II.4 COMMENTS AND RESPONSES: ORGANIZATIONS (O8-O10)

CONTENTS

The master responses provided in Section II.2*, Master Responses, MR-1 through MR-8*, address similar comments received from multiple commenters on the Draft Supplemental EIR and, therefore, many individual responses to comments refer back to the master responses. These Master Responses are:

- MR-1, Scope of the Commission's Discretionary Action
- MR-2, Lease Modification Project Scope
- MR-3, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR
- MR-4, Piecemealing
- MR-5, Diffuser Entrainment Mortality and Species Affected
- MR-6, Marine Protected Areas
- MR-7, Cumulative Impacts
- MR-8, Alternatives

II.4.8 Comment Set O8: California Coastkeeper Alliance

CALIFORNIA COASTKEEPER ALLIANCE

June 22, 2017

Jennifer Lucchesi
Executive Officer
California State Lands Commission
100 Howe Avenue, Suite 100-South
Sacramento, CA 95825

Sent via electronic mail to: Jennifer.Lucchesi@slc.ca.gov

RE: Request for a 60 Day Comment Period on the Poseidon Supplemental EIR Comments

Dear Ms. Lucchesi:

On behalf of the California Coastkeeper Alliance we are requesting State Lands Commission (SLC) extend the public review period for the Poseidon Draft Supplemental EIR (SEIR) to a 60-day comment period. O8-1

The SEIR is a sensitive and controversial project. As such, the public should be given ample time to review and comment on the SEIR to ensure SLC is made fully aware of the issues before it. More importantly, SLC and its staff should be afforded ample time to review comments and consider them thoughtfully. The Commission's response to comments should not be done hastily. Traditionally, comment review for controversial issues – like the Poseidon Project – are given the full 60-day comment period, we are requesting the same.

The SEIR is unique and complicated. The proposed SEIR is unlike any CEQA analysis we have come across: where the former lead agency (the City) no longer has discretionary authority, but the responsible agency with the next discretionary act continues as a responsible agency. It is also complicated that SLC is only performing a supplemental EIR rather than a subsequent EIR. Compounding the complication, SLC suggests that other agencies, like the Regional Water Board and the Orange County Water District, will be conducting future CEQA analysis and various components of the same Project. These issues bring up unique and complicated legal questions, questions that would serve the public if given a thorough analysis through a 60-day comment period.

Finally, SLC has provided a GHG mitigation plan as part of the SEIR. The Alliance, and its partner NGOs, have contracted with a GHG specialist to review the GHG mitigation plan and provide feedback to SLC. We believe this expert analysis will be helpful to the Commission's full analysis in the SEIR. However, it is highly unlikely we will be able to finalize the expert GHG report by the 45-day comment period. The additional two weeks of review will ensure we can provide the SLC our expert GHG report as part of our overall SEIR comments.

Thank you for considering our request to extend the Poseidon Draft Supplemental EIR from a 45-day comment period to a 60-day comment period. We believe a short, but necessary extension is best for all parties – and most importantly, SLC as they review and respond to an extremely controversial Project.

Sincerely,

Sean Bothwell
Policy Director, California Coastkeeper Alliance

Cc: Alexandra Borack, Project Manager, alexandra.borack@slc.ca.gov
Cy Oggins, Chief, Environmental Planning and Management, Cy.Oggins@slc.ca.gov

RESPONSE TO COMMENT SET O8: CALIFORNIA COASTKEEPER ALLIANCE

O8-1 The commenter's request to extend the public review and comment period for the Supplemental EIR from a 45-day comment period to a 60-day comment period was acknowledged and granted by the CSLC staff. The original comment closure date of July 12, 2017, was extended to July 27, 2017, per a Notice of Availability/Notice of Public Review Time Extension released by the CSLC on June 27, 2017.

II.4.9 Comment Set O9: California Coastkeeper Alliance et al. Joint Letter 1

COMMENT SET O9: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 1 (cont.)

July 26, 2017

The Honorable Edmund G. Brown
Governor, State of California
c/o State Capitol, Suite 1173
Sacramento, CA 95814

Felicia Marcus, Chair
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Dayna Bochco, Chair
California Coastal Commission
45 Fremont Street #2000
San Francisco, CA 94105

Gavin Newsom, Chair
California State Lands Commission
100 Howe Avenue, Suite 100-South
Sacramento, CA 95825

William Ruh, Chair
California Regional Water Quality Control Board
Santa Ana Region
3737 Main Street, Suite 500
Riverside, California 92501-334

RE: Brookfield/Poseidon Huntington Beach Desalination Project – OPPOSE

Dear Governor Brown and Honorable Chairpersons:

O9-1

We write in opposition to the Brookfield/Poseidon Huntington Beach seawater desalination facility as currently proposed (Project). Our organizations and our hundreds of thousands of members are dedicated to advancing freshwater sustainability, consumer protection, environmental justice, and coastal and marine conservation in California. Upcoming decisions regarding the Project are of precedential importance as California considers how to make its water supply more safe, resilient, equitable, and cost-effective into our collective long-term future. We oppose the Project as proposed because it is not consistent with these goals, and instead would:

(1) Impose significant and unnecessary costs on Orange County water districts and ratepayers;

(2) Set back California's efforts to advance climate-smart water policy;

(3) Fail to alleviate reliance upon, or impacts to, freshwater ecosystems, including the Bay-Delta; and

(4) Fail to comply with California law and regulations that govern seawater desalination facilities.[1]

We should be clear that we remain open to the use of seawater desalination as a "last resort" element of a well-planned local or regional water supply portfolio that prioritizes investment in multi-benefit, cost-effective, climate-smart supplies. As recently explained

COMMENT SET O9: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 1 (cont.)

O9-1 cont.

by Stanford's Water in the West Program, sustainable seawater desalination projects are those that "are smaller; that provide supply to meet a specific, clear local demand; that are located away from sensitive and valuable marine areas; and that are powered by renewable energy sources."[2] For example, the proposed Monterey Peninsula Water Supply Project,[3] which includes a modestly-sized desalination facility as part of a portfolio of investments, follows many of the recommendations our organizations have put forth, such as prioritizing lower-impact water resources, seeking to "right-size" the facility, and using subsurface intakes in order to comply with the State Water Board's Ocean Plan Desalination Amendment.

By contrast, large-scale seawater desalination facilities in California will have significant economic, energy, and opportunity costs that rarely justify their benefits. It would be far too easy for an expensive and inefficient large-scale facility to become a stranded asset – or, worse, an inescapable long-term liability – for local water districts and communities a the expense of more affordable, resilient, and environmentally sound alternatives.

We also reiterate our support for a rigorous regulatory process that ensures seawater desalination facilities are sited, scaled, and designed to meet demonstrated needs and to incorporate "best available" technologies that avoid or minimize adverse impacts on California's productive coastal and marine ecosystems. At minimum, proposed facilities must comply with the State Water Resources Control Board's 2015 regulations governing seawater desalination facilities and brine disposal ("Desalination Policy'). They should also use innovative designs and technologies, such as the use of renewable energy to power 100% of their operations; variable production schedules that allow facilities to take advantage of less expensive electricity rates at certain times of day; and sub-surface intakes to minimize marine life impacts, in contrast to open ocean intakes, the use of which is contrary to long-standing California policy and barred from use in other contexts.

In this case, after reviewing permit application materials and other documents associated with the proposed Project, as well as claims made by the Project's agents and lobbyists, we believe the Project is not compatible with the common-sense approaches, policies, and regulations that California has established to guide its water investments and, more specifically, to guide the introduction of seawater desalination into the state's water supply portfolio.

For these reasons, we urge you to deny the Project as proposed pursuant to your respective authorities. California should be showing the United States and the world how it will champion innovative water solutions, rather than enabling the Project's proponent to lock Californians into long-term dependence on a project that is more costly than the alternatives and based on the use of outdated, harmful, and unsustainable technology.

Sincerely,

COMMENT SET O9: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 1 (cont.)

Sean Bothwell
Policy Director
California Coastkeeper Alliance

Garry Brown
Executive Director
Orange County Coastkeeper
Inland Empire Waterkeeper

Susan Jordan
Executive Director
California Coastal Protection Network

Merle Moshiri
President
Residents for Responsible Desalination

Damon Nagami
Director, Southern California Ecosystems Project
Natural Resources Defense Council

Steven Johnson
Water Resources Policy Analyst
Heal the Bay

Kyle Jones
Policy Advocate
Sierra Club

Staley Prom
Legal Associate
Surfrider Foundation

Marce Gutiérrez-Graudiņš
Founder / Director
AZUL

Olga Reynolds
Founder
Orange County Earth Stewards

Marco Gonzalez
Executive Director
Coastal Environmental Rights Foundation

Elizabeth Dougherty PhD
Director
Wholly H20

Conner Everts, Executive Director & Facilitator
Executive Director & Facilitator
Environmental Water Caucus
Desal Response Group
Southern California Watershed Alliance

Oscar Rodriquez
Victor Valladares
Directors
OakviewcomUNIDAD

Dan Silver
Executive Director
Endangered Habitats League

Dan Jacobson
State Director
Environment California

Adam Scow
California Director
Food & Water Watch

Leslie Tamminen
Ocean Program Director
Seventh Generation Advisors

Yenni Diaz
Project Director
Orange County Environmental Justice

Kira Redmond
Executive Director
Santa Barbara Channelkeeper

Claire Robinson
Managing Director
Amigos de los Rios - Emerald Necklace

Colin Bailey
Executive Director & Managing Attorney
The Environmental Justice Coalition for Water

COMMENT SET O9: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 1 (cont.)

APPENDIX

The Brookfield/Poseidon Huntington Beach Project ("Project") would impose significant and unnecessary costs on Orange County water districts and ratepayers.

O9-2

A recent analysis from the Pacific Institute found that when the full costs of construction and lifetime operation are calculated, seawater desalination is the most expensive "alternative" water supply option available, as compared to indirect potable reuse, direct reuse, brackish groundwater desalination, and stormwater capture, while conservation and efficiency can generate significant *savings*.[1]

In the case of the Brookfield/Poseidon Huntington Beach project, construction costs of the facility alone have been estimated at $1 billion; additional anticipated costs include up to $100 million to build and manage a new pipeline system to convey the water to customers; maintenance and repair costs resulting from siting the project in an area that is vulnerable to sea level rise, storm surge, tsunamis, and earthquakes; and the cost of re-treating any desalinated water that must be stored in groundwater aquifers. The Project will also be vulnerable to fluctuating energy costs in light of its dependence on high levels of electricity consumption.

Moreover, the proposed water purchase agreement between Brookfield/Poseidon and its potential customer, Orange County Water District (OCWD), guarantees that ***water produced by the Huntington Beach desalination project will not be cost competitive with imported water for at least the first 40 years of the project's operation.*** Under the 2015 term sheet approved by OCWD, the "base price" of the Project's water "will be tied to the treated full service rate cost of imported water provided by the Metropolitan Water District of Southern California (MWD)." Additional guaranteed costs include "readiness to serve" and capacity charges required by MWD, *plus* a premium to cover the facility's operating costs and an "agreed upon rate of return" for Brookfield/Poseidon.[2] The premium will raise the cost of water generated by the Project as high as 20 percent above the combined cost of imported water and the MWD charges. The Project's water can only achieve cost parity with imported water after the Project has been operating for 40 years, and even then, only if Brookfield / Poseidon is capturing its guaranteed rate of return.

Orange County does not need Brookfield/Poseidon's water, and to the extent it does need additional local water supplies, it has better alternatives. Orange County's existing water supply is anticipated to be sufficient to cover its anticipated needs through 2040, even in a multiple-year dry period. The Metropolitan Water District of Orange County (MWDOC), which, in coordination with OCWD, sells water at retail to local water districts throughout Orange County, recently published an urban water management plan showing that the water agencies in

O9-3

[1] Heather Cooley and Rapichan Phurisamban, The Cost of Alternative Water Supply and Efficiency Options in California (Pacific Institute, 2016), *available at* http://bit.ly/2dMKDcT.

[2] Orange County Water Dist., Ocean Desalination Exploration Term Sheet Explained http://bit.ly/2r5NQaK.

COMMENT SET O9: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 1 (cont.)

O9-3 cont.

MWDOC's service area have successfully used conservation to limit growth in water use, keeping retail water use relatively flat even as the County's population has increased.[3]

Future growth in water demand in MWDOC's service area will also be limited. By 2040, under normal conditions MWDOC expects total retail water demand in its service area to increase by only 3.27 percent, even as population grows by 10 percent.[4] In both normal years and single dry years, MWDOC's available water supply "will meet projected demand due to diversified supply and conservation measures."[5] Even in a multiple-year drought, "MWDOC is capable of meeting all retail agency demands with significant reserves held by [MWD] from 2020 through 2040 with a demand increase of 6 percent."[6] In a recent presentation to the MWDOC Board of Directors, MWDOC staff calculated only a 30 percent likelihood that available supplies may not meet demand in 2040; even then, they explained, a 10,700 acre-foot (AF) project would be sufficient to fill the anticipated gap. Staff also concluded that the Brookfield/Poseidon project "would supply more water than needed in most every year."[7]

As it works to reduce its reliance on imported water over time, Orange County has cheaper and more sustainable alternatives to the Project. MWDOC's Urban Water Management Plan describes many such options, including water recycling, stormwater capture, enhanced storage, and brackish groundwater desalination, as well as smaller seawater desalination projects. Collectively these projects could provide far more "new" water than the anticipated 56,000 AFY that the Brookfield/Poseidon project would produce. Specific examples[8] include:

Metropolitan Indirect Potable Reuse Project (Carson City)	65,000 AFY
Santa Ana River Conservation & Conjunctive Use Program	60,000 AFY
Expansion of water recycling throughout Orange County	53,520 AFY
Groundwater Replenishment System expansion	30,000 AFY
Doheny Desalination Project (using subsurface intakes)	16,800 AFY
West Orange County Enhanced Pumping Project	10,000 AFY
Total potential production of alternatives shown here	**235,320 AFY**

[3] Municipal Water District of Orange County, 2015 Urban Water Management Plan 2-1 (April 2016 Draft), *available at* http://bit.ly/2pb6C2M).

[4] Id. at 2-2 and 2-5.

[5] Id. at 3-47 and 3-48.

[6] Id. at 3-49.

[7] Municipal Water District of Orange County, OC Water Reliability Study Overview (February 6, 2017), *available at* http://bit.ly/2qSR1py.

[8] Id. at 6-3 and 7-2.

COMMENT SET O9: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 1 (cont.)

The Brookfield/Poseidon Project would set back California's efforts to advance climate-smart water policy

O9-4

State policies and climate change strategies such as the Governor's Executive Order B-20-15 on Climate Change, the 2017 AB 32 Scoping Plan Update, *Safeguarding California*, and *Making Water Conservation a California Way of Life* aim to make California's water supply and conveyance system less energy intensive, reduce its direct and indirect GHG emissions, and make it more resilient to climate impacts. These policies require "full life-cycle cost accounting,"[9] and prioritize greater use of water conservation, efficiency, recycling, stormwater capture, and sustainable groundwater management.[10] Similarly, the State Water Resources Control Board's recent climate change resolution acknowledges the need to modify permits and other regulatory requirements to reduce the vulnerability of water infrastructure to flooding, storm surge, and sea level rise.[11]

By contrast, seawater desalination is the most energy-intensive water supply option available and, in the absence of an electricity supply that is based on renewable energy sources, will generate significant direct and indirect GHG emissions.[12] The Brookfield/Poseidon Project is no exception. It will create significant new, unplanned energy demand in a region that is already electrically constrained.[13] It will be fueled primarily by fossil fuels, generating more than 10,000 metric tons of GHGs in the course of its construction and nearly 70,000 metric tons of GHGs *each year* over anticipated lifetime.[14] The Project is also vulnerable to flooding and inundation from sea level rise and storms within its anticipated lifetime.[15]

The best way to reduce GHG emissions is to avoid them in the first place, and the best way to avoid vulnerability to sea level rise is to develop new sources that are not in the ocean's way. As noted above, Orange County has identified a range of less energy- and GHG-intensive options to

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[9] Executive Order B-30-15, Section 6 (April 29, 2015), *available at* http://bit.ly/1KmIVsi, ("State agencies shall take climate change into account in their planning and investment decisions, and employ full life-cycle cost accounting to evaluate and compare infrastructure investments and alternatives.")

[10] California Air Resources Board, 2017 Climate Change Scoping Plan Update (Jan. 20, 2017), *available at* http://bit.ly/2lQuFzb; California Natural Resources Agency, Safeguarding California Plan: 2017 Update (Draft, May 2017), *available at* http://bit.ly/1MgQd16; California Department of Water Resources, et al., Making Water Conservation a California Way of Life: Implementing Executive Order B-37-16 (April 2017), *available at* http://bit.ly/2oYfGZl.

[11] State Water Resources Control Board, Resolution No. 2017-0012, Comprehensive Response to Climate Change (March 7, 2017), *available at* http://bit.ly/2r9nWqj.

[12] H. Cooley and M. Heberger, Key Issues for Seawater Desalination in California: Energy and Greenhouse Gas Emissions (Pacific Institute, May 2013), *available at* http://bit.ly/2r9lUGF.

[13] See Natural Resources Defense Council, Proceed with Caution II: California's Droughts and Desalination in Context (March 2016), *available at* http://on.nrdc.org/2qofMHX.

[14] Poseidon Resources, Huntington Beach Desalination Plant, Energy Minimization and Greenhouse Gas Reduction Plan (Nov. 6, 2017), *available at* http://bit.ly/2r91NZg.

[15] California Coastal Commission, Poseidon Water Staff Report, Appeal No. A-5-HNB-10-225, pg. 75 (October 25, 2013); *available at http://bit.ly/2rQZoiK*. The Poseidon site and facility would be subject to flooding and tsunami runup, both of which would be exacerbated by expected higher sea levels during the life of the project.

secure new water. Orange County officials and California leaders should be encouraging those climate-smart alternatives to this Project.

O9-4 cont.

The Brookfield/Poseidon Project would fail to alleviate reliance upon, or impacts to, freshwater ecosystems, including the Bay-Delta

O9-5

Many of us have worked for decades to advance the long-term health and stewardship of the Bay-Delta as a critically important ecosystem and water supply. Many have also worked to improve local supplies in Southern California, as we know is necessary to make Southern California more self-reliant. However, seawater desalination is not a viable solution to this problem. As explained in a recent report from Stanford's Water in the West program:

> Ocean desalination will not, in the foreseeable future, significantly reduce stress on freshwater resources—particularly freshwater ecosystems. Even the highest total projected production of potable water from ocean desalination in California is so low that it will not meaningfully reduce stress on freshwater systems, such as, for example, exports from the Bay Delta system…. In addition, it is not clear the extent to which planned desalination facilities will provide the regions with supplemental supply and therefore work to reduce or replace existing demands on groundwater and surface water sources.[16]

Brookfield/Poseidon has not been able to identify any agreement or mechanism by which construction of its project would guarantee that water remains in the Bay-Delta or other surface water sources. Indeed, legal and practical barriers preclude any possibility that construction of this Project, or indeed any desalination facility in Southern California, would significantly reduce withdrawals from the Bay-Delta. The existing water supply contract between MWD and the State Water Project, which underlies exports to Orange County via MWD and MWDOC, prevents new local supplies in Southern California from limiting MWD's ability to import or use its full State Water Project entitlement.[17]

The Brookfield/Poseidon project fails to comply with California law and regulations governing seawater desalination facilities

O9-6

Since 1976, California law and policy have strongly discouraged the use of "open ocean" water intakes for industrial facilities because they entrain and kill organisms that are integral parts of California's productive marine and coastal ecosystems.[18] Under state law and the U.S. Clean Water Act, such intakes are no longer permissible for coastal power plants, which must use alternative cooling technologies to minimize their impacts or else (in the case of existing

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[16] Leon Szeptycki, et al., *Marine and Coastal Impacts of Ocean Desalination in California* (Water in the West, Center for Ocean Solutions, Monterey Bay Aquarium, The Nature Conservancy, May 2016), *available at* http://stanford.io/2axdXE7.

[17] San Diego County Water Authority, SEAWATER DESALINATION PROGRAM AGREEMENT AMONG THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THE SAN DIEGO COUNTY WATER AUTHORITY, et al., SDP Agreement No. 70025, Section 13: Metropolitan's Imported Water Entitlements (Nov. 24, 2009).

[18] California Water Code § 31342.5(b); California Public Resources Code §§ 30230-31.

COMMENT SET O9: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 1 (cont.)

facilities) achieve comparable harm reduction through other means.[19] This clear emphasis on protecting California's ecology and natural heritage is continued under the State Water Resources Control Board's 2015 regulations governing seawater desalination facilities and brine disposal ("Desalination Policy"),[20] which are intended to minimize the "significant intake and mortality" of marine life, and the associated "loss of biological productivity," that is caused by the potential use of open ocean intakes at seawater desalination facilities.

O9-6 cont.

The Desalination Policy establishes subsurface water intakes as the preferred technology for avoiding such harms. It requires the use of site selection, facility design (including but not limited to facility size), and control technologies to minimize environmental harms and, where such measures are demonstrably infeasible, requires mitigation to compensate fully for all unavoidable harms.[21]

The Brookfield/Poseidon project would fail to comply with the Desalination Policy, and fail to be consistent with California's long-standing priorities, if assessed for compliance today. The Project's current flaws include:

- Failure to identify a need for desalinated water that is sufficient to justify Brookfield/Poseidon's proposed choice of facility site, design (including size), and control technologies. (See discussion of needs and alternatives, above.)

O9-7

- Failure to complete an environmental impact report (EIR) of the Project and related activities and actions, including the likely uses of Project water and the potential impacts of those uses on the environment; alternative means and routes of transmitting Project water to anticipated customers; potential impacts to marine protected areas (MPAs); and any anticipated updates or changes to the Project's site, design, and control technologies that would be required to secure a tidelands lease from the State Lands Commission and bring the project fully into compliance with all applicable state laws and policies.

O9-8

- Continued use of the Huntington Beach Generating Station's antiquated open-ocean intakes past the end of 2019, thereby perpetuating harms that will no longer be caused by the generating station itself – and indeed would no longer be lawful for the station itself to cause under California's Once-Through Cooling (OTC) Policy.[22]

O9-9

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[19] *See* State Water Resources Control Board, Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling, as amended April 7, 2015 ("OTC Policy"), *available at* http://bit.ly/2qkJr6D; *id.*, OTC Policy, Final Substitute Environmental Document (May 4, 2010), *available at* http://bit.ly/2qoCeAq.

[20] State Water Resources Control Board, Resolution No. 2015-0033, Amendment to the Statewide Water Quality Control Plan for the Ocean Waters of California Addressing Desalination Facility Intakes, Brine Discharges, and to Incorporate Other Nonsubstantive Changes ("Desalination Policy"), May 6, 2015, available at http://bit.ly/2pOC6cm.

[21] California Water Code § 13142.5(b); Desalination Policy, Part III.M.2.e ("Mitigation for the purposes of this section is the replacement of all forms of marine life or habitat that is lost due to the construction and operation of a desalination facility after minimizing intake and mortality of all forms of marine life through best available site, design, and technology.")

