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6 POSEIDON RESOURCES SURFSIDE (LLC)

7
8 BEFORE THE
9 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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In the Matter of Petitions of California
Coastkeeper Alliance, Orange County
Coastkeeper, and Residents for Responsible
Desalination (Renewal of Waste Discharge
Requirements for Poseidon Resources
(Surfside) L.L.C., Huntington Beach
Desalination Facility, Order No. R8-2012-
0007 [NPDES No. CA8000403], Orange
County), Santa Ana Regional Water Quality
Control Board

**POSEIDON RESOURCES (SURFSIDE)
LLC'S RESPONSE TO PETITION TO
REOPEN ORDER R8-2012-0007;
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

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1 **I. INTRODUCTION & SUMMARY STATEMENT**

2 This matter involves the Santa Ana Regional Water Quality Control Board’s (“Regional
3 Board” or “Board”) approval of Order No. R8-2012-0007 (the “2012 Order”) for the proposed
4 Huntington Beach Desalination Facility Project (“Project”), a seawater desalination facility
5 proposed in the City of Huntington Beach. The 2012 Order permits the proposed Project’s
6 intake and discharge of seawater consistent with the requirements of California Water Code
7 section 13142.5(b) and the federal Clean Water Act’s NPDES program. Specifically, the 2012
8 Order allows for the Project to use the Huntington Beach General Station’s (“HBGS”) existing
9 seawater intake and discharge facilities under co-located and temporary stand-alone operating
10 conditions. The 2012 Order finds that under these two operating conditions, the Project complies
11 with the requirements of section 13142.5(b), which requires projects to use the best available
12 site, design, technology and mitigation measures feasible to minimize the intake and mortality of
13 all forms of marine life.

14 It is anticipated that the HBGS could decommission its cooling water system within the
15 proposed Project’s next five-year NPDES cycle (2017-2021). Additionally, Poseidon has
16 requested that its permit be amended to include an update to the section 13142.5(b)
17 determination in the 2012 Order, pursuant to the amendments to the California Ocean Plan.
18 Accordingly, Poseidon Resources (Surfside) LLC (“Poseidon”), which is developing the Project
19 and will operate it, is seeking an amendment and renewal of the 2012 Order and a new section
20 13142.5(b) determination for its long-term, stand-alone operation of the Project.

21 Unwilling to wait for—or perhaps intending to disrupt—Poseidon’s renewal process,
22 California Coastkeeper Alliance, Orange County Coastkeeper, and Residents for Responsible
23 Desalination (collectively, “Petitioners”) have petitioned the State Water Resources Control
24 Board (“State Board”) to review and re-open the 2012 Order (“Petition”). For the reasons set
25 forth below, Poseidon respectfully submits that the Petition lacks merit and fails to raise any
26 substantial issues appropriate for review. The Petition should therefore be denied without further
27 review by the State Board.

28

1 **II. PROCEDURAL HISTORY**

2 **A. The Project's 2006 and 2012 Orders**

3 The original NPDES permit for the Project was approved by the Santa Ana Regional
4 Water Quality Control Board ("Regional Board") on August 25, 2006, as Order No. R8-2006-
5 0034 (the "2006 Order"). In September 2006 Petitioners filed a petition with the State Water
6 Resources Control Board appealing the Regional Board's approval of the 2006 Order. On
7 August 28, 2007, the State Board denied the appeal on the basis that it "failed to raise substantial
8 issues." On February 2, 2010, Poseidon submitted a timely application for renewal of the 2006
9 Order. The 2012 Order was approved by the Regional Water Board on February 10, 2012, as
10 Order No. R8-2012-0007. Petitioners again appealed the Regional Board's approval of the 2012
11 Order to the State Board. The State Board did not act on the petition, and Petitioners withdrew
12 their petition on July 15, 2015.

13 As described above, the 2012 Order contains a finding that the Project meets the
14 requirements of Water Code section 13142.5(b) that new industrial facilities using seawater for
15 processing use the best available site, design, technology and mitigation feasible to minimize the
16 intake and mortality of all forms of marine life. (2012 Order at 9, F-16.) However, the Order
17 also provides that, if the HBGS permanently ceases operations of the once-through cooling water
18 system and/or if the HBGS permanently stops generating electricity at the current site, then
19 Poseidon must obtain a new section 13142.5(b) determination. (*Id.* at 9.) Additionally, the 2012
20 Order should be amended to incorporate the interpretation of section 13142.5(b) contained in the
21 California Ocean Plan, as amended.

22 **B. Petitioners' Requests to Reopen the 2012 Order**

23 Petitioners filed a Petition to Reopen the 2012 Order on February 22, 2016. The
24 Regional Board announced its decision declining to reopen the 2012 Order on May 5, 2016.
25 Petitioners appealed this decision to the State Water Resources Control Board on June 2, 2016.

26 **C. Poseidon's Pending and Forthcoming Applications for Renewal**

27 The 2012 Order is set to expire on February 1, 2017. Poseidon is seeking a renewal of
28 the 2012 Order by the Regional Board to cover the Project's NPDES permit requirements and

1 Water Code section 13142.5(b) consistency determination.

2 Poseidon's renewal request is based in part on the State Board's May 6, 2015, adoption
3 of amendments to the Water Quality Control Plan for Ocean Waters of California Addressing
4 Desalination Facility Intakes, Brine Discharges, and Incorporating Other Non-substantive
5 Changes (the "Desalination Amendment"). The Desalination Amendment took effect as a new
6 regulation on January 28, 2016. The State Board's approval of the Desalination Amendment
7 affirms the discretion of the state's nine regional boards to determine on a project and site-
8 specific basis compliance with Water Code section 13142.5(b). (Desalination Amendment,
9 Chapter III.M.2(a)(1).)

10 On February 17, 2016, Poseidon submitted an initial response to requests from State
11 Board staff for site-specific studies and analyses that the Regional Board may use as it conducts
12 its Water Code section 13142.5(b) consistency determination. These studies include a report by
13 the Independent Scientific Technical Advisory Panel ("ISTAP") commissioned to review the
14 feasibility of subsurface seawater intakes for the Project. These studies were previously shared
15 with Coastal Commission staff and many are available on-line.

