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VIA MESSENGER AND ELECTRONIC MAIL

January 26, 2009

California Regional Water Quality Control Board,
San Diego Region
Attn: John H. Robertus
Executive Officer
9174 Sky Park Court
San Diego, California

Re: Statement of Procedural Objections and Request for Alternate Procedures at February 11, 2009 Regional Water Quality Control Board Meeting

Dear Mr. Robertus:

On January 23, 2009, the Regional Board issued a notice of its Agenda ("Agenda") for the February 11, 2009 Regional Board meeting. As discussed under Agenda item 6, the Regional Board will consider "whether Poseidon Resources Corporation's Marine Life Mitigation Plan ("MLMP") dated November 14, 2008, satisfies the conditions established in Resolution No. R9-2008-0039, Conditional Approval of Revised Flow, Entrainment, and Impingement Minimization Plan for Poseidon's Carlsbad Desalination Project, or whether failure to satisfy the conditions has rendered the Resolution inoperative by its own terms."

Note C, attached to the Agenda, sets forth the procedures that will be followed by the Regional Board in contested adjudicatory matters when a separate Hearing Procedures Document has not been issued for the agenda item. As the Regional Board has not issued a separate Hearing Procedures Document for Agenda item 6, we understand that the Regional Board proposes to consider Poseidon Resources Corporation's ("Poseidon") MLMP under the procedures set forth in Note C. Note C states that, "The Regional Board follows the procedures established by the State Water Resources Control Board, which may be found in title 23 of the California Code of Regulations, commencing with section 647. Adjudicatory matters before the Regional Board are conducted pursuant to Government Code sections 11400 et seq., but not sections 11500, et seq." Note C goes on to state that, "The Board does not, generally, require the designation of parties, the prior identification of witnesses, prior submission of written testimony, or the cross examination of witnesses."

This letter sets forth Poseidon's objection to the adjudicatory nature of the proceeding and requests that the Regional Board's consideration of the matter take place in a non-

adjudicatory setting. If the Regional Board refuses this request and proceeds with an adjudicatory proceeding, Poseidon requests a restructuring of the proposed procedures to ensure the protection of Poseidon's due process rights.

I. POSEIDON'S OBJECTION TO AN ADJUDICATORY PROCEEDING

Poseidon objects to the adjudicatory nature of the Feb 11 hearing. The February 11 hearing requires the Regional Board to consider whether the MLMP satisfies the conditions established by Resolution No. R9-2008-0039. The principal condition of the Resolution requires Poseidon to submit an amendment to its Revised Flow, Entrainment, and Impingement Minimization Plan ("Minimization Plan") regarding mitigation within 6 months of the adoption of the Resolution. The Regional Board conditionally approved the Minimization Plan on April 9, 2008 without holding an adjudicatory proceeding. The Regional Board should follow the same procedures when deciding whether to approve an amendment to that plan.

Furthermore, the Regional Board is not deciding whether to issue Poseidon a NPDES permit, which might entail an adjudicatory hearing. Rather, it is deciding whether an amendment to Poseidon's Minimization Plan, which was conditionally approved at a non-adjudicatory hearing, should be approved. Just as conditional approval of the Minimization Plan took place at a non-adjudicatory meeting, Poseidon requests that consideration of an amendment to the Minimization Plan also take place at a non-adjudicatory meeting.

II. REQUEST FOR ALTERNATIVE PROCEDURES

If the February 11 hearing is to be an adjudicatory proceeding, Poseidon requests appropriate procedures to safeguard its due process rights. The Regional Board's decision on February 11 potentially could deprive Poseidon of substantial legal rights and privileges. Regional Board disapproval of the MLMP could affect adversely the project's planning, financing, and implementation, and may impede the construction of a $300 million desalination plant, which has the potential to bring 50 million gallons a day of potable water to a region in dire need of new potable water sources. Because Poseidon has substantial legal rights and privileges at stake, Poseidon requests the following procedural safeguards to protect its due process rights.

