

12670 High Bluff Drive  
San Diego, California 92130  
Tel: +1.858.523.5400 Fax: +1.858.523.5450  
www.lw.com

## LATHAM & WATKINS<sup>LLP</sup>

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January 16, 2019

### VIA EMAIL

Teresita Sablan, Esq.,  
State Water Resources Control Board  
Office of Chief Counsel  
1001 I Street, 22nd Floor  
Sacramento, CA 95814  
[Teresita.Sablan@Waterboards.ca.gov](mailto:Teresita.Sablan@Waterboards.ca.gov)

Re: Ruling in *California Coastkeeper Alliance v. State Lands Commission*, Case No. 34-2017-800002736 (Sacramento Superior Court)

Dear Ms. Sablan:

We are writing on behalf of Poseidon Resources (Surfside) LLC (“Poseidon”) regarding the ruling issued in *California Coastkeeper Alliance v. State Lands Commission*, Case No. 34-2017-800002736, attached hereto as Attachment A, in which the Sacramento County Superior Court upheld the California State Lands Commission’s (“SLC”) approval and certification of a supplemental environmental impact report (“SEIR”) for the Huntington Beach Project (“Project”). In its ruling, the court made two findings that we want to bring to your attention. First, the court determined that the SEIR adequately analyzed the feasibility of subsurface intakes, and that substantial evidence supported the SLC’s conclusion that subsurface intakes were infeasible. Second, the court found that the SEIR did analyze the use of one-millimeter screened intakes as required by the Desalination Amendment. These two findings bear on the Regional Board’s consideration of Poseidon’s California Water Code section 13142.5(b) application.

In challenging the SLC’s SEIR, California Coastkeeper Alliance (“CCKA”) asserted, among other claims, that the SLC failed to analyze the feasibility of subsurface intakes and the impacts associated with the use of 1-mm screened intakes. In particular, CCKA argued that studies performed since the City of Huntington Beach prepared the Project’s initial EIR in 2010 demonstrate that subsurface intakes at the Project site are feasible. These studies included HydroFocus’ report, *Huntington Beach Seawater Desalination Facility Groundwater Modeling Evaluation* (September 23, 2016)—the very same report CCKA submitted to the Regional Board in June 2018. The court found CCKA’s reliance on the HydroFocus report insufficient to overcome the substantial evidence before the SLC that “supported a finding that subsurface intakes at the Project site are infeasible.” (See Att. A at p. 16.) The court further explained that CCKA failed to identify the evidence favorable to the SLC and Poseidon, which was fatal to CCKA’s challenges under the California Environmental Quality Act. As such, the court’s ruling

confirms that the administrative record for the Project is replete with information confirming the infeasibility of slant wells and other subsurface intakes at the Project site.

Further, as we explained in our April 21, 2018 (Appendix CCCCC) and November 27, 2018 (Appendix HHHHH1) letters, Poseidon has submitted more than sufficient information to enable the Regional Board to make a determination that subsurface intakes are infeasible at the Project site. For instance, since the SLC evaluated the feasibility of subsurface intakes in the SEIR, Poseidon has submitted additional extensive subsurface intake analyses at the request of Regional Board staff. These analyses confirm that the HydroFocus report provides no new site-specific geologic data or information that suggests that subsurface intakes are feasible. Indeed, as the Regional Board previously determined in 2012—and as the Sacramento County Superior Court recently found—subsurface intakes are not a feasible alternative at the Project site.

In addition, the court rejected CCKA's arguments that the SLC failed to analyze potential impacts associated with 1-mm screens. Throughout the SEIR process, the SLC evaluated not only potential impacts from the use of 1-mm screens, but also alternative locations of the intake and screens, as required by the Desalination Amendment. In fact, the court recognized that the SLC performed the requisite analysis, finding that the SEIR "did analyze the one-millimeter screens in connection with the Desalination Amendment." (Att. A at p. 14.)

We remind the Regional Board that, as part of the Permit Sequencing Agreement, the Regional Board agreed to rely upon the initial EIR prepared by the City of Huntington Beach, as well as the SLC's CEQA analysis in the SEIR. The SLC's CEQA process is now complete and has been upheld by the Sacramento County Superior Court. In light of this robust analysis and the additional thorough technical analyses that Poseidon has submitted to the Regional Board throughout the application review process, the Regional Board has all the information necessary to make a determination that the Project complies with Water Code section 13142.5(b) and the Desalination Amendment.

Sincerely,

*Christopher W. Garrett*

Christopher W. Garrett  
of LATHAM & WATKINS LLP

cc: Hope Smythe, Santa Ana Regional Water Quality Control Board  
Kelly Huffman, Poseidon Water  
Scott Maloni, Poseidon Water  
Jennifer Roy, Latham & Watkins LLP

# **ATTACHMENT A**

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO**

<b>DATE/TIME</b>	<b>JANUARY 8, 2019</b>	<b>DEPT. NO</b>	<b>28</b>
<b>JUDGE</b>	<b>HON. RICHARD K. SUEYOSHI</b>	<b>CLERK</b>	<b>E. GONZALEZ</b>
<b>CALIFORNIA COASTKEEPER ALLIANCE, CALIFORNIA COASTAL PROTECTION NETWORK, and ORANGE COUNTY COASTKEEPER,</b>  <b>Petitioners,</b> <b>v.</b> <b>CALIFORNIA STATE LANDS COMMISSION,</b>  <b>Respondent.</b>  <b>POSEIDON RESOURCES (SURFSIDE) LLC,</b>  <b>Real Party in Interest.</b>		<b>Case No.: 34-2017-80002736</b>	
<b>Nature of Proceedings:</b>		<b>RULING ON SUBMITTED MATTER RE: PETITION FOR WRIT OF MANDATE</b>	

The petition for writ of mandate came before the Court for oral argument on October 12, 2018. Prior to the hearing, the Court issued an order to appear accompanied by questions it directed the parties to address as part of their oral presentations. Upon hearing oral argument, the Court took the matter under submission. Having considered the briefs and arguments pertaining to the petition, the Court now rules as set forth herein.