16 On March 15, 2016, Poseidon submitted a formal request for the Regional Board to
17 conduct a Water Code section 13142.5(b) determination for the Project. Poseidon's submittal
18 included a detailed Water Code section 13142.5(b) compliance matrix and supporting studies
19 and reports that show how the proposed Project proposes to comply with the Desalination
20 Amendment and section 13142.5(b).

21 Poseidon intends to submit its formal application for a NPDES permit renewal in June
22 2016. As described in correspondence from Poseidon to the State Board dated June 10, 2016,
23 and June 15, 2016, Poseidon anticipates that the Regional Board will consider both prongs of
24 Poseidon's application (i.e., the NPDES permit renewal and section 13142.5(b) compliance
25 determination) as part of a single, open, public process. This would be consistent with the
26 Regional Board's existing public hearing process and with Sections 3.1 and 3.2 (page 24) and 4.2
27 (page 26) of the Desalination Amendment's Substitute Environmental Document ("SED"). (*See*
28 Exhibits 1, 2.)

1 **III. STANDARD OF REVIEW**

2 The State Board may “at any time refuse to review the action . . . of the regional board if
3 the petition fails to raise substantial issues appropriate for review.” (23 Cal. Code Regs.
4 § 2052(a)(1).) “[T]he state board retains unreviewable discretion to determine what issues are
5 ‘substantial’ and whether they are ‘appropriate for review.’” (*People ex rel. Cal. Reg’l Wat.*
6 *Quality Control Bd. V. Barry*, 194 Cal. App. 3d 158, 176 (1987); *Johnson v. State Water*
7 *Resources Control Bd.*, 123 Cal. App. 4th 1107, 1114 (2004) [State Board’s discretionary
8 decision to dismiss a petition “is not subject to judicial review.”].)

9 The State Board also may deny a petition after reviewing all or part of the regional
10 board’s administrative record, if the State Board determines that “the action . . . of the regional
11 board was appropriate and proper or that the petition fails to raise substantial issues that are
12 appropriate for review.” (23 Cal. Code Regs. § 2052(a)(2)(A).) The State Board will uphold the
13 orders of a regional board when they are supported by substantial evidence in the record. (*E.g.*,
14 *Exxon Co., USA, et al.*, Order No. WQ 85-7 (State Board 1985).) Substantial evidence means
15 relevant evidence that a reasonable mind might accept as adequate to support a conclusion.
16 (*Bowman v. City of Petaluma* , 185 Cal. App. 3d 1065, 1072, 1075 (1986).)

17 **IV. ARGUMENT**

18 **A. The Petition to Reopen Is Untimely**

19 The Petition should be summarily dismissed as untimely. Pursuant to Water Code
20 section 13320(a), a petition concerning the Regional Board’s failure to act must be filed within
21 30 days of the date on which the refusal to take action occurred, or within 60 days after the
22 request was made, “*whichever occurs sooner.*” (Cal. Water Code § 13320(a) (emphasis added).)
23 Here, Petitioners made their initial request for Regional Board action on February 22, 2016—**102**
24 **days before submitting the Petition.** Petitioners had ample opportunity to submit a petition
25 within the statutory time period, but did not. Accordingly, the Petition is untimely and should
26 not be considered by the State Board.

27 Taking this untimely Petition up for review would establish a poor precedent for the State
28 Board. Hearing an untimely petition challenging a regional board’s failure to act on, or refusal to

1 reopen, a validly-issued permit would mean that no permit would ever be final. This would
2 fundamentally undermine the statutory appeal periods in the Water Code.

3 **B. The Regional Board Will Provide Ample Opportunity for Public Comment**
4 **on Poseidon's NPDES Permit Renewal/Section 13142.5(b) Determination**

5 Given that the Regional Board is *already* in the process of considering a renewal and
6 amendment of the 2012 Order, re-opening the 2012 Order at this time would be a needless
7 exercise and an inefficient use of the State Board staff's time. As described above, Poseidon has
8 already submitted an application for a section 13142.5(b) compliance determination and will be
9 submitting an application for its NPDES permit renewal this month. Further, Poseidon is not
10 discharging under the existing 2012 Order, so there are no exigent circumstances warranting
11 review. Petitioners will have ample opportunity to communicate opinions about the Project and
12 its features during the Regional Board's review of Poseidon's application for an updated,
13 renewed, and amended California Water Code section 13142.5(b) compliance determination and
14 NPDES Permit. This application will be acted upon prior to any discharge by the Project.

15 **1. The Regional Board Hearing Process Includes Public Comment and**
16 **Participation**

17 The Petition largely concerns the process for allowing the Petitioners to participate in the
18 Regional Board's pending (1) determination of the Project's compliance with California Water
19 Code section 13142.5(b); and (2) NPDES permit renewal. Petitioners want to ensure their
20 participation prior to the Regional Board's final determination on both matters, which is not
21 expected to occur until after the Coastal Commission's consideration of the Project this fall.

22 As discussed in Poseidon's June 10, 2016, and June 15, 2016, correspondence, the
23 Regional Board's process for considering Poseidon's applications is an open, public process with
24 ample opportunity for comment and input. Pursuant to the process outlined on the Regional
25 Board's website,¹ the Regional Board will hold a public hearing with at least a 30 day public

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27 ¹ Cal. EPA – Santa Ana Regional Water Quality Control Board, "Do I need a Permit?" (last visited
28 June 2016),
http://www.waterboards.ca.gov/santaana/water_issues/programs/permit/get_started.shtml.

1 notification. A decision will be made only after the Regional Board hears its staff
2 recommendation and considers evidence submitted in writing during the public comment period
3 or presented at the public hearing. All parties, including Petitioners, are welcome to comment on
4 any aspect of the application information submitted by Poseidon to the Regional Board at the
5 proper forum—the public comment period noticed by the Regional Board prior to the hearing on
6 Poseidon’s applications, and at the podium during the public hearing on those items.

