed.

Sincerely,

Christopher W. Garrett
of LATHAM & WATKINS LLP

cc: Teresita Sablan, Esq.
Scott Maloni, Poseidon Water

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[8] ISTAP, Phase 2 Report: Feasibility of Subsurface Intake Designs for the Proposed Poseidon Water Desalination Facility at Huntington Beach, Calif. at p. 15 (Nov. 2015), available at: available at: https://ftp.waterboards.ca.gov/ (Appendix G to Poseidon: Application_Appendices.zip).

[9] *Ibid.*