

Supporting Document No. 12

LATHAM & WATKINS LLP

Atlanta	Washington, D.C.
Barcelona	New Jersey
Brussels	New York
Chicago	Northern Virginia
Doha	Orange County
Dubai	Paris
Frankfurt	Rome
Hamburg	San Diego
Hong Kong	San Francisco
London	Shanghai
Los Angeles	Silicon Valley
Madrid	Singapore
Milan	Tokyo
Moscow	Washington, D.C.

January 21, 2009

File No. 036182-0005

Catherine Hagan, Esq.
Senior Staff Counsel
Office of Chief Counsel
State Water Resources Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

via email and U.S. mail, return receipt requested

Re: *Poseidon Resources Corporation Carlsbad Desalination Plant Project*, February 11, 2009 Meeting to Consider Poseidon's Marine Life Mitigation Plan

Ms. Hagan:

Thank you for your January 9, 2009 email to me inviting us to submit to you in writing questions we may have regarding the San Diego Regional Water Quality Control Board's ("Regional Board") review of Poseidon's Resources Corporation's ("Poseidon") Marine Life Mitigation Plan (the "MLMP"), which has been placed on the agenda for the Regional Board's February 11, 2009 meeting. Please consider this correspondence public comment pursuant to the January 2, 2009 notice for the meeting.¹

As you are aware, the MLMP has been developed per Regional Board direction as an amendment to Poseidon's Flow, Entrainment, and Impingement Minimization Plan ("Minimization Plan"), which was conditionally approved by the Regional Board at its April 9, 2008 meeting, Resolution No. R9-2008-0039. Preparation of the MLMP originally was ordered

¹ Accordingly, this correspondence should be added to the administrative record for the Flow, Entrainment, and Impingement Minimization Plan (conditionally approved April 9, 2008, Resolution No. R9-2008-003), which record was recently submitted to the San Diego Superior Court, Case No. 37-2008-00091983-CU-WM-CTL, in the matter of *Surfrider Foundation v. California Regional Water Quality Control Board, San Diego Region*.

by the Coastal Commission on November 15, 2007, as part of its review of the Desalination Project. Thus, it is not surprising that the Regional Board at its April 9 meeting directed Poseidon to develop the MLMP through a collaborative process involving the various stakeholder agencies, most prominently the Coastal Commission and the Regional Board.

The Coastal Commission approved the MLMP on August 6, 2008, and made the final wording for the MLMP available on or about November 7, 2008. Since the Regional Board's April 9, 2008 conditional approval of Poseidon's Flow, Entrainment, and Impingement Minimization Plan, we have repeatedly reached out to Regional Board staff to ensure that we support the Regional Board process with respect to the many issues associated with developing a specific mitigation plan through the required multi-party, interagency process. Throughout this period, Poseidon has responded to each of staff's requests for additional information and kept staff informed as to the timing of the completion of the MLMP. Staff has replied that its questions had been satisfactorily answered and that the timeline for completion of the Coastal Commission-led process to develop and finalize the MLMP was acceptable. Yet, since we submitted the MLMP to the Regional Board on November 14, 2008, staff has suggested that Poseidon has not been responsive to prior requests for information and asserted that the submittal of the MLMP was not timely.

Unfortunately, staff has not accepted our offers to meet and discuss its comments or concerns. We believe that resuming a face-to-face dialogue between staff and Poseidon is the most productive and efficient way to ensure that staff has the information it needs to make the February 11, 2009 meeting productive and informative for the board members. To that end, as we have indicated in the past with our offers of support and information, we remain committed to working with staff to facilitate the staff report and presentation to the Regional Board members. We extend our offer again to meet with you to discuss any specific concerns you or staff may have and to otherwise assist.

In response to your January 9 email, we submit the following questions:

I. PROCEDURAL QUESTIONS

A. Meeting Procedure

1. Will the February 11, 2009 Regional Board meeting to consider the MLMP be a public meeting like the April 9, 2008 meeting, or, alternatively, an adjudicatory hearing?
2. If the February 11, 2009 meeting will be an adjudicatory hearing, why has the agency changed the procedure from that which was used at the April 9, 2008 meeting?

B. Notice Issues and Purpose of February 11, 2009 Meeting

1. During the April 9, 2008 meeting, you advised the Regional Board that notice for the proceeding was adequate (transcript at pp. 115-116). Has that opinion changed?

2. On December 30, 2008, a notice of public hearing was issued for the February 11, 2009 meeting indicating that the Regional Board would be considering rescission of its April 9, 2008 conditional approval of the Minimization Plan, Resolution No. R9-2008-0039. On January 2, 2009, the Regional Board issued a corrected notice of public hearing stating instead that it would instead be considering whether the MLMP meets the conditions of Resolution No. R9-2008-0039.

a. Why did the Board initially issue a notice indicating that it would be considering rescission of Resolution No. R9-2008-0039?

b. On what basis was rescission considered?

c. On January 12, 2009, after the corrected January 2, 2009 notice, an article was published in Water Desalination Report, Vol. 45, No. 2, in which Brian Kelley, senior engineer for the Regional Board, is quoted as saying that because Poseidon allegedly submitted the draft MLMP one month late, the April 9, 2008 conditional approval of the Minimization Plan may be rendered null and void. In spite of the January 2, 2009 corrected notice indicating that possible rescission was not the purpose of the February 11, 2009 meeting, is the Board nevertheless intending to consider rescission?