7 Poseidon agrees with Petitioners that there should be a single hearing process on
8 Poseidon’s application for an updated, amended, and renewed 2012 Order. (*See* Petition at 7
9 [“Under normal circumstances, the NPDES permit process and 13142.5(b) determination would
10 proceed together.”]; Exhibit 1 at 3 [requesting that the section 13142.5(b) determination and
11 NPDES permit renewal decision be made at the same hearing].) This approach will allow the
12 Regional Board to proceed with a concurrent approval process for both the section 13142.5(b)
13 compliance determination and the NPDES permit renewal, whereby each approval is heard and
14 considered by the Regional Board at the same hearing and the Petitioners and other Project
15 stakeholders have ample opportunity to participate in the formal decision-making process.
16 Further, a single process and hearing is *required* here because the two determinations are
17 necessarily interrelated. The section 13142.5(b) determination, which applies to the Project’s
18 intake, may affect the appropriate decision on the NPDES permit renewal, which applies to the
19 Project’s outfall. As described in Poseidon’s June 15, 2016 correspondence, there are complex
20 environmental issues and interdependencies between seawater intake and seawater discharge
21 from desalination facilities that require the Regional Boards to consider both intake and
22 discharge at the same time, rather than in isolation. Considering the two elements of the Project
23 in isolation would effectively constitute an improper piecemealing of the Project’s review. (*See*,
24 *e.g.*, 14 Cal. Code Regs. § 15378(a) [agencies to review the “whole of the action” that “has a
25 potential for resulting in either a direct physical change in the environment, or a reasonably
26 foreseeable indirect physical change in the environment.”].)

1 **2. The Inter-Agency Consultation Process Does Not Replace the**
2 **Regional Board’s Formal Public Hearing Process**

3 Petitioners appear to misunderstand the consultation process required for section
4 13142.5(b). Petitioners suggest that the Regional Board has “deprived Petitioners of the
5 opportunity to meaningfully participate in the review process required by the Desalination
6 Amendment.” (Petition at 6.) Petitioners ignore that the consultation process is an inter-agency
7 consultation, not a public process, that was designed to streamline the section 13142.5(b)
8 determination process. (Desalination Amendment, Chapters III(M)(1)(f), III(M)(3)(c)(2).)
9 There is nothing in section 13142.5(b), nor in the Desalination Amendment, that contemplates
10 public participation during the consultation period among the state agencies. Indeed, even
11 Poseidon is not included in the consultation process. Instead, both Petitioners and Poseidon have
12 the opportunity to present evidence and voice concerns during the Regional Board’s public
13 hearing process on the NPDES permit renewal and section 13142.5(b) consistency
14 determination.²

15 Further, the consultation process itself does not result in any sort of permit or approval.
16 Rather, the Regional Board’s ultimate determination is made during the public hearing process in
17 which Petitioners and Poseidon may participate. The consultation process is not a substitute for
18 the Regional Board’s obligation to make a determination on evidence presented at a public
19 hearing.

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25 ² Petitioners allege that they do not have access to information about Regional Board’s section
26 13142.5(b) compliance determination. (Petition at 10.) As described above, the Regional Board’s
27 practice is to make materials available to the public in advance of the public hearing. Further, all
28 of the documents submitted by Poseidon in February and March 2016 are public records and may
be requested and reviewed by members of the public. Poseidon is not aware of any refusal of any
request for these documents by the Regional Board. Poseidon does not object to making its
submittals publicly accessible prior to the ultimate hearing notice and public comment period.

1 **3. The Regional Boards Are Vested With Authority To Make Section**
2 **13142.5(b) Determinations**

3 As described above, Petitioners’ arguments are premature given that the Regional Board
4 process is ongoing. To the extent that Petitioners are attempting an end-run around the Regional
5 Board and requesting that the State Board staff opine on Poseidon’s NPDES permit renewal and
6 section 13242.5(b) consistency determination, such an attempt is inappropriate. It is also not
7 supported by the Desalination Amendment or statutory authority, which provides that both
8 determinations are made by the **Regional Board** after hearing all the evidence. (*See* Desalination
9 Amendment, Chapter III.M.2(a)(1) (section 13142.5(b) determination); Cal. Water Code § 13260
10 [discharges]; *Pacific Lumber Co. v. State Water Resources Control Bd.*, 37 Cal. 4th 921 (2006)
11 [“The [Regional Boards] are ‘the principal state agencies with primary responsibility for the
12 coordination and control of water quality.’”].)

13 **C. The Petition to Reopen Raises No Substantial Issue**

14 The Petition raises unfounded concerns about Project need, alternative sites and the
15 Project’s seawater intake. As described above, because the Petition is untimely and because the
16 issues raised by Petitioners will be addressed in the Regional Board’s public hearing process on
17 Poseidon’s applications for renewal and amendment of the 2012 Order, there is no reason for the
18 State Board to consider these technical issues in connection with the Petition. As described
19 below, even if the State Board does consider these substantive issues, which it should not, the
20 State Board should deny the Petition because Petitioners’ allegations lack merit.

21 **1. Poseidon Has Demonstrated Need for the Project**

22 Petitioners allege that Poseidon has not met the Desalination Amendment’s “need”
23 requirement. Petitioners make the specious claim that the 2012 Order did “not discuss need at
24 all.” (Petition at 10.) Petitioners are wrong—the “Responses to Comments on the Tentative
25 Order” explicitly address the need for the facility. (2012 Order at 7.) Specifically, the Regional
26 Board confirmed that twenty-one Orange County municipalities and retail and public water
27 agencies expressed an interest in purchasing water from Poseidon. (*Id.*) Further, eighteen
28 working group participants signed non-binding Letters of Intent (“LOI”) to purchase water from

1 Poseidon at the time of the 2012 Order. (*Id.* at 7 –8.) The Municipal Water District of Orange
2 County (“MWDOC”) wrote in its LOI that “any water that we may be able to procure from the
3 desalination facility [Poseidon] is intended to replace imported water and further diversify our
4 local supplies.” (*Id.* at 8 (citing MWDOC, LOI (Jan. 27, 2009).) The Orange County Water
5 District’s (“OCWD”) also informed the Regional Board that:

6 On March 17, 2010, the District entered into a letter of
7 intent with Poseidon Resources for the consideration of the
8 purchase of desalinated water from the HBDF. Water from
9 HBDF could provide flexibility in how the District
10 manages the groundwater basin, specifically the desalinated
11 water could be used to augment supplies we inject into our
12 Talbert Seawater Barrier to help prevent intrusion into the
13 groundwater basin.