A. Poseidon Requests the Regional Board to Designate Parties

Poseidon request that the Regional Board designate parties to the proceeding to protect Poseidon from invasive intervention that will undermine its due process rights. "Adjudicative proceeding shall be conducted in a manner as the Board deems most suitable to the particular case with a view toward securing relevant information expeditiously without unnecessary delay and expense to the parties and the Board." Cal. Code of Regs. Tit. 23 § 648.5(a). Poseidon requests that the Regional Board limit the designation to Poseidon and the Regional Board staff. Additional designated parties will impede the orderly conduct of the hearing, and a speedy proceeding, and may convolute the material issues.[1] The Regional Board's designation of Poseidon and the Regional Board staff will prevent unnecessary delay and expense and promote an orderly and efficient proceeding. Without the appropriate designation of parties, there is a risk of injustice, disorder and delay. See Sanders v. Pacific Gas & Elec. Co., 53 Cal. App. 3d 661, 669 (1975) ("An intervention will not be allowed when it would retard the principal suit."). The Regional Board's designation of parties is essential to preserving an orderly and efficient proceeding and to securing the relevant information for the Regional Board's ultimate determination. If the Regional Board does not designate parties, it will jeopardize Poseidon's due process right to be heard.[2]

B. Poseidon Requests Sufficient Time to Present Evidence at the Proceedings Before the Board

Due process principles require a meaningful opportunity to be heard.[3] To the extent that the Regional Board's procedures for contested adjudicatory matters do not make any specific determinations with respect to length to be employed at the evidentiary hearing, Poseidon is not opposed to it. Poseidon opposes any attempt by the Regional Board, however, to limit the parties' participation at the hearing to "summarizing" advance written submissions of testimony and evidence. The amount of time to be provided to Poseidon and the other parties at the hearing must correspond with the complexity of the record and the significant and adverse potential impact to the parties. See Cal. Gov't Code § 11425.10(1); *Matthews v. Eldridge* (1972) 424 U.S. 319, 333; *Horn v. County of Ventura* (1979) 24 Cal. 3d 605, 612. The parties must be allotted adequate time to present evidence, call and question witnesses, and cross-examine opposing witnesses. See Cal. Code Regs., Tit. 23, § 648.5(a)(5) (2005); Cal. Gov't Code § 11513(b).

The activities expressly listed in Regional Board's own regulations controlling adjudicative proceedings include: (1) presentation of evidence by the parties; (2) cross-examination of witnesses; and (3) redirect and recross-examination. Cal. Code of Regs. Tit. 23 § 648.5(b). It is clear from the statutory and regulatory provisions that the evidentiary hearing

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[1] See Paul N. Singarella, *Flood of Intervention Stems Due Process in Regional Water Proceedings*, Daily Journal, Mar. 24, 2005 (attached)(arguing that intervention by parties without a substantial interest undermines due process.)

[2] See Cal. Gov't Code § 11425.10(a)(1) (Deering 2005) ("The agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence."); see also Horn v. County of Ventura, 24 Cal. 3d 605, 612 (1979) ("Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest.")

[3] See *Supra* note 1

cannot be limited to the mere presentation of "summaries" of previously-submitted evidence and comments. As the Regional Board's determination in this matter could impede a $300 million desalination project, Poseidon must be afforded the full opportunity to present its case to the Regional Board members, and probe any case being made against it.

As discussed below, Poseidon recommends a pre-trial hearing for scheduling the length of evidentiary hearings. With this in mind, Poseidon requests, on behalf of themselves only, approximately four hours to present evidence and cross-examine opposing witnesses. This does not include the time of the Regional Board staff, or time permitted interested persons to comment on the matter, nor does this include the time for Regional Board members to ask any questions it may have of witnesses.

C. Poseidon Requests the Right to Cross-Examine Witnesses

Poseidon request the right to cross-examine opposing witnesses. As stated previously, regulations controlling Regional Board adjudicatory proceedings include cross-examination of witnesses and redirect and recross-examination. Cal. Code of Regs. Tit. 23 § 648.5(b). The right of cross-examination is a fundamental aspect of any adjudication. If the Regional Board staff or other designated parties (or any other person) puts forth evidence at the hearing, Poseidon must be permitted the opportunity to cross-examine their witnesses and experts, both to test their credibility and to determine the basis for their positions.

Poseidon appreciates the public nature of this proceeding, and fully embraces the concept of public participation in the proceeding and public comment at the hearing(s). The Regional Board must recognize, however, that it has elected an adjudication, and as such, the parties' rights are paramount, including their right to present evidence, cross-examine *any* person presenting more than policy statements, and challenge the admissibility of witness testimony.

D. Poseidon Requests Discovery

Due process requires a full right of discovery in administrative proceedings, especially where a $300 million desalination plant and years of planning are in the balance. See Mohilef v. Janovici, 51 Cal. App. 4th 267, 302 (1996) ("[B]ecause the due process clause ensures that an administrative proceeding will be conducted fairly, discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process.") (internal citations and quotations omitted). Accordingly, Poseidon requests very limited but important discovery of relevant emails from staff members Mike Porter and Eric Becker. Specifically, we request copies of emails within the last year between these individuals and third-parties other than Poseidon regarding the Carlsbad Desalination Plant, including any such emails with other agencies and with non-governmental organizations.

