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From: Halter, Amanda (OC)
Sent: Thursday, February 26, 2009 7:48 PM
To: 'PWyels@waterboards.ca.gov'; 'CHagan@waterboards.ca.gov'
Cc: Peter MacLaggan; 'Jessica Jones'; Garrett, Christopher (SD); Singarella, Paul (OC)
Subject: Poseidon: other agencies' requirements for CDP

Attachments: DA.pdf; #2 Red_permit.pdf; #3 MMRP.pdf; #1 PDP.pdf; #4 SLC Lease Amendment.pdf; #6 Approved CCC Findings for MLMP and GHG.pdf

Phil and Catherine,

Attached are the documents requested relating to other agencies' requirements regarding the Carlsbad Desalination Project. Please let us know if you have any questions. A hard copy of these items follows by FedEx tomorrow.

City of Carlsbad

Development Agreement



DA.pdf (3 MB)

Redevelopment Permit



#2 Red_permit.pdf
(1 MB)

Mitigation Monitoring and Reporting Program



#3 MMRP.pdf (146
KB)

Precise Development Plan



#1 PDP.pdf (1 MB)

State Lands Commission Lease Amendment



#4 SLC Lease
Amendment.pdf (9..

Coastal Commission Findings



#6 Approved CCC
Findings for ...



Best regards,
Amanda

Amanda Halter

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ATTACHMENT

PLANNING COMMISSION RESOLUTION NO. 6090

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF CARLSBAD, CALIFORNIA, RECOMMENDING APPROVAL OF A DEVELOPMENT AGREEMENT BETWEEN THE CITY OF CARLSBAD AND POSEIDON RESOURCES (CHANNELSIDE) LLC TO PROVIDE FOR THE CONSTRUCTION OF THE CARLSBAD SEAWATER DESALINATION PLANT.

CASE NAME: PRECISE DEVELOPMENT PLAN AND DESALINATION PLANT

CASE NO.: DA 05-01

WHEREAS, Poseidon Resources (Channelside) LLC, "Developer," and the City of Carlsbad ("City") have proposed a Development Agreement for the Carlsbad Seawater Desalination Plant, appurtenant facilities, and related project approvals ("Project") as more completely described in Covenant 1 of the proposed Development Agreement; and

WHEREAS, the property leased by the Developer for the Carlsbad Seawater Desalination Plant that is generally the subject of the Development Agreement is described as:

That portion of Lot "H" of Rancho Agua Hedionda in the City of Carlsbad, County of San Diego, State of California, according to Partition Map thereof No. 823, filed in the Office of the County Recorder of San Diego County, November 16, 1896, as described in Certificate of Compliance recorded October 30, 2001, as Document No. 2001-0789068, Parcel 4, more particularly described as follows:

Commencing at the most southerly corner of said Parcel 4, also being a point on the westerly line of the 100.00-foot-wide right-of-way on the Atchison Topeka and Santa Fe Railroad, also being the most southeasterly corner of Parcel 4 as shown on Record of Survey No. 17350; thence along said westerly line, north 22°30'13" west, 1763.84 feet; thence leaving said westerly line, at right angles, south 67°29'47" west, 54.68 feet to the point of beginning; thence south 67°22'25" west, 427.00 feet; thence north 22°37'35" west, 320.00 feet; thence north 67°22'25" east, 427.00 feet; thence south 22°37'35" east, 320.00 feet to the point of beginning

("the Property"); and

1 WHEREAS, the Carlsbad Seawater Desalination Plant and some appurtenant
2 facilities are proposed at the Encina Power Station; other appurtenant facilities, including water
3 conveyance pipelines and a pump station, are proposed offsite of the Encina Power Station and
4 in the cities of Carlsbad, Oceanside, and Vista; and

5 WHEREAS, said Development Agreement is referenced in Exhibit "X," dated
6 May 3, 2006, attached hereto and on file in the Planning Department **PRECISE**
7 **DEVELOPMENT PLAN AND DESALINATION PLANT – DA 05-01** as provided by
8 Government Code 65864 et seq., Chapter 21.70 of the Carlsbad Municipal Code, and City
9 Council Policy 54; and

10 WHEREAS, the Planning Commission did on the 3rd day of May, 2006, hold a
11 duly noticed public hearing as prescribed by law to consider said request; and

12 WHEREAS, at said public hearing, upon hearing and considering all testimony
13 and arguments, if any, of all persons desiring to be heard, said Commission considered all factors
14 relating to the Development Agreement.

15 NOW, THEREFORE, BE IT HEREBY RESOLVED by the Planning
16 Commission of the City of Carlsbad as follows:

- 17 A) That the foregoing recitations are true and correct.
- 18 B) That based on the evidence presented at the public hearing, the Commission
19 **RECOMMENDS APPROVAL** of **PRECISE DEVELOPMENT PLAN AND**
20 **DESALINATION PLANT – DA 05-01**, based on the following findings and
21 subject to the following conditions:

22 **Findings:**

- 23 1. Approval of the Development Agreement complies with all the provisions of state law
24 (Government Code Section 65864 et seq.) which enables the City to enter into such
25 agreements including the following:
- 26 a) The Development Agreement specifies the duration of the agreement, the
27 permitted uses of the property, the density or intensity of use, the maximum

1 height and size of proposed buildings, and provisions for reservation or dedication
2 of land for public purposes as the **Agreement incorporates the Precise**
3 **Development Plan and Desalination Plant project (as described in Precise**
4 **Development Plan PDP 00-02 and Environmental Impact Report EIR 03-05)**
5 **and other project approvals.**

6 b) The Development Agreement includes conditions, terms, restrictions, and
7 requirement for subsequent discretionary actions; however, the conditions, terms,
8 restrictions, and requirements do not prevent development of the land for the uses
9 and to the density or intensity of development set forth in the Development
10 Agreement, and are consistent with the **development standards, design**
11 **guidelines, and other provisions of the Precise Development Plan and**
12 **Desalination Plant project** and existing rules, regulations, and policies.

13 c) Unless otherwise provided by the Development Agreement, rules, regulations,
14 and official policies governing permitted uses of the land, governing density and
15 governing design, improvement, and construction standards and specifications,
16 applicable to development of the property subject to the Development Agreement
17 shall be those rules, regulations, and official policies in force at the time of
18 execution of the agreement.

19 d) The Development Agreement does not prevent the City, in subsequent actions
20 applicable to the property, from applying new rules, regulations, and policies
21 which do not conflict with those rules, regulations, and policies applicable to the
22 property as set forth in the Agreement, and which do not materially, adversely
23 affect the timing or phasing of construction of development as further set forth in
24 the Development Agreement, nor does the Development Agreement prevent the
25 City from denying or conditionally approving any subsequent development
26 project application on the basis of noncompliance with existing rules, regulations,
27 and policies.

28 e) The Development Agreement includes terms and conditions **to ensure funding**
for public facilities in the South Carlsbad Coastal Redevelopment Area.

f) The applicant for the Development Agreement has a legal or equitable interest in
the real property which is the subject of this Development Agreement.

g) The Development Agreement requires an annual review at which time the
applicant shall be required to demonstrate good faith compliance with the terms of
the Development Agreement. If, as a result of such annual review, the City finds
and determines, on the basis of substantial evidence, that the applicant has not
complied in good faith with terms or conditions of the Development Agreement,
the City may terminate or modify the Development Agreement.

h) The Development Agreement is consistent with the City's Local Coastal Program
in that **the Project is consistent with, and includes elements specifically**
intended to advance the goals of the State of California related to, the
protection, maintenance and where feasible enhancement and restoration of

1 the overall quality of the coastal zone environment and to maximize public
2 access and recreational opportunities along the coast, and includes public
3 dedication of several acres of ocean and lagoon front property.

- 4 2. Approval of the Development Agreement complies with Chapter 21.70 of the Carlsbad
5 Municipal Code. All noticing, review, and other procedural requirements have been
6 accomplished in compliance with the Chapter. The findings required by the Chapter
7 have been met as follows:

8 a) The Development Agreement is consistent with the objectives, policies, general
9 land uses, programs, and provisions specified in the General Plan, and any
10 applicable specific plan, in that the Development Agreement implements and
11 legally references the other Project approvals being considered. It does not
12 permit anything that is inconsistent or does not conform to these other
13 approvals. It does not change or modify the zoning, General Plan
14 designations, the Specific Plan regulations or the Precise Development Plan
15 being considered under the other Project actions. It will not become effective
16 unless the other Project approvals are given. Therefore, it is consistent with
17 the General Plan, the zoning, the applicable Specific Plan and the Precise
18 Development Plan for the Property. Additionally, the Project will achieve
19 the South Carlsbad Coastal Redevelopment Plan goals to enhance
20 commercial and recreational functions and increase parking and open space
21 amenities in the Project area and is consistent with the Plan's permitted uses.
22 It further is in conformity with public convenience, general welfare, and good
23 land use practices and will not be detrimental to the health, safety, and
24 welfare of the community.

25 b) The Development Agreement is compatible with the uses authorized in and the
26 regulations prescribed for the land use district in which the real property is located
27 and all other provisions of Title 21 of the Carlsbad Municipal Code, in that the
28 Development Agreement is consistent with the uses in and the regulations
29 prescribed for the Public Utilities (P-U) Zone in which the real property is
30 located and the provisions of Title 21 of the Carlsbad Municipal Code. The
31 Development Agreement implements and incorporates by reference the other
32 project actions and approvals, including the Precise Development Plan, the
33 approval of which is a requirement of Title 21 for development in the P-U
34 Zone. These other actions establish the permitted uses of the property, the
35 density and intensity of use, the maximum height and size of proposed
36 buildings, and provisions for reservation or dedication of land for public
37 purposes. Further, as required by Chapter 21.70 of the Carlsbad Municipal
38 Code, the Administrative Services Director (Finance Director), the City
39 Attorney, and the Planning Director have reviewed the Development
40 Agreement and find that it does conform to all of the applicable state laws,
41 City ordinances, and City policies.

42 c) The Development Agreement is in conformity with public convenience, general
43 welfare, and good land use practices, in that it will result in a use that has been
44 planned in a comprehensive manner, which provides benefits to the

community in terms of water reliability and quality, recreation and coastal access, and economics, and has been reviewed in terms of protecting the general welfare of the community.

- d) The Development Agreement will not be detrimental to health, safety, and general welfare, in that it incorporates other project approvals, which have been analyzed and found not to have a negative effect on the general public health, safety, and welfare. Furthermore, the Development Agreement does not prevent the City from imposing emergency measures related to the health, safety, and welfare of the community, nor does the agreement limit the authority of other agencies. Finally, the Development Agreement requires the Developer to operate and maintain the project in accordance with all applicable state and federal environmental laws, notwithstanding any exemption the Developer may otherwise have under international trade rules.
- e) The Development Agreement will not adversely affect the orderly development of property or the preservation of property values in that the Project has been comprehensively planned and conditioned in accordance with all City and other agency requirements, including the California Environmental Quality Act; and the majority of the project, with the exception of the desalination plant building, appurtenant facilities at Encina Power Station, and a small pump station, are pipelines that will be placed underground in existing or future roads.
- f) The Development Agreement is consistent with the provisions of Government Code Sections 65864.5 - 65869.5, in that compliance with the Government Code provisions is demonstrated in Finding No. 1 of this resolution.
- g) The Development Agreement ensures provision of public facilities in a manner consistent with the General Plan, in that since it incorporates the other project actions and approvals, the Development Agreement identifies the public facilities, improvements, and infrastructure needed to allow the project to be built and contains provisions requiring compliance with the Growth Management Plan.
- h) The approval of the Development Agreement will result in the provision of economic, environmental, recreational, cultural, or social benefits to the City which would not be attainable without its approval in that benefits are detailed in Finding No. 3 of this resolution. The Development Agreement provides more certainty that the project will be built, thus increasing the likelihood of resulting benefits.

3. The Development Agreement has been drafted, processed, negotiated, and reviewed in terms of compliance with City Council Policy No. 56. Approval of the Development Agreement conforms to the Council determinations identified in the Policy for approving an agreement as follows:

- 1 a) The proposed development is in the interests of the city in that it will provide
2 substantial economic, public recreation, and water reliability benefits to the
3 City. Roughly 80% (about \$2 million) of the tax revenue from the Project
4 will go to the Carlsbad Housing and Redevelopment Commission to be used
5 to fund projects within the South Carlsbad Coastal Redevelopment Area
6 including road improvements, water distribution facilities, sewer facilities,
7 and support of affordable housing programs. Further, if the Desalination
8 Plant facilities are relocated to property not covered by the Development
9 Agreement, the Developer is required by the Agreement to pay liquidated
10 damages to the City of \$15 million, which will be reduced by a specified
11 amount for each year the Developer pays the property taxes or mitigation
12 fees specified in the Agreement. The City's right to receive an economic
13 benefit from the Project is protected even in the event of the purchase (either
14 through voluntary sale or condemnation) by a governmental body. The
15 payment of liquidated damages and protected right to receive an economic
16 benefit would not be achievable without a development agreement.

17
18 The Project also provides a local source of potable water to supplement
19 imported water supplies available to the City of Carlsbad and the San Diego
20 region, improve water reliability and enhance water quality. In so doing, the
21 Project also complements local and regional water conservation, and water
22 recycling programs. In addition, Project construction and operation will
23 benefit the economy through creation of jobs and increased spending.
24 Furthermore, the Project increases opportunities for public access to the
25 coastal area through public enhancements and dedications of coastal
26 property.

- 27 b) The proposed development is a well-planned, comprehensive development,
28 involving more than one building, more than one phase of development, or some
other condition that the City Council considers justification for entering into a
Development Agreement in that the Project consists of a multi-year, multi-
phased development with specialized components to be constructed in several
locations and in different jurisdictions. The Project features a complex
network of product water pipelines both on-site at the Encina Power Station
and off-site in the communities of Carlsbad, Vista, and Oceanside, that are
comprehensively planned to deliver water to existing distribution facilities,
and minimize impacts to sensitive habitats and resources and other utilities
and infrastructure. The Project will require a substantial expenditure by the
Developer of time and predevelopment costs and risk before approval of
building and other permits. This justifies and is a reasonable and
appropriate request for entering into a Development Agreement. A degree of
certainty is needed so the Project can proceed forward in construction and
operation.
- c) The proposed development will require a substantial expenditure by the applicant
of time, predevelopment costs, and "holding" costs prior to the approval of
permits and other land use entitlements in that the Developer will realize
significant expense, risk, and time to design the Project and obtain all

1 necessary permits from local, state, and federal agencies to construct a
2 project that desalinates seawater into potable water, discharges brine into
3 the ocean, and requires construction of a complex and lengthy network of
4 pipelines and infrastructure to deliver the desalinated water into existing
5 public water systems.

- 6
- 7 d) The proposed development will require a substantial expenditure by the applicant
8 to design and construct public infrastructure facilities that will benefit the
9 community in that the Developer will realize significant expense, risk, and
10 time to design the Project, obtain all necessary permits from local, state, and
11 federal agencies, and acquire necessary rights of way to construct a complex
12 and lengthy network of pipelines and infrastructure to deliver the
13 desalinated water into existing public water systems. Through the Water
14 Purchase Agreement, the City may elect to own these pipelines and other
15 appurtenant facilities.
- 16
- 17 e) The proposed Development Agreement is consistent with the requirements of this
18 Policy in that the City Attorney has determined that the proposed
19 Development Agreement legally conforms to all of the applicable state laws,
20 City ordinances, and City policies.
- 21
- 22 f) The proposed Development Agreement includes legally binding commitments by
23 the applicant to provide substantial public benefits over and above those which
24 the applicant would otherwise be obligated to provide as a condition of project
25 approval in the absence of a development agreement in that many of the terms
26 and conditions of the proposed Development Agreement are intended to
27 preserve for the benefit of the City, Carlsbad Municipal Water District, and
28 Carlsbad Housing and Redevelopment Commission the property tax
 revenues that will be paid by the Project. If a successor of Poseidon does not
 have an agreement with the City regarding payment of a mitigation fee or
 such successor fails to pay property taxes, the Development Agreement
 establishes a mitigation fee that will be paid by Poseidon, or its successors in
 interest. This mitigation fee is sufficient to fund all, or a significant portion,
 of the most beneficial Redevelopment Plan projects to be undertaken. The
 mitigation fee and property tax revenue have been secured for the City,
 Carlsbad Municipal Water District, and Carlsbad Housing and
 Redevelopment Commission through the proposed Development Agreement,
 the Water Purchase Agreement between the District and Poseidon
 (September 2004), and the Agreement Memorializing Certain
 Understandings and Establishing a Framework for Cooperation between the
 City, Carlsbad Municipal Water District, Carlsbad Housing and
 Redevelopment Commission, and San Diego County Water Authority (April
 2005). Therefore, the proposed Development Agreement includes legally
 binding commitments by Poseidon to provide substantial public benefits over
 and above those which Poseidon otherwise would be obligated to provide as a
 condition of approval in the absence of the Development Agreement.

1 g) It is unlikely that the proposed development, including the public benefits to be
2 derived therefrom, would occur when and as provided in the proposed
3 Development Agreement in the absence of the vesting assurances incorporated in
4 the proposed Development Agreement **because the Development Agreement**
5 **provides more certainty that the Project will be built and justifiably allows**
6 **the applicant to proceed with the Project in accordance with existing policies,**
7 **rules and regulations, and Project conditions.**

8 4. **The Development Agreement removes uncertainty in the approval of the Project**
9 **which can result in a waste of resources, escalate the cost of development, and**
10 **discourage significant investment in the community and in a commitment to**
11 **comprehensive planning.**

12 5. **The Development Agreement provides assurances to the Developer that upon**
13 **approval of the Project, the Developer may proceed with the Project in accordance**
14 **with existing policies, rules and regulations, and subject to conditions of approval.**
15 **This will strengthen the public planning process, encourage private participation in**
16 **comprehensive planning, and reduce the economic costs of development.**

17 NOTICE

18 Please take **NOTICE** that approval of your project includes the "imposition" of fees,
19 dedications, reservations, or other exactions hereafter collectively referred to for convenience as
20 "fees/exactions."

21 You have 90 days from date of final approval to protest imposition of these fees/exactions. If
22 you protest them, you must follow the protest procedure set forth in Government Code Section
23 66020(a), and file the protest and any other required information with the City Manager for
24 processing in accordance with Carlsbad Municipal Code Section 3.32.030. Failure to timely
25 follow that procedure will bar any subsequent legal action to attack, review, set aside, void, or
26 annul their imposition.

27 You are hereby **FURTHER NOTIFIED** that your right to protest the specified fees/exactions
28 **DOES NOT APPLY** to water and sewer connection fees and capacity charges, nor planning,
zoning, grading or other similar application processing or service fees in connection with this
project; **NOR DOES IT APPLY** to any fees/exactions of which you have previously been given a
NOTICE similar to this, or as to which the statute of limitations has previously otherwise
expired.

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1 PASSED, APPROVED AND ADOPTED at a regular meeting of the Planning
2 Commission of the City of Carlsbad held on the 3rd day of May 2006, by the following vote, to
3 wit:

4 AYES: Chairperson Montgomery, Commissioners Baker, Cardosa,
5 Heineman, Segall, and Whitton

6 NOES:

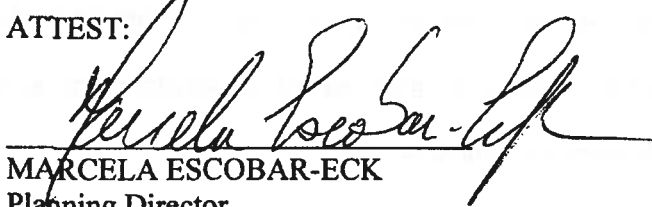
7 ABSENT:

8 ABSTAIN: Commissioner Dominguez
9

10
11 

12 MARTELL B. MONTGOMERY Chairperson
13 CARLSBAD PLANNING COMMISSION

14 ATTEST:

15 

16 MARCELA ESCOBAR-ECK
17 Planning Director
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CASE NO.: DA 05-01

SECTION I: That the Development Agreement between the City of Carlsbad and Poseidon Resources (Channelside) LLC, attached hereto marked Exhibit "D-1" and

1 incorporated by reference ("Development Agreement") is approved. The Mayor is authorized to
2 execute said agreement on behalf of the City.

3 SECTION II: That the findings of the Planning Commission in Planning
4 Commission Resolution No. 6090 also shall also constitute the findings of the City Council.

5 Section III: Upon the occurrence of the Effective Date (as defined in the
6 Development Agreement), the City Clerk is authorized and directed to record the Development
7 Agreement in the Office of the San Diego County Recorder pursuant to Section 21.70.030 of the
8 Carlsbad Municipal Code.

9 EFFECTIVE DATE: This ordinance shall be effective thirty (30) days after
10 its adoption, and the City Clerk shall certify to the adoption of this ordinance and cause it to be
11 published at least once in a publication of general circulation in the City of Carlsbad within
12 fifteen (15) days after its adoption. Notwithstanding the preceding, this ordinance shall not
13 become effective unless and until the Development Agreement is approved by the California
14 Coastal Commission.
15

16
17 INTRODUCED AND FIRST READ at the regular meeting of the Carlsbad City
18 Council on the _____ day of _____ 2006, and thereafter.

19 ////

20 ////

21 ////

22 ////

23 ////

24 ////

25 ////

26 ////

27 ////

28 ////

1 PASSED, APPROVED AND ADOPTED at a regular meeting of the City Council
2 of the City of Carlsbad, California, on the _____ day of _____, by the following vote, to
3 wit:

4 AYES:

5 NOES:

6 ABSENT:

7 ABSTAIN:
8

9 APPROVED AS TO FORM AND LEGALITY
10

11 _____
12 RONALD R. BALL, City Attorney

13
14 _____
15 CLAUDE A. LEWIS, Mayor

16 ATTEST:

17 _____
18 LORRAINE M. WOOD, City Clerk

19 (SEAL)
20
21
22
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27
28

Recorded at request of:)

Clerk, City Council)

City of Carlsbad)

When recorded return to:)

CITY OF CARLSBAD)

1200 Carlsbad Village Drive)

Carlsbad, CA 92008)

Attn: City Attorney)

(Space above for Recorder's Use Only)

This document is exempt from the payment of
a recording fee pursuant to Government Code
Section 6103.

DEVELOPMENT AGREEMENT

A DEVELOPMENT AGREEMENT BETWEEN

CITY OF CARLSBAD

and

POSEIDON RESOURCES (CHANNELSIDE) LLC

TABLE OF CONTENTS

| | | |
|----------|--|-----------|
| 1 | DEFINITIONS AND EXHIBITS..... | 2 |
| | 1.1 Definitions..... | 2 |
| 2 | GENERAL PROVISIONS..... | 6 |
| | 2.1 Binding Effect of Agreement..... | 6 |
| | 2.2 Legal Interest in Property..... | 6 |
| | 2.3 Term..... | 6 |
| | 2.4 Sale, Transfer or Assignment..... | 6 |
| | 2.5 Amendment or Cancellation of Agreement..... | 9 |
| | 2.6 Termination..... | 9 |
| | 2.7 Liability..... | 10 |
| | 2.8 Compliance With Environmental Law..... | 10 |
| 3 | DEVELOPMENT OF THE PROJECT..... | 10 |
| | 3.1 Permitted Uses..... | 10 |
| | 3.2 Vested Rights..... | 10 |
| | 3.3 Effect of Agreement on Land Use Regulations..... | 11 |
| | 3.4 Timing of Development..... | 11 |
| | 3.5 Changes and Amendments..... | 11 |
| | 3.6 Reservations of Authority..... | 12 |
| | 3.7 Public Works..... | 13 |
| | 3.8 Provision of Real Property Interests by the City..... | 13 |
| | 3.9 Regulation by Other Public Agencies..... | 14 |
| | 3.10 Tentative Tract Map Extension..... | 14 |
| | 3.11 Poseidon Obligation to Obtain and Maintain Insurance..... | 14 |
| 4 | PUBLIC BENEFITS..... | 14 |
| | 4.1 Intent..... | 14 |
| | 4.2 Mitigation Measures and Fees..... | 14 |
| | 4.3 Dedications..... | 15 |
| 5 | FINANCING OF APPURTENANT FACILITIES; OTHER PUBLIC FINANCING; USE OF PUBLIC RIGHTS OF WAY..... | 16 |
| | 5.1 Appurtenant Facilities..... | 16 |
| | 5.2 Other Public Financing..... | 16 |
| | 5.3 Use of Public Rights of Way..... | 16 |
| 6 | ANNUAL REVIEW..... | 16 |
| | 6.1 Periodic Review..... | 16 |
| | 6.2 Opportunity to be Heard..... | 17 |
| | 6.3 Information to be Provided Poseidon..... | 17 |
| 7 | INCORPORATION AND ANNEXATION..... | 17 |
| | 7.1 Intent..... | 17 |
| | 7.2 Incorporation..... | 17 |
| | 7.3 Annexation..... | 17 |
| 8 | DEFAULT AND REMEDIES..... | 17 |
| | 8.1 Remedies in General..... | 17 |

| | | |
|----|--|----|
| | 8.2 Termination by City | 18 |
| | 8.3 Liquidated Damages for Poseidon's Failure to Amend This Agreement Upon Relocation of Plant Facilities | 18 |
| | 8.4 Specific Performance | 19 |
| | 8.5 Release and Reservation | 19 |
| | 8.6 Termination Agreement for Default of Poseidon | 19 |
| | 8.7 Termination of Agreement for Default of the City | 20 |
| | 8.8 Rights, Remedies for Negligence, Willful Misconduct | 20 |
| 9 | THIRD PARTY LITIGATION; INDEMNIFICATION | 20 |
| | 9.1 General Plan Litigation | 20 |
| | 9.2 Third Party Litigation Concerning Agreement | 20 |
| | 9.3 Breaches of Agreement; Property Damage, Bodily Injury or Death | 21 |
| | 9.4 Indemnification Procedure | 21 |
| | 9.5 Survival | 21 |
| 10 | MORTGAGEE PROTECTION | 22 |
| 11 | MISCELLANEOUS PROVISIONS | 22 |
| | 11.1 Recordation of Agreement | 22 |
| | 11.2 Further Actions | 22 |
| | 11.3 Amendment | 22 |
| | 11.4 Entire Agreement | 23 |
| | 11.5 Notices | 23 |
| | 11.6 Controlling Law | 23 |
| | 11.7 Headings | 23 |
| | 11.8 Cumulative Rights; Waiver | 23 |
| | 11.9 Liberal Construction | 24 |
| | 11.10 Severability | 24 |
| | 11.11 Good Faith and Fair Dealing | 24 |
| | 11.12 No Third Party Beneficiaries | 24 |
| | 11.13 Execution in Counterparts | 24 |
| | 11.14 Time of the Essence | 24 |
| | 11.15 Number, Gender | 25 |
| | 11.16 Relationship | 25 |
| | 11.17 Joint and Several Obligations | 25 |
| | 11.18 Force Majeure | 25 |
| | 11.19 Mutual Covenants | 25 |
| | 11.20 Successors in Interest | 25 |
| | 11.21 Jurisdiction and Venue | 25 |
| | 11.22 Project as a Private Undertaking | 26 |
| | 11.23 Eminent Domain | 26 |
| | 11.24 Agent for Service of Process | 26 |
| | 11.25 Authority to Execute | 26 |
| | 11.26 Commission Approval Required | 26 |
| | 11.27 Approval Procedure | 26 |

DEVELOPMENT AGREEMENT

This Agreement, entered into as of the Effective Date, by and between the City and Poseidon, is made with respect to the following facts:

RECITALS

WHEREAS, the City is authorized to enter into binding development agreements with persons having legal or equitable interests in real property for the development of such property, pursuant to Section 65864, et seq. of the Code; and,

WHEREAS, pursuant to Section 65865 of the Code, the City has adopted Chapter 21.70 of the Carlsbad Municipal Code, establishing rules and regulations for consideration of development agreements; and,

WHEREAS, Poseidon and the City have agreed to enter into a development agreement and proceedings have been taken in accordance with Chapter 21.70 and otherwise in accordance with the rules and regulations of the City; and,

WHEREAS, by electing to enter into this Agreement, the City shall bind future City Councils of the City by the obligations specified herein and limit the future exercise of certain governmental and proprietary powers of the City; and,

WHEREAS, the terms and conditions of this Agreement have undergone extensive review by the City and the City Council of the City and have been found to be fair, just and reasonable; and,

WHEREAS, the best interests of the citizens of the City and the public health, safety and welfare will be served by entering into this Agreement; and,

WHEREAS, the Project (as hereinafter defined) is consistent with, and includes elements specifically intended to advance the goals of the State of California related to, the protection, maintenance and where feasible enhancement and restoration of the overall quality of the coastal zone environment and to maximize public access and recreational opportunities along the coast, and includes public dedication of several acres of ocean and lagoon front property that has been agreed to by Poseidon as described in Exhibit 5 of the Precise Development Plan (PDP 00-02); and,

WHEREAS, all of the procedures of CEQA have been met with respect to the Project and this Agreement; and,

WHEREAS, by Council Resolution No. _____, the City Council, after making appropriate findings, certified the Environmental Impact Report for the Project, dated _____, 2006, under the provisions of CEQA; and,

WHEREAS, this Agreement and the Project are consistent with the City's General Plan and the Precise Development Plan applicable to the Property; and,

WHEREAS, all actions taken and approvals given by the City have been duly

taken or approved in accordance with Chapter 21.70 and with all applicable legal requirements for notice, public hearings, findings, votes, and other procedural matters; and,

WHEREAS, pursuant to the Approval Ordinance, the City Council approved this Agreement; and,

WHEREAS, development of the Project in accordance with this Agreement will provide substantial benefits to the City and will further important policies and goals of the City; and,

WHEREAS, this Agreement will eliminate uncertainty in planning and provide for the orderly development of the Project, ensure progressive installation of necessary improvements, provide for public services appropriate to the development of the Project, and generally serve the purposes for which development agreements under Sections 65864, et seq. of the Code and Chapter 21.70 are intended; and,

WHEREAS, Poseidon has incurred and will in the future incur substantial costs in the development of the Project in accordance with this Agreement in order to assure vesting of legal rights to develop the Project in accordance with this Agreement.

NOW, THEREFORE, in consideration of the above recitals and of the mutual covenants hereinafter contained and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties agree as follows:

COVENANTS

1 DEFINITIONS AND EXHIBITS.

1.1 Definitions. When used in this Agreement, the following terms shall have the meaning set forth below:

1.1.1 "Agreement" means this Development Agreement.

1.1.2 "Agreement Date" means the date this Agreement is fully executed by the parties.

1.1.3 "Approval Ordinance" means the City Ordinance No. _____, which became effective on _____, 2006, approving this Agreement.

1.1.4 "Appurtenant Facilities" means transmission assets, whether or not located at the Power Plant, consisting of appurtenant and ancillary facilities, including without limitation (a) pipelines, pump stations and other facilities within the City that are necessary or convenient for the use, conveyance, storage, and distribution of desalinated seawater, and (b) such incidental appurtenant and ancillary facilities as are located in the Cities of Oceanside or Vista, California.

1.1.5 "Cabrillo" means Cabrillo Power I, LLC, a Delaware limited liability company, its successors and assigns, and the successors in interest to all or any part of Cabrillo's interest in the Property.

1.1.6 "CEQA" means the California Environmental Quality Act, California Public Resources Code Sections 21000 et seq.

1.1.7 "City" means the City of Carlsbad, California, a municipal corporation and a general law city formed under the laws of the State of California.

1.1.8 "City Council" means the duly elected members of the City Council of the City, as those members may from time to time be elected.

1.1.9 "Code" means the California Government Code.

1.1.10 "Commission" means the California Coastal Commission.

1.1.11 "Default" means (a) with respect to either party, any failure to perform any material duty or obligation under this Agreement, (b) with respect to Poseidon, any Event of Default with respect to Poseidon under the Water Purchase Agreement, and with respect to the City, any Event of Default with respect to the District under the Water Purchase Agreement.

1.1.12 "Development" means the improvement of the portion of the Property subject to the Leasehold for the purposes of completing the structures, improvements and facilities comprising the Plant Facilities, including, but not limited to: grading; the construction of infrastructure and public facilities, whether located within or outside the portion of the Property subject to the Leasehold that are related to the Plant Facilities; the construction of buildings and structures; and the installation of landscaping. "Development" does not include the maintenance, repair, reconstruction or redevelopment of any building, structure, improvement or facility after the construction and completion thereof.

1.1.13 "Development Approvals" means all permits and other entitlements for use, subject to approval or issuance by the City, the RDA or the Commission, as applicable, in connection with: (i) Development of the portion of the Property subject to the Leasehold and (ii) the Appurtenant Facilities, including, but not limited to:

- (a) Project EIR
- (b) Precise Development Plan (PDP 00-02) and any amendments thereto;
- (c) Coastal Development Permit;
- (d) Redevelopment Permit;
- (e) Improvement Plans;
- (f) Grading permit(s);
- (g) Habitat Management Plan Permit;
- (h) Encroachment Permit(s);
- (i) Easements and Rights of Way Permits;
- (j) Haul Route Permit;

(k) This Agreement; and

(l) Special Use Permit.

1.1.14 "Development Plan" means the Existing Development Approvals and the Existing Land Use Regulations applicable to Development of the Project on the portion of the Property subject to the Leasehold.

1.1.15 "District" means the Carlsbad Municipal Water District, a municipal water district.

1.1.16 "Effective Date" means the last to occur of the following: (i) the date the Approval Ordinance becomes effective, (ii) the date that the Agreement is fully executed by the parties, (iii) the date the Commission approves this Agreement, or (iv) the date Cabrillo has provided the consent attached hereto as Exhibit "A".

1.1.17 "Existing Development Approvals" means all Development Approvals approved or issued prior to the Agreement Date. Existing Development Approvals include the approvals incorporated herein as Exhibit "D" and all other approvals which are a matter of public record on the Agreement Date.

1.1.18 "Existing Land Use Regulations" means all Land Use Regulations in effect on the Agreement Date. Existing Land Use Regulations include the Land Use Regulations incorporated herein as Exhibit "E" and all other Land Use Regulations which are a matter of public record on the Agreement Date. Existing Land Use Regulations do not include Police Power Regulations.