14 (Letter from Michael R. Markus, P.E., OCWD, to Carole Beswick, Santa Ana Regional Water
15 Quality Control Board (Dec. 7, 2011) (Exhibit 3.) Based on this evidence, the Regional Board
16 declared that there was “demand and interest” in a consistent water supply. (*Id.* at 8.) All of
17 these terms—demand, interest, replacement for imported water and diversifying local supplies—
18 demonstrate a need for new potable water sources in Southern California.

19 The Regional Board also discussed the need for desalinated water in Huntington Beach.

20 The Regional Board stated that the Project:

21 will supply Orange County with up to 8% of its drinking
22 water needs [and] the . . . location is critical for serving
23 Huntington Beach and the surrounding water districts in a
24 feasible manner because of its close proximity to the
25 existing intake and outfall structure and key delivery points
26 of the regional water distribution system.

27 (*Id.* at 15.) The Regional Board also noted that “[t]he need for a reliable new local water supply
28 is great and desalination provides such a supply, as recognized by the California Department of
Water Resources, Metropolitan Water District and the Municipal Water District of Orange
County.” (*Id.* at 51 (citing SEIR, Section 3.5.) Indeed, the Metropolitan Water District
submitted a letter to the Regional Board in 2011 supporting the Project, noting that it would
“provide a new, local water supply that will help reduce the reliance on imported supplies to
meet expected future demands.” (Letter from Devan Upadhyay, Metropolitan Water District, to
Carole H. Beswick, Santa Ana Regional Water Quality Control Board, dated Dec. 6, 2011

1 (Exhibit 4.) Likewise, the Municipal Water District of Orange County also wrote to the
2 Regional Board in 2011, confirming that the Orange County water agencies have a collective
3 demand that equals the Project’s maximum 56,000 acre-feet annual capacity. (Letter from Kevin
4 P. Hunt, P.E, Municipal Water District of Orange County, to Carole H. Beswick, Santa Ana
5 Regional Water Quality Control Board, dated Oct. 31, 2011 (Exhibit 5.) Accordingly, the
6 Regional Board expressly considered need when it issued the 2012 Order.

7 The 2012 Order also references the robust analysis of need in the Project’s Subsequent
8 Environmental Impact Report (“SEIR”) regarding project need. (SEIR at 3-79.) The SEIR
9 discusses the same LOIs as the 2012 Order, however it goes on to note that those requests
10 reserved the entire 56,000 acre-feet of desalinated water to be produced by the project. (*Id.*)
11 The SEIR also identified four ways in which Poseidon will meet “Orange County’s water
12 needs”: (1) by increasing water supply reliability during times of drought or shortages in other
13 water supplies; (2) by replacing imported water supplies that have been, and will be, lost by
14 Orange County to statewide and environmental needs; (3) by providing a planned-for water
15 supply to accommodate increasing water needs shown in water plans adopted by the state,
16 regional, and local water agencies; and (4) by providing a new supply source that will allow
17 operational flexibility in managing the amount of groundwater pumped from underground
18 aquifers. (*Id.* at 3-80.) Petitioners present no evidence that these “needs” are less relevant or
19 critical today.

20 Petitioners also contend that Poseidon relies on the Orange County Water District’s
21 (“OCWD”) 2014 Long Term Facility Plan as a substitute for an urban water management plan
22 (“UWMP”). (Petition at 11.) Whether or not the 2012 Order relied on UWMPs is insignificant
23 because Poseidon will address UWMPs in the forthcoming Regional Board proceeding for the
24 Project’s new section 13142.5(b) determination. Petitioners will have a chance to raise their
25 concerns about UWMPs as part of that process this year. Moreover, UWMPs were addressed
26 during the Project’s 2013 proceedings before the California Coastal Commission. For example,
27 MWDOC attested that its Regional UWMP included the Project as one of the ways it would
28 meet increasing future water demand. (Letter from Jeffrey Thomas, Vice President of MWDOC,

1 to Mary Shallenberger, Chair of the California Coastal Commission, (Oct. 15, 2013) (Exhibit 6.)

2 The need for additional drinking water in Orange County has been confirmed as recently
3 as last year, when the OCWD's Board of Directors (the "Board") voted to approve a Water
4 Reliability Agreement Term Sheet for the purchase of 50 million gallons per day ("mgd") of
5 desalinated water from Poseidon. (Poseidon Detailed Response to State Board Feb. 8, 2016
6 Letter, Attachment 1 to Response Letter from Poseidon to the State Board (Feb. 2016) (Exhibit
7 7.) The Board approved the Term Sheet because the Board determined that it needed the water
8 to meet its customers' current and future demands.

9 Further, the 2015 OCWD Ground Water Management Plan ("GWMP"), which is the
10 controlling planning document for groundwater in the OCWD, identified a local and regional
11 need for the 56,000 acre feet per year of desalinated water. (Greg Woodside and Marsha
12 Westropp, Orange County Water District Groundwater Management Plan 2015 Update at 2-11
13 (June 17, 2016) (Exhibit 8.) This need assessment is based on three key factors: limited
14 imported water supplies; declining Santa Ana River flows; and increased demand for water. (*Id.*
15 at 10-12, 5-22, 10-13.) The GWMP explicitly identifies the Project as a planned source of
16 56,000 acre-feet per year in the five-year period of 2015 to 2020. (*Id.* at 2-11.)

