

Overview of Poseidon Responses to January 30, 2009 Released Executive Officer Summary Report (January 30th Staff Report)

(1) **Take Final Action:** The Regional Board has the opportunity to take final agency action on Poseidon's Carlsbad Desalination Facility by taking action on Agenda Item No. 6 on February 11, 2009. The Board should resist staff suggestions to postpone and delay reviewing the information that has been developed in the past two years. Please accept Poseidon's suggestion [Tab 2---Gold Sheets] to take sufficient time to address all the issues on February 11.

(2) **Consider Our Proposed Resolution Approving The Inter-Agency MLMP:** Unfortunately, staff has not prepared a clear set of alternative proposed actions which would allow the Regional Board to reject, approve, or add to the Marine Life Mitigation Plan ("MLMP") that was approved by the California Coastal Commission and the California State Lands Commission as part of the Regional Board mandated "inter-agency" process. Please accept Poseidon's suggested resolution [Tab 3--- Green Sheets] to give final approval to the "Inter-Agency" MLMP.

(3) **No Explanation For Staff Disengagement From Process:** The January 30th Staff Report does not address staff's apparent disengagement from the interagency process:

- It does not contain concrete suggestions by staff to amend or add to the MLMP to provide anything which the staff feels is "missing" from the Inter-Agency MLMP.
- It is also written in open-ended fashion, as if staff did not want to clearly list for Poseidon or the Regional Board "all" of its remaining concerns with the MLMP, e.g., will there be 20 more questions later?
- It also characterizes Poseidon's submittals for the hearing as "new material," when in fact staff has had access to all this material for many months, and as part of the Inter-Agency process.
- It does not explain staff's failure to ask for additional information from Poseidon, or hold any meetings with Poseidon after the interagency May 1, 2008 concerning the MLMP, despite Poseidon's repeated requests and offers to answer any further questions.

(4) **Specific Proposal For Mitigation**": Obviously, the key concern of the Board has always been to provide a specific, complete mitigation plan with enforcement mechanisms and specific review requirements to assure that the needed mitigation will be provided. This led the Board to call for a "specific proposal for mitigation" in its 2008 Resolution. However, the January 30th Staff Report curiously refuses to acknowledge that Poseidon has submitted such a specific proposal for mitigation. If staff were concerned that the MLMP needed more or different mitigation details, or more enforcement mechanisms, one would expect staff to suggest specific changes or amendments, perhaps during the Inter-Agency review process that occurred between May and August 2008. However, as late as the January 30th Staff Report, staff is unable to

suggest anything new or different that would provide the alleged missing “specificity” to the MLMP.

(5) “**Specific Mitigation Alternative**”: The January 30th Staff Report faults the MLMP, stating that the “overarching concern” is that it fails to include a “specific mitigation alternative.”

- It should be noted that this is a different term than the actual language used by Condition 3 of the Board’s resolution, a “Specific Proposal for Mitigation.” Poseidon has complied with Condition 3 to the 2008 Resolution by submitting such a “specific proposal for mitigation” in the MLMP.
- Whatever staff may mean by using this different term, staff has ignored the specific Regional Board direction in April to include several different Mitigation Alternatives. This was specifically requested by Regional Board Chairperson Wright.
- The MLMP approved by the Inter-Agency process and submitted to the Regional Board does more than just “set forth a process and criteria for evaluating 11 independent mitigation site options”; it actually sets forth an enforceable plan of mitigation with specific performance criteria and enforcement mechanisms.
- The fact that a number of sites are analyzed and included in the Plan is a virtue, not a defect because it gives the Coastal Commission, the State Lands Commission and the Regional Water Quality Control Board an extensive array of required sites to assure the required quantity and quality of mitigation is provided.
- Curiously, staff’s argument seems to echo the attacks of entities which have sued the California Coastal Commission over its approval of a Coastal Development Permit, accusing it of deferral of mitigation. However, the Coastal Commission has made clear that the Commission did not “defer” mitigation for marine life impacts, but instead provided a specific plan of mitigation in the Inter-Agency MLMP. We urge the Regional Board to reject any suggestion that the Coastal Commission’s approved Inter-Agency MLMP has failed to provide for full mitigation with a complete set of performance standards and enforcement mechanisms.

**Summary of Poseidon's Responses to
EXECUTIVE OFFICER SUMMARY REPORT
Regional Water Quality Control Board, San Diego
February 11, 2009
Item No. 6**

No.	Issue Presented	Poseidon Response
1.	"Staff remains concerned that the MLMP fails to satisfy a number of conditions in the-Resolution, such as the requirement to submit adequate data on impingement of organisms []... (see Resolution, Implementing, 3.d.)."	<ul style="list-style-type: none"> • The California Coastal Commission found that impingement impacts from the intake system were <i>de minimis</i> and did not require mitigation. Regional Board staff was aware of this finding throughout the interagency process on the development of the MLMP, and did not raise the issue at the interagency review meeting or to Poseidon. • Second, the Regional Board maintains significant data regarding the impingement impacts from the intake in its own files. The Regional Board obtained a copy of the 316(b) impingement and entrainments study from Cabrillo Power LLC dated January 2008. In fact, Ms. Jessica Jones, Poseidon's Assistant Project Manager, requested and obtained the 316(b) study from the records manager at the Regional Board in March of 2008. Therefore, if staff lacked data on the impingement impacts of the intake system, they could have asked for the data from Poseidon, or reviewed the information contained in its own files. • Finally, even though impingement impacts have been determined to be <i>de minimis</i>, the MLMP fully mitigates for <i>both</i> entrainment <i>and</i> impingement-related impacts. CDP's operations will result in the impingement of no more than 1.56 kg of organisms per day. On an annual basis, this is equal to 569 kg. By restoring 37 to 55 acres, Poseidon will yield between 1348 to 2003 kg fish biomass. Given that this will result in Poseidon's mitigation project yielding between 2.4 and 3.5 times the amount of fish that are impinged by CDP's operations, Poseidon will more than adequately account for CDP's <i>de minimis</i> impingement impacts.