1.1.19 "Land Use Regulations" means all ordinances, resolutions, codes, rules, regulations and official policies of the City, other than the Police Power Regulations, governing the development and use of land, including without limitation the permitted use of land, the density or intensity of use, subdivision requirements, the maximum height and size of proposed buildings, the provisions for reservation or dedication of land for public purposes, and the design, improvement and construction standards and specifications applicable to the development of the Property.

1.1.20 "Lease" means that certain Ground Lease and Easement Agreement, dated July 11, 2003, and entered into by and between Poseidon and Cabrillo.

1.1.21 "Leasehold" means Poseidon's interest in a portion of the Property under the terms and conditions of the Lease.

1.1.22 "MGD" means million gallons per day.

1.1.23 "Mortgagee" means a mortgagee of a mortgage, a beneficiary under a deed of trust or any other security-device lender, and their successors and assigns.

1.1.24 "Plant Facilities" means production assets consisting of a reverse-osmosis seawater desalination plant.

1.1.25 "Police Power Regulations" means any City ordinance, resolution, code, rule, regulation or official policy, governing: (a) public health, safety, morals and welfare, in general, and the control and abatement of nuisances, in particular; (b) the

granting of right of way permits and the conveyance of rights and interests which provide for the use of or the entry upon public property (excluding any Development Approvals or any rights of way necessary to implement the Project as specified in the Development Approvals) or (c) the exercise of the power of eminent domain.

1.1.26 "Poseidon" means Poseidon Resources (Channelside) LLC, a Delaware limited liability company, its successors and assigns, and the successors in interest to all or any part of Poseidon's interest in the Project.

1.1.27 "Power Plant" means the Encina Power Station owned and operated by Cabrillo.

1.1.28 "Product Water" means desalinated seawater produced from the Project.

1.1.29 "Project" means, generally, the Development of the portion of the Property subject to the Leasehold contemplated by the Development Plan as such Development Plan may be further defined, enhanced or modified pursuant to the provisions of this Agreement, and specifically, the development of an integrated reverse-osmosis desalination plant comprising: (1) the Plant Facilities; and (2) the Appurtenant Facilities; provided, however that if the District elects to own or have a joint powers authority own facilities pursuant to Section 9.2 of the Water Purchase Agreement, such facilities shall be excluded from the definition of Project hereunder. The Project is expected to have the capacity to produce and convey approximately 25 MGD to 55 MGD of Product Water, but the scope of the Project, including without limitation the location of the Appurtenant Facilities, may be further defined, enhanced or modified pursuant to the provisions of the Development Approvals.

1.1.30 "Property" means the real property described on Exhibit "B" and depicted on Exhibit "C" to this Agreement.

1.1.31 "RDA" means the Carlsbad Housing and Redevelopment Commission.

1.1.32 "Reservations of Authority" means the rights and authority excepted from the assurances and rights provided to Poseidon under this Agreement and reserved to the City under Sections 3.6 through 3.6.4 of this Agreement.

1.1.33 "Subsequent Development Approvals" means all Development Approvals required subsequent to the Agreement Date in connection with development of the Project.

1.1.34 "Subsequent Development Exaction" means any requirement of the City in connection with or pursuant to any Subsequent Land Use Regulation or Subsequent Development Approvals for the dedication of land, the construction of improvements or public facilities, or the payment of fees in order to lessen, offset, mitigate or compensate for the impacts of development on the environment or other public interests.

1.1.35 "Subsequent Land Use Regulations" means any Land Use Regulations adopted and effective after the Agreement Date.

1.1.36 "Water Purchase Agreement" means that certain Water Purchase Agreement, dated as of September 28, 2004, and entered into by and between

Poseidon and the District, as the same shall be amended from time to time.

1.2 Exhibits. The following documents are attached to, and by this reference made a part of, this Agreement:

- Exhibit "A" – Form of Cabrillo Consent.
- Exhibit "B" – Legal Description of the Property.
- Exhibit "C" – Map depicting Property and its location.
- Exhibit "D" – Existing Development Approvals.
- Exhibit "E" – Existing Land Use Regulations.

2 GENERAL PROVISIONS.

2.1 Binding Effect of Agreement. This Agreement runs with, and is binding upon, the Leasehold, the Project and the Property. Development of the Project is authorized by the Development Approvals and, except as otherwise provided for herein, shall be carried out only in accordance with the terms of the Development Approvals. Notwithstanding anything in this Agreement to the contrary, this Agreement shall only apply to the Development of the Project on the Property subject to the Leasehold, and shall not apply to any other development of the Property.

2.2 Legal Interest in Property. Poseidon represents and covenants that Cabrillo is the owner of the fee simple title to the Property, and that, as of the Agreement Date, Poseidon has a legal interest in the Property pursuant to the Lease.

2.3 Term. The term of this Agreement shall commence on the Effective Date and shall continue for a period of forty (40) years thereafter, unless the Agreement is terminated or the term is modified or extended pursuant to the provisions of this Agreement.

2.4 Sale, Transfer or Assignment.

2.4.1 Right to Assign. Poseidon shall have the right to sell, transfer or assign this Agreement, in whole or in part, if and only if it meets the conditions set forth in clauses (a) and (b) below:

(a) Either:

(i) The sale, transfer or assignment is made in connection with a sale, transfer or assignment, voluntarily or involuntarily, by operation of law or otherwise, of all or a part of the Project and the prior written consent of the City is obtained; or

(ii) The sale, transfer or assignment is made in connection with a sale, transfer or assignment, voluntarily or involuntarily, by operation of law or otherwise, of all or a part of Poseidon's interest in the Leasehold and the Property and the prior written consent of the City is obtained;

or

(iii) The sale, transfer or assignment is made in connection with a permitted assignment of the Water Purchase Agreement; and

(b) The proposed assignee has provided the City Manager with an executed agreement, in a form reasonably acceptable to the City, providing therein that such purchaser, transferee or assignee expressly and unconditionally assumes all the duties and obligations of Poseidon under this Agreement, including but not limited to the financial obligations of Poseidon set forth herein.

(c) Any sale, transfer or assignment not made compliance with the foregoing conditions shall constitute a default by Poseidon under this Agreement. Notwithstanding the failure of any purchaser, transferee or assignee to execute the agreement required by Paragraph (b), above, of this Subsection 2.4.1, and regardless of whether such purchaser, transferee or assignee has succeeded to Poseidon's interest in the Project, the Property or the Leasehold voluntarily or involuntarily, by operation of law or otherwise, the burdens of this Agreement shall be binding upon such purchaser, transferee or assignee, but the benefits of this Agreement shall not inure to such purchaser, transferee or assignee until and unless such agreement is executed.

2.4.2 Condemnation. In reliance upon the terms, covenants and conditions set forth in this Agreement, the City and (or) the RDA have (has) incurred and/or will incur costs and expenses, including but not limited to costs and expenses to finance or refinance the construction and installation of public improvements of benefit to the Project, a portion of are expected to be reimbursed to the City as mitigation fees pursuant to Section 4 of this Agreement. The parties intend that the right to this mitigation fee and the recordation of this Agreement reflecting the mitigation fee obligation, which runs with the Property and the Project under this Agreement, constitute a compensable interest in the Property held by the City and/or the RDA (the "City/RDA Property Interest"). If at any time during the term of this Agreement: (i) all or any portion of Poseidon's interest in the Project or its interest in the Lease or the real property underlying the Project (the "Poseidon Property Interest") is taken under the power of eminent domain, or if there is a voluntary conveyance in lieu of or under the threat of eminent domain, (ii) Poseidon is no longer obligated to pay the mitigation fee pursuant to Section 4 of this Agreement and (iii) the acquiring party does not agree to pay such mitigation fee, the provisions of this Section 2.4.2 shall apply.

(a) If a court or jury renders a total, undivided award of compensation in a condemnation action without apportioning the award between the Poseidon Property Interest and the City/RDA Property Interest, then the parties agree (absent an agreement upon how the undivided sum should be shared), to request the court to conduct a second phase of the trial to apportion the award between the City and/or the RDA, on the one hand, and Poseidon, on the other hand, in accordance with their respective property interests. In such a second phase, the City and/or RDA shall present evidence of the value of its interest as described in subsection (c) below, and Poseidon shall present evidence of the value of its interest according to the method of valuation which it believes is most appropriate under the circumstances and timing of the condemnation. If the amount of the undivided award is insufficient to compensate the City and/or the RDA, on the one hand, and Poseidon, on the other hand, based on each party's method of valuation, then it is the parties'

intent that the court shall equitably apportion the undivided award (without any preference or priority being applied to the interest of either the City and/or the RDA, on the one hand, or Poseidon, on the other hand).

(b) If there is a voluntary conveyance by Poseidon of the Poseidon Property Interest or any part thereof to a public or quasi-public agency or entity (the "Condemning Agency") in lieu of or under threat by the Condemning Agency to take the Poseidon Property Interest, or any portion thereof, by eminent domain proceedings, Poseidon shall include in the voluntary sales price the present value (calculated as of the date of the voluntary conveyance using as a discount rate the Standard & Poor's (S&P) Composite Yield Table, prepared by the Bond Market Association, showing the yield composites of AA-rated municipal bonds with 20-year maturities (the "S&P Composite Bond Yield Index") for the month immediately preceding the month in which the voluntary conveyance occurs) of the estimated property taxes that the City, the District or the RDA would receive from the construction, operation and ownership of the Project on the Property, from the date of the voluntary conveyance to the end of the term of this Agreement, and within thirty (30) days of receipt of the voluntary sales proceeds or the first installment thereof if there is an installment sale, shall pay to the City and/or the RDA such present value (or in the case of an installment sale a portion thereof based on the relative amount of such present value and the aggregate voluntary sales price).

(c) If at any time during the term of this Agreement there is a taking of an interest in the Project under the power of eminent domain, as more particularly set forth in and subject to Section 2.4.2 (a) above, then, as between the City and/or the RDA, on the one hand, and Poseidon, on the other hand, the parties agree that the value of the City/RDA Property Interest shall be calculated as follows:

the value shall be equal to the unamortized value of the total cost and expenses incurred by the City and/or the RDA pursuant to this Agreement, determined by calculating the present value (calculated as of the date of the taking using as a discount rate the S&P Composite Bond Yield Index for the month immediately preceding the month in which the taking occurs) of the estimated property taxes that the City, the District or the RDA would receive from the construction, operation and ownership of the Project on the Property, from the date of the taking to the end of the term of this Agreement.

(d) Within ten (10) days after receipt thereof, each party shall give the other party copies of any notice received with respect to a proposed or pending taking under power of eminent domain of any portion of the Project or the real property underlying the Project. Poseidon shall give the City and RDA written notice at least ten (10) days prior to entering into an agreement voluntarily conveying all or any portion of the Poseidon Property Interest in lieu of or under the threat of eminent domain.

(e) This Section 2.4.2 shall not apply to any Condemning Agency that has an agreement with the City and/or the RDA with respect to the

payment of a mitigation fee (including that certain Agreement Memorializing Certain Understandings and Establishing a Framework for Cooperation, dated as of April 28, 2005, by and between the San Diego County Water Authority, the City, the District and the RDA).

(f) If (i) at any time during the term of this Agreement there is a taking of an interest in the Project under the power of eminent domain (or by a voluntary conveyance in lieu thereof), as more particularly set forth in Section 2.4.2 (a) or (b) above, (ii) the Condemning Agency does not have an agreement with the City and/or the RDA with respect to the payment of a mitigation fee, (iii) the Condemning Agency nonetheless pays some or all of the mitigation fee required by Section 4 of this Agreement, (iv) the City or the RDA has received payment for the City/RDA Property Interest pursuant to Section 2.4.2 (a) or (b) above and (v) in the case of an award being apportioned pursuant to Section 2.4.2(a) above Poseidon receives less than its proposed value of its interest, then the City shall pay Poseidon (or shall cause the RDA to pay to Poseidon) such installments of the mitigation fee received from the Condemning Agency, within thirty (30) days of the date the City and/or RDA receives such payments, until such time as Poseidon has received an amount equal to the amount paid to the City and/or RDA pursuant to Section 2.4.2 (a) or (b) above set forth.

2.4.3 Subsequent Assignment. Any subsequent sale, transfer or assignment of this Agreement after an initial sale, transfer or assignment of this Agreement shall be made only in accordance with and subject to the terms and conditions of this Section.

2.5 Amendment or Cancellation of Agreement. This Agreement may be amended or cancelled in whole or in part only by written consent of all parties in the manner provided for in Code Section 65868. This provision shall not limit any remedy of the City or Poseidon as provided by this Agreement.

2.6 Termination. The parties acknowledge and agree that, except for Section 2.7 hereof, this Agreement is intended to run with the Leasehold and the Project and to be binding on successors and assigns of the parties hereto. Accordingly, even if Poseidon is no longer the lessee under the Lease or the owner of the Project, this Agreement shall not be deemed terminated, but shall continue in full force and effect unless any of the following events occurs:

- 2.3;
- (a) Expiration of the term of this Agreement stated in Section 2.3;
 - (b) Entry of a final non-appealable judgment setting aside, voiding or annulling the adoption of the Approval Ordinance;
 - (c) The adoption of a referendum measure repealing the Approval Ordinance; or
 - (d) The Project does not commence operation within ten (10) years after the Agreement Date.

Termination of this Agreement shall not constitute termination of any other land use entitlements approved for the Project or the portion of the Property subject to the Leasehold. Upon the termination of this Agreement, no party shall have

any further right or obligation hereunder except with respect to any obligation to have been performed prior to such termination or with respect to any default in the performance of the provisions of this Agreement which has occurred prior to such termination or with respect to any obligations which are specifically set forth as surviving the termination of this Agreement.

2.7 Liability. The parties acknowledge and agree that Poseidon Resources (Channelside) LLC shall have no further liability under this Agreement in the event of:

(i) A sale, transfer or assignment of this Agreement pursuant to Section 2.4.1;

(ii) Acquisition of Poseidon's interest in the Project as described in Section 2.4.2; or

(iii) Poseidon otherwise ceases the Development of the Project.

The release of liability in this Section 2.7 shall apply to Poseidon Resources (Channelside) LLC only, and not to any successor in interest, by operation of law or otherwise, to Poseidon Resources (Channelside) LLC.

2.8 Compliance With Environmental Law. Poseidon shall operate and maintain the Project in accordance with all applicable state and federal environmental laws, notwithstanding any exemption that Poseidon may otherwise have under international trade rules.

3 DEVELOPMENT OF THE PROJECT.

3.1 Permitted Uses. The Project shall be used and developed only for the purposes more particularly set forth in the Development Plan and for such other uses that may be mutually agreed upon by the parties hereto in accordance with Subsequent Development Approvals and the applicable provisions of the Code relating to the amendment of development agreements. In particular, the permitted uses of the portion of the Property subject to the Leasehold, the density and intensity of use, the maximum height and size of proposed buildings, the production capacity of the Plant Facilities, and provisions for reservation and dedication of land for public purposes shall be those set forth in the Development Plan.

3.2 Vested Rights. Unless amended or terminated in the manner specified in this Agreement (and subject to the provisions of this Agreement), or unless Poseidon otherwise agrees, Poseidon shall have the rights and benefits afforded by this Agreement and this Agreement shall be enforceable by Poseidon and the City notwithstanding the occurrence of any of the following after the Agreement Date: (a) any growth control measure or any development moratorium, or (b) any change in the applicable general or specific plans, zoning, subdivision or building regulations adopted by the City which alter or amend the Development Approvals, or (c) the adoption of any new or amended ordinance, resolution, rule, regulation, requirement or official policy, other than any of the Police Power Regulations, that is inconsistent with, or more burdensome on Poseidon than, the Development Approvals so as to prevent or materially adversely affect development, financing, construction or operation in accordance with the Development Approvals. Unless Poseidon otherwise consents in

writing, this Section shall be construed to prohibit the City from applying to the Project any development moratorium that is adopted specifically to prohibit the construction of the Project, or as an interim measure pending contemplated General Plan, specific plan or zoning changes, or as a general growth control management measure without other bona fide reasons relating to unforeseeable emergency situations (as described in Section 3.2.1, below). The Project shall remain subject to all Subsequent Development Approvals required to complete the Project as contemplated by the Development Plan.

3.2.1 Exceptions to Vested Rights. Notwithstanding any provision to the contrary contained herein, and without limiting the generality of Section 3.6, the City expressly reserves the right to apply to the Project: (a) Reservations of Authority made under Section 3.6; (b) any of the Police Power Regulations; or (c) any development moratorium, limitation on the delivery of City-provided utility services, or other generally applicable emergency rule, regulation, law or ordinance (collectively an "Emergency Measure") which meets all of the following criteria: (i) such Emergency Measure is based on genuine health, safety and general welfare concerns (other than general growth management issues); (ii) such Emergency Measure arises out of an emergency situation, as declared by the President of the United States or the Governor of California, or as declared by the Mayor or City Council of the City of Carlsbad; and (iii) such Emergency Measure is based upon its terms or its effect as applied, does not apply exclusively or primarily to the Project.

3.3 Effect of Agreement on Land Use Regulations. Except as otherwise provided under the terms of this Agreement, including without limitation Section 3.2.1 above, the rules, regulations and official policies governing permitted uses of the portion of the Property subject to the Leasehold, the density and intensity of use of the portion of the Property subject to the Leasehold, the maximum height and size of proposed buildings, and the design, improvement and construction standards and specifications applicable to development of the Project shall be the Existing Land Use Regulations. In connection with any Subsequent Development Approval, the City shall exercise its discretion in accordance with the Development Plan, and as provided by this Agreement including without limitation Section 3.2.1 hereof. The City shall accept for processing, review and action all applications for Subsequent Development Approvals, and such applications shall be processed in the normal manner for processing such matters.

3.4 Timing of Development. The parties acknowledge that Poseidon cannot at this time predict when or the rate at which the Project will be developed. Such decisions depend upon numerous factors which are not within the control of Poseidon, such as approvals from other government agencies, availability of subsidies from Metropolitan Water District of Southern California or others, obtaining water supply contracts with purchasers of Product Water equal to output of the Project, interest rates, construction completion and other similar factors. Since the California Supreme Court held in Pardee Construction Co. v. City of Camarillo (1984) 37 Cal.3d 465, that the failure of the parties therein to provide for the timing of development resulted in a later adopted initiative restricting the timing of development to prevail over such parties' agreement, it is the parties' intent to cure that deficiency by acknowledging and providing that Poseidon shall have the right to develop the Project in such order and at such rate and at such times as are more particularly described in the Water Purchase Agreement, subject only to any additional or different timing requirements set forth in the Development Plan.

3.5 Changes and Amendments. The parties acknowledge that refinement and further development of the Project will require Subsequent Development Approvals and may demonstrate that changes are appropriate and mutually desirable in the Existing

Development Approvals. If Poseidon finds that a change in the Existing Development Approvals is necessary or appropriate, Poseidon shall apply for Subsequent Development Approvals to effectuate such change and the City shall process and act on such application in accordance with the Existing Land Use Regulations, except as otherwise provided by this Agreement, including the Reservations of Authority. If approved, any such change in the Existing Development Approvals shall be incorporated herein as an addendum to Exhibit "D," and may be further changed from time to time as provided in this Section. Unless otherwise required by law, as determined in the City's reasonable discretion, a change to the Existing Development Approvals shall not require an amendment to this Agreement, provided such change does not:

- (a) Alter the permitted uses of the Property as a whole; or,
- whole; or, (b) Increase the density or intensity of use of the Project as a
- buildings; or, (c) Increase the maximum height and size of permitted
- (d) Increase the production capacity of the Plant Facilities; or
- (e) Delete a requirement for the reservation or dedication of land for public purposes within the Property as a whole; or,
- (f) Constitute a project requiring a subsequent or supplemental environmental impact report pursuant to Section 21166 of the Public Resources Code.

3.6 Reservations of Authority.

3.6.1 Limitations, Reservations and Exceptions. Notwithstanding any other provision of this Agreement, the City shall have the following Reservations of Authority with respect to application of Subsequent Land Use Regulations to the Development of the Project.

(a) Processing fees and charges of every kind and nature imposed by the City to cover the estimated and/or actual costs to the City of processing applications for Development Approvals or for monitoring compliance with any Development Approvals granted or issued.

(b) Procedural regulations relating to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals and any other matter of procedure.

(c) Regulations governing construction standards and specifications including, without limitation, the City's Building Code, Plumbing Code, Mechanical Code, Electrical Code, Fire Code and Grading Code.

(d) Regulations imposing Subsequent Development Exactions; provided, however, that no such Subsequent Development Exaction shall be applicable to development of the Project unless such Subsequent Development Exaction is applied uniformly to development, either throughout the City or within the South Carlsbad

Redevelopment Area. No such Subsequent Development Exaction shall apply if its application to the Project would have a material adverse effect on the development of the Project for the uses and to the density or intensity of development set forth in the Development Plan.

(e) Regulations which may be in conflict with the Development Plan but which are reasonably necessary to protect the public health, safety, morals and welfare. To the extent possible, any such regulations shall be applied and construed so as to provide Poseidon with the rights and assurances provided under this Agreement.

(f) Regulations which are not in conflict with the Development Plan; provided that such regulations do not have a material adverse effect on the development of the Project. Any regulation, whether adopted by initiative or otherwise, limiting the rate or timing of development of the Project shall be deemed to conflict with the Development Plan and shall therefore not be applicable to the development of the Project.

(g) Regulations which are in conflict with the Development Plan, provided Poseidon has given written consent to the application of such regulations to development of the Project.

3.6.2 Subsequent Development Approvals. This Agreement shall not prevent the City, in acting on Subsequent Development Approvals, from applying Subsequent Land Use Regulations which do not conflict with the Development Plan (provided that such regulations do not have a material adverse effect on the development of the Project).

3.6.3 Modification or Suspension by State or Federal Law. If State or Federal laws or regulations, whether existing on or enacted after the Agreement Date, prevent or preclude compliance with one or more of the provisions of this Agreement, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such State or Federal laws or regulations, provided, however, that this Agreement shall remain in full force and effect to the extent it is not inconsistent with such laws or regulations and to the extent such laws or regulations do not render such remaining provisions impractical to enforce.

3.6.4 Intent. The parties acknowledge and agree that the City is restricted in its authority to limit its police power by contract and that the foregoing limitations, reservations and exceptions are intended to reserve to the City all of its police power which cannot be so limited, including without limitation the Police Power Regulations. This Agreement shall be construed, contrary to its stated terms if necessary, to reserve to the City all such power and authority which cannot be restricted by contract.

3.7 Public Works. If Poseidon is required by this Agreement to construct any public works facilities which will be dedicated to the City or any other public agency upon completion, and if required by applicable laws to do so, Poseidon shall perform such work in the same manner and subject to the same requirements as would be applicable to the City or such other public agency should it have undertaken such construction.

3.8 Provision of Real Property Interests by the City. In any instance where Poseidon is required to construct any public improvement on land not owned by Poseidon, Poseidon shall at its sole cost and expense provide or cause to be provided,

the real property interests necessary for the construction of such public improvements. If Poseidon is unable, and upon a showing that it has exhausted all legal remedies available to it, including without limitation the rights under Sections 1001 and 1002 of the California Civil Code, to acquire the real property interests necessary for the construction of such public improvements, and if so requested by Poseidon and upon Poseidon's provision of adequate security for costs the City may reasonably incur, then: (a) the City may negotiate the purchase of the necessary real property interests to allow Poseidon to construct the public improvements as required by this Agreement; and (b) if necessary, in accordance with the procedures established by law, the matter may be brought before the City Council to, in its discretion, make the findings necessary to use its power of eminent domain to acquire such required real property interests. Poseidon shall pay all costs associated with such acquisition or condemnation proceedings. This Section 3.8 is not intended by the parties to impose upon: (x) the City a duty to acquire any land or otherwise exercise any power of eminent domain; or (y) upon Poseidon an enforceable duty to acquire land or construct any public improvements on land not owned by Poseidon, except to the extent that Poseidon elects to proceed with the Development of the Project, and then only in accordance with valid conditions imposed by the City upon the Development of the Project under applicable legal authority.

3.9 Regulation by Other Public Agencies. The parties acknowledge that other public agencies not within the control of the City possess authority to regulate aspects of the development of the Project separately from or jointly with the City, and this Agreement does not limit the authority of such other public agencies. If any revisions or corrections of the Development Plan approved by the City shall be required by any government official, agency, department or bureau having jurisdiction over the development of the Project (except the City), Poseidon and the City shall cooperate in reasonable efforts in complying with such requirements, to obtain waiver of such requirements or to develop a mutually acceptable alternative.

3.10 Tentative Tract Map Extension. Notwithstanding the provisions of Section 66452.6 of the Code, no tentative subdivision map or tentative parcel map, heretofore or hereafter approved in connection with development of the Project, shall be granted an extension of time except in accordance with the Existing Land Use Regulations.

3.11 Poseidon Obligation to Obtain and Maintain Insurance. Before commencing any improvement or construction work pursuant to any City-approved permit on the Project, Poseidon shall obtain and maintain the insurance as required under Section 12 of the Water Purchase Agreement.

4 PUBLIC BENEFITS.

4.1 Intent. The parties acknowledge and agree that this Agreement and the development of the Project will result in substantial benefits for Poseidon, and the City.

4.2 Mitigation Measures and Fees.

4.2.1 Payment; Waiver; No Contest. Poseidon and its successors in interest shall pay a mitigation fee to the City equal to the property taxes that the City, the District or the RDA would receive from the construction, ownership, use and occupancy of the Project on the portion of the Property subject to the Leasehold; provided, however, that this shall not apply to any successor which has an agreement with the City with respect to the payment of a mitigation fee (including that certain Agreement Memorializing Certain Understandings and Establishing a Framework for Cooperation, dated as of April 28, 2005, by and between the San Diego County Water

Authority, the City, the District and the RDA). Notwithstanding the foregoing, such mitigation fee shall be waived so long as Poseidon or its successors in interest shall pay and continue to pay, as and when due, property taxes due under state law for the construction, ownership, use and occupancy of the portion of the Property subject to the Leasehold, and shall not claim a partial or full exemption from payment for such tax. Neither Poseidon nor any of its successors in interest shall contest the payment of (a) any property taxes validly imposed under applicable law or (b) the mitigation fee above described; provided however that this shall not prevent Poseidon or its successors from contesting that such taxes were not correctly calculated.

4.2.2 No Discriminatory Fees. The City agrees that for the term of this Agreement, so long as the City, the District or the RDA is paid property taxes from the construction, ownership, use and occupancy of the Project on the portion of the Property subject to the Leasehold, or the mitigation fee described in Section 4.2.1, the City agrees that it will not levy, set or impose any taxes, fees, rates or charges in a discriminatory manner against Poseidon. For example and not by way of limitation, so long as the City, the District or the RDA is paid property taxes from the construction, ownership, use and occupancy of the Project on the portion of the Property subject to the Leasehold, or the mitigation fee described in Section 4.2.1, the City will not attempt to collect from Poseidon a franchise fee, tax, or other monetary charge levied only on businesses which produce or sell water. Further, if such discriminatory fee, tax or charge is adopted by the City, Poseidon and its successors shall be exempt therefrom.

4.2.3 Continuation of Fees. Should all or any portion of the Property become part of a city or another county, the fees payable pursuant to Section 4.2 shall remain and still be payable to the City.

4.2.4 Security. The performance of the terms and conditions of Sections 4.2.1 and 8.3 shall, upon the closing of the construction financing (the "Financing"), for the Project, be secured by a deed of trust and a security agreement encumbering the Project. Each of such deed of trust and security agreement shall be in a form reasonably acceptable to both parties. The City's rights under each of the deed of trust and the security agreement shall be subordinated to the prior payment in full of the lenders providing the Financing pursuant to an agreement with the City acceptable to such lenders.

4.2.5 Preliminary Security. The performance of the terms and conditions of Section 4.2.1 shall be secured by a deed of trust encumbering the Project. The deed of trust shall be: (i) in a form reasonably acceptable to the parties, (ii) be recorded within ninety (90) days after the parties agree upon the form thereof and (iii) released upon the earlier of (x) a termination of this Agreement pursuant to Section 2.6 or (y) a recordation of this Agreement pursuant to Section 11.27(d).

4.2.6 Accounting Requirements. With respect to any fee the City receives or costs the City recovers pursuant to this Agreement, in general, or this Section 4, in particular, the City shall comply with the requirements of Section 21.70.025 of the Carlsbad Municipal Code and Section 66006 et seq. of the Code.

4.3 Dedications. Poseidon acknowledges that one of the Development Approvals other than this Agreement shall require Cabrillo, at the commencement of construction, to dedicate real property as described in Exhibit 5 of the Precise Development Plan (PDP 00-02).

5 FINANCING OF APPURTENANT FACILITIES; OTHER PUBLIC FINANCING; USE OF PUBLIC RIGHTS OF WAY.

5.1 **Appurtenant Facilities.** The City will use commercially reasonable efforts to cooperate with Poseidon in obtaining subsidies, grants or external funding, including without limitation funds available under Proposition 50, to pay for the construction of Appurtenant Facilities required as part of the Development Plan. The City also agrees that, to the extent any such subsidies, grants or external funding is available to finance such Appurtenant Facilities, the City may join with Poseidon in applying therefor. Notwithstanding the foregoing, the parties acknowledge and agree that nothing contained in this Agreement shall be construed as requiring the City or the City Council of the City to join with Poseidon to apply for such subsidies, grants or external funding.

5.2 **Other Public Financing.** The City shall have no obligation to use public financing of any kind, including, without limitation, a community facilities district, an assessment district or other land-secured financing, for financing the construction, maintenance or operation of public infrastructure or other improvements, including without limitation roads or pipelines.

5.3 **Use of Public Rights of Way.** The City shall provide without charge, and shall cause any governmental agency under its control to provide without charge, Poseidon access to any public rights of way required for the construction or installation of the Appurtenant Facilities to deliver Product Water to the District from the Project. The City's obligations under this Section 5.3 shall apply only to public rights of way already in existence or planned as of the Effective Date as described in Exhibit 3.5 of the final Project EIR and shall not apply to any rights of way on, in, under, about or in any way relating to that certain real property commonly known as the Carlsbad Municipal Golf Course, located in the area bounded by Faraday Avenue and Cannon Road on the North, Palomar Airport on the East, Palomar Airport Road on the South, and Hidden Valley Road on the West. Nothing set forth in this Section 5.3 shall require the City to provide without charge, or to cause any governmental agency under its control to provide without charge, access to any required public rights of way for the Appurtenant Facilities to deliver Product Water from the Project to any purchaser of Product Water other than the District. Further, nothing set forth in this Section 5.3 shall permit Poseidon access to public rights of way without first obtaining all necessary permits for work and otherwise in accordance with the Development Plan.

6 ANNUAL REVIEW.

6.1 **Periodic Review.** The City's Planning Director shall review the extent of good faith substantial compliance by Poseidon with the terms of this Agreement annually, on or before each anniversary of the Effective Date. Subject to the notice and cure procedure set forth in Section 8.6, such a periodic review may result in termination of this Agreement, provided a Default has been established under the terms of this Agreement. Pursuant to Government Code Section 65865.1, as amended, Poseidon shall have the duty to demonstrate its good faith compliance with the terms of this Agreement at such review. The parties recognize that this Agreement and the documents incorporated herein could be deemed to contain many requirements and that evidence of each and every requirement would be a wasteful exercise of the parties' resources. Accordingly, Poseidon shall be deemed to have satisfied its duty of demonstration if it presents substantial evidence to the City of its good faith and substantial compliance with the provisions of this Agreement, including any information concerning the numbers, types, densities, heights and sizes of structures completed and of any reservations and dedications to the City. Any party may address any

requirement of this Agreement during the review. However, ten (10) days' written notice of any requirement to be addressed shall be made by the requesting party. If at the time of review an issue not previously identified in writing is required to be addressed, the review at the request of either party shall be continued to afford sufficient time for analysis and preparation. Poseidon shall pay the City's reasonable costs incurred in conducting annual review in accordance with this Agreement.

6.2 Opportunity to be Heard. Upon written request to the City by Poseidon, Poseidon shall be permitted an opportunity to be heard orally and/or in writing at a noticed public hearing regarding its performance under this Agreement. Poseidon shall be heard before the City Council at any required public hearing concerning a review of action on the Agreement.

6.3 Information to be Provided Poseidon. The City shall deposit in the mail to Poseidon a copy of staff reports and related exhibits concerning contract performance a minimum of ten (10) calendar days prior to any such review or action upon this Agreement by the City Council.

7 INCORPORATION AND ANNEXATION.

7.1 Intent. If all or any portion of the Property subject to the Leasehold is annexed to or otherwise becomes a part of another city or another county, the parties intend that this Agreement shall survive and be binding upon such other jurisdiction.

7.2 Incorporation. If at any time during the term of this Agreement, another city is incorporated comprising all or any portion of the Property subject to the Leasehold, the validity and effect of this Agreement shall be governed by Section 65865.3 of the Code.

7.3 Annexation. Poseidon and the City shall oppose, in accordance with the procedures provided by law, the annexation to any other city of all or any portion of the Property subject to the Leasehold unless both Poseidon and the City give written consent to such annexation.

8 DEFAULT AND REMEDIES.

8.1 Remedies in General. The parties would not have entered into this Agreement without the limits on damages set forth herein. Accordingly, the parties agree that each of the parties hereto may pursue any remedy at law or equity available for breach of any provision of this Agreement, subject to the following:

(a) The City and all persons acting on behalf of the City shall not be liable in damages to Poseidon, or to any successor in interest, or to any other person. Poseidon covenants not to sue for monetary damages or claim any monetary damages:

(i) for any breach of this Agreement or for any cause of action which arises out of this Agreement; or

(ii) for taking, impairment or restriction of any property right or interest as the result of or arising under or pursuant to this Agreement, but excluding claims based upon applicable obligations of the City acting in its governmental capacity and not as a party to this Agreement, and reserving the reserved rights and remedies described in Sections 8.5 and 8.8; or

(iii) arising out of or connected with any dispute, controversy or issue regarding the application or interpretation or effect of the provisions of this Agreement.

(b) Poseidon shall not be liable in monetary damages to City, or to any person acting on behalf of City, and City covenants not to sue for damages or claim any monetary damages:

(i) for failure to construct and operate the Project or any breach of this Agreement or for any cause of action which arises out of this Agreement; or

(ii) arising out of or connected with any dispute, controversy or issue regarding the application or interpretation or effect of the provisions of this Agreement;

(iii) provided, however, that City reserves the right to sue for any sums, including without limitation any sums due pursuant to Section 4 of this Agreement, that are specifically required to be paid by Poseidon or its successors pursuant to this Agreement, and provided further, however, the City also reserves the rights and remedies described in Section 8.8:

Nothing in this Section 8.1 shall be construed to limit or otherwise effect the remedies available to Poseidon and the District under the Water Purchase Agreement.