17 On a regional basis, the need for this Project has been demonstrated in water planning
18 documents at all levels. First, the MWDOC's 2015 Final UWMP includes the Project as a
19 planned water supply project for 56,000 acre feet per year. (MWDOC, 2015 Urban Water
20 Management Plan at 7-2 (May 2016) (Exhibit 9.) Moreover, the Metropolitan Water District of
21 Southern California's ("MWDSC") Integrated Water Resources Plan update identifies a local
22 supply reliability target of 238,000 acre-feet, and references seawater desalination as a way to
23 meet future water demand. (MWDSC, Integrated Water Resources Plan 2015 Update VIII at 3.9
24 (Jan. 2016) (Exhibit 10.) Similarly, the Integrated Regional Water Management Plans in
25 Orange County confirm the importance of enhancing local water supplies and reducing reliance
26 on imported water. (*See, e.g.*, South Orange County Watershed Management Area, 2013
27 Integrated Regional Water Management Plan at 1-5 (July 2013) (Exhibit 11.) Finally, the
28 State's California Water Action Plan and Delta Reform Act both also include policy objectives

1 that emphasize increased regional self-reliance and reduced dependence on imported water.
2 (California Water Action Plan 2016 Update at 6 (Exhibit 12); Cal. Water Code § 85021.)
3 Therefore, ample evidence confirms the need for the Project both at the time of the 2012 Order
4 and today.

5 **2. An Alternative Sites Analysis Has Previously Been Conducted and**
6 **Will Be Conducted for the NPDES Permit Renewal and Section**
7 **13142.5(b) Determination**

8 Petitioners contend that there has “never been an independent ‘best available site’
9 analysis for the proposed desalination facility.” (Petition at 11.) Petitioners are wrong—
10 multiple alternative sites were considered in the 2012 Order. (2012 Order at F-24.) Two of the
11 alternative sites were rejected because of environmental impacts and incompatibility issues
12 related to noise and aesthetics. (*Id.*) The final option was rejected because its proximity to
13 existing nuclear power plant facilities created engineering and land acquisition issues. (*Id.*)
14 Based on this analysis and other evidence in the Regional Board’s record, the Regional Board, in
15 its independent judgment, appropriately determined that, when the Facility is operating in
16 temporary stand-alone mode, “it is utilizing the best available site, design, technology, and
17 mitigation measures feasible to minimize the intake and mortality of all forms of marine life and
18 is in compliance with [Water Code] Section 13242.5(b).” (*Id.* at 9.) The Regional Board will
19 make a similar independent decision on Poseidon’s 2016 application and the evidence before it at
20 the time of its decision. At that point, the Board can choose to make its own determination,
21 adopt the applicant’s consultant’s determination, or adopt the determination submitted by any
22 participant in the hearing process.

23 Poseidon included a robust best available site analysis in its February 2016 submittal to
24 the Regional Board. (Joe Monaco, Memorandum re: Huntington Beach Desalination Plant
25 Alternative Sites Analysis (June 15, 2015), Attachment 2 to Response Letter from Poseidon to
26 the State Water Board at 1 (Feb. 2016) (“Dudek Analysis”) (Exhibit 13.) This analysis was
27 conducted in 2015 by Dudek, an environmental consulting firm, in conformance with the
28 guidance provided by the Desalination Amendment.

1 Dudek evaluated the suitability of potential sites within Orange County for a 25 to 50
2 mgd desalination plant. (Dudek Analysis at 1.) Dudek divided the Orange County coast into
3 nine segments bounded by the coastal zone and delineated based on similar natural and physical
4 characteristics such as geology and hydrology. (*Id.*) Dudek first looked at the suitability of the
5 overall segments, and then evaluated specific sites within the selected segments. (*Id.*) Segments
6 1, 7 and 8 were found to have the greatest suitability for siting a desalination plant based on the
7 potential impacts to biological and marine resources. (*Id.* at 2.) Thus, these were the only
8 segments to proceed to the siting stage.

9 Dudek analyzed fourteen potential sites within Segments 1, 7 and 8 that were potentially
10 large enough to accommodate a 25 to 50 mgd desalination facility and that also had either
11 industrial or utility land uses. (*Id.* at 5.) Eight of those properties were then eliminated based on
12 inconsistent zoning. (*Id.* at 6.) Two more sites were eliminated based on limited available land
13 due to existing structures that would be difficult to demolish. (*Id.*) The final four properties
14 (two in Segment 1 and one each in Segments 7 and 8), were compared based on differences in
15 availability and feasibility. (*Id.*) Only Property 1G, the current proposed site, was both available
16 and feasible for constructing and operating a 25 to 50 mgd desalination facility. (*Id.*) It also
17 bears noting that all of the other evaluated sites were outside the OCWD's service territory.
18 OCWD has a Water Reliability Agreement Term Sheet with Poseidon to purchase the full 50
19 mgd capacity from the Project with the stated purpose of allowing for the sustainable
20 management of the groundwater basin by offsetting the need to import water.

21 Petitioners are also misled in their assertion that the Regional Board "foreclosed
22 meaningful analysis of alternative sites" in the 2012 Order by premising the alternative sites
23 evaluation on co-location with a power plant. (Petition at 12.) This is untrue—the Dudek
24 Analysis evaluated alternative sites based on potential impacts to biological and marine
25 resources, availability and feasibility—not on co-location with a power plant. (Dudek Analysis
26 at 1.) The Dudek Analysis thus provides the "thorough and unbiased section 13142.5(b)
27 compliance determination" that Petitioners request. And, as described in Section IV.B, above,
28 Petitioners will have ample opportunity to comment on the Dudek Analysis during the upcoming

1 Regional Board process.

2 Under the California Environmental Quality Act (“CEQA”), a lead agency must consider a
3 “reasonable range” of alternatives “which would feasibly attain most of the basic objectives of the
4 project but would avoid or substantially lessen any of the significant effects of the project.” (Cal.
5 Code Regs., tit. 14 (“Guidelines”), § 15126.6(a); see also *id.*, § 13053.5(a).) An agency need not
6 consider “every conceivable alternative” and may determine how many are a reasonable range. (*Id.*,
7 § 15126.6(a); *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 566 (1990).) An
8 agency’s selection of alternatives will be upheld unless “manifestly unreasonable.” (*Cal. Native*
9 *Plant Society v. City of Santa Cruz*, 177 Cal. App. 4th 957, 988 (2009) (“CNPS”), quoting
10 *Federation of Hillside & Canyon Assns. v. City of Los Angeles*, 83 Cal. App. 4th 1252, 1265 (2000).)
11 There is no requirement that off-site alternatives be explored in every case. (*CNPS*, 177 Cal. App.
12 4th at p.993; *Mira Mar Mobile Community v. City of Oceanside*, 119 Cal. App. 4th 477, 491 (2004)
13 [lead agency has discretion to evaluate on-site or off-site alternatives or both].) An agency may
14 properly determine that no feasible locations exist either because basic project objectives cannot be
15 achieved at another site or because there are no sites meeting the criteria for feasible alternate sites.
16 (*City of Long Beach v. Los Angeles Unified School Dist.*, 176 Cal. App. 4th 889, 921 (2009).) Here,
17 the Regional Board’s analysis of three alternative sites in 2011—and Dudek’s evaluation of *fourteen*
18 alternative sites in Poseidon’s 2016 submittal—fully complies with CEQA’s requirements.