[22] OTC Policy § 3(E) (Huntington Beach Generation Station compliance deadline of December 31, 2020).

COMMENT SET O9: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 1 (cont.)

- Use of 1 mm screens to attempt to reduce marine life mortality, despite Water Code requirements that new or expanded industrial facilities must "minimize" marine life mortality, as well as conclusions by the State Water Board and its Expert Review Panel on Desalination Plant Entrainment Impacts and Mitigation that ***a 1 mm screen would reduce marine life mortality by, at most, one percent.*** Indeed the State Water Board found that "fine meshed screens … still allow all small phytoplankton and zooplankton, and the majority of eggs, and fish and invertebrate larvae to pass through" the screens and be entrained.[23] (By contrast, alternatives to full "Track 1" compliance with the OTC Policy must reduce mortality by 90 percent as compared to full compliance.[24]) O9-10

- Failure to demonstrate that alternative facility sites, including sites that would support the use of subsurface intakes, would not be feasible. O9-11

- Failure to demonstrate that alternative facility designs, including a combination of smaller facility sizes and alternative intake designs, including subsurface intakes, would not be feasible. The State Water Board has determined that "a design capacity in excess of the need for desalinated water … shall not be used by itself to declare subsurface intakes as not feasible."[25] O9-12

- Failure to demonstrate, using a full life-cycle cost analysis, that the Project as proposed – as compared to the potential use of alternative sites, sizes, and designs for which subsurface intakes would be feasible – would be the only economically viable option for meeting the demonstrated need for the facility's water.[26] O9-13

- Failure to demonstrate that the Project will not adversely impact nearby state marine protected areas (MPAs) or the ecological connectivity between those MPAs.[27] O9-14

Because of these serious outstanding shortcomings, it is imperative that California's public trust and regulatory agencies undertake stringent analysis of the Brookfield/Poseidon project. If the Project cannot be brought into compliance, it must not be authorized to proceed. O9-15

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[23] State Water Resources Control Board, Final Staff Report Including Substitute Environmental Documentation for Amendment to California Ocean Plan Addressing Desalination Facility Intakes, Brine Discharges, and Incorporation of other Non-Substantive Changes 51, 56, 98 (2015) ("Desalination Policy SED"), *available at* http://bit.ly/2pN3qZ9.

[24] OTC Policy § 2 (A)2).

[25] Desalination Policy § M(2)(d)(1)(a).

[26] Desalination Policy § M(2)(d)(1(a)(i); Executive Order B-30-15, Section 6.

[27] See Public Resources Code §§ 36710 (stating that it is unlawful to "injure, damage, take, or possess" any living marine resource within a state marine reserve, and unlawful to "injure, damage, take, or possess" any living marine resource in a state marine conservation area for commercial or recreational purposes); Fish & Game Code § 2862 (requiring the Department of Fish and Wildlife to evaluate "proposed projects with potential adverse impacts to marine life and habitat in MPAs" and to "recommend measures to avoid or fully mitigate any impacts that are inconsistent with the goals and guidelines of [the Marine Life Protection Act] or the objectives of the MPA.").

RESPONSE TO COMMENT SET O9: CA COASTKEEPER ALLIANCE Joint Letter 1

O9-1 See master response MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR*

O9-2 See master response MR-2*, Lease Modification Project Scope*.

O9-3 See master response MR-7, *Cumulative Impacts*.

O9-4 See master response MR-2*, Lease Modification Project Scope*.

O9-5 See master response MR-2*, Lease Modification Project Scope*.

O9-6 See master response MR-3, *Responsible vs. Lead Agency & Supplemental vs. Subsequent EIR*, Subpart 4D.2, *2015 Desalination Amendment and 2014 and 2015 ISTAP Reports*, regarding compliance with the Desalination Amendment. In particular, master response MR-3 identifies the Santa Ana RWQCB, in coordination with the SWRCB, as the agency designated under the Desalination Amendment to determine, on a project- and site-specific basis and in consultation with the SWRCB, the best available site, design, technology and mitigation measures for the HB Desalination Plant Project. As noted in Supplemental EIR Section 1.2.2, *Santa Ana RWQCB Permitting Status*: (1) the RWQCB is currently conducting the Water Code section 13142.5, subdivision (b) analysis in accordance with the Desalination Amendment, the results of which could result in a change to Poseidon's site, design, technology, or mitigation measures needed to conform to the Desalination Amendment; and (2) at such time as the RWQCB completes its Water Code section 13142.5, subdivision (b) determination, if the RWQCB identifies any changes, new CEQA or CEQA functional equivalent analysis would need to be conducted pursuant to such action. Such changes or alterations are within the responsibility and jurisdiction of the Santa Ana RWQCB, not the Commission (see also State CEQA Guidelines, § 15091, subd. (a)(2)).

As also stated in MR-2*, Lease Modification Project Scope*, Subpart B, *Relationship of Lease Modifications to Approved Lease and Minor Additions/Changes to Lease (State CEQA Guidelines, § 15163, subd. (a)(2)),* (1) Poseidon is in compliance with its lease (PRC 1980.1); (2) Poseidon has a vested right to use the Huntington Beach Generating Station pipelines for seawater desalination until August 7, 2026; and (3) without the proposed modifications, Poseidon would be unable to conduct stand-alone desalination operations consistent with the 2015 Desalination Amendment and its vested right to do so under PRC 1980.1.

COMMENT SET O9: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 1 (cont.)

O9-7 See master response MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR* regarding project need.

O9-8 See master response MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR*.

O9-9 See master response MR-3, *Responsible vs. Lead Agency & Supplemental vs. Subsequent EIR*, Subpart 4D.2, *2015 Desalination Amendment and 2014 and 2015 ISTAP Reports*, regarding compliance with the Desalination Amendment.

O9-10 See master response MR-3, *Responsible vs. Lead Agency & Supplemental vs. Subsequent EIR*, Subpart 4D.2, *2015 Desalination Amendment and 2014 and 2015 ISTAP Reports*, regarding compliance with the Desalination Amendment.

O9-11 See master response MR-8, *Alternatives*.

O9-12 See Response to Comment O9-6, regarding the authority of the Santa Ana RWQCB, in coordination with the SWRCB and pursuant to the Desalination Amendment, to determine, on a project- and site-specific basis and in consultation with the SWRCB, the best available site, design, technology and mitigation measures for the HB Desalination Plant Project. As stated in master response MR-8, *Alternatives*, alternative facility designs, including smaller facilities and alternative intake designs, such as subsurface intakes were considered in the 2010 FSEIR. See Supplemental EIR Section 5.3.3, Table 5-2, *Intake/Discharge Alternatives Eliminated in 2010 FSEIR*.

O9-13 See master response MR-2*, Lease Modification Project Scope*.

O9-14 See master response MR-6, *Marine Protected Areas*.

O9-15 The commenter's assertion that the Project must not be authorized to proceed if it cannot be brought into compliance will be provided to the Commission for consideration in its decision-making process. The Project that will be considered by the Commission is the proposed Lease Modification Project, as defined in Section 2 of this Supplemental EIR. (See also master responses MR-1*, Scope of the Commission's Discretionary Action,* and MR-2*, Lease Modification Project Scope*.)

II.4.10 Comment Set O10: California Coastkeeper Alliance et al. Joint Letter 2

COMMENT SET O10: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 2 (cont.)

July 27, 2017

Alexandra Borack, Project Manager
California State Lands Commission
100 Howe Avenue, Suite 100-South
Sacramento, CA 95825

Sent via electronic mail to: CEQA.comments@slc.ca.gov

RE: Poseidon Supplemental EIR Comments

Dear Ms. Borack,

O10-1

On behalf of the undersigned organizations, we appreciate the opportunity to provide comments on the California State Lands Commission (SLC) Poseidon Supplemental EIR (SEIR). We urge the SLC to take full responsibility as the California Environmental Quality Act (CEQA) lead agency for the legally required Subsequent EIR for the revised Poseidon Project (Project). A partial, segmented SEIR cannot withstand judicial scrutiny.

The Draft SEIR is fundamentally flawed and must be re-written and re-circulated as a Subsequent EIR.

The analysis in the Draft SEIR rests on the incorrect premise that the SLC can "continue their role as a responsible agency" and simply define a new "Lease Modification Project" narrowly limited to the changes since the 2010 SEIR that are relevant to the discretionary authority of the SLC. This underlying premise is based on a fundamental misunderstanding of CEQA and the facts as they exist today.

The City of Huntington Beach (City) was the original lead agency for the Project and prepared a Final SEIR in September 2010, which the SLC relied upon in issuing its lease for the project in October 2010. Had the SLC determined in October 2010 that the City's Final SEIR did not adequately address impacts related to the proposed lease, the SLC could, at that time, have prepared a narrow supplemental CEQA document to address only those limited additional impacts. Once the SLC exercised its discretionary authority to grant the lease based on the City's certified Final SEIR, the SLC's role as a mere responsible agency was concluded. Any agency that now proposes to make a new discretionary decision (including a SLC lease amendment) for the revised Project must assume lead agency status for the entire project and prepare an appropriately updated CEQA document. The SLC's attempt to avoid review of the full Project based on its prior status as a responsible agency is plainly unlawful and inconsistent with CEQA.

The issue before the SLC today is whether substantial changes to "the project" described in the City's 2010 SEIR require a Subsequent EIR.[1] As the comments below illustrate, substantial evidence demonstrates that changes to the project and its circumstances implicate new significant environmental impacts and require major updates and revisions to analyses contained in the 2010 Final SEIR.[2] Accordingly, the SLC must substantially revise and recirculate the current Draft SEIR, including a thorough review of alternatives that would meet the basic objectives of the entire proposed seawater desalination facility, with consideration of a "superior alternative" that would minimize the significant impacts of the entire project and a "No Project" alternative that would mean the entire project would not be built.

A substitute lead agency must evaluate all impacts from the Project as a whole in any supplemental or

[1] *See Bowman v. City of Petaluma,* 185 Cal. App. 3d 1065 (1986).
[2] 14 C.C.R. § 15126.

COMMENT SET O10: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 2 (cont.)

subsequent EIR. That is, the task of additional environmental review cannot be segmented between different agencies—the new lead agency, like the prior one, must prepare and circulate a single updated EIR that can then be relied upon by other responsible agencies taking subsequent discretionary actions. Under the current circumstances, there is no legal authority that would allow the SLC to slice off a piece of the Project for additional CEQA review while ignoring other substantial changes to the Project or deferring consideration of those changes to another agency.

O10-1 cont.

As currently proposed, the draft SEIR is unlawful because the State Lands Commission cannot:

(A) Adopt a Supplemental EIR – only a Subsequent EIR will be legally sufficient in this case;
(B) Continue to limit its role as a Responsible Agency when it must, by law, assume the role of Lead Agency;
(C) Consider the Lease Modification a separate "Project" when it is an integral part of a larger project to build and operate a seawater desalination facility;
(D) Piecemeal the SEIR or defer consideration of substantial changes to another agency;
(E) Avoid undertaking a proper cumulative impacts analysis by unlawful piecemealing;
(F) Ignore the Desalination Ocean Plan Amendment and its existing policy alternatives;
(G) Ignore potential marine resource impacts – including impacts to California's marine protected areas – in its analysis.

A. THE STATE LANDS COMMISSION IS LEGALLY RESPONSIBLE FOR THE PREPARATION OF A SUBSEQUENT EIR.

O10-2

When an EIR has been certified, but the project has not yet commenced, CEQA imposes continuing obligations on public agencies. In particular, CEQA *requires* a Subsequent EIR, not a narrow Supplemental EIR, where there are changes to a project, changes to circumstances under which it will be taken, and/or new information available, such that new or more severe significant impacts, including reasonably foreseeable cumulative impacts, will result.[3] All of these factors are present with respect to the proposed Poseidon desalination facility; accordingly, a subsequent EIR is required.

The Draft SEIR is inadequate in that it has failed to fully document all the changes in the project and circumstances that result in significant new impacts or significantly increased severity of the direct and indirect impacts identified in the 2010 SEIR. For example, in 2014 the California Coastal Commission prepared a Staff Report for Poseidon's application for a Coastal Development Permit (CDP) and response to appeals of the separate CDP issued by the City after the 2010 SEIR was certified and after the SLC adopted the 2010 lease amendment.[4] This evidence shows that, as early as 3 years ago, the project and circumstances affecting the analyses in the 2010 SEIR had changed. The SLC has also identified new substantially changed circumstances in the Draft SEIR since the Coastal Commission staff report in 2013. For example, the cumulative impacts of simultaneous development projects near the site of the proposed Project.[5] Further, the SLC's Draft SEIR identifies changes in the project itself, including modifications to the intake and discharge alternatives necessitated by the adoption of the OPA[6] - the nation's first statewide regulations for ocean desalination. The regulations, commonly referred to as the Desalination Policy, create a set of rules that facilities must follow to minimize marine life mortality during the intake of seawater. The Policy also sets rules for how facilities will dilute brine discharges to prevent toxicity build-up.

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[3] 14 C.C.R. § 15162.
[4] *See* Attachment A: CCC Staff Report.
[5] *See* eg. Draft SEIR Table 3-1 at page 3-9; *See* also Attachment C(1), C(2) & C(3).
[6] However, the SLC's proposed modifications identified in the SEIR are not in compliance with the OPA requirements.

COMMENT SET O10: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 2 (cont.)

There are proposed changes to the project, changes in circumstances, and new information, which all give rise to numerous and significant new and more severe significant impacts. Accordingly, we urge the SLC to follow basic CEQA requirements in moving forward on Poseidon's requested lease amendment, and prepare a Subsequent EIR fully addressing these concerns. O10-2 cont.

1. *CEQA Guidelines Dictate that the State Lands Commission Cannot Adopt a Narrow Supplemental EIR.* O10-3

The SLC cannot choose to prepare a supplemental EIR—only a subsequent EIR is appropriate. CEQA Guideline §15163 states that the "Lead or Responsible Agency may choose to prepare a supplement to an EIR rather than a subsequent EIR if:

> (1) Any of the conditions described in Section 15162 would require the preparation of a subsequent EIR; and
> (2) Only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation."[7]

The SLC can only forego the preparation of a Subsequent EIR when the evidence demonstrates that only minor changes are needed to the previous EIR given all the changed circumstances to the entire project. Here, the evidence shows that project alterations and changed circumstances are substantial, not minor. These changes rise to the level of requiring a Subsequent EIR:

> (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
> (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
> (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the Negative Declaration was adopted, shows any of the following:
>> (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
>> (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
>> (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
>> (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative. [8]

[7] Section 21083, Public Resources Code; Reference: Section 21165, Public Resources Code.
[8] Section 21083, Public Resources Code; Reference: Section 21166, Public Resources Code; Bowman v. City of Petaluma (1986) 185 Cal.App.3d 1065; Benton v. Board of Supervisors (1991) 226 Cal.App.3d 1467; and Fort Mojave Indian Tribe v. California Department of Health Services et al. (1995) 38 Cal.App.4th 1574.

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Since 2010, when the City approved permits for the facility and the SLC approved a lease modification, Poseidon has significantly altered key facets of the Project, and other substantial circumstances have changed. These changes necessitate additional environmental review under CEQA. The SLC cannot lawfully proceed with consideration of the most recent requested lease amendment until that additional review is completed. O10-3 cont.

The SLC has not and cannot satisfy its burden to warrant a Supplemental EIR. Significant changes have not been evaluated for the Project, thus only minor additions or changes would not be sufficient to make the 2010 EIR adequately apply to the Project as a whole in its changed situation. Since major additions and changes need to be made to the 2010 EIR, the SLC's only option is to complete a Subsequent EIR.

2. *Significant changes have not been evaluated for the Project.* O10-4

In 2005, the City certified an EIR that evaluated the Project as a "co-located" facility at the existing power plant. In 2010, the City certified a Subsequent Environmental Impact Report (SEIR) for a "stand-alone" project that would continue drawing cooling water through the power plant's open ocean intake system after the power plant stopped using this system once the new regulations on "once through cooling" were enforced. Since then, numerous changed circumstances have occurred, including the adoption of an Amendment to the California Ocean Plan that regulates seawater desalination.

i. <u>The project has substantial changes which will require major revisions of the previous 2010 Subsequent EIR</u>.

Poseidon has proposed several substantial changes to the Project that were not evaluated in the 2010 SEIR. In particular, Poseidon now proposes to:

(1) Continue using the existing intake structure for "temporary stand alone" use despite new scientific information and changes in the law;
(2) Change substantially the offshore seawater intake by dismantling the existing velocity cap to add one millimeter wedgewire screens and associated structures, once the power plant discontinues withdrawing seawater;
(3) Change substantially the existing seawater discharge pipe with a concentrated seawater diffuser; and
(4) Change substantially the pipeline to carry potable product water away from the site for injection into the groundwater aquifer and/or other means of delivering the product water to member agencies of the Orange County Water District.

None of these significant changes to the project have been evaluated in any existing EIR or SEIR. Each of these changes are substantial and require the SLC to make major revisions to the 2010 Subsequent EIR. Therefore, the SLC is required to prepare a Subsequent EIR – not a Supplemental.

ii. <u>Substantial changes have occurred with respect to the circumstances under which the project is undertaken which will require major revisions of the previous 2010 Subsequent EIR</u>. O10-5

Since the 2010 certification of the Subsequent EIR numerous substantial changes have occurred with respect to the circumstances of the Project. First, the State Water Board adopted the Desalination Ocean Plan Amendment in 2015. Second, California completed a network of marine protected areas in 2012. These require full considerations of new project design, site, technology, and mitigation, as well as the potential significant impacts to individual marine protected areas – including the impacts to the connectivity between marine protected areas.

Further, since certification of the 2010 SEIR, there are numerous significant changed circumstances in the surrounding area that will contribute to cumulative impacts from the Project, including the new schedules for developing the Huntington Beach Energy Project, ASCON toxic landfill remediation, the proposal to demolish and develop the adjacent Tank Farm property, and the OCWD's plan to develop alternative distribution systems from the proposed treatment plant property. These substantially changed circumstances will create new cumulatively significant adverse impacts and/or substantially change the impacts analyzed in the 2010 SEIR, including, but not limited to, cumulative air quality impacts already identified by the SLC in this Draft SEIR. O10-6

iii. New information of substantial importance pertains to the project, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous 2010 Subsequent EIR. O10-7

New information of substantial importance has come to light since 2010 that could mitigate or offer alternatives that would reduce the project's impacts. Most importantly, the assessed need for the project provides new information of substantial importance.

Much has changed with water management in Orange County, many of those changes making its water supply more reliable than it was in 1999 when Poseidon first proposed this idea. However, Poseidon's proposal to include 50 million gallons a day (MGD) into the water supply has not changed since 1999.

Since then, in January 2008, the Orange County Water District's (OCWD) Groundwater Replenishment System (GWRS) became operational, originally producing 70 MGD of highly purified water. In 2015, the project was expanded to produce 100 MGD. Ultimate capacity for the GWRS is projected at 130 MGD after infrastructure is built to increase wastewater flows from Orange County Sanitation District (OCSD) to the GWRS.

Orange County residents and businesses have also made significant improvements to conserving water that was being wasted in 1999. Despite our economy and population continuing to grow, we are using cumulatively less water now than we did in 1999. And most importantly, new water demand projections revealed in February 2016 by Municipal Water District of Orange County showed significantly reduced water demand than previously reported – a difference of about 90,000 acre feet less than predicted in 2010. New reporting estimates that demand by 2040 will be closer to 435,000 acre-feet as opposed to 525,000 acre-feet per year recently estimated by OCWD.

It is important to note that there is opposition from some of the largest water agencies within OCWD's service area to the idea of being forced to buy desalinated water. The cities of Anaheim and Fullerton have both informed OCWD in writing that they are only interested in buying desalinated water on an "as needed" basis, not as part of a take or pay contract. The Irvine Ranch Water District (IRWD) has sent twelve letters to OCWD detailing their concerns of the impacts of desalinated water on their operations, the lack of need for, and the high the cost of desalinated water.

In February of 2017 MWDOC staff gave a presentation of their final Water Reliability Study that explicitly discussed the future need for water by OCWD and concluded that the average future shortage through 2040 would be only 6,300 AFY and that the "Poseidon Yield at 56,000 AF per year would supply more water than needed in most every year". The presentation also documented that the average future shortage through 2040 for all of Orange County is projected to be only 10,700 AFY, still far below the proposed 56,000 AFY planned for the Poseidon Huntington Beach project.

Moreover, new information has come to light since 2010 regarding the feasibility of subsurface intakes. O10-8

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After the ISTAP Panel was concluded, Poseidon's consultants, Geosyntec Consultants, produced a study of the feasibility of slant wells at this site. The attached Slant Well Study finds that, in reviewing the study submitted by Poseidon:

> We conducted a model sensitivity analysis to assess the effects of varying model inputs on model results. Specifically, we evaluated the effect on simulated flow to the slant wells from inland groundwater and the wetlands and the average water-level decline due to varying model inputs for aquifer transmission properties (i.e. hydraulic conductivity), pumping rates, well location and length, and water levels at the seawater intrusion barrier . The model was most sensitive to changes in the aquifer properties of the Talbert Aquifer and the overlying sediments. Varying these properties produced large changes in model-estimated groundwater-level drawdowns and inland flow to the slant wells. These results indicate that more data is needed for these inputs to improve model certainty.
>
> Pumping at lower rates than originally simulated will reduce impacts on the groundwater system. Operation of the slant wells will affect the extent of seawater intrusion in the Talbert Aquifer; pumping will likely increase the gradient from inland areas toward the project wells, which will enhance the movement of inland freshwater toward the coast and move the seawater/freshwater interface closer to the coastline. *This increase in seaward gradient along with capture of seawater by the slant wells will have the effect of reducing the inland migration of seawater*.[9]

In brief, the Slant Well Study suggests that, not only would slant wells not have an adverse impact on the groundwater basin, slant wells may actually improve protection from seawater intrusion. The study goes on to suggest more studies before drawing conclusions that slant wells are infeasible. Slant wells at this site may be technically feasible and may actually improve the efficiency of the seawater intrusion barrier.[10] This is important new information that has come to light since 2010 regarding the feasibility of subsurface intakes.

O10-8 cont.

Finally, new information of substantial importance has come about from the 2015 Substitute Environmental Document (SED) for the OPA.[11] Of particular note, is the SED outlines important findings by the State Water Board's Expert Panel.[12] Studies have found that a 1 mm screened intake will result in a zero reduction of entrainment for small and younger species. The State Water Board's Expert Panel has concluded that the net benefit of a 1 mm screened is only one percent. And the State Water Board has decided that a 1 mm screened intake will only result in a 1 percent reduction of entrainment – resulting in a 99 percent mortality rate.[13]

O10-9

Given the substantial changes in the proposed Project, and substantial changes to closely related projects, since the 2010 Subsequent EIR was certified, there simply is no question that a subsequent EIR must be

O10-10

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[9] Attachment G: Slant Well Report at page 2 (emphasis added).
[10] *See* Attachment G: Slant Well Report.
[11] *See* State Water Resources Control Board, Final Staff Report Including the Final Substitute Environmental Documentation: Amendment to the Water Quality Control Plan For Ocean Waters of California Addressing DESALINATION FACILITY INTAKES, BRINE DISCHARGES, AND THE INCORPORATION OF OTHER NON-SUBSTANTIVE CHANGES (Adopted May 6, 2015); *available at* http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2015/rs2015_0033_sr_apx.pdf.
[12] *See* Foster et al., Expert Report III Review and Responses to Questions Concerning APF and Mitigation Fees; *available at* http://www.waterboards.ca.gov/water_issues/programs/ocean/desalination/docs/erp_final.pdf; *See* Foster et al., Expert Panel II: Mitigation and Fees for the Intake of Seawater by Desalination and Power Plants; available at http://www.waterboards.ca.gov/water_issues/programs/ocean/desalination/docs/erp_intake052512.pdf.
[13] *Id.*

prepared to inform the SLC's discretionary decision on any lease amendment, as well as all the following responsible and trustee agencies' decisions. All EIRs, including subsequent EIRs, must evaluate the "whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."[14] "From this principle, 'it is clear that the requirements of CEQA 'cannot be avoided by chopping up proposed projects into bite-sized pieces' which, when taken individually, may have no significant adverse effect on the environment."[15]

O10-10 cont.