II. STAFF'S FEBRUARY 11, 2009 MEETING PREPARATION

A. Informational Needs

Given the staff's participation in the interagency process that generated the MLMP, we would expect staff to have all of the information it needs to reach the merits of the plan. It is clear from the April 9, 2008 hearing transcript (see, e.g., pp. 12 and 114) that staff was satisfied with Poseidon's data submittal. On April 17, 2008, staff sent Poseidon questions, which Poseidon answered on April 30, 2008. On May 1, 2008, the Executive Officer indicated that in light of Poseidon's April 30, 2008 submittal, coupled with the Coastal Commission's independent experts' review of Poseidon's Impingement and Entrainment study, the Regional Board had no further questions regarding the identification of impacts from impingement and entrainment and adequate monitoring data to determine such impacts. Further, in response to Poseidon's inquiry, on January 7, 2009, staff indicated it would let Poseidon know if additional information on the MLMP was needed. No requests for additional information have been received. Consistent, however, with our continuing commitment to ensure that the Regional Board has the information it believes necessary to evaluate the adequacy of the MLMP, please let us know whether you have identified any additional data that you believe you need to reach the merits of the MLMP, or whether you have any open questions about already submitted data that can be answered before the February 11, 2009 meeting.

1. Do you have any outstanding informational needs?

B. General Merits and Substance of the MLMP

During the interagency process, staff did not object or otherwise indicate that it had any unresolved concerns about the merits of the MLMP by the time the Coastal Commission settled on the final language on or about November 7, 2008, so we would not expect that staff would have any unanswered questions at this juncture. The preparation of the MLMP included extensive interagency coordination, including a day-long meeting attended by the Regional Board's Executive Officer and Senior Scientist, Coastal Commission staff, State Lands Commission staff, California Department of Fish & Game, California Department of Transportation, U.S. Fish and Wildlife Service and numerous local agencies. The MLMP was peer-reviewed by the Coastal Commission's Marine Science Advisory Panel consisting of eight scientists affiliated with universities across California. The MLMP was approved by the Coastal Commission (11-1) on August 6, 2008, following a ten-hour hearing attended by Regional Board staff. The State Lands Commission approved the MLMP on August 22, 2008 (3-0) following a four-hour hearing. Coastal Commission settled on final language for the MLMP November 7, 2008.

As directed during this interagency process, the MLMP is a performance-based plan for restoration of 55.4 acres of marine wetlands modeled after the Coastal Commission's success with the wetlands mitigation program for the San Onofre Nuclear Generating Station. As approved, the MLMP:

- Includes 11 pre-approved candidate mitigation sites;
- Allows Poseidon to consider any additional priority sites that may be recommended by California Department of Fish and Game;
- Establishes minimum standards, objectives and requirements for final mitigation site selection;
- Establishes an enforceable schedule for completion of site selection (nine months) and environmental review and permitting (24 months);
- Anticipates the start of construction (six months after approval of the permits);
- Provides objective performance criteria for measuring success of the project (within five years of the start of construction, the constructed wetlands must match habitat values, e.g., biological communities, vegetation, reproductive success, food chain support, density of fish, birds and habitat) within 95% confidence level for four undisturbed wetlands identified by in the MLMP;
- Provides a budget for monitoring and management that includes funding for administration, review and oversight by Coastal Commission staff and the Commission's Marine Science Advisory Panel;
- Provides that monitoring data are to be made available for public review via the internet;

- Provides that the Coastal Commission will receive annual written project status reports and convene periodic public hearings to assess progress and success of the project;
- Authorizes the Executive Director of the Coastal Commission to order remediation to make up in any deficiencies in achieving the performance criteria;
- Provides for up to 55.4 acres of mitigation, a result of the extremely conservative methodology used by the Marine Science Advisory Panel to arrive at that number, an approximately 50% increase in acreage over the methodology typically relied on by the California Energy Commission;
- Provides for various approvals (e.g., site selection, performance, and remediation) by the Executive Director of the Coastal Commission;
- Is such that, once approved by the Regional Board, the MLMP would be equally enforceable by the Regional Board's Executive Officer; and
- Assures enforcement of Poseidon's commitment to implement the amendment of the Plan through the requirements of Regional Board Order R9-2006-0065 and Condition 8 of Poseidon's Coastal Development Permit.

1. Given this extensive process and the Regional Board's participation therein, why does staff's December 2, 2008 letter to Poseidon indicate that the MLMP does not address the Regional Board's prior concerns identified in its February 19, 2008 correspondence?

