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April 8, 2009

BY HAND DELIVERY

Chairman Richard Wright and Board Members
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, California 92123

File No. 036182-0011

Re: Tentative Order No. R9-2009-0038: Response to Comment from California Coastal Commission Staff

Dear Dr. Wright and Members of the Board:

On behalf of Poseidon Resources Corporation (“Poseidon”), we wish to take the opportunity to clarify and respond to several issues raised in the Comment Letter submitted by Tom Luster of the California Coastal Commission (“CCC Letter”) on April 6, 2009 concerning Poseidon’s proposed Flow, Entrainment and Impingement Minimization Plan (the “Minimization Plan”). We note that the CCC Letter was submitted to the Board only two days before the Board’s April 8, 2009 hearing on the Minimization Plan, which has provided Poseidon with minimal time to respond. To ensure that the Board has all of the necessary information to consider the Plan at the April 8 hearing – and specifically the complete background concerning the Coastal Commission’s approval of the Project’s Marine Life Mitigation Plan (“MLMP”) – below Poseidon has responded to the significant issues raised in the CCC Letter.

As referenced in the CCC Letter, on August 2008 the Coastal Commission approved Poseidon’s Marine Life Mitigation Plan (“MLMP”) for the Carlsbad Desalination Project, which is consistent with the Minimization Plan the Board is considering. The Coastal Commission then adopted its findings to support the MLMP approval in December 2008. In contrast to several of the statements in the CCC Letter, however, Poseidon believes that the Minimization Plan is wholly consistent with the MLMP, and should be approved by the Board as submitted by Poseidon. In order to clarify several issues raised in the CCC Letter, however, Poseidon hereby responds as follows:

I. IMPINGEMENT EFFECTS AND MITIGATION

A. CCC Letter Comment (page 3): “Given the problems Dr. Raimondi identified in Poseidon’s recent impingement analysis . . . we recommend the Board not adopt Poseidon’s analyses as the basis of a Board decision about the amount of mitigation needed to address the Project’s impingement effects.”

- Poseidon Response: Poseidon objects to Coastal Commission staff's recommendation. As provided in Poseidon's April 2, 2009 Comment Letter to the Board, the mitigation acreage provided in the Minimization Plan is more than sufficient to fully offset impingement resulting from Project operations, even if the Project operates as a stand-alone facility, which the Board is not required to analyze at this time. More specifically, the wetlands Poseidon will restore under the Plan: (1) have the capacity to compensate for fish lost to impingement as well as larvae lost to entrainment; and (2) will provide habitat to replace the loss of fish that predominate impingement – which are largely different than the species that predominate entrainment.¹ Further, and as discussed in detail in Poseidon's April 2 letter, impingement losses resulting from the Project will be markedly lower than those estimated by Board staff, which take into account unrealistic assumptions, do not offset Poseidon's impingement numbers based on the facility's reduced flow rate as compared to the power plant, and do not take into account Poseidon's future dredging of the Agua Hedionda Lagoon that will benefit marine life in the Lagoon.²

B. CCC Letter Comment (pages 3-4): “The Commission determination of *de minimis* impingement impacts relied in part on descriptions from Poseidon and the CEQA lead agency that the Project would operate with intake water flows of 0.5 feet per second (fps) or less.”

- Poseidon Response: Poseidon has remained consistent that the Project's intake water flows would be 0.5 fps or less at the Project's intake bar racks, and the Coastal Commission's findings for the Project's CDP concluded that this flow rate at the bar racks would prevent the impingement of sea turtles and that it is consistent with U.S. EPA's “best available technology” guidance for cooling water intakes.

In Poseidon's November 7, 2007 response to the Coastal Commission's Staff Report concerning the Project's Coastal Development Permit (“CDP”), Poseidon again confirmed for Commission staff that “Poseidon has documented that the velocity of the water at the entrance to the bar racks is below 0.5 feet per second. Therefore the proposed operation would be consistent with what the U.S. EPA considers to be ‘best available technology’ for cooling water intakes.”³ The Coastal Commission then confirmed this intake velocity in its August 8, 2008 CDP findings, explaining: “The flow rate of the water in the intake bays is expected to be at or below 0.5 fps; therefore, death of healthy sea turtles after entering these areas is highly unlikely . . . Poseidon has documented that stand-

¹ Poseidon Resources, Submittal to Regional Water Quality Control Board, April 2, 2009, p. 3.

² *Id.* at pp. 3-4.

³ Poseidon Resources, November 7, 2007 Response to Staff Report, Exh. A at p. 10.

alone operation of the facility would result in intake water velocities at or below 0.5 feet per second, which is consistent with U.S. EPA guidance for ‘best available technology’ for cooling water intakes.”⁴

C. CCC Letter Comment (page 4): “To provide consistency with the Commission’s findings, we therefore recommend that the Board adopt conditions that require Poseidon to operate at or below the above-referenced flow rate and to monitor its impingement and adult fish productivity.”

