

Christopher Garrett
Direct Dial: 858.523.5458
Christopher.garrett@lw.com

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

LATHAM & WATKINS LLP

FIRM / AFFILIATE OFFICES

Beijing	Moscow
Boston	Munich
Brussels	New York
Century City	Orange County
Chicago	Paris
Dubai	Riyadh
Düsseldorf	San Diego
Frankfurt	San Francisco
Hamburg	Seoul
Hong Kong	Shanghai
Houston	Silicon Valley
London	Singapore
Los Angeles	Tokyo
Madrid	Washington, D.C.
Milan	

File No. 036182-0015

January 9, 2020

VIA EMAIL: hope.smythe@waterboards.ca.gov

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

Re: Tentative Order 8-2020-0005 – Additional Information Requests

Dear Ms. Smythe:

On behalf of our client, Poseidon Water (“Discharger”), Latham & Watkins is writing in response to your January 8, 2020 letter requesting additional information in support of the Regional Board’s Tentative Order 8-2020-0005 and California Water Code section 13142.5(b) and Ocean Plan Amendment compliance determination and findings.

The Discharger looks forward to working with the Regional Board staff to provide the requested responses to the questions raised by Board members during the December 6, 2019 workshop and to help further perfect the Tentative Order’s administrative record.

Nevertheless, the Regional Board and staff should note that there was no new information introduced nor new arguments raised during the December 6, 2019 workshop by desalination opponents that were not previously presented in writing or orally during the Regional Board’s four-year permit amendment and renewal application process. This application process has involved five public workshops, including a June 14, 2019 Board workshop dedicated exclusively to the proposed Huntington Beach Desalination Plant’s (the “Project”) compliance with the Ocean Plan Amendment’s “identified need for desalination” (Ocean Plan, Chapter III.M.2.b.(2)). As such, the Regional Board staff has all the information in its possession needed to finalize the Order and does not require additional information from the Discharger to address Board member questions and proceed on schedule to the planned April 3, 2020 hearing.

Furthermore, the issues identified in your letter raised by Project opponents related to the cost of water, intended use and potential water supply alternatives were the same issues previously addressed by the State Water Board during the 5-year Ocean Plan Amendment process, and these issues were determined to be beyond the Water Board’s regulatory scope by the State Water Board. Specifically, the State Water Board has already flatly rejected previous attempts by desalination opponents to use the Ocean Plan Amendment to usurp local water agency resource management authority:

A goal of the proposed Desalination Amendment is to support the use of ocean water as a reliable supplement to traditional water supplies while protecting beneficial uses. Desalination is another water supply option that can be used in conjunction with other water supplies to ensure areas can meet their water demands. The proposed Desalination Amendment would establish an analytical framework for evaluating proposed desalination projects that would use seawater in order to increase availability of potable water supplies. It is up to water providers to evaluate various supply options and costs and impacts of each to make informed decisions about future supplies. Selecting water supply alternatives at a local, regional, or statewide level is not the State Water Board's role and the State Water Board does not propose to prioritize or rank water supply options on a statewide level. (OPA Staff Report, Appendix H, p. H-7 [emphasis added].)

Further, in its responses to comments on the draft Desalination Amendment, the State Board staff repeatedly rejected this approach:

The economic basis for selecting desalination over other alternatives supplies (e.g. recycling) is not an issue addressed by the proposed Desalination Amendment. Each water provider is responsible for making informed decisions about future conditions to ensure reliability of supplies and affordability for rate payers. Any decision by a water provider to plan for and develop desalination of ocean waters among other potential water supplies is outside the purview of the Water Boards. The intent of the proposed Desalination Amendment, if adopted, is to ensure that aquatic life related beneficial uses are protected if desalination is selected by a water provider. (OPA Staff Report, Appendix H, p. H-399.)

Finally, the State Lands Commission in their Final Supplemental EIR, and Superior Court Judge Sueyoshi, have each confirmed that there is substantial evidence supporting the need for the Project as presented by Poseidon. The arguments by opponents that there were alleged flaws in Poseidon's demonstration of "need" for the Project have been flatly rejected by both the State Lands Commission and by the California courts. As stated in Judge Sueyoshi's 2019 decision:¹

Poseidon argues the Orange County Water District has repeatedly affirmed its need for the Project, contrary to Petitioners'

¹ *Cal. Coastkeeper Alliance v. Cal. State Lands Com.* (Super. Ct. Sacramento County, 2019, No. 2736) at p. 15.

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 that the need for the Project remained at the time of the 2017 Lease Amendment.

While opponents of the Project have appealed Judge Sueyoshi's decision on other grounds to the Court of Appeal, they have not appealed the Judge's decision that substantial evidence continues to support the need for the Project as demonstrated by Poseidon.

As you know, tremendous independent due diligence and introspection went into the Regional Board staff's determination that the Project complies with the spirit and intent of the Ocean Plan Amendment Chapter III.M.2.b.(2). We urge the Regional Board to reject the latest attacks by the opponents on this aspect of the staff's proposed tentative order. The Discharger will further assist Regional Board staff to address recent Board member questions about the cost of water, intended use and potential water supply alternatives and other issues raised in your January 8, 2020 letter that are beyond the scope of California Water Code section 13142.5(b) and the Ocean Plan Amendment compliance determination.

Sincerely,

Christopher W. Garrett

Christopher W. Garrett
of LATHAM & WATKINS LLP

cc: (via email)
Santa Ana Water Board

LATHAM & WATKINS LLP

Teresita Sablan, State Water Resources Control Board

Teresita.Sablan@waterboards.ca.gov

Marleigh Wood, State Water Resources Control Board

Marleigh.Wood@waterboards.ca.gov

Jayne Joy, Santa Ana Regional Water Quality Water Board

Jayne.Joy@waterboards.ca.gov

Mark Smythe, Santa Ana Regional Water Quality Control Board

Mark.Smythe@waterboards.ca.gov

Julio Lara, Santa Ana Regional Water Quality Control Board

Julio.Lara@waterboards.ca.gov

Lauma Willis, Santa Ana Regional Water Quality Control Board

Lauma.Willis@waterboards.ca.gov

Terri Reeder, Santa Ana Regional Water Quality Control Board

Terri.Reeder@waterboards.ca.gov

Daniel Ellis, State Water Resources Control Board

Daniel.Ellis@waterboards.ca.gov

Leslie Hart, State Water Resources Control Board

Leslie.Hart@waterboards.ca.gov

Jonathan Bishop, State Water Resources Control Board

Jonathan.Bishop@waterboards.ca.gov

Mike Markus, Orange County Water District

mmarkus@ocwd.com

John Kennedy, Orange County Water District

jkennedy@ocwd.com

Robert Hunter, Municipal Water District of Orange County

rhunter@mwdoc.com

Karl Seckel, Municipal Water District of Orange County

kseckel@mwdoc.com

Tom Luster, California Coastal Commission

Tom.Luster@coastal.ca.gov

Sean Bothwell, California Coastkeeper

sbothwell@cacoastkeeper.org