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San Diego Region

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VIA ELECTRONIC MAIL AND U.S. MAIL

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Dear Mr. Garrett and Ms. Halter:

RE: POSEIDON RESOURCES CORPORATION, PROPOSED CARLSBAD DESALINATION PROJECT, AGENDA ITEM 6, SAN DIEGO WATER BOARD FEBRUARY 11, 2009 AGENDA NOTICE

This letter responds to the procedural issues raised in recent correspondence[1] from Poseidon Resources Corporation (Poseidon) concerning the above-referenced agenda item.

ADJUDICATIVE PROCEEDINGS

Poseidon has requested that the San Diego Regional Water Quality Control Board (San Diego Water Board) consider Agenda Item 6 on its upcoming February 11, 2009 agenda as a non-adjudicative matter. Poseidon appears to be under the impression that the San Diego Water Board's adoption of Resolution No. R9-2008-0039 (Conditional Approval of Revised Flow, Entrainment, Impingement, and Minimization Plan for Poseidon's Carlsbad Desalination Project) (Resolution), on April 9, 2008, occurred in the absence of an adjudicative proceeding. I hope that the following information will be helpful in explaining why both the April 9, 2008 and February 11, 2009 Poseidon agenda items are appropriately considered adjudicative proceedings.

As indicated in the August 2, 2006 memorandum from the State Water Resources Control Board's (State Water Board) Chief Counsel, which I provided for your reference by email on January 23, 2009, an adjudicative proceeding is a hearing to receive evidence for the determination of facts by which the State Water Board or a Regional Water Quality Control Board (Regional Water Board) reaches a decision. A decision determines a right, duty, privilege or legal interest of a particular person or persons. Adjudicative proceedings include, but are not limited to, permit issuance and enforcement actions. The State Water Board's regulations setting forth the procedures

[1] This letter responds to Christopher Garrett's letter of January 21 and his email of January 23, 2009, both addressed to Catherine Hagan, and to Amanda Halter's letter of January 26, 2009, addressed to John Robertus.

for adjudicative proceedings before the State and Regional Boards are codified in Division 3 of Title 23 of the California Code of Regulations. Adjudicative proceedings before the Regional Board are governed by these regulations, as authorized by chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government Code.).

The State and Regional Water Boards also conduct quasi-legislative proceedings including rulemaking and some informational proceedings. For example, these types of matters may include hearings for the adoption or amendment of regulations, water quality control plans or state policy for water quality control and hearings to gather information to assist the boards in formulating policy for future action. Quasi-legislative matters are not adjudicative and are subject to different procedures. (See Cal. Code. Regs., title 23, § 649, et seq.)

Poseidon's correspondence suggests that it believes the April 9, 2008 adoption of Resolution No. R9-2008-0039 occurred in the absence of an adjudicative proceeding. At the April 9, 2008 meeting, the San Diego Water Board acted to conditionally approve Poseidon's Flow, Entrainment, and Impingement Minimization Plan, subject to the subsequent satisfaction of certain conditions. The San Diego Water Board's decision was adjudicative in nature in that it determined, conditionally, an entitlement or right that is integral to the National Pollutant Discharge Elimination System (NPDES) permit issued to Poseidon in 2006 (Order No. R9-2006-0065, NPDES No. CA0109223). Similarly, an action by the Board at its upcoming meeting may determine or affect the same entitlement or right. By the very nature of the decision that occurred in April 2008 and the decision which may occur on February 11, the proceedings cannot be characterized as informational or quasi-legislative, but are inherently adjudicative.