19 In addition, State Board staff have acknowledged that the alternatives sites analysis required
20 by the Desalination Amendment may properly be limited to the “area where the community water
21 system is lacking in alternative water supplies.” (*See* Final Staff Report Including the Final
22 Substitute Environmental Documentation Adopted May 6, 2015, Amendment to the Water Quality
23 Control Plan For Ocean Waters of California Addressing Desalination Facility Intakes, Brine
24 Discharges, and the Incorporation of Other Non-substantive Changes at H-362 (May 6, 2012).)
25 Further, in its responses to comments on the draft Desalination Amendment, the State Board noted
26 that “[p]romoting the development of a desalination project in other areas would defeat the purpose
27 of the project since the water supply would not be provided where it is needed.” (*Id.*) The State
28 Board also rejected suggestions to require a specific geographic area for alternative sites analysis.

1 (*Id.*) Accordingly, the area under consideration for an alternatives sites analysis does not need to
2 extend to far-reaching areas.

3 The Desalination Amendment also confirms that only a “reasonable range of nearby sites,
4 including sites that would *likely* support subsurface intakes,” is required. (Desalination Amendment,
5 Chapter III.M.2(b) (emphasis added).) The Desalination Amendment does not mandate that a
6 subsurface alternative site be located in every case, only that sites that could potentially
7 accommodate a subsurface intake be explored and considered. The Dudek Analysis meets this
8 requirement by identifying potentially suitable locations for subsurface intakes, and then analyzing
9 whether developing a desalination project on those sites would be feasible. This information will be
10 used to inform the Regional Board’s section 13142.5(b) “best available site” determination.

11 **3. Subsurface Intake Wells Are Economically and Technically Infeasible**

12 **a. Subsurface Wells Are Infeasible for Numerous**

13 **Technical Reasons**

14 Petitioners erroneously suggest that the Coastal Commission’s Independent Scientific &
15 Technical Advisory Panel (“ISTAP”) failed to demonstrate the infeasibility of subsurface
16 intakes. To the contrary, the Commission’s ISTAP process was the most comprehensive,
17 independent evaluation of the feasibility of subsurface seawater intake technologies ever
18 conducted in California. ISTAP evaluated nine different subsurface intake technologies.³
19 (ISTAP, Final Report: Technical Feasibility of Subsurface Intake Designs for the Proposed
20 Poseidon Water Desalination Facility at Huntington Beach, Calif. at 14 (Oct. 2014) (“ISTAP
21 Phase 1 Report”) (Exhibit 14)). ISTAP also analyzed different project scales (i.e., product water
22 production capacities) ranging from a plant capable of producing 12.5 mgd to 100 mgd of
23 drinking water. Based on the application of the Coastal Act’s and Desalination Amendment’s

24 _____
25 ³ These subsurface intake options included technologies utilized for fresh, brackish and salt water
26 extraction including (1) vertical wells completed in the shallow aquifer above the Talbert aquifer,
27 (2) vertical deep wells completed within the Talbert aquifer, (3) vertical wells open to both the
28 shallow and Talbert aquifers, (4) radial collector wells tapping the shallow aquifer, (5) slant
wells tapping the Talbert aquifer, (6) seabed infiltration gallery, (7) beach gallery (surf zone
infiltration gallery), (8) horizontal directional drilled wells, and (9) a water tunnel. (ISTAP
Report at 17–18.)

1 definition of feasibility,⁴ ISTAP concluded that subsurface intakes would not be feasible at the
2 proposed site.

3 ISTAP issued two reports providing detailed evidence in supports of its conclusion that
4 eight of the nine subsurface intakes were technologically infeasible.⁵ (ISTAP Phase 1 Report at
5 17-18; ISTAP, Phase 2 Report: Feasibility of Subsurface Intake Designs for the Proposed
6 Poseidon Water Desalination Facility at Huntington Beach, Calif. at 15 (Nov. 2015) (“ISTAP
7 Phase 2 Report) (Exhibit 15.) Namely, the ISTAP Phase 1 Report found the eight options
8 technologically infeasible due to: (a) local hydrologic conditions that would result in adverse
9 impacts to the environment, such as moving contaminants seaward and damaging local
10 wetlands; (b) performance risks; (c) decimating critical freshwater aquifers; (d) sensitivity to sea
11 level rise; (d) poor geochemistry; and (e) constructability issues. (*Id.* at 17–18.)

12 Petitioners incorrectly claim that ISTAP rejected subsurface intakes primarily due to “the
13 assumption that large volumes of freshwater will be drawn into the seawater intake.” (Petition at
14 12.) As noted above, there are many reasons why ISTAP concluded that subsurface wells would
15 be technologically infeasible at this site. Further, the risk of freshwater drawdown is much more
16 grave than Petitioner’s flippant characterization of a “minor loss of freshwater.” (*Id.*)

17 The proposed Project site overlies the western portion of the Talbert aquifer, which is a
18 “significant groundwater source for Orange County’s Water needs.” The Talbert aquifer has a
19 reversed seaward gradient that causes seawater intrusion and threatens inland portion of the
20 aquifer system. (ISTAP Phase 1 Report at 14.) In fact, in 2014, Orange County was injecting 30
21 mgd of treated wastewater into the aquifer system to replenish the basin and control seawater.
22 (*Id.*) Any increased intrusion of seawater into the Talbert Aquifer would cause severe harm to
23 Orange County’s freshwater supply, and would be irreconcilable with the purpose of this
24 Project—namely, to provide fresh water to Orange County.