2.	“Staff looks forward to discussions with Poseidon and members of the public in the future to try to resolve these and other substantive concerns.”	Since the submittal of the MLMP to the Regional Board on November 14, 2008, Poseidon has offered its assistance to Regional Board Staff on several occasions in an effort to address any issues that Regional Board staff may have in regards to the MLMP, including on December 19, 2008, January 5, 2009, January 6, 2009 and January 7, 2009. If Regional Board staff is now interested in participating in such a discussion, Poseidon likewise looks forward to meeting with Regional Board staff and other interested members of the public to resolve any outstanding issues regarding the MLMP.
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<p>3. “Staff’s overarching concern, which remains unsatisfied, is that the MLMP fails to include a specific mitigation alternative as the Board required. Instead, it sets forth a process and criteria for evaluating 11 independent mitigation site options. The Resolution conditions approval of the Plan on the timely submittal of a specific mitigation alternative for Regional Board approval. Staff continues to believe that a specific mitigation alternative is a critical element in order to properly evaluate whether the functions of the proposed mitigation will match those lost from impingement and entrainment. Poseidon’s MLMP is fundamentally flawed in that it fails to fulfill this condition.”</p>	<p>At no time during the preparation and development process of either the Minimization Plan or the MLMP was Poseidon directed to prepare a <i>single-site</i> mitigation plan. Instead, following direction from the Regional Board, Staff and the multiple interested state, federal and local agencies involved in the interagency process required under Resolution No. R9-2008-0039, Poseidon developed and submitted the MLMP which fully addresses all concerns raised by the Regional Board’s February 19, 2008 letter, the Resolution No. R9-2006-0065 and Regional Board staff input.</p> <p>This direction included the following:</p> <ul style="list-style-type: none"> • <u>Order R9-2006-0065 NPDES No. CA0109223</u> – The 2006 Order specifically does not indicate that site-specific mitigation measures are required under the Minimization Plan, or that Poseidon shall prepare a single-site mitigation plan. Nor was there any interpretation during the permitting phase to that effect. • <u>Resolution No. R9-2008-0039</u> - While the 2008 Resolution required “a specific proposal for mitigation of impacts,” there is no language in the Resolution requiring that the mitigation plan provide for mitigation at a “single site.” • <u>February 19, 2008 Regional Board Letter</u> - The February 19, 2008 Regional Board letter raised the concern that Poseidon’s July 2007 submittal did not “identify and evaluate the possible mitigation projects located within the same watershed [Agua Hedionda Lagoon], prior to proposing the out of watershed mitigation in San Dieguito.” (pg. 2) This statement implies that the Regional Board was interested in the evaluation of additional sites beyond simply the San Dieguito site proposed by Poseidon. • <u>March 4, 2008 Meeting</u> - In response to the February 19, 2008 Regional Board letter, Poseidon met with Regional Board staff members on March 4, 2008 to receive input on Poseidon’s proposed revisions to the Minimization Plan. At this meeting, Regional Board staff requested that Poseidon include additional sites in its mitigation planning.
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- March 7, 2008 Minimization Plan - The March 7, 2008 version of the Minimization Plan, submitted in response to the February 19, 2008 Regional Board letter and input received at the March 4, 2008 meeting, did not propose a “single site” mitigation plan and expressly stated that multiple sites would be evaluated in the final submittal. (See pgs. pages 6-9 and 6-10 of the updated Minimization Plan.) Neither Staff nor any of the Board members expressed dissatisfaction with the mention of multiple site review in either Poseidon’s Response or the updated Minimization Plan.
- April 4, 2008 Central Watershed Unit Report - The April 4, 2008 Central Watershed Unit Technical Report stated, “The proposed process seems to favor a pre- determined outcome (i.e. mitigation in San Dieguito Lagoon). Other mitigation alternatives (e.g. kelp bed enhancement and artificial reef construction) should be considered and evaluated equally as viable mitigation possibilities.” This indicates that Regional Board staff did not want a plan focused on one specific site, and instead Poseidon should consider and evaluate “other mitigation alternatives.”
- April 4, 2008 Central Watershed Unit Report - The Central Watershed Report also acknowledged, with apparent approval, that Poseidon was considering mitigation at several possible sites, including those expressly enumerated: Frazee State Beach, Loma Alta Lagoon and Buena Vista Lagoon, in addition to Agua Hedionda Lagoon and San Dieguito Lagoon.
- April 9, 2008 Meeting Transcript - Regional Board Chairman Wright stated: “It sounds like there’s a lot more that needs to be done before you have full evaluation of the mitigation alternatives.” This statement indicates that Chairman Wright was open to the prospect of multiple mitigation alternatives, and in fact, thought it necessary for the mitigation plan to include a “full evaluation” of such alternatives.

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| | | <ul style="list-style-type: none">• <u>May 1 and 2, 2008 Interagency Meeting Agenda</u> - The draft agenda for the May 1 and 2 interagency meeting specifically requested the proposal of additional mitigation sites: “If proposing marine life mitigation, describe <i>the type and location of potential mitigation sites</i>, and describe how restoration or creation of this particular habitat/vegetation would mitigate for impacts associated with the desalination facility’s impacts to marine life in Agua Hedionda.” (emphasis added). This language makes clear that multiple sites would be taken into consideration during the interagency process of developing the plan. |
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