A Subsequent EIR is necessary to evaluate these new significant changes.

B. THE STATE LANDS COMMISSION CANNOT DESCRIBE ITSELF AS A CONTINUING RESPONSIBLE AGENCY—THE COMMISSION IS THE LEAD AGENCY.

O10-11

The State Lands Commission is the lead agency. In 2010, the City assumed lead agency status for the Project, preparing and certifying both the original EIR and the 2010 Subsequent EIR in connection with its issuance of a coastal development permit and a conditional use permit. That 2010 SEIR was also to be used by "responsible agencies" in their discretionary approvals – which the SLC already did in approving the amended lease now being considered for additional amendments.[16] As discussed, substantial changes to the Project not evaluated in those prior documents necessitate additional CEQA review. It does not appear, however, that there are any additional discretionary approvals pending before the City. Therefore, the SLC has stepped into the shoes of the lead agency.

1. The State Lands Commission has stepped into the shoes of the lead agency.

The SLC states that the "California State Lands Commission, in its continuing role as a responsible agency under the California Environmental Quality Act has prepared this Supplemental Environmental Impact Report…".[17] The SLC has improperly characterized its "continuing role"; it is now the lead agency according to CEQA Guidelines.

Based on CEQA Guidelines, the SLC cannot characterize itself as a continuing responsible agency. CEQA Guidelines mandate that the SLC is the lead agency. CEQA Guideline §15050 states that where "a project is to be carried out or approved by more than one public agency, one public agency shall be responsible for preparing an EIR or Negative Declaration for the project. This agency shall be called the Lead Agency."[18] In 2010, numerous state and local agencies were required to provide approval for the project, but it was deemed that the City was the lead agency.

In 2016, it was determined that significant changes to the Project have occurred where further CEQA would be required. The SLC, the former Responsible Agency, was called upon to grant approval of new amendments to the Project's lease that are necessitated by changed circumstances since the SLC approved

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[14] 14 C.C.R. § 15378.

[15] Ass'n for a Cleaner Env't v. Yosemite Cmty. Coll. Dist., 116 Cal. App. 4th 629, 638 (2004) (project to close shooting range included cleanup and dismantling); see also Christward Ministry v. Superior Court, 184 Cal. App. 3d 180, 195–96 (1986) (city impermissibly chopped up single project into three separate projects, which was "exactly the type of piecemeal environmental review prohibited by CEQA"); Citizens Ass'n for Sensible Dev. of Bishop Area v. County of Inyo, 172 Cal. App. 3d 151, 165 (1985) (project improperly segmented into two projects for CEQA purposes).

[16] When SLC approved the amended lease in 2010, after considering the 2010 SEIR, its "continuing role as a responsible agency" came to an end.

[17] SEIR 1-1.

[18] Section 21083, Public Resources Code; Reference: Sections 21080.1, 21165, and 21167.2, Public Resources Code.

a lease amendment based on the 2010 SEIR. In the cover letter from Poseidon to the SLC for the Application to Amend the Lease, Poseidon discussed options for ensuring CEQA compliance, including:

O10-11 cont.

> Alternatively, the SLC may choose to act as the *Lead Agency* under CEQA and apply CEQA Guidelines Sections 15162-15164 in determining whether a Subsequent EIR, Supplemental EIR, or EIR Addendum would be appropriate.[19]

Poseidon informed the SLC of the mandate to act as a "Lead Agency" in communications leading up to the decision to take on this SEIR, and this is the option the SLC chose to take.

Specifically, the CEQA Guidelines mandate:

> Where a responsible agency is called on to grant an approval for a project subject to CEQA for which another public agency was the appropriate lead agency, the responsible agency shall assume the role of the lead agency when any of the following conditions occur:
> . . .
> (2) The lead agency prepared environmental documents for the project, but the following conditions occur:
> (A) A subsequent EIR is required pursuant to Section 15162,
> (B) The lead agency has granted a final approval for the project, and
> (C) The statute of limitations for challenging the lead agency's action under CEQA has expired.[20]

The current situation satisfies all three requirements, and the SLC must step into shoes of the lead agency. First, all parties agree the SLC must prepare additional CEQA analysis. And as we argue above, the law requires that a subsequent EIR be prepared. Second, the City does not have any additional discretionary approvals pending and has granted final approval for the project.[21] Third, the statute of limitations for challenging the City of Huntington Beach CEQA approval has expired.[22] Since the SLC is the next agency with continuing discretionary approval of the changed project, the SLC must take on the role of lead agency.

If there are no further discretionary approvals of the Project by the City the SLC is stepping into the role of "lead agency" for the requisite additional CEQA review and preparing an updated EIR for public review and certification. In that role, the SLC must fully evaluate all potential impacts associated with proposed changes to the Project. Despite the claims made in the draft SEIR, the SLC is not acting in a "continuing role as a responsible agency" – that role ended when the SLC adopted the October 2010 lease amendment after the City certified the 2010 SEIR in September.

CEQA requires public agencies to undertake an environmental review of proposed projects that require their discretionary approval.[23] And when "subsequent environmental documents are required," a

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[19] *See* Attachment II: Poseidon Application Cover Letter to SLC at 5 (emphasis added).
[20] 14 C.C.R. § 15052(a) (emphasis added).
[21] 14 C.C.R. § 15052(c) ("Once a project has been approved, the lead agency's role in project approval is completed, unless further discretionary approval on that project is required. Information appearing after an approval does not require reopening of that approval. If after the project is approved, any of the conditions described in subdivision (a) occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project.").
[22] Pub. Resources Code § 21167.
[23] Pub. Resources Code, § 21080, subd.(a).

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responsible agency "called upon to approve a project," like the SLC, "may be required to step into the shoes of the lead agency."[24]

O10-11 cont.

As a substitute lead agency, the SLC must evaluate all impacts from the Project as a whole in any supplemental or subsequent EIR. So when the SLC steps into the City's shoes, it must play the full role of a lead agency and consider all reasonably foreseeable direct, indirect and cumulative impacts from the Project, including from those aspects of the Project that may fall under the approval jurisdiction of another responsible agency. A decision to proceed on the lease amendment application with only a partially updated EIR would render the SLC's actions vulnerable to a viable legal challenge.

2. *The State Lands Commission, Regional Water Board, Coastal Commission, and OCWD Cannot Prepare Sequential CEQA Documents for the Same Project.*

O10-12

The SLC cannot continue being a responsible agency solely because other agencies have future discretionary approval. Since more than one public agency may have discretionary approval authority for a project, CEQA includes rules for determining each agency's obligations. The agency with "principal responsibility" for carrying out or approving a project serves as the CEQA "lead agency" for purposes of complying with the statutory requirements.[25]

CEQA demands the SLC integrate all CEQA review. CEQA sets out a fundamental policy requiring local agencies to "integrate the requirements of this division with planning and environmental review procedures otherwise required by law or by local practice so that all those procedures, to the maximum feasible extent, run concurrently, rather than consecutively."[26] The CEQA guidelines similarly specify that "[t]o the extent possible, the EIR process should be combined with the existing planning, review, and project approval process used by each public agency."[27] To the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements."[28] Toward that end, agencies are encouraged to "[c]onsult with state and local responsible agencies before and during preparation of an environmental impact report so that the document will meet the needs of all the agencies which will use it."[29] The purpose of an environmental impact report is to "provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project."[30]

CEQA requires that the lead agency conduct a thorough review of the project in question, even though additional review might later be undertaken by other agencies with jurisdiction over specific resources, and must provide a comprehensive analysis on which other agencies may rely.[31] Once a lead agency is selected, that agency shoulders the burden of complying with CEQA in all respects. In particular, "the lead agency is responsible for considering the effects of all activities involved in a project and, if required by CEQA, preparing the draft and final EIR's and certifying the final EIR for a project."[32] In contrast,

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[24] *City of Sacramento v. State Water Res. Control Bd.*, 2 Cal. App. 4th 960, 970 (1992). *See* also *Comm. for a Progressive Gilroy v. State Water Res. Control Bd.*, 192 Cal. App. 3d 847, 863 n.7 (1987) ("[I]n the event a subsequent or supplementary EIR were required it would be the duty of the cities, as the "lead agency" to prepare it.").
[25] Cal. Pub. Res. Code § 21067.
[26] § 21003, subd. (a).
[27] Guidelines, § 15080.
[28] Guidelines, § 15124, subd. (d)(1)(C), italics added; see also Guidelines, § 15006, subd. (i).
[29] Guidelines, § 15006, subd. (g) (emphasis added).
[30] § 21061; see § 21002.1, subd. (a).
[31] *Save San Francisco Bay Assn. v. San Francisco Bay Conservation etc. Com.*, 10 Cal. App. 4th 908, 921 (1992).
[32] *Riverwatch v. Olivenhain Mun. Water Dist.*, 170 Cal. App. 4th 1186, 1201 (2009) (emphasis added).

"[r]esponsible agencies generally rely on the information in the CEQA document prepared by the lead agency [e.g., an EIR] and ordinarily are not allowed to prepare a separate EIR or negative declaration."[33] In other words, "while the lead agency is responsible for considering all environmental impacts of the project before approving it, a responsible agency has a more specific charge: to consider only those aspects of a project that are subject to the responsible agency's jurisdiction."[34]

O10-12 cont.

In the Draft SEIR, the SLC seems to be setting up a scheme where each former "responsible agency" continues to be acting in their respective "continuing role as a responsible agency" to prepare separate CEQA documents. For example, the Draft SEIR states:

> At such time as the RWQCB completes its Water Code section 13142.5, subdivision (b) determination, if the RWQCB identifies a site outside the PRC 1980.1 lease boundaries, new CEQA or CEQA functional equivalent analysis would need to be conducted pursuant to such action.[35]

However, CEQA Guidelines, Section 15162 states:

> (b) Except as provided in subdivision (c), the decision-making body of each Responsible Agency shall consider the Lead Agency's EIR or Negative Declaration prior to acting upon or approving the project. Each Responsible Agency shall certify that its decision-making body reviewed and considered the information contained in the EIR or Negative Declaration on the project.
> (c) The determination of the Lead Agency of whether to prepare an EIR or a Negative Declaration shall be final and conclusive for all persons, including Responsible Agencies, unless:
> (1) The decision is successfully challenged as provided in Section 21167 of the Public Resources Code,
> (2) Circumstances or conditions changed as provided in Section 15162, or
> (3) A Responsible Agency becomes a Lead Agency under Section 15052.

Like the SLC, the Regional Water Quality Control Board has no "continuing role" as a "responsible agency" – they will be acting as a "responsible agency" in the preparation of a new Subsequent EIR. The Santa Ana Regional Water Quality Control Board considered the 2010 SIER certified by the City and in 2012 issued an amended NPDES permit based on that 2010 SEIR.[36] Much like the SLC, the RWQCB's "continuing role as a responsible agency" ceased when that amended permit was approved. In this case, just as in 2012, the Regional Board will be acting as a "responsible agency" relying on the SEIR the SLC is preparing now.

Further, the language in the SEIR is quoted from the "Sequencing Agreement" proposed by Poseidon and agreed to by the SLC, RWQCB and CCC.

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[33] *Id.*
[34] *Id.* 1201, 1206 (emphasis added).
[35] Draft SEIR at 1-8.
[36] *See* Attachment D, 2012 NPDES/WDR at page 10 of 33: In compliance with the California Environmental Quality Act, a Subsequent Environmental Impact Report (SEIR) for the Facility was certified by the City of Huntington Beach on September 7, 2010, and the City adopted a CEQA Statement of Findings of Facts with a Statement of Overriding Considerations and Mitigation Monitoring and Reporting Program. Also on September 7, 2010, the City of Huntington Beach amended Conditional Use Permit No. 02-04 and on September 20, 2010, the City of Huntington Beach approved Coastal Development Permit No. 10-014 for the Facility.
As documented in the Fact Sheet (Attachment F), the Regional Water Board has reviewed the final SEIR….

> The RWQCB will make available for public review its tentative order amending and/or renewing the 2012 NPDES Permit and tentative Water Code section 13142.5, subdivision (b) compliance determination within 90 days of: (a) a RWQCB determination that complete applications have been submitted for the NPDES Permit and the compliance determination; (b) a final approval by the CSLC on Poseidon's application to modify PRC 1980.1; and (c) approval and/or *certification of any and all CEQA documents* and related environmental information and analysis necessary for the RWQCB to act as a CEQA responsible agency in connection with Poseidon's Project." [37] [38]

O10-12 cont.

It is clear in the "Sequencing Agreement", signed by Poseidon and the 3 agencies that the RWQCB is relying on the lead agency to prepare "any and all CEQA documents… [necessary] for them to act as a responsible agency." Clearly the agreement, signed by Poseidon and the SLC, does not suggest the RWQCB is relying on the 2010 SEIR, nor are they required to prepare additional CEQA documents as a responsible agency for project approval. As described in the Cover Letter from Poseidon for the Application to Amend the Lease[39], the RWQCB is a "responsible agency" in the preparation of this Draft SEIR being prepared by the SLC as the "lead agency" and should participate in the drafting of this SEIR to ensure it is adequate for their use approving the relevant permits.

This interpretation of the Sequencing Agreement would also be consistent with the CEQA Guidelines: "The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. *The term 'project' does not mean each separate governmental approval*."[40]

The SLC is the lead agency and needs to take responsibility for preparing a single Subsequent EIR. The SLC has stepped into the City's shoes. It must play the full role of a lead agency and consider all reasonably foreseeable direct, indirect and cumulative impacts from the Project. This includes impacts from those aspects of the Project that may fall under the approval jurisdiction of another responsible agency. Anything less cannot withstand a legal challenge.

C. THE STATE LANDS COMMISSION PIECEMEALS THE PROJECT BY ILLEGALLY DEFINING THE LEASE MODIFICATION AS A SEPARATE PROJECT.

O10-13

When the SLC steps into the City's shoes, it must play the full role of a lead agency and consider all reasonably foreseeable direct, indirect and cumulative impacts from the Project, including from those aspects of the Project that may fall under the approval jurisdiction of another responsible agency. This result also makes sense from a policy perspective. Just as CEQA requires a single initial lead agency for each project and a single EIR upon which all other responsible agencies may rely, the same rules apply to a subsequent or supplemental EIR. The agency that steps into the lead agency role must prepare a single document that evaluates impacts from the whole project. Here, by defining an integral part of the whole project as a separate "Lease Modification Project", when that separate project in and of itself would have no independent utility, the SLC is engaged in illegal "piecemealing" of the project and its foreseeable

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[37] Draft SEIR at 1-11 (emphasis added). Regardless of what is said in the MOA, it is important to note that the Sequencing Agreement does not waive the SLC's responsibilities under CEQA.
[38] It appears in the Draft SEIR that the RWQCB is expected to act in "its continuing role as a responsible agency" from when the 2010 SEIR was approved. However, the Sequencing Agreement language must be read to mean that the RWQCB would be acting as a responsible agency as the SLC prepares this Draft SEIR.
[39] *See* Attachment H: Poseidon Application Cover Letter to SLC at 5 (emphasis added).
[40] CEQA Guidelines S 15378 (c) (emphasis added).

adverse impacts. Moreover, the "Lease Modification Project", by itself, is incapable of meeting the objectives stated for the project in the Draft SEIR – a symptom of a "piecemeal" analysis.

O10-13 cont.

Deferring evaluation of some project impacts simply because another responsible agency has later approval authority would deprive the public and decision makers of the ability to comprehensively understand the project's full environmental impacts—in violation of CEQA. A decision to proceed on the lease amendment application with only a partially updated EIR would render the SLC's actions vulnerable to a viable legal challenge.

O10-14

1. *A Project Must Have Independent Utility.*

The SLC cannot define a project that does not have independent utility. The SLC defines the Project as a "Lease Modification Project" rather than the proposed Poseidon desalination project. Then the SLC asserts that other parts of the project that have substantially changed since 2010 are "not germane" to the so-called "Lease Modification Project."

The case of *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora et al.*[41] is instructive as to why the SLC's "Project" is illegally defined and constitutes piecemealing. The SLC's reasons for segmenting the Huntington Beach desalination facility are eerily similar to the arguments made by the Respondents in *Tuolumne County Citizens*. The Respondents unsuccessfully claimed that (1) the City properly evaluated the whole of the home improvement center project and (2) substantial evidence showed that the road realignment project was a long-standing, separate City project. Respondents argued that the City's determination to segment the projects does not mean environmental review of the road realignment project has been avoided because that project is undergoing a separate CEQA review.

In rejecting that argument and deciding that both activities were the same "project", the court first looked at the CEQA definition of "project". CEQA broadly defines a "project" as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."[42] The statutory definition is augmented by the Guidelines, which define a "project" as "*the whole of an action*, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment …."[43] "The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval."[44] The same reasoning would apply here to the SLC's SEIR. The SLC cannot argue that its Lease Modification is a separate project and that each separate governmental approval is also a separate project. The project is the whole of the action – the entire Poseidon facility.

Tuolumne County Citizens also relied upon precedent from the California Supreme Court. The California Supreme Court has considered how to interpret the word "project" and has concluded that CEQA is "to be interpreted in such manner as to afford the fullest possible protection to the environment within the

[41] *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora et al.,* Court of Appeal, Fifth District, California (October 02, 2007).
[42] Pub. Resources Code, § 21065.
[43] Guidelines, § 15378, subd. (a), italics added; *see Remy et al., Guide to the Cal. Environmental Quality Act* (CEQA) (10th ed. 1999) 75-77 (Remy) ["whole of an action" requirement].).
[44] Guidelines, § 15378, subd. (c).

reasonable scope of the statutory language."[45] This broad interpretation ensures that "the requirements of CEQA 'cannot be avoided by chopping up proposed projects into bitesize pieces' which, when taken individually, may have no significant adverse effect on the environment…."[46] The same conclusion can be drawn here. By chopping the Poseidon project into bitesize pieces (the Lease Modification, the alternatives before the Regional Water Board, and the water distribution system), the SLC is illegally piecemealing the project so that no significant adverse effect on the environment will be identified.

O10-14 cont.

Tuolumne County Citizens then applied general CEQA principles to determine whether the center and road were one project. The court examined how closely related the acts are to the overall objective of the project. The relationship between the particular act and the remainder of the project is sufficiently close when the proposed physical act is among the "various steps which taken together obtain an objective."[47] The commencement of business operations at the site is conditioned upon the completion of the realignment of the road. As a result, the road realignment is a step towards the project's objective. In other words, the road and the center need to be taken together to achieve their objective – taken separately there is no independent utility.

Just as in *Tuolumne County Citizens*, there is no independent utility if you piecemeal the project. The Draft SEIR clearly fails to properly characterize the modifications to the intake and discharge structures as a "part of the project." That is, the modifications cannot be a separate project because they have no "independent utility", nor does the project have any utility without the intake and discharge. Further, clearly the modification of the intake and discharge conduits are, as the court noted, "a step toward achieving the project objectives" to supply fresh water to the region.

The flawed effort to create a fictional separate project is part and parcel of the logic that results in a "piecemealed" analysis of the project and objectives defined in the 2010 SEIR. The Draft SEIR must be rewritten and recirculated for public comment with a comprehensive analysis of all the changes to the entire project since certification of the 2010 SEIR.

2. *The SLC must evaluate the changes related to Purpose and Need for the project and the implications those changes have for the range of alternatives considered.*

O10-15

CEQA has discreet rules for describing the Purpose and Need for a project. Under CEQA an EIR must include a statement of objectives sought by the proposed project. The statement of objectives should include the underlying purpose of the project.[48] As a legal matter, CEQA Guideline 15124 (b) explains that a clearly written statement of objectives, that includes the project purpose, aids in development of a reasonable range of alternatives, as well as any statement of overriding considerations.

The Draft SEIR states the "project objectives" as:

> These objectives are:
> - Use proven technology to affordably provide a long-term, local and reliable source of water not subject to the variations of drought or regulatory constraints;
> - Reduce local dependence on imported water and strengthen regional self-reliance; and
> - Contribute desalinated water to satisfy regional water supply planning goals.

[45] *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259, 8. Disapproved of on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888, 896-897.
[46] *Lake County Energy Council v. County of Lake* (1977) 70 Cal.App.3d 851, 854.
[47] Robie et al., Cal. Civil Practice–Environmental Litigation (2007) § 8.7.
[48] CEQA Guideline 15124 (b).

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O10-15 cont.

Poseidon's objectives also include obtaining:

- RWQCB determination of consistency, in consultation with the SWRCB, with Water Code section 13142.5, subdivision (b), as implemented through the Ocean Plan (hereinafter referred to as the Desalination Amendment) and issuance of a National Pollutant Discharge Elimination System (NPDES) permit; and CCC approval under the California Coastal Act (Pub. Resources Code, § 30000 35 et seq.).[49]

First, obtaining permits from the RWQCB and CCC is not a basic "project objective" to be considered in an EIR. It may be the project proponents' objective, but that seems like an obvious and irrelevant fact to include. As far as a CEQA analysis is concerned, issuing permits is the discretionary authority of responsible agencies, and the SEIR is an analysis of adverse environmental impacts that must be considered by those agencies before exercising their authority. Obtaining those permits is a prerequisite to construction and operation – but it is not the purpose of the project or a "project objective."

Second, and more importantly, the Purpose and Need for the project have dramatically changed since the 2010 SEIR was certified.[50] The regional water supply agency recently completed an updated Urban Water Management Plan (UWMP) based on a comprehensive regional Reliability Study. Those recent studies and reports document that regional demand has been decreasing previous to and since 2010, and new supplies have already become available since 2010. Further, the studies employ a more sophisticated model for predicting future demand than what was used in the previous UWMPs.

The Purpose and Need for the proposed seawater desalination facility has substantially changed since 2010 and meeting the objectives of "regional self-reliance" through water "not subject to drought and regulatory constraints" have in large part already been met through an expanded Groundwater Replenishment System, enhanced per capita conservation, and other local and reliable efforts. These enhancements to local reliability will be even more advanced when the Los Angeles County, in partnership with Metropolitan Water District, develops a new Indirect Potable Reuse facility in Carson, and transfers approximately 65,000 acre feet a year of potable water to recharge the Orange County groundwater basin – another post-2010 reasonably foreseeable source of local and reliable water to meet the stated objectives.