**I. Factual and Procedural Background**

Respondent California State Lands Commission (“Commission” or “Respondent”) has jurisdiction over tidal and submerged lands owned by the State of California, including the beds of navigable rivers, lakes, bays, and other water ways. (Pub. Res. Code § 6301.) On February 5, 2007, the Commission authorized lease of state tidelands to AES Huntington Beach, LLC (“AES”) for 20 years for continued use of existing offshore pipelines as components of a once through cooling system serving the Huntington Beach Generating Station. (AR 8324.)

In 2010, the City of Huntington Beach served as a California Environmental Quality Act (“CEQA”) “lead agency” for the “Seawater Desalination Project at Huntington Beach” (the “Project”). The Project includes the construction of a seawater desalination facility on the site of the power plant owned by AES as well as construction and operation of off-site improvements

including “water delivery pipeline (new pipeline and/or replacement of portions of existing pipeline), underground booster pump stations, and modifications to an existing booster pump station, all of which will be utilized by the Applicant to deliver desalinated seawater to Orange County retail water purveyors.” (AR 203).

In September 2010, the City certified an EIR and approved the Project. The EIR was not challenged.<sup>1</sup> Also in 2010, the Commission approved an amendment to the AES lease (“2010 Lease Amendment”). (AR 21, 8331.) The amendment included Poseidon Resources (Surfside) LLC as a Co-Lessee. For purposes of CEQA, the Commission acted as a responsible agency, and relied upon the 2010 EIR prepared by the City. (AR 8339.)

The 2010 Lease Amendment describes Poseidon’s proposed use of the once through cooling technology as,

[t]he AES power plant currently uses Once-Through Cooling (OTC) technology to cool its generators, and the desalination facility would reuse this water as its supply source. This source water would be desalinated using RO technology...The [resulting] brine solution would...[be] discharged with the OTC flows originating from the power plant. (AR 8338.)

The 2010 Lease Amendment states that Poseidon Resources “shall complete construction of the desalination facility within eight years of the authorization of this amendment.” (AR 27.) The 2010 Lease Amendment also specifies that if Poseidon fails to “comply in any material respect with any and all of its separate obligations under this Lease, Lessor *may terminate* Poseidon Resources [sic] rights under this Lease without affecting any or all of AES’s rights or obligations...” (*Id.*)(emphasis added.)

Poseidon did not obtain final permits from the Regional Water Board, and has not yet built the Project.

In 2015, the State Water Board adopted an “Amendment to the Statewide Water Quality Control Plan for the Ocean Waters of California Addressing Desalination Facility Intakes, Brine Discharges, and to Incorporate Other Non-substantive Changes” (“Desalination Amendment”). (23 CCR § 3009.) The Desalination Amendment “provides a consistent statewide approach for minimizing intake and mortality of all forms of marine life and protecting water quality and related beneficial uses of ocean water at and near desalination facilities.” (*Id.*)

In September 2015, Poseidon submitted an application to the California Coastal Commission to “build and operate the Project under co-located, temporary stand-alone and permanent stand-alone operation scenarios. Poseidon amended the Project description that was considered by the Coastal Commission...in order to comply with the requirements of the Desalination Amendment based on the...determination that subsurface seawater intake technologies are infeasible at the Project site.” (AR 20321.)

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<sup>1</sup> And there is no challenge in this matter to the 2010 EIR in connection with the original Project.

In 2016, Poseidon applied for an amendment to the AES lease. The purpose of the amendment was to

modify the offshore pipelines to be used by the Huntington Beach Desalination Plant. Proposed physical modifications include: installing stainless steel wedgewire screens with 1-millimeter (mm) (0.04-inch [in]) spacing to the end of the existing offshore seawater intake pipeline; and installing a multiport diffuser to the end of the existing offshore discharge pipeline... Other proposed changes offshore consist of a reduction in seawater intake volume, riprap reconfiguration (moving existing riprap around the subsea HBGS intake and discharge pipeline towers), installation of pile foundations to support the wedgewire screens, and placement of two gravity anchor blocks where boats could moor while conducting maintenance on the screens. (AR 9101.)

For purposes of CEQA, the Commission determined a supplement to the 2010 EIR was required because the 2010 EIR “retained informational value” but the amendment proposed to “add screens and a diffuser to the offshore HB Desalination Plant pipelines after and in response to the 2015 Desalination Amendment [and] the environmental effects of these modifications were not analyzed” in the 2010 EIR. (AR 5522, 5541.) The Supplemental EIR described the project as the “Lease Modification Project, which would modify the existing Huntington Beach Generating Station Once-Through Cooling (OTC) seawater intake and discharge (outfall) pipelines within the CSLC Lease area.” (AR 5505.) The Commission determined only minor additions or changes would be necessary to make the 2010 EIR adequately apply to the changed circumstances, and therefore focused on the “environmental impacts due to the minor changes within the Commission’s lease area to the approved HB Desalination Plant structures (intake and discharge pipelines) and operations (reduced intake water flow).” (AR 5522.)

This was emphasized in the Introduction to the “Environmental Setting and Impact Analysis” section of the Supplemental EIR. “[T]he information here supplements information in the September 2010 Final Subsequent EIR... certified by [the City] as lead agency... The 2010 FSEIR analyzed potential significant impacts associated with the construction and operation of the 50 million gallon per day (MGD) Huntington Beach Desalination Plant... Table 4-01 identifies the environmental issue areas analyzed in the 2010 FSEIR, those analyzed in Section 4 of this Supplemental EIR, and those found not to be substantially affected by the Lease Modification Project.” (AR 6244.)