- Poseidon Response: As discussed above, Poseidon consistently has maintained in its CEQA and Coastal Commission proceedings for the Project that its intake water flows would be at or below 0.5 fps at the Project’s intake bar racks. However, there is no support for the contention in the CCC Letter that the Project’s intake water flows should be limited to 0.5 fps or less at the Project’s intake rotating screens. Further, whether impingement monitoring is necessary or appropriate should only be considered if the power plant shuts down and Poseidon is required to seek a stand-alone permit from the Board.

D. CCC Letter Comment (page 5): “We note that Poseidon has suggested deleting several references in the proposed Plan related to this flow velocity and to the Commission’s *de minimis* impingement findings. This would be problematic because both the CEQA review and the Coastal Commission relied on the 0.5 foot-per-second maximum velocity as a key Project component for reducing impingement impacts. Poseidon’s proposed removal of this velocity limit may require Poseidon to submit a request to the Commission for an amendment to its coastal development permit.”

- Poseidon Response: As stated above, Poseidon has consistently maintained that the 0.5 foot-per-second maximum velocity applies to the Project’s intake bar racks. This is wholly consistent with the Coastal Commission’s finding that the 0.5 fps limitation in the “intake bays” would prevent the impingement of sea turtles, consistent with U.S. EPA’s “best available technology” guidance.⁵ The revisions to the Minimization Plan proposed by Poseidon do not affect the intake water velocities at the intake bar racks, and therefore the revised language

⁴ Coastal Commission Recommended Revised Findings Coastal Development Permit for Carlsbad Desalination Project, August 8, 2008, p. 48 of 133 (previously submitted January 26, 2009, Latham & Watkins Comments, Appendix A). Available at: <http://documents.coastal.ca.gov/reports/2008/8/W4a-8-2008.pdf>.

⁵ Coastal Commission Recommended Revised Findings Coastal Development Permit for Carlsbad Desalination Project, August 8, 2008, p. 48 of 133 (previously submitted January 26, 2009, Latham & Watkins Comments, Appendix A). Available at: <http://documents.coastal.ca.gov/reports/2008/8/W4a-8-2008.pdf>.

remains consistent with the Coastal Commission's CDP findings. Accordingly, an amendment to Poseidon's CDP would not be required.

E. CCC Letter Comment (page 5): "To ensure Poseidon can meet the maximum 0.5 fps rate presented to the Commission, the Board may also wish to consider requiring Poseidon to construct a bypass channel between the power plant intake and the discharge . . ."

- Poseidon Response: Because Poseidon's intake velocity limitations have not changed from those approved by the Coastal Commission, there is no basis for the Board to require the construction of a bypass channel.

II. STEWARDSHIP OF AGUA HEDIONDA LAGOON

A. CCC Letter Comment (page 6): The CCC Letter recommends adding the following language to pages 2-8 & 2-9 of the Minimization Plan: "Poseidon's lagoon preservation efforts will be aimed at maintaining and enhancing the Lagoon's beneficial uses, including marine and wildlife habitat, recreation, public access, and others, while ensuring long-term health and vitality of the future water supply of 300,000 San Diego County residents."

- Poseidon Response: Pursuant to Special Condition 12 of the Project's CDP, Poseidon may not undertake stewardship of the Agua Hedionda Lagoon, including maintenance dredging, until Poseidon obtains a separate CDP for those activities. Specifically, page 2 of the August 6, 2008 approved findings for the Permit states "Regarding dredging, the Commission's imposition of **Special Condition 12** requiring Poseidon to submit separate coastal development permit applications for any future dredging projects it may propose will ensure that the Commission will determine at that time whether specific dredging proposals conform to applicable Coastal Act provisions." Accordingly, since dredging of the Agua Hedionda Lagoon is not permitted under Poseidon's existing CDP, Poseidon does not believe Coastal Commission staff's proposed revision is necessary.

III. CHARACTERIZING MITIGATION RESULTS

A. CCC Letter Comment (page 7): "Please note that although Poseidon's entrainment will affect a large number of species, the Commission's assessment of entrainment impacts and its mitigation requirement are based primarily on the Project's effects on three estuarine species and one open ocean species. While the expected restoration will benefit a variety of species, the compensatory mitigation approach used in the Plan should not be characterized as "fully offsetting" or "zeroing out" the facility's entrainment."

- Poseidon Response: Poseidon is pleased that Coastal Commission staff agrees with Poseidon that the Project's entrainment impacts and the Commission's mitigation requirement under the MLMP are primarily limited to specific species, but that the compensatory mitigation provided for in the MLMP also will benefit a wide variety of species. However, in contrast to Commission staff's statement, Poseidon also notes that the Commission's December 10, 2008 findings to support its approval of

the MLMP explicitly state on page 19 that: “The Commission further finds that implementation of the Plan will ensure the project’s entrainment related impacts will be **fully mitigated** and will enhance and restore the marine resources and biological productivity of coastal waters in conformity to Coastal Act Sections 30230 and 30231.” (Emphasis added.)

B. CCC Letter Comment (page 7): Coastal Commission staff also recommends several modifications to an excerpt from pages 6-7 of the Minimization Plan.