The Draft SEIR must be rewritten and re-circulated with a new Purpose and Need section. As explained in Section F, these fundamental changes in water reliability have an impact on the CEQA analysis of environmental impacts and alternatives to minimize those impacts. Further, changes in demand for the product water from the proposed project impact the required analysis of compliance with the recently adopted Ocean Plan amendment regulating seawater intakes for desalination.

Finally, the project objectives cited from the 2010 SEIR illustrate that the so-called "Lease Modification Project" is not a project. Treating the Lease Modification as a separate project is defying the long-held rules against "piecemealing" the analysis to disguise the cumulative impacts. Further, the narrow analysis of the fictional "Lease Modification Project" illegally restrains alternatives that would meet the basic objectives while minimizing the environmental impacts.

The Lease Modification alone will not independently achieve the stated objectives. As stated above, the fictional "Lease Modification Project" described in the Draft SEIR has no independent utility. Therefore, the so-called "Lease Modification Project" cannot, without the other components of a complete project, fulfill the basic objectives to supply water to the region. The "Lease Modification Project", in and of itself, will not:

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[49] Draft SEIR at 2-1.

[50] *See* Attachment F: OCWD Demand Analysis.

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- Provide a long-term, local and reliable source of water not subject to the variations of drought or regulatory constraints;
- Reduce local dependence on imported water and strengthen regional self-reliance; nor,
- Contribute desalinated water to satisfy regional water supply planning goals."

O10-15 cont.

The Draft SEIR is fatally flawed and must be wholly revised to comply with CEQA. The "project" described in the Draft SEIR must be capable of achieving the basic project objectives or it is not a relevant "project" that has independent utility.

D. THE STATE LANDS COMMISSION CANNOT ILLEGALLY PIECEMEAL THE PROJECT BY DEFERRING CONSIDERATION OF SUBSTANTIAL PROJECT CHANGES TO ANOTHER AGENCY.

O10-16

A substitute lead agency must evaluate all impacts from the Project as a whole in any supplemental or subsequent EIR. That is, the task of additional environmental review cannot be segmented between different agencies—the new lead agency, like the prior one, must prepare and circulate a single updated EIR that can then be relied upon by other responsible agencies taking subsequent discretionary actions. As the CEQA Guidelines expressly state: the term "project" refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term "project" does not mean each separate governmental approval.[51]

Under the current circumstances, there is no legal authority that would allow the SLC to slice off a piece of the Project for additional CEQA review while ignoring other substantial changes to the Project or deferring consideration of those changes to another agency. The circumstances here are much like the circumstances the SLC faced in 2010 when they approved a lease amendment – with one critical exception—according to this Draft SEIR, the City no longer has discretionary authority and the SLC is the next agency with discretionary authority and must fill the shoes of a lead agency.

1. Piecemealing the project will not adequately inform the public or decision-makers.

O10-17

The SLC is legally responsible for informing the public and decision-makers as to the environmental impacts of the project. However, the approach taken by the SLC is in direct conflict with the recent California Supreme Court decision *Banning Ranch Conservancy v. City of Newport Beach et al.*[52] The Court held that the City ignored its obligation to integrate CEQA review with the requirements of the Coastal Act, and gave little consideration to the Coastal Commission's needs. The issue in *Banning Ranch* was whether the Banning Ranch EIR was required to identify potential Environmentally Sensitive Habitat Areas (ESHAs) and analyze the impacts of the project on those areas.[53] Similar to the current situation with the Agency Sequencing MOU, in *Banning Ranch*, Consent Orders were agreed upon that a "a separate analysis will be undertaken by the Coastal Commission in connection with any future Coastal Development Permit application or proceeding before the Coastal Commission involving these properties."[54] Similar to the SLC in this instance, the "City disavowed any obligation to further consider" issues to be decided by the Coastal Commission.[55] The City claimed it had "fulfilled its obligation under CEQA to analyze the significant impacts of a project on the physical environment."[56] It maintained that findings on issues before the Commission were "within the discretion of the Coastal Commission" and that while the Draft EIR must

[51] CEQA Guidelines §15378 (c).
[52] *Banning Ranch Conservancy v. City of Newport Beach et al.*, Supreme Court of California (March 30, 2017).
[53] *Id* at 18.
[54] *Id* at 13.
[55] *Id*.
[56] *Id*.

O10-17 cont.

identify a project's impact on the environment, "it is not required to make a finding pursuant to the Coastal Act."[57] That would be within the discretion and authority of the Coastal Commission when this Project comes before them."[58] The Court disagreed, and held that the:

> City did not make a good faith attempt to analyze project alternatives and mitigation measures in light of applicable Coastal Act requirements. It *openly declared that it was omitting any consideration of potential ESHA from the EIR, and deferring that analysis to a subsequent permitting process*. The City's approach, if generally adopted, would permit lead agencies to perform truncated and siloed environmental review, leaving it to other responsible agencies to address related concerns seriatim.[59]

The Court's conclusion is on point to the current situation before the SLC. Similar to the Consent Orders in *Banning Ranch*, here, the Draft SEIR implies the Agency Sequencing MOU requires that separate analysis will be undertaken by additional resource agencies at a later date. Moreover, the SLC has openly declared that it is omitting consideration of alternative intake and discharge sites and technologies, and any impacts associated with the Project's distribution system. The SLC's excuse is that subsequent permitting will address analysis of impacts and alternatives. Just as in *Banning Ranch*, the SLC's approach would provide for a truncated and siloed environmental review, leaving it to other responsible agencies to address related concerns seriatim.

The SLC cannot rely upon the Regional Water Board to analyze alternative sites and technologies. In *Banning Ranch*, the City argued that Coastal Commission issues would be "fully considered during the permitting phase of the project." However, such a delay is inconsistent with CEQA's policy of integrated review.[60] The City's argument was also undermined by *Citizens for Quality Growth v. City of Mt. Shasta*[61], where the EIR did not discuss a mitigation measure proposed by the United States Army Corps of Engineers.[62] The City justified the omission by claiming the corps would act to protect wetlands during the permit process. The court was not persuaded: "*Each* public agency is required to comply with CEQA and meet its responsibilities, including evaluating mitigation measures and project alternatives."[63]

The SLC cannot contend it does not need to analyze alternative intake and discharge sites and technologies on the basis that it does not have the authority to mandate a particular site or technology. In *Banning Ranch*, the City argued it had "no authority to designate ESHA on Banning Ranch because only the Coastal Commission can do that."[64] However, the Court stated that a lead agency is not required to make a "legal" ESHA determination in an EIR.[65] Rather, it must discuss potential ESHA and their ramifications for mitigation measures and alternatives when there is credible evidence that ESHA might be present on a project site.[66] Similarly here, SLC is not required to make a legal determination as to what the best site and best technology is for minimizing marine life mortality. But, it is required to discuss mitigation measures and alternatives as they relate to marine life impacts due to ongoing desalination activities.

The Guidelines specifically call for consideration of related regulatory regimes, like the Coastal Act and

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[57] *Id.*
[58] *Id* at 14.
[59] *Id* at 26 (emphasis added).
[60] *Id* at 23; § 21003, subd. (a).
[61] *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433.
[62] *Banning Ranch* at 23.
[63] *Id* at 23-24; See Guidelines, § 15020; *Citizens for Quality Growth*, at p. 442, fn. 8.
[64] *Id* at 21.
[65] *Id.*
[66] *Id.*

O10-17 cont.

the Porter-Cologne Act, when discussing project alternatives.[67] An EIR must "describe a range of reasonable alternatives to the project," or to its location, that would "feasibly attain" most of its basic objectives but "avoid or substantially lessen" its significant effects.[68] Among the factors relevant to the feasibility analysis are "other plans or regulatory limitations, [and] jurisdictional boundaries (projects with a regionally significant impact should consider the regional context)."[69] The Guidelines anticipate that the lead agency will consider other plans and regulatory limitations—the SLC cannot justify ignoring significant impacts and alternatives just because another agency has regulatory authority over those issues.

CEQA procedures "are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects."[70] The Guidelines state that an EIR should identify "[a]reas of controversy known to the lead agency including issues raised by [other] agencies."[71] "Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts."[72] "[M]ajor environmental issues raised when the lead agency's position is at variance with recommendations and objections raised in the comments must be addressed in detail."[73]

The SLC cannot avoid analysis of the Project's alternative sites and technologies simply because the Regional Water Board has the legal duty to consider those alternatives as part of its enforcement of the Ocean Plan amendment. The SLC is legally required to consider and enforce mitigation measures and alternatives associated with the Project as part of the issuance of permits.

Further, the SLC cannot evade analyzing foreseeable changes to the Project's distribution system[74] simply because it's purportedly speculative. In *Banning Ranch*, the City claimed that "identification of potential ESHA would be merely speculative."[75] The Court disagreed. "The fact that precision may not be possible . . . does not mean that no analysis is required."[76] "Drafting an EIR . . . involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can."[77] The SLC cannot disregard foreseeable changes to the Project's distribution system merely because precise details are not available. The SLC has more than enough information to forecast the possible distribution scenarios and to analyze those scenarios for future permitting agencies.

The SEIR does not provide the public nor the responsible agencies relying on this CEQA analysis the appropriate amount of information to make informed regulatory decisions. In order to serve the important purpose of providing other agencies and the public with an informed discussion of impacts, mitigation measures, and alternatives, an EIR must lay out any competing views put forward by the lead agency and other interested agencies.[78] As the California Supreme Court makes clear, the preparation and circulation

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[67] *Id* at 19.
[68] Guidelines, § 15126.6, subd. (a).
[69] *Id*., subd. (f)(1).
[70] *Id* at 20; § 21002; see Guidelines, §§ 15126.4, 15126.6.
[71] *Id*; Guidelines, § 15123, subd. (b)(2).
[72] *Id*; Guidelines, § 15151.
[73] *Id* at 25; Guidelines, § 15088, subd. (c).
[74] *See* Attachment B: OCWD Alternative Distribution Systems.
[75] *Id* at 22.
[76] *Id*.
[77] *Id*; Guidelines, § 15144; *Laurel Heights I*, *supra*, 47 Cal.3d at p. 399.
[78] *Id* at 25-26. See § 21061; *Laurel Heights I*, *supra*, 47 Cal.3d at p. 391.

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of an EIR is more than a set of technical hurdles for agencies and developers to overcome.[79] The "EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account."[80]

O10-17 cont.

Banning Ranch is analogous to the current situation before the SLC. The SLC's approach would provide for a truncated and siloed environmental review, leaving it to other responsible agencies to address related concerns seriatim. The Draft SEIR must be rewritten and re-circulated for public comment prior to being certified.

2. *The SLC cannot ignore activities that are an integral part of another activity—they are all within the scope of the same CEQA Project.*

O10-18

The SLC is purposefully ignoring other activities – like the water distribution system – to illegally piecemeal the project. Courts have considered separate activities as one CEQA project and required them to be reviewed together where, for example, the second activity is a reasonably foreseeable consequence of the first activity.[81] The distribution system for the desalinated product water is a reasonably foreseeable consequence – as it's the critical component to deliver the product of the desalination project – and thus is plainly an integral part of the water-sourcing project. In fact, as noted above, the project cannot meet the objectives listed in this Draft SEIR without a product water delivery system. As such, Poseidon's delivery system, carried out in partnership with the OCWD, is required to be reviewed together by the SLC in a Subsequent EIR with all other aspects of the project.

To comply with CEQA, the SLC must prepare a Subsequent EIR for the whole project that covers impacts from all substantial changes to the Project and circumstances as described in the 2010 SEIR, including changes to aspects of the Project that do not involve the tidelands lease, because all other responsible agencies must rely on the subsequent CEQA document for any additional discretionary approvals. In particular, as noted above, we understand that the substantial changes to the Project include a pipeline to carry desalinated water away from the site for injection into the groundwater aquifer.[82] Because these new aspects – the pipeline and the groundwater injection – are necessary steps in Poseidon's objective to produce and sell desalinated water, they unquestionably are part of the same project for CEQA purposes.[83] As such, the SLC must evaluate them in its updated SEIR.[84]

Poseidon not undertaking the distribution system does not mean the distribution system is not part of the project. The courts have found that being the party undertaking both matters only "increases the likelihood that the matters are related"[85] – but it does not bar the review of both matters. Instead, the SLC

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[79] *Id* at 26.
[80] *Id*; *Laurel Heights I*, *supra*, 47 Cal.3d at pp. 391-392; *Vineyard*, *supra*, 40 Cal.4th at p. 449; see *Concerned Citizens*, *supra*, 42 Cal.3d at pp. 935-936.
[81] Bozung v. Local Agency Formation Com. (1975) 13 Cal.3d 263 [118 Cal. Rptr. 249, 529 P.2d 1017]); or both activities are integral parts of the same project (No Oil, Inc. v. City of Los Angeles (1987) 196 Cal. App. 3d 223 [242 Cal. Rptr. 37])(Sierra Club v. Westside Irrigation District et al. (2005) 128 Cal. App. 4th 690.
[82] *See* Attachment B: OCWD Alternative Delivery Systems.
[83] Tuolumne Cty. Citizens for Responsible Growth, Inc. v. City of Sonora, 155 Cal. App. 4th 1214, 1226 (2007) ("The relationship between the particular act and the remainder of the project is sufficiently close [to constitute a single project under CEQA] when the proposed physical act is among the "various steps which taken together obtain an objective.").
[84] Rural Landowners Assn. v. City Council, 143 Cal. App. 3d 1013, 1025 (1983) (where responsible agency stepped into the shoes to prepare a subsequent or supplemental EIR, all parts of project, including new parts, had to be evaluated).
[85] *Tuolumne County Citizens for Responsible Growth* at 13.

should look to the Guidelines, which establish that the need for separate approvals does not sever all of the connections between the two acts.[86] The acts remained connected, notwithstanding the separate approvals, because the distribution system is a condition that must be completed before desalination operations can commence.[87]

O10-18 cont.

Furthermore, "Courts have considered separate activities as one CEQA project and required them to be reviewed together where … both activities are integral parts of the same project.[88] Thus, when one activity is an integral part of another activity, the combined activities are within the scope of the same CEQA project. This case is similar to *Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712 (*Plan for Arcadia*), where the court found that the construction of (i) a shopping center, (ii) a parking lot, and (iii) improvements to an adjacent street were all part of a single CEQA project.

The Huntington Beach proposal is similar to *Respondents in Tuolumne County Citizens for Responsible Growth* and *Arcadia, Inc.* The approval of the water distribution system is conditioned upon completion of the desalination facility. Consequently, there is a strong connection between the distribution system and the completion of the desalination facility. It follows that in order for a court to be consistent with the case law from *Respondents in Tuolumne County Citizens for Responsible Growth* and *Arcadia, Inc.*, that a court would conclude that the desalination facility and the distribution system are part of a single CEQA project.

And construction of the distribution system will clearly add to the severity of impacts of subject areas reviewed in the Draft SEIR, including Air Quality and GHG. The Draft SEIR estimates Air Quality impacts and GHG emissions that need revisions to the 2010 analysis, but fails to include the additional impacts from some of the alternative distribution systems that would require significant new construction activities. Further, the construction of the distribution system will add to the severity of impacts to subject areas not reviewed in the Draft SEIR, including Traffic, Terrestrial Biological Resources, Noise and others not reviewed in the Draft SEIR. For example, the routes of the new alternative distribution systems have never been analyzed for these impacts beyond the alternatives reviewed in the 2010 SEIR, and those routes considered in 2010 are clearly not the only alternatives under consideration today.

The Draft SEIR must be rewritten and re-circulated to define the distribution system alternatives as reasonably foreseeable changes to the project, and include a thorough analysis of the alternatives with a description of the superior alternative. This analysis cannot be left to the OCWD as that would result in the issuance of permits by the Regional Water Quality Control Board and Coastal Commission prior to the public and decision-makers being informed of the potential adverse impacts of the project as a whole (or even a separate closely related project creating cumulative impacts) – undermining the fundamental intent of CEQA.

3. *The Project's Distribution System is Not Speculative and Needs to be analyzed by the State Lands Commission to Prevent Illegal Piecemealing.*

O10-19

The SLC is purposefully ignoring the project's distribution system and thus illegally piecemealing. The SLC admits in the DSEIR that potential changes may occur to the product water delivery system but then fails to analyze them. Contrary to the DSIER's unsubstantiated conclusion that these changes are "speculative", evidence shows that since the 2010 SEIR was certified, the Orange County Water District (OCWD) has agreed to modify the project by assuming responsibility for developing the product water

[86] *See* Guidelines, § 15378, subd. (c) [Separate governmental approvals do not create separate projects].
[87] *See* reasoning *Tuolumne County Citizens for Responsible Growth* at 14.
[88] *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223.)" (*Sierra Club v. West Side Irrigation Dist.* (2005) 128 Cal.App.4th 690, 698 (*West Side Irrigation*).

O10-19 cont.

delivery system – starting at the edge of the treatment plant property. OCWD has reviewed numerous new alternative delivery system options not considered in the 2010 SEIR and has narrowed the alternatives to several that have never been evaluated. These new alternatives are clearly "reasonably foreseeable" and very significant changes to the project that were not evaluated in 2010.[89] The Draft SEIR fails to consider and analyze the cumulative impacts from these changes (eg, Air Quality and GHG emissions from construction and operation of the delivery system, water quality degradation, etc). Much like the offshore components of the modified intake and discharge, the delivery system, in and of itself, has no independent utility and must be analyzed as a part of the project as a whole.

The Draft SEIR states:

> Based on this information, *potential modifications contemplated to distribute desalinated water by local or regional water agencies is speculative at this time and not germane* to the Lease Modification Project. Future CEQA analysis may be needed to construct an onshore desalinated drinking water distribution system, for example if a proposed system differs from the distribution system previously evaluated in the 2010 FSEIR.[90]

The Huntington Beach desalination project's proposed delivery system is not "speculative" and it certainly is "germane" to the project objectives[91] to supply water to the region. Consequently, the alternatives for a delivery system, not known in 2010, must be included in the SLC's CEQA analysis. CEQA Guidelines define a "project" to mean "the whole of an action." It is improper for an agency to divide a project into separate parts to avoid CEQA review.[92] Poseidon, in partnership with the Orange County Water District (OCWD), has changed the reasonably foreseeable range of feasible delivery systems from what was proposed in 2010.[93] The 2010 proposal was to put the water into new and existing pipes and deliver it to customers. And Poseidon was going to build the necessary infrastructure. Now OCWD is expected to build the needed infrastructure. Moreover, the water delivery plan now includes putting some, and perhaps all, of the product water into the groundwater basin. Those changes since the 2010 SEIR was certified require analysis of impacts from construction and operation of the distribution system, as well as analysis of potential impacts to the groundwater basin which is regulated by the Regional Water Quality Control Board.

The OCWD engaged in a thorough review of alternative distribution systems after agreeing with Poseidon to construct the system as part of the Term Sheet for a future contract to purchase the water. That review process began with numerous alternatives, and through the process of analyzing the feasibility of each, finally resulted in only several considered "feasible". While the OCWD has not identified the final choice of a new delivery system, the options left after their relatively thorough evaluation are clearly new alternatives to the several considered in the 2010 Subsequent EIR.

The Project's potential new water delivery system raises new concerns. Where will the delivery pipes be

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[89] *See* Attachment B: OCWD Alternative Delivery Systems.

[90] Draft SEIR at page 1-12.

[91] Draft SEIR at page 2-1: …this Supplemental EIR incorporates these objectives within the context of Poseidon's application to amend PRC 1980.1. These objectives are:

- Use proven technology to affordably provide a long-term, local and reliable source of water not subject to the variations of drought or regulatory constraints;
- Reduce local dependence on imported water and strengthen regional self-reliance; and

Contribute desalinated water to satisfy regional water supply planning goals.

[92] Guidelines, § 15378, (a); California Farm Bureau Federation v. California Wildlife Conservation Bd., 143 Cal.App.4th 173 (2006).

[93] *See* Attachment B; also *see* e.g.,http://www.ocwd.com/media/2462/01b0revisedposeidontermsheetcleanversion_20150514.pdf.

built and what adverse impacts to the community and the environment will come from that construction? What are the cumulative impacts of the entire project (including the distribution alternatives) given changes to closely related projects since the 2010 SEIR was certified? And how will the water be put into the basin, and what adverse impacts will come from that additional desalinated water being mixed with groundwater?

O10-19 cont.

The Draft SEIR cannot conclude alternative distribution systems from those reviewed in the 2010 SEIR are "speculative." The Orange County Water District has conducted a review of alternative distribution systems, and by the process of elimination has whittled the alternatives to a few that the agency considered feasible.[94] Much like the two alternative distribution systems reviewed in the 2010 SEIR, it is not necessary for the lead agency to identify which of the alternatives will be ultimately chosen, but it is required to include all the alternatives. While the OCWD has yet to finalize that alternative review and select their preferred alternative, it is clear that those additional alternatives to what were reviewed in the 2010 SEIR are now "reasonably foreseeable" and must be included in the updated alternatives analyses.

4. *If the Lease Modification is a separate project, then it still needs to be considered for cumulative impacts.*

O10-20

As noted throughout these comments, the modification to the intake and discharge should be properly identified as a part of the whole project, including but not limited to the changed circumstances nearby the proposed treatment plant site (see Attachment C), the foreseeable new alternative distribution options (see Attachment B), as well as numerous changed circumstances documented in the Coastal Commission Staff Report from 2014 (see Attachment A) and elsewhere.

Alternatively, as noted above, the Draft SEIR might be amended to describe the modifications to the intake and discharge as part of several "Multiple and Phased Projects." But while we wholly disagree with that characterization, the CEQA Guidelines §15165 would still require the several projects to be considered as a whole. For the numerous reasons stated elsewhere in these comments, we strongly disagree that the fictional "Lease Modification Project" is a separate project from the whole Poseidon proposal. Nonetheless, even if it were a separate project, the Draft SEIR would still need to review the "cumulative impacts" from all project modifications, and all the changed circumstances since the 2010 SEIR was certified and State Lands acted by issuing a lease amendment a month afterwards.

CEQA defines "cumulative impacts" as the change in the environment resulting "from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time."[95] Simply because the project specific impacts were insignificant does not mean that the cumulative impacts will be insignificant, nor that the Project impacts will not make a considerable contribution to cumulative impacts.

In this case, the Draft SEIR appears to argue that most of the impacts from the fictional "Lease Modification Project" are less than significant – some after mitigation. But the Draft SEIR is void of any analysis of the significant cumulative impacts from several reasonably foreseeable projects that have substantially changed since being considered in the 2010 SEIR. Ironically, some, but not all, of the "past, present and reasonably foreseeable future projects" are identified in the Draft SEIR.[96] For example, the Draft SEIR lists the Huntington Beach Energy Project, ASCON toxic landfill remediation, and the newly proposed "Magnolia Tank Farm" multi-use development proposal. And while the Draft SEIR argues

[94] *See* Attachment B.
[95] CEQA Guideline 15355, subd. (b).
[96] Draft SEIR, Table 3-1 at page 3-9.

potential changes to the distribution system are "speculative", the distribution system is now under consideration by the Orange County Water District and is clearly a reasonably foreseeable change to the project, or a "reasonably foreseeable future project" under the CEQA definition.