With regard to potential Project changes outside those proposed in the 2017 Lease Amendment, the Commission responded to EIR comments concerning the need for a subsequent EIR instead of a supplemental EIR,

[no] entity to date has submitted detailed proposed physical changes to the 2010 Project, including to the Project’s potable water distribution system. Furthermore, the Lease Modification Project does not change the onshore components of the desalination facility... potential changes in the distribution of desalinated water onshore by local or regional water agencies are speculative at this time and not germane to the offshore Lease Modification Project before the

Commission. CEQA does not require analysis of speculative impacts, and the Commission need not prepare a subsequent EIR to address environmental impacts of future actions that are uncertain, such as an onshore desalinated water distribution system that may or may not differ from the distribution system already evaluated in the 2010 FSEIR. (AR 5544-45.)

The Commission approved the modifications subject to the Sana Ana Regional Water Quality Control Board approving the modifications in substantially the same form. (AR 10176.) In June 2016, Poseidon submitted an application to the Regional Water Quality Control Board for a determination in accordance with the requirements of the Desalination Amendment. On August 28, 2017, the Regional Water Control Board deemed the application complete, and as of the submission of the administrative record, the final determination was still pending. (AR 9106, 20321.)

Petitioners contend the Commission violated CEQA by unlawfully segmenting the Project, failing to prepare a comprehensive subsequent EIR, and declining to assume lead agency status. Petitioners also contend the Commission has an affirmative duty under the public trust doctrine to consider and balance competing uses of the public tidelands and to preserve the resources they support. Petitioners assert the Commission violated its public trust fiduciary obligation by failing to perform the necessary factual analysis.

## **II. Standard of Review**

### **A. CEQA claims**

In reviewing whether Respondent complied with CEQA, the court's inquiry is whether there was a prejudicial abuse of discretion. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426.) Abuse of discretion can be established in two ways: (1) by demonstrating Respondent did not proceed in the manner required by law, or (2) by demonstrating Respondent's decision is not supported by substantial evidence. (*Id.*) The standard of review depends on which type of error is alleged. The court determines de novo whether Respondent has proceeded in the manner required by law, and "scrupulously enforce[s] all legislatively mandated CEQA requirements." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) The court accords much greater deference to Respondent's factual determinations and conclusions, upholding them if they are supported by substantial evidence. (*Vineyard Area Citizens*, supra, 40 Cal.4th at 435; *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 275.)

Substantial evidence "means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. (14 CCR §15384.) It includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (*Id.*) The substantial evidence standard is "highly deferential." (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 984.)

Under the substantial evidence test, the court “must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision.” (*Id.*) It must also “resolve reasonable doubts in favor of the administrative finding and decision.” (*Laurel Heights Improvement Assn. of San Francisco v. Regents* (1988) 47 Cal.3d 376, 393.) The court “may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable.” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) “A court's task is not to weigh conflicting evidence and determine who has the better argument. These questions are left to the discretion of the agency and its environmental consultants; it is they who decide how best to prepare an EIR to achieve CEQA’s informational purpose.” (*San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 12.)

Petitioners argue their CEQA claim presents “pure questions of law” which the Court reviews de novo. (Memo., p. 29.) Petitioners maintain the following claims are procedural violations, and therefore fall within the de novo standard: that Respondent “(1) segmented and piecemealed its CEQA analysis by redefining the scope of the Project to exclude many component parts; (2) omitted the evaluation of significant new Project impacts and alternatives in its Supplemental EIR; and (3) refused to assume lead agency status as required by the CEQA regulations.” (*Id.*)

Respondent and Poseidon argue the CEQA claim is subject to the substantial evidence standard. “An agency’s determination to proceed under CEQA’s additional environmental review procedures after an initial EIR has been prepared and certified for a project (Public Resources Code, § 21166), as occurred here, is reviewed under the deferential substantial evidence standard.” (Resp. Opp., p. 14)(citing to *Friends of the College of San Mateo Gardens v. San Mateo Community College Dist.* (2016) 1 Cal.5th 937, 952-53.)

In *College of San Mateo* the Court stated that

[F]or purposes of determining whether an agency may proceed under CEQA's subsequent review provisions, the question is not whether an agency's proposed changes render a project new in an abstract sense. Nor does the inquiry turn on the identity of the project proponent, the provenance of the drawings, or other matters unrelated to the environmental consequences associated with the project. (citation.) Rather, under CEQA, when there is a change in plans, circumstances, or available information after a project has received initial approval, the agency's environmental review obligations “turn[] on the value of the new information to the still pending decisionmaking process.” (citation.) If the original environmental document retains some informational value despite the proposed changes, then the agency proceeds to decide under CEQA's subsequent review provisions whether project changes will require major revisions to the original environmental document because of the involvement of new, previously unconsidered significant environmental effects.

...

[W]hether an initial environmental document remains relevant despite changed plans or circumstances—like the question whether an initial environmental document requires major revisions due to changed plans or circumstances—is a predominantly factual question. It is thus a question for the agency to answer in the first instance, drawing on its particular expertise. (citation.) A court's task on review is then to decide whether the agency's determination is supported by substantial evidence; the court's job ““is not to weigh conflicting evidence and determine who has the better argument.”” (citation.)

(*Id.* at 951-53.)