8.2 Termination by City. The City may terminate this Agreement upon a termination of the Water Purchase Agreement by the District pursuant to Section 2.3.4 thereof.

8.3 Liquidated Damages for Poseidon's Failure to Amend This Agreement Upon Relocation of Plant Facilities. Provided the Desalination Project has commenced Commercial Operation (as that term is defined in the Water Purchase Agreement), if all of or a material portion of the Plant Facilities are relocated to real property that is not encumbered by this Agreement, then Poseidon agrees to amend this Agreement in all respects necessary to provide for this Agreement to encumber the real property to which the Plant Facilities are so relocated. If Poseidon fails to do so and fails to pay the mitigation fees payable pursuant to Section 4.2.1 of this Agreement, Poseidon shall be in Default of this Agreement, and shall pay liquidated damages to the City in the initial amount of Fifteen Million Dollars (\$15,000,000.00), to compensate the City for a portion of the mitigation fees that would be payable pursuant to Section 4 of this Agreement. Such amount of liquidated damages shall be reduced by One Million Dollars (\$1,000,000) for each year that Poseidon pays the property taxes or mitigation fee pursuant to Section 4.2.1 of this Agreement. By signing or initialing in the space provided below, Poseidon and the City acknowledge and agree that it would be impractical and extremely difficult for the City to estimate its costs and losses as the result of the failure to pay such mitigation fees, and that under the circumstances as they exist as of the date of execution of this Agreement, the sum of the liquidated damages set forth above is a reasonable estimate of costs that the City would incur in the event of such failure.

Initials of Authorized
Signatory on Poseidon's
Behalf

Initials of Authorized
Signatory on City's
Behalf

8.4 Specific Performance. The parties acknowledge that, except as provided in Sections 8.1(b)(iii) above and 8.8 below, money damages and remedies at law generally are inadequate and that specific performance and other non-monetary relief are the exclusive remedies for the enforcement of this Agreement and should be available to all parties for the following reasons:

(i) Money damages are unavailable against City, or against Poseidon except as provided herein;

(ii) Due to the size, nature and scope of the Project, it will not be practical or possible to restore the portion of the Property subject to the Leasehold to its preexisting condition once implementation of this Agreement has begun. After such implementation Poseidon may be foreclosed from other choices it may have had to utilize the portion of the Property subject to the Leasehold and provide for other benefits. Poseidon has invested significant time and resources and performed extensive planning and processing of the Project in agreeing to the terms of this Agreement, and will be investing even more significant time and resources in implementing the Project in reliance upon these terms, and it will not be possible to determine the sum of money that would adequately compensate Poseidon for such efforts. By the same token, City will have invested substantial time and resources and will have permitted irremediable changes to the land and increased demands on the surrounding infrastructure and will have committed, and will continue to commit, to development in reliance upon the terms of this Agreement, and it would not be possible to determine a sum of money which would adequately compensate City for such undertakings. For this reason, the parties hereto agree that, except as otherwise provided in this Agreement, if any party fails to carry out its obligations under this Agreement, an injured party shall be entitled to non-damages remedies, including the remedy of specific performance of this Agreement.

8.5 Release and Reservation. Except for non-damage remedies, including the remedy of specific performance and judicial review as provided for in Section 8.4, Poseidon, for itself, its successors and assignees, hereby releases the City, its officers, agents and employees from any and all claims, demands, actions, or suits of any kind or nature arising out of any liability, known or unknown, present or future, including, but not limited to, any claim or liability, based or asserted, pursuant to Article I, Section 19 of the California Constitution, the Fifth Amendment of the United States Constitution, or any other law or ordinance which seeks to impose any other liability or damage, whatsoever, upon the City because it entered into this Agreement or because of the terms of this Agreement; provided, however, that Poseidon reserves all of its otherwise applicable rights and remedies in the event of an actual condemnation, inverse condemnation or inappropriate taking, restriction or regulation by the City, which are rights and remedies Poseidon otherwise has as a property owner.

8.6 Termination Agreement for Default of Poseidon. The City may terminate this Agreement for any Default by Poseidon; provided, however, the City may terminate this Agreement pursuant to this Section only after providing written notice to Poseidon

of Default setting forth the nature of the Default and the actions, if any, required by Poseidon to cure such Default and, where the Default can be cured, Poseidon has failed to take such actions and cure such Default within sixty (60) days after Poseidon's receipt of such notice or, in the event that such Default cannot be cured within such sixty (60) day period but can be cured within a longer time, Poseidon has failed to commence the actions necessary to cure such Default within such sixty (60) day period and to diligently proceed to complete such actions and cure such Default.

8.7 Termination of Agreement for Default of the City. Poseidon may terminate this Agreement for any Default by the City only after providing written notice to the City of Default setting forth the nature of the Default and the actions, if any, required by the City to cure such Default and, where the Default can be cured, the City has failed to take such actions and cure such Default within sixty (60) days after the City's receipt of such notice or, in the event that such Default cannot be cured within such sixty (60) day period but can be cured within a longer time, the City has failed to commence the actions necessary to cure such Default within such sixty (60) day period and to diligently proceed to complete such actions and cure such Default.

8.8 Rights, Remedies for Negligence, Willful Misconduct. Nothing in this Agreement shall be deemed to waive or limit any rights and remedies that the parties otherwise would have against the other in the absence of this Agreement with respect to injury caused by the negligence or willful misconduct of a party.

9 THIRD PARTY LITIGATION; INDEMNIFICATION.

9.1 General Plan Litigation. The City has determined that this Agreement is consistent with its General Plan and the Precise Development Plan, and that the General Plan and the Precise Development Plan meet all requirements of law. Poseidon has reviewed the General Plan and the Precise Development Plan and concurs with the City's determination. The parties acknowledge that:

(a) In the future there may be litigation challenging the legality, validity and adequacy of certain provisions of the General Plan or Precise Development Plan or other, similar challenges; and,

(b) If successful, such challenges could delay or prevent the performance of this Agreement and the development of the Project.

The City shall have no liability in damages under this Agreement for any failure of the City to perform under this Agreement or the inability of Poseidon to develop the Project as contemplated by the Development Plan of this Agreement as the result of a judicial determination that on the Agreement Date, or at any time thereafter, the General Plan or the Precise Development Plan, or portions thereof, are invalid or inadequate or not in compliance with law.

9.2 Third Party Litigation Concerning Agreement. In the event of any legal action instituted by a third party (not a party to this Agreement) or any governmental entity or official (other than the City or an official of the City), challenging the validity of any provision of this Agreement or the other Development Approvals or any City action relating thereto, the parties hereby agree to cooperate in defending said action; provided, however Poseidon shall indemnify and hold harmless City from all litigation expenses, including reasonable attorneys' fees and costs, arising out of any legal action instituted by such third party (not a party to this Agreement), or other governmental

entity or official (other than City or an official of the City) challenging the validity of any provision of this Agreement, or the other Development Approvals or any City action relating thereto. City shall promptly notify Poseidon of any such action and City shall cooperate in the defense thereof.

9.3 Breaches of Agreement; Property Damage, Bodily Injury or Death. In addition to the provisions of Section 9.2 above, Poseidon shall save, indemnify, hold harmless and defend, at its expense, including attorneys' fees, the City, its officers, agents, employees and independent contractors (the "City Indemnitees") from and against any and all loss, costs, fees, expenses or liability whatsoever, arising out of or based upon any breach or alleged breach of this Agreement by Poseidon. Poseidon shall not, however, be required to indemnify the City Indemnitees with respect to any loss, costs, fees, expenses or liability arising through the gross negligence or willful misconduct of the City.

9.4 Indemnification Procedure. In any situation in which Poseidon is required to indemnify the City pursuant to this Agreement, as a condition thereto the City shall give Poseidon reasonably prompt notice of any matter for which indemnification is sought hereunder. The City shall cooperate in the defense of such claim (and pending assumption of defense, the City, in its good faith judgment, may take such steps to defend itself against such claim as it deems appropriate to protect its interests). Poseidon shall pay the City's reasonable out-of-pocket expenses incurred in connection with such cooperation and such steps taken to defend itself pending Poseidon's assumption of defense. Poseidon shall keep the City reasonably informed as to the status of the defense of such claim. After notice from Poseidon to the City of the assumption, and the defense of a claim, Poseidon shall not be liable to the City for any legal or other expenses subsequently incurred by the City in connection with the defense thereof other than those expenses referred to above. Poseidon, at its own expense and through counsel chosen by it (which counsel shall be reasonably acceptable to the City), shall defend any such claim; provided, however, that if, in the City's reasonable judgment at any time, either a conflict of interest arises between Poseidon and the City or if there are defenses which are different from or in addition to those available to Poseidon and/or the City and the representation of both parties by the same counsel would be inappropriate, then in each such case the City shall have the right to employ a separate law firm in each applicable jurisdiction (if necessary) ("Separate Counsel"), to represent the City in any action or group of related actions (which firm or firms shall be reasonably acceptable to Poseidon), and in that event: (a) the reasonable fees and expenses of such Separate Counsel shall be paid by Poseidon (it being understood, however, that Poseidon shall not be liable for the expenses of more than one Separate Counsel with respect to any claim (even if against multiple indemnified Parties)); and (b) Poseidon shall have the right to conduct its own defense in respect of such claim. If Poseidon does not defend against a claim, the City may defend, compromise and settle such claim and shall be entitled to indemnification hereunder (to the extent permitted by this Agreement). Notwithstanding the foregoing, Poseidon shall not, without the City's prior written consent (which shall not be unreasonably withheld, conditioned or delayed), settle or compromise any claim or consent to the entry of any judgment unless: (x) there is no finding or admission of any violation of law or any violation of the rights of any person and no effect on any other claims that may be made against the City; and (y) the sole relief provided is monetary damages that are paid in full by Poseidon.

9.5 Survival. The provisions of this Sections 9.1 through 9.4, inclusive, shall survive the termination of this Agreement.

10 MORTGAGEE PROTECTION.

The parties hereto agree that this Agreement shall not prevent or limit Poseidon, in any manner, at Poseidon's sole discretion, from encumbering the Project or any portion thereof or any improvement thereon by any mortgage, deed of trust or other security device securing financing with respect to the Project. The City acknowledges that the lenders providing such financing may require certain Agreement interpretations and modifications and agrees upon request, from time to time, to meet with Poseidon and representatives of such lenders to negotiate in good faith any such request for interpretation or modification. The City will not unreasonably withhold its consent to any such requested interpretation or modification provided such interpretation or modification is consistent with the intent and purposes of this Agreement. Any Mortgagee of the Project shall be entitled to the following rights and privileges:

(a) Neither entering into this Agreement nor a breach of this Agreement shall defeat, render invalid, diminish or impair the lien of any mortgage on the Project made in good faith and for value, unless otherwise required by law.

(b) Any Mortgagee of any mortgage or deed of trust encumbering the Project, or any part thereof, which has submitted a request in writing to the City in the manner specified herein for giving notices, shall be entitled to receive written notification from the City of any Default by Poseidon in the performance of Poseidon's obligations under this Agreement concurrently with the receipt of any such notice by Poseidon.

(c) The Mortgagee shall have the right, but not the obligation, to cure a Default during the remaining cure period allowed Poseidon under this Agreement.

(d) Subject to compliance with the provisions of Section 2.4.1(b) of this Agreement, any Mortgagee who comes into possession of the Project, or any part thereof, pursuant to foreclosure of the mortgage or deed of trust, or deed in lieu of such foreclosure, shall take the Project, or part thereof, subject to the terms of this Agreement.

11 MISCELLANEOUS PROVISIONS.

11.1 Recordation of Agreement. As more particularly set forth below in Section 11.27, this Agreement and any amendment or cancellation thereof shall be recorded against the real property included in the Specific Plan Amendment area by the Clerk of the City Council filing a copy of this Agreement or any such amendment with the San Diego County Recorder within the period required by Section 65868.5 of the Code.

11.2 Further Actions. Each of the parties shall cooperate with and provide reasonable assistance to the other to the extent contemplated hereunder in the performance of all obligations under this Agreement and the satisfaction of the conditions of this Agreement. At any time and from time to time after the date hereof, each Party agrees to take such actions and to execute and deliver such documents as each other Party may reasonably request to effectuate the purposes of this Agreement.

11.3 Amendment. Except as otherwise provided in this Agreement, neither this

Agreement nor any provision hereof may be waived, modified, amended, discharged, or terminated except by an instrument in writing signed by the party against which the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such writing.

11.4 Entire Agreement. This Agreement and the Water Purchase Agreement constitute the entire understanding among the parties with respect to the matters set forth herein, and supersede all prior or contemporaneous understandings or agreements among the parties with respect to the subject matter hereof, whether oral or written.

11.5 Notices. As used in this Agreement, "notice" includes, but is not limited to, the communication of notice, request, demand, approval, statement, report, acceptance, consent, waiver, appointment or other communication required or permitted hereunder. Any notice, approval, consent, waiver or other communication required or permitted to be given or to be served upon any party in connection with this Agreement shall be in writing. Such notice shall be personally served, sent by facsimile, sent prepaid by registered or certified mail with return receipt requested, or sent by reputable overnight delivery service, such as Federal Express, and shall be deemed given: (a) if personally served, when delivered to the party to whom such notice is addressed; (b) if given by facsimile, when sent, provided that the confirmation sheet from the sending fax machine confirms that the total number of pages were successfully transmitted; (c) if given by prepaid or certified mail with return receipt requested, on the date of execution of the return receipt; or (d) if sent by reputable overnight delivery service, such as Federal Express, when received. Such notices shall be addressed to the party to whom such notice is to be given at the address below specified. Either party may, by notice given at any time and sent in accordance with this Section, require subsequent notices to be given to another person or entity, whether a party or an officer or representative of a party, or to a different address, or both. Notices given before actual receipt of notice of change shall not be invalidated by the change.

If to CITY, to:

City of Carlsbad
1200 Carlsbad Village Drive
Carlsbad, CA 92008
Attn: City Manager
Fax No. (760) 729-9461

If to Poseidon, to:

Poseidon Resources (Channelside) LLC
501 West Broadway, Suite 840
San Diego, CA. 92101
Attn: President
Fax No. (619) 595-7892

11.6 Controlling Law. This Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the State of California, without giving effect to any choice-of-law or conflicts-of-laws rule or principle that would result in the application of any other laws.

11.7 Headings. Headings, titles and captions are for convenience only and shall not constitute a portion of this Agreement or be used for the interpretation thereof.

11.8 Cumulative Rights; Waiver. The rights created under this Agreement, or

by law or equity, shall be cumulative and may be exercised at any time and from time to time. No failure by any party to exercise, and no delay or omission by any party in exercising any rights, shall be construed or deemed to be a waiver thereof, nor shall any single or partial exercise by any party preclude any other or future exercise thereof or the exercise of any other right. Any waiver of any provision or of any breach of any provision of this Agreement must be in writing, and any waiver by any party of any breach of any provision of this Agreement shall not operate as or be construed to be a waiver of any other breach of that provision or of any breach of any other provision of this Agreement. The failure of any party to insist upon strict adherence to any term of this Agreement on one or more occasions shall not be considered or construed or deemed a waiver of any provision or any breach of any provision of this Agreement or deprive that party of the right thereafter to insist upon strict adherence to that term or provision or any other term or provision of this Agreement.

11.9 Liberal Construction. This Agreement constitutes a fully-negotiated agreement among commercially sophisticated parties, each assisted by legal counsel, and the terms of this Agreement shall not be construed or interpreted for or against any party hereto because that party or its legal representative drafted or prepared such provision.

11.10 Severability. If any provision of this Agreement shall be ruled invalid, illegal or unenforceable, then the parties shall: (a) promptly negotiate a substitute for such provision which shall, to the greatest extent legally permissible, therein effect the intent of the parties in such invalid, illegal or unenforceable provision; and (b) negotiate such changes in, substitutions for or additions to the remaining provisions of this Agreement as may be necessary in addition to and in conjunction with clause (a) above to give effect to the intent of the parties without the invalid, illegal or unenforceable provision. To the extent that the parties are able to negotiate such changes, substitutions or additions as set forth in the preceding sentence, and the intent of the parties with respect to the essential terms of the Agreement may be carried out without the invalid, illegal or unenforceable provision, then the balance of this Agreement shall not be affected, and this Agreement shall be construed and enforced as if such invalid, illegal or unenforceable provision did not exist.

11.11 Good Faith and Fair Dealing. The parties hereto acknowledge and agree that the performances required by the provisions of this Agreement shall be undertaken in good faith, and with all parties dealing fairly with one another.

11.12 No Third Party Beneficiaries. Except as provided in this Section 11.12, this Agreement does not create, and shall not be construed to create, any rights enforceable by any person, partnership, corporation, joint venture, limited liability company or other form of organization or association of any kind that is not a party to this Agreement. Notwithstanding the foregoing, the RDA and the District are intended beneficiaries of this Agreement, with the right to enforce this Agreement in accordance with its terms.

11.13 Execution in Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature page of any counterpart may be detached therefrom without impairing the legal effect of the signature(s) thereon, provided such signature page is attached to any other counterpart identical thereto except for having an additional signature page executed by the other party.

11.14 Time of the Essence. Time is of the essence of each and every provision

of this Agreement. Unless business days are expressly provided for, all references to "days" herein shall refer to consecutive calendar days. If any date or time period provided for in this Agreement is or ends on a Saturday, Sunday or federal, state or legal holiday, then such date shall automatically be extended to the next day which is not a Saturday, Sunday or federal, state or legal holiday.

11.15 Number, Gender. Where a word or phrase is defined in this Agreement, its other grammatical forms have a corresponding meaning. As used herein, and as the circumstances require, the plural term shall include the singular, the singular shall include the plural, the neuter term shall include the masculine and feminine genders, the masculine term shall include the neuter and the feminine genders, and the feminine term shall include the neuter and the masculine genders.

11.16. Relationship. Nothing in this Agreement shall be deemed to constitute either party a partner, agent or legal representative of the other party, neither party is acting as the agent of the other in any respect hereunder, each party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement, and no partnership, joint venture or other association of any kind is formed by this Agreement. No liability or benefits, such as workers' compensation, pension rights or liabilities, other provisions or liabilities arising out of or related to a contract for hire or employer/employee relationship, shall arise or accrue to any party's agent or employee as a result of this Agreement or its performance.

11.17 Joint and Several Obligations. If at any time during the term of this Agreement the Project is owned, in whole or in part, by more than one owner, all obligations of such owners under this Agreement shall be joint and several, and the Default of any such owner shall be the Default of all such owners.

11.18 Force Majeure. Neither party shall be deemed to be in Default where failure or delay in performance of any of its obligations under this Agreement is caused an event of Force Majeure. "Force Majeure" as used herein shall have the meaning more particularly set forth in Section 17 of the Water Purchase Agreement.

11.19 Mutual Covenants. The covenants contained herein are mutual covenants and also constitute conditions to the concurrent or subsequent performance by the party benefited thereby of the covenants to be performed hereunder by such benefited party.

11.20 Successors in Interest. The burdens of this Agreement shall be binding upon all successors in interest to the parties to this Agreement. Subject to Section 2.4 of this Agreement, the benefits of this Agreement shall inure to the successors in interest to the parties to this Agreement. Subject to the receipt of any consent of Cabrillo required under the Lease, all provisions of this Agreement shall be enforceable as equitable servitudes and constitute covenants running with the Leasehold. Subject to the receipt of any consent of Cabrillo required under the Lease, each covenant to do or refrain from doing some act hereunder with regard to development of the Project and the Leasehold : (a) is for the benefit of and is a burden upon every portion of the Project and the Property subject to the Leasehold; (b) runs with the Project and the portion of the Property subject to the Leasehold and each portion thereof; and, (c) is binding upon each party and each successor in interest during ownership of the Project or the Leasehold or any portion thereof.

11.21 Jurisdiction and Venue. Any action at law or in equity arising under this Agreement or brought by a party hereto for the purpose of enforcing, construing or determining the validity of any provision of this Agreement shall be filed and tried in the

Superior Court of the County of San Diego, State of California, and the parties hereto waive all provisions of law providing for the filing, removal or change of venue to any other court.

11.22 Project as a Private Undertaking. The parties specifically understand and agree that the development of the Project is a private development. The only relationship between the City and Poseidon is that of a government entity regulating the development of a private Project and the lessee, grantee and developer of such Project.

11.23 Eminent Domain. No provision of this Agreement shall be construed to limit, restrict or require the exercise by the City of its power of eminent domain.

11.24 Agent for Service of Process. Poseidon shall designate and maintain Corporation Service Company (or a similar national company) as its agent for the purpose of service of process in any court action arising out of or based upon this Agreement, and the delivery to such agent of a copy of any process in any such action shall constitute valid service upon Poseidon. If for any reason service of such process upon such agent is not feasible, then in such event Poseidon may be personally served with such process out of this County and such service shall constitute valid service upon Poseidon.

11.25 Authority to Execute. Each party warrants and represents that this Agreement has been duly authorized by such party. Each party shall deliver to the other party copies of such resolutions, certificates or written assurances evidencing authorization to execute, deliver and perform this Agreement.

11.26 Commission Approval Required. This Agreement shall not become effective unless and until it is approved by the Commission, as required by Code Section 65869.

11.27 Approval Procedure. The following procedure shall govern approval of this Agreement:

(a) Prior to City Council consideration of this Agreement, Poseidon shall execute this Agreement; provided, however, that Poseidon shall have the right prior to the Agreement Date of this Agreement to withdraw its execution based upon the terms and conditions contained in the Development Approvals, in which case this Agreement shall be of no force or effect.

(b) City Council shall undertake all necessary proceedings to consider this Agreement. Approval by the City shall be by adoption of the Approval Ordinance.

(c) Following adoption of the Approval Ordinance, the Mayor shall execute this Agreement on behalf of the City, and take such steps as may be required to obtain Commission approval as described above in Section 11.26.

(d) This Agreement shall be effective on the Effective Date. As provided in Code Section 65868.5, the City shall cause a copy of this Agreement to be recorded against the real property included in the Specific Plan Amendment area by the Clerk of the City Council filing a copy of this Agreement with the San Diego County Recorder within ten (10) days following the Effective Date. Poseidon shall pay any recording costs.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement
on the day and year below set forth.

Dated: _____, 2006

"CITY"

CITY OF CARLSBAD

By: _____

Name:

Title:

ATTEST:

By: _____
City Clerk
(SEAL)

Dated: _____, 2006

"POSEIDON"

Poseidon (Channelside) LLC, a
Delaware limited liability company

By: _____

Name:

Title:

STATE OF CALIFORNIA }

} ss

COUNTY OF SAN DIEGO }

On _____, before me,

_____, personally appeared
_____, personally known to me (or proved to me on the
basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to
the within instrument and acknowledged to me that he/she/they executed the same in
his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the
instrument the person(s) or the entity upon behalf of which the person(s) acted,
executed the instrument.

Witness my hand and official seal.

Signature

STATE OF CALIFORNIA }

} ss

COUNTY OF SAN DIEGO }

On _____, before me,

_____, personally appeared
_____, personally known to me (or proved to me on the
basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to
the within instrument and acknowledged to me that he/she/they executed the same in
his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the
instrument the person(s) or the entity upon behalf of which the person(s) acted,
executed the instrument.

Witness my hand and official seal.

Signature

Exhibit "A"
CONSENT OF PROPERTY OWNER

Cabrillo Power I, LLC, a Delaware limited liability company ("Cabrillo"), is the owner of the Property that is the subject of the Precise Development Plan No. _____ (Planning Application No. _____). Poseidon Resources (Channelside) LLC, a Delaware limited liability company ("Poseidon"), currently is the lessee of the Property under the terms and conditions of that certain Ground Lease and Easement Agreement, dated July 11, 2003, by and between Cabrillo and Poseidon. Cabrillo hereby consents to the entering into of that certain Development Agreement between the City of Carlsbad and Poseidon, to which this Consent is attached and which affects the Property.

Dated: "Cabrillo"

CABRILLO POWER I, LLC, a Delaware limited liability company

By: _____
Name: _____
Title: _____

STATE OF CALIFORNIA }
 } ss
COUNTY OF SAN DIEGO }

On _____, before me, _____, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal.

Signature

EXHIBIT "B"

(Legal Description of the Property)

EXHIBIT "C"

(Map of the Property)

EXHIBIT "D"

(Existing Development Approvals)

- (a) Final EIR 03-05; Findings of Fact; Statement of Overriding Considerations; and Mitigation Monitoring and Reporting Program
- (b) Precise Development Plan (PDP 00-02);
- (c) Specific Plan 144(H)
- (d) Coastal Development Permit CDP 04-41;
- (e) South Carlsbad Coastal Redevelopment Permit RP 05-12;
- (f) Habitat Management Plan Permit HMPP 05-08;
- (g) This Agreement DA 05-01; and
- (h) Special Use Permit SUP 05-04.

The development approvals listed above include the approved maps and all conditions of approval.

COPIES OF THE EXISTING DEVELOPMENT APPROVALS LISTED ABOVE ARE ON FILE IN THE CITY OF CARLSBAD CITY CLERK'S OFFICE AND THE CITY OF CARLSBAD PLANNING DEPARTMENT AND ARE INCORPORATED HEREIN BY REFERENCE.

EXHIBIT "E"

(Existing Land Use Regulations)

1. City of Carlsbad General Plan as amended through Resolution No. 8307.
2. City of Carlsbad Precise Development Plan 00-02 as amended through Ordinance No. _____.
3. South Carlsbad Coastal Redevelopment Plan.
4. Specific Plan 144(H), as amended through City of Carlsbad Ordinance No. _____.

COPIES OF THE EXISTING LAND USE REGULATIONS LISTED ABOVE ARE ON FILE IN THE CITY OF CARLSBAD CITY CLERK'S OFFICE AND THE CITY OF CARLSBAD PLANNING DEPARTMENT AND ARE INCORPORATED HEREIN BY REFERENCE.

ATTACHMENT

ATTACHMENT

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CASE NAME: PRECISE DEVELOPMENT PLAN AND
DESALINATION PLANT
CASE NO.: RP 05-12

That portion of Lot "H" of Rancho Agua Hedionda in the City of Carlsbad, County of San Diego, State of California, according to Partition Map thereof No. 823, filed in the Office of the County Recorder of San Diego County, November 16, 1896, as described in Certificate Of Compliance recorded October 30, 2001, as Document No. 2001-0789068, Parcel 4, more particularly described as follows:

Commencing at the most southerly corner of said Parcel 4, also being a point on the westerly line of the 100.00-foot-wide right of way on the Atchison Topeka and Santa Fe Railroad, also being the most southeasterly corner of Parcel 4 as shown on Record of Survey No. 17350; thence along said westerly line, north 22°30'13" west, 1763.84 feet; thence leaving said westerly line, at right angles, south 67°29'47" west, 54.68 feet to the point of beginning; thence south 67°22'25" west, 427.00 feet; thence north 22°37'35" west, 320.00 feet; thence north 67°22'25" east, 427.00 feet; thence south 22°37'35" east, 320.00 feet to the point of beginning.

1 **The application also affects properties identified by Assessor's**
2 **Parcel Numbers 210-010-41, 210-010-43, 210-010-42, 210-011-**
3 **05, and 211-010-24**

4 ("the Property"); and

5 WHEREAS, said verified application constitutes a request for a Redevelopment
6 Permit as shown and described in the **"Encina Power Station Precise Development Plan"**
7 **document** dated **May 3, 2006**, on file in the Planning Department **PRECISE**
8 **DEVELOPMENT PLAN AND DESALINATION PLANT – RP 05-12** as provided and
9 required by Sections 600 and 608 of the South Carlsbad Coastal Redevelopment Area (SCCRA)
10 Plan; and

11 WHEREAS, the Carlsbad Seawater Desalination Plant consists of the desalination
12 plant facilities itself, which include a reverse osmosis facility, pretreatment filters, and chemical
13 storage area, and appurtenant facilities such as intake and discharge pipelines, solids handling
14 building, and product water conveyance pipelines; and

15 WHEREAS, the Carlsbad Seawater Desalination Plant, including many of its
16 appurtenant facilities, are located within the boundaries of the Encina Power Station, while
17 product water conveyance pipelines extend beyond the boundaries of the Encina Power Station
18 and east of Interstate 5; and

19 WHEREAS, this Redevelopment Permit applies to the Carlsbad Seawater
20 Desalination Plant and all appurtenant facilities located onsite and offsite of the Encina Power
21 Station and within the boundaries of the SCCRA Plan; and

22 WHEREAS, Section 600 of the Redevelopment Plan states a desalination plant,
23 including its appurtenant facilities, may be permitted in the SCCRA only if the Housing and
24 Redevelopment Commission approves a finding that: 1) the desalination plant serves an
25 extraordinary public purpose; 2) a precise development plan which sets forth standards for
26 extraordinary public purpose; 2) a precise development plan which sets forth standards for
27 extraordinary public purpose; 2) a precise development plan which sets forth standards for

1 development of the desalination plant is first approved by the Housing and Redevelopment
2 Commission; and 3) the Commission has issued a Redevelopment Permit for the Project; and

3 WHEREAS, processed concurrently with Redevelopment Permit RP 05-12 is
4 Precise Development Plan PDP 00-02, which establishes the development standards for the
5 desalination plant and Environmental Impact Report EIR 03-05, which provides location and
6 other information on appurtenant facilities located offsite of the Encina Power Station and within
7 the boundaries of the SCCRA Plan; and

8
9 WHEREAS, the Planning Commission is the review body for recommending and
10 processing land use permits proposed in the SCCRA; and

11 WHEREAS, the Planning Commission did on the 3rd day of May, 2006, hold a
12 duly noticed public hearing as prescribed by law to consider said request; and

13 WHEREAS, at said public hearing, upon hearing and considering all testimony
14 and arguments, if any, of all persons desiring to be heard, said Commission considered all factors
15 relating to the Redevelopment Permit; and

16
17 WHEREAS, in its deliberations, the Planning Commission considered whether
18 the desalination plant serves an extraordinary public purpose.

19 NOW, THEREFORE, BE IT HEREBY RESOLVED by the Planning
20 Commission of the City of Carlsbad as follows:

- 21 A) That the foregoing recitations are true and correct.
- 22 B) That based on the evidence presented at the public hearing, the Commission
23 **RECOMMENDS APPROVAL** of **PRECISE DEVELOPMENT PLAN AND**
24 **DESALINATION PLANT – RP 05-12**, based on the following findings and
subject to the following conditions:

25 **Findings:**

- 26 1. The City of Carlsbad Planning Commission hereby finds the desalination plant serves an
27 extraordinary public purpose to the City of Carlsbad, the RDA, and the citizens of
28 Carlsbad as demonstrated by the following benefits:

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a. **Security of Water Supply:** The need for a diverse water portfolio was illustrated by the early 1990's drought, when the San Diego County Water Authority (CWA) reduced water supplies to its member agencies, including Carlsbad, by 30% and was considering 50% reductions. According to the CWA Regional Water Facilities Master Plan (RWFMP), the CWA currently imports nearly 600,000 acre feet per year (AFY) from the Metropolitan Water District (MWD), but is only legally entitled to approximately 300,000 AFY. This makes the region's imported water supply highly vulnerable to water shortages and supply disruptions. The Colorado River is a major source of water supply for California, Nevada, and Arizona. California has traditionally used more than its allocated 4.4 million acre feet (MAF) per year because Arizona and Nevada did not use their full allocations. Arizona and Nevada's increasing water needs have led to demands that California reduce its usage to its 4.4 MAF allocation. Potential threats to future deliveries of water from the Sacramento-San Joaquin Bay Delta, such as a severe decline in fish populations, levee instability, and a series of adverse court rulings, may also lead to reductions in the amount of water that can be delivered from Northern to Southern California through the State Water Project.

The project will allow the City of Carlsbad Municipal Water District (CMWD) to purchase 100% of its potable water supply needs from the desalination plant, thus providing a secure local water supply that is not subject to the variations of drought or political and legal constraints on water supplies (Appendix B to Final Environmental Impact Report EIR 03-05, Sections 1.2 and 10.1).

b. **Redundant Water Supply:** The project will provide water supply redundancy for the City, strengthening security and reliability of water supply for residents and businesses. The CMWD will maintain its membership in and right to purchase water at the CWA, while receiving 100% of its potable water supply needs from the Project, thereby creating a redundant supply of water available in the event of catastrophe or unforeseen circumstances (Appendix B to Final EIR 03-05, Section 13). The Project will add approximately 21,000 AFY dedicated to CMWD, thus replacing its current supply and increasing the reliability of CMWD's water supply.

c. **Reliable Water Supply:** The desalination plant will provide a reliable water supply for 30 years with two possible 30-year extensions (Appendix B to Final EIR 03-05, Section 2.). The City is protected from shortfalls in delivery under the terms of the Water Purchase Agreement (Appendix B to Final EIR 03-05, Sections 9 and 14).

d. **High Quality Drinking Water:** The Project will provide high quality drinking water that will compare favorably with the water supply that can be purchased from the CWA. The project will deliver a drinking water supply to the City that meets all State and Federal health standards, as well as provide a reduction in the total dissolved solids (TDS) compared to imported water from the Colorado River and Sacramento-San Joaquin Delta provided by the CWA. The desalinated water TDS will be monitored on a weekly basis and shall not exceed 350 mg/L in more

1 than half the samples taken. Additionally, 90% of the samples shall be less than
2 400 mg/L. The City is not obligated to accept or pay for water that does not meet
3 the quality standards (Appendix B to Final EIR 03-05, Section 8 and Schedule
4 8.2.). Imported water has a TDS of 466-574 mg/L (Metropolitan Water District
5 2005 Water Quality Report for the Skinner Filtration Plant).

- 6 e. **Economic Benefits:** The project will achieve the SCCRA Plan goal to strengthen
7 the economic base of the Project Area and the community. The Project will
8 provide the City with desalinated water at a predictable and reasonable price
9 through the long-term Water Purchase Agreement, which sets agreed-upon water
10 rates (Appendix B to Final EIR 03-05).

