

Christopher W. Garrett
Direct Dial: +1.858.523.5458
christopher.garrett@lw.com

12670 High Bluff Drive
San Diego, California 92130
Tel: +1.858.523.5400 Fax: +1.858.523.5450
www.lw.com

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June 10, 2016

VIA EMAIL AND U.S. MAIL

Adrianna M. Crowl
Office of Chief Counsel
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95814-0100

File No. 036182-0021

Re: Petition to Re-Open Order No. R8-2012-0007, NPDES No. CA8000403

Dear Ms. Crowl:

On behalf of Poseidon Resources (Surfside) LLC (“Poseidon”), this letter concerns the June 3, 2016, letter (“Petition”) from California Coastkeeper Alliance, Orange County Coastkeeper, and Residents for Responsible Desalination (“Petitioners”) petitioning the State Water Resources Control Board (“State Board”) to Re-Open Order No. R8-2012-0007, NPDES No. CA8000403 (“Order”) by the Santa Ana Regional Water Quality Control Board (“Regional Board”). The Order renewed the Waste Discharge Requirements for the proposed Huntington Beach Desalination Facility (“Project”) and determined that the renewal satisfied the requirements of California Water Code section 13142.5(b).

Poseidon believes the June 3, 2016 Petition lacks merit. Poseidon wholly agrees with the Regional Board’s May 5, 2016, decision declining to reopen the Order and confirming that the Order remains valid and in full force and effect. Accordingly, Poseidon will be submitting a more fulsome response to the Petition in a future submittal.

Poseidon would like to stress, however, that reopening the Order at this point in time is a needless exercise and inefficient use of the State Board staff’s time—especially considering that Poseidon has already submitted an application for a section 13142.5(b) compliance determination and will be submitting an application for its NPDES permit renewal shortly, and Poseidon is not discharging under the existing NPDES permit. Petitioners will have ample opportunity to communicate opinions about the Project and its features during the Regional Board’s review of Poseidon’s applications prior to a determination by the Regional Board and any discharge by the Project.

Interagency Consultation Process

The Petition appears to be the result of confusion and uncertainty surrounding the Project's interagency consultation process initiated by the State Board staff.

On September 1, 2015, Poseidon submitted to the California Coastal Commission staff its application for a Coastal Development Permit ("CDP") for the co-located, temporary stand-alone and long term stand-alone operation of the Project. Poseidon's CDP application includes a Project description that complies with the requirements of the State Water Board's Amendments to the Water Quality Control Plan for Ocean Waters of California Addressing Desalination Facility Intakes, Brine Discharges, and Incorporating Other Non-substantive Changes ("Desalination Amendment").

On February 6, 2016, State Board staff sent a letter to Coastal Commission staff requesting a "formal consultation" in an effort to "*coordinate review of the Project and ensure the Project's compliance with the Desalination Amendment.*" At that point in time, Poseidon did not have an application pending before the Regional Board for a determination of the Project's compliance with California Water Code section 13142.5(b) or NPDES permit renewal application, two events that would trigger the Regional Board's consultation with the State Board under the provisions of the Desalination Amendment. Nonetheless, since February, Coastal Commission staff and State and Regional Board staffs have engaged in a formal interagency consultation over the proposed Project to ensure the Project description provided to the Coastal Commission in Poseidon's September 1, 2015, CDP application is consistent with the requirements of the Desalination Amendment.

On March 15, 2016, at the request of the State Board, Poseidon formally submitted a request to the Regional Board for a determination that the proposed Project complies with the Desalination Amendment.

On April 1, 2016, Coastal Commission staff deemed Poseidon's CDP application complete. Pursuant to the requirements of the State's Permit Streamlining Act, Coastal Commission staff and Poseidon are working together towards a CDP hearing to occur no later than September 2016.

Consistent with the stated intent of the consultation process initiated by the State Board staff, prior to the Coastal Commission's CDP hearing the consultation process is designed to provide feedback to Poseidon, and coordination between permitting agencies, and not meant to result in a formal water code determination as only the Regional Board can make such a determination.