E. Poseidon Requests Pre-Hearing Conference

Poseidon request a pre-hearing conference to define the parameters and timing of discovery and determine the appropriate amount of time that should be allotted to Poseidon for

presentation of its evidence. A pre-hearing conference will help ensure that Poseidon will be afforded its due process right to be heard at the February 11 hearing.

III. CONCLUSION

For the foregoing reasons, Poseidon respectfully objects to the adjudicatory nature of the proceeding and requests the that the Regional Board's consideration of the matter take place in a non-adjudicatory setting. If the Regional Board refuses this request and proceeds with an adjudicatory hearing, Poseidon requests a restructuring of the proposed procedures to ensure the protection of Poseidon's due process rights.

Dated: January 26, 2009

LATHAM & WATKINS LLP
Paul N. Singarella (Bar No. 155393)
Amanda Halter (Bar No. 254084)

By _____
Amanda Halter
Attorney for POSEIDON
RESOURCES CORPORATION

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ENVIRONMENTAL • Mar. 24, 2005

Flood of Intervention Stems Due Process in Regional Water Proceedings

Forum Column

By Paul Singarella

Gov. Arnold Schwarzenegger promised to "blow up the boxes" of agency bureaucracy through action by the ongoing California Performance Review, an organization and commission formed to assess and correct bureaucratic dysfunction.

The time is ripe for this watchdog commission to focus its attention on the state's regional water quality control boards, which have granted environmentalists a virtual stipulation to intervene in permit and enforcement proceedings - undermining due process by ignoring existing statutory safeguards to keep such interest groups from interfering in adjudicatory proceedings.

This problem is evident in a pending adjudication in Monterey County, where the Central Coast Regional Water Quality Control Board is demanding that the Pebble Beach golf course and local cities eliminate stormwater drainage into so-called "areas of special biological significance."

Clearly, environmental groups have an interest in such matters; in the mid-1970s, the state designated 34 biologically significant areas along California's coast - including sections off the Monterey Peninsula - affording them protection by special provisions in the California Ocean Plan.

The problem with the environmentalists' intervention in the Monterey proceedings - and other proceedings like it - is that it threatens the ability of the named parties to defend themselves against unprecedented and onerous enforcement.

Despite the common regional board practice of granting virtually automatic party status to environmental groups, the California Administrative Procedure Act and state board regulation make clear that these groups must satisfy a strict test before they legally may secure such status. The California Performance Review commission should direct the regional boards to start following that test - an important step toward addressing present dysfunction.

For any agency that elects by regulation (as the regional water board has) to follow the Administrative Procedure Act, the act specifies a test for intervention by third parties in adjudicative proceedings. An "adjudicative proceeding" is defined as an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision. Such proceedings include regional board enforcement and permit proceedings.

Under the intervention test, a third party must move for intervention in a written motion, served on all parties named in the agency's pleading. The motion must be made as early as practicable before the hearing, and in advance of a prehearing conference, if one is scheduled.

These important procedural safeguards are coupled with two even more important substantive elements. One of them is standing. Standing under the Administrative Procedure Act test is conferred where the intervention motion "states facts demonstrating that the applicant's legal rights, duties, privileges or immunities will be substantially affected by the proceedings or that the applicant qualifies as an intervenor under a statute or regulation."

Thus, standing to intervene is recognized where agency action will constitute a substantial deprivation of property rights - such as where the agency names an industrial tenant in a contamination proceeding, and the property owner seeks to intervene, or when an association representing the likely permittees of a general permit seeks to intervene.

As stated in the 1995 Law Revision Commission comment on the standing test:

"This provision is not intended to permit intervention by a person such as a victim or interest group whose legal rights are not affected by the proceeding, but to permit intervention only by a person who has a legal right entitled to protection by due process of law that will be substantially impaired by the proceeding."

The Law Revision Commission relied on *Horn v. County of Ventura*, 24 Cal.3d 605 (1979), in which the California Supreme Court held that landowners adjacent to land to be subdivided were at risk of a "governmental deprivation of a significant property interest," and that, therefore, they deserved "reasonable notice and an opportunity to be heard" in the subdivision proceeding in accordance with "due process requirements ... compelled by the ... force of constitutional principle."