O10-20 cont.

We only offer these comments to highlight that, even if the "Lease Modification Project" was a separate project, the Draft SEIR would need to be dramatically expanded to meet the CEQA requirements to identify and analyze the cumulative impacts from "past, present and reasonably foreseeable future projects."

More importantly, carrying the Draft SEIR logic of "sequential CEQA documents" to its unavoidable conclusion means that there will be several CEQA documents: one by the SLC, a separate one from the RWQCB, a separate one by the Coastal Commission, and possibly another by the Orange County Water District. The trustee agencies will be left having to comment on repeated documents and left with no single document from which to find the information of total project impacts and cumulative impacts from other closely related projects to guide their decision. The public will be left in the same situation, meaning the process completely undermines the CEQA intent to inform the public before these agencies act. It is unclear when this series of CEQA documents would ever be reconciled so that the public and reviewing agencies can ever find a "cumulative impacts" analysis, mitigation measures (if needed) and conclusions. In fact, if it is the responsibility of the last agency in the sequence to prepare a through cumulative impact analysis – that might be OCWD, and they do not intend to do that until after all the other agencies have acted.

And without that cumulative impact analysis -- which would apparently be the duty of an undefined agency to cull from the several CEQA documents and combine the several pieces of cumulative impacts and paste them together -- the process will be a "case book" illustration of a "piecemeal" approach. Each respective CEQA document from the responsible agencies will be part of the "chopping up a proposed project into bite-sized pieces' which, when taken individually, may have no significant adverse effect on the environment."[97]

The Draft SEIR is a clear violation of the long-held CEQA standards to avoid "piecemealed" analyses. We reiterate that the "Lease Modification Project" is not a separate project with "independent utility" so it must be analyzed as a part of the whole seawater desalination proposal.

E. THE STATE LANDS COMMISSION FAILS TO ADEQUATELY DOCUMENT SUBSTANTIALLY CHANGED CUMULATIVE IMPACTS.

O10-21

The SLC is responsible for identifying and evaluating the cumulative impacts for the entire Poseidon desalination facility. Substantial changes in the project, and substantial changes to relevant circumstances, result in significant new impacts and/or a significant increase in the severity of the impacts identified in the 2010 SEIR. Yet the Draft SEIR completely ignores and fails to analyze substantial changes in relevant topic areas – for example: Geological Hazards, Biological Resources (terrestrial), Traffic & Parking, etc. Since these changed circumstances are totally dismissed, the Draft SEIR excludes important cumulative impacts. For example, but not an exhaustive list, the Draft SEIR fails to document and analyze the cumulative Air Quality and GHG emissions during simultaneous construction of the changes to both the

[97] Ass'n for a Cleaner Env't v. Yosemite Cmty. Coll. Dist., 116 Cal. App. 4th 629, 638 (2004) (project to close shooting range included cleanup and dismantling); see also Christward Ministry v. Superior Court, 184 Cal. App. 3d 180, 195–96 (1986) (city impermissibly chopped up single project into three separate projects, which was "exactly the type of piecemeal environmental review prohibited by CEQA"); Citizens Ass'n for Sensible Dev. of Bishop Area v. County of Inyo, 172 Cal. App. 3d 151, 165 (1985) (project improperly segmented into two projects for CEQA purposes).

offshore components [the so-called "Lease Modification Project"] and the onshore components of the project and surrounding onshore developments, and how those emissions will be compounded by new changes to traffic and parking. The Draft SEIR fails to identify significant changes or analyze the foreseeable changes to the entire project and closely related projects, and the cumulative impacts to the proposed project as a whole.

O10-21 cont.

1. *The SLC's illegally narrowing of the project to the Lease Modification results in an inadequate cumulative analysis.*

O10-22

Banning Ranch mandates this Draft SEIR must adequately inform the public and decision-makers of the significant impacts from the project that are relevant to Coastal Act policies and the future decision by the Coastal Commission both in the ruling on pending appeals and on the issuance of a "retained jurisdiction" coastal development permit.

The SLC must evaluate any and all aspects of the revised Project that were not previously considered in the 2010 SEIR, including the proposed changes to the offshore intake and discharge technologies of the project and alternative technologies and sites as required in the Ocean Plan amendment. Further, changes to the project described in the 2010 SEIR must also include reasonably foreseeable changes to the distribution system as documented in studies conducted by OCWD. These substantial changes to the project itself must be analyzed for the significant "direct impacts" of the project, as well as alternatives to minimize those adverse impacts.

Equally, if not more importantly, the Draft SEIR must document and analyze substantial new "indirect" cumulative impacts in the vicinity of the Project. Indirect impacts are "secondary effects" that are the reasonably foreseeable result of another project even though they "are later in time or farther removed in distance."[98]

A cumulative impact "is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time."[99] "One of the most important environmental lessons evident from past experience is that environmental damage often occurs incrementally from a variety of small sources."[100] Thus, without "meaningful cumulative analysis" and control, "piecemeal development would inevitably cause havoc in virtually every aspect of the urban environment."[101]

According to the draft SEIR:

> The information provided in this Supplemental EIR, if certified, will assist the CSLC in making its decision to approve or deny the Lease Modification Project. Each additional responsible agency is responsible for considering the effects of those activities that it is required by law to carry out or approve (Pub. Resources Code, § 21002.1, subd. (d)). Section 3.8 of the 2010 FSEIR presented a list of agency approvals, including those to be issued by agencies acting as responsible agencies under CEQA. Most of those agency actions are related to construction and operation of the HB Desalination Plant.[102]

[98] 14 C.C.R. § 15358(a)(2); Bakersfield Citizens for Local Control v. City of Bakersfield, 124 Cal. App. 4th 1184, 1205 (2004).
[99] 14 C.C.R. §15130.
[100] *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692 (1990).
[101] *San Franciscans for Reasonable Growth v. City and County of San Francisco*, 151 Cal. App. 3d 61 (1984).
[102] Draft SEIR at 1-21 (*emphasis added*).

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O10-22 cont.

The Draft SEIR also argues that, based on that narrow purpose "…the following subject issues would not be impacted by the Lease Modification Project, and are therefore eliminated from consideration in this Supplemental EIR:

- Agricultural and Forestry Resources;
- Biological Resources (Terrestrial);
- Hydrology, Drainage, and Stormwater Runoff;
- Geology and Soils;
- Land Use and Planning;
- Mineral Resources;
- Population and Housing;
- Public Services;
- Transportation/Traffic (onshore); and
- Utilities and Service Systems.

But this narrow review, and reliance on responsible agencies to produce separate CEQA documents for their separate permitting authority, violates basic premises of CEQA. The term "project" refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term "project" does not mean each separate governmental approval.[103] And the Draft SEIR also violates the recent Supreme Court decision in *Banning Ranch* that clearly states this SEIR must take into account Coastal Act policies and the impacts a project may have on those policies.

O10-23

2. *The Coastal Commission's 2013 Staff Report identifies important issues to be considered in the State Land Commission's SEIR.*

In 2013, Poseidon applied for a retained jurisdiction permit from the Coastal Commission, and after nearly ten years of requesting postponements, finally agreed to a hearing on appeals filed by the public and Coastal Commissioners. In preparation for the hearing, Coastal Commission staff prepared a report and recommendations for action by the Commission.[104] However, at the hearing, Poseidon withdrew the application and once again requested a postponement of the appeal hearing. Nonetheless, the Staff Report serves to identify the types of information required in the Draft SEIR to meet the purpose of informing the public and decision-makers in regards to Coastal Act policy. The subject areas in the CCC Staff report include:

- Marine Life and Water Quality;
- Wetlands and Environmentally Sensitive Habitat Areas;
- Flood, Tsunami, and Sea Level Rise Hazards;
- Geological Hazards;
- Climate Change;
- Public Access and Recreation; and
- Land Use – Site Designation and Allowable Uses.[105]

These subject areas are only the Coastal Commission's identified changes from 2010 to 2013. There have been substantial changes to the project and cumulative projects since the Coastal Commission prepared the 2013 Staff Report.

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[103] CEQA Guidelines §15378 (c).
[104] *See* Attachment A: CCC Staff Report (2013).
[105] *Id* at pg. 4.

Further, Appendix A of this Draft SEIR lists numerous Coastal Act policies relevant to the changed circumstances since the 2010 SEIR was certified. Nonetheless, the Draft SEIR is void of any analysis of the cumulative impacts nor the relevance to the Coastal Act policies enumerated in Appendix A. It is inadequate to simply cite relevant Coastal Act policies in an appendix to the Draft SEIR, yet fail to mention and analyze those policies in the text of the CEQA document.

O10-23 cont.

Additionally, OCWD is now planning several different distribution systems that may alter impacts around the treatment plant site and the Draft SEIR neither considers the impacts as a part of the project, as it should, or as exacerbating cumulative impacts from separate but closely related projects.

The proposed Poseidon desalination facility project alone will have impacts on the environment and community and surrounding environment for years, and those impacts will be dramatically more severe given the numerous reasonably foreseeable past, future and concurrent projects adjacent to the Poseidon site that have changed since certification of the 2010 SEIR. Yet, while the Draft SEIR mentions these projects that are all closely related in time and space, the Draft SEIR fails to adequately document, analyze and mitigate the significant cumulative impacts.

The Draft SEIR states:

> Direct and cumulative impacts associated with HB Desalination Plant construction and operation were analyzed in 2010 in a Final Subsequent Environmental Impact Report (2010 FSEIR) certified by the city of Huntington Beach (City). However, offshore construction activities were not part of the 2010 Project subsequently approved by the City and California State Lands Commission (CSLC).

The Draft SEIR errs in assuming the analysis in the 2010 FSEIR is adequate to inform the public and decision-makers of the significant impacts from changed circumstances since the 2010 SEIR was certified. The addition of noise, air emissions, and other impacts from the offshore construction alone must be more clearly considered in the context of changed cumulative impacts.

3. *The State Lands Commission needs to evaluate the cumulative impacts of new proposals that were not considered in the 2010 SEIR.*

O10-24

Construction and operation of the Poseidon factory will create numerous adverse impacts on the environment and surrounding community, including: traffic, parking, noise, dust, nighttime lighting, air pollution, and much more. These impacts will compound ("cumulative impacts") those of concurrent or consecutive projects closely related to the project in both space and time. For example, on sites directly adjacent to the proposed site for the desalination facility, and either immediately prior to, concurrent with, or consecutive to, development of the Poseidon project:

- AES is proposing to demolish the existing generators and build a "replacement" power plant;
- DTSC is planning a massive remediation effort to remove contaminated soil from the Ascon toxic landfill, and;
- A new developer is demolishing an old Oil Tank Farm and developing the site for a massive new multi-use residential-commercial development.

Some of these projects are new proposals and were not considered in the 2010 SEIR, for example the "Magnolia Tank Farm" project. Others, like the AES demolition and re-power project and the Ascon

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toxic landfill remediation, were known at the time of the 2010 SEIR but have substantially changed in the meantime. And finally, the Draft SEIR includes the proposed changes to the product water delivery system in the list of closely related projects – when it should be considered a change to the project itself.

O10-24 cont.

i. AES Re-Power Project (HBEC).

O10-25

The AES re-power project, or Huntington Beach Energy Center (HBEC) project, was analyzed for adverse impacts as part of the California Energy Commission (CEC) license certification process in 2014 and a similar process to review an amended application to CEC in 2015.[106]

The 2010 Poseidon Project FSEIR did not thoroughly consider the cumulative impacts of the proposed AES re-power project. And the CEC analysis of the AES re-power project did not include cumulative impacts from the changes proposed to the Poseidon Project under consideration in this Draft SEIR.

Further, it is now certain that the AES re-power project will create numerous impacts from construction and/or operation that will last until 2025[107], overlapping in proximate time and place with the changed Poseidon project and other closely related projects. Clearly the HBEC project construction and operation will create numerous impacts (eg, Air Quality degradation, GHG emissions, Noise, Traffic, Biological *terrestrial*, Sea Level Rise, Stormwater Runoff, and more)[108], similar to the Poseidon project and other closely related projects. And those foreseeable impacts will last for approximately 9 years and occur concurrently with and consecutive to the construction and operation of the Poseidon project.

Without a thorough analysis in this Draft SEIR, the public and decision-makers will be unable to fully understand the severity of the cumulative impacts from simultaneous and/or consecutive demolition and construction projects in close proximity to the Poseidon project as a whole, and/or the modifications to the proposed Poseidon project.

ii. Ascon Remediation.

O10-26

Since certification of the 2010 SEIR, the Department of Toxic Substances Control (DTSC) has made substantial changes to what was known about the "final remedy" for cleaning up the Ascon toxic landfill.[109]

A summary description of the proposed project explains:

> As discussed above, Alternative 4 in the RAP is the Project being evaluated in this EIR. The remediation activities proposed as part of the Project include development of a protective cap to cover the contaminated materials after select waste deposits are removed. To enable the construction of the cap, the contaminated materials at the Site would need to be graded to reconsolidate waste from the Site perimeter to the Site interior and to create appropriate slopes for storm water runoff and collection from the cap. The remediation activities include excavation and off-site disposal of up to 30,000 cubic yards of Site contaminated materials, in addition to the removal of the Pit F waste (approximately 2,250 cubic yards), to allow for cap installation.[110]

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[106] *See* Attachment C(1): AES-HBEC PMPD.
[107] *Id* at page 2-9.
[108] *Id* at Sections IV, V, and VI.
[109] *See* Attachment C2: Ascon EIR (2015); *See* Projects Document at: http://www.dtsc.ca.gov/SiteCleanup/Projects/Ascon.cfm.
[110] *See* Attachment C2: Ascon EIR at page 1-4.

> Alternative 4 would remove up to 32,250 cubic yards of contaminated materials from the Site. A total of approximately 206,000 cubic yards of suitable soils would need to be imported to construct the cap and backfill the non-capped areas.[111]

O10-26 cont.

As described in that EIR, "…the construction schedule for the preferred alternative is estimated at approximately 11 months."[112]

The project construction and operation will create numerous impacts (eg, Air Quality degradation, GHG emissions, Noise, Traffic, Biological *terrestrial*, Sea Level Rise, Stormwater Runoff, and more), similar to the Poseidon project and other closely related projects. And those foreseeable impacts will last for approximately 11 months and occur either soon before, concurrently with, or consecutive to the construction and operation of the Poseidon project.

Without a thorough analysis in this Draft SEIR, the public and decision-makers will be unable to fully understand the severity of the cumulative impacts from simultaneous and/or consecutive demolition and construction projects in close proximity to the Poseidon project as a whole, and/or the modifications to the proposed Poseidon project.

iii. Magnolia Tank Farm.

O10-27

The 2010 Poseidon Project FSEIR was certified by the City prior to the recent announcement to demolish the existing Oil Tank Farm and develop the property for a mixed-use project.[113]

Further, it is reasonably foreseeable that the proposed "Magnolia Tank Farm" project will create numerous impacts from construction and/or operation (eg, Air Quality degradation, GHG emissions, Noise, Traffic, Biological terrestrial, Sea Level Rise, Stormwater Runoff, and more), similar to the Poseidon project and other closely related projects, that will last for approximately ten years[114], overlapping in proximate time and place. It also seems reasonably foreseeable that these cumulative projects would exacerbate the impacts from the inclusion of the offshore modifications to the intake and discharge structures alone – but most certainly the development would compound the severity of the Poseidon project impacts from the nearby cumulative projects.

Without a thorough analysis in this Draft SEIR, the public and decision-makers will be unable to fully understand the severity of the cumulative impacts from simultaneous and/or consecutive demolition and construction projects in close proximity to the Poseidon project as a whole, and/or the modifications to the proposed Poseidon project.

4. *The SLC is required to analyze the cumulative impacts of the foreseeable Orange County Water District Distribution System.*

O10-28

The Draft SEIR errs by placing the Potable Water Distribution System in the "List of Cumulative Projects."[115] As stated above, the potable water distribution system foreseen by Orange County Water District is part of the Poseidon project as a whole: it has no independent utility, nor does the desalination

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[111] *Id* at page 1-5.
[112] *Id.*
[113] *See* Attachment C(3).
[114] *Id* at page 4: "It is expected that construction of the project would be initiated in 2020. The project would be phased based on market demands, but it is expected that development would be completed within 10 years."
[115] Draft SEIR at page 3-5 and 3-7.

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O10-28 cont.

facility and its offshore intake and discharge have any independent utility without the distribution system. It is apparent that none of these parts of the project can meet the Needs and Purpose and stated "objectives" without the other parts – assuming there is any need for the project at all given substantial changes in water demand since 2010[116].

Since the 2010 SEIR was certified by the City, the Orange County Water District has gone through a process of re-defining potential distribution systems for the proposed Poseidon project.[117] The process was based on numerous potential alternatives that have been narrowed down to a few.

The Draft SEIR states:

> In March 2017, the Orange County Water District 29 (OCWD) staff placed on hold any plans "to begin an extensive environmental analysis related to use of the desalinated water in OCWD's operations and facilities, along with distributing the water to other agencies, prior to the approval of the permits for the HB Desalination Plant." (Letter from Michael R. Markus, OCWD General Manager, to Kurt Berchtold, Santa Ana RWQCB, March 20, 2017 [OCWD 2017]; see discussion in Section 1.2.5, City of Huntington Beach and Orange County Water District). Therefore, any potential future development or modification of the distribution pipeline system analyzed in the 2010 FSEIR is speculative at this time, and not considered as a cumulative project in this cumulative impact analysis.[118]

However, it is not necessary for OCWD to do an "extensive environmental analysis" in order for the recent addition of more likely alternatives to be "reasonably foreseeable" and included in this Draft SEIR. In fact, the 2010 SEIR included more than one alternative without identifying which would be the ultimate choice, yet each was considered by the City to be "reasonably foreseeable." And so is the case here -- despite OCWD not finalizing a selection of the alternative that will be ultimately used, they have identified several choices that are "reasonably foreseeable."

By excluding an analysis of the new reasonably foreseeable potable water distribution alternatives, the Draft SEIR fails to adequately inform the public and decision-makers of the adverse impacts of the project.

For example, construction impacts will differ with the change of the distribution systems' routes, and consequently air quality degradation and GHG emissions from construction equipment will be significantly different if the potable water is distributed to destinations farther inland than the plans analyzed in the 2010 SEIR.

Finally, it stands to reason that relying on a series of CEQA documents from the several agencies who had a role as a "responsible agency" in 2010 will result in the total avoidance of documenting the indirect cumulative impacts in this Subsequent EIR. If the SLC only prepares a CEQA document for changes to the offshore components, the RWQCB only prepares a CEQA document for changes needed to comply with the new Ocean Plan amendment, the Coastal Commission only prepares a CEQA document for changes in the coastal zone, and then OCWD prepares a separate CEQA document after the responsible agencies have issued permits – when and how would a cumulative impacts analysis from all these segmented parts ever occur? For just one example: each of these pieces of the required analysis will have some impacts on noise and air quality degradation that effects coastal wetlands and wildlife directly adjacent to the treatment plant – but under the "sequential CEQA documents" scheme in the Draft SEIR,

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[116] *See* Attachment F: OCWD Water Demand Analysis.
[117] *See* Attachment B: OCWD Alternative Distribution System.
[118] Draft SEIR at page 3-7 (*emphasis added*).

none of the agencies will be responsible for doing a cumulative impact analysis of these subject issues. Further, this Draft SEIR fails to inform decisions by the RWQCB and Coastal Commission as mandated in the *Banning Ranch* decision.

O10-28 cont.

There are new reasonably foreseeable changes to the project, new projects, and changed circumstances that were not known in 2010. Clearly the cumulative impacts have substantially changed, and consequently the Draft SEIR needs to analyze all the changes and the relevance of the cumulative impacts to future enforcement of the Coastal Act.

5. *The SLC is required to consider Coastal Act Policies when analyzing cumulative impacts for the project.*

O10-29

As noted above, the Draft SEIR must include a discussion of Coastal Act policies and foreseeable impacts from changes to the project and cumulative projects that are relevant to Coastal Commission enforcement of those policies.[119] And many of the relevant Coastal Act policies have already been identified. In 2013, based on the 2010 SEIR and acting in its continuing role as a responsible agency, the California Coastal Commission staff drafted a Staff Report (CCC Staff Report) for consideration by the Commission before deciding several appeals of the City-issued CDP as well as an application for a "retained jurisdiction" CDP.[120] At the hearing in early 2014, Poseidon withdrew the application and requested a postponement of the appeal hearing. Nonetheless, the Staff Report identifies several subject areas in the 2010 SEIR that were relevant for their permitting considerations and remain relevant now.

As the lead agency, the State Lands Commission is responsible for consulting with the Coastal Commission in their role as a responsible agency to ensure the Draft SEIR adequately informs the public and the Coastal Commission regarding Coastal Act policies. Below is a sample of policies discussed in the 2013 CCC Staff Report that are equally relevant to this Draft SEIR. This is not an exhaustive list.

iv. Marine Resources and Water Quality.

O10-30

In regards to the project impacts on marine resources, the CCC Staff Report stated that in "implementing the Coastal Act and LCP and selecting feasible and less environmentally damaging alternatives, the Commission is guided by the mitigation sequencing identified in CEQA, which requires feasible mitigation measures be considered in the following order:

- Those that would entirely avoid the impact;
- Those that would minimize impacts by limiting the proposed action;
- Those that would rectify the impact by repairing or restoring the affected environment;
- Those that would reduce or eliminate the impact over time through preservation and maintenance; and,
- Those that compensate for the impact by replacing or providing substitute resources or environments."[121]

The CCC Staff Report then applied that CEQA mitigation sequencing specifically to seawater intakes:

> For seawater intakes, meeting the first step of the mitigation sequence – avoiding the impact – is most often done by using any of several subsurface intake designs and selecting a site where subsurface intakes can feasibly be built and operated to provide the amount of seawater or brackish water needed, as is being done at several locations along the California

[119] *See* discussion of "*Banning Ranch*" decision in Section D above.
[120] *See* Attachment A: CCC Staff Report.
[121] *See* Attachment A: CCC Staff Report at 38.

> coast (see examples below). Where these designs are infeasible, meeting the second step – limiting the impacts – can be accomplished in a number of ways, including siting the intake at a location with lower concentrations of entrainable organisms, drawing less water into the intake, and/or placing any of several types of screens over the intake to reduce entrainment. When these methods are infeasible or do not fully mitigate for entrainment, compensatory mitigation is required to make up for the loss of marine life and productivity resulting from entrainment and impingement. All seawater desalination facilities being proposed along the California coast, except Poseidon's, are proposing to use either subsurface intakes or screened intakes or proposing to site their intakes at locations that would reduce the number of entrained organisms.[122]

O10-30 cont.

The CCC Staff Report considered alternative intake technologies and sites that could minimize and/or mitigate the adverse impacts to marine life.[123] Similarly, the CCC Staff Report considered alternative discharge technologies and sites that could minimize and mitigate adverse impacts to water quality and marine habitat.[124]

However, this Draft SEIR fails to follow the CEQA "order" of analyzing alternatives, and consequently fails to fully inform the Coastal Commission. The Draft SEIR fails to analyze subsurface intakes at the proposed site or alternative sites; fails to analyze alternative sites for the proposed screened intake; and fails to analyze drawing less water into the intake despite significant reductions in demand[125] for the product water since 2010. Consequently, the Draft SEIR must be re-written and re-circulated to ensure it adequately informs the public and the Coastal Commission and Regional Water Quality Control Board of substantial changes to the project and associated impacts that are relevant to Coastal Act policies.