11 The desalination plant will generate up to \$2.4 million per year in increased
12 property tax revenue. Because the Project site is located within the South
13 Carlsbad Redevelopment Project, an estimated \$2.0 million per year of the tax
14 revenue will be allocated directly to the RDA (Exhibit 2, page 7, of CMWD
15 Agenda Bill 577, dated September 28, 2004, regarding adoption of Resolution
16 1226, approving the Water Purchase Agreement). The Project will also generate
17 up to \$2.9 million per year in increased business tax revenue.

- 18 f. **Positive Economic Impact on Ability to Attract and Retain Business:** The
19 desalination plant will create a drought-resistant, reliable water supply for the City
20 of Carlsbad that will provide the stability necessary to attract and retain high-tech
21 and biotechnology businesses which are dependent on a reliable water supply for
22 their research and manufacturing processes. These businesses provide high skill,
23 high wage jobs in the City of Carlsbad that enhance the overall economy of the
24 community.

25 The project will provide an extraordinary benefit to the residents and businesses
26 of the City by generating approximately \$2.4 million per year in property tax
27 revenue, 85% of which will remain in the City to support schools, municipal
28 services, and the RDA (Exhibit 2, page 7, of CMWD Agenda Bill 577, dated
September 28, 2004, regarding adoption of Resolution 1226, approving the Water
Purchase Agreement). Among other things, this revenue can be used to support
the proposed public improvements identified in Exhibit C of the Redevelopment
Plan. Additionally, the Project will generate substantial tax revenues that will go
to the general funds of Carlsbad and other San Diego County cities to support
police, fire, health, welfare, and transportation. Good public services help to
attract high quality businesses.

- g. **Acquisition of Land for Public Purpose:** The project will advance the goals of
the SCCRA Plan and the California Coastal Act to develop new beach and coastal
recreational opportunities. The Project is consistent with and includes elements
specifically intended to advance the goals of the State of California and the City
related to the protection, maintenance, and enhancement of the overall quality of
the coastal zone environment, while maximizing public recreational opportunities
along the coast. The Project will achieve the SCCRA Plan goals to enhance

commercial and recreational functions and increase parking and open space amenities in the Project area.

Through the Precise Development Plan for this project, Cabrillo Power, the Encina Power Station owner, has offered several acres of dedications to the City for the public's benefit and for marine research. Each dedication, in the form of an easement, title transfer, or deed restriction, would further Coastal Act goals of maximizing public access and recreational opportunities along the coast. The dedications are described below:

- Fishing Beach – An easement for this site, along the shore of Agua Hedionda Lagoon and next to Carlsbad Boulevard, would be dedicated for public recreational and coastal access use, including public parking.
- Bluff Area – The Bluff Area, located on the west side of Carlsbad Boulevard and opposite the Power Station, is proposed to be dedicated in fee title to the City for recreational and coastal access uses.
- Hubbs Site – The Hubbs Site, along the lagoon north shore, consists of the land between the existing Hubbs Sea World Research Institute and the railroad tracks. The site is proposed to be deed restricted to uses such as a fish hatchery, aquatic research, and trails.
- South Power Plant Public Parking Area – An easement for this site, along the east side of Carlsbad Boulevard and near the south entrance to the power plant, would be dedicated for public parking.

Further, a condition of approval of the Precise Development Plan will also enhance the public recreation through the dedication of an easement for the Coastal Rail Trail.

h. Restore and Enhance the Marine Environment: As a wholesale water supplier regulated by the California Department of Health Services, Poseidon Resources will be subject to the provisions of the federal Safe Drinking Water Act that require restoration, protection, and enhancement of watersheds upstream of a source of drinking water supply. As a result, Poseidon has been and will likely remain actively involved in activities aimed at protecting, restoring, and enhancing the health and vitality of Agua Hedionda Lagoon, the surrounding 30-square-mile watershed upstream of the Lagoon, and the near shore environment. Through board participation, financial contributions, and activity involvement, Poseidon currently supports nonprofit organizations that protect the lagoon habitat, including the Agua Hedionda Lagoon Foundation and Hubbs Sea World Research Institute. Additionally, the project proposes to deed restrict approximately 2 acres of vacant land located on the north side of the lagoon between the Hubbs Sea World Research Institute and nearby railroad tracks for uses such as marine research and expansion of the Hubbs facility.

i. Regional Leadership Role: Creation of a 50 million gallon per day (mgd) desalination facility will enhance the position of the City of Carlsbad as a Statewide and Regional leader in water supply by creating a new supply called for

1 in the State Department of Water Resources 2005 California Water Plan and the
2 CWA's Urban Water Management Plan.

3 2. That the proposed desalination use can be approved because the underlying Public
4 Utilities (P-U) zoning district requires the approval of an official Precise Development
5 Plan prior to the approval of building permits for allowed uses, and **PDP 00-02**,
processed and approved concurrently with **RP 05-12**, serves as the code-mandated
regulatory document for the subject property.

6 3. As demonstrated in Finding 1 above, the Project complies with several SCCRA Plan
7 goals, which are listed in Section IV (400) of the Plan. Furthermore, the Project also
complies with these other applicable Plan goals:

8 a. **Facilitate the redevelopment of the Encina power generating facility to a**
9 **smaller, more efficient power generating plant.** Compliance with this goal is
10 achieved by positioning the desalination plant in a location that creates the least
11 amount of constraints on any future conversion of the Encina power station as
detailed in the Land Use/Planning analysis section of the Project's Environmental
Impact Report, **EIR 03-05**.

12 b. **Implement performance criteria to ensure quality site design and**
13 **environmental standards to provide unity and integrity to the entire**
14 **Redevelopment Plan area.** The desalination plant exhibits a quality design that
15 is sensitive to its environment and non-utility surroundings. As a regulatory
16 document, the Precise Development Plan establishes development standards and
review procedures for the Encina Power Station and the desalination plant.
Further, the Project has been reviewed concurrently with the processing and
certification of Environmental Impact Report **EIR 03-05**, compliant with the
provisions of the California Environmental Quality Act.

17 4. The Project is consistent with the General Plan in that it implements goals stated in the
18 Vision section of the General Plan. The project will provide a high-quality, reliable
19 water supply to the residents of Carlsbad, thereby fulfilling the General Plan vision
20 statement, "A City which provides adequate public facilities to preserve the quality
21 of life of its residents." Additionally, a reliable drinking water supply is a major
22 issue for all Southern California jurisdictions, and by providing one hundred
percent of Carlsbad's drinking water, the Project helps to fulfill another General
Plan vision statement, "A City which recognizes its role as a participant in the
solution of regional issues."

23 Further, the project also helps to fulfill the vision goal of "A City committed to
24 economic growth of progressive commercial and industrial businesses to serve the
employment, shopping, recreation, and service needs of its residents." The Project
25 will create new jobs and new economic activity in Carlsbad and provide a reliable
water supply that businesses can count on for sustainable economic activity.

26 5. The Project is also consistent with the General Plan in that it implements goals of the
27 Land Use Element. The Project is consistent with the Public Utility (U) land use
28 designation of the Encina Power Station and product water conveyance pipelines

1 are permitted in any land use designation. Further, the modern office appearance
2 and appropriate screening of equipment and chemical storage areas complies with
3 the sensitive design objective of Overall Land Use Pattern Policy C.6, which states,
4 "Review the architecture of buildings with the focus on ensuring the quality and
5 integrity of design and enhancement of the character of each neighborhood."

6. The Project is consistent with the Encina Specific Plan 144 in that:
- 7 a. It complies with applicable Specific Plan standards and requirements
8 adopted over the years regarding architectural review, building height,
9 exterior lighting, and rooftop mechanical equipment.
 - 10 b. Since the Project proposes no changes to the operation of the Encina Power
11 Station and only limited changes to its facilities (seawater discharge and
electrical connections and removal of the fuel oil storage tank), the Project
does not conflict with Specific Plan standards and requirements regarding
power station operations.
 - 12 c. The proposed amended and restated Encina Specific Plan, SP 144(H),
13 incorporates the land use designations of the City of Carlsbad General Plan,
14 with which the Project is consistent. Additionally, SP 144(H) would
15 incorporate by reference PDP 00-02.

- 16 7. The Project is in conformance with the Agua Hedionda Land Use Plan and all applicable
17 policies in that the Project has been reviewed for consistency with relevant coastal
18 policies including land use, habitat protection, grading and drainage, stormwater
19 management, recreation, shoreline access, and visual resources. In particular, the
20 Project complies with the Land Use Plan building height limitation of 35 feet.
21 Furthermore, the Project has been conditioned to obtain a coastal development
22 permit from the California Coastal Commission.

- 23 8. The Project is consistent with the City's adopted Scenic Corridor Guidelines, which
24 apply to Carlsbad Boulevard and the North County Transit District railroad corridor, in
25 that it features a quality building design and appropriate visual screening.

- 26 9. The Project is consistent with the Citywide Facilities and Improvements Plan, the Local
27 Facilities Management Plan for Zone 3 and Zone 13 and all City public facility policies
28 and ordinances. The Project includes elements or has been conditioned to construct or
provide funding to ensure that all facilities and improvements regarding sewer collection
and treatment; water; drainage; circulation; fire; schools; parks and other recreational
facilities; libraries; government administrative facilities; and open space, related to the
Project will be installed to serve new development prior to or concurrent with need.
Specifically:

- a. The Project has been conditioned to provide proof from the Carlsbad Unified
School District that the Project has satisfied its obligation for school facilities.
- b. All necessary public improvements have been provided or are required as
conditions of approval.

1 c. **Other than its obligation to provide funding for school facilities, the Project**
2 **does not generate any facility plan improvement requirements or funding.**

3 10. The Planning Commission has reviewed each of the exactions imposed on the Developer
4 contained in this resolution, and hereby finds, in this case, that the exactions are imposed
5 to mitigate impacts caused by or reasonably related to the Project, and the extent and the
6 degree of the exaction is in rough proportionality to the impact caused by the Project.

7 11. As conditioned, the Project is consistent with the City's Landscape Manual (Carlsbad
8 Municipal Code Section 14.28.020 and Landscape Manual Section I B).

9 12. The Planning Commission hereby finds that all development in Carlsbad benefits from
10 the Habitat Management Plan, which is a comprehensive conservation plan and
11 implementation program that will facilitate the preservation of biological diversity and
12 provide for effective protection and conservation of wildlife and plant species while
13 continuing to allow compatible development in accordance with Carlsbad's Growth
14 Management Plan. Preservation of wildlife habitats and sensitive species is required by
15 the Open Space and Conservation Element of the City's General Plan which provides for
16 the realization of the social, economic, aesthetic and environmental benefits from the
17 preservation of open space within an increasingly urban environment. Moreover, each
18 new development will contribute to the need for additional regional infrastructure that, in
19 turn, will adversely impact species and habitats. The In-Lieu Mitigation Fee imposed on
20 all new development within the City is essential to fund implementation of the City's
21 Habitat Management Plan.

22 **Conditions:**

23 **Notes:**

- 24 a) **All conditions of approval apply only to the desalination plant and appurtenant**
25 **facilities and not to existing facilities of the Encina Power Station.**
26 b) **Unless otherwise specified herein, all conditions shall be satisfied prior to issuance**
27 **of grading or building permits for the desalination plant, whichever occurs first.**

28 **General**

1 1. If any of the following conditions fail to occur; or if they are, by their terms, to be
2 implemented and maintained over time, if any of such conditions fail to be so
3 implemented and maintained according to their terms, the **RDA** shall have the right to
4 revoke or modify all approvals herein granted; deny or further condition issuance of all
5 future building permits; deny, revoke or further condition all certificates of occupancy
6 issued under the authority of approvals herein granted; record a notice of violation on the
7 property title; institute and prosecute litigation to compel their compliance with said
8 conditions or seek damages for their violation. No vested rights are gained by Developer
9 or a successor in interest by the **RDA's** approval of this **Redevelopment Permit**, other
10 than those described in the **Development Agreement (DA 05-01)**.

11 2. Staff is authorized and directed to make, or require the Developer to make, all corrections
12 and modifications to the **Redevelopment Permit** documents, as necessary to make them
13 internally consistent and in conformity with the final action on the Project. Development

1 shall occur substantially as shown on the approved Exhibits (**Encina Power Station**
2 **Precise Development Plan PDP 00-02 dated May 3, 2006, and Environmental**
3 **Impact Report EIR 03-05 dated December 2005**). Any proposed development
different from this approval shall require an amendment to this approval.

4 3. **As a condition** to approval of the **Redevelopment Permit**, the Developer shall apply for
and obtain approval of a Coastal Development Permit issued by the California Coastal
5 Commission or its successor in interest that substantially conforms to this approval. A
signed copy of the Coastal Development Permit must be submitted to the Planning
6 Director. If the approval is substantially different, an amendment to the **Redevelopment**
Permit shall be required.

7
8 4. This approval is granted subject to the certification, adoption, and approval of the
Environmental Impact Report (**EIR 03-05**) and Mitigation Monitoring and Reporting
9 Program, **PDP 00-02, SP 144(H), DA 05-01, CDP 04-41, SUP 05-04, and HMPP 05-08**
and is subject to all conditions contained in Planning Commission Resolutions No. **6087,**
10 **6088, 6089, 6090, 6092, 6093 and 6094** for those other approvals incorporated herein by
reference.

11
12 5. Approval is granted for **Redevelopment Permit 05-12** as shown and described in the
13 **"Encina Power Station Precise Development Plan"** document dated May 3, 2006,
and the **Final Environmental Impact Report EIR 03-05 dated December 2005** on file
14 in the Planning Department and incorporated herein by reference. Development shall
occur substantially as shown unless otherwise noted in these conditions.

15 6. **The Encina Power Station has a once-through seawater cooling system. The**
16 **seawater intake is located in Agua Hedionda Lagoon and the outfall is a channel to**
17 **the ocean located south of the mouth of Agua Hedionda Lagoon. The Desalination**
18 **Plant is planned to operate in conjunction with the EPS by using the EPS cooling**
19 **water discharge as its source water and by discharging the brine that is the**
20 **by-product of the desalination process back into the EPS discharge, which in turn is**
21 **released from the EPS outfall. In the event that the EPS were to permanently cease**
22 **operations, and the Developer were to independently operate the existing EPS**
23 **seawater intake and outfall for the benefit of the project, such independent**
24 **operation will require CEQA compliance and permits to operate as required by**
25 **then-applicable rules and regulations of the City and other relevant agencies. The**
26 **Developer will not independently operate the EPS intake and/or outfall unless and**
27 **until CEQA compliance is completed and any required permits have been issued.**

28 7. If any condition for construction of any public improvements or facilities, or the payment
of any fees in-lieu thereof, imposed by this approval or imposed by law on this Project
are challenged, this approval shall be suspended as provided in Government Code
Section 66020. If any such condition is determined to be invalid, this approval shall be
invalid unless the City Council determines that the Project without the condition complies
with all requirements of law.

8. Developer shall comply with all applicable provisions of federal, state, and local laws and
regulations in effect at the time of building permit issuance.

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9. Developer/Operator shall and does hereby agree to indemnify, protect, defend, and hold harmless the **RDA**, its **governing body members**, officers, employees, agents, and representatives, from and against any and all liabilities, losses, damages, demands, claims and costs, including court costs and attorney's fees incurred by the **RDA** arising, directly or indirectly, from (a) the **RDA's** approval and issuance of this **Redevelopment Permit**, (b) the **RDA's** approval or issuance of any permit or action, whether discretionary or nondiscretionary, in connection with the use contemplated herein, and (c) Developer/Operator's installation and operation of the facility permitted hereby, including without limitation any and all liabilities arising from the emission by the facility of electromagnetic fields or other energy waves or emissions. This obligation survives until all legal proceedings have been concluded and continues even if the **RDA's** approval is not validated.
 10. Prior to the issuance of a building permit, the Developer shall provide proof to the Director from the **Carlsbad Unified School District** that this Project has satisfied its obligation to provide school facilities.
 11. Building permits will not be issued for this Project unless the local agency providing sewer services to the Project provides written certification to the City that adequate sewer facilities are available to the Project at the time of the application for the building permit, and that sewer capacity and facilities will continue to be available until the time of occupancy.
 12. Developer shall pay the citywide Public Facilities Fee imposed by City Council Policy #17, the License Tax on new construction imposed by Carlsbad Municipal Code Section 5.09.030, and CFD #1 special tax (if applicable), subject to any credits authorized by Carlsbad Municipal Code Section 5.09.040. Developer shall also pay any applicable Local Facilities Management Plan fee for Zone 3 and Zone 13, pursuant to Chapter 21.90. All such taxes/fees shall be paid at issuance of building permit. If the taxes/fees are not paid, this approval will not be consistent with the General Plan and shall become void.
 13. This Project shall comply with all conditions and mitigation measures which are required as part of the Zone 3 and Zone 13 Local Facilities Management Plans and any amendments made to those Plans prior to the issuance of building permits. **Should amendments occur to the LFMPs, the applicant shall comply subject to the limitations of the Development Agreement (DA 05-01).**
 14. The approval shall become null and void if the Project does not become operational within 10 years of the final discretionary approval, including the discretionary approvals of the California Coastal Commission or other agencies, as may be consistent with the Development Agreement (DA 05-01).
 15. Developer shall implement, or cause the implementation of, the **EIR 03-05 Project Mitigation Monitoring and Reporting Program**.

- 1 16. As a condition of this approval, Developer must comply with the applicable requirements
2 of all regulatory agencies having jurisdiction over the Project.
- 3 17. This Project has been found to result in impacts to wildlife habitat or other lands, such as
4 agricultural land, non-native grassland, and disturbed lands, which provide some benefits
5 to wildlife, as documented in the City's Habitat Management Plan and the environmental
6 analysis for this Project. Developer is aware that the City has adopted an In-Lieu
7 Mitigation Fee consistent with Section E.6 of the Habitat Management Plan and City
8 Council Resolution No. 2000-223 to fund mitigation for impacts to certain categories of
9 vegetation and animal species. The Developer is further aware that the City has
10 determined that all projects will be required to pay the fee in order to be found consistent
11 with the Habitat Management Plan and the Open Space and Conservation Element of the
12 General Plan. The City is currently updating the fee study, which is expected to result in
13 an increase in the amount of the fee, and the Developer or Developer's successor(s) in
14 interest shall pay the adjusted amount of the fee once it is approved by the City Council.
15 The fee shall be paid prior to recordation of a final map, or issuance of a grading permit
16 or building permit, whichever occurs first. If the In-Lieu Mitigation Fee for this Project
17 is not paid, this Project will not be consistent with the Habitat Management Plan and the
18 General Plan and any and all approvals for this Project shall become null and void.
- 19 18. Developer shall submit to the **Housing and Redevelopment Director and the Planning**
20 **Director** a reproducible 24" x 36" mylar copy of the **Redevelopment Permit** reflecting
21 the conditions approved by the final decision-making body.
- 22 19. Developer shall include, as part of the plans submitted for any permit plan check, a
23 reduced legible version of all approving resolution(s) in a 24" x 36" blueline drawing
24 format (including any applicable Coastal Commission approvals and the **Mitigation**
25 **Monitoring and Reporting Program**).
- 26 20. **The proposed fill area along the south side of the pretreatment filters and reverse**
27 **osmosis building parking lot and driveway shall be landscaped with, at a minimum,**
28 **trees, shrubs, and groundcover consistent with the City's Landscape Manual.**
- 21 21. Developer shall submit and obtain Planning Director approval of a Final Landscape and
22 Irrigation Plan showing conformance with the conditions herein and the City's Landscape
23 Manual. Developer shall construct and install all landscaping as shown on the approved
24 Final Plans, and maintain all landscaping in a healthy and thriving condition, free from
25 weeds, trash, and debris.
- 26 22. The first submittal of Final Landscape and Irrigation Plans shall be pursuant to the
27 landscape plan check process on file in the Planning Department and accompanied by the
28 Project's building, improvement, and grading plans.
- 23 23. Developer shall construct trash receptacle and recycling areas enclosed by a six-foot high
24 masonry wall with gates pursuant to City Engineering Standards and Carlsbad Municipal
25 Code Chapter 21.105. The Planning Director shall approve location of said receptacles.
26 Enclosure shall be of similar colors and/or materials to the Project to the satisfaction of
27 the Planning Director.

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2 24. Developer shall report, in writing, to the **Housing and Redevelopment Director** and the
3 Planning Director within 30 days, any address change from that which is shown on the
4 permit application.

5 25. Prior to the issuance of **grading or building permits, whichever occurs first**, Developer
6 shall submit to the **RDA** a Notice of Restriction to be filed in the office of the County
7 Recorder, subject to the satisfaction of the **Housing and Redevelopment Director** and
8 the Planning Director, notifying all interested parties and successors in interest that the
9 **RDA** of Carlsbad has issued a **Redevelopment Permit** Resolution No. **6091** on the
10 property. Said Notice of Restriction shall note the property description, location of the
11 file containing complete project details and all conditions of approval as well as any
12 conditions or restrictions specified for inclusion in the Notice of Restriction. The
13 Planning Director has the authority to execute and record an amendment to the notice
14 which modifies or terminates said notice upon a showing of good cause by the Developer
15 or successor in interest.

16 **Engineering**

17 26. Prior to hauling dirt or construction materials to or from any proposed construction site
18 within this Project, Developer shall apply for and obtain approval from the City Engineer
19 for the proposed haul route.

20 27. Developer shall apply for and obtain a grading permit from the City Engineer.

21 28. Prior to the issuance of a grading permit or building permit, whichever occurs first,
22 Developer shall submit to the City Engineer proof that a Notice of Intention for the start
23 of work has been submitted to the State Water Resources Control Board.

24 29. Developer shall have the entire drainage system designed, submitted to, and approved by
25 the City Engineer, to ensure that runoff resulting from 10-year frequency storms of
26 6 hours and 24 hours duration under developed conditions, are equal to or less than the
27 runoff from a storm of the same frequency and duration under existing developed
28 conditions. Both 6-hour and 24-hour storm durations shall be analyzed to determine the
detention basin capacities necessary to accomplish the desired results.

30. Prior to construction of water conveyance pipelines, Developer shall obtain all
necessary permits and clearances as required by the Carlsbad Municipal Code.

31. Prior to the issuance of any grading or building permits, Developer shall execute
and record a City standard Development Improvement Agreement to install and
secure with appropriate security as provided by law, a bridge rail to CalTrans
standards on the easterly side of Carlsbad Boulevard over the cooling water
discharge culvert to the satisfaction of the City Engineer and the Planning Director.
If determined appropriate by the Planning Director and the City Engineer, the
bridge rail shall be incorporated into the design of the decorative screen wall or
fencing along the Encina Power Station's Carlsbad Boulevard frontage as required

by and conditioned in Planning Commission Resolution No. 6088 for Precise Development Plan PDP 00-02.

32. Prior to the issuance of any grading or building permits, Developer shall pay any required Planned Local Drainage Area (PLDA) fee as established in the Drainage Master Plan adopted by the City at time of grading or building permit issuance for the approximately 3.2-acre portion of the Precise Development Plan property occupied by the desalination plant. Developer acknowledges that its obligation for drainage area fees under the Drainage Master Plan is not affected by the Developer's Development Agreement with the City.

33. Prior to the issuance of any certificate of occupancy, Developer shall demonstrate to the satisfaction of the City Engineer that site drainage from the new impervious surfaces which are part of the desalination plant has been captured for "source water intake for filtration and ultimate domestic use" as describe on page 4.7-12 of the Final Environmental Impact Report.

Water

34. Prior to approval of improvement plans, Developer shall meet with the Fire Marshal to determine the specific fire protection measures (fire flows, fire hydrant locations, building sprinklers) required to serve the Project.

35. The Developer shall design and install sewer laterals and clean-outs to the satisfaction of and at locations approved by the Deputy City Engineer-Utilities. The locations of sewer laterals shall be reflected on improvement plans.

Fire Department

36. The Developer shall design and install a new water main to provide potable water and fire service. The locations of the water main shall be reflected on improvement plans.

37. Fire hydrants shall be provided within 300 feet of any desalination plant structure.

38. All desalination plant habitable structures shall be fire-sprinklered per the California Fire Code.

39. The Developer shall provide a Knox key entry system on all desalination plant buildings as approved by the Fire Marshal.

Code Reminders

40. Developer shall pay a landscape plan check and inspection fee as required by Section 20.08.050 of the Carlsbad Municipal Code

41. Approval of this request shall not excuse compliance with all applicable sections of the Zoning Ordinance and all other applicable City ordinances in effect at time of building permit issuance, except as otherwise specifically provided herein.

- 1 42. The Project shall comply with the latest nonresidential disabled access requirements
2 pursuant to Title 24 of the State Building Code.
- 3 43. Premise identification (addresses) shall be provided consistent with Carlsbad Municipal
4 Code Section 18.04.320.
- 5 44. Any signs proposed for this development shall at a minimum be designed in conformance
6 with the City's Sign Ordinance and shall require review and approval of the Planning
7 Director prior to installation of such signs.

8 NOTICE

9 Please take **NOTICE** that approval of your Project includes the "imposition" of fees,
10 dedications, reservations, or other exactions hereafter collectively referred to for convenience as
11 "fees/exactions."

12 You have 90 days from date of final approval to protest imposition of these fees/exactions. If
13 you protest them, you must follow the protest procedure set forth in Government Code Section
14 66020(a), and file the protest and any other required information with the **RDA Executive**
15 **Director** for processing in accordance with Carlsbad Municipal Code Section 3.32.030. Failure
16 to timely follow that procedure will bar any subsequent legal action to attack, review, set aside,
17 void, or annul their imposition.

18 You are hereby **FURTHER NOTIFIED** that your right to protest the specified fees/exactions
19 **DOES NOT APPLY** to water and sewer connection fees and capacity charges, nor planning,
20 zoning, grading or other similar application processing or service fees in connection with this
21 Project; **NOR DOES IT APPLY** to any fees/exactions of which you have previously been given
22 a **NOTICE** similar to this, or as to which the statute of limitations has previously otherwise
23 expired.

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1 PASSED, APPROVED AND ADOPTED at a regular meeting of the Planning
2 Commission of the City of Carlsbad, California, held on the 3rd day of May 2006 by the
3 following vote, to wit:

4 AYES: Chairperson Montgomery, Commissioners Baker, Cardosa,
5 Heineman, Segall, and Whitton

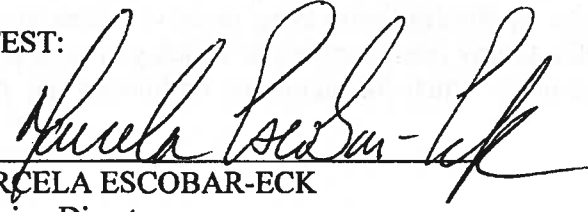
6 NOES:

7 ABSENT:

8 ABSTAIN: Commissioner Dominguez
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13 MARTELL B. MONTGOMERY, Chairperson
14 CARLSBAD PLANNING COMMISSION

15 ATTEST:

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17 MARCELA ESCOBAR-ECK
18 Planning Director
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ATTACHMENT

EXHIBIT "EIR-B"

CITY OF CARLSBAD

RESOLUTION NO. _____

CALIFORNIA ENVIRONMENTAL QUALITY ACT MITIGATION MONITORING AND REPORTING PROGRAM

for the

**FINAL ENVIRONMENTAL IMPACT REPORT
(EIR 03-05) (SCH No. 2004041081)**

**PRECISE DEVELOPMENT PLAN AND DESALINATION
PLANT PROJECT**

EXHIBIT B: MITIGATION, MONITORING, AND REPORTING PROGRAM

The following environmental mitigation measures for this project were incorporated into the Conditions of Approval in order to mitigate identified environmental impacts to a level of insignificance. A completed and signed checklist for each measure indicates that this measure has been complied with and implemented, and fulfills the City's monitoring requirements with respect to Assembly Bill 3180 (Public Resources Code Section 21081.6). The City recognizes that it does not have authority to mitigate impacts in other jurisdictions; other jurisdictions will be required to adopt the applicable mitigation measures herein and/or adopt other mitigation measures as necessary to mitigate identified environmental impacts to a level of insignificance.

SUMMARY OF MITIGATION MEASURES

| MITIGATION MEASURE | | RESPONSIBLE MONITORING PARTY | TIMING OF COMPLIANCE | DATE OF & SIGNATURE INDICATING COMPLIANCE |
|--------------------|--|---|---|---|
| Aesthetics | | | | |
| AES-1: | Replacement planting for trees that are removed along the railroad corridor shall be provided to screen views from the rail line towards the facility. Tree or other plant species, quantity, and size shall be in keeping with the adopted City of Carlsbad Scenic Corridor Guidelines, City Landscape Manual, and the vegetative character of the Agua Hedionda Lagoon to the extent that the species are compatible with existing vegetation. Planting shall be sufficient to provide screening when mature. Verification of the adequacy of the proposed plantings will occur through City review and approval of the project's landscape plan. The project landscape plan shall also be sent to the North County Transit District for review and comment to ensure that replacement planting poses no potential rail hazards. | City of Carlsbad Planning Department; North County Transit District | Prior to issuance of grading or building permits, whichever occurs first | |
| AES-2: | Desalination Plan exterior mechanical equipment and facilities, including tanks, heating, air conditioning, refrigeration equipment, plumbing lines, duct work and transformers, shall be screened from view on all sides visible to the public. The design and material used for screening shall be architecturally compatible with the building. | Construction Contractor, City of Carlsbad Planning Department and Building Department | Prior to issuance of grading or building permits, whichever occurs first; prior to City approval of plant occupancy | |
| AES-3: | To the extent practical, the existing mature landscape on the slope facing Carlsbad Boulevard adjacent to the desalination plant site shall remain in place and be protected from construction impacts through the use of fencing and signage. Replacement planting for trees and shrubs that are removed along the slope facing Carlsbad Blvd. shall be provided to screen views from Carlsbad Blvd. | Construction Contractor, City of Carlsbad Planning Department | Prior to issuance of grading or building permits, whichever occurs first | |

| MITIGATION MEASURE | RESPONSIBLE MONITORING PARTY | TIMING OF COMPLIANCE | DATE OF & SIGNATURE INDICATING COMPLIANCE |
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| towards the facility. Tree or other plant species, quantity, and size shall be in keeping with the adopted City of Carlsbad Scenic Corridor Guidelines, City Landscape Manual, the vegetative character of the Agua Hedionda Lagoon area and shall be sufficient to provide screening from the ground up when mature. Verification of the adequacy of the proposed plantings will occur through City review and approval of the project's landscape plan. | | | |
| AES-4: Construction staging areas within the PDP area shall be screened from public view or located in an area away from direct public view. Plans showing the staging area locations and screening shall be submitted to the City Planning Director or his/her designee for review and approval. | Construction Contractor, City of Carlsbad Planning Department | Prior to issuance of grading or building permits, whichever occurs first | |
| AES-5: Exterior lighting for the desalination facilities shall serve the purpose of operations, security and safety only. The applicant shall submit for approval a lighting plan for the proposed facilities prior to building permit issuance. The lighting plan shall demonstrate that project lighting is shielded from surrounding areas, and that only the minimum amount of lighting required for safety purposes is provided to avoid adverse effects on surrounding areas. In general, lighting fixtures shall be shielded downward and away from the adjacent Agua Hedionda Lagoon and adjacent properties. Construction of the desalination plant and related facilities and improvements shall be in conformance with the approved plan. | City of Carlsbad Planning Department | Prior to issuance of building permits; prior to City approval of plant occupancy | |
| AES-6 Building elevations, including those visible from the NCTD railroad, shall substantially conform to plans approved for the desalination plant pursuant to PDP 0002. | City of Carlsbad Planning Department, Construction Contractor | Prior to issuance of grading or building permits, whichever occurs first; prior to City approval of plant occupancy | |
| Biological Resources | | | |
| BIO-1: Proposed mitigation for temporary impacts to sensitive habitats shall be based on the ratios listed below in Table 4.3-9. With the exception of temporary impacts on habitats designated as Groups E and F by the HMP (i.e., disturbed lands, eucalyptus and agricultural lands) mitigation shall consist of, at a minimum, 1:1 revegetation of in-kind habitats at the location of impact, and, for the portion of ratios greater than 1:1, off-site purchase or acquisition as | Cities of Carlsbad, Oceanside; California Department of Fish and Game; United States Fish and Wildlife Service; and United States Army Corps of Engineers, as applicable | Prior to approval of improvement plans | |

| MITIGATION MEASURE | | | | | RESPONSIBLE MONITORING PARTY | TIMING OF COMPLIANCE | DATE OF & SIGNATURE INDICATING COMPLIANCE |
|---|-----------------|----------------------|-------|------------------|------------------------------|----------------------|---|
| <p>described in mitigation measure 4.3-2. Temporary impacts on non-native habitats designated as Groups E and F by the HMP are expected to recover on their own and therefore are not included in revegetation efforts; however, impacts to these habitat groups are subject to payment of a fee pursuant to the Habitat Management Plan Mitigation Fee Program. Mitigation acreages for disturbed and undisturbed habitats have been added together. It should be noted that acreage figures are based on estimated "worst case" impacts. Actual impacts may be less and would be subject to the same mitigation ratios, but the mitigation acreages could change as a result.</p> | | | | | | | |
| Habitat Type | Impacts (acres) | | | Mitigation Ratio | Mitigation (acres) @ ratio | | |
| | In Coastal Zone | Outside Coastal Zone | Total | | In Coastal Zone | Outside Coastal Zone | Total |
| Coastal Sage Scrub | 0.90 | 3.6 | 4.5 | 2:1 | 1.80 | 7.20 | 9.00 |
| Coyote Bush Scrub | 0.00 | 0.03 | 0.03 | 2:1 | 0.00 | 0.06 | 0.06 |
| Herbaceous Wetland | 0.00 | 0.06 | 0.06 | 3:1 | 0.00 | 0.18 | 0.18 |
| Open Channel | 0.00 | 0.07 | 0.07 | 1:1 | 0.00 | 0.07 | 0.07 |
| Southern Willow Scrub | 0.00 | 0.44 | 0.44 | 3:1 | 0.00 | 1.32 | 1.32 |
| Annual (non-native) grassland | 0.68 | 3.71 | 4.39 | Fee | 0.00 | 0.00 | 0.00 |
| Agriculture/ disturbed/ ruderal | 3.12 | 4.53 | 7.65 | Fee | 0.00 | 0.00 | 0.00 |
| <p>Sensitive vegetation communities shall be restored to the pre-existing vegetation type. Restoration of wetlands shall be described in a Conceptual Wetlands Mitigation and Monitoring Plan which shall, at a minimum, include discussion of impact assessment, recording of pre-construction site conditions, post-construction site preparation, planting, irrigation, five-year maintenance and monitoring, and long-term preservation. Restoration of uplands shall be</p> | | | | | | | |