- Poseidon Response: Based on the Coastal Commission’s findings for the MLMP, Poseidon objects to Commission staff’s proposal as inconsistent with the Commission’s Project approval. As discussed above, the Commission found that under the MLMP the Project’s entrainment impacts would be “fully mitigated.”⁶ The Commission also found that “Poseidon shall create or restore **up to 55.4** acres of coastal estuarine wetland habitat within the Southern California Bight.”⁷ Further, the Commission found that “Based on the above and on the record, the Commission finds that requiring 55.4 acres of estuarine wetland restoration in the Southern California Bight subject to the conditions shown in Exhibit 1 **provides a sufficient degree of certainty** that the facility’s entrainment impacts **will be fully mitigated** and brings the Plan into conformity to Special Condition 8 and the Coastal Act’s marine life protection policies.”⁸

IV. TIMING OF PROJECT-RELATED IMPACTS AND MITIGATION

A. CCC Letter Comment (page 7): “We recommend the Board replace the Plan’s references to permanent cessation of power plant operations with references to power plant operations of less than 304 MGD.”

- Poseidon Response: Neither the MLMP nor the Coastal Commission’s findings for the MLMP impose a mitigation obligation if the power plant operates with intake flows below 304 MGD. Instead of making Poseidon’s Phase II mitigation requirements contingent on the amount of water the power plant withdraws, however, the MLMP approved by the Commission requires Poseidon to submit a CDP for Phase II mitigation within 5 years from the date that the CDP for Phase I mitigation issues.⁹ Accordingly, Poseidon requests that the Board disregard Coastal

⁶ Coastal Commission Recommended Revised Condition Compliance Findings for Marine Life Mitigation Plan Carlsbad Desalination Project, December 10, 2008 (hereafter “MLMP Findings”), p. 19 of 19. Available at: <http://documents.coastal.ca.gov/reports/2008/12/W16a-12-2008.pdf>.

⁷ MLMP Findings, p. 5 of 19 (emphasis added).

⁸ MLMP Findings, p. 16 of 19 (emphasis added).

⁹ See CCC Comment Letter, April 6, 2009, p. 2.

Commission staff's recommendation that the Board impose a mitigation obligation that is based on the flow rate of the power plant's seawater intake.

B. CCC Letter Comment (page 8): The CCC Letter recommends revisions to Section 6.3, page 6-18 of the Minimization Plan.

- Poseidon Response: Poseidon objects to these revisions as unnecessary, as the specific requirements for Poseidon's coastal development permit applications for Phases I and II are specifically cited and referenced in the Minimization Plan. The Minimization Plan states "Specific requirements for coastal development permit applications for Phases I and II are detailed in Section 4.0 of the MLMP."

V. SITE SELECTION

A. CCC Letter Comment (page 8): "Also, while not a requirement, it is generally preferred that mitigation sites be larger rather than smaller, and that they be part of a coordinated or comprehensive mitigation effort."

- Poseidon Response: Poseidon appreciates Coastal Commission staff's recommendation, and notes that following extensive analysis, it has not located many sites within the Southern California Bight with sufficient acreage to satisfy Poseidon's mitigation requirements under the MLMP at a single site. The MLMP and the Mitigation Plan as drafted provide Poseidon with the flexibility necessary to allow it to select a mitigation site or sites to satisfy its mitigation obligations. As provided on page 9 of Poseidon's April 2, 2009 submittal letter, Poseidon has agreed to consider mitigation sites within the San Diego region before considering other sites in the Southern California Bight.

VI. NEED FOR ONGOING ASSESSMENT AND COORDINATION TO FURTHER REDUCE PROJECT IMPACTS

A. CCC Letter Comment (page 9): "Section 4.2 of the Plan describes a subsurface infiltration gallery as infeasible due in part to its size and maintenance requirements; however, recent studies and information suggest that a similar gallery at Carlsbad could be less than half the size and need far less maintenance than described in the Plan."

- Poseidon Response: Despite Coastal Commission staff's contention, the Coastal Commission found "that alternative intakes that might avoid or minimize environmental impacts are infeasible or would cause greater environmental damage" than the Project as proposed.¹⁰ However, as part of Poseidon's Phase II obligations

¹⁰ Coastal Commission Recommended Revised Findings Coastal Development Permit for Carlsbad Desalination Project, August 8, 2008, p. 80 of 133 (previously submitted January 26, 2009, Latham & Watkins Comments, Appendix A). Available at: <http://documents.coastal.ca.gov/reports/2008/8/W4a-8-2008.pdf>.

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under the MLMP, Poseidon will evaluate other feasible technologies that may be implemented in the Project's existing intake system to reduce entrainment and impingement impacts.

We thank the Board for considering Poseidon's response to Coastal Commission staff's late submittal, and we look forward to the Board's consideration of the Minimization Plan at today's hearing.

Very truly yours,

A handwritten signature in black ink that reads "David Goldberg" with a stylized flourish at the end.

David A. Goldberg
of LATHAM & WATKINS LLP