Despite the fact that the San Diego Water Board considers these proceedings to be adjudicative in nature, please rest assured that the San Diego Water Board does indeed intend to conduct its February 11, 2009 proceeding in much the same manner as it conducted its April 9, 2008, proceeding. That is, the San Diego Water Board does not intend to issue a special hearing notice for this proceeding, nor does it intend to designate parties, require the prior identification of witnesses and the prior submission of written testimony, or set aside time specifically for the cross-examination of witnesses. (See Board Meeting Agenda Notice, Note C.) As with the April 9, 2008, proceeding, rather than following the more formalistic "order of proceedings" contained in California Code of Regulations, title 23, section 648.5, the San Diego Water Board will hear its staff's presentation and recommendation, followed by Poseidon's presentation, then comments by any other entities and members of the public. Persons addressing the San Diego Water Board will be required to speak under oath.

Given the limited and preliminary nature of the issue that will be before the San Diego Water Board on February 11, I believe that this more streamlined hearing approach comports with due process. As it is also consistent with the approach used on April 9,

2008, I trust that it satisfies Poseidon's request in its January 26, 2009 letter. Please be aware that the San Diego Water Board may choose to employ more formalistic procedures in future related proceedings, including any subsequent adjudicative proceeding to consider final approval of Poseidon's Flow, Entrainment, and Impingement Minimization Plan.

REQUEST FOR ALTERNATE PROCEDURES

Presentation Time and Order of Proceedings

The Agenda published for Item 6 does not specify a time limit for parties' presentations. I anticipate recommending to the Chair that San Diego Water Board staff and Poseidon each be allotted 30 minutes for their respective presentations. There is ample opportunity for submitting written materials in advance of the meeting and, in fact, Poseidon has already submitted voluminous comments, declarations and other documents that will be provided to the Board in advance for its consideration. As always, the Chair retains the discretion, even at the hearing, to grant parties or interested persons more time to speak upon a showing of necessity.

Discovery Requests

Poseidon's January 23 letter requests that the Regional Board provide copies of email correspondence within the last year between Eric Becker or Mike Porter and third parties, including other agencies and non-governmental organizations, regarding the Carlsbad Desalination Plant. I assume this request renews the request made in Poseidon's January 21 letter. Staff is searching for responsive emails and I anticipate any responsive will be available by the end of the week.

Pre-hearing Conference

In light of the above, it does not appear necessary at this time to convene a prehearing conference. Poseidon may renew its request if additional concerns arise.

OTHER MATTERS

Adequate Notice of April 8, 2009 Agenda Item

Poseidon inquires whether I have changed my opinion about whether notice for the April 9, 2008, agenda item was adequate (January 21, 2009 Letter from Christopher Garrett, p. 2). Whether or not the agenda notice for the April 2008 proceeding comported with legal requirements for public notice, the San Diego Water Board strives very hard to solicit public participation and public input in matters it considers. To the extent some members of the public have asserted that the public notice provided for the April

proceeding was inadequate, the San Diego Water Board takes such assertions very seriously.

Public Notice Correction for February 11, 2009 Agenda Item 6

Poseidon notes that the San Diego Water Board's January 2, 2009 notice of public hearing superseded a December 30, 2008 notice and asks, in light of the corrected notice, whether the San Diego Water Board intends to consider rescission of the Resolution at its February 11, 2009, meeting. (January 21, 2009 Letter from Christopher Garrett, p. 3.) Upon further consideration, following publication of the December 30 notice, we determined that an action to rescind the Resolution would not be necessary because if the Board determines that one or more conditions have not been satisfied, the Resolution becomes inoperative by its own terms.

San Diego Water Board Closed Session at December 10, 2009 Meeting

Poseidon notes its understanding that the San Diego Water Board met in closed session December 10, 2008 regarding the Poseidon matter and asks what the basis for that closed session was. The San Diego Water Board met in closed session under the authority of Government Code section 11126, subdivision (e), as noticed in the agenda for the closed session published for the December 2008 meeting, to discuss the litigation filed against the San Diego Water Board by Surfrider Foundation and San Diego Coastkeeper.

Please contact me if you have any questions.

Sincerely,

Catherine George Hagan

Catherine George Hagan
Senior Staff Counsel