| MITIGATION MEASURE | RESPONSIBLE MONITORING PARTY | TIMING OF COMPLIANCE | DATE OF & SIGNATURE INDICATING COMPLIANCE |
|---|---|---|---|
| discussed in an Uplands Mitigation and Monitoring Plan which shall, at a minimum, include discussion of impact assessment, recording of pre-construction site conditions, post-construction site preparation, planting, irrigation, five-year maintenance and monitoring, and long-term preservation. These measures will reduce significant direct effects identified in Section 4.3-4 to a level less than significant | | | |
| BIO -2: Mitigation ratios identified in Mitigation Measure BIO-1, above, that require more than 1:1 mitigation (e.g., 2:1) shall satisfy the mitigation that is in addition to the 1:1 in one or both of the following ways and in a manner acceptable to local, state, and federal agencies: <ul style="list-style-type: none"> • Through purchase of mitigation bank credits • Through acquisition and preservation of suitable habitat in the vicinity of the project | Cities of Carlsbad and Oceanside; California Department of Fish and Game; United States Fish and Wildlife Service; and United States Army Corps of Engineers, as applicable | Prior to approval of improvement plans | |
| BIO-3: Indirect impacts including dust, soil erosion, pollution, siltation, and runoff shall be reduced through implementation of construction best management practices (BMPs) and implementation of an approved SWPPP. At a minimum, implementation of these practices shall include the following. <ul style="list-style-type: none"> • Placement of stockpiles of soils and materials such that they cause minimal interference with onsite drainage patterns. • Hay bale barriers or gravel bags shall be placed along areas of exposed soil to help reduce sedimentation during grading operations. • Placement of a silt curtain or other drainage control device around construction areas shall be required to protect natural drainage channels from sedimentation. • Any dewatering that is needed shall be conducted in accordance with the standard regulations of the RWQCB. A permit to discharge water from dewatering activities will be required. • Use of paved roadways or designated staging areas (existing developed areas) for all equipment and vehicle refueling and maintenance. • Implementation of dust control measures such as watering. • Temporary fencing of the limits of the construction area with clearly visible orange construction fencing. • Temporary fencing of the Nuttall's scrub oak population located adjacent to | Project Biologist; cities of Carlsbad, Oceanside, and Vista; and Regional Water Quality Control Board, as applicable | Prior to approval of improvement plans and issuance of permit by RWQCB; during construction | |

| MITIGATION MEASURE | RESPONSIBLE MONITORING PARTY | TIMING OF COMPLIANCE | DATE OF & SIGNATURE INDICATING COMPLIANCE |
|--|---|---|---|
| <p>the work area and northeast of the intersection of El Camino Real and Palomar Airport Road to avoid impacts.</p> <p>In order to assure that these measures are adequately protecting adjacent biological resources, construction activity shall be monitored by a qualified biologist familiar with the sensitive flora and fauna of the area. Biological monitoring shall be of a frequency and duration necessary to reasonably assure that indirect impacts are minimized. This shall include implementation of a contractor education program, verification of proper construction and maintenance of staking/fencing, full-time monitoring of vegetation removal, periodic monitoring of construction activity adjacent to sensitive resource areas, and reporting of contractor compliance and impact minimization measures on a monthly basis. These measures shall ensure that indirect impacts on vegetation communities, including dust, erosion, sedimentation, pollution, siltation, and runoff are reduced to level below significant.</p> | | | |
| BIO-4: The potential for direct impacts on coastal California gnatcatcher individuals shall be mitigated by restricting the clearing of coastal sage scrub within the project alignment to outside of the gnatcatcher breeding season (August 16 through February 14). | Project Biologist; cities of Carlsbad and Oceanside, as applicable | Prior to approval of improvement plans; | |
| BIO-5: The potential short-term increase in noise related to construction shall be mitigated through avoidance of construction during the gnatcatcher breeding season or maintenance of noise levels below 60 dBA Leq at occupied nest locations if construction takes place during the breeding season (i.e., February 15 through August 15). The maintenance of appropriate noise levels shall be confirmed through protocol gnatcatcher surveys to determine presence of all gnatcatcher within 500 feet of project construction and noise measurements at nest locations during peak construction activity by a qualified acoustician. | Project Biologist; Project Acoustician; cities of Carlsbad, Oceanside, and Vista, as applicable | Prior to approval of improvement plans; during construction | |
| BIO-6: To avoid potential adverse effects from hydro-fracturing that could occur as a result of horizontal directional drilling or micro-tunneling, the applicant shall provide evidence to the local jurisdiction that demonstrates that the design of the drilling operation provides sufficient horizontal distance and depth from sensitive habitat areas. Information provided shall provide appropriate engineering calculations to demonstrate to the local jurisdiction's satisfaction that surface rupture will not occur within sensitive habitat areas. | Cities of Carlsbad, Oceanside, and Vista, as applicable | Prior to approval of improvement plans | |
| BIO-7: The operator of the desalination plant shall continuously monitor the | City of Carlsbad Engineering | During operations | |

| MITIGATION MEASURE | RESPONSIBLE MONITORING PARTY | TIMING OF COMPLIANCE | DATE OF & SIGNATURE INDICATING COMPLIANCE |
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| <p>desalination plant and EPS discharge flow rates and salinity levels. The operator of the desalination plant shall on at least a semi-annual frequency monitor and conduct testing to measure and evaluate the combined EPS/desalination plant discharge for compliance with Ocean Plan acute and chronic toxicity requirements. The operator of the desalination plant shall maintain records of the monitoring results to ensure compliance with Ocean Plan criteria and EPA guidelines. All semi-annual monitoring and testing required by this mitigation measure shall be summarized in a report and submitted to the RWQCB within 45 days of completion, and any noncompliance with Ocean Plan acute and chronic toxicity requirements shall be reported to the RWQCB. Such monitoring results shall be available for inspection by the City of Carlsbad and the RWQCB. Should the RWQCB adopt a permit requirement that is intended to provide equal or greater protection to the marine environment, the Planning Director is authorized to amend this mitigation measure to conform to the RWQCB order.</p> | <p>Department; Regional Water Quality Control Board (RWQCB); and Applicant</p> | <p>throughout project life or as amended by RWQCB</p> | |
| Cultural Resources | | | |
| <p>CULT-1: Where project construction will impact cultural resources that have been determined to be significant, mitigation shall include either avoidance, or if avoidance is not feasible, then a data recovery program shall be completed to recover a large enough sample of cultural material so that information of importance in addressing regional research questions will not be irretrievably lost. The data recovery program shall be developed by a qualified archaeologist and approved by the City of Carlsbad.</p> | <p>City of Carlsbad; Project Archeologist</p> | <p>Prior to approval of improvement plans; during construction; within three months following the completion of archaeological monitoring</p> | |
| <p>CULT-2: In cases where the precise alignment of the pipeline is not available, and therefore the potential to affect cultural resources cannot be specifically determined, the applicant shall be required to retain a qualified archaeological monitor during construction so that buried cultural resources can be identified in the field. The archaeological monitor shall meet the minimum qualifications as required by the City of Carlsbad. If significant resources are identified within the areas that could be affected by construction, the resources shall be tested (pursuant to the mitigation measure CULT-1, above) to determine significance with appropriate mitigation measures employed as necessary.</p> | <p>Cities of Carlsbad, Oceanside, and Vista; Project Archeologist; Project Construction Contractor or Manager</p> | <p>As applicable: Prior to approval of improvement plans; at preconstruction meeting; during construction; within three months following the completion of archaeological</p> | |

| MITIGATION MEASURE | RESPONSIBLE MONITORING PARTY | TIMING OF COMPLIANCE | DATE OF & SIGNATURE INDICATING COMPLIANCE |
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| <p>Monitoring Program Requirements</p> <p>The evaluation and monitoring program will be used for cultural resources within the project study area that are located within developed areas where surface evaluation is precluded and specific mitigation cannot be determined at this time. For these sites, a monitoring program is required if construction is to occur within or adjacent to the cultural resource site. Components of such a monitoring program would include, but not be limited to the following:</p> <p>Prior to Preconstruction (Precon) Meeting</p> <p>Planning Department (PD) Plan Check: Prior to the first Precon Meeting, the Planning Director of the appropriate jurisdiction or his/her designee shall verify that the requirements for Archaeological Monitoring and Native American monitoring, if applicable, have been noted on the appropriate construction documents.</p> <p>Submit Letter of Qualification to Planning Director: Prior to the first Precon Meeting, the applicant shall provide a letter of verification to the Planning Director or his/her designee stating that a qualified Archaeologist has been retained to implement the monitoring program.</p> <p>Records Search Prior to Precon Meeting: At least thirty days prior to the Precon Meeting the qualified Archaeologist shall verify that a records search has been completed and updated as necessary and be prepared to introduce any pertinent information concerning expectations and probabilities of discovery during trenching and/or grading activities. Verification includes, but is not limited to, a copy of a confirmation letter from South Coast Information Center or, if the search was incomplete, a letter of verification from the Archaeologist stating that the search was completed.</p> <p>Precon Meeting</p> <p>Monitor Shall Attend Precon Meetings: Prior to beginning any work that requires monitoring, the Applicant shall arrange a Precon Meeting that shall</p> | | monitoring | |

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| <p>include the Archaeologist, Construction Manager and/or Grading Contractor and Planning Director or his/her designee. The qualified Archaeologist shall attend any grading related Precon Meetings to make comments and/or suggestions concerning the Archaeological Monitoring program with the Construction Manager and/or Grading Contractor.</p> <p>Identify Areas to be Monitored: At the Precon Meeting, the Archaeologist shall submit to the Planning Director or his/her designee a copy of the site/grading plan (reduced to 11x17) that identifies areas to be monitored as well as areas that may require delineation of grading limits.</p> <p>During Construction</p> <p>Monitor Shall be Present During Grading/Excavation: The qualified Archaeologist shall be present full-time during grading/excavation native soils within or adjacent to a cultural site and shall document activity via the Consultant Monitor Record. This record shall be sent to the Planning Director or his/her designee, as appropriate, each month.</p> <p>Monitoring of Trenches Will Include Mainline, Laterals, and all Appurtenances: Monitoring of trenches is required for the mainline, laterals, services and all other appurtenances that impact native soils within or adjacent to a cultural site one foot deeper than existing as detailed on the plans or in the contract documents identified by drawing number or plan file number. It is the Construction Manager's responsibility to keep the monitor(s) up-to-date with current plans..</p> <p>Discoveries: In the event of a discovery, and when requested by the Archaeologist, or the Principal Investigator (PI) if the Monitor is not qualified as a PI, the Construction Manager (CM), as appropriate, shall be contacted and shall divert, direct or temporarily halt ground disturbing activities in the area of discovery to allow for preliminary evaluation of potentially significant archaeological resources. The PI shall also immediately notify the Planning Director or his/her designee of such findings at the time of discovery.</p> <p>Determination of Significance: The significance of the discovered resources</p> | | | |

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| <p>shall be determined by the PI. For significant archaeological resources, a Research Design and Data Recovery Program shall be prepared, approved by the City and carried out to mitigate impacts before ground-disturbing activities in the area of discovery will be allowed to resume.</p> <p>Minor Discovery Process for Pipeline Projects: For all projects: The following is a summary of the criteria and procedures related to the evaluation of small cultural resource deposits during excavation for pipelines.</p> <p>Coordination and Notification: Archaeological Monitor shall notify PI, CM and the Planning Director or his/her designee, as appropriate.</p> <p>Criteria Used to Determine if it is a Small Cultural Resource Deposit</p> <ol style="list-style-type: none"> The deposit is limited in size both in length and depth; and, The information value is limited and is not associated with any other resources; and, There are no unique features/artifacts associated with the deposit. A preliminary description and photographs, if available, shall be transmitted to the Planning Director or his/her designee. <p>The information will be forwarded to the Planning Department for consultation and verification that it is a small historic deposit.</p> <p>Procedures for documentation, curation and reporting: The following constitutes adequate mitigation of a small historic deposit to reduce impacts due to excavation activities to below a level of significance.</p> <ol style="list-style-type: none"> 100% of the artifacts within the trench alignment and width shall be documented in-situ, to include photographic records, plan view of the trench and profiles of sidewalls, recovered, photographed after cleaning and analyzed and curated. The remainder of the deposit within the limits of excavation (trench walls) shall be left intact. The Final Results Report shall include a requirement for monitoring of any future work in the vicinity. | | | |

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| <p>Human Remains: If human remains are discovered, work shall halt in that area and procedures set forth in the California Public Resources Code (Sec. 5097.98) and State Health and Safety Code (Sec. 7050.5) as follows:</p> <p>a. Notification</p> <ol style="list-style-type: none"> (1) Archaeological Monitor shall notify the PI, CM and the Planning Director or his/her designee. (2) The PI shall notify the County Coroner after consultation. <p>b. Stop work and isolate discovery site</p> <ol style="list-style-type: none"> (1) CM/ the Planning Director or his/her designee, as appropriate, shall stop work immediately and overlay adjacent human remains until a determination can be made by the County Coroner in consultation with the PI concerning the origin of the remains and the cause of death. (2) The County Coroner, in consultation with the PI, shall determine the need for a field investigation to examine the remains and establish a cause of death. (3) If a field investigation is not warranted, the PI, in consultation with the County Coroner, shall determine if the remains are of Native American origin. <p>c. If Human Remains are Native American</p> <ol style="list-style-type: none"> (1) The Coroner shall notify the Native American Historic Commission (NAHC). (By law, ONLY the Coroner can make this call.) (2) NAHC will identify the person or persons it believes to be the Most Likely Descendent (MLD). (3) The MLD may make recommendations to the landowner or PI responsible for the excavation work to determine the treatment, with appropriate dignity, of the human remains and any associated grave goods (PRC 5097.98). <p>d. If Human Remains are not Native American</p> <ol style="list-style-type: none"> (1) The PI shall contact the NAHC and notify them of the historical context of the burial. (2) NAHC will identify the person or persons it believes to be the MLD. (3) The MLD may make recommendations to the landowner or PI responsible for the excavation work to determine the treatment of the human remains (PRC 5097.98). | | | |

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| <p>(4) If the remains are of historic origin, they shall be appropriately removed and conveyed to the Museum of Man for analysis. The decision for reinterment of the human remains shall be made in consultation with the Planning Director or his/her designee, the landowner, the NAHC and the Museum of Man.</p> <p>e. Disposition of Human Remains</p> <p>The landowner, or his/her authorized representative, shall reinter the Native American human remains and any associated grave goods, with appropriate dignity, on the property in a location not subject to further subsurface disturbance, IF:</p> <p>(1) The NAHC is unable to identify the MLD, OR the MLD failed to make a recommendation within 24 hours after being notified by the NAHC; OR;</p> <p>(2) The landowner or authorized representative rejects the recommendation of the MLD and mediation in accordance with PRC 5097.94 (k) by the NAHC fails to provide measures acceptable to the landowner.</p> <p>Notification of Completion: The Archaeologist shall notify the Planning Director or his/her designee, in writing of the end date of monitoring.</p> <p>Post Construction</p> <p>Handling and Curation of Artifacts and Letter of Acceptance</p> <p>a. The Archaeologist shall be responsible for ensuring that all cultural remains collected are cleaned, catalogued, and permanently curated with an appropriate institution; that a letter of acceptance from the curation institution has been submitted to the Planning Development; that all artifacts are analyzed to identify function and chronology as they relate to the history of the area; that faunal material is identified as to species; and that specialty studies are completed, as appropriate.</p> <p>b. Curation of artifacts associated with the survey, testing and/or data recovery for this project shall be completed in consultation with the Planning Director or his/her designee and the Native American representative, as applicable.</p> <p>Final Results Reports (Monitoring and Research Design and Data Recovery Program)</p> | | | |

| MITIGATION MEASURE | RESPONSIBLE MONITORING PARTY | TIMING OF COMPLIANCE | DATE OF & SIGNATURE INDICATING COMPLIANCE |
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| <p>a. Within three months following the completion of monitoring, two copies of the Final Results Report (even if negative) and/or evaluation report, if applicable, which describes the results, analysis, and conclusions of the Archaeological Monitoring Program (with appropriate graphics) shall be submitted to the Planning Director or his/her designee for approval.</p> <p>b. For significant archaeological resources encountered during monitoring, the Research Design and Data Recovery Program shall be included as part of the Final Results Report.</p> <p>Recording Sites with State of California Department of Park and Recreation. The Archaeologist shall be responsible for recording (on the appropriate State of California Department of Park and Recreation forms-DPR 523 A/B) any significant or potentially significant resources encountered during the Archaeological Monitoring Program in accordance with the City's Historical Resources Guidelines, and submittal of such forms to the South Coastal Information Center with the Final Results Report.</p> | | | |
| <p>CULT-3: A qualified paleontological monitor shall be present at a pre-grading meeting with the construction contractor and environmental review coordinator. The purpose of the meeting would be to consult and coordinate the role of the paleontologist during construction. The paleontological monitor shall have adequate knowledge and experience with fossilized remains likely to be present to identify them in the field. The paleontological monitor shall be adequately experienced to remove paleontological resources for further study.</p> | City of Carlsbad, Project Paleontologist | Preconstruction meeting | |
| <p>CULT-4: The paleontological monitor shall be present during the applicable stages of grading and construction (including trenching) as determined at the pre-grading meeting. The paleontological monitor shall have the authority to temporarily direct, divert, or halt grading in the area of an exposed fossil to facilitate evaluation and, if necessary, salvage. At the discretion of the monitor, recovery may include washing and picking of soil samples for microvertebrate bone and teeth. The contractor shall be aware of the random nature of fossil occurrences and the possibility of a discovery of such scientific and/or educational importance which might warrant a long-term salvage operation or preservation. All fossils collected shall be donated to a museum with a systematic paleontological collection, such as the San Diego Natural History Museum. The City of Carlsbad Engineering Division shall ensure the grading contractor is aware of this provision. Conflicts regarding the role and authority of the monitor shall be resolved by the Planning</p> | City of Carlsbad Engineering Department and Planning Department; Project Paleontologist; Project Construction Contractor | Preconstruction meeting; during construction | |

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| Director or his/her designee. | | | |
| CULT -5: A paleontological monitoring report shall be submitted to the City of Carlsbad. The report shall describe the materials recovered by the monitoring program. | City of Carlsbad Planning Department, Project Paleontologist | Three months following termination of paleontological monitoring program | |
| Geology and Soils | | | |
| GEO-1: To provide a uniform bearing for the proposed facility, the fill/residual soils beneath the desalination facility site shall be removed and recompacted. As an alternative, all the building footings may be deepened through the compacted fill soils and be founded into the formational materials of the Santiago Formation, in accordance with the recommendations contained in the geotechnical report (GeoLogic Associates 2004). | City of Carlsbad Building Department and Engineering Department, | Prior to issuance of grading or building permits, whichever occurs first | |
| GEO-2: A pre-construction geotechnical investigation shall be prepared to address geotechnical considerations related to constructing and operating all of the offsite project components including water delivery pipelines, the pump station, and surge control facilities. The report shall contain all necessary requirements to address any adverse soils conditions that may be encountered in final design of the facilities. The project will be required to adhere to all such requirements. The report shall include a discussion of site-specific geology, soils and foundational issues, a seismic hazards analysis to determine the potential for strong ground acceleration and ground shaking, potential groundwater issues, and structural design recommendations. The soil engineer and engineering geologist shall review the grading plans prior to finalization to verify the plans' compliance with the recommendations of the report. A third party review of the geotechnical report and final grading plans shall be conducted by the Engineering Department of the appropriate local jurisdiction (e.g., the City of Carlsbad) prior to issuance of grading permits and encroachment permits. Compliance with this measure shall be verified by the local jurisdiction. | Cities of Carlsbad, Oceanside, and Vista, as applicable | Prior to approval of improvement plans | |
| Hazards and Hazardous Materials | | | |

| MITIGATION MEASURE | RESPONSIBLE MONITORING PARTY | TIMING OF COMPLIANCE | DATE OF & SIGNATURE INDICATING COMPLIANCE |
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| HAZ-1: To mitigate the potential for exposure of existing contamination during construction of offsite pipelines, construction monitoring will be provided in areas identified as having the potential for such risks, and appropriate actions, as determined by the City's construction inspector shall be taken if such materials are encountered. Such actions may include avoidance or removal of contaminated materials, or special handling measures to avoid exposure to materials. | Cities of Carlsbad, Oceanside, and Vista; County of San Diego Dept. of Public Health and Construction Contractor | Prior to approval of improvement plans; during construction | |
| HAZ-2: In accordance with all applicable federal, state and local regulations, plant personnel shall regularly inspect all hazardous materials handling facilities for compliance with applicable regulations and shall ensure that any deficiencies are promptly repaired. In addition, the facility shall be subject to regular inspections by the County Department of Public Health and City's Fire Department, which will ensure compliance with appropriate regulatory requirements for hazardous materials and regulated substances handling. | County of San Diego Dept. of Public Health; City of Carlsbad; Applicant | During operations throughout project life | |
| HAZ-3: All hazardous materials shall be handled stored, transported and disposed in accordance with all applicable federal, state and local codes and regulations. Specific requirements of the California Fire Code that reduce the risk of fire or the potential for a release of hazardous materials that could affect public health or environment include: <ul style="list-style-type: none"> • Provision of an automatic sprinkler system for indoor hazardous material storage areas; • Provision of an exhaust system for indoor hazardous material storage areas; • Separation of incompatible materials by isolating them from each other with noncombustible partition. • Location of incompatible materials as far away from each other as practical. • Spill control in all storage, handling and dispensing areas; • Separate secondary containment for each liquid chemical storage system. The secondary containment shall be designed to hold 110 % of the entire contents of the tank. . Adequate storage shall be provided inside the RO building to hold water for the fire suppression system that could be used for fire protection for a period of 20 minutes in the event of a catastrophic spill. The secondary containment of the chemical storage tanks located outside the RO building shall have extra storage capacity to hold precipitation from a 25- | County of San Diego Dept. of Public Health; City of Carlsbad; Applicant | Prior to issuance of grading or building permits, whichever occurs first; during operations throughout project life | |

| MITIGATION MEASURE | RESPONSIBLE MONITORING PARTY | TIMING OF COMPLIANCE | DATE OF & SIGNATURE INDICATING COMPLIANCE |
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| <p>year, 24-hour event.</p> <ul style="list-style-type: none"> • Use of chlorine in liquid form (sodium hypochlorite) to mitigate concerns associated with accidental toxic gas plume releases and potential odor emissions from the chlorine storage facility; • Use of aqua ammonia of concentration below the regulatory threshold limit of 20 % and amount below the regulatory threshold of 20,000 gallons to mitigate concerns associated with accidental release of significant toxic ammonia gas plume releases. • All liquid chemical storage tanks shall be equipped with a pressure relief valve, vapor equalization, a carbon filter vent, and vacuum breaker. Any potential vapor fume releases from the storage tanks shall be absorbed by the carbon filter vent, thereby providing an effective odor control for volatile chemicals, such as ammonia and chlorine. | | | |
| <p>HAZ -4: Each of the liquid chemicals used on site shall be stored in a tank with a concrete secondary containment surrounding the tank. The containment area shall have a sloped floor, which shall direct the liquid to a drain centered below the tank. This drain shall lead to a covered sump. Each of the chemical storage tanks shall be equipped with continuous level monitors, automated leak detection system, temperature and pressure monitors and alarms, and excess flow and emergency block valves. All storage tanks shall be constructed of appropriate, non-reactive materials, compatible with the recommendations of the supplier of the hazardous material.</p> | County of San Diego Dept. of Public Health; City of Carlsbad | Prior to issuance of grading or building permits, whichever first occurs; during operations throughout project life | |
| <p>HAZ -5: In the event of an accidental liquid chemical spill, the chemical shall be contained within the concrete containment structure and evacuated through an individual drainage system, and pumped into hazardous waste containment trucks and transported off-site for disposal at an appropriate facility accepting such waste. This operation shall be completed by a specialized contractor licensed in hazardous waste handling and disposal. Appropriate agencies, such as the City of Carlsbad Fire and Police Departments, shall also be contacted if necessary.</p> | County of San Diego Dept. of Public Health; City of Carlsbad; Applicant | During operations throughout project life | |
| <p>HAZ -6: The chemical conveyance piping system connecting chemicals from their storage areas to their points of application shall be protected from leaks utilizing one of the following leak protection measures:</p> | County of San Diego Dept. of Public Health; City of Carlsbad | Prior to issuance of grading or building permits, whichever | |

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| <ul style="list-style-type: none"> • Use of piping with double containment walls to prevent potential chemical leaks from reaching the soil or groundwater; and • Installation of chemical conveyance and feed pipelines in designated plastic or concrete trenches that will contain potential leaks and drain the leaking chemical(s) to a designated containment sump or tank, from where the chemical(s) will be evacuated and disposed of in compliance with all applicable federal, state, and local codes. | | first occurs | |
| HAZ -7: Appropriate safety programs shall be developed addressing hazardous materials storage locations, emergency response procedures, employee training requirements, hazard recognition, fire safety, first aid/emergency medical procedures, hazard communication training, and release reporting requirements. These programs shall include a Hazardous Materials Business Plan, worker safety program, fire response program, a plant safety program, and the facility's standard operating procedures. The project shall also be in compliance with all applicable hazardous material storage and management regulations and shall prepare all safety planning documentation associated with compliance with these regulations. For security purposes, the desalination facility would allow site access to authorized personnel only via a secured entry point with a 24-hour guard. | County of San Diego Dept. of Public Health; City of Carlsbad; Applicant | During operations throughout project life | |
| Hydrology and Water Quality | | | |
| HYDRO-1: Prior to issuance of a grading permit, building permit or demolition permit, whichever occurs first, the project applicant shall demonstrate compliance with all applicable regulations established by the United States Environmental Protection Agency (USEPA) as set forth in the National Pollutant Discharge Elimination System (NPDES) permit requirements for urban runoff and storm water discharge and any regulations adopted by the city within which construction will take place, pursuant to the NPDES regulations or requirements of that city (Carlsbad, Oceanside and Vista). Further, the applicant shall file a Notice of Intent (NOI) with the State Water Resources Control Board to obtain coverage under the NPDES General Permit for Storm Water Discharges Associated with Construction Activity and shall implement a Storm Water Pollution Prevention Plan (SWPPP) concurrent with the commencement of grading activities. The SWPPP shall include both construction and post-construction pollution prevention and pollution control measures and shall identify funding mechanisms for post-construction control measures. The SWPPP shall also be sent to the North County Transit | Cities of Carlsbad, Oceanside, and Vista; Regional Water Quality Control Board; North County Transit District; Construction Contractor | Prior to issuance of a grading permit, building permit or demolition permit, whichever occurs first; during construction | |

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| <p>District for review and comment.</p> <p>The following best management practices shall be adhered to during construction:</p> <ul style="list-style-type: none"> Gravel bags, silt fences, etc. shall be placed along the edge of all work areas as determined appropriate by the City's construction inspector in order to contain particulates prior to contact with receiving waters. All concrete washing and spoils dumping will occur in a designated location. Construction stockpiles will be covered in order to prevent blow-off or runoff during weather events. A pollution control education plan shall be developed by the General Contractor and implemented throughout all phases of development and construction. Severe weather event erosion control materials and devices shall be stored onsite for use as needed. <p>Other best management practices as determined necessary by the cities</p> | | | |
| <p>HYDRO-2: Prior to issuance of grading or building permits, whichever occurs first, the applicant shall submit for City approval a Storm Water Management Plan (SWMP). The SWMP shall demonstrate compliance with the city of Carlsbad Standard Urban Storm water Mitigation Plan (SUSMP), Order 2001-01, issued by the San Diego Region of the California Regional Water Quality Control Board and City of Carlsbad Municipal Code.</p> | City of Carlsbad City Engineer, | Prior to issuance of grading or building permits, whichever occurs first | |
| <p>HYDRO-3: Construction within any area the City of Carlsbad identifies as a 100-year flood hazard shall occur only during dry months (May 1 – September 30). The City may waive this restriction if the applicant satisfactorily demonstrates, as determined by the City, that construction would not impede or redirect flood flows and would not expose people or structures to flooding. Such demonstration shall occur before the City issues grading or other permits to permit construction in the flood hazard area in the wet months and may require the applicant to submit plans and details regarding the type, location, quantities and duration of construction equipment and materials as well as any other information that the City may require.</p> | City of Carlsbad City Engineer, | Prior to issuance of grading or other permits or approval of improvement plans for the applicable pipeline, whichever occurs first | |
| Land Use and Planning | | | |
| <p>LAND USE-1: The applicant shall coordinate with and receive approval from the McClellan-Palomar Airport Operations Manager before constructing within the Airport</p> | City of Carlsbad Planning Department and Public Works | Prior to approval of improvement plans | |

| MITIGATION MEASURE | | RESPONSIBLE MONITORING PARTY | TIMING OF COMPLIANCE | DATE OF & SIGNATURE INDICATING COMPLIANCE |
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| Influence Area and particularly within any Flight Activity Zone and Runway Protection Zone or on airport property. | | Department; Applicant | for applicable pipeline | |
| Traffic and Circulation | | | | |
| TRAFFIC-1: Prior to issuance of grading permits and/or encroachment permits for work within public rights-of-way, the Applicant shall provide the ultimate location of soil disposal sites to the appropriate city (if they are different from the disposal site identified in this analysis), and shall further demonstrate that transport of soil and materials to and from the proposed sites will not result in Levels of Service during peak hour periods on affected roadways and intersections falling below acceptable standards established by the affected cities. | | Cities of Carlsbad, Oceanside, and Vista, | Prior to issuance of a right of way permit or approval of improvement plans, whichever occurs first | |
| TRAFFIC-2: Prior to improvement plan approval, a traffic control plan will be prepared for approval by each jurisdiction within which the project is proposed to be located. The traffic control plan will show all signage, striping, delineate detours, flagging operations and any other devices which will be used during construction to guide motorists safely through the construction zone and allow for adequate access and circulation, to the satisfaction of the city or agency with applicable jurisdiction. The traffic control plan will also include provisions for coordinating with local emergency service providers regarding construction times and locations of lane closures as well as specifications for bicycle lane safety. The Applicant's construction contractors will coordinate traffic diversions, street and lane closures, and obstruction of intersections with each jurisdiction's engineering department prior to commencing construction activities through the development of routing and detour plans. This Traffic Control Plan will be prepared in accordance with each jurisdiction's traffic control guidelines and will be prepared to ensure that access will be maintained to individual properties and businesses, and that emergency access will not be restricted. Additionally, the Plan will ensure that congestion and delay of traffic resulting from project construction are not substantially increased and will be of a short-term nature. The limits of construction work area(s) and suggested alternate traffic routes for through traffic will be published in a local newspaper periodically throughout the construction period. In addition, the Applicant's construction contractor shall provide not less than a 2-week written notice prior to the start of construction by | | Cities of Carlsbad, Oceanside, and Vista, Construction Contractor | Prior to issuance of a right of way permit or approval of improvement plans, whichever occurs first; during construction | |

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| <p>mailing to owners/occupants along streets to be impacted during construction.</p> <p>During construction, the Applicant's contractor will ensure that continuous, unobstructed, safe and adequate pedestrian and vehicular access to and from public facilities such as schools, parks, post offices and fire stations. If normal access to these facilities is blocked by construction for more than four hours in any given workday, alternative access will be provided. The Applicant's contractor will coordinate with each facility's administrators in preparing a plan for alternative access.</p> <p>During construction, the Applicant's contractor will ensure that continuous, unobstructed, safe and adequate pedestrian and vehicular access remains to commercial/ industrial establishments during regular business hours. If normal access to business establishments is blocked by construction for more than four hours in any given workday, alternative access will be provided. The Applicant's contractor, and possibly the city, will coordinate with the businesses in preparing a plan for alternative access.</p> <p>During construction, the Applicant's contractor will maintain continuous vehicular and pedestrian access to residential driveways from the public street to the private property line, except where necessary construction precludes such continuous access for reasonable periods of time. For example, when the pipeline is initially being excavated, access to individual driveways may be closed during the course of a workday. Access will be reestablished at the end of the workday. If a driveway needs to be closed or interfered with as described above, the Applicant's construction contractor shall notify the owner or occupant of the closure of the driveway at least five working days prior to the closure.</p> <p>Methods to maintain safe, vehicular and pedestrian access includes the installation of temporary bridge or steel plates to cross over unfilled excavations. Whenever sidewalks or roadways are removed for construction, the Applicant's contractor will place temporary sidewalks or roadways promptly after backfilling until the final restoration has been made.</p> <p>The traffic control plan will include provisions to ensure that the Applicant's construction contractor's work in any public street does not interfere unnecessarily</p> | | | |

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| with the work of other agencies such as emergency service providers, mail delivery, school busses and waste services. | | | |
| Public Services and Utilities | | | |
| PS-1: The combined waste discharge from the desalination facility to the EWPCF shall not exceed an instantaneous maximum of 300 gpm and a daily maximum of 200,000 gpd. The combined total suspended solids discharged to the EWPCF shall not exceed 500 pounds per day. Should the project operations cause the monthly average TDS of the effluent at the local water recycling facilities to exceed 1,000 mg/L, or contribute to the monthly average TDS at the local water recycling facilities exceeding 1,000 mg/L, the Applicant shall take steps to reduce the TDS increase or reimburse the operators of local water recycling plants for its proportional share of the cost to reduce the increase in TDS resulting from project operations. In addition, the applicant shall provide the City a minimum 2 years worth of data that establishes a baseline water quality and TDS levels of the effluent at the local water recycling facilities prior to commencement of project operations. Upon commencement of operations, the applicant shall establish a monitoring program which regularly reports the TDS contribution of the desalination plant. The City shall determine monitoring program parameters, including the frequency of monitoring and duration of the program. | City of Carlsbad City Engineer; Applicant | During operations throughout project life | |

| Date | | Time | | Location | | Remarks | |
|------|----------|-------|-------|----------|-------|---------|-------|
| 1 | 10/10/19 | 10:00 | 10:30 | 10:00 | 10:30 | 10:00 | 10:30 |
| 2 | 10/10/19 | 10:30 | 11:00 | 10:30 | 11:00 | 10:30 | 11:00 |
| 3 | 10/10/19 | 11:00 | 11:30 | 11:00 | 11:30 | 11:00 | 11:30 |
| 4 | 10/10/19 | 11:30 | 12:00 | 11:30 | 12:00 | 11:30 | 12:00 |
| 5 | 10/10/19 | 12:00 | 12:30 | 12:00 | 12:30 | 12:00 | 12:30 |
| 6 | 10/10/19 | 12:30 | 13:00 | 12:30 | 13:00 | 12:30 | 13:00 |
| 7 | 10/10/19 | 13:00 | 13:30 | 13:00 | 13:30 | 13:00 | 13:30 |
| 8 | 10/10/19 | 13:30 | 14:00 | 13:30 | 14:00 | 13:30 | 14:00 |
| 9 | 10/10/19 | 14:00 | 14:30 | 14:00 | 14:30 | 14:00 | 14:30 |
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CASE NAME: PRECISE DEVELOPMENT PLAN AND
DESALINATION PLANT
CASE NO.: PDP 00-02

That portion of Lot "H" of Rancho Agua Hedionda in the City of Carlsbad, County of San Diego, State of California, according to partition map thereof No. 823, filed in the Office of the County Recorder of San Diego County, November 16, 1896, as described in Certificate of Compliance recorded October 30, 2001, as Document No. 2001-0789068, Parcel 4 (Assessor's Parcel Numbers 210-010-41 and a portion of 210-010-43).