25 _____
26 ⁴ Feasible means capable of being accomplished in a successful manner within a reasonable
27 period of time, taking into account economic, environmental, social and technological factors.
(Cal. Pub. Res. Code § 30108).

28 ⁵ The ninth technology was found to be economically infeasible, as discussed in more detail
below.

1 At the conclusion of the ISTAP Phase 1 evaluation, Poseidon and the Coastal
2 Commission convened a Wells Investigation Team to develop additional information about the
3 potential effects of using wells to provide source water for the Project. (Scott McCreary,
4 CONCUR, Inc., Summary of the California Coastal Commission-Poseidon Well Investigation
5 Team Process at 1 (Jan. 13, 2016) (Exhibit 16.) As part of this investigation, Geosyntec
6 conducted site-specific hydraulic modeling, which shows that the amount of groundwater
7 flowing from inland to a subsurface intake could account for 22 to 36 percent of the total
8 subsurface intake extraction. (Gordon Thrupp, Geosyntec Consultants, Inc., Revision and
9 Sensitivity Analyses of Slant Well SSI Model Feasibility Assessment of Shoreline Subsurface
10 Collectors, Huntington Beach Seawater Desalination Project (June 3, 2015) (Exhibit 17.) In
11 response to this information, OCWD informed the Coastal Commission:

12 Based on the modeling parameters used and the overall
13 hydrogeologic setting of the Talbert Gap that OCWD staff
14 has studied for decades, these results appear reasonable and
15 could, in fact, still underestimate the proportion of inland
16 groundwater extracted by a SSI. Geosyntec also found that
17 lowering the total SSI extraction rate produced a slight
18 increase in the proportion of inland groundwater being
19 extracted by the SSI.

20 Based on the results presented by Geosyntec, it is OCWD
21 staff's position that a SSI constructed within the Talbert
22 aquifer near the coast would produce an unacceptable
23 amount of inland groundwater that would reduce the yield
24 of the groundwater basin and, likewise, would effectively
25 reduce the net yield of "new" water produced by an ocean
26 desalination project. Not only would such a reduction in
27 net yield of an ocean desalination project undermine its
28 objective of increasing water reliability, but it would cause
the project to be economically infeasible. For these
reasons, OCWD staff would not be in favor of continued
consideration of a SSI option for the Huntington Beach
Seawater Desalination Project.

(Letter from Roy Herndon, Chief Hydrogeologist, OCWD, to Scott McCreary, Principal,
CONCUR, Inc., dated Sept. 28, 2015 (Exhibit 18.)

Petitioners unreasonably cite a proposed small-scale desalination project in South Orange
County that is investigating the use of slant wells as an indication that interception of freshwater
is an acceptable environmental impact at this Project. This argument is inherently flawed. The

1 identified Dana Point project has not undergone CEQA analysis and certification, thus the
2 proposed project's impacts are unknown. In fact, the Dana Point project has not been approved
3 by a single permitting or regulatory agency. Further, the proposed Dana Point project is outside
4 of the OCWD's managed groundwater basin and would not have the impacts on the OCWD
5 seawater intrusion barrier and basin management practices that are at issue here. Petitioners
6 even suggest that the Dana Point Project will result in a fresh groundwater drawdown of 10%,
7 which is only approximately 1 mgd of the plant's initial source water capacity requirement of 10
8 MGD. While this assertion has not been validated by the yet-to-be completed CEQA process, it
9 is a very small quantity compared to the Coastal Commission Well Investigation Team's
10 conclusion that slant wells in Huntington Beach would result in a fresh water drawdown of up to
11 36% or 36 mgd, which is 36 times greater given Poseidon's 106 mgd source water capacity
12 requirement. Finally, it is not for Petitioners to decide what amount of freshwater drawdown is
13 acceptable, and their suggestion that drawdown is insignificant is not supported by the record.

14 Further, the Regional Board considered the option of beach wells in 2012. Like ISTAP,
15 the Regional Board concluded that beach wells would be infeasible due to their likelihood of
16 interfering with the Talbert Barrier. (2012 Order at F-27.) The Regional Board found that
17 intercepting injection water from the Talbert Barrier could impair the function of the barrier to
18 protect against seawater intrusion to the groundwater basin and may direct reclaimed water into
19 the intake. (*Id.*) Further, intake wells could drain the existing nearby coastal wetlands, including
20 the Talbert Marsh, Brookhurst Marsh, and the Magnolia Marsh. This could cause land
21 subsidence in the vicinity of the site, which would damage key traffic arteries, such as Pacific
22 Coast Highway. (*Id.* at F-28.) In addition, the source water collected using wells in the coastal
23 aquifer in the vicinity of the Project would have very poor water quality in terms of high
24 pathogen and ammonia content, and low concentrations of dissolved oxygen. (*Id.*) For all of
25 these reasons, the Regional Board determined that beach wells were not feasible taking into
26 account economic, environmental, and technological factors.

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b. There Is a Demonstrated Need for the Project Size

As discussed in detail in Section IV.C.1 above, there is a demonstrated need for a 50 mgd desalination plant in Orange County. Further, Poseidon has already reached a tentative agreement with OCWD to distribute all of its product water. Thus, diminishing the size of the plant is neither necessary nor appropriate. More importantly, the ISTAP concluded that a smaller capacity facility would not render subsurface wells feasible and the Desalination Amendment does not require that a project diminish its capacity in order to accommodate such wells.