In *City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526, the appellant argued a “supplemental” EIR was insufficient, and that the county should have prepared a “subsequent” EIR. (*Id.* at 538.) The Court noted the applicable regulatory language allowed an agency to “choose” whether to proceed by way of “supplemental” or “subsequent” EIR, making it a discretionary decision tested under a reasonableness standard. (*Id.* at 539-40.) The court also noted the appropriate judicial inquiry was into the substance of the EIR, not its title. The Court concluded the county did not abuse its discretion in preparing a “supplemental” EIR. (*Id.*)

The Court agrees with Respondent that the question of whether the initial EIR remains relevant despite changed plans is subject to a substantial evidence review. The Court also agrees with Petitioner that the determination as to what steps Respondent was legally required to take pursuant to CEQA after making its factual determination (should the Court find the factual determination is supported by substantial evidence) is a question of law for the Court to review de novo.

#### B. Public Trust claim

Petitioners assert their public trust claim poses a question of law to be reviewed de novo. (Memo., p. 30)(citing *Citizens for E. Shore Parks v. California State Lands Comm.* (2011) 202 Cal.App.4th 549, 573.) Respondent maintains the Court’s review is limited to “was [the Commission’s decision] arbitrary and capricious or entirely lacking in evidentiary support or whether it failed to follow appropriate procedures.” (Oppo., p. 15)(citing *World Bus. Acad. v. California State Lands Comm.* (2018) 24 Cal.App.5th 476, 509.)

In *Citizens for East Shore Parks*, the court noted the issue was whether the Land Commission “failed to consider other public trust uses and to impose conditions mitigating impacts on those uses to the greatest extent possible – in other words, plaintiffs claim the Lands Commission failed to comply with asserted procedural requirements of the public trust doctrine. This is a legal issue subject to de novo review.” (*Id.* at 573.)

In *World Business Academy*, the plaintiffs claimed the staff never performed the factual evaluation necessary to make a decision on public trust. (24 Cal.App.5th at 509.) The court found the “staff report adopted by the Commission explicitly analyzed the public trust doctrine.” (*Id.*) The court noted that the Commission “considered the facts before it, citing record evidence while balancing the public trust rights to navigation, and environmental protection against the

public need for efficient electrical production. This review was not arbitrary, capricious, or procedurally irregular.” (*Id.* at 509-10.)

The Court finds the appropriate standard in determining whether the Commission violated the public trust doctrine *substantively* is whether the Commission’s decision was arbitrary and capricious or entirely lacking in evidentiary support or whether it failed to follow appropriate procedures. To the extent Petitioners’ claim is that the Commission failed to comply with the *procedural* requirements of the public trust doctrine, the Court will review that issue *de novo*.

### **III. Discussion**

#### **A. Request for Judicial Notice and Objections**

The Court notes at the outset of this discussion that although the existence of a document may be judicially noticeable, the truth of statements contained in the documents is not subject to judicial notice if those matters are reasonably disputable. (*Freemont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113.)

Poseidon has filed a request for judicial notice concerning two documents, Exhibits A and B. Petitioners have objected to Exhibit B. The Court has reviewed the documents and finds judicial notice is appropriate as to Exhibit A, but not as to Exhibit B. Accordingly, the request is **GRANTED** as to Exhibit A, and **DENIED** as to Exhibit B.

Respondent and Poseidon have filed joint objections to portions of Petitioners’ reply brief presenting new arguments regarding the sufficiency of the Commission’s environmental analysis. It is generally improper for a party to introduce evidence (or argument) for the first time on reply. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308; *Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794 FN3; *Landis v. Pinkertons* (2004) 122 Cal.App.4th 985, 993. ) Accordingly, the Court will not consider any arguments made by Petitioners for the first time on reply.<sup>2</sup>

#### **B. CEQA Statutory Framework**

A project is defined by Public Resources Code section 21065 as, an activity which may cause direct or indirect physical change in the environment and which is an activity carried out by a public agency, an activity approved by a public agency, or an activity funded by a public agency. In considering what activity constitutes a project, the Court is to consider “the whole of an action” that may directly or ultimately physically change the environment and includes the

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<sup>2</sup> For instance, for the first time on reply, Petitioners make arguments regarding alternate sites, splitting the facility’s capacity between subsurface and open-ocean intake, and reduced facility size. (Reply at 18.) As discussed at the hearing, Petitioners’ principal contention is that the Commission’s environmental analysis and documents are insufficient. Therefore, the Court finds no justifiable grounds for Petitioners’ omission of these arguments (which appear to relate to the sufficiency of the Commission’s environmental analysis) from their opening brief. The Court shall not consider such arguments raised for the first time on reply.

overall activity that is being approved. (14 CCR §15378.) The whole of the project may be subject to several discretionary approvals by governmental agencies. (*Id.* at subd. (c).)

If a state agency is considering approval of a project that is subject to CEQA, then it must prepare an Environmental Impact Report (“EIR”) if the project “may have a significant effect on the environment.” (Pub. Res. Code § 21100).

A CEQA “lead agency” is the “public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.” (Pub. Res. Code § 21067.) A “responsible agency” is a “public agency, other than the lead agency, which has responsibility for carrying out or approving a project.” (*Id.* at § 21069.) The CEQA guidelines direct the lead agency to prepare the project EIR or negative declaration, which is “final and conclusive for all persons, including responsible agencies.” (14 CCR § 15050.)

Pursuant to the CEQA guidelines, a responsible agency complies with CEQA by considering the EIR prepared by the lead agency and by “reaching its own conclusions on whether and how to approve the project involved.” (14 CCR § 15096, subd. (a).) If the responsible agency “believes that the final EIR ... prepared by the lead agency is not adequate for use by the responsible agency, the responsible agency must either:

- (1) Take the issue to court within 30 days after the lead agency files a notice of determination;
- (2) Be deemed to have waived any objection to the adequacy of the EIR or negative declaration;
- (3) Prepare a subsequent EIR if permissible under Section 15162; or
- (4) Assume the lead agency role as provided in Section 15052(a)(3).” (*Id.* at subd. (e).)