WHEREAS, said verified application constitutes a request for a Precise Plan as referenced in Exhibit "X" dated May 3, 2006, attached hereto and on file in Department **PRECISE DEVELOPMENT PLAN AND DESALINATION P 00-02** as provided by Chapters 21.36 and 21.52 of the Carlsbad Municipal Code;

1 WHEREAS, the Precise Development Plan serves as a land use application for
2 the Carlsbad Seawater Desalination Plant, which is proposed at the Encina Power Station; and

3 WHEREAS, the purpose of the Precise Development Plan is to also document
4 existing land uses at the Encina Power Station, a facility that began operation in 1954, and
5 provides land use and development standards for existing and potential future uses at the power
6 station as well as the Carlsbad Seawater Desalination Plant; and

7
8 WHEREAS, the Precise Development Plan and Desalination Plant project does
9 not involve any modification to the Encina Power Station with the exception of demolishing a
10 fuel oil tank, making certain electrical connections and making certain connections to the Encina
11 Power Station seawater discharge as required by the Carlsbad Seawater Desalination Plant; and

12 WHEREAS, the Planning Commission did on the 3rd day of May, 2006 hold a
13 duly noticed public hearing as prescribed by law to consider said request; and

14 WHEREAS, at said public hearing, upon hearing and considering all testimony
15 and arguments, if any, of all persons desiring to be heard, said Commission considered all factors
16 relating to the Precise Development Plan.

17
18 NOW, THEREFORE, BE IT HEREBY RESOLVED by the Planning
19 Commission of the City of Carlsbad as follows:

- 20 A) That the foregoing recitations are true and correct.
- 21 B) That based on the evidence presented at the public hearing, the Commission
22 **RECOMMENDS APPROVAL** of **PRECISE DEVELOPMENT PLAN AND**
23 **DESALINATION PLANT – PDP 00-02**, based on the following findings and
subject to the following conditions:

24 **Findings:**

- 25 1. The **Precise Development Plan PDP 00-02** is consistent with the intent and purpose of
26 the Public Utilities (P-U) Zone, Section 21.36.010 (1) of the Carlsbad Municipal Code, to
27 provide a Precise Development Plan that is compatible with the General Plan and
surrounding developments, in that (1) existing and permitted land uses within the
28 proposed Precise Development Plan are consistent with and/or implement the

1 objectives of the Public Utilities (U) General Plan designation; (2) the Precise
2 Development Plan, through developments standards and review procedures, is
3 compatible with surrounding developments; (3) the Precise Development Plan
4 planning area is adequately buffered from surrounding, more sensitive uses (e.g.,
5 residences and businesses) by open space, other utility uses, and transportation
6 corridors and through development standards, including setbacks, of the proposed
7 Precise Development Plan. Furthermore, the Owner, through the Precise
8 Development Plan, has offered to provide certain public dedications that will
9 enhance the public's use of open space areas adjacent to the Precise Development
10 Plan area and the PDP is conditioned to dedicate an easement for the Coastal Rail
11 Trail.

12 2. The Precise Development Plan PDP 00-02 is consistent with the intent and purpose of
13 the Public Utilities (P-U) Zone, 21.36.010 (2) of the Carlsbad Municipal Code to provide
14 a Precise Development Plan that has given due regard to environmental factors, in that
15 the proposal has been reviewed concurrently with the processing and certification of
16 Environmental Impact Report (EIR) 03-05, compliant with the provisions of the
17 California Environmental Quality Act.

18 3. The Precise Development Plan PDP 00-02 is consistent with the intent and purpose of
19 the Public Utilities (P-U) Zone, 21.36.010 (3) of the Carlsbad Municipal Code to provide
20 a Precise Development Plan that provides for necessary public improvements, in that
21 conditions of approval have been placed on the project, which, in addition to the
22 terms and obligations of Development Agreement DA 05-01, combine to ensure that
23 adequate public improvements and/or dedications, and/or funds necessary therefor,
24 will be secured concurrent with project approval.

25 4. The Precise Development Plan PDP 00-02 permits the Carlsbad Seawater
26 Desalination Plant that is identified as a permitted use in the P-U Zone by
27 Municipal Code Section 21.36.020 (4)(c) and that incorporates design, location, and
28 operation characteristics that ensure compliance with the intent and purpose of the
P-U Zone. Furthermore, PDP 00-02 sets forth the standards of development for the
desalination plant.

5. The Precise Development Plan PDP 00-02 is consistent with the General Plan in that:

- a. It provides regulations and standards for uses that are appropriate uses for the General Plan Public Utilities ("U") land use designation, the designation applied to the Encina Power Station.
- b. The General Plan Land Use Element notes that the U land use designation is applied to existing areas, such as the Encina Power Station, that are being used for public or quasi-public functions.
- c. It provides development standards for the Encina Power Station, including the Carlsbad Seawater Desalination Plant, which is consistent with the Overall Land Use Pattern goal A.2 that states, "A City which provides for an orderly balance of both public and private land uses within convenient and compatible locations throughout the community and ensures that all such uses, type, amount, design, and arrangement serve to protect and enhance the environment, character, and image of the City."

- 1 d. **The establishment of the Precise Development Plan, its regulation of**
2 **development and uses at the Encina Power Station, and the Owner's offers of**
3 **public dedications as conditioned herein, achieve compliance with Land Use**
4 **Element Environmental Policy C.6, which states, "Ensure the preservation**
5 **and maintenance of the unique environmental resources of the Agua**
6 **Hedionda Lagoon while providing for a balance of public and private land**
7 **uses through implementation of the Agua Hedionda Land Use Plan."**
6. **The Precise Development Plan PDP 00-02 is consistent with Encina Specific Plan 144**
 in that:
- a. **It complies with and enhances applicable Specific Plan standards and**
 requirements adopted over the years to regulate development at the Encina
 Power Station.
- b. **It documents and maps power plant uses and features, and, since it proposes**
 no changes to the operation of the Encina Power Station and only limited
 changes to its facilities (seawater discharge and electrical connections and
 removal of the a fuel oil storage tank), the Precise Development Plan does not
 conflict with Specific Plan standards and requirements regarding power
 station operations.
- c. **The proposed amended and restated Encina Specific Plan, SP 144(H),**
 incorporates the land use designations of the City of Carlsbad General Plan,
 with which the Precise Development Plan is consistent. Additionally, SP
 144(H) would incorporate by reference PDP 00-02.
7. **The Precise Development Plan PDP 00-02 is consistent with the goals of the South**
 Carlsbad Coastal Redevelopment Plan in that:
- a. **Establishment of the Precise Development Plan and its development and**
 environmental standards assists in eliminating blight and environmental
 deficiencies in the Redevelopment Plan area and ensuring quality site design.
- b. **Development of the Carlsbad Seawater Desalination Plant will assist in the**
 stimulation of new commercial/industrial expansion, employment, and
 economic growth. The Owner-offered dedication to set aside vacant land
 next to the Hubbs-Sea World research facility for marine research or
 aquaculture also furthers this goal.
- c. **The Owner-offered public dedications, including dedication of the Fishing**
 Beach along the lagoon and Bluff area adjacent to the beach, enable
 development of new public beach and coastal recreation opportunities,
 parking, and open space amenities.
- d. **Locating the Carlsbad Seawater Desalination Plant in a location that creates**
 the least amount of constraints on any future conversion of the Encina power
 station facilitates the redevelopment of the Encina power generating facility
 to a smaller, more efficient power generating plant.
8. **The Precise Development Plan PDP 00-02 is consistent with the City's adopted Scenic**
 Corridor Guidelines, which apply to Carlsbad Boulevard and the North County Transit
 District railroad corridor, in that it provides for the Carlsbad Seawater Desalination
 Plant a quality building design and appropriate visual screening, and, for the

1 **Encina Power Station as a whole, recognition of the Guidelines and development**
2 **standards.**

- 3 9. **The Precise Development Plan PDP 00-02, including the public dedications proposed**
4 **by the Owner through the Precise Development Plan, is in conformance with the Agua**
5 **Hedionda Land Use Plan and all applicable policies in that it has been reviewed for**
6 **consistency with relevant coastal policies including land use, habitat protection,**
7 **grading and drainage, stormwater management, recreation, shoreline access, and**
8 **visual resources. In particular, the Precise Development Plan achieves consistency**
9 **with Land Use Plan policies as follows:**

- 10 a. **The Precise Development Plan regulates uses that are consistent with those**
11 **land uses shown on the Plan's Land Use Map (Policy 1.1).**
12 b. **The Owner-offered dedication of a public access easement for the Fishing**
13 **Beach is consistent with policies 6.5 and 6.7, which encourage the Encina**
14 **fishing area on the Outer Lagoon to be maintained and present recreational**
15 **uses of the lagoon to be expanded where feasible.**
16 c. **Other Owner-offered public dedications in the vicinity of Agua Hedionda**
17 **Lagoon and the Pacific Ocean are consistent with Coastal Act Policies**
18 **regarding public access to coastline and recreational features.**
19 d. **The Precise Development Plan is subject to, and incorporates as a regulating**
20 **document, the Mitigation and Monitoring Program for EIR 03-05, which**
21 **provides mitigation to ensure consistency with Land Use Plan policies**
22 **regarding environmentally sensitive habitats, geology, and water quality.**

23 **Furthermore, the Project has been conditioned to obtain its coastal development**
24 **permit from the California Coastal Commission.**

- 25 10. **The approval of Precise Development Plan PDP 00-02 fulfills the requirement of**
26 **Municipal Code Section 21.36.030, which in part states that "no building permit or**
27 **other entitlement for any use in the P-U zone shall be issued until a precise**
28 **development plan has been approved for the property."**
- 29 11. **As conditioned, the project is consistent with the City's Landscape Manual (Carlsbad**
30 **Municipal Code Section 14.28.020 and Landscape Manual Section I B).**
- 31 12. **The Planning Commission has reviewed each of the exactions imposed on the Developer**
32 **contained in this resolution, and hereby finds, in this case, that the exactions are imposed**
33 **to mitigate impacts caused by or reasonably related to the project, and the extent and the**
34 **degree of the exaction is in rough proportionality to the impact caused by the project.**
- 35 13. **That the City has adopted a Citywide Trails Program and a segment of the trail network,**
36 **the Coastal Rail Trail, is associated with this project. To facilitate locating this trail,**
37 **which cannot be accommodated in its originally intended location within the North**
38 **County Transit District Railroad right of way due to various reasons including**
39 **space limitations, security, and safety concerns, the Owner and the City have agreed**
40 **to try and find a mutually agreeable trail location within the Precise Development**
41 **Plan boundaries.**

1 **Conditions:**

2 **Notes:** Unless otherwise specified herein, all conditions shall be satisfied prior to issuance of
3 **grading or building permits for the Carlsbad Seawater Desalination Plant, whichever**
4 **occurs first.**

- 5 1. If any of the following conditions fail to occur; or if they are, by their terms, to be
6 implemented and maintained over time, if any of such conditions fail to be so
7 implemented and maintained according to their terms, the City shall have the right to
8 revoke or modify all approvals herein granted; deny or further condition issuance of all
9 future building permits; deny, revoke or further condition all certificates of occupancy
10 issued under the authority of approvals herein granted; record a notice of violation on the
11 property title; institute and prosecute litigation to compel their compliance with said
12 conditions or seek damages for their violation. No vested rights are gained by Developer
13 or a successor in interest by the City's approval of this **Precise Development Plan, other**
14 **than those described in the Development Agreement (DA 05-01).**
- 15 2. Staff is authorized and directed to make, or require the Developer to make, all corrections
16 and modifications to the **Precise Development Plan** documents, as necessary to make
17 them internally consistent and in conformity with the final action on the project.
18 Development shall occur substantially as shown on the approved Exhibits. Any proposed
19 development different from this approval shall require an amendment to this approval.
- 20 3. Prior to approval of the **Precise Development Plan**, the Developer shall apply for and
21 obtain approval of a Coastal Development Permit issued by the California Coastal
22 Commission or its successor in interest, that substantially conforms to this approval. A
23 signed copy of the Coastal Development Permit must be submitted to the Planning
24 Director. If the approval is substantially different, an amendment to the **Precise**
25 **Development Plan** shall be required.
- 26 4. This approval is granted subject to the certification, adoption and approval of the
27 Environmental Impact Report (**EIR 03-05**) and Mitigation Monitoring and Reporting
28 Program, **SP 144(H), DA 05-01, RP 05-12, CDP 04-41, SUP 05-04 and HMPP 05-08**
and is subject to all conditions contained in Planning Commission Resolutions No. **6089,**
6090, 6091, 6092, 6093, and 6094 for those other approvals incorporated herein by
reference.
5. **Those portions of the Project's water conveyance pipelines located within the City of**
Carlsbad but outside of the City's coastal zone are not approved as part of this
permit and are subject to future permits by the City of Carlsbad, and will be subject
to the requirements of the Carlsbad Municipal Code.
6. If any condition for construction of any public improvements or facilities, or the payment
of any fees in-lieu thereof, imposed by this approval or imposed by law on this Project
are challenged, this approval shall be suspended as provided in Government Code
Section 66020. If any such condition is determined to be invalid, this approval shall be
invalid unless the City Council determines that the project without the condition complies
with all requirements of law.

- 1 7. a. Developer shall comply with all applicable provisions of federal, state, and local
2 laws and regulations in effect at the time of building permit issuance, **except as**
3 **otherwise provided in the Development Agreement.**
- 4 b. **Owner** shall comply with all applicable provisions of federal, state, and local
5 laws and regulations in effect at the time of building permit issuance as they relate
6 to the existing Encina Power Station.
- 7 8. Indemnification:
- 8 a. Developer shall and does hereby agree to indemnify, protect, defend, and hold
9 harmless the City of Carlsbad, its Council members, officers, employees, agents,
10 and representatives (collectively "Indemnified Parties"), from and against any and
11 all liabilities, losses, damages, demands, claims and costs, including court costs
12 and attorney's fees incurred by the City arising, directly or indirectly, from
13 (i) City's approval and issuance of this **Precise Development Plan**, (ii) City's
14 approval or issuance of any permit or action, whether discretionary or
15 nondiscretionary, in connection with the Carlsbad Seawater Desalination Plant
16 use contemplated herein, and (iii) Developer's installation and operation of the
17 Carlsbad Seawater Desalination Plant, including without limitation, any and all
18 liabilities arising from the emission by the Carlsbad Seawater Desalination Plant
19 of electromagnetic fields or other energy waves or emissions. These obligations
20 survive until all legal proceedings have been concluded and continue even if any
21 City approval giving rise to an indemnification obligation is not validated.
- 22 b. Owner shall and does hereby agree to indemnify, protect, defend, and hold
23 harmless Indemnified Parties, from and against any and all liabilities, losses,
24 damages, demands, claims and costs, including court costs and attorney's fees
25 incurred by the City arising, directly or indirectly, from (i) City's approval and
26 issuance of this **Precise Development Plan**, (ii) City's approval or issuance of
27 any permit or action, whether discretionary or nondiscretionary, in connection
28 with the use of the existing 95-acre Encina Power Station, and (iii) Owner's
installation and operation of the Encina Power Station, including without
limitation, any and all liabilities arising from the emission by the Encina Power
Station of electromagnetic fields or other energy waves or emissions. Owner's
duty to indemnify the Indemnified Parties does not include any and all liabilities,
losses, damages, demands, claims, costs, court costs and attorney's fees arising,
directly or indirectly from the Carlsbad Seawater Desalination Plant. These
obligations survive until all legal proceedings have been concluded and continue
even if any City approval giving rise to an indemnification obligation is not
validated.

- 1 9. a. The Desalination plant project shall comply with all conditions and mitigation
2 measures which are required as part of the Zone 1 and Zone 3 Local Facilities
3 Management Plans and any amendments made to that Plan prior to the issuance of
4 building permits. **Should amendments occur to the LFMPs, the Developer**
5 **shall comply subject to the limitations of the Development Agreement**
6 **(DA 05-01).**
7 b. For the Encina Power Station, Owner shall comply with all conditions and
8 mitigation measures which are required as part of the Zone 1 and Zone 3 Local
9 Facilities Management Plans and any amendments made to that Plan prior to the
10 issuance of building permits for any permits not contemplated in this PDP, as it
11 may be amended from time to time.
- 12 10. The approval of the PDP shall become null and void for the portions relating to the
13 Desalination Plant, if the Desalination Plant does not **become operational within**
14 **10 years of the final discretionary approval, including the discretionary approvals of**
15 **the California Coastal Commission or other agencies, as may be consistent with the**
16 **Development Agreement (DA 05-01).**
- 17 11. Developer shall implement, or cause the implementation of, the **EIR 03-05 Project**
18 **Mitigation Monitoring and Reporting Program.**
- 19 12. a. As a condition of this approval, Owner must comply with the requirements of all
20 regulatory agencies having jurisdiction over the Encina Power Station.
21 b. As a condition of this approval, Developer must comply with the requirements of
22 all regulatory agencies having jurisdiction over the Desalination Plant and the
23 Mitigation Monitoring and Reporting requirements of the environmental
24 documents for the Desalination Plant.
- 25 13. Developer shall submit to the **Planning Director** a reproducible 24" x 36" mylar copy of
26 the **Precise Development Plan** reflecting the conditions approved by the final decision-
27 making body.
28 a. Developer shall include, as part of the plans submitted for any permit plan check,
a reduced legible version of all approving resolution(s) in a 24" x 36" blue-
line drawing format (including any applicable Coastal Commission approvals and the
Mitigation Monitoring and Reporting Program).
b. **Prior to final inspection of the desalination plant, Developer shall have**
constructed a decorative screen wall or fence and, where feasible, install
landscaping and irrigation along the entire Carlsbad Boulevard frontage of
the Encina Power Station beginning at the power station's south boundary
adjacent to the SDG&E property and extending approximately to the north
end of the aquaculture facilities adjacent to the power station's discharge
pond, provided that (i) prior to issuance of building or grading permits for
the desalination plant, plans for the decorative screening wall or fence,
landscaping and irrigation, as outlined in the conditions for a Final
Landscape and Irrigation Plan contained herein, shall be submitted to the

1 Planning Director and the City Engineer for review and approval; and
2 (ii) such decorative screen wall or fence shall replace the existing fence and
3 shall incorporate, if determined appropriate by the Planning Director and
4 the City Engineer, the bridge rail over the cooling water discharge culvert as
required by and conditioned in Planning Commission Resolution No. 6091
for Redevelopment Permit RP 05-12.

- 5 c. Developer shall submit and obtain Planning Director approval of a Final
6 Landscape and Irrigation Plan showing conformance with the conditions herein
7 and the City's Landscape Manual. Developer shall construct and install all
landscaping as shown on the approved Final Plans, and maintain all landscaping
8 in a healthy and thriving condition, free from weeds, trash, and debris.
- 9 d. The first submittal of Final Landscape and Irrigation Plans shall be pursuant to the
10 landscape plan check process on file in the Planning Department and
11 accompanied by the project's building, improvement, and grading plans.
- 12 e. Prior to the issuance of any permits for the project, the applicant shall submit to
13 the Planning Director a digital copy and a camera-ready master copy of the
ENCINA POWER STATION AND PRECISE DEVELOPMENT PLANT –
14 **PDP 00-02**, in addition to the required number of bound copies determined by the
Planning Director.

14 Engineering

- 15 14. Prior to issuance of any building permit, Developer shall comply with the requirements of
16 the City's anti-graffiti program for wall treatments if and when such a program is
formally established by the City.
- 17 15. Prior to approval of a grading or building permits for the desalination plant, Developer
18 shall cause Owner to give written consent to the City Engineer to the annexation of the
19 area shown within the boundaries of the Precise Development Plan into the existing City
of Carlsbad Street Lighting and Landscaping District No. 1 and/or to the formation or
20 annexation into an additional Street Lighting and Landscaping District. Said
written consent shall be on a form provided by the City Engineer.
- 21 16. Prior to issuance of grading or building permits for the desalination plant, Developer shall
22 cause Owner or its successor in interest to make an irrevocable offer of dedication to the
23 City and/or other appropriate entities for all public streets, lands, and easements shown
24 on the Precise Development Plan listed below, except as otherwise provided in the
Precise Development Permit. The offer shall be made by a separate document. All land
25 so offered shall be offered free and clear of all liens and encumbrances and without cost.
Streets that are already public are not required to be rededicated.
- 26 a. **Public dedications:** The locations of the following dedications are shown on
27 exhibit "Poseidon Desalination Plant Proposed Parcel Exhibit" attached
hereto for reference. Prior to issuance of grading or building permits for the
desalination plant, precise legal descriptions and documentation shall be

1 submitted to the satisfaction of the City Attorney, the City Engineer, and the
2 Planning Director.

3 i. Hubbs Site Parcel: A deed restriction shall be recorded on the
4 property known as the Hubbs Site Parcel. The Hubbs Site Parcel is
5 the vacant, approximately two-acre eastern portion of the property
6 identified by Assessor's Parcel Number (APN) 206-07-017 and
7 currently occupied by the Hubbs-Sea World Research facility. The
8 deed restriction shall limit allowable land uses on the Hubbs Site
9 Parcel to those that are directly related to fish hatchery, fish ecology
10 research, aquaculture uses, and trails to the satisfaction of the
11 Planning Director.

12 ii. Bluff Area Parcel: Fee title to property known as the Bluff Area
13 Parcel shall be granted to the City of Carlsbad for public access and
14 recreational uses. The Bluff Area Parcel is on the west side of
15 Carlsbad Boulevard, between the Encina Power Station discharge
16 jetty and the Terramar residential area. Fee title shall include only
17 the bluff area and not the beach. Cabrillo Power I LLC shall pay all
18 costs associated with the property dedication.

19 iii. South Power Plant Parcel: A public parking and public access
20 easement shall be granted to the City of Carlsbad for the property
21 described as the South Power Plant Parcel for the development of
22 public vehicle parking by the City of Carlsbad. The South Power
23 Plant Parcel is located at the southwest corner of the Precise
24 Development Plan, adjacent to the east side of Carlsbad Boulevard
25 and Encina Power Station south entrance gate, an area approximately
26 0.27 acre in size. If necessary, Developer shall be responsible for costs
27 associated with removal and relocation of any gates or fences
28 necessary to accommodate the parking and access to it. Furthermore,
prior to issuance of grading or building permits for the desalination
plant, one (or more) plan(s) shall be provided to the City to show
feasible parking layouts as determined by the Planning Director and
the City Engineer. Parking lot plans shall be designed to complement
and allow installation of the Carlsbad Boulevard frontage landscape
and wall conditioned herein. The operational parameters of the
public parking and public access shall be ones that are mutually
agreeable to both the Owner and the Planning Director.

iv. Fishing Beach Parcel: A public access and public parking easement
shall be granted to the City of Carlsbad for the property known as the
Fishing Beach Parcel for access and on-shore recreational uses,
including public parking. The operational parameters of the on-shore
recreational facilities, public parking, and public access shall be ones
that are mutually agreeable to both the Owner and the Planning
Director. This property, approximately 2.4 acres, is located on the
east side of Carlsbad Boulevard along the Outer Agua Hedionda
Lagoon and stretches from the lagoon inlet jetty to a point at an
existing fence about 1,500 feet south. Cabrillo Power I LLC or their
assignee shall retain the right to close the Fishing Beach property to

1 public use and access from time to time during periodic dredging
2 cycles as approved for lagoon maintenance.

3 b. **Carlsbad Boulevard:** From the southerly boundary of the Precise
4 Development Plan to the northerly boundary of Specific Plan 144, dedicate
5 additional right-of-way for public street and utility purposes along the
6 easterly side of Carlsbad Boulevard. Width of additional right-of-way shall
7 be one (1) foot to the satisfaction of the City Engineer.

8 c. **The Owner of the Precise Development Plan property shall enter into an
9 agreement with the City whereby the Owner:**

10 i. **Acknowledges that the existing storm drain facilities across Precise
11 Development Plan property may be of inadequate size to contain the
12 100-year storm flows.**

13 ii. **Acknowledges that under existing NPDES requirements applicable to
14 the Owner's property that Owner has legal obligations to prevent
15 illegal or unpermitted discharges into the Agua Hedionda Lagoon or
16 Pacific Ocean under expected drainage water flows, and no releases of
17 hazardous materials or pollutants as the result of drainage flows
18 across the Precise Development Plan property.**

19 iii. **Subject to any Owner-initiated development which requires a formal
20 amendment to the Precise Development Plan, regardless of any
21 potential exemption based upon square footage, Owner shall
22 irrevocably offer to dedicate a public drainage easement over the
23 existing main storm drain line carrying public drainage water across
24 the Precise Development Plan property. The offer shall include
25 additional width and rights to allow for the complete construction,
26 operation and maintenance of the existing storm and future Drainage
27 Master Plan (DMP) Facility BAA to the satisfaction of the City
28 Engineer. The offer may allow for Owner to adjust the exact
alignment or increase the capacity of the new drainage facility at
Owner's expense to accommodate the flow in the existing drainage
facility, prior to the City's construction of any facilities. After
construction of the facilities, the City may allow Owner to relocate the
existing storm drain facilities at Owner's expense if the relocated
alignment is acceptable to the City Engineer or eliminate the existing
facility at Owner's expense if eliminating the existing facility is
acceptable to the City Engineer. Prior to acceptance of the existing
private storm drain and the proposed drainage easement by the City,
the Owner shall remove all liens and encumbrances from the
easement property proposed for dedication that would interfere with
the construction, operation, or maintenance of the existing and future
drainage facilities to the satisfaction of the City Engineer, including
buildings, structures, and pipelines. The agreement and its provisions
shall be subject to the satisfaction of the City Engineer and the City
Attorney.**

1
2 **NOTICE**

3 Please take **NOTICE** that approval of your project includes the "imposition" of fees,
4 dedications, reservations, or other exactions hereafter collectively referred to for convenience as
5 "fees/exactions."

6 You have 90 days from date of final approval to protest imposition of these fees/exactions. If
7 you protest them, you must follow the protest procedure set forth in Government Code Section
8 66020(a), and file the protest and any other required information with the City Manager for
9 processing in accordance with Carlsbad Municipal Code Section 3.32.030. Failure to timely
10 follow that procedure will bar any subsequent legal action to attack, review, set aside, void, or
11 annul their imposition.

12 You are hereby **FURTHER NOTIFIED** that your right to protest the specified fees/exactions
13 **DOES NOT APPLY** to water and sewer connection fees and capacity charges, nor planning,
14 zoning, grading or other similar application processing or service fees in connection with this
15 project; **NOR DOES IT APPLY** to any fees/exactions of which you have previously been given a
16 **NOTICE** similar to this, or as to which the statute of limitations has previously otherwise
17 expired.

18
19 **PASSED, APPROVED AND ADOPTED** at a regular meeting of the Planning
20 Commission of the City of Carlsbad, California, held on the **3rd** day of **May 2006** by the
21 following vote, to wit:

22 **AYES:** Chairperson Montgomery, Commissioners Baker, Cardosa,
23 Heineman, Montgomery, Segall, and Whitton

24 **NOES:**

25 **ABSENT:**

26 **ABSTAIN:** Commissioner Dominguez

27 
28 **MARTELL B. MONTGOMERY**, Chairperson
CARLSBAD PLANNING COMMISSION

ATTEST.

29 
30 **MARCELA ESCOBAR-ECK**
31 Planning Director

ORDINANCE NO..

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CARLSBAD, CALIFORNIA, APPROVING A PRECISE DEVELOPMENT PLAN PDP 00-02 FOR (1) THE EXISTING 95-ACRE ENCINA POWER STATION (EPS), LOCATED AT 4600 CARLSBAD BOULEVARD IN LOCAL FACILITIES MANAGEMENT ZONES 1 AND 3 AND GENERALLY NORTH OF CANNON ROAD, SOUTH OF AGUA HEADIONDA LAGOON, EAST OF THE PACIFIC OCEAN, AND WEST OF INTERSTATE 5, AND; (2) THE PROPOSED CARLSBAD SEAWATER DESALINATION PLANT, WHICH WOULD BE LOCATED ON THE GROUNDS OF THE EPS.

CASE NAME: PRECISE DEVELOPMENT PLAN AND
DESALINATION PLANT

CASE NO.: PDP 0-02

WHEREAS, the City Council of the City of Carlsbad, California has reviewed and considered a request to approve Precise Development Permit 00-02 for the Encina Power Station and Carlsbad Seawater Desalination Plant; and

WHEREAS, after procedures in accordance with the requirements of law, the City of Carlsbad has determined that the public interest indicates that said Precise Development Plan be approved.

WHEREAS, the City Council did on the ____ day of _____, hold a duly noticed public hearing as prescribed by law to consider said request; and

WHEREAS at said public hearing, upon hearing and considering all testimony and arguments, if any, of all persons desiring to be heard, said Commission considered all factors relating to the Specific Plan Amendment; and

NOW, THEREFORE, the City Council of the City of Carlsbad does ordain as follows:

SECTION I: That Precise Development Plan PDP 00-02, dated May 3, 2006, on file in the Planning Department and incorporated by reference herein is approved. All development of the property shall substantially conform to the approved plan as conditioned.

1 SECTION II: That the findings and conditions of the Planning Commission in
2 Planning Commission Resolution No. 6088 shall also constitute the findings and conditions of
3 the City Council.

4 EFFECTIVE DATE: This ordinance shall be effective thirty days after its
5 adoption, and the City Clerk shall certify to the adoption of this ordinance and cause it to be
6 published at least once in a publication of general circulation in the City of Carlsbad within
7 fifteen days after its adoption. Notwithstanding the preceding, this ordinance is subject to a
8 coastal development permit issued by the California Coastal Commission and shall not be
9 effective until it is approved by the California Coastal Commission.
10

11 INTRODUCED AND FIRST READ at the regular meeting of the Carlsbad City
12 Council on the _____ day of _____ 2006, and thereafter.