The CCC Staff Report also analyzed potential water quality degradation. The foreseeable adverse cumulative impacts to water quality, both onshore and offshore, are much broader than the narrow analysis of constituents in the brine discharge include in the Draft SEIR. For example:

O10-31

> The project could cause adverse water quality effects due to disturbance and release of known and currently unknown hazardous and toxic materials at the project site and along parts of its pipeline route. The project site and portions of some proposed pipeline routes are known to be contaminated and require remediation. With relatively high groundwater tables at the site and along much of the pipeline routes, and the potential that water released during construction may be contaminated, several mitigation measures are needed to ensure consistency with LCP Policy C 6.1.1. The Findings below address the project site and pipeline route separately.[126]

The CCC Staff Report then went on to describe contaminants likely occurring on the proposed treatment plant site, and risks of water quality degradation from remediation and development of the site.[127] The Staff Report notes:

O10-32

> The SEIR notes that one of the project objectives is to 'remediate the subject site of on-site contaminants resulting from approximately 35 years of use as a fuel oil storage facility in order to protect the health and safety of those in the surrounding community.' Because the

[122] *Id.*
[123] *Id.*
[124] *Id* at 52.
[125] *See* Attachment F: OCWD Demand Analysis.
[126] Attachment A: CCC Staff Report at 55.
[127] *Id.*

> contaminants at the site have not yet been fully characterized, several site aspects normally studied, measured, identified, and implemented prior to redevelopment will need to be addressed through special conditions, as described below.[128]

O10-32 cont.

The CCC Staff Report also included similar analyses for development of the distribution system.[129] The CCC Staff Report noted:

O10-33

> Both Poseidon and the project SEIR asserted that project construction would not intercept groundwater adjacent to the [Ascon] Landfill and that the project would therefore not affect Landfill-related cleanup activities. However, as shown in several landfill cleanup documents, the proposed trench is within the range of groundwater depths along that route and within the range of elevated contaminants associated with the landfill. DTSC has identified contaminants requiring remediation along much of the north side of the Landfill, including a 30-foot wide strip along Hamilton Avenue for which cleanup and remediation measures have not yet been identified.[130]

The CCC Staff Report went on the discuss mitigation measures in the 2010 SEIR as well as additional recommended steps to ensure against water quality degradation.[131] But since the 2010 SEIR was certified, and more recently since the CCC Staff Report in 2013 was drafted, there have been substantial changes to the Ascon Landfill remediation plan, the AES power station demolition and re-power project, as well as addition of a new "cumulative project" to remediate the adjacent Magnolia Tank Farm and construct a large multi-use development. All of these substantial changes will significantly change the impacts on water quality.

O10-34

The 2013 CCC Staff Report concluded:

> The development, as proposed, would result in significant adverse marine life and water quality effects. However, as conditioned, the Commission finds the project is in conformity with relevant policies of the LCP and the Coastal Act.[132]

Given the changes to the Poseidon project and changes to the closely related projects, the basis for the conditions proposed in the CCC Staff Report have substantially changed since the 2010 SEIR was certified, and have also changed since the Coastal Commission Staff Report was finalized in 2013. To fully inform the next Coastal Commission staff report, and future decisions by the Coastal Commission, this Draft SEIR must include documentation and analysis of all the changes since the 2010 SEIR was certified.

v. Wetlands and Environmentally Sensitive Habitat Areas (ESHA).

O10-35

The CCC Staff Report relied on the 2010 SEIR in considering "direct" impacts to wetlands and ESHA:

> The City determined in its SEIR that there were no wetlands within the project footprint. However, from the information provided by the City and Poseidon, Commission staff has determined that there were approximately 3.5 acres of wetlands within the project site and there are an additional approximately 0.5 acres on the east side of the project site, as defined

[128] *Id* at 56.
[129] *Id*. at 57.
[130] *Id* at 58.
[131] *Id*.
[132] *Id*.

in the Coastal Act and the Commission's regulations.[133]

O10-35 cont.

The disputed wetlands delineation in the 2010 SEIR was never resolved to the Coastal Commission staff's satisfaction. The 2013 CCC Staff Report notes:

> Shortly after the City's September 2010 certification of the SEIR and issuance of its CDP, the Commission determined at its November 2010 Substantial Issue hearing that additional on-site evaluation was needed to make a conclusive wetland determination. Commission staff requested another site visit to evaluate site conditions and the potential presence of wetlands; however Poseidon did not grant permission until July 2012, when Dr. Engel again visited the site and found that the areas she had previously identified as exhibiting wetland indicators had recently been disked and all vegetation removed. The grading and vegetation removal was apparently conducted by the power plant owner and is the subject of a separate enforcement action by Commission staff.[134]

The subject area of wetlands and other environmentally sensitive habitat areas (ESHA) in the 2010 SEIR was determined to be inadequate for the Coastal Commission's consideration and resolution of the appeals of the City-issued CDP. Therefore, this Draft SEIR must be amended to include the unresolved controversy of wetlands on the site, as well as inclusion of information and changed circumstances since the 2010 SEIR was certified.

The first "indirect" ESHA impacts issue raised in the CCC Staff Report is the impact of "dewatering" the site. According to the CCC Staff Report:

> The SEIR stated that dewatering during construction is highly unlikely to affect nearby ESHA/wetland areas because the radius of influence of the dewatering intake wells is expected to stay within the project site.[135]

But after some discussion, the CCC Staff Report concluded that:

> [Site hydrology] characteristics suggest that dewatering during construction could involve significantly higher volumes and affect a larger area than anticipated in the SEIR.[136]

This Draft SEIR fails to document those controversies from the 2010 SEIR. But more importantly, this Draft SEIR fails to document and analyze changes since the 2010 SEIR that would change the severity of cumulative impacts from demolition and construction of the AES site, the Ascon site, and the newly proposed "Magnolia Tank Farm" development – all major projects adjacent to the proposed Poseidon project that would have impacts on the adjacent wetlands. Given the extensive soil excavation anticipated in each of the several adjacent properties and projects, the cumulative impacts require a changed dewatering analysis since the 2010 SEIR was certified.

Second, the CCC Staff Report documents and discusses indirect adverse impacts to wetlands and ESHA from noise generated during demolition and construction.

O10-36

> Poseidon's currently proposed project configuration includes construction and project components immediately adjacent to nearby ESHA/wetland areas, with parts of several

[133] Attachment A: CCC Staff Report at 61.
[134] *Id* at pg. 62.
[135] *Id* at pg. 68.
[136] *Id*.

O10-36 cont.

> buildings and parking areas within 100 feet of those ESHA/wetland areas.[137]

After citing numerous noise levels that adversely impact wildlife in the adjacent wetlands, the Staff Report notes:

> The City's CDP included a condition requiring Poseidon to conduct a noise study during the project design stage to ensure that noise levels at the nearest residential property line are no more than 5 dBA greater than existing nighttime ambient noise levels at that property. However, neither the SEIR nor the CDP addressed the effects of expected noise and vibration levels at the much closer ESHA/wetland complex, including habitat within and adjacent to the project site used by the endangered Belding's Savannah Sparrow, California Least Tern, and Light-footed Clapper Rail. These sound levels are considered harmful to avian species and could result in "take" of special status species that use these ESHA/wetland areas.
>
> Several bird species, including the Light-footed Clapper Rail, are particularly sensitive to vibration, and the CDFW specifically prohibits pile driving during their nesting season due to its relatively high levels of both noise and vibration.[138]

This Draft SEIR analyzes the impact of noise from construction of the offshore intake and discharge modifications on a nearby residential mobile home park, but not on the adjacent wetlands. The Draft SEIR states:

> The largest of the nearby onshore projects are the Magnolia Tank Farm Redevelopment Project and the HBGS Demolition and Replacement Project, which are separated from beach parking lots and beachfront and offshore areas by the Pacific Coast Highway (State Route [SR] 1). Thus onshore construction noise impacts would not readily combine with impacts from offshore construction associated with the Lease Modification Project.[139]

But the Draft SEIR also states:

> As quantified in the discussion of Impact NOI-1 above, construction noise levels from the Lease Modification Project would range up to 57 dBA Leq. If intake and discharge construction were to overlap, the resulting combined noise levels at these residences would range up to 60 dBA Leq.[140]

Ironically, these separate statements fail to inform the public and decision-makers that the "residences" affected by the combined offshore construction are also "separated from the offshore construction noises by the beach parking lot." Therefore, contrary to the Draft SEIR conclusion that noise from onshore development "would not readily combine with impacts from offshore development", those cumulative noise sources will clearly impact the residential property.

Further, the residential property noted in the Draft SEIR is not the only sensitive receptor within range of cumulative impacts from the offshore project and concurrent and/or consecutive noise impacts from nearby onshore demolition and construction.[141] The Draft SEIR fails to document the nearby rare coastal

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[137] *Id* at 69.
[138] *Id.*
[139] Draft SEIR at. 4-144.
[140] *Id* at 4-143.
[141] *See* eg. Attachment A: CCC Staff Report (2013) beginning at page 69.

wetlands' habitats and wildlife that would be adversely impacted by the cumulative noise. For example, the CEC documented noise impacts from demolition and re-development of the power plant on wetlands wildlife, but did not include the proposed new Poseidon project's offshore construction in their analysis. Further, neither the CEC review of the HBEC nor the draft Coastal Commission staff report considered the cumulative impacts of demolition and construction from the "Ascon Final Remedy" or the "Magnolia Tank Farm" development.

O10-36 cont.

The 2013 CCC Staff Report noted:

> The Energy Commission's review specifically notes that cumulative sound from Poseidon's project and from the power plant project could create a significant adverse noise impact at monitoring locations several hundred feet farther away than these nearby wetland areas.[142]

And it is inadequate to assume that, because the offshore construction noise is a short-term impact it would not be "cumulatively considerable."

The CCC Staff Report found:

> The SEIR states that construction-related noise and vibration is expected to be short-term; however, the expected 24-month construction period would occur during at least two, and possibly three, breeding and nesting cycles of the nearby special status bird species in the adjacent habitat. The breeding and nesting season runs from about March 1 to September 15 for most birds and from January 1 to August 31 for raptors. Disturbance of these or other species using or nesting in the adjacent habitat may constitute illegal "take" under the Endangered Species Act.[143]

Similarly, this Draft SEIR finds the impacts from construction of the offshore modifications to the Poseidon project would be short-term – but uses that fact to conclude the impacts are and consequently less than insignificant:

> Since construction noise would be temporary, would only occur offshore during daylight hours, would implement noise reduction measures such as mufflers on construction equipment, and would cease upon completion of the Lease Modification Project, potential impacts of offshore construction noise would be less than significant.[144]

As is true when any project is analyzed in a piecemeal fashion, each "piece" may seem insignificant unless it is considered cumulatively. So in the present case, if the short-term noise from the offshore construction is part of a sequence of events in the several adjacent developments (including AES, Ascon, Magnolia Tank Farm, Poseidon treatment plant and OCWD potable water delivery system) with short-term excessive noise, the significance would be either much greater short-term noise levels from the concurrent projects and/or much greater duration of excessive noise from consecutive projects.

Therefore, this Draft SEIR fails to document how this new source of noise from the construction of the offshore components changes the severity of noise from the other cumulative projects that are closely related in time and location.

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[142] *Id* at 70.
[143] *Id* at 71.
[144] Draft SEIR at 4-142.

vi. Sea Level Rise.

O10-37

According to the CCC Staff Report:

> The site and desalination facility would be subject to flooding and tsunami runup, both of which would be exacerbated by expected higher sea levels during the life of the project. The City of Huntington Beach has been singled out as being particularly susceptible to sea level rise. A 2013 study determined that up to 5,000 homes in the City, including many that are close to Poseidon's project site, are at risk due to sea level rise by 2020.[145]

Further, the CCC Staff Report based the sea level rise analysis on the assumption:

> Poseidon has requested that the Commission consider only a 30- to 35-year operating life – until approximately 2050 – and has expressed a willingness to accept a permit based only on that period of operations, even though Poseidon has options to renew its leases and water purchase agreements for an additional 30 years, which could extend the facility's operating life to about 2080.[146]

However, because the Draft SEIR seems to assume a project life of 9-years, when the lease expires, it is not clear whether the Draft SEIR assumes impacts until 2026, or a 35-year life expectancy (as in the CCC Staff Report), or a 50-year life expectancy (as recently requested by Poseidon).
Secondly, the scant analysis of sea level rise in the Draft SEIR states:

> Industrial buildings in the planning area are at high risk of impacts from sea-level rise due to their high sensitivity and low adaptive capacity. Local subsidence, coupled with sea-level rise, will contribute to higher total water levels.

But simply making a broad statement about sea level rise threats without analyzing the impacts to the project, and the relevance to Coastal Act policies, is inadequate.

The Draft SEIR also analyzes other climate change impacts, and concludes:

> Not enough is known about the potential climate change-driven changes to seafloor sediment at the Lease Modification Project site to draw conclusions about effects on the proposed intake screens and diffuser that Poseidon proposes to install on the risers (towers) of the existing Huntington Beach Generating Station (HBGS) subsea pipelines.

Again, the narrow scope of the Draft SEIR, and the illegal fabrication of a separate "Lease Modification Project", has limited the analysis of sea level rise to only the offshore components of the project. That is an example of "piecemealing."

Further, the Draft SEIR fails to consider alternative intake technologies, like slant wells, which are relevant considerations when assessing the impacts of sea level rise. For example, it is well known that sea level rise will exacerbate seawater intrusion into the freshwater portion of the aquifer – undermining the project objective to provide a more reliable regional water supply. It is also known that defending against seawater intrusion can be accomplished by either injecting freshwater into the inland side of the seawater transition zone, or by pumping seawater from the ocean side of the seawater transition zone with

[145] Attachment A: CCC Staff Report at 76.
[146] *Id.*

subsurface slant wells.[147] But because the Draft SEIR fails to look at alternatives to a screened surface intake, these adverse impacts of sea level rise are ignored, as is the analysis of alternatives to minimize the impacts.

O10-37 cont.

Moreover, the SLC has failed to assess new information related to sea level rise and the project's proposed site. A recent report concluded that Huntington Beach is among the coastal communities that are particularly vulnerable to sea level rise.[148] According to the study, the City could see more than a 10 percent of its land chronically flooded by 2100, and under high sea level rise scenarios, the City would see about a quarter of its territory subject to chronic flooding.[149] These new assessments have not been analyzed in any CEQA cumulative impacts analysis.

In conclusion, the publication of more accurate sea level rise predictions since the 2010 SEIR was certified, and since the 2013 CCC Staff Report was prepared, are changed circumstances to both the land-based parts of the project as well as the offshore components. Yet, because the Draft SEIR illegally precludes analysis of changed circumstances surrounding the onshore components of the project, and precludes analysis of alternative intake technologies like slant wells for the offshore part of the project, none of the relevant analyses of sea level rise impacts are included. Therefore, it is impossible for the public or future decision-makers to fully understand the effects of sea level rise on the proposed project site, and consequently the numerous Coastal Act policies relevant to sea level rise.

vii. GHG Emissions and Other Air Quality Impacts.

O10-38

The CCC Staff Report summarizes:

> The construction and operation of major water, energy, telecommunication, and transportation projects can significantly increase emissions of greenhouse gases (GHG) and therefore climate change through global warming, which in turn can cause significant adverse impacts to coastal resources of California. The Coastal Act has a number of provisions that provide authority to take steps to reduce climate change and to adapt to the effects of global warming. These include the Coastal Act's public access and recreation policies (Sections 30220 and 30211), marine resource and water quality policies (Sections 30230 and 30231), the environmentally sensitive habitat area protection policy (Section 30240), and the coastal hazards policy (Section 30253(1) and (2)). Further, Section 30253(4) in part requires development to minimize energy consumption.[150]

After a great deal of analysis of energy demand from operation of a seawater desalination facility compared to alternative potable water supplies, the CCC Staff Report concludes:

> The development, as proposed, would result in significant adverse effects due to its indirect greenhouse gas emissions. However, as conditioned, the Commission finds the project is in conformity with relevant policies of the LCP and Coastal Act.[151]

Since the 2013 CCC Staff Report, the other closely related cumulative projects have changed the

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[147] Attachment G: Slant Well Report.
[148] Union of Concerned Scientists, When Rising Seas Hit Home: Hard Choices Ahead for Hundreds of US Coastal Communities (July 2017); *available at* http://www.ucsusa.org/sites/default/files/attach/2017/07/when-rising-seas-hit-home-full-report.pdf.
[149] *Id.*
[150] Attachment A: CCC Staff Report at 105.
[151] *Id* at 112.

circumstances and analyses of GHG emissions and other air quality degradation, yet no cumulative impact analysis has been conducted. For example, the California Energy Commission's Presiding Member Preliminary Decision (PMPD) considered GHG emissions from construction of the Huntington Beach Energy Center proposal and found:

O10-38 cont.

> The 2014 Decision concluded that GHG emissions from demolition and construction would be temporary and intermittent, and not continue during the life of the project. The 2014 Decision did not adopt any specific conditions of certification to mitigate short-term demolition and construction impacts. However, Condition of Certification **AQ-SC5** would require implementation of best practices to reduce any GHG emissions from demolition and construction equipment. Therefore, the 2014 Decision concluded that GHG emissions from demolition and construction activities resulted in a "less than significant" impact.[152]

And:

> Despite having higher GHG emissions than the 2014 Project, we find that demolition and construction of the Amended Project will not have a substantial adverse impact on GHG emissions. This conclusion arises from the short-term intermittent nature of the emissions. In addition, the control measures used to address criteria pollutant emissions such as limiting idling times and requiring new equipment that may be compatible with low-carbon fuels (e.g., bio-diesel and ethanol) will reduce GHG emissions from construction vehicles and equipment.[153]

But the HBEC PMPD did not consider nor analyze the cumulative impacts of additional GHG emissions from the proposed Poseidon project amendments. Nor does this Draft SEIR adequately identify and analyze the cumulative impacts of the HBEC demolition and construction in combination with the proposed Poseidon project amendments. And none of the other closely related projects -- Ascon remediation, Magnolia Tank Farm development and OCWD desalination delivery system – are considered for cumulative impacts from GHG emissions and other cumulative air quality impacts.

For just two examples of undocumented other cumulative air quality impacts, the HBEC PMPD included:[154]

> In October 2014, the Energy Commission approved the Huntington Beach Energy Project (2014 Project). In the 2014 Decision, we reviewed the project's potential impacts on air quality, noting that demolition, construction, commissioning, and operation activities occurred concurrently throughout the construction time period so that there may be some overlap in potential air quality impacts.
>
> We found that particulate matter emissions from construction would cause a significant impact because they would cause new exceedances or contribute to existing violations of PM10 and PM2.5 ambient air quality standards.

The DEIR for Ascon noted numerous concerns for cumulative impacts, including for example:

> With respect to short-term emissions, implementation of the RAP is predicted to result in a cumulatively considerable net increase of a criteria pollutant for which the region is

[152] *See* Attachment C1: HBEC PMPD at 4.1-1.
[153] *Id* at page 4.1-5.
[154] *See* eg. Attachment C1: HBEC PMPD at 4.2-4.

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> nonattainment under applicable federal and state AAQS (including releasing emissions which exceed quantitative thresholds for ozone precursors). Even with all feasible emissions control measures, impacts would be significant and unavoidable.[155]

O10-38 cont.

It is reasonably foreseeable that demolition and construction of the Magnolia Tank Farm project will contribute PM2.5, PM 10, ozone precursors and numerous other cumulatively significant air quality degradation to the adjacent community and ESHA.

Clearly there have been substantial changes to closely related projects since the 2010 SEIR was certified and subsequent to the 2013 CCC Staff Report. And it is equally clear the cumulative impacts will be significant and relevant to the Coastal Commission's analysis of the project and the proposed changes to the project.

The Draft SEIR is wholly inadequate to inform the public and decision-makers about the significant impacts from GHG emissions and other air quality degradation. The Draft SEIR must be re-written and re-circulated for public comment.

F. THE STATE LAND COMMISSION MISREPRESENTS THE DESALINATION OCEAN PLAN AMENDMENT AND THE ALTERNATIVES FOR MEETING THE PROJECT OBJECTIVES.

O10-39

The SLC has failed to properly evaluate the State Water Board's Desalination Ocean Plan Amendment (OPA), and thus has omitted critical alternatives that could mitigate significant impacts of the project. The CEQA guidelines specify that "[t]o the extent possible, the EIR process should be combined with the existing planning, review, and project approval process used by each public agency."[156] To the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements."[157] Toward that end, agencies are encouraged to "[c]onsult[] with state and local responsible agencies before and during preparation of an environmental impact report so that the document *will meet the needs of all the agencies which will use it*."[158] The purpose of an environmental impact report is to "provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project."[159]

As described above in Section B (3) of these comments, this Draft SEIR cannot defer this CEQA mandate for the several responsible agencies to prepare separate CEQA documents. Further, as described above in Section D (1) of these comments, the Draft SEIR must adequately cite and analyze the relevant laws and policies to be enforced by responsible and trustee agencies. Finally, as noted above, the narrow scope of the Draft SEIR, and the creation of a separate "Lease Modification Project", fails to describe a "project" that will meet the stated objectives and/or preferred alternatives that would meet the project objectives. The SLC effectively does what CEQA expressly prohibits – the DSEIR creates a "project" for each separate agency approval.[160]

But the citation and analysis of the OPA goes beyond just inadequate. By failing to adequately describe and analyze the preferred alternatives for intakes and discharges, and instead only citing exceptions to those rules, the Draft SEIR discussion actually misleads the public to believe the fictional "Lease

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[155] *See* eg. Attachment C2: Ascon DEIR at page 4.2-41; See also Ascon FEIR.
[156] Guidelines, § 15080.
[157] Guidelines, § 15124, subd. (d)(1)(C), italics added; see also Guidelines, § 15006, subd. (i).
[158] Guidelines, § 15006, subd. (g). (*emphasis added*).
[159] § 21061; see § 21002.1, subd. (a). (*emphasis added*).
[160] Guidelines §15378 (c).

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Modification Project" is compliant with the new regulations. Ironically, the Draft SEIR creates a project that cannot meet the stated objectives in the Draft SEIR.

O10-39 cont.

Fully informing the public is a fundamental element in both the letter and intent of CEQA. The Draft SEIR's inadequate and misleading discussion of the OPA is just one more discreet example why the Draft SEIR cannot be allowed to piecemeal the analysis by fabricating a "continuing role as a responsible agency" and a fictional "Lease Modification Project."