When an EIR has been completed for a project, no “subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available. (Pub. Res. Code § 21166.)

This language is tracked by section 15162 of the CEQA guidelines:

- (a) When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless the lead

agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant, environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
  - (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
  - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
  - (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
  - (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative. (14 CCR § 15162.)

A responsible agency is to assume the role of lead agency, “when any of the following conditions occur:

- (1) The lead agency did not prepare any environmental documents for the project, and the statute of limitations has expired for a challenge to the action of the appropriate lead agency.
- (2) The lead agency prepared environmental documents for the project, but the following conditions occur:
  - (A) A subsequent EIR is required pursuant to Section 15162,
  - (B) The lead agency has granted a final approval for the project, and

(C) The statute of limitations for challenging the lead agency's action under CEQA has expired.

(3) The lead agency prepared inadequate environmental documents without consulting with the responsible agency as required by Sections 15072 or 15082, and the statute of limitations has expired for a challenge to the action of the appropriate lead agency. (14 CCR 15052.)

A lead or responsible agency may choose to prepare a supplement to an EIR rather than a subsequent EIR if:

(1) Any of the conditions described in Section 15162 would require the preparation of a subsequent EIR, and

(2) Only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation. (14 CCR § 15163.)

The supplement need only contain “the information necessary to make the previous EIR adequate for the project as revised.” (*Id.* at subd. (b).)

### C. Piecemealing and Lead Agency Status

Petitioners contend the modifications proposed by Poseidon as part of the 2017 Lease Amendment constitute “substantial changes” that require “major revisions of the previous EIR” sufficient to trigger the section 15162 requirement for preparation of a subsequent EIR. Petitioners also contend these modifications trigger the section 15052 subdivision (a)(2) requirement that the responsible agency (in this case, the Commission) assume the role of lead agency in the original lead agency’s absence. Accordingly, Petitioners contend the Commission violated CEQA when it instead prepared a supplement to the EIR addressing only the proposed lease modification terms, instead of the major modifications to the entire desalination plant project Petitioners contend are being made outside of those proposed in the 2017 Lease Amendment.<sup>3</sup>

The Commission and Poseidon argue the Commission properly made a determination pursuant to section 15163 that the 2010 EIR retained informational value except to the extent it did not consider the “offshore pipeline modifications” proposed in the 2017 Lease Amendment.

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<sup>3</sup> As discussed at the hearing, Petitioners’ opening brief includes extensive arguments regarding the Commission’s failure to prepare a *subsequent* EIR as opposed to a *supplemental* EIR, and the Commission’s failure to assume *lead* agency status under CEQA. In response to the Court’s questions, Petitioners agreed that their principal contention is that the Commission’s environmental analysis and documents are insufficient under CEQA and that the primary inquiry in this case is whether or not the original EIR and supplemental EIR are collectively sufficient. As stated by Petitioners at the hearing: “[T]he discussion of the lead agency principle, for example, was to provide again just the background CEQA framework that confirms that what was required in this case in preparing a supplemental review is a comprehensive update of the document. . . . Petitioners are not concerned with the name of the document. We are not particularly concerned with the official designation of agencies. We are concerned with the completion of this document, and its ability to inform agencies in the public. And this document on the desalination piece simply fails to do that.” (Reporter’s Transcript at 20:25-21: 13.)

As these modifications necessitated only “minor additions or changes” to the 2010 EIR to make it “adequately apply to the project in the changed situation” the Commission was only required to prepare a supplement to the EIR, and consequently also did not need to become the Project’s lead agency.

Petitioners argue the “project” the Commission should have considered as part of its 2017 review is the “construction and operation of a regional desalination facility, not mere wording changes in a tidelands lease. And the ‘whole’ of the proposed action includes all operations, from the intake of seawater on the tidelands to its subsequent processing and ultimate injection into the groundwater aquifer.” (Memo., p. 32.) Petitioners essentially contend the Project in its entirety is changed, and it was improper for the Commission to consider the 2017 Lease Amendment in absence of a reconsideration of the entire regional desalination facility.

In support of this assertion, Petitioners cite to numerous cases discussing improper piecemealing of projects to avoid complete CEQA analysis. “We hold that an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. Absent these two circumstances, the future expansion need not be considered in the EIR for the proposed project.” (*Laurel Heights Improv. Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 396. “There is no dispute that CEQA forbids ‘piecemeal’ review of the significant environmental impacts of a project... Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal... and weigh other alternatives in the balance.” (*Berkeley Keep Jets over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1358.)

The Commission argues the “whole of the action” was already analyzed via the 2010 EIR. The Commission found the “Findings of Fact and Statement of Overriding Considerations for the portion of the Huntington Beach Desalination Plant Project within the Commission’s jurisdiction... remain valid are incorporated” into the Supplemental EIR. (AR 9123.) Respondent cites to *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467 for its contention that supplemental review of only the “incremental differences between the original project and the modifications” is appropriate.

In *Benton*, the real party in interest sought county approval for a winery on its property. (226 Cal.App.3d at 1473.) The real party had previously obtained a mitigated negative declaration in connection with the project, and subsequently sought to relocate the winery on the property after acquiring an adjoining 120-acre parcel. The court found the winery, “had already survived environmental review. The only item subject to board approval was modification of the original permit to allow relocation of the winery building on the enlarged site. Therefore we must evaluate the board’s environmental review of the modification.” (*Id.* at 1482.)