13 ////

14 ////

15 ////

16 ////

17 ////

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20 ////

21 ////

22 ////

23 ////

24 ////

25 ////

26 ////

27 ////

28 ////

1 PASSED, APPROVED AND ADOPTED at a regular meeting of the City Council
2 of the City of Carlsbad, California, on the _____ day of _____, by the following
3 vote, to wit:

4 AYES:

5 NOES:

6 ABSENT:

7 ABSTAIN:
8

9 APPROVED AS TO FORM AND LEGALITY
10

11 _____
RONALD R. BALL, City Attorney
12

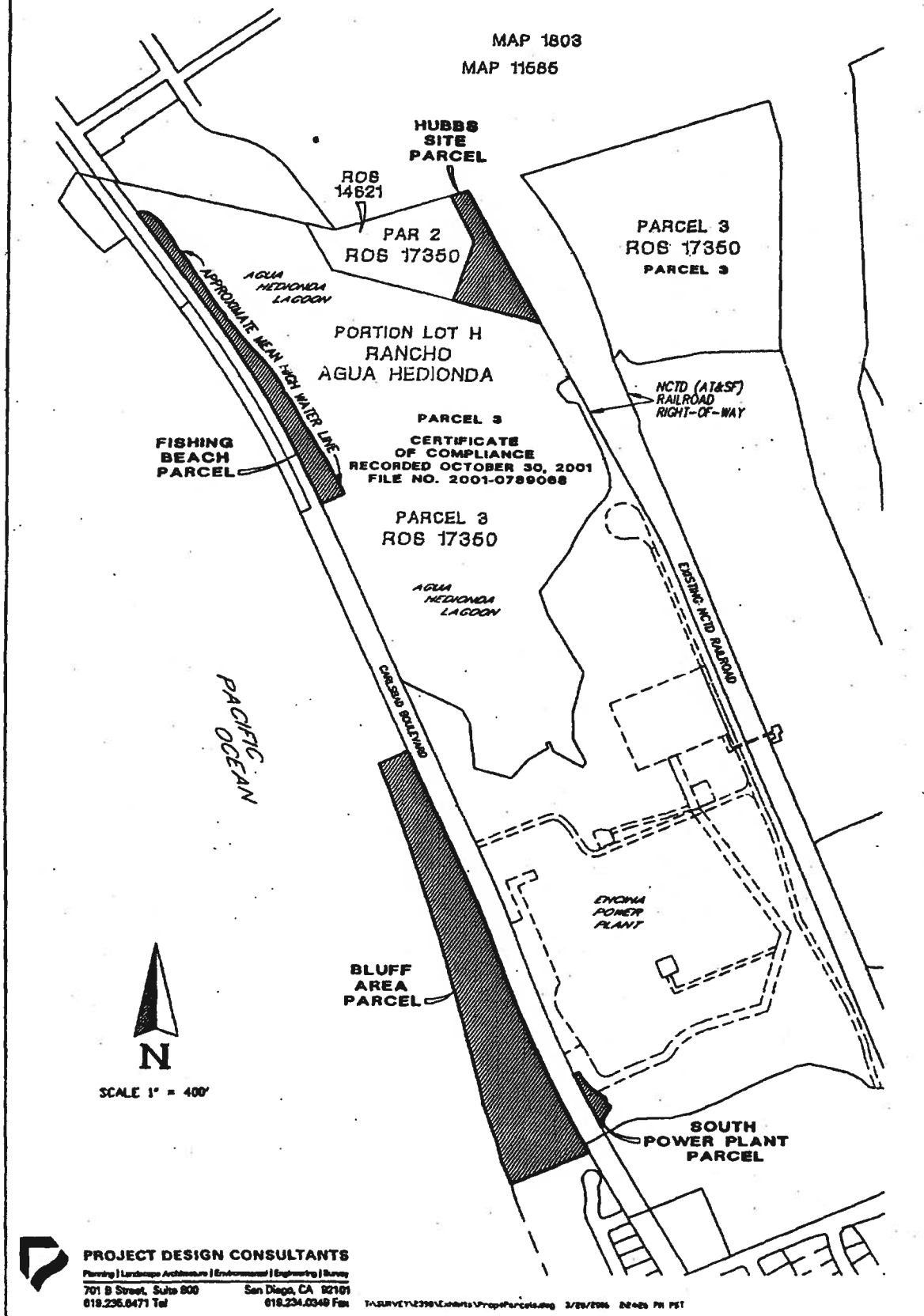
13
14 _____
CLAUDE A. LEWIS, Mayor
15

16 ATTEST:

17 _____
LORRAINE M. WOOD, City Clerk
18

19 (SEAL)
20
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28

POSEIDON DESALINATION PLANT PROPOSED PARCEL EXHIBIT



REPORT ON THE PROGRESS OF THE
RESEARCH DURING THE YEAR 1900



ATTACHMENT

RECORDED AT THE REQUEST OF
AND WHEN RECORDED MAIL TO:
STATE OF CALIFORNIA
State Lands Commission
Attn: Title Unit
100 Howe Avenue, Suite 100-South
Sacramento, CA 95825-8202

STATE OF CALIFORNIA
OFFICIAL BUSINESS
Document entitled to free recordation
pursuant to Government Code Section 27383

SPACE ABOVE THIS LINE FOR RECORDER'S USE

STATE OF CALIFORNIA
STATE LANDS COMMISSION

AMENDMENT OF LEASE PRC 8727.1

WHEREAS, the State of California, acting through the State Lands Commission, hereinafter called Lessor, and, Cabrillo Power I LLC, hereinafter called Cabrillo, have heretofore entered into an agreement designated as Lease PRC 8727.1, authorized by the Lessor on May 10, 2007 and executed August 14, 2007, whereby the Lessor granted to said Lessee a General Lease – Industrial Use covering certain State Land situated in San Diego County, hereinafter referred to as Lease Premises (“Lease Premises”); and

WHEREAS, Section 4, Paragraph 15(e) provides that the Lease may be terminated and its terms, covenants and conditions amended, revised or supplemented only by mutual written agreement of the parties; and

WHEREAS, Cabrillo and Poseidon (Channelside) LLC, hereafter referred to as Poseidon, have entered into an Agreement dated July 11, 2003; and

WHEREAS, the Agreement between the Cabrillo and Poseidon provides for a use of the Lease Premises that is not allowed under current provisions contained in the Lease; and

WHEREAS, Poseidon has applied to the Lessor to use the Lease Premises for desalination purposes; and

WHEREAS, by reason of the foregoing, it is now the desire of the parties to amend the foregoing Agreement.

NOW THEREFORE, the parties hereto agree as follows:

SECTION 1 – BASIC PROVISIONS and MAILING ADDRESS is amended to include Poseidon as a Co-Lessee, whose mailing address is 501 W. Broadway, Suite 1260, San Diego, CA 92101. Any reference to “Lessee” in this lease shall refer to both Cabrillo and Poseidon as Co-Lessees.

SECTION 1 – LAND USE OR PURPOSE is amended to include desalination use of the existing improvements by Poseidon.

SECTION 2 – SPECIAL PROVISIONS shall be amended to include the following amendment to paragraph 8 (which replaces the prior paragraph 8) and to add paragraphs 10 through 23 as separate obligations of Poseidon:

8. Authorized Uses:

It is the intent of the parties to this lease that the improvements and activities authorized herein are for the exclusive use of the Co-Lessees, Cabrillo and Poseidon, in conjunction with Cabrillo's existing power plant cooling water system involving the intake of sea water and the commingling of brine water discharge from Poseidon's desalination facility. The test desalination facility shall cease operation prior to the operation of the Poseidon desalination facility.

10. Poseidon shall, at all times during the term of the Lease, comply with the Energy Minimization and Greenhouse Gas Reduction Plan (the GHG Plan), as adopted by the California Coastal Commission on August 6, 2008, except that, notwithstanding the provisions of that Plan:

- a) In addition to Poseidon's offset requirements under the GHG Plan, Poseidon shall be deemed to have fully offset construction and operational impacts of the desalination facility by obtaining an additional 25,000 tons of carbon offsets/Renewable Energy Certificates (RECs), subject to the verification procedures in the GHG Plan, as a one-time obligation, to be purchased prior to operation of the desalination facility;
 - b) The provisions of Section III(E) of the Energy Minimization and Greenhouse Gas Reduction Plan (the GHG Plan), as adopted by the California Coastal Commission on August 6, 2008, entitled, "Contingency if No GHG Reduction Projects are Reasonably Available," shall apply to Poseidon's lease, except that if:
 - i) offsets in an amount necessary to mitigate the Project's GHG emissions are not reasonably available; ii) the "market price" for carbon offsets or RECs is not reasonably discernable; (iii) the market for offsets or RECs is suffering from significant market disruptions or instability; or (iv) the market price has escalated to a level that renders the purchase of offsets/RECs economically infeasible to the Project, then: Poseidon may delay or postpone acquisition of carbon offsets or RECs required under this lease for a period of up to three years from the date acquisition of the offset is due, provided that: i) Poseidon shall bank the minimum purchase price of \$10 per ton of carbon required to be offset per year during the market disruption as required under Section III(E) of the GHG Plan; and ii) that within three years from the date that acquisition of the annual offset would otherwise be due, Poseidon shall acquire those carbon offsets or RECs as required under this lease for that annual offset, regardless of cost per ton of carbon offsets required.
 - c) This sub-paragraph was intentionally left blank.
 - d) This sub-paragraph was intentionally left blank.
11. a) Poseidon shall, at all times during the term of the Lease, comply with the Marine Life Mitigation Plan, as adopted by the California Coastal Commission on August 6, 2008. Poseidon will provide copies of all reports that are required to be

provided to the California Coastal Commission to the Lessor's Executive Officer at the time any such reports are required to be submitted to the California Coastal Commission. The restoration project shall require up to 55.4 acres of wetlands restoration to be implemented in two Phases, with the first Phase (Phase I) comprising not less than 37 acres of wetlands restoration, and the second Phase (Phase II) comprising up to an additional 18.4 acres. Obligations for Phase II of the wetland mitigation comprise 18.4 acres, but may be proportionally reduced by the California Coastal Commission if it finds that Poseidon has reduced marine life impacts caused by entrainment and impingement.

- b) The provisions of the Marine Life Mitigation Plan notwithstanding, Poseidon shall request an amendment to Lease PRC 8727.1 if Poseidon desires to receive mitigation credits for direct benefits to marine life from dredging that would otherwise be required pursuant to compliance with the Marine Life Mitigation Plan.
 - c) Poseidon shall at all times during the term of the Lease, comply with the post restoration monitoring and remediation requirements set forth in the Marine Life Mitigation Plan Section 5.4 for ensuring the success of the wetlands restoration site(s), provided that the standards include success criteria from four existing relatively undisturbed sites and that Poseidon achieve a 95% confidence level of success for the restoration required. Should the Coastal Commission amend Section 5.4 at any time, Poseidon shall request amendment of this Lease.
12. Poseidon, without interference with, or interruption of, powerplant scheduled operations and at its sole cost and expense, shall use the best available design, technology, and mitigation measures at all times during which this Lease is in effect to minimize the intake (impingement and entrainment) and mortality of all forms of marine life associated with the operation of the desalination facility as determined by the San Diego Regional Water Quality Control Board or any other federal, state, or local entity having applicable jurisdiction.
13. As reasonably determined by the Lessor, the monitoring, maintenance, and operation of the wetland restoration site(s) and the reference site(s) may be modified to conform with equivalent or superior standards and requirements developed by the San Diego Regional Water Quality Control Board or the California Coastal Commission or any other federal, state, or local entity having applicable jurisdiction.
14. Within ten years from the effective date of this Amendment, or upon such earlier time as agreed to by the Lessor, or upon notice by Cabrillo that it will no longer require the use of the Lease Premises for the purposes of generating electrical power, Lessor will undertake an environmental review of the ongoing impacts of operation of the desalination facility to determine if additional requirements pursuant to Special Provision paragraph number 12, above, are required. Lessor, at its sole discretion, may hire a qualified independent environmental consultant, at the sole expense of Poseidon, with the intent to analyze all environmental effects of facility operations and alternative technologies that may reduce any impacts found. Lessor may require, and Poseidon shall comply with, such additional requirements as are reasonable and as are consistent with applicable state and federal laws and regulations and as Lessor determines are appropriate in light of the environmental review.

15. Poseidon shall provide copies of all regulatory monitoring and compliance reports pertaining to the operation of its desalination facility to Lessor at the time of submitting such reports with any regulatory agency.
16. a) Poseidon shall provide Lessor with
 - i) a non-cancelable operational performance deposit in the amount of \$1,000,000, prior to commencement of construction, but not more than one year from the effective date of the Lease Amendment. At any time during the term of the Lease, Lessor may require an increase in the amount of the performance deposit to reflect economic inflation or to cover any additionally authorized improvements, alterations, or purposes or any modification of rental.
 - and-
 - ii) a non-cancelable wetland performance deposit in the amount of \$3,700,000 prior to commencement of operation of the desalination facility to ensure the implementation of compensatory mitigation, monitoring and maintenance as described in the approved plan. Fifty percent (50%) of the wetland performance deposit shall be released when the Lessor's Executive Officer determines that construction has been completed in conformance with the plans approved by the California Coastal Commission. The remainder of the wetland performance deposit for Phase I of the restoration project shall be proportionally and incrementally released based upon the productivity of the wetlands as determined by Lessor's Executive Officer, based upon the performance standards as outlined in the Marine Life Mitigation Plan, as adopted by the California Coastal Commission on August 6, 2008, provided that any further modification to the performance standards in Marine Life Mitigation Plan Section 5.4, shall require amendment of Lease PRC 8727.1.
- b) The performance deposit may take one of the forms set out below or some other form acceptable to Lessor, and shall guarantee Poseidon's full and faithful performance of all the terms, covenants, and conditions of this Lease;
 - (i) Cash;
 - (ii) A renewable Time Certificate of Deposit from a financial institution authorized to do business in the State of California, wherein the principal sum is made payable to the State or order and both the financial institution and the form of the certificate are approved by the Lessor's Staff;
 - (iii) A Non-Cancelable Bond issued by a responsible surety company authorized to do business in California, as approved by the Lessor's Staff, provided:
 - (A) The Bond is automatically renewable and any alteration of the bond shall first require 30 days' prior written notice to Lessor, and
 - (B) The Bond shall guarantee payment in cash to Lessor of the performance deposit amount upon receipt of written demand from Lessor.

- (iv) An irrevocable Standby Letter of Credit in a form acceptable to the Lessor's staff.
 - c) Regardless of the form in which Poseidon elects to make said performance deposit(s), all or any portion of the principal sum shall be available unconditionally to Lessor for correcting any default or breach of this lease by Poseidon, its successors or assigns or for payment of reasonable and actual expenses incurred by Lessor as a result of the failure of Poseidon, its successors or assigns, to perform faithfully any and all of the terms, covenants, and conditions of this Lease. The wetland performance deposit referenced in subsection (a)(ii) above shall only be available to cure defaults related to section 11 of this lease. The performance deposit referenced in subsection (a)(i) above shall be available to cure all other defaults under the lease.
 - d) Should Poseidon elect to assign or provide a Time Certificate of Deposit to fulfill the performance deposit requirements of this Lease, the agreement entered into by Poseidon with a financial institution to establish a deposit necessary to permit assignment or issuance of a certificate may allow the payment to Poseidon or order of interest accruing on account of said deposit.
 - e) Should the entire performance deposit or any portion thereof be appropriated and applied by Lessor for the payment of overdue rent or any such other sum due and payable to Lessor by Poseidon, then Poseidon, within 30 days after written demand by Lessor, restore said performance deposit to the required amount. This Paragraph D is only applicable to the performance deposit and shall not be applicable to the wetland performance deposit.
 - f) Poseidon shall maintain the required performance deposit throughout the Lease term. Failure to do so shall be deemed a default and shall be grounds for immediate termination of this Lease Amendment as the same relates to the additional use approved by this Lease Amendment.
 - g) The performance deposit shall be rebated, reassigned, released, or endorsed to Poseidon or order, as Poseidon may direct at such time as Poseidon has vacated the premises, is not in default and has no further obligation under the Lease. Interest on the performance deposit required hereunder shall accrue for the benefit of Poseidon and shall be made available to Poseidon from time to time except as the same is required to remedy or cure any default by Poseidon; provided, however, that if the performance deposit is given in the form of cash then Poseidon shall not be entitled to any interest thereon.
17. Poseidon shall, as a separate obligation, provide to Lessor, prior to commencement of construction, in the form attached to this Lease Amendment as Exhibit A, or in a form approved by Lessor's staff, an unconditional guarantee by parent company Poseidon Water LLC for full performance by Poseidon of all the obligations under the Lease.
18. Poseidon shall, prior to the use of the Lease Premises for desalination purposes, provide to Lessor a detailed report of compliance with Order No. R9-2006-0065, NPDES No. CA0109223, adopted by the San Diego Regional Water Quality Control Board, on August 16, 2006, and became effective on October 1, 2006, and any subsequent amendments thereto.

19. Poseidon shall provide a written report to the Lessor for use at a public hearing to be conducted by Lessor within five years of the effective date of this lease amendment in order to publicly review and evaluate Poseidon's compliance with the terms of the lease as provided for in Section 4, Paragraph 6 including, but not limited to, compliance with the federal Clean Water Act, and California's Porter-Cologne Water Quality Control Act.
20. In the event that Poseidon fails to comply with any or all of its separate obligations under this Lease, Lessor may terminate Poseidon's rights under this Lease Amendment. Such termination shall not affect any or all of Cabrillo's rights or obligations under this Lease. Additionally, assuming that Cabrillo is not otherwise in default of any of its separate obligations under this Lease, no default by Poseidon of any or all of its separate obligations under this Lease will give Lessor the right to terminate any of Cabrillo's rights under this Lease.
21. Poseidon shall not make any changes in use or operation of the intake channels and jetties without prior authorization by Lessor.
22. Poseidon shall be responsible for reimbursing all of Lessor's reasonable staff expenses incurred by Lessor and its Staff to monitor compliance by Poseidon of all of its reservations, terms, covenants and conditions of the Lease for the term of the Lease. Upon execution of the Lease Amendment, Poseidon shall execute a Reimbursement Agreement with the Lessor specifying the mechanism by which all actual costs by Lessor shall be reimbursed. An expense deposit of \$25,000 shall be paid to and held by the Lessor as a cash surety to ensure performance of this paragraph.
23. Poseidon acknowledges that it is responsible for Section 4 General Provisions of Lease PRC 8727.1, except as otherwise noted below.

SECTION 2 – SPECIAL PROVISIONS shall be amended to include the following paragraph 24 as a separate obligation of Cabrillo:

24. Cabrillo shall notify Lessor in writing prior to discontinuing its use of the Lease Premises in connection with the production of electricity. Upon receipt of notification by Lessor, Cabrillo may apply to Lessor for approval of an assignment of its obligations under the lease to Poseidon. In considering Cabrillo's application for approval of an assignment, Lessor will take into account Poseidon's past performance and the likelihood that Poseidon could and would carry out all obligations under the lease as sole lessee. In the event that Lessor finds that there is a substantial probability that Poseidon would not or could not carry out all such obligations, then Lessor may disapprove the assignment, in which case, at Cabrillo's option, the lease would terminate or Cabrillo would remain as Co-Lessee.

SECTION 2 – SPECIAL PROVISIONS shall be amended to include the following paragraph 25:

25. Cabrillo and Poseidon shall be jointly and severally liable for all provisions of this Lease except for those provisions that specify a separate obligation of one or the other.

SECTION 4 – GENERAL PROVISIONS is amended as follows:

Paragraph 11, Default and Remedies, (a) Default, Paragraph (4) is hereby deleted in its entirety and is replaced with the following:

- (4) Co-Lessees' failure to obtain, maintain and comply with all necessary governmental permits or other entitlements;

The effective date of this amendment to the aforesaid Agreement shall be August 22, 2008. This Amendment, consisting of seven pages together with Exhibit A, consisting of four pages, is a portion of document number PRC 8727.1, with a beginning date of December 14, 2006, consisting of four sections with a total of fourteen pages. All other terms and conditions of this lease shall remain in full force and effect. This Agreement will become binding on the Lessor only when duly executed on behalf of the State Lands Commission of the State of California.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date hereafter affixed.

CO-LESSEES:

*CABRILLO POWER I, LLC

LESSOR:

STATE OF CALIFORNIA
STATE LANDS COMMISSION

By: Keith Richards

By: _____

Title: PRESIDENT

Date: _____

Date: NOVEMBER 24, 2008

*POSEIDON RESOURCES (CHANNELSIDE), LLC

By: Peter MacLagan

Title: VICE PRESIDENT

Date: November 24, 2008



State of California

County of San Diego

On November 24, 2008 before me, Jesse Alo, Notary Public, personally appeared Keith S Richards and Peter MacLagan who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal. Jesse Alo

*All signatures must be acknowledged

This Lease was authorized by the California State Lands Commission on _____

EXHIBIT A
PRC 8727.1 LEASE AMENDMENT

GUARANTY

1. **Poseidon Water LLC, a Delaware limited liability company** ("Guarantor"), owns **Poseidon Carlsbad LLC**, which in turn owns **Poseidon Resources (Channelside) LLC** (Poseidon Resources). POSEIDON RESOURCES is a Co-Lessee under General Lease – Industrial Use Lease No. PRC 8727.1 (the "Lease") granted by the State of California acting by and through the State Lands Commission ("Lessor"). For valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the undersigned, Guarantor hereby unconditionally guarantees performance of all the terms, covenants, conditions, agreements, and obligations of POSEIDON RESOURCES under the Lease in the same manner and to the same extent as though Guarantor were the co-lessee thereunder (the "Obligation").
2. This is a continuing and absolute Guaranty relating to the Obligation, irrespective of any release of, or granting of time or any other forbearance or indulgence to POSEIDON RESOURCES. Modifications of or alterations or changes which may be made in the Lease, or in the terms, duties and obligations imposed thereunder shall not in any way release the Guarantor, either in whole or in part, from any liability arising under this Guaranty. Notice to the Guarantor of any such modifications, alterations, changes, extensions or forbearance is hereby waived.
3. If, during the term this Guaranty is in effect, POSEIDON RESOURCES fails to timely perform any Obligation including without limitation, any obligation of POSEIDON

RESOURCES to make any monetary payment provided for thereunder, and fails to cure any such failure in the manner and within the period of time provided within the Lease, Guarantor will tender performance of such obligation directly for Lessor's benefit promptly upon Lessor's demand therefor, and without Lessor having to make prior demand upon POSEIDON RESOURCES. Notwithstanding the preceding sentence, the obligations of the Guarantor hereunder are independent of the obligations of POSEIDON RESOURCES, and a separate action or actions may be brought and prosecuted against the Guarantor whether an action is brought against POSEIDON RESOURCES or whether POSEIDON RESOURCES is joined in any such action or actions.

4. The Guarantor waives: (a) any right to require the Lessor to (i) proceed against POSEIDON RESOURCES; (ii) proceed against or exhaust any security or other guarantor; or (iii) pursue any other remedy in Lessor's power whatsoever; and (b) notice of acceptance of this Guaranty.
5. The Guarantor represents and warrants to Lessor that (a) all authorizations, approvals, notices, filings and other action required by the internal documents governing the Guarantor and the regulatory authorities having jurisdiction over the Guarantor in connection with the due authorization, execution and delivery of this Guaranty has been duly obtained or made and are in full force and effect; and (b) this Guaranty has been duly executed and delivered by the Guarantor and constitutes the legal, valid and binding obligation of the Guarantor enforceable against the Guarantor in accordance with its terms.

6. THIS GUARANTY SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF CALIFORNIA WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAWS. The Guarantor, by its execution of this Guaranty, hereby submits to the non-exclusive jurisdiction of the courts of the State of California and of the United States of America in connection with any action or proceeding relating to this Guaranty and hereby consents to service of process or other summons in any such action or proceeding brought by Lessor against it in any such court by means of registered mail to the last known address of the Guarantor. Nothing herein, however, shall prevent service of process by any other means permitted by law or the bringing of any such action or proceeding in any other jurisdiction.
7. None of the terms or provisions hereof may be waived, altered, modified or amended except by a writing duly signed by the Lessor and by the undersigned. If any term hereof shall be held to be invalid, illegal or unenforceable in any jurisdiction, the validity of all other terms shall in no way be affected thereby in that jurisdiction, and the unenforceability in that jurisdiction shall in no way affect the validity or enforceability of that or any other terms hereof in any other jurisdiction.
8. This Guaranty shall be binding on the Guarantor and its successors and assigns and shall inure to the benefit of the Lessor. This Guaranty shall not be deemed to benefit any person except POSEIDON RESOURCES and Lessor.

In witness whereof, the Guarantor has caused this Guaranty to be executed on its behalf
by its duly authorized representative, as of this _____ day of August, 2008.

POSEIDON WATER LLC

By: _____

Name: _____

Title: _____

(Attach Notary of Authorized Signature)

(Attach Delegation of Authority of Signatory)

in the United States, the Department of Justice has been

asked to provide information on the activities of the

Department of Justice.

The Department of Justice has been asked to provide

information on the activities of the Department of Justice.

The Department of Justice has been asked to provide

information on the activities of the Department of Justice.

The Department of Justice has been asked to provide

ATTACHMENT

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400



Click here to go
to the report addendum.

W16a

RECOMMENDED REVISED CONDITION COMPLIANCE FINDINGS

November 21, 2008

To: To Commissioners and Interested Parties

From: Peter Douglas, Executive Director
Alison Dettmer, Deputy Director
Tom Luster, Staff Environmental Scientist

Regarding: **Condition Compliance for CDP No. E-06-013** – Poseidon Resources (Channelside), LLC; **Special Condition 8:** Submittal of a Marine Life Mitigation Plan

Commissioners on Prevailing Side: Commissioners Achadjian, Blank, Burke, Hueso, Kram, Lowenthal, Neely, Potter, Reilly, Shallenberger, and Chair Kruer

Exhibit 1: Approved Marine Life Mitigation Plan (MLMP)

Exhibit 2: Staff's Proposed Draft MLMP Conditions (June 2008)

Exhibit 3: Poseidon's August 2, 2008 Proposed MLMP and attachments

Exhibit 4: Transcript of August 6, 2008 hearing (Commission deliberations only)

STAFF NOTE

Staff prepared these recommended Revised Findings to reflect the Commission's August 6, 2008 decision approving a Marine Life Mitigation Plan for the Poseidon desalination facility in Carlsbad, San Diego County. The Plan is required pursuant to **Special Condition 8** of Coastal Development Permit #E-06-013. The Commission's approval at the August hearing included modifications to the Plan proposed by both staff and Poseidon. Because the Commission's action differed from staff's recommendation, revised findings are necessary. The recommended Revised Findings herein support the Plan as approved by the Commission and are based on staff's review of the August 6, 2008 hearing transcript and the record before the Commission. Recommended changes from the August 6th document are shown in ~~striketrough~~ and **bold underline** text.

Please note that the Commission required Poseidon to submit within 60 days of Commission approval a revised Plan for Executive Director review and approval that incorporates the Commission's approved modifications. Poseidon submitted a plan in early October 2008, which has been reviewed and approved by the Executive Director, and is attached as Exhibit 1.

SUMMARY

On November 15, 2007, the Commission conditionally approved CDP E-06-013 for Poseidon Resources (Channelside), LLC (Poseidon) for construction and operation of a desalination facility to be located adjacent to the Encina Power Plant in Carlsbad, San Diego County. As part of the Adopted Findings for its approval, the Commission imposed **Special Condition 8**, which required Poseidon to submit for further Commission review and approval, a Marine Life Mitigation Plan (**MLMP, or the Plan**).¹

In June 2008, Commission staff provided to Poseidon recommended conditions to include in its Plan (see Exhibit 2). On July 7, 2008, Poseidon submitted to Commission staff ~~its a~~ proposed Marine Life Mitigation Plan (the Plan). On August 2, Poseidon submitted a revised version of that Plan (see Exhibit 3). ~~This report provides staff's analysis of the Plan, staff's evaluation of whether the Plan conforms to the Adopted Findings and Special Condition 8, and staff's recommendation as to whether the Commission should approve the Plan.~~

In brief, staff's analysis shows that the Plan as submitted does not conform to the Adopted Findings and **Special Condition 8**. However, if modified as described herein, staff believes the modified Plan would conform to the applicable Findings and **Special Condition 8**. Staff therefore recommends the Commission ~~approve~~ the Plan, as modified herein. The modifications staff has identified as being necessary for Plan approval are summarized below and are further detailed in Sections 1.1 and 4.0 of this memorandum. At its August 6, 2008 hearing, the Commission approved a modified Plan. Because the Commission's action differed from staff's recommendation, revised findings are necessary.

~~Staff recommends the Plan be modified to include the following~~The Commission modified the Plan as follows:

- 1) Poseidon shall ~~is to~~ create or restore ~~between-up to 55.4 and 68~~ acres of coastal estuarine wetland habitat within the Southern California Bight. For Phase I, within 10 months of issuance of the desalination facility's coastal development permit (CDP), Poseidon must submit proposed site(s) and a Preliminary Restoration Plan for Commission review and approval. Within two years of issuance of the CDP for the desalination facility, Poseidon must submit a complete CDP application to restore at least 37

¹ The Commission's approval of this CDP also included **Special Condition 10**, which required Poseidon to submit for Commission review and approval an Energy Minimization and Greenhouse Gas Reduction Plan. ~~That Special Condition and Poseidon's submitted plan are evaluated in a separate staff report under Item W5a of the August 6, 2008 Commission hearing.~~ The Commission approved the Energy Minimization and Greenhouse Gas Emission Reduction Plan at its August 6, 2008 hearing. The recommended Revised Findings for that Plan are on the Commission's December 2008 hearing agenda as Item W16b.

acres of estuarine wetlands. For Phase II, Poseidon must within five years of issuance of the Phase I CDP submit a complete CDP application either to restore an additional 18.4 acres of estuarine wetlands or to propose reducing or eliminating this Phase II restoration requirement by instead implementing technologies not currently available or feasible that would reduce entrainment levels below currently anticipated levels or by undertaking dredging in Agua Hedionda Lagoon in a manner that warrants mitigation credit. Poseidon may apply to do all 55.4 acres of restoration during Phase I.

- 2) Poseidon shall implement its Marine Life Mitigation Plan in conformity to the conditions provided in Exhibit 2 of ~~this memorandum~~ these Findings.
- 3) Within 60 days of the Commission's approval of ~~this modified the~~ Plan (i.e., as approved at the August 6, 2008 hearing), Poseidon shall submit for the Executive Director's review and approval a revised Plan that includes these modifications.

The first ~~recommendation~~ modification is based on a review of Poseidon's proposed Plan by staff and the Commission's independent scientific experts.² Poseidon's entrainment study identified impacts that these reviewers believe require more mitigation than Poseidon ~~has had~~ proposed. ~~Staff further believes that t~~ This amount of mitigation is necessary to ensure the project conforms to Special Condition 8 and Sections 30230, 30231, and 30260 of the Coastal Act. Based on results from Poseidon's entrainment study, this range in acreage—from 55 to 68 acres—represents the range in statistical confidence that would 55.4 acres of wetland restoration will provide the Commission with 80% (i.e., 55 acres) to 95% confidence (i.e., 68 acres) that the mitigation would will fully mitigate the impacts identified in the study. Section 4.2 of this memorandum—these Findings provides a more detailed discussion.³

The second ~~recommendation is meant to~~ modification ensures that mitigation is timely and successful. It ~~would requires~~ Poseidon to implement its mitigation subject to the conditions similar to those the Commission required of Southern California Edison at its San Dieguito Restoration Project (see, for example CDPs #183-73 and #6-04-88). Although Poseidon's current Plan does not commit to provide mitigation at a particular site, Poseidon had previously identified a mitigation site in San Dieguito Lagoon adjacent to Edison's as the best its preferred location to mitigate for its entrainment impacts. ~~Staff recommends the two projects be held to similar standards. The Commission's scientific experts concur with this recommendation~~ recommend that the two restoration projects be subject to similar standards (see Exhibit 1 – Approved Conditions for Marine Life Mitigation Plan). Section 4.2 provides a more detailed discussion of this ~~recommendation~~ modification.

² Staff consulted with members of the Commission's ~~Marine Review Committee~~ Scientific Advisory Panel (SAP). Committee members are identified in Section 3.0 of this memorandum.

³ ~~As an alternative to staff's recommendation, the Commission may wish to require mitigation in a manner similar to past decisions in which it applied a mitigation ratio to the identified level of impact. If the Commission selects this alternative approach, staff recommend mitigation be provided at between a 2:1 to 3:1 ratio, which would result in from 85 to 127.5 acres of coastal estuarine wetland habitat as mitigation.~~

The third ~~recommendation~~ **modification** is meant to help **ensure** Poseidon and the Commission implements the approved mitigation plan **as approved**. Additionally, the 60-day deadline in the recommendation ~~would be~~ **is** consistent with the requirement imposed by the San Diego Regional Water Quality Control Board that Poseidon provide a mitigation plan for Board approval by October 9, 2008.⁴

~~With these recommended modifications, staff believes Poseidon's Plan would conform to applicable provisions of **Special Condition 8**.~~

TABLE OF CONTENTS

| | | |
|-------|--|----|
| 1.0 | MOTION & RESOLUTION | 4 |
| 1.1 | Recommended Modifications | 5 |
| 2.0 | STANDARD OF REVIEW | 6 |
| 3.0 | Plan Development and Review | 7 |
| 4.0 | ANALYSIS FOR CONFORMITY TO SPECIAL CONDITION 8..... | 8 |
| 4.1 | Plan Description..... | 9 |
| 4.2 | Analysis – Adequacy of Mitigation | 10 |
| 4.2.1 | Analysis of Poseidon's Entrainment Study | 10 |
| 4.2.2 | Determining the mitigation needed to address identified impacts..... | 13 |
| 4.2.3 | Analysis of Proposed Mitigation Phasing..... | 16 |
| 4.2.4 | Analysis of dredging as project mitigation..... | 17 |
| 4.3 | Analysis – Assurance that Mitigation will Succeed | 18 |

1.0 MOTION & RESOLUTION

Motion:

"I move that the Commission approve the Marine Life Mitigation Plan attached to the staff recommendation as Exhibit 1 if modified as shown in Section 1.1 below and Exhibit 2 of this memorandum, as compliant with **Special Condition 8** of CDP E-06-013. I move that the Commission adopt the revised findings in support of the Commission's action on August 6, 2008 to approve the Marine Life Mitigation Plan as compliant with **Special Condition 8** of CDP E-06-013."

⁴ The Regional Board's Order, adopted on April 9, 2008 requires, in part: "Within six months of adoption of this resolution, Poseidon shall submit to the Regional Board Executive Officer, for approval by the Regional Board an amendment to the Plan that includes a specific proposal for mitigation of the impacts, by impingement and entrainment upon marine organisms resulting from the intake of seawater from Agua Hedionda Lagoon, as required by Section VI.C.2(e) of Order No. R9-2006-0065; and shall resolve the concerns identified in the Regional Board's February 19, 2008 letter to Poseidon Resources, and the following additional concerns:

- a) Identification of impacts from impingement and entrainment;
- b) Adequate monitoring data to determine the impacts from impingement and entrainment;
- c) Coordination among participating agencies for the amendment of the Plan as required by Section 13225 of the California Water Code;
- d) Adequacy of mitigation; and
- e) Commitment to fully implement the amendment to the Plan.

Resolution to Approve:

The Commission hereby finds that the compliance plan titled “Marine Life Mitigation Plan” prepared and submitted by the permittee, Poseidon Resources (Channelside) LLC, dated July 3, 2008, if modified as shown in Section 1.1 and Exhibit 2 of the July 24, 2008 Commission staff report, is adequate, if fully implemented to comply with Special Condition 8 of CDP E-06-013. The Commission hereby adopts the findings set forth below for the Commission’s approval of the Marine Life Mitigation Plan as compliant with Special Condition 8 of CDP E-06-013 on the ground that the findings support the Commission’s decision made on August 6, 2008 and accurately reflect the reasons for it.

Staff Recommendation:

Staff recommends a “YES” vote, which will result in the approval of the modified plan as compliant with the Adopted Findings and Special Condition 8 and adoption of the motion, resolution, and findings herein. The motion passes only by an affirmative vote of a majority of the Commissioners present. Staff’s recommended modifications are provided in Section 1.1 below, and further detailed in Section 4.0 of this memorandum. If these recommended modifications are not incorporated into the Plan, staff recommends the Commission find the Plan, as submitted, does not conform to Special Condition 8 and staff would therefore recommend the Plan be denied. Staff recommends a “YES” vote on the motion. Passage of the motion will result in the adoption of revised findings as set forth in this staff report. The motion requires a majority vote of the members from the prevailing side present at the revised findings hearing, with at least three of the prevailing members voting. Only those Commissioners on the prevailing side of the Commission’s action are eligible to vote on the revised findings.