Petitioners' Intent

The Petition largely concerns the process for allowing the Petitioners to participate in the Regional Board's pending (1) determination of the Project's compliance with California Water Code section 13142.5(b); and (2) NPDES permit renewal. Petitioners want to ensure their

participation prior to a final determination on both matters by the Regional Board, which is not expected to occur until after the Coastal Commission's consideration of the Project.

The Petitioners express concerns about an inefficient bifurcated process where the Regional Board would first act upon Poseidon's application for a determination of compliance with section 13142.5(b), and only then turn to approval of a new or revised NPDES permit. Requiring two separate processes for the same Project, however, would result in a substantial overlap of Regional Board time and resources. Further, such a process is not required by law.

Considering the section 13142.5(b) determination and the NPDES permit renewal at the same hearing would not only conserve agency resources, but would provide the Regional Board with the best opportunity to fully consider the import of its actions. The section 13142.5(b) determination, which applies to the Project's intake, and the NPDES permit renewal, which applies to the Project's outfall, are necessarily interrelated. Therefore, the two decisions should not be made in isolation but should be made at the same time. This approach will allow the Regional Board to proceed with a concurrent approval process for both the section 13142.5(b) compliance determination and the NPDES permit renewal, whereby each approval is heard and considered by the Regional Board at the same hearing and the Petitioners and other Project stakeholders have ample opportunity to participate in the formal decision-making process.

Petitioners also suggest that the section 13142.5(b) compliance determination and NPDES permit renewal processes must include a distinct "consultation process" with the State Board. While Poseidon is of course happy for staff to seek input from the State Board during the Regional Board process, there is no requirement that they do so under the Ocean Plan Amendments. *See* Ocean Plan, Chapter III.M.2(a)(2) (providing that "[t]he **regional water board** shall conduct a Water Code section 13142.5(b) analysis" of desalination facilities) (emphasis added); *id.*, Chapter III.M.2(a)(4) (providing that, "[i]n conducting the Water Code section 13142.5(b) determination, the regional water boards shall consult with other state agencies involved in the permitting of that facility"). In addition, both the section 13142.5(b) and NPDES permit renewal determinations are made by the **Regional Board** after hearing all the evidence. *See* Ocean Plan, Chapter III.M.2(a)(1) (section 13142.5(b) determination); Cal. Water Code § 13260 (discharges).

Thank you very much for your time and attention to this matter. Please do not hesitate to contact me if you have any questions or require additional information.

Sincerely,



Christopher W. Garrett
of LATHAM & WATKINS LLP

cc: Philip G. Wyels, State Water Resources Control Board
Kurt Berchtold, Santa Ana Regional Water Quality Control Board

Elizabeth A. Jones, Mills Legal Clinic, Stanford Law School
Elizabeth M. Vissers, Mills Legal Clinic, Stanford Law School
Deborah A. Sivas, Mills Legal Clinic, Stanford Law School
Scott Maloni, Poseidon Resources

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 12670 High Bluff Drive, San Diego, CA 92130.

On **June 10, 2016**, I served the following document described as:

Letter dated June 10, 2016, to Adrianna M. Crowl, Re: Petition to Re-Open Order No. R8-2012-0007, NPDES No. CA 8000403

by serving a true copy of the above-described document in the following manner:

BY U.S. MAIL

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Adrianna M. Crowl
Office of Chief Counsel
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95814-0100

Kurt Berchtold
California Regional Water Quality Control Board
Santa Ana Region
3737 Main Street, Suite 500
Riverside, California 92501-3348

Elizabeth M. Vissers
Mills Legal Clinic
Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305

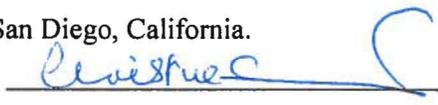
Philip G. Wyels
Assistant Chief Counsel
State Board Water Quality Unit
State Water Resources Control Board
1001 I Street
Sacramento, California 95814

Elizabeth A. Jones
Mills Legal Clinic
Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305

Deborah A. Sivas
Mills Legal Clinic
Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **June 10, 2016**, at San Diego, California.



Christine Sherer