The Court finds that Petitioners’ argument appears to be that because the intake and discharge infrastructure analyzed in the Supplemental EIR is an “integral part of the seawater desalination Project” the Commission was under an obligation to engage in a re-do of the EIR for

the entire project. (Memo., p. 34.)<sup>4</sup> The Court is not persuaded by Petitioners' argument. It is undisputed in this matter that an EIR was prepared in 2010 for the "Seawater Desalination Project at Huntington Beach." Thus, the Project has *already* been subjected to CEQA review, and the time to challenge the 2010 EIR has passed. The issue is not, whether the Commission engaged in improper piecemealing with regard to the previously studied Project, but instead, is whether one or more of the following events has occurred:

- (d) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
- (e) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
- (f) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available. (Pub. Res. Code § 21166, see also 14 CCR § 15162.)

Or, in the alternative, whether it was appropriate for the Commission to prepare a supplement to the EIR on the basis that "only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation." (14 CCR § 15163.) The Commission's factual determination that such circumstances existed is subject to substantial evidence review. Ultimately, as noted earlier, it is the sufficiency of the environmental analysis contained in the documents that is at issue in this case.

Petitioners argue that "major revisions of the EIR are necessary" to address the following "substantial changes and new information:"<sup>5</sup>

1. *Will the one-millimeter screens Poseidon is installing comply with the "best feasible technology" requirement of California's new desalination regulations?*

In support of this argument, Petitioners cite to the Supplemental EIR's statement as follows:

[T]he Santa Ana RWQCB, in coordination with SWRCB [is] the agency designated under the Desalination Amendment to determine, on a project- and site-specific basis and in consultation with SWRCB, the best available site, design, technology and mitigation measures for the [Project]... the RWQCB is currently conducting the Water Code section

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<sup>4</sup> Petitioners also make arguments about statements made in responses to comments that Poseidon has a "vested right to use the subsea pipelines for seawater desalination through August 7, 2026." (AR 5535.) Petitioners assert Poseidon does not have a vested right to construct a modified project, and that Poseidon's right to build the original project was on the verge of expiring. (AR 27.) However, Petitioners do not demonstrate that this "vested right" discussion itself impacts the sufficiency of the Supplemental EIR, and the language Petitioners rely on to argue Poseidon was going to lose rights under the 2010 Lease Amendment did not automatically terminate Poseidon's Lease rights, it gave the Commission the option to terminate. Again, the Court finds this discussion is not relevant to the Court's evaluation of the appropriate CEQA procedure or the adequacy of the Supplemental EIR.

<sup>5</sup> Petitioners' specific arguments regarding the substantive content of the EIR documents do not appear in Petitioners' opening brief until pages 40-41. The Court next addresses each of these arguments.

13142.5, subdivision (b) analysis which could result in a change to Poseidon's site, design, technology, or mitigation measures needed to conform to the Desalination Amendment...if the RWQCB identifies any changes, new CEQA or CEQA functional equivalent analysis would need to be conducted pursuant to such action. Such changes or alternations are within the responsibility and jurisdiction of the Santa Ana RWQCB, not the Commission. (AR 5740.)

Generally, with regard to the sufficiency of the Supplemental EIR's analysis, the Commission asserts the core of the analysis is in Chapter 4, titled "Environmental Setting and Impact Analysis." (AR 6244.) The Commission argues Chapter 4 provides a comprehensive analysis of the ten environmental resource areas determined to be potentially affected by the project modifications including, "ocean water quality and marine biological resources, aesthetics, air quality, cultural resources, cultural resources – tribal, greenhouse gas emissions, hazards and hazardous materials, noise and vibration, recreation, transportation – marine." (Oppo., pp. 18-19, AR 6144-47.)

With regard to the one-millimeter screens, the Commission argues the Supplemental EIR *did* analyze marine impacts, including the requirements of the Desalination Amendment, chemical leaching that could occur from the stainless steel screens, and potential marine biology impacts due to both impingement and entrainment associated with the screens. (AR 6267-69, 6296-97, 6300-6302.) The Commission asserts the Supplemental EIR extensively describes the regulatory requirements of the Desalination Amendment and how the pipeline modifications meet the regulatory requirements. (*Id.*, see also 6158-59, 6160, 6180-82, 5537, 5547.) The Supplemental EIR also incorporates by reference the 2015 Substitute Environmental Document the State Water Board prepared during its development of the Desalination Amendment to analyze the potential environmental impacts associated with the operation of seawater desalination facilities, including the use of wedgewire screens and multiport diffusers. (AR 6272-73, 6303-04, 6159.)

The Commission stresses Petitioners' obligation is to identify this analysis and affirmatively show that there was no substantial evidence to support the Supplemental EIR's findings and conclusions. (See *California Native Plant Soc'y v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626)(finding a petitioner must "set forth in its challenge to the EIR all of the evidence material to the [agency's] finding, then show that that evidence could not reasonably support the finding.")

Poseidon also argues, "[c]onsistent with the mandates of the Desalination Amendment, Poseidon proposed technological enhancements to the Project, and the Commission adequately analyzed the environmental impacts associated with those enhancements." (See AR 5520-5522, 5537-38, 6245, 6258, 6272-73, 6158, 6180-81, 6343.) Further, the Substitute Environmental Document cites numerous studies concerning the effectiveness of wedgewire screens, and the State Water Board determined that screened intakes are allowable when subsurface intakes are infeasible. (AR 17050, 17053-56.)

The Court finds the Supplemental EIR did analyze the one-millimeter screens in connection with the Desalination Amendment. The Court further finds Petitioners have failed to demonstrate that this analysis is not supported by substantial evidence. (See *California Native Plant Soc'y v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626) This failure to so demonstrate is fatal to this portion of Petitioners' claim.