1. *The State Water Board's Desalination Amendment must be fully considered in the SEIR.*

O10-40

Just like the Once-Through Cooling Policy was fully considered in the 2010 Subsequent EIR, the SLC must fully consider the State Water Board's new Desalination OPA. It is important to note that the 2010 Subsequent EIR was the result of changed circumstances caused by the State regulating seawater intakes for cooling water. The City rightly decided the "Once-Through Cooling Policy" required a full Subsequent EIR for changes to the previously proposed co-located facility. Here, the adoption of the OPA is equally, if not a more significant changed circumstance. Yet, even given more reason to complete a thorough Subsequent EIR now, contrary to the City's reasoning in 2010, State Lands has determined a narrowly focused Supplemental review is adequate. The inadequate analysis of the OPA highlights the foundational flaw in the Draft SEIR. The adoption of the OPA is the reason for Poseidon requesting the lease modification. The SLC is the "next agency with discretionary authority, the lease modification application requires a Subsequent EIR to analyze changes to the "project" analyzed in the 2010 Subsequent EIR certified by the City, and acted on by the City and the SLC. But the Draft SEIR does not adequately describe and analyze the Ocean Plan amendment, and does not apply those changed circumstances to the project approved in the 2010 Subsequent EIR.

The Draft SEIR states: "Since 2010, a relevant update has been the SWRCB's adoption of the Desalination Amendment, which addresses effects of the construction and operation of seawater desalination facilities."[161] But the Draft SEIR goes on to narrowly select and cite portions of the OPA, failing to adequately inform the public and the future decisions of responsible agencies.

The State Lands Commission needs to consider the State Water Board OPA in its entirety – not only the parts Poseidon wishes the SLC to consider. The State Water Board's OPA was adopted in 2015 and sets forth standards for minimizing marine life mortality and ensuring brine discharges do not exceed salinity water quality standards. According to Poseidon, the modifications to the Project are designed to enhance marine life protection and comply with requirements of the State Water Board's OPA. But the draft SEIR fails to fully inform the public that, in fact, the "Modified Lease Project" falls far short of the protections in the OPA.

And while the RWQCB may well know the rules and fully enforce the OPA, that knowledge by a responsible agency does not relieve the SLC's duty to include the discussion in this Draft SEIR – as decided in *Banning Ranch*.[162]

The draft SEIR then goes on to describe how Poseidon intends to comply with the OPA.

2. *The State Lands Commission must analyze the seawater intake preferred alternatives.*

O10-41

The Draft SEIR narrowly states that the modifications Poseidon is seeking in the lease amendment are not the policy preferences in the OPA:

[161] Draft SEIR at 4-15.
[162] *See* Section D(1) above.

O10-41 cont.

> The Santa Ana Regional Water Quality Control Board (RWQCB), in coordination with the SWRCB, is responsible for determining the HB Desalination Plant's compliance with Water Code section 13142.5, subdivision (b) per the Desalination Amendment, which (if the RWQCB determines that subsurface intakes are infeasible) includes the following requirements to protect marine life associated with desalination project surface intake and discharge…

Then, without including the Ocean Plan amendment mandatory consideration of the feasibility of subsurface intakes, the Draft SEIR states:

> Prior to the permanent stand-alone conditions, Poseidon would retrofit the existing seawater intake pipeline with the offshore 1 mm wedgewire screen manifold that, according to Poseidon, would achieve a through-screen velocity of 0.5 feet/second or less, in accordance with requirements of California Ocean Plan Section III.M.2.d(1)(c).

The Draft SEIR fails to inform the public and decision-makers that the expressed preference in the OPA is to utilize sub-surface intakes when feasible. The Draft SEIR states:

> Appendix A summarizes relevant state and federal regulations, including new regulations since the City and CSLC adopted findings related to their 2010 Project approvals, including the SWRCB (2015b) adoption of the Desalination Amendment to the California Ocean Plan (Ocean Plan).[163]

However, Appendix A does not include reference to, or a summary of, the OPA in the section on "Biological Resources."

And because the narrow focus of this Draft SEIR has precluded discussion of any alternative intake technologies or sites to minimize adverse impacts, the public is left unaware of the Ocean Plan "rule" preferring sub-surface intakes, and is instead left thinking screens on the existing pipe (the exception to the rule) comply with the law.

The OPA dictates the preferred alternative of subsurface intakes as the best available technology for minimizing marine life mortality. The SLC cannot simply ignore this core component of the OPA and only consider Poseidon's preferred substandard of a screened intake. To fully inform the public and assist the Regional Board's deliberations, the SEIR needs to include a thorough and adequate analysis of subsurface intakes.

The Draft SEIR implies that subsurface intakes including slant wells were considered by the ISTAP panel and found infeasible based on:

> The alternatives eliminated in ISTAP Phase 1 were based primarily on the specific hydrogeology of the Huntington Beach area and the configuration of the groundwater basin near the coast.[164]

The alternatives eliminated in ISTAP Phase 1 were based primarily on the specific hydrogeology of the Huntington Beach area and the configuration of the groundwater basin near the coast.

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[163] Draft SEIR at 4-25.
[164] Draft SEIR, Table 5-3 at 5-9.

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That is an inaccurate characterization of the ISTAP report. The ISTAP panel discontinued looking into subsurface wells based on a comment letter submitted by Orange County Water District expressed their opposition to any technology option that would draw down freshwater from the aquifer. The OPA is clear that drawdown of freshwater is not an unconditional finding of infeasibility.[165] Further, there was no OCWD's concern about freshwater drawdown was not supported by any scientific evidence concluding that slant wells were technically infeasible before the ISTAP Phase One was concluded – and wells were not considered in Phase Two. In fact, slant wells at this site may be technically feasible and may actually improve the efficiency of the seawater intrusion barrier.[166]

O10-41 cont.

After the ISTAP Panel was concluded, Poseidon's consultants, Geosyntec Consultants, produced a study of the feasibility of slant wells at this site. In brief, the attached Slant Well Study suggests that, not only would slant wells not have an adverse impact on the groundwater basin, slant wells may actually improve protection from seawater intrusion. The study goes on to suggest more studies before drawing conclusions that slant wells are infeasible.

Further, the feasibility of preferred intakes, like slant wells and other subsurface intakes, is often a function of how much water will be withdrawn though the intake structure.[167] That in turn, is a function of how much product water is absolutely needed, as laid out in the OPA.[168] Therefore, the project "Purpose" and "Alternatives" sections of the SEIR are not just required for CEQA analyses of the Project as a whole, including alternatives of a smaller sized treatment facility to simultaneously meet the changed demand since 2010, but changes to the 2010 SEIR are necessary to adequately describe the OPA process for analyzing the feasibility of subsurface intakes -- they are both CEQA and OPA requirements for analyzing preferred alternatives to the proposed "screened intake."

The SLC should not limit its analysis to the co-located site that was self-selected by Poseidon. The OPA requires an analysis of alternative sites.[169] Since the 2010 SEIR was certified, changed circumstances include finalization of the license issued by the California Energy Commission ensuring the cooling water intake will be abandoned by AES in 2020. Therefore, Poseidon's co-location with the power plant is not necessarily the best site anymore. Further, the project must be analyzed for preferred alternative sites, despite the Draft SEIR unsubstantiated claim that Poseidon has a "vested right" to use the AES site. We do not agree that Poseidon actually maintains a "vested right" in the amended lease issued in 2010. But more importantly, the Draft SEIR does not explain how that "vested right" has any relevance to the OPA and/or CEQA mandates to review alternative sites.

O10-42

The SEIR needs to thoroughly analyze alternative sites that may be more feasible for subsurface intakes. Given that the SLC is the lead agency, and should undertake this subsequent environmental review with respect to the entire project, and all relevant permits, the assertion that analysis of other locations is encompassed in the "no project" alternative is legally inadequate. Further, the SEIR must review whether alternative sites would minimize all the cumulative impacts from developing the desalination plant at the AES site – compounding the adverse impacts from multiple demolition and development projects in close proximity both in time and location.

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[165] *See* State Water Resources Control Board, Water Quality Control Plan: Ocean Waters of California; Section M, 2.d.(1).a.i. at 39-40; *available at* http://www.waterboards.ca.gov/water_issues/programs/ocean/docs/cop2015.pdf.
[166] Attachment G: Slant Well Report.
[167] *Id.*
[168] *See* State Water Resources Control Board, Water Quality Control Plan: Ocean Waters of California; *available at* http://www.waterboards.ca.gov/water_issues/programs/ocean/docs/cop2015.pdf.
[169] *See* State Water Resources Control Board, Water Quality Control Plan: Ocean Waters of California; Section M, 2.b. at 37-38; *available at* http://www.waterboards.ca.gov/water_issues/programs/ocean/docs/cop2015.pdf.

COMMENT SET O10: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 2 (cont.)

3. *The State Lands Commission needs to analyze the change for the need of the project as part of its Alternatives analysis.*

O10-43

Much has changed with water management in Orange County, many of those changes making its water supply more reliable than it was in 1999 when Poseidon first proposed this idea. However, Poseidon's proposal to include 50 million gallons a day (MGD) into the water supply has not changed since 1999.

Since then, in January 2008, the Orange County Water District's (OCWD) Groundwater Replenishment System (GWRS) became operational, originally producing 70 MGD of highly purified water. In 2015, the project was expanded to produce 100 MGD. Ultimate capacity for the GWRS is projected at 130 MGD after infrastructure is built to increase wastewater flows from Orange County Sanitation District (OCSD) to the GWRS.

Orange County residents and businesses have also made significant improvements to conserving water that was being wasted in 1999. Despite our economy and population continuing to grow, we are using cumulatively less water now than we did in 1999. And most importantly, new water demand projections revealed in February 2016 by Municipal Water District of Orange County showed significantly reduced water demand than previously reported – a difference of about 90,000 acre feet less than predicted in 2010. New reporting estimates that demand by 2040 will be closer to 435,000 acre-feet as opposed to 525,000 acre-feet per year recently estimated by OCWD. These are critical new facts that need to be considered in the SEIR "purpose" and "alternatives" section for the Project. Further, these demand predictions are a critical part of the RWQCB's decision whether Poseidon will be allowed an exception to the OPA preferred intake technology – subsurface intakes.[170]

Moreover, Los Angeles County is now building a GWRS project similar to the OCWD's GWRS project. The planned Los Angeles Indirect Potable Reuse/Ground Water Replenishment System project will provide both indirect and direct benefits by adding 67,000 acre feet of water to the regional supply per year during the project's first operational phase. The proposed first phase includes 30 miles of distribution lines to replenish both Los Angeles County and Orange County groundwater basins. Approximately 168,000 acre-feet per year will be produced to replenish groundwater systems in additional operational phases – resulting in reduced regional reliance on imported water and greater "local reliability" compared to 2010.

G. THE STATE LANDS COMMISSION'S MARINE RESOURCE IMPACTS ANALYSIS IS LEGALLY FLAWED.

O10-44

The Draft SEIR defines a fictional "Lease Modification Project", and then analyzes both the construction and "operation" of that narrow project description. However, it is inconceivable, and not explained in the Draft SEIR, how the screens and diffusers "operate" without a direct connection to the desalination treatment facility – including the onshore vaults and pumps that move water in through the screens and out through the diffusers. If the SLC insists that the "Lease Modification Project" is the only project under review, and that narrow project has no connection to changed circumstances at the treatment plant site and delivery system, than there is no need for the Draft SEIR to review the operational impacts from the modifications – the screens and diffusers do not "operate" without all the other components of the entire project.

Nonetheless, the analysis of the impacts on marine resources is inadequate. The Draft SEIR must be re-written and re-circulated for purposes of comments by the public and the Department of Fish and Wildlife as a "trustee agency."

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[170] *See* State Water Resources Control Board, Water Quality Control Plan: Ocean Waters of California; Section M.2.d. at 39-40; *available at* http://www.waterboards.ca.gov/water_issues/programs/ocean/docs/cop2015.pdf.

O10-45

1. *The State Lands Commission failed to adequately evaluate the Project's impacts on federally endangered and threatened marine species.*

The SLC cannot ignore significant impacts to federally endangered and threatened marine species. The SLC contradicts itself in the Draft SEIR analysis of threatened and endangered species. The Draft SEIR states that "sea floor and littoral water habitats occurring near the HBGS discharge site are not home to any threatened or endangered marine species."[171] However, only two pages later, the SEIR states that sea turtles that "occur in Southern California and *may occur in the Lease Modification Project area* include the green sea turtle (*Chelonia mydas*) and olive ridley sea turtle (*Lepidochelys olivacea*), which are listed as federally threatened species, and the loggerhead sea turtle (*Caretta caretta*) and leatherback sea turtle (*Dermochelys coriacea*), which are listed as federally endangered species."[172] If threatened and endangered species may occur in the Project area, then the SLC is legally obligated to analyze impacts on those listed species.

The Endangered Species Act (ESA) affords broad protections to threatened and endangered species. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[173] Its fundamental purposes are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species . . . ."[174]

To achieve these objectives, the ESA directs the USFWS to determine which species of plants and animals are "threatened" and "endangered" and place them on the list of species afforded protection under the ESA.[175] An "endangered" species is one "in danger of extinction throughout all or a significant portion of its range," and a "threatened" species is "likely to become endangered in the near future throughout all or a significant portion of its range."[176] Once a species is listed, the ESA provides a variety of procedural and substantive protections to ensure not only the species' continued survival, but also its ultimate recovery. The Supreme Court has noted that "Congress has spoken in the plainest words, making it clear that endangered species are to be accorded the highest priorities."[177]

Section 9 of the ESA prohibits any "person" from "taking" or causing take of any member of an endangered species.[178] This take prohibition also applies to threatened species such as the western snowy plover.[179] The term "take" is defined broadly, need not be lethal, and includes to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" or cause another to do so.[180] The U.S. FWS has further defined "harass" to include "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding, or sheltering."[181] In addition, "harm" is defined to "include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[182]

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[171] Draft SEIR at 4-21
[172] Draft SEIR at 4-23.
[173] *Tennessee Valley Auth. v. Hill* ("Hill"), 437 U.S. 153, 180 (1978).
[174] 16 U.S.C. § 1531(b).
[175] 16 U.S.C. § 1533.
[176] *Id.* at §§ 1532(6), (20).
[177] *Hill*, 437 U.S. at 194.
[178] 16 U.S.C. § 1538(a).
[179] *Id.* at § 1533(d); 50 C.F.R. § 17.31.
[180] 16 U.S.C. § 1532(19).
[181] 50 C.F.R. § 17.3.
[182] *Id.*

COMMENT SET O10: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 2 (cont.)

O10-45 cont.

The ESA's legislative history supports "the broadest possible" reading of the prohibition against take.[183] "Take" includes direct as well as indirect harm and need not be purposeful.[184] Present or future harms qualify as take: "an imminent threat of harm . . . falls easily within the broad scope of Congress' definition of 'take.'"[185]

The ESA authorizes private enforcement of the take prohibition through a broad citizen suit provision. "[A]ny person may commence a civil suit on his own behalf to enjoin any person, including . . . any . . . governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the ESA] . . . ."[186] Citizens may seek to enjoin both present activities that constitute an ongoing take and future activities that are reasonably likely to result in a take.[187] Courts have held that "the language and legislative history of the ESA, as well as applicable case law, support our holding today that a showing of a future injury to an endangered or threatened species is actionable under the ESA [citizen suit provisions]."[188] Upon a showing of "imminent threat of injury to wildlife," the injury requirement of the Secretary's definition of "take" and "harm" would be satisfied.[189] The ESA's citizen suit provision also provides for the award of costs of litigation, including reasonable attorney and expert witness' fees.[190]

Under section 10 of the ESA, a non-federal entity such as a developer can avoid potential liability for taking a threatened species by obtaining an incidental take permit.[191] In exchange for permission to "take" a listed species pursuant to an ITP, the permit applicant must commit to implement a plan that "conserv[es]" – *i.e.*, facilitates the recovery of – the species.[192] This plan is called a Habitat Conservation Plan and it must delineate "the impact which will likely result from such taking" and the "steps the applicant will take to minimize and mitigate such impacts . . . ."[193]

O10-46

2. *The State Lands Commission failed to analyze significant impacts to Marine Protected Areas.*

The need to safeguard the long-term health of our marine environment was recognized by the California Legislature in 1999 with the passage of the Marine Life Protection Act (MLPA). This law aims to protect California's marine natural resources through the establishment and ongoing stewardship of a statewide network of marine protected areas (MPAs) using sound science. California's MPAs are intended to protect the diversity and abundance of marine life, the habitats they depend on, and the integrity of marine ecosystems, including by ensuring the movement of marine organisms, or "connectivity," between MPAs.[194] The Southern California MPAs went into effect on January 1, 2012 from Point Conception

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[183] *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704-05 (1995).
[184] *Id.* at 704; *see also Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1512 (9th Cir. 1994).
[185] *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 784, 785 (9th Cir. 1995).
[186] 16 U.S.C. § 1540(g).
[187] *Nat'l Wildlife*, 23 F.3d at 1511.
[188] *Forest Conservation Council v. Rosboro Lumber Company*, 50 F.3d 781, 783 (9th Cir. 1995); 50 F.3d at 783.
[189] *Id.*; see also *Animal Welfare Institute v. Beech Ridge Energy*, 675 F.Supp 2d 540 (D. Md. 2009) (enjoining construction of wind turbines until an ITP is obtained by developer to protect Indiana Bat).
[190] 16 U.S.C. § 1540(g)(4).
[191] 16 U.S.C. § 1539(a)(1)(B).
[192] *Id.* at §§ 1539(a)(1)(B), (a)(2)(A); *see also Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir. 2001) ("'[c]onservation' is a much broader concept than mere survival" because the "ESA's definition of 'conservation' *speaks to the recovery of a threatened or endangered species*" (emphasis added)).
[193] 16 U.S.C. § 1539(a)(2)(A).
[194] See Fish and Wildlife Code sections 2851, 2853; see also Gaines, Steven D., et al., Designing marine reserve networks for both conservation and fisheries management, 107(43) Proceedings of the National Academy of Sciences 18286 (Oct. 26, 2010) (describing the purposes and intended functions of MPAs and MPA networks).

COMMENT SET O10: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 2 (cont.)

(Santa Barbara County) to the California-Mexico border, including the Channel Islands.[195] Several of the region's MPAs, including a marine reserve and multiple "no-take" state marine conservation areas, are within 25 miles of the proposed project site. The SLC has legally committed to avoiding and mitigating any significant impacts that the project may have on these MPAs, consistent with its statutory and common law public trust authorities, pursuant to a memorandum of understanding on implementation of the state's MPA network (MPA MOU).[196] [197]

O10-46 cont.

The Southern California MPAs were established after the adoption of the Poseidon project's 2010 SEIR, and accordingly their presence constitutes changed circumstances, with associated unreviewed environmental impacts, that must be described and analyzed in a subsequent EIR. More specifically, in recognition of the statutory and regulatory purposes and goals of the MPAs, as well as its commitments under the MPA MOU, the SLC should assess the Project's impacts on the species, habitats, and ecosystems that are located within the nearby MPAs; on the MPAs' ability to function as a network; and on the MPAs' ability to provide long-term ecological and other benefits for California's marine ecosystems.[198] However, the SLC performs no impacts analysis whatsoever of the proposed Project on nearby MPAs. Instead, the SLC only states that the "nearest MPA is the Bolsa Chica State Marine Conservation Area, which is approximately 4.3 miles northwest, along the coast."[199] Stating the proximity of the Project to the nearest MPA is nowhere near a legally sufficient analysis of the project's impacts on California's MPA network.[200] [201] The Draft SEIR fails to consider whether the project might draw its source water from nearby MPAs, and, if so, what impact this might have.

To understand, avoid, and fully mitigate any potential project impacts to Southern California MPAs, the SLC must, as part of its required CEQA review, consult with the California Department of Fish and Wildlife (DFW) which is the CEQA trustee agency with jurisdiction over living marine resources, and with express and special responsibility to protect nearby MPAs from the adverse impacts of the project. The MLPA directs DFW, when reviewing the project, to "highlight [potential] impacts [to MPAs] in its analysis and comments related to the project and shall recommend measures to avoid or fully mitigate any impacts that are inconsistent with the goals and guidelines of this chapter or the objectives of the MPA."[202] The DSEIR shows no evidence that the SLC has consulted with DFW or that the SLC itself has taken any subsequent steps to avoid, minimize, and mitigate the project's impacts to nearby MPAs.

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[195] Guide to the Southern California Marine Protected Areas, pg. 2 (March 2016); *available at* https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=43293&inline=true.

[196] *See* Memorandum of Understanding for Implementation of the California Marine Life Protection Act, Paragraphs 3.8 and 4.3 (July 15, 2015) (signed by SLC's Executive Officer on Feb. 25, 2015), *available at* http://www.opc.ca.gov/webmaster/_media_library/2016/08/151104-FINAL-MPA-implementation-MOU_scannedsigs.pdf.

[197] Section 2860(b) of the MLPA states that "the taking of a marine species in a marine life reserve is prohibited for any purpose, including recreational and commercial fishing."

[198] See generally California Department of Fish and Wildlife, 2016 Master Plan for Marine Protected Areas, Appendix F: South Coast MPAs (2016), pages F-4 through F6 (describing regional MPA goals including ensuring species and habitat protection and ensuring ecological connectivity).

[199] Draft SEIR at 4-23.

[200] The CCC identified the project's potential impacts on MPA network connectivity and functioning as an issue of particular concern in its review of the project in 2013. It stated that "Integral to [MPA] network function is the idea that MPAs would act as a series of "stepping stones," allowing organisms originating in one MPA to drift with the currents and settle in the next protected area." See Attachment A: California Coastal Commission Staff Report Filed: 6/6/13 for Hearing Date: 11/13/13 for Appeal No.: A-5-HNB-10-225, Application No.: E-06-007, Applicant: Poseidon Water; quoted in the Tenera report.

[201] See Attachment A: California Coastal Commission Staff Report Filed: 6/6/13 for Hearing Date: 11/13/13 for Appeal No.: A-5-HNB-10-225, Application No.: E-06-007, Applicant: Poseidon Water; quoted in the Tenera report.

[202] Fish and Wildlife Code section 2862.

In addition, the SLC should consult with the California Fish and Wildlife Commission (FGC), which has authority to regulate the taking of marine species in MPAs[203], to ensure the Draft SEIR addresses any concerns that FGC has raised and any guidance that it has provided. In a February 1, 2017 FGC letter to the Coastal Commission, the FGC urges that, "due to the potential impacts to marine resources, open ocean intakes be avoided." The FGC goes on to state that "facilities with open ocean intakes near MPAs can have direct impact on marine resources through incidental take and the reduction of critical larval connectivity between MPAs as marine life is pulled into the plant and removed from the ecosystem." The SLC must incorporate the FGC's findings, particularly FGC's statement that impacts from "open ocean intake have the potential to undermine the ability of our MPAs to function as a network, weakening the science-based framework on which they were created and potentially their ability to generate expected long-term benefits."

O10-46 cont.

The SLC needs to complete an analysis of the Project's impacts on the Southern California MPA network that was created after certification of the 2010 SEIR. The SLC should consult with DFW and FGC, and incorporate DFW's finding and recommendations as well as FGC's February 1st, 2017 letter[204] into the record.

