

TO: Mr. Kurt Berchtold, Santa Ana Regional Water Quality Control Board

FROM: California Coastkeeper Alliance, Orange County Coastkeeper, Residents for Responsible Desalination

RE: Petition to Re-Open Order No. R8-2012-007, NPDES No. CA8000403 (Poseidon-Huntington)

DATE: May 26, 2016

VIA ELECTRONIC MAIL: kberchtold@waterboards.ca.gov

Dear Mr. Berchtold:

We are writing in regards to our petition to re-open Order No. R8-2012-007, NPDES No. CA8000403 (Poseidon-Huntington), and the recent letter from the Regional Board rejecting that petition. Thank you for clarifying the current status of the permit and the need for Poseidon to request a determination of compliance with section 13142.5(b) of the Water Code and the Ocean Plan prior to any discharge.

It is clear from your response that the Regional Board recognizes the policy changes that have occurred since adoption of the 2012 Order and that Poseidon is proposing physical modifications to their project that trigger the re-opener provisions in the 2012 permit. We appreciate the complexity of enforcing the 2012 permit while simultaneously ensuring compliance with the new laws. And we understand the Regional Board's suggestion that it would be appropriate to take action once the on-going consultation process concludes.

We believe the re-opener provisions are mandatory, and that the Regional Board does not have the discretion to unilaterally reject the petition to re-open. Therefore, we reserve the right to petition the State Board to review your decision to reject our petition.

Nonetheless, in the spirit of cooperation, we are willing to forego petitioning the State Board if the Regional Board will state on the record the public process for the determination of compliance and NPDES renewal.

Below are recitals we believe are necessary clarifications of the public process for a review of the changed facility proposal to ensure compliance with the change of law.

We request a written response from the Regional Board by June 2nd, 2016 – prior to the 30-day deadline for petitioning the State Board for review of the Regional Board's rejection of our petition to re-open. Should we receive that clarification we will forego petitioning the State Board, and prepare to cooperate in the public process for the compliance determination.

In addition to your confirmation of the public process for the determination of compliance and review of a new or revised permit, we request updates from staff, and an opportunity to informally participate in the on-going consultation process.

- 1. If the Regional Water Board decides to approve a new or revised NPDES permit in a two-step process, the following formal process will be provided to the public. First, the Applicant will apply for a determination of compliance with Water Code section 13142.5(b) and other requirements in the Ocean Plan. Second, upon completion of the determination of compliance, the Applicant will seek approval of a new or revised NPDES permit. Both the determination of compliance and the new or revised permit*

application will allow separate but full public participation outlined below and in the rules and regulations for NPDES permit approval, including the Ocean Plan.

- 2. First, the Applicant will continue to consult with staff of the Regional Board, State Board and Coastal Commission to ensure the application is complete. The determination of completeness is not to be considered, even by implication, that the materials in the application ensure Board approval – it is simply a determination of application “completeness”, not “adequacy.”*
- 3. Once the consultation process is finalized, and the application is deemed complete, the Regional Board and State Board will prepare a draft Staff Report with Findings and Recommendations for Board action regarding the Water Code §13142.5(b) determination. There will be a public notice of the draft Staff Report for public review.*
- 4. Given the complexity of the technical materials required in the application, the potential for numerous interested parties’ comments, and the fact this is the first permit review under the new law, the public will have at least 60 days to submit evidence and comment on the draft Staff Report regarding the Water Code §13142.5(b) determination. The Regional Board may extend the comment period on its own or on reasonable requests from the public.*
- 5. After public comment, the Regional Board will prepare a final Staff Report, including response to comments, and any necessary revisions to the draft Findings and Recommendations.*
- 6. The Regional Board will then set a hearing date to make a formal decision on the §13142.5(b) determination of compliance, and publish notice of the hearing including the final Staff Report and response to comments. The hearing will provide adequate opportunity for public participation. The formal decision on the §13142.5(b) determination of compliance should largely resemble a formal NPDES process. Most importantly, the Regional Board members’ decision will be a formal decision as it relates to Water Code §13320.*
- 7. The same public process will be repeated for the NPDES permit adoption.*

If the Regional Water Board decides to go with a one-step, traditional NPDES permit process, we request that process be put in writing. Furthermore, we request an explanation detailing the ex parte rules that will apply to the potential regulatory pathways the Regional Board is considering.

We look forward to your reply and written confirmation of the public process outlined above, prior to June 3, 2016. In the meantime, please do not hesitate to contact us if there are questions or concerns regarding Petitioners’ request.

Sincerely,



Sean Bothwell
Policy Director
California Coastkeeper Alliance

CALIFORNIA COASTKEEPER. ALLIANCE



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