2. *Poseidon is redesigning its water distribution system such that the treated water will be injected into a local aquifer.*

In support of this assertion, Petitioners cite to a document titled "Agenda Item Submittal" with the subject, "Workshop #3 – Proposed Poseidon Resources City of Huntington Beach Ocean Desalination Project Distribution Options." (AR 20258.) The summary provides that workshops were held with the "Board" to discuss options for distributing the desalination water. The attachments are "presentation material" and the recommendation is to "direct staff to further investigate and refine Distribution Option #6." (*Id.*) The page Petitioners cite is a page titled, "Recharging Poseidon Water into the Groundwater Basin," and it discusses possible pros and cons of this option. (AR 20289.)

The Court agrees with the Commission and Poseidon that this evidence does not support a finding that at the time the Commission prepared the Supplemental EIR, Poseidon had modified the Project such that it would be injecting the treated water into a local aquifer. Accordingly, the Court finds that Petitioners have not sufficiently demonstrated that the Commission abused its discretion when it determined this potential change was speculative at the time, and not subject to review as part of the 2017 Lease Amendment studied by the Supplemental EIR.

3. *Poseidon is modifying the Project to extend its operating life from the 30 years evaluated in the 2010 EIR to 50-60 years.*

In support of this assertion, Petitioners cite to a memorandum from the California Coastal Commission to the Commission, dated May 11, 2017, regarding "Comments in support of CSLC expanding its CEQA review of the proposed Poseidon desalination project." (AR 26607.001.) The memorandum's author, Tom Luster, asserts that Poseidon's "current proposal is for a 50-60 year operating life." He indicates this is based on the "2015 Terms Sheet between Poseidon and the Orange County Water District. "Although the Term Sheet is non-binding (in that OCWD is not required to eventually agree to purchase water), elements of the Term Sheet are now part of Poseidon's project proposal and are different than the project evaluated in the 2010 CEQA review." (*Id.* at FN 1.) Petitioners also cite to the subject Term Sheet. (AR 16966, 16985.)

This extra project life, Petitioners contend, "increases the adverse effects of the project, including on marine life. The [Commission] did not address this issue as to marine effects and barely addressed the related public comments. (Memo., p. 40.)

Poseidon argues neither the 2010 EIR nor the 2017 Supplemental EIR placed a cap on the Project at 30 years. Poseidon also argues the Commission's Executive Officer provided at the

2017 Lease Amendment hearing that the amendment “does not change the original lease term for [Project] operation.” The lease terminates in 2026. (AR 10148.)

The Court finds Petitioners have failed to demonstrate sufficiently that the Project is, in fact, being modified from one with a 30 year cap, to one with a 50-60 year cap. Petitioners acknowledge the cited term sheet is not binding, and the evidence cited does not support a finding that there is a substantial change in the project requiring major revisions of the environmental impact report, and that such a change was not adequately studied in the 2017 Supplemental EIR.

4. *Water demand forecasts have dropped since 2010, and more alternative local sources are now available, changing the need for the Project.*

In support of this assertion, Petitioners cite, among other things, a document from the Orange County Water District titled “Possible Future OCWD Service Territory Water Supply Sources.” (AR 30627.) Petitioners argue the Commission should have considered water supply options other than water supplied by the proposed desalination plant.

The Commission argues that “Coastkeeper not only forfeits its claims by selectively citing only to statements in the record that support its argument, it fails to explain what additional analysis of impacts and mitigation measures CEQA requires. Under CEQA, the purpose and need of a project is relevant only to the description of the project objectives, which helps guide the development of a reasonable range of alternatives, and does not implicate the impacts analysis.” (Oppo., p. 25.)

Poseidon argues the Orange County Water District has repeatedly affirmed its need for the Project, contrary to Petitioners’ assertions. Poseidon cites testimony from the Orange County Water District as part of the hearing on the 2017 Lease Amendment. The President of the Board of Directors testified that he was there to “urge” the Commission to approve the Project supplemental EIR and lease amendment. (AR 9948.) Further, “desalinization provides the district with a high quality, locally controlled, and drought-proof source that reduces the demand on imported water sources that are climate driven.” (AR 9950.) He also stated, “the desalinated water could be used to augment supplied we inject into our Talbert Seawater Barrier to help prevent seawater intrusion into the groundwater basin and to buffer against any reductions in base flows from the Santa Ana River. As the slide points out, we have historically taken more than our adjudicated rights to the Santa Ana River, and cannot be certain that water will always - that water will always be there for us.” (AR 9951.) He further stated all of the water produced by the Project would be used. (AR 9958.)

The Court finds the evidence before it does not sufficiently demonstrate that the need for the Project has changed such that further environmental review was necessitated. The Court finds the record contains substantial evidence that supports a finding<sup>6</sup> that the need for the Project remained at the time of the 2017 Lease Amendment.

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<sup>6</sup> The Court also agrees with Respondent that Petitioners have failed to cite the evidence that is not in support of their position. Such a failure is fatal to a claim. (*South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 331; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266.)

5. *New studies since 2010 show that subsurface intakes to mitigate the Project's environmental impacts may be available.*

In support of this assertion, Petitioners cite a document titled, "Staff Report: Regular Calendar," from the California Coastal Commission, dated June 6, 2013. The cited page discusses "subsurface intakes generally" and discusses different site requirements for such intakes. As part of the discussion it provides, "[i]n many ways, the beach and offshore areas of Huntington Beach exhibit what appear to be ideal characteristics for subsurface feasibility, as the area consists of broad, relatively uninterrupted sandy bottom with currents that help maintain seafloor conditions that are useful for subsurface intakes." (AR 8546.)

Petitioners also cite a document titled, "Huntington Beach Seawater Desalination Facility Groundwater Model Evaluation," dated September 23, 2016. (AR 31583.) Petitioners contend this study showed "that subsurface slant wells may be feasible in the area and would reduce detrimental saltwater intrusion, contrary to the EIR's findings." (Memo., p. 41.)