It is worth noting that even if Poseidon diminished the size of the Project the cost per unit would increase so dramatically that the entire Project would become economically infeasible. (ISTAP Phase 2 Report at 15.) Unfortunately, the construction costs of subsurface technologies do not decrease in a linear fashion when the size of the facility is reduced. (*Id.*) This lack of proportionality is due to the high mobilization costs of subsurface technologies, regardless of scale. (*Id.*) Reducing the scale of the plant would not suddenly render subsurface intake feasible, but would hinder local water agencies’ efforts to obtain a reliable local source of water.

c. ISTAP’s Economic Infeasibility Test Was Not Based Solely on Willingness to Pay

Contrary to Petitioners’ assertions, ISTAP did not premise infeasibility findings solely on “willingness to pay” alone—rather, the ISTAP report considered capital cost increases and technological feasibility for various subsurface intake designs. (Petition at 12-13.) Specifically, the ISTAP Phase 1 Report concluded that seven of the nine subsurface intake designs were *technologically* infeasible for a range of reasons, including unacceptable, detrimental impacts to Orange County’s critical freshwater supply. The ISTAP Phase 2 Report determined that one of the two remaining design options was also infeasible for technological reasons. (ISTAP Phase 2 Report at 8.) Finally, the last option—a seafloor infiltration gallery (“SIG”)—was found to be economically infeasible pursuant to the relevant Desalination Amendment directive. (*Id.* at 14.) In other words, no technologies were discounted solely on “willingness to pay.”

1 Looking specifically at SIGs—the capital costs for a SIG at this site (at \$1.936–2.347
2 billion) would be dramatically greater than those for Ocean Open Intake (at \$852–899 million).
3 (*Id.*) More specifically, the ISTAP Phase 2 Report found that “the selection of a SIG intake
4 technology, regardless of the construction method, increases the estimated unit cost for the 50
5 mgd product capacity by nearly 80%.” (*Id.* at 15.) The Report’s conclusion was that “[t]he SIG
6 option is not economically viable at the Huntington Beach location within a reasonable time
7 frame, due to high capital costs and only modest reduction in annual operating costs compared to
8 the open ocean intake option.” (*Id.* at 18.)

9 The Desalination Amendment states that “subsurface intakes may be determined to be
10 economically infeasible if the additional cost or lost profitability associated with subsurface
11 intakes, as compared to surface intakes, would render the desalination facility not economically
12 viable.” (*Id.* at 8–9 (citing Desalination Amendment, Chapter M(2)(d)(1)(a)(i)).) The difference
13 in cost between the SIG and Ocean Open Intake at the Project site is enough to render the site
14 economically unviable. The ISTAP Phase 2 Report also noted that because of the high capital
15 costs of the SIG, Poseidon may not be able to secure financing for this option, which poses
16 “significant barriers to implementation.” (*Id.* at 18.) In addition, OCWD’s term sheet—which
17 commits OCWD to a 50 year purchase agreement—places a ceiling on the cost it is willing to
18 pay for desalinated water from the Project at no more than 10% above the cost it would
19 otherwise pay for imported water. (Letter from Michael Markus, OCWD, to Scott McCreary,
20 Concur, Inc. (May 21, 2015) (Exhibit 19.) Thus, the SIG is economically infeasible for this
21 Project in every possible way.

22 Finally, Petitioners incorrectly cite the Desalination Amendment’s feasibility criteria for
23 the contention that Poseidon has not demonstrated that subsurface intakes are infeasible for
24 reasons beyond being “solely . . . more expensive.” (Petition at 12.) As discussed above,
25 subsurface intake options are 80% more expensive than surface intakes, which is sufficient to
26 meet the Desalination Amendment’s economic infeasibility standard. (*See* Desalination
27 Amendment, Chapter M(2)(d)(1)(a)(i).) No further demonstration is required.

28

1 **V. CONCLUSION**

2 For the foregoing reasons, Poseidon respectfully requests that the Petitions be dismissed
3 because they fail to raise any substantial issues appropriate for review, or denied on the merits
4 because the Regional Board's approval of the 2012 Order is supported by substantial evidence in
5 the administrative record. Further, Petitioners will have ample opportunity to raise any concerns
6 about post-2012 developments in the upcoming NPDES Permit renewal/section 13142.5(b)
7 determination before the Regional Board this year.

8 Dated: June 27, 2016

Respectfully submitted,

LATHAM & WATKINS LLP

11 By 
12 Christopher W. Garrett
13 Attorneys for Interested Party
14 Poseidon Resources Corporation

1 **PROOF OF SERVICE**

2 I am employed in the County of San Diego, State of California. I am over the age of
3 18 years and not a party to this action. My business address is Latham & Watkins LLP,
4 12670 High Bluff Drive, San Diego, CA 92130.

5 On **June 27, 2016**, I served the following document described as:

6 **POSEIDON RESOURCES (SURFSIDE) LLC'S RESPONSE TO PETITION TO**
7 **REOPEN ORDER R8-2012-0007; POINTS AND AUTHORITIES IN SUPPORT**
8 **THEREOF**

8 by serving a true copy of the above-described document in the following manner:

9 **BY U.S. MAIL**

10 I am familiar with the office practice of Latham & Watkins LLP for collecting and
11 processing documents for mailing with the United States Postal Service. Under that practice,
12 documents are deposited with the Latham & Watkins LLP personnel responsible for depositing
13 documents with the United States Postal Service; such documents are delivered to the United
14 States Postal Service on that same day in the ordinary course of business, with postage thereon
15 fully prepaid. I deposited in Latham & Watkins LLP's interoffice mail a sealed envelope or
16 package containing the above-described document and addressed as set forth below in
17 accordance with the office practice of Latham & Watkins LLP for collecting and processing
18 documents for mailing with the United States Postal Service:

19 State Water Resources Control Board
20 Office of Chief Counsel
21 Adrianna M. Crowl
22 P.O. Box 100
23 Sacramento, CA 95812-0100

Colin Kelly
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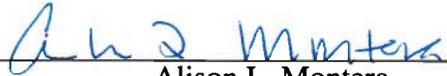
22 Joe Geever
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24 P.O. Box 5422
25 Huntington Beach, CA 92615

Kurt V. Berchtold, Executive Officer
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Santa Ana Region
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Riverside, CA 92501-3348

25 Sean Bothwell
26 California Coastkeeper Alliance
27 156 Second Street
28 San Francisco, CA 94105

1 I declare that I am employed in the office of a member of the Bar of, or permitted to
2 practice before, this Court at whose direction the service was made and declare under penalty of
3 perjury under the laws of the State of California that the foregoing is true and correct.

4 Executed on **June 27, 2016**, at San Diego, California.

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Alison L. Montero