2. Similarly, why does staff's December 2, 2008 letter state that the MLMP does not address the all the Regional Board's enumerated concerns (a) through (e) identified in paragraph 3 of Resolution No. R9-2008-0039?

3. At this juncture, does staff still have any outstanding, specific questions about the adequacy of the MLMP as developed during the interagency process and approved by the Coastal Commission?

C. Proposed Mitigation Sites

Consistent with the Resolution, Poseidon submitted eleven specific mitigation sites determined during the interagency process and submitted a specific proposal for mitigation at these identified sites. In its December 2, 2008 letter to Poseidon, staff indicated that "the MLMP does not propose a specific mitigation site or a specific proposal for mitigation at an identified site." This letter is not clear in indicating staff's concern with the MLMP.

In the April 4, 2008 Technical Report, staff faulted Poseidon's mitigation planning for seeming to "favor a pre-determined outcome (i.e., mitigation in San Dieguito Lagoon)." In that same Technical Report, and with apparent approval, staff acknowledged that Poseidon was considering mitigation at several possible sites, including Frazee State Beach, Loma Alta Lagoon and Buena Vista Lagoon, in addition to Agua Hedionda Lagoon and San Dieguito Lagoon. The April 4, 2008 Technical Report stated that the adoption of the Minimization Plan was premature because it did not "clearly identify the method for the final selection and agency concurrence of the preferred mitigation alternative." In fact, both prior to the April 9, 2008 conditional approval, and during the interagency process, Poseidon was led to believe that staff viewed a short list of potential sites coupled with a rigorous screening, selection and implementation process that is evaluated against a comprehensive set of objective performance criteria a strength of an appropriate mitigation plan.

1. Is staff now objecting to the MLMP approved by the Coastal Commission and submitted to the Regional Board on the basis that the MLMP did not select one, and only one mitigation site, and reject all other potential mitigation sites, i.e., "lock in" to one site?
2. Does staff believe that Resolution No. R9-2008-0039 required Poseidon to select one and only one site?
3. Why would staff assert this position only now, after promoting a multi-site approach for the last year?
4. The current proposed slate of sites provides Regional Board members an opportunity to offer input as to which site or sites they wish Poseidon to focus upon. Having not objected during the interagency process, which resulted in this particular slate of sites, is staff willing to support the slate of sites currently contemplated?
5. Are there any particular sites staff would like to see deleted or added from the list?
6. In particular, the Executive Officer has indicated that he wishes to de-emphasize siting in Agua Hedionda Lagoon. Is staff in agreement that Agua Hedionda Lagoon is not the preferred mitigation site for Poseidon?

III. TIMING OF MLMP SUBMITTAL

Poseidon submitted the MLMP in final form to the Regional Board on November 14, 2008, seven days after receiving final language from the Coastal Commission staff on November 7, 2008. Since the delay in submission of the final MLMP language to the Regional Board was created by the direction in the Resolution to participate in the interagency process, Poseidon would not expect staff to be troubled by the November 14, 2008 submission date. In addition, the Executive Officer indicated that he preferred to wait for the final wording from the Coastal Commission, rather than receiving a draft MLMP. During the November 12, 2008 Regional Board meeting, a member of the public expressed concern about enforcing the time schedule in the Resolution. In response, the Executive Officer noted that the Regional Board was allowing flexibility in the schedule because the Coastal Commission and other agencies were holding up the approval process, noting also that timeliness may have been impacted by litigation initiated by groups opposing the project. By directing Poseidon to wait to submit a final plan and yet publicly indicating that doing so jeopardizes the April 9, 2008 conditional approval, staff have created an ambiguity.

1. Is staff aware that Poseidon offered the Executive Officer the option to receive the MLMP within the 6-month timeframe, before final language was available from the Coastal Commission staff?

2. Is staff willing to resolve the ambiguity it has created by recommending that the Board take no action against Poseidon due to the timing of the submittal of the MLMP, as such would be manifestly unfair under these circumstances?

IV. CLOSED SESSION ON MLMP

We understand that the Board met in closed session December 10, 2008 regarding the Plan as submitted November 14, 2008.

1. What was the basis for that closed session regarding the submittal of the MLMP?

V. DOCUMENTATION OF INTERAGENCY PROCESS

It is important that the Board be fully apprised of the interagency process directed by its April 9, 2008 resolution. As such, we need access to all of the staff's communications with other agencies regarding the MLMP and the interagency process.

1. May we coordinate with you to obtain access to staff's communications, or will it be necessary for us to make a formal legal demand? We certainly would prefer to avoid the latter given our prior history of working cooperatively together on this Project.

LATHAM & WATKINS^{LLP}

An environmentally sound Project that will provide much needed water resources to Southern California is our common goal, and we believe continued coordination and cooperation between staff and Poseidon is the best way to meet that goal. We look forward to discussing these matters and any other issues that may be of concern to staff at your earliest convenience.

Sincerely,



Christopher W. Garrett
of LATHAM & WATKINS LLP

cc: John Robertus

via email