Poseidon argues the Commission as well as other state agencies and experts have determined that subsurface intakes at the Project site are infeasible. (AR 6415, 21323, 21408-411, 21062-66.)

The Commission argues that Petitioner fails to cite or discuss the Supplemental EIR's discussion of subsurface intakes, including the conclusion of the expert panel report, and the Commission's rationale for eliminating subsurface intake alternative from further detailed analysis because the alternatives were not potentially feasible. (AR 6412-6419, 5547-5549.)

The Court finds the Supplemental EIR adequately discusses subsurface intakes, and that the evidence before the Commission supported a finding that subsurface intakes at the Project site are infeasible. The Court also finds that, again, Petitioners have failed to identify the evidence favorable to the other side and demonstrate why it is lacking. Such a failure to do so is fatal. (*Defend the Bay*, 119 Cal.App.4th at 1266.)

6. *Impacts on the connectivity of California's new marine protected area network have not been analyzed conclusively.*

In support of this assertion, Petitioners cite the Supplemental EIR response to comments:

As noted in section I.4.4, *Santa Ana Regional Water Quality Control Board (RWQCB: 2006 to Date & State Water Resources Control Board (SWRCB): 2016-2016*, in its comment letter on this Draft Supplemental EIR (comment A9-1), RWQCB staff states that the Santa Ana Water Board, not the Commission, "is the agency responsible for issuing the National Pollutant Discharge Elimination System (NPDES) permit for the discharge of brine and other wastes from the Project to the Pacific Ocean and for making a determination regarding the Projects consistency with Water Code section 13142.5(b) (CWC section 13142.5(b))." This will include a determination or [sic] whether Poseidon's

proposal for the entire Huntington Beach seawater desalination facility (not simply the offshore modifications to the Commission's 2010 lease) avoids or minimizes impacts to MPAs and all marine resources through best available siting, design, and technology. (AR 5564.)

Poseidon argues the purported changes in marine protection requirements were fully analyzed in the Supplemental EIR. With regard to the Marine Protected Areas, Poseidon cites Figure 2-1 which is a map of California and includes a designation of areas that are Marine Protected Areas. (AR 6786.) Poseidon also cites the Supplemental EIR's response to comments providing that,

Section 4.1.1.3 of the Supplemental EIR includes a map of MPAs and ASBSs and identifies MPAs and ASBSs near the Lease Modification Project site; the map indicates the nearest MPA to the Lease Modification Project is the Bolsa Chica State Marine Conservation Area, which is approximately 4.3 miles northwest, and the nearest Area of Special Biological Significance is located more than 9 miles southeast and down current of the Project Site... (AR 5561.)

Poseidon also cites section 4.1.1.3, which is titled, "Marine Protected Areas and Areas of Special Biological Significance" which states, in part, that "[m]ost of the larvae anticipated to be within the Lease Modification Project impact area are primarily from open ocean or soft-bottom habitats and not fish species associated with the kelp and rocky reef habitat inside the Southern California coastal MPA reserve network." (AR 6267.) In support of this conclusion, Poseidon cites a report prepared by Poseidon in May 2015 titled "Assessment of Entrainment Effects Due to the Proposed Huntington Beach Desalination Plan on State Marine Protected Areas." (AR 22108-22110.)

The Court agrees with Poseidon that the 2017 Supplemental EIR *did* analyze potential impacts to MPAs, and Petitioners have failed to identify the evidence favorable to the other side and demonstrate why it is lacking. Such a failure to do so is fatal. (*Defend the Bay*, 119 Cal.App.4th at 1266.) The Court also finds substantial evidence supports the 2017 Supplemental EIR's analysis and consideration of Marine Protected Areas.

#### D. Public Trust Doctrine

Lastly, Petitioners argue the Commission violated its fiduciary duty under the public trust doctrine to "consider and balance competing uses of the public tidelands and to preserve the resources they support." (Memo., p. 44.) Petitioners contend the proposed Project will entrain and kill hundreds of millions of fish larvae each year, and that the Commission "did not undertake the kind of careful consideration and balancing mandated by the courts." (Memo., p. 46.) Petitioners argue that the Commission should have considered the Project versus a baseline of "no project."

The Commission argues it "thoroughly considered these impacts when it approved the 2017 Lease Amendment and concluded that the Facility would not result in significant adverse impacts to marine life or to other public trust values, including navigation, waterborne



**CERTIFICATE OF SERVICE BY MAILING**  
**C.C.P. Sec. 1013a(3))**

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of January 8, 2019 **RULING ON SUBMITTED MATTER RE: PETITION FOR WRIT OF MANDATE** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

Christina Morkner Brown  
Nicole Rinke  
Department of Justice  
Office of the Attorney General  
Public Rights, Land Law Section  
1300 I Street  
P O Box 944255  
Sacramento, CA 94244-2550

Deborah A. Sivas  
Alicia E. Thesing  
Isaac Cheng  
ENVIRONMENTAL LAW CLINIC  
Mills Legal Clinic at Stanford Law School  
Crown Quadrangle  
559 Nathan Abbott Way  
Stanford, CA 94305-8610

Jennifer K. Roy  
Christopher W. Garrett  
LATHAM WATKINS LLP  
12670 High Bluff Drive  
San Diego, CA 92130-2071

Winston P. Stromberg  
LATHAM WATKINS LLP  
355 South Grand Ave., Suite 100  
Los Angeles, CA 90071-1560

Dated: January 8, 2019

Superior Court of California,  
County of Sacramento

By:   
E. GONZALEZ,  
Deputy Clerk