In contrast, regional board action does not threaten to deprive environmental groups of the due process touchstone - "a significant property interest" - at least when their interest is in the interpretation and implementation of water quality laws and the public policy questions implicated.

The interests of such groups are more akin to an amicus curiae interest, and are protected fully by regulations allowing interested persons to submit policy statements during regional board proceedings.

Alternatively, standing is conferred where a third-party applicant qualifies as an "intervenor" under a statute or regulation. The water code provisions governing regional board adjudications, however, do not contain an intervention statute. And while the state board promulgated an intervention regulation in 1998, that regulation cannot be read reasonably to expand the regional boards' discretion beyond the Administrative Procedure Act's intervention statute.

That state board regulation, Section 648.1(a) of Title 23 of the California Code of Regulations, merely provides that parties to a regional board adjudication include, in addition to permittees and other persons named in the agency pleading, "any other person whom the Board determines should be designated as a party."

While the regulation grants discretion for the agency to designate parties not named on the face of the agency's pleading, the Administrative Procedure Act statute, incorporated by reference into that regulation, is the source of the standard by which that discretion is exercised. This interpretation allows the statute and the Title 23 regulation to be read in harmony, and it prevents the latter from nullifying the former - which would violate rules of construction.

The contrary interpretation urged by environmental groups - that Section 648.1(a) grants broad discretion to let in third parties, the substantive rights of which are not put in any material jeopardy by the agency action - emasculates the Administrative Procedure Act intervention

statute and creates conflict between it and Section 648.1(a), when the two provisions can be reconciled (as they should be since the 1998 regulation was promulgated to implement the 1995 statute).

Further, severing Section 648.1(a) from the Administrative Procedure Act statute would leave the intervention inquiry by the regional board completely rudderless, as Section 648.1(a) does not itself contain a standard for the regional board to follow in evaluating an intervention request.

The Administrative Procedure Act further specifies that a regional board must conclude that third-party intervention will not impair "the interests of justice and the orderly and prompt conduct of the proceeding." Granting full participation rights to third parties necessarily will complicate the "orderly and prompt conduct of the proceeding" when the proceeding already includes multiple parties, raises numerous questions of law and entails significant coordination and prehearing discovery.

For example, in the pending Monterey Peninsula adjudication, a third party that is claiming "designated party" status has sought to depose parties (and their experts) named in a cease and desist order, though the prosecuting agency itself has not pursued such prehearing discovery. Further, the agency threatened to quash the administrative subpoena of the named parties if they did not coordinate with "designated parties," which had not even made a written motion for intervention.

The interests of justice are not being served in the Monterey matter, as the ability of the named parties to prepare and put on a defense to a very serious cease and desist order is being impaired by the agency's improper liberality. This particular proceeding is not anomalous, as the environmental groups orchestrate throughout the state to take advantage of compliant regional boards, frequently securing "designated party" status with ease.

The Administrative Procedure Act intervention statute follows in large part the 1981 Model State Administrative Procedure Act. However, the 1981 act contains a second, permissive intervention test that the California Legislature did not adopt - further testament to the impropriety of the regional boards' excessively liberal intervention practice.

Under the 1981 act, an agency permissively "may grant ... intervention" if doing so "is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings." Whereas under the act this impairment test serves as a sufficient basis in and of itself to grant intervention, the California Legislature incorporated the impairment inquiry as a second substantive element that must be satisfied in addition to the standing element.

Thus, the state Legislature determined to insulate California agencies from third-party distractions and complications more so than is provided under the 1981 act.

The Legislature's 1995 determination to limit intervention through meaningful safeguards should be reinforced through California Performance Review. However, with or without such reinforcement, one cannot assume that a habit long engaged will be broken easily. Certainly, the environmental groups will respond on all fronts, including legislative, if they perceive material threat to the special status to which they have grown accustomed in regional board proceedings.

Fortunately, the policy behind the Administrative Procedure Act intervention statute is to facilitate "judicial review on an expedited basis before the [agency] hearing commences" - in the event of an "unfavorable" agency ruling on intervention.

Judicial review is facilitated by requiring the agency to issue an order granting or denying the motion for intervention in advance of the hearing on the merits of the permit or enforcement action. Such an order would appear ripe for potential interlocutory relief by means of a writ of mandate proceeding in superior court under the Code of Civil Procedure.

Expedited relief is warranted given the constitutionally protected rights to a fair hearing that weigh in the balance.

Paul Singarella is an environment, land and resources partner in the Orange County office of Latham & Watkins.

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