3. *The State Lands Commission needs to reconsider significant impacts to water quality and marine resources due to changed circumstances and new information.*

O10-47

Poseidon's Carlsbad facility has been cited by the State Water Resources Control Board and the San Diego Regional Water Quality Control Board for multiple permit violations, including water quality exceedances. Since December 2015, Poseidon has had water quality violations including two spills - one of which reached the ocean - and ongoing monitoring failures. In April 2016, the San Diego Water Board sent a notice of violation for toxicity exceeding their effluent limitations (as evidenced by the fertility of sea urchin eggs not reaching the same level as the control group) in the discharge water prior to it being mixed with the power plant wastewater. Thirteen violations were issued between September 2015 and June 2016, and eight of these were for Chronic Toxicity. The toxicity has continued every month to present.[205] Poseidon is supposed to identify what is causing the toxicity and control it. They've sent one progress report to date, in July 2016, but have not yet identified the source and no penalties have been imposed.

These spills and the water quality impacts will not be resolved by the inclusion of screens, yet pose substantial threats to ocean water quality in the same area.

This history, from the first major desalination facility permitted in California, especially given the same project proponent, illustrates the foreseeable increased risk for violations, and is cause for increased concern about more serious negative impacts on surrounding water quality, marine environment, and species. Stricter monitoring, mitigation, and cease and desist provisions are necessary in light of this increased risk.

Further, because the Draft SEIR is illegally narrow and only considers water quality degradation from the installation of diffusers and screens, there is no cumulative impacts analysis of potential spills from the construction and operation of the Poseidon treatment plant, nor polluted runoff and spills from development of the closely related adjacent projects. This is particularly offensive given that the "Ascon Final Remedy", demolition of the Huntington Beach Generating Station and demolition of the Magnolia

[203] Fish and Wildlife Code section 2860.
[204] Attachment E: Letter from CA Fish & Game Commission to CA Coastal Commission; *See* also Letter from Professor Warner to CA Coastal Commission.
[205] *See* State Water Resources Control Board. ESMR At-A-Glance Report. http://bit.ly/2i6S0P6.

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Tank Farm all require removal and disposal highly contaminated soils and other hazardous materials.

O10-47 cont.

4. *The State Lands Commission needs to analyze the significant impacts the Project will have on fisheries.*

O10-48

The Draft SEIR includes an impact assessment by Dr. Raimondi, in which it is explained:

> Regarding whether there would be a "substantial adverse effect" on any special-status species, there is insufficient information to address the question of effects on special status species. This is largely a feature of the modeling approach, which works well for species for which there is sufficient data (meaning observations of that species) to make robust estimates of proportional mortality. Two features render species of special interest (typically) unfit for evaluation: larvae of species of special interest are almost by definition rare (e.g. giant sea bass) and are sometimes smaller than mesh size used for sampling (e.g. some stages of black abalone). This means that the absence of such species from either the formal evaluation process (i.e. the ETM/APF modeling) or from the list of species sampled in the field studies (as in the Huntington Beach evaluation) should not be taken to indicate that such species will not be entrained or that there will be no impact to these species resulting from entrainment.[206]

In brief, this expert statement indicates there is no support for the Draft SEIR conclusion of no impact to special status species.

The Draft SEIR Appendix F1 states:

> The CEQA analysis must conclude whether the levels of entrainment defined above would have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Wildlife or U.S. Fish and Wildlife Service or cause any affected populations to fall below self-sustaining levels. *Entrainment numbers are unlikely to be informative with respect to this question. Much more important are the results of ETM/APF calculations. However, even these numbers require context.* The key consideration is whether the determination is based on the results from the particular study (e.g., Pm values based on Huntington Beach) or from a cumulative impact assessment where there is an assessment of the impact of loss due to a new project added to the loss based on existing projects. This cumulative estimate could then be placed in the context of the population status of the target species. For example a proportional mortality (Pm) of 0.02 for species in a given source water body may be unimportant or very important based on: (1) the cumulative Pm from the proposed and current projects and (2) the status of the species (e.g. is it in decline, stable or growing). *In my opinion, the information sufficient to address cumulative impacts quantitatively was not provided.*[207]

Clearly, given this expert opinion, any findings in the Draft SEIR of no significant cumulative impacts from marine life mortality are unsupported. And importantly, "cumulative impacts" or "cumulative projects" would primarily include commercial and recreational fisheries, and the status of the affected species populations. Further, settled CEQA law prohibits use of a "ratio theory" to determine if impacts are cumulatively considerable. In the seminal *Kings County*[208] case, the court found:

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[206] Draft SEIR Appendix F1: Raimondi Report at 8
[207] Draft SEIR Appendix F1: Raimondi Report at 8.
[208] *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d, 692, 270 Cal.Rptr. 650.

COMMENT SET O10: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 2 (cont.)

O10-48 cont.

> Acknowledging that cumulative ozone impacts of valley-wide energy development projects were potentially significant, the EIR preparers nevertheless found that the project would not have a significant cumulative impact because it would contribute less than one percent of area emissions for all criteria pollutants in the valley.[209]

Much like this case, the EIR theorized that because the "ratio" between the project's contribution to the impact was relatively small, it was insignificant. The court went on to find the EIR "improperly focused upon the individual project's relative effects and omitted facts relevant to an analysis of the collective effect this and other sources will have upon air quality."[210] And the court concluded this approach "avoids analyzing the severity of the problem and allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling."[211]

Similar to the *Kings County* example, in this case, Dr Raimondi is correct to state:

> …a proportional mortality (Pm) of 0.02 for species in a given source water body may be unimportant or *very important* based on: (1) the cumulative Pm from the proposed and current projects and (2) the status of the species (e.g. is it in decline, stable or growing).

We agree with Dr. Raimondi's conclusion that in this case "the information sufficient to address cumulative impacts quantitatively was not provided."[212]

It is critical for the Department of Fish and Wildlife to compare the entrainment and impingement data to their list of "overfished species" and other relevant population assessments before the Draft SEIR can make an informed conclusion on the "significance" of cumulative impacts from multiple sources marine life mortality, as well as the status of the numerous species' populations. If the marine life species populations are already significantly impacted, any additional impact must be considered cumulatively significant.

Further, the Draft SEIR should not assume the addition of screens on an open ocean intake minimizes mortality from impingement. While it may seem rhetorical, it is likely some of the assumed reduction in entrainment only adds to the non-screened impingement mortality. The Raimondi Report states: "With the addition of proposed wedgewire screens, and the estimated intake velocity, impingement loss will for all practical purposes be avoided."[213] However, the report then states: "If the maximum body axis for all of the three planes exceeds the screen size then the organism will not be able to get through the screen."[214] Without some further explanation, it is inconsistent to say that an organism that comes into contact with the screen surface, but is too large to enter through the screen slot size, is not "impinged" on the screen.

Marine life populations and marine ecosystems are poorly understood in the science community. Even important commercially valuable species often have limited data on survival strategies, life histories and even population assessments. From a policy perspective, this paucity of scientific certainty argues for a "precautionary approach" to decisions affecting marine ecosystems. And that approach can only be fully understood by the public and decision-makers when the Draft SEIR is re-written and re-circulated with a more thorough analysis of what is known in the scientific community, as well as what is not known. Given subsurface intakes at the proposed site, or alternative sites, are likely feasible[215], CEQA mandates

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[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Draft SEIR Appendix F1: Raimondi Report at* 3.
[214] *Id.*
[215] *See* Attachment G: Slant Well Report.

COMMENT SET O10: CA COASTKEEPER ALLIANCE ET AL. Joint Letter 2 (cont.)

identification of this type of subsurface intake as the "Superior Alternative" for minimizing marine life mortality.

O10-48 cont.

A full and thorough discussion of marine resource impacts would also allow the SLC to evaluate all available scientific information as it conducts its separate and independent evaluation under the public trust doctrine. That doctrine imposes an affirmative duty on the SLC to protect public trust marine resources and to consider and avoid or minimize impacts to them, whenever feasible, before approving any use of public trust lands. See, e.g., *San Francisco Baykeeper v. Cal. State Lands Commission*, 243 Cal. App. 4th 202 (2015). In satisfying its public trust obligations, the SLC will thus need to fully understand marine resource impacts and the feasibility of alternatives that avoid or minimize them. The CEQA analysis should, ideally, provide the necessary information and analysis to fulfill this additional legal duty.

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For the reasons discussed above, we strongly advise the SLC to take full responsibility for preparation, circulation, and certification of the required subsequent EIR for this Project. A partial, segmented SEIR simply cannot withstand judicial scrutiny. Moreover, the SLC cannot lawfully move forward with approving a lease amendment until all necessary CEQA review is completed; the law simply does not allow approval of the lease amendment contingent on some later environmental analysis by a different agency. There is thus no practical benefit – to any agency or party – from preparing a partial SEIR.

O10-49

Sincerely,

Sean Bothwell
Policy Director
California Coastkeeper Alliance

Garry Brown
Executive Director
Orange County Coastkeeper

Susan Jordan
Executive Director
California Coastal Protection Network

Merle Moshiri
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Residents for Responsible Desalination

Damon Nagami
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Surfrider Foundation

Charming Evelyn
Chair – Water Committee
Sierra Club Angeles Chapter

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ATTACHMENTS

A. **(CCC Staff Report)**: "California Coastal Commission Staff Report Filed: 6/6/13 for Hearing Date: 11/13/13 for Appeal No.: A-5-HNB-10-225, Application No.: E-06-007, Applicant: Poseidon Water". O10-50

B. **(OCWD Alternative Delivery System)**: 6 documents, B(a) through B(f), illustrating progressive reports analyzing alternative distribution systems – including one on potential basin water quality from desal water injection. O10-51

C. New Cumulative Projects/Adjacent Developments O10-52
   1. **(AES HBEC)**: **HUNTINGTON BEACH ENERGY PROJECT AMENDMENT: Presiding Member's Proposed Decision.**
   2. **(Ascon Final Remedy)**: FEIR "Remedial Action Plan for Ascon Landfill Site".
   3. **(Magnolia Tank Farm)**: Magnolia Tank Farm Specific Plan Project Description – Environmental Assessment.

D. **(2012 NPDES/WDR)**: Renewal of Waste Discharge Requirements for Poseidon Resources(Surfside) L.L.C., Huntington Beach Desalination Facility, Order No. RB-2012-0007, NPDES No. CA8000403, Orange County. O10-53

E. **(Letter from CA Fish & Game Commission to CA Coastal Commission)**: O10-54
   1. Letter from CA FGC to Coastal Commission.
   2. Letter from Dr. Warner to Coastal Commission.

F. (OCWD Demand Analysis): "A Review of Water Demand Forecasts for the Orange County Water District" (Fryer, 2016). O10-55

G. (Slant Well Report): "Huntington Beach Seawater Desalination Facility Groundwater Model Evaluation" (HydroFocus, 2016). O10-56

H. (Poseidon Application Cover Letter to SLC): "Application for Amendment - Amendment of PRC 1980.1 Right of Way Lease for the Huntington Beach Seawater Desalination Project". O10-57

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O10-1 See master responses MR-3, *Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR,* and MR-4, *Piecemealing*.

O10-2 See master response MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR*.

O10-3 See master response MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR*.

O10-4 See master response MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR*.

O10-5 See master response MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR*.

O10-6 See master response MR-7, *Cumulative Impacts*.

O10-7 See master response MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR*.

O10-8 See master response MR-8, *Alternatives*.

O10-9 See master response MR-5, *Diffuser Entrainment Mortality and Species Affected*, Subpart A, *23% vs. 100% Mortality*. The Final Supplemental EIR assumes 100 percent mortality of organisms entrained by the proposed intake. See footnote 4 of Table 4.1-6, *Impingement/Entrainment Comparison*, in the Final Supplemental EIR.

O10-10 See master response MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR*.

O10-11 See master response MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR*.

O10-12 See master responses MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR,* and MR-4, *Piecemealing*).

O10-13 See master responses MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR,* and MR-4, *Piecemealing*.

O10-14 See master response MR-4, *Piecemealing*.

O10-15 See master response MR-8, *Alternatives*.

O10-16 See master responses MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR,* and MR-4, *Piecemealing*.

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O10-17 See master response MR-4, *Piecemealing*.

O10-18 See master responses MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR,* and MR-4, *Piecemealing*.

O10-19 See master responses MR-2*, Lease Modification Project Scope,* and MR-4, *Piecemealing*.

O10-20 See master response MR-7, *Cumulative Impacts*.

O10-21 See master response MR-7, *Cumulative Impacts*.

O10-22 See master response MR-7, *Cumulative Impacts*.

O10-23 See master response MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR* regarding consideration of changed circumstances since certification of the 2010 FSEIR. See also master response MR-7, *Cumulative Impacts*.

O10-24 See master response MR-7, *Cumulative Impacts*.

O10-25 See master response MR-7, *Cumulative Impacts*.

O10-26 See master response MR-7, *Cumulative Impacts*.

O10-27 See master response MR-7, *Cumulative Impacts*.

O10-28 See master response MR-7, *Cumulative Impacts*.

O10-29 See master response MR-7, *Cumulative Impacts*.

O10-30 See master response MR-8, *Alternatives*.

O10-31 See master response MR-2*, Lease Modification Project Scope,* regarding consideration of onshore components of the HB Desalination Plant.

O10-32 See master response MR-2*, Lease Modification Project Scope,* regarding consideration of onshore components of the HB Desalination Plant.

O10-33 See master response MR-7, *Cumulative Impacts*.

O10-34 See master response MR-7, *Cumulative Impacts*.

O10-35 The comment describes wetlands that exist within or near the HB Desalination Plant site, and suggests that dewatering during construction of the HB Desalination Plant and other cumulative projects would impact the wetlands. Supplemental EIR Section 1.2, Summary of Other Agency Roles, describes the permitting responsibility of each agency involved.

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The responsibility of the California Coastal Commission is described in Supplemental EIR Section 1.2.3, CCC Permitting Status. No feature associated with the Lease Modification Project would influence the hydrology of the wetlands. See master response MR-2*, Lease Modification Project Scope,* regarding the scope of the proposed offshore Lease Modification Project, which does not include the onshore desalination plant components approved by the City of Huntington Beach in 2010.

O10-36 The comment addresses the potential impact of noise during construction of the Lease Modification Project, especially in conjunction with noise caused by cumulative projects. The comment describes that species near the HB Desalination Plant site may be sensitive to noise and suggests additional documentation for the effects of cumulative noise on coastal wetlands habitat and wildlife. Impacts associated with Noise are addressed in two sections of the Supplemental EIR, Section 4.8, *Noise and Vibration*, and Section 4.1, Ocean Water Quality/Marine Biological Resources, in particular in Impact OWQ/MB-3, *Impact to Special Status Species Populations and Movement of Marine Mammal Species as a Result of Underwater Noise during Construction*.

Section 4.8.4, *Environmental Impact Analysis and Mitigation*, identifies expected noise and vibration levels onshore that would be generated by the short-term construction activities associated with the Lease Modification Project occurring 1,500 to 1,650 offshore the OHWM, and determines that such impacts would be less than significant. Impact NOI-3 shows that noise levels from offshore construction could reach 60 dB Leq directly onshore at Huntington State Beach but would not exceed applicable community noise standards (Table 4.8-4 identifies ambient noise levels at Huntington State Beach as reported in the City of Huntington Beach's 2010 FSEIR). Noise levels would be further attenuated by the time they reach the wetlands referenced by the commenter, which are farther inland and at a greater distance from the construction activities associated with the Lease Modification Project. As noted in Impact NOI-3, implementation of mitigation adopted with the 2010 Project approvals would ensure that the construction noise impact at all locations would be less than significant.

As discussed under Impact OWQ/MB-3, *Impact to Special Status Species Populations and Movement of Marine Mammal Species as a Result of Underwater Noise during Construction*, impacts to marine mammals

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associated with the use of impact pile drivers were determined to be significant and unavoidable.

O10-37 The commenter questions the project lifetime analyzed and the analysis of sea-level rise impacts. With respect to the scope of the Supplemental EIR, please see master responses MR-1*, Scope of the Commission's Discretionary Action,* MR-2, *Lease Modification Project Scope*, and MR-3, *Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR*, including those sections addressing "changed circumstances." In addition, see master response MR-4, *Piecemealing*. See also Response to Comment A6-2 regarding sea-level rise and Response to Comment O9-6 regarding slant wells (see also See master response MR-3, *Responsible vs. Lead Agency & Supplemental vs. Subsequent EIR*, Subpart 4D.2, *2015 Desalination Amendment and 2014 and 2015 ISTAP Reports*, regarding compliance with the Desalination Amendment). Supplemental EIR Section 5.3.3 describes the intake and discharge alternatives eliminated in the 2010 FSEIR (See Table 5-2). This discussion includes consideration of "beach well intake," including slant wells. (See also master response MR-8, *Alternatives*.)

O10-38 The comment states that the Supplemental EIR failed to analyze the cumulative GHG and other air quality impacts of the HBEC demolition/construction activities, the Magnolia Tank Farm, the Ascon remediation system, and the OCWD water delivery system in combination with the Lease Modification Project activities. Supplemental EIR Section 3.1 has been revised to clarify the scope of analysis in terms of both geographic area and activity frequency and duration for the Lease Modification Project. The environmental disciplines in Section 4.0 have also been revised to clarify that the Lease Modification Project activities, when analyzed with closely related projects in terms of geographic area and time limits, do not provide a cumulatively considerable contribution. The exception is for air quality impacts, where the 2010 FSEIR found that short-term, construction-related impacts were significant and unmitigable, both individually and cumulatively, and CSLC (as a responsible agency) adopted Findings that are described in Sections 4.3.4 and 4.3.5.

Supplemental EIR Section 4.6.5 has also been revised to clarify that, independent of APM-7, the Lease Modification Project construction and operational GHG emissions do not create a cumulatively considerable impact when analyzed with closely related projects in terms of geographic area and time limits.

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The commenter also states that the Draft Supplemental EIR must be re-written and re-circulated for public comment in order to inform the public and decision-makers about GHG and air quality impacts from the project. See Response to Comment O2-4 regarding recirculation and master response MR-2*, Lease Modification Project Scope*, regarding the scope of the Lease Modification Project analyzed in this Supplemental EIR.

O10-39 See master response MR-8, *Alternatives*.

O10-40 See master response MR-3, *Responsible vs. Lead Agency & Supplemental vs. Subsequent EIR*, Subpart 4D.2, *2015 Desalination Amendment and 2014 and 2015 ISTAP Reports*, regarding compliance with the Desalination Amendment.

O10-41 See master response MR-8, *Alternatives*.

O10-42 See master response MR-8, *Alternatives*.

O10-43 See master response MR-8, *Alternatives*.

O10-44 See master response MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR,* regarding consideration of changed circumstances since certification of the 2010 FSEIR.

O10-45 See Response to Comment AP1-10 regarding consideration of special-status species.

O10-46 See master response MR-6, *Marine Protected Areas*.

O10-47 Consideration of Poseidon's desalination facility in Carlsbad is not within the scope of this Supplemental EIR. Impacts to ocean water quality are addressed in Supplemental EIR Section 4.1 (Ocean Water Quality and Marine Biological Resources). Additionally, water quality would be regulated by Poseidon's National Pollutant Discharge Elimination System Permit, which is being considered by the RWQCB. See also master responses MR-2*, Lease Modification Project Scope*, and MR-7, *Cumulative Impacts*.

O10-48 The Draft Supplemental EIR concluded that impacts to special-status marine organisms were cumulatively considerable. Although this is revised in the Final Supplemental EIR to conclude that impacts to special-status marine organisms would be less than cumulatively considerable with implementation of mitigation, the Supplemental EIR does not use "ratio theory" as described by the commenter to justify this conclusion. The

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commenter's agreement with Dr. Raimondi's statement regarding quantifying cumulative impacts in Supplemental EIR Appendix F1 is acknowledged. It is not required, nor would it be reasonably feasible, to quantify cumulative impacts to marine organisms from all sources of mortality. The Supplemental EIR (Section 4.1.5, *Ocean Water Quality and Marine Biological Resources, Cumulative Impacts*) presents adequate qualitative analysis and justification for the conclusion that impacts to marine organisms would be less than cumulatively considerable with implementation of mitigation.

The commenter requests further explanation regarding how the proposed wedgewire screens and the estimated intake velocity would avoid impingement. If an organism comes into contact with the wedgewire screen, but is too large to fit through the screen slots, it is assumed that a through-screen velocity (0.5 feet per second or less) would be sufficiently slow as to allow the organism to move off the screen and avoid impingement; as stated in the SWRCB's Final Substitute Environmental Document (SED; SWRCB 2015a): "A maximum intake velocity of 0.5 feet per second (ft/s; 0.15 meters per second) has been shown to protect most small fish (U.S. EPA 1973) and is an appropriate value to preclude most impingement of fish large enough to be unable to pass through the screen."

See master response MR-8, *Alternatives*, regarding consideration of subsurface intake alternatives.

The Supplemental EIR will be used, as appropriate, in the CSLC's evaluation of impacts to public trust resources. Supplemental EIR Section 8 (Other Commission Considerations) addresses topics of special interest to the CSLC, beyond the required CEQA disciplines.

O10-49 See master response MR-3*, Responsible Vs. Lead Agency & Supplemental Vs. Subsequent EIR*.

O10-50 The commenter's submission of the 2013 Huntington Beach Desalination Plant California Coastal Commission Staff Report will be provided to the Commission for consideration in its decision-making process. The Project that will be considered by the Commission is the proposed Lease Modification Project, as defined in Section 2 of this Supplemental EIR. (See also master responses MR-1*, Scope of the Commission's Discretionary Action,* and MR-2*, Lease Modification Project Scope*.)

O10-51 See master response MR-8, *Alternatives*.

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O10-52 See master response MR-7, *Cumulative Impacts*.

O10-53 The commenter's submission of the 2012 NPDES permit renewal will be provided to the Commission for consideration in its decision-making process. The Project that will be considered by the Commission is the proposed Lease Modification Project, as defined in Section 2 of this Supplemental EIR. (See also master responses MR-1*, Scope of the Commission's Discretionary Action,* and MR-2*, Lease Modification Project Scope*.)

O10-54 Attachment E presents two letters addressed to the California Coastal Commission (CCC). With respect to the February 1, 2017 letter from the Fish and Game Commission and the September 9, 2016 letter from Dr. Robert Warner, see master response MR-6, *Marine Protected Areas*.

O10-55 See master response MR-2*, Lease Modification Project Scope.*

O10-56 Attachment G to Comment Set O10 presents a September 23, 2016 report prepared by HydroFocus, Inc., entitled "Huntington Beach Desalination Facility Groundwater Model Evaluation." The purpose of the report was to provide a critical review of the Applicant's groundwater flow model results (prepared by Geosyntec Consultants). The HydroFocus report defines several additional steps that could be taken to improve the groundwater model to more effectively simulate potential impacts of slant wells on the Talbert Aquifer, and its freshwater/seawater interface. Please see Response to Comment O10-37 regarding the assessment of alternatives in the Supplemental EIR. The slant well information will also be considered by the RWQCB in its assessment of Poseidon's compliance with the Desalination Amendment, which requires consideration of subsurface seawater intake before open water intakes are approved. See master response MR-3, *Responsible vs. Lead Agency & Supplemental vs. Subsequent EIR*, Subpart 4D.2, *2015 Desalination Amendment and 2014 and 2015 ISTAP Reports*, regarding compliance with the Desalination Amendment.

O10-57 The commenter's submission of Poseidon's Application Cover Letter to SLC will be provided to the Commission for consideration in its decision-making process.