1.1 RECOMMENDED MODIFICATIONS

- 1) Poseidon shall create or restore between up to 55.4 and 68 acres of coastal estuarine wetland habitat within the Southern California Bight. For Phase I, within 10 months of issuance of the desalination facility’s coastal development permit (CDP), Poseidon must submit proposed site(s) and a Preliminary Restoration Plan for Commission review and approval. Within two years of issuance of the CDP for the desalination facility, Poseidon must submit a complete CDP application to restore at least 37 acres of estuarine wetlands. For Phase II, Poseidon must within five years of issuance of the Phase I CDP submit a complete CDP application either to restore an additional 18.4 acres of estuarine wetlands or to propose reducing or eliminating this Phase II restoration requirement by instead implementing technologies not currently available or feasible that would reduce entrainment levels below currently anticipated levels or by undertaking dredging in Agua Hedionda Lagoon in a manner that warrants mitigation credit. Poseidon may apply to do all 55.4 acres of restoration during Phase I.

- 2) Poseidon shall implement its Marine Life Mitigation Plan in conformity to the conditions provided in Exhibit 2 of ~~this memorandum~~ **these Findings**.
- 3) Within 60 days of the Commission's approval of ~~this modified the Plan~~ **(i.e., as approved at the August 6, 2008 hearing)**, Poseidon shall submit for the Executive Director's review and approval a revised Plan that includes these modifications.

2.0 STANDARD OF REVIEW

The ~~Commission must determine whether the~~ subject plan **must** conform to **Special Condition 8 of CDP E-06-013**, which states:

"Marine Life Mitigation Plan: PRIOR TO ISSUANCE OF THE PERMIT, the Permittee shall submit to and obtain from the Commission approval of a Marine Life Mitigation Plan (the Plan) that complies with the following:

- a) *Documentation of the project's expected impacts to marine life due to entrainment and impingement caused by the facility's intake of water from Agua Hedionda Lagoon. This requirement can be satisfied by submitting a full copy of the Permittee's Entrainment Study conducted in 2004-2005 for this project.*
- b) *To the maximum extent feasible, the mitigation shall take the form of creation, enhancement, or restoration of aquatic and wetland habitat.*
- c) *Goals, objectives and performance criteria for each of the proposed mitigation sites. It shall identify specific creation, restoration, or enhancement measures that will be used at each site, including grading and planting plans, the timing of the mitigation measures, monitoring that will be implemented to establish baseline conditions and to determine whether the sites are meeting performance criteria. The Plan shall also identify contingency measures that will be implemented should any of the mitigation sites not meet performance criteria.*
- d) *Requires submittals of "as-built" plans for each site and annual monitoring reports for no less than five years or until the sites meet performance criteria.*
- e) *Defines legal mechanism(s) proposed to ensure permanent protection of each site – e.g., conservation easements, deed restriction, or other methods.*

The Permittee shall comply with the approved Plan. Prior to implementing the Plan, the Permittee shall submit a proposed wetlands restoration project that complies with the Plan in the form of a separate coastal development permit application for the planned wetlands restoration project."

The Commission's **Permit Findings** supporting **Special Condition 8** state that the Plan is **to** ensure that all project-related entrainment impacts will be fully mitigated and that marine resources and the biological productivity of coastal waters, wetlands, and estuaries, will be enhanced and restored in compliance with Coastal Act Sections 30230 and 30231. The **Permit Findings** further state that the Plan must provide mitigation to the maximum extent feasible through creating, enhancing, or restoring aquatic and wetland habitat and must include acceptable performance standards, monitoring, contingency measures, and legal mechanisms to ensure permanent protection of the proposed mitigation sites.

3.0 PLAN DEVELOPMENT AND REVIEW

On November 15, 2007, the Commission approved CDP No. E-06-013 for Poseidon's proposal to construct and operate a desalination facility in Carlsbad, San Diego County. As part of that approval, the Commission required Poseidon, through **Special Condition 8**, to submit for additional Commission review and approval a Marine Life Mitigation Plan addressing the impacts that will be caused by the facility's use of estuarine water and entrainment of marine organisms.

~~Since~~ **After** the Commission's project approval in November 2007, staff and Poseidon ~~have~~ worked to develop a Plan that would meet the requirements of **Special Condition 8** and would be consistent with the Commission's **Permit** Findings. In March 2008, and as required by **Special Condition 8**, Poseidon provided a copy of its entrainment study for Commission staff review. Staff provided the study to Dr. Pete Raimondi, an independent scientist with expertise in evaluating entrainment studies, for his review and recommendations (described in more detail in Section 4.0 below).⁵ Dr. Raimondi provided the initial results of his review and recommendations to Poseidon in April 2008. In May 2008, staff conducted with Poseidon an interagency meeting with representatives from state and local agencies to determine what mitigation options might be available and feasible for Poseidon to include as part of its Plan.

Attendees included representatives from:

| | |
|--|--------------------------------|
| California Department of Fish and Game | City of Carlsbad |
| California Department of Transportation | City of Vista |
| California State Lands Commission | U.S. Fish and Wildlife Service |
| San Diego Regional Water Quality Control Board | |

In June 2008, based in part on concerns Poseidon expressed about Dr. Raimondi's review and recommendations, staff asked the Commission's ~~Marine Review Committee (MRC)~~ **Scientific Advisory Panel (SAP)**⁶ to review Dr. Raimondi's conclusions and make further

⁵ Dr. Raimondi is Professor and Chair of Ecology and Evolutionary Biology at the University of California, Santa Cruz Center for Ocean Health, Long Marine Lab. Dr. Raimondi is considered by many to be California's leading expert on entrainment analysis. He has been a key participant and reviewer of most of the entrainment studies done along the California coast during the past decade, including those done for the Diablo Canyon Nuclear Power Plant, the Huntington Beach Generating Station, Morro Bay Power Plant, and Moss Landing Power Plant. He is also a member of the Coastal Commission's ~~Marine Review Committee~~ **Scientific Advisory Panel (SAP)** responsible for determining mitigation needed for the San Onofre Nuclear Generating Station (SONGS) and providing review and oversight for the SONGS mitigation work at San Dieguito Lagoon.

⁶ The ~~Marine Review Committee~~ **SAP** is a team of independent scientists that provides guidance and oversight to the Commission on ecological issues associated with the San Dieguito Restoration Project. That Project is being implemented by Southern California Edison pursuant to requirements of coastal development permits issued by the Commission and is meant to mitigate for marine resources losses caused by the San Onofre Nuclear Generating Station (SONGS). The ~~Marine Review Committee~~ **SAP** currently consists of **Dr. Richard Ambrose**, Professor and Director of Environmental Science & Engineering Program, Department of Environmental Health Sciences, University of California Los Angeles; **Dr. John Dixon**, Senior Ecologist, California Coastal Commission; **Dr. Mark Page**, Marine Science Institute, University of California at Santa Barbara; **Dr. Pete Raimondi**, Professor and Chair of Ecology and Evolutionary Biology, University of California at Santa Cruz; **Dr. Dan Reed**, Marine Science Institute, University of California at Santa Barbara; **Dr. Steve Schroeter**, Marine Science Institute, University of

recommendations for Poseidon to include in its proposed Plan. The MRC-SAP review is described in more detail in Section 4.0.

Also in June 2008, staff provided Poseidon a copy of the conditions the Commission had required of Southern California Edison (Edison) for its wetland restoration project at San Dieguito Lagoon (see Exhibit 2). Until June, Poseidon had been proposing a site adjacent to Edison's as the best-its preferred site for its mitigation. Based on the Commission's Permit Findings and discussion at the November 2007 hearing, staff recommended to Poseidon that it incorporate modified versions of the Edison conditions into its proposed Plan to ensure the two adjacent mitigation sites would be subject to compatible and consistent mitigation requirements. These conditions are in Exhibit 21.

On July 7, 2008, staff received Poseidon's ~~currently~~ proposed Plan for review by the Commission (~~see Exhibit 1~~). On July 14, 2008, staff again consulted with the MRC-SAP to evaluate changes Poseidon had proposed in this most recent submittal. On August 2, 2008, Poseidon submitted a revised Poseidon's current proposed Plan, (see Exhibit 3). ~~and the~~ results of reviews by staff, Dr. Raimondi, and the MRC-SAP are described in Section 4.0 below.

4.0 ANALYSIS FOR CONFORMITY TO SPECIAL CONDITION 8

~~Staff's evaluation of the proposed Plan shows that the Poseidon's proposed Plan, as submitted, does did not ensure conformity to *Special Condition 8*. Staff recommends the Plan be modified~~ The Commission therefore required modifications to the Plan to address two main areas in which the Plan ~~does not yet~~ did not conform to the condition: 1) the adequacy of mitigation proposed in the Plan; and, 2) assurances that the Plan will result in successful mitigation being implemented in a timely manner.

Section 4.1 below describes the submitted Plan's key elements and the Commission's adopted modifications (shown in Exhibit 1). Sections 4.2 and 4.3 evaluate elements of the Plan that ~~staff believes require modification. Staff's recommendations~~ The modifications are based on review by staff and by members of the Commission's Marine Review Committee (MRC) Scientific Advisory Panel (SAP), as described in Section 3.0. They also reflect comments received from other agencies, including the U.S. Fish and Wildlife Service and the California State Lands Commission. ~~The discussions below also identify concerns Poseidon expressed about staff's recommendations and staff's response to those concerns. Staff believes its third recommendation~~ The third modification, which ~~would require~~ Poseidon to submit a revised Plan that incorporates these modifications, ~~would help~~ ensure the Commission and Poseidon in ~~implementing~~ implements the modified Plan.

4.1 PLAN DESCRIPTION

Poseidon's proposed Plan includes^d the following main elements:

- **Phased Mitigation Approach:** Poseidon proposes^d that it implement necessary mitigation in two phases. Phase I would result in 37 acres of wetland restoration or creation within the Southern California Bight. During this phase, Poseidon would also conduct technology review to determine whether new or developing technologies would be reasonably feasible to reduce entrainment. It would also conduct a new entrainment study ten years after beginning operations to determine whether additional mitigation is needed for the facility's entrainment impacts. Phase I would apply during the time Poseidon's desalination facility operations are concurrent with operations of the power plant's cooling water system.

Phase II would occur if the power plant stops operating or, for three consecutive years, operates at a level that provides less than 15% of the water Poseidon needs to operate the desalination facility (i.e., about 16.6 billion gallons per year)⁷. This amount would be based on the power plant's average water use over any three-year period. Under Phase II, Poseidon would conduct a new entrainment analysis and evaluate potential new technologies, similar to the review described in Phase I. Poseidon would then provide the results of those analyses to the Commission for review. If the Commission determines the analyses show a need for additional mitigation or the evaluations show certain technologies might reduce entrainment impacts, Poseidon would request its Plan be amended to require those changes. If additional mitigation is needed, Poseidon would propose one of the following:

- Assume dredging obligations for Agua Hedionda Lagoon from the power plant and obtain mitigation credit of up to 81 acres of restoration credit for conducting dredging; or,
 - Provide additional wetland mitigation of up to 5.5 acres.
- **Suggested Conditions:** The Poseidon's proposed Plan includes^d suggested conditions that Poseidon would use to implement further studies, evaluate new technologies, select its mitigation site(s), and implement mitigation options. Many of these are modified versions of conditions the Commission required Edison use to implement its mitigation measures for the impacts to marine life from the San Onofre Nuclear Generating Station. These are discussed in Section 4.3 below.

In adopting the final MLMP, the Commission incorporated several concepts from Poseidon's proposed Plan with a number of modifications, including:

- **Entrainment impacts: The Commission determined that Poseidon's entrainment impacts resulted in a loss of marine organisms equivalent to that produced in a 55.4-acre area of estuarine and nearshore habitat (see Sections 4.2.1 & 4.2.2 below for details).**

⁷ Poseidon's average withdrawal of 304 million gallons per day would equal almost 111 billion gallons per year. 15% of that amount is about 16.6 billion gallons, or about 45 million gallons per day.

- **Phased mitigation: The Commission required mitigation in up to two phases:**
 - **During Phase I, Poseidon is to create or restore at least 37 acres of coastal estuarine wetland habitat in one or two sites within the Southern California Bight. Within 10 months of issuance of the CDP for the desalination facility, Poseidon is to submit a preliminary site selection and restoration plan for Commission approval, and with 24 months of issuance of that CDP, Poseidon is to submit a complete CDP application for restoration of at least 37 acres of estuarine wetlands. Poseidon may choose to restore the full 55.4 acres of wetlands during Phase I.**
 - **For Phase II, Poseidon must within five years of issuance of the Phase I CDP submit a complete CDP application to restore an additional 18.4 acres of estuarine wetlands, or as part of that application may request to reduce or eliminate this Phase II restoration requirement by instead implementing technologies that are not currently available or feasible to reduce entrainment impacts below currently anticipated levels or undertaking dredging in Agua Hedionda lagoon in a manner that warrants mitigation credit.**
- **Required conditions: Poseidon is to implement its Marine Life Mitigation Plan as modified by the Commission and in conformity to the conditions provided in Exhibit 1 of these Findings. Those modifications require Poseidon to submit within sixty days of the Commission's August 6, 2008 approval a revised Plan that includes all required conditions and modifications for the Executive Director's review and approval.**

4.2 ANALYSIS – ADEQUACY OF MITIGATION

This section evaluates the following elements of Poseidon's proposed Plan:

Section 4.2.1: Analysis of Poseidon's entrainment study

Section 4.2.2: Determining the mitigation needed to address identified impacts

Section 4.2.3: Analysis of Poseidon's phased approach

Section 4.2.4: Analysis of dredging as proposed mitigation

4.2.1 Analysis of Poseidon's Entrainment Study

Special Condition 8 required Poseidon to submit its entrainment study for Commission staff review. In March 2008, Poseidon submitted data and modeling results from its study. The study was conducted using the Empirical Transport Model (ETM), which is used to identify the level of adverse effect caused by entrainment. The model compares the portion of a population at risk of entrainment to the portion of that population actually entrained. It calculates this proportional mortality for each of the main species subject to entrainment, and uses the source water area of each species – that is, the total volume or area of water in which species are at risk of being entrained – to calculate the Area of Production Foregone (APF), which provides an estimate of the average area of habitat that would be needed to produce the organisms lost to entrainment. As shown below, this APF provides the basis for determining the amount of mitigation needed to address entrainment impacts.

As described in Section 3 above, staff provided Poseidon's data and study results to Dr. Raimondi for review. In reviewing the study, Dr. Raimondi concluded the following:

- **Adequacy of Study:** Dr. Raimondi found that, as submitted, Poseidon's study could not be evaluated for its technical merits or its estimates of impacts. However, by reviewing additional relevant Poseidon documents and documents from the associated power plant's entrainment study, and by working with the consultants that had conducted Poseidon's study (Tenera Consultants), Dr. Raimondi was able to determine that the study's sampling and data collection methods were consistent with those used in other recent studies conducted in California pursuant to the protocols and guidelines used by the U.S. EPA, Regional Water Quality Control Boards, California Energy Commission, and Coastal Commission.

Dr. Raimondi also found that the study provided adequate data to determine the types and numbers of organisms that would be subject to entrainment and to determine the area of the source water bodies – that is, the area of Agua Hedionda and nearshore ocean waters where entrainable organisms would be subject to entrainment. The study identified a source water area within Agua Hedionda of 302 acres and a nearshore source water area of about 22,000 acres. Poseidon's calculations were generally consistent with those used in other recent studies, although the calculations Poseidon used to determine its source water areas differed from those used in other recent studies to reflect the tidal exchange between Agua Hedionda Lagoon and the nearshore ocean environment.

- **Determining the Effects of Poseidon's Entrainment:** Poseidon concluded that the entrainment caused by 302 MGD of water withdrawal by the desalination facility would result in an APF of 37 acres in Agua Hedionda Lagoon. Dr. Raimondi's review revealed that Poseidon's APF calculation was accurate, albeit at the 50% confidence level – that is, the 37-acre APF represented the area for which the study could assure with at least 50% confidence that the area reflected the full extent of Poseidon's entrainment impacts in the Lagoon. This calculation is based on applying standard statistical techniques to the error rates Poseidon generated in its study. Dr. Raimondi also used those error rates to calculate APFs at the 80% and 95% confidence levels – that is, the number of acres for which the area of full entrainment impacts could be described with at least 80% or 95% confidence. This resulted in APFs of 49 and 61 acres, respectively.

Poseidon's study did not include an APF for the area of nearshore ocean waters that would be affected by entrainment; therefore, using Poseidon's data, Dr. Raimondi calculated an APF for the entrainment effects Poseidon would cause in these nearshore waters. At the same 50%, 80%, and 95% confidence levels, the APFs would be 55, 64, and 72 acres, respectively. The APFs for both source water areas and each confidence level are shown in Table 1 below.

Table 1: APF Totals

| Source water areas: | APF (in acres) at three levels of confidence: | | |
|---|---|------------------|------------------|
| | 50% | 80% | 95% |
| Estuarine: 302 acres of source water | 37 | 49 | 61 |
| Nearshore: 22,000 acres of source water | 55 | 64 | 72 |
| Total APF | 92 acres | 113 acres | 133 acres |

In its July 3, 2008 proposed MLMP submittal, Poseidon raised a number of concerns with staff's and Dr. Raimondi's review (see also Exhibit B of Poseidon's August 2, 2008 submittal in Exhibit 3 of the MLMP). In response, and to supplement Dr. Raimondi's review, Commission staff requested that the MRC SAP assess the review and respond to Poseidon's concerns.

Poseidon stated its study made a number of conservative assumptions that result in an overestimate of the mitigation needed, and that those conservative assumptions, and the SAP's response, include:

- *The study overestimated the number of larvae in the lagoon and assumed a greater amount of entrainable larvae than are actually present.* In response, Dr. Raimondi and the MRC SAP noted that this type of study is based on actual sampling data, not estimates. The data reviewed were those Poseidon provided from its sampling efforts, so there should be no overestimate or assumption of a greater number of larvae than were actually sampled. If Poseidon believes the data are incorrect, that would suggest either that the raw data should be re-evaluated or the study should be run again. Further, if Poseidon's contention were true – that is, if the study overstated the number of larvae in the Lagoon – this would result in a higher APF and would therefore result in a need for *more* mitigation.⁸
- *The study assumes the project will render all affected acreage (i.e., the APF) non-functional, even though that acreage would only be partially affected and would continue to allow numerous other species to function.* In response, the MRC SAP reiterated that these entrainment studies do not assume the complete loss of ecosystem function within an area of APF; instead, they identify only the area that would be needed to replace the numbers and types of species identified in the study as subject to entrainment. The APF is used to determine impacts to only those species most affected by entrainment, and the mitigation resulting from the APF is meant to account only for those effects.

⁸ To provide a simple example, the APF is based in part on proportional mortality, which is the ratio of the number of organisms entrained compared to those at risk of being entrained. Assuming the number of entrained organisms remains the same, the fewer organisms in the Lagoon, the higher the proportion of those organisms entrained – therefore, Poseidon's contention results in a higher proportional impact area.

- *The study protocols assume 100% mortality for entrained organisms; however, Poseidon believes actual mortality will be significantly lower. Poseidon also contends that it should be required to provide less mitigation based on its contention of a lower mortality rate.* In response, the ~~MRC-SAP~~ noted that the protocols used in these entrainment studies include an assumption of 100% mortality based on guidance from the U.S. EPA and reflecting the practice of California's State and Regional Water Boards, the California Energy Commission, and the Coastal Commission in conducting and evaluating these studies. This assumption applies to these studies regardless of the type of intake and discharge system being evaluated. For example, although each power plant or desalination facility may use different water volumes, have different and variable water velocities and levels of turbulence, use different types of screens, pumps, and other equipment, and draw in a different mix of organisms, all entrainment studies similar to Poseidon's have used this same 100% mortality rate. Further, there are no peer-reviewed scientific studies that support using a lower mortality rate for different types of power plant or desalination systems that cause entrainment. In the case of Poseidon's desalination facility, entrained organisms will be subject to a number of stressors – including high pressures, significant changes in salinity, possible high temperature differences if the power plant is operating, etc. – and they will then be discharged to a different environment than is found in Agua Hedionda. Any one or a combination of these stressors could result in mortality.

Poseidon's proposed phased mitigation approach, which is based in part on its contention of lower mortality rates, is evaluated in more detail below. One element of this approach, however, is that Poseidon states it might use alternative screening systems to reduce entrainment or entrainment mortality. ~~However, staff considers this only speculative at this time, and notes that screening systems that have been tested for reducing entrainment have not been found effective in the marine environment. The current scientific understanding is that entrainment impacts are based on an assumption of 100% mortality of organisms present in the full volume of water drawn into an intake system, and that is the basis of the analysis herein.~~ Pursuant to the Commission's action, if Poseidon proposes to adopt alternative technologies that are not currently available or feasible to reduce entrainment, it may apply for reduced mitigation requirements as part of its Phase II CDP application.

Based on the above, and on the reviews conducted by Dr. Raimondi and the SAP, the Commission concurs with the conclusions of the scientific reviews showing that the facility's expected entrainment impacts result in the above-referenced APFs and incorporates those conclusions into its approval of the Plan.

4.2.2 Determining the mitigation needed to address identified impacts

The APFs generated from the study and shown in Table 1 identify the extent of expected entrainment impacts, and also serve as the basis for identifying the type and amount of mitigation needed to address those impacts. Past entrainment studies have generally used the 50% confidence level APF as the basis for mitigation and applied a mitigation ratio (e.g., 1:1, 2:1, 3:1, etc.) to compensate for mitigation occurring at a distance from the affected area, to reflect a temporal loss of habitat functions caused by the impact, to reflect mitigation that provides a different type of habitat than the affected area, or other concerns. This option is described briefly later in this Section.

For this review, however, Dr. Raimondi provided an alternative approach to determine the amount of mitigation needed, based on two main assumptions:

- First, that any mitigation provided would be in the form of restored habitat similar to the types of habitat that produced or supported the affected entrained organisms – that is, that mitigation would consist of tidally-influence salt marsh or shallow water areas similar to those found in Agua Hedionda Lagoon.
- Second, that the mitigation provided would be fully successful – that is, the mitigation site would provide fully functioning habitat that would meet required performance standards, contingency plans, etc., required for such projects to ensure success. This was based on an additional assumption – that Poseidon would be providing mitigation at a site in San Dieguito Lagoon adjacent to Edison’s restoration site and would be subject to the same conditions the Commission required of Edison. Dr. Raimondi and the ~~MRC~~ SAP believe the conditions required of Edison provide a high level of certainty that Edison’s restoration efforts will be successful and that they would provide a similar level of certainty for Poseidon’s mitigation at this location.

Using the above assumptions, and using the APF figures noted above, Dr. Raimondi concluded with at least 50% confidence that creating or restoring 37 acres of suitable and fully functioning estuarine habitat would fully replace the lost productivity of Agua Hedionda Lagoon, that 49 acres would be needed to provide an 80% level of certainty, and that 61 acres would be needed to reach a 95% level of certainty. By applying the same approach to the nearshore APFs, Dr. Raimondi concluded that creating or restoring 55 acres of open water habitat would be needed to provide at least 50% certainty that that entrainment effects in that source water area would be fully mitigated, that 64 acres were needed to provide 80% certainty, and 72 acres would provide 95% certainty. However, in recognition of the impracticality of creating 55 to 72 acres of offshore open water habitat and recognizing the relatively greater productivity rates per acre of estuarine wetland habitats, Dr. Raimondi suggested that these offshore impacts be “converted” to estuarine mitigation areas. That is, by assuming that successfully restored wetland habitat would be ten times more productive than a similar area of nearshore ocean waters, every ten acres of nearshore impacts could be mitigated by creating or restoring one acre of estuarine habitat.⁹ Applying this 10:1 ratio to the nearshore APFs results in 5.5, 6.4, and 7.2 acres, respectively. Although this approach would result in “out of kind” mitigation, it is also expected to produce overall better mitigation – not only is it not practicable to create nearshore, open water habitat, that habitat type is already well-represented along the shoreline, whereas creating or restoring coastal estuarine habitat types would support a long-recognized need to increase the amount of those habitat types in Southern California.¹⁰ These totals are shown Table 2 below.

⁹ This approach – converting offshore entrainment impacts to areas of wetland mitigation – has been used to help determine mitigation in several recent California power plant siting cases, including Huntington Beach (00-AFC-13), Morro Bay (00-AFC-12), and others.

¹⁰ See, for example, the Southern California Wetlands Recovery Project at <http://www.scwrp.org/index.htm>

Table 2: Adjusted APF Totals

| Habitat Type | APF (in acres) at three levels of confidence | | | Conversion ratio | Resulting APF (in acres) at three levels of confidence | | |
|-------------------------|--|-----|-----|------------------|--|-------------|-------------|
| | 50% | 80% | 95% | | 50% | 80% | 95% |
| Estuarine | 37 | 49 | 61 | 1:1 | 37 | 49 | 61 |
| Nearshore | 55 | 64 | 72 | 10:1 | 5.5 | 6.4 | 7.2 |
| Total Mitigation | | | | | 42.5 | 55.4 | 68.2 |

In sum, Dr. Raimondi concluded that creating 55.4 to 68.2 acres of fully functioning estuarine habitat similar to habitat in Agua Hedionda Lagoon would provide between 80 to 95% confidence that Poseidon's entrainment impacts would be fully mitigated. This conclusion is also based on Poseidon's mitigation being subject to conditions similar to Edison's, which is discussed in more detail in Section 4.2.3 below.

Poseidon contends that Dr. Raimondi's staff's recommendation to apply an 80-95% level of certainty for mitigation is "extraordinary and unprecedented" and would result in excess mitigation for the project's expected impacts. In response, Dr. Raimondi and the MRC-SAP state that the confidence levels used are based on the error rates Poseidon calculated as part of its study, and generating these calculations is a standard practice for this type of entrainment study considering uncertainty is a standard practice in data analysis and that such consideration provides a context for understanding the likelihood that a particular amount of mitigation will provide full compensation for identified impacts. Staff notes that Poseidon's entrainment study included error rates that Dr. Raimondi used initially to calculate a higher estuarine APF of 87 acres at the 80% confidence level. Dr. Raimondi then used a different error rate, which he considered more appropriate for this study, to calculate an APF of 49 acres at the 80% confidence level.¹¹

Dr. Raimondi's recommendation of using the 80-95% confidence level is "unprecedented" only in that past studies have used the 50% confidence level to describe the expected impact and then applied a mitigation ratio, such as 2:1 or 3:1, to reflect the lower confidence level, and to include consideration of mitigation that may be "out of kind", or provided at some distance from the affected area, or may not be fully successful. Dr. Raimondi's proposal, as supported by the MRC-SAP and Commission staff, would actually result in less mitigation acreage than that standard mitigation approach, but it would have higher certainty of success.

Staff recognizes that the Commission could apply a mitigation ratio to the identified level of impact, consistent with past mitigation determinations for wetland impacts. For example, applying a 2:1 ratio to the 50% 42.5 acre total APF would yield 85 acres of restored coastal wetland habitat, and applying a 3:1 ratio would yield 127.5 acres of habitat. If the Commission selects this approach, staff believes these ratios would be appropriate minimums to apply to reflect that the Plan does not identify specific mitigation sites and the site(s) selected could be more than a hundred miles from the impact site at and near Agua Hedionda.

¹¹ Poseidon's study included error rates based on source water sampling, which Dr. Raimondi believed were unreasonably high. He instead calculated an error rate based on the proportional mortality of each species being an independent replicate, which he believes better meshes with the logic behind the use of the APF to determine impacts.

However, as described previously, Commission staff believes that Dr. Raimondi's proposed approach of creating 55.4 to 68.2 acres would be an adequate and preferable approach ~~if Poseidon's proposed Plan is also modified to include staff's other recommended modifications, including the one described in the next section of this memorandum.~~

Based on the discussion above and on the record, the Commission finds that requiring 55.4 acres of estuarine wetland restoration in the Southern California Bight subject to the conditions shown in Exhibit 1 provides a sufficient degree of certainty that the facility's entrainment impacts will be fully mitigated and brings the Plan into conformity to Special Condition 8 and the Coastal Act's marine life protection policies.

4.2.3 Analysis of Proposed Mitigation Phasing

As noted above, Poseidon's Plan includes a proposed phased approach to mitigation, which would be based on changes in power plant operations or possible changes in technology. **Because of the possibility that Poseidon might in the future adopt technologies that are not currently available or feasible to reduce entrainment and because of uncertainty regarding future power plant operations, the Commission finds that it is appropriate to allow phasing of the mitigation. For the first phase, Poseidon must submit within two years of the issuance of the CDP for the desalination facility a complete CDP application for wetland restoration of at least 37 acres. Poseidon may apply during Phase I to implement the entire 55.4 acres of wetland restoration. For the second phase, Poseidon must within five years of issuance of the Phase I CDP submit a complete CDP application to restore the additional 18.4 acres of restoration, or as part of that application request the Commission reduce or eliminate the amount of required restoration if Poseidon implements the above-referenced technologies that result in reduced entrainment or if, as explained below, Poseidon performs dredging in Agua Hedionda Lagoon in a manner that warrants mitigation credit.** For several reasons, staff recommends the Commission not accept this aspect of the Plan and instead require a specific type and amount of mitigation as described above. The entrainment impacts described in the Commission's Findings were based on Poseidon application to withdraw 304 million gallons per day of estuarine water to operate its desalination facility, and staff recommends the Commission use this as the basis for its decision on the amount of mitigation needed to address this impact.

Staff believes this phasing approach is speculative in that it is tied to unknown future operations of the power plant. Additionally, information in the record shows that the power plant owner expects to replace the existing power plant within the next few years and to operate the existing plant only at very low levels or on a back-up basis until it is no longer needed to support the regional electrical power grid. More recently, the power plant owner announced that it would consider constructing its own desalination facility to provide water for its proposed new power plant. If built, this facility would use only about one percent of the water Poseidon proposes to use, and so would likely have a relatively minor affect on the overall mitigation needed to adequately address the impacts of both facilities.

Staff also believes that tying Poseidon's mitigation to power plant operations would be inappropriate for purposes of the coastal development permit and the Commission's Findings. Poseidon's coastal development permit application did not include the power plant owner as a co-applicant, and the Commission has made no determinations about how the power plant should or may operate.

4.2.4 Analysis of dredging as project mitigation

Similarly, staff recommends the Commission not approve Poseidon's proposal to allow it to use as mitigation during Phase II the dredging activities now being conducted by the power plant owner. Poseidon proposes a formula by which it could obtain up to 81 acres of credit for conducting dredging in Agua Hedionda Lagoon. The Commission does not accept this formula because it does not currently have sufficient information to evaluate the purpose, nature, or extent of potential dredging, or whether Poseidon would be able to conduct the proposed dredging. It is possible, however, that Poseidon might carry out future dredging in a manner that warrants mitigation credit. Poseidon may therefore apply as part of its Phase II mitigation CDP application for a reduction in restoration requirements in exchange for mitigation credits that the Commission may consider for Poseidon's dredging activities. However, the Commission has not considered dredging in and of itself to be mitigation. Dredging that the power plant has conducted in the past has been done to maintain its intake channel, and similarly, Poseidon's main purpose for dredging would be to maintain that channel. The Commission has considered habitat benefits resulting from dredging for that primary purpose as merely incidental to the primary purpose of the dredging activities rather than mitigation. Had those dredging activities instead been considered mitigation, the power plant owner may have been required to continue dredging to maintain the area of mitigation, regardless of the need for an intake structure.

Further, as noted in the Findings, the power plant owner also owns the Lagoon and has expressed its intentions to maintain the Lagoon for the foreseeable future. Additionally, the power plant owner is not a permit co-applicant with Poseidon, and the permit record includes no agreement between Poseidon and the owner regarding dredging, so staff believes it would not be appropriate for the Commission to approve a plan that may create an expectation that Poseidon would take on these activities on the owner's property without landowner approval.

As Poseidon notes in its Plan, the Commission accepted as part of Edison's San Dieguito restoration project a commitment by Edison to maintain the San Dieguito tidal inlet in an open condition in perpetuity. However, in that instance, dredging was necessary for that project to support the more than 100 acres of restored tidal wetlands Edison had created as a substantial portion of the mitigation required pursuant to its SONGS coastal development permit. The Commission's acceptance of that mitigation element was also based on multiple years of study by the MRC, whose recommendation the Commission used in its decision. The MRC has not made a similar recommendation for Poseidon's proposal. Further, Poseidon has not proposed mitigation within Agua Hedionda that would require dredging.

~~Finally, Poseidon's proposal would not meet the provision of Special Condition 8 requiring mitigation to be in the form of creation, enhancement, or restoration of aquatic and wetland habitat, to the maximum extent feasible. As noted above, there are wetland mitigation opportunities within the Southern California Bight well in excess of the amount needed to mitigate for this project's impacts, and Poseidon has not shown that it would be infeasible to provide the required type of mitigation.~~

4.3 ANALYSIS – ASSURANCE THAT MITIGATION WILL SUCCEED

Until recently, Poseidon had proposed that it provide wetland restoration at a site in San Dieguito Lagoon, adjacent to Edison's restoration project. Review by staff, Dr. Raimondi, and the MRC SAP had been based on determining whether that site would provide suitable mitigation. In April 2008, Dr. Raimondi concluded that Poseidon's proposed San Dieguito site would likely provide suitable habitat for the losses of estuarine larvae at Agua Hedionda if the restored habitat was similar to the habitat affected at Agua Hedionda. In June 2008, Dr. Raimondi and the MRC SAP also concluded that the San Dieguito site would also provide at least partial mitigation for some species affected in Poseidon's nearshore impact area. Also in June, staff provided Poseidon with a modified version of the conditions the Commission required Edison to meet for conducting its site selection, construction, monitoring, and other aspects of its restoration plan, and recommended that Poseidon include these conditions as part of its proposed Plan. These are provided in Exhibit 2.

~~Since then, Several weeks before the August 2008 hearing, Poseidon altered its Plan so that San Dieguito is was no longer necessarily Poseidon's preferred site. The Plan instead proposes that Poseidon select a site or sites somewhere within the Southern California Bight that meet conditions shown in Sections 3.1 and 3.2 of the Plan. Those conditions included further modifications to the conditions staff provided in June.~~

Staff asked the MRC SAP to review Poseidon's two proposed changes – that is, its proposal to consider sites other than San Dieguito and the modifications in its Plan to staff's previously recommended conditions. Regarding staff's proposed conditions, the MRC SAP believes those conditions – i.e., Exhibit 2 – would generally provide adequate assurance of success for a restoration project to be implemented in most coastal estuarine areas of Southern California, although a higher degree of assurance would result if specific sites were identified. The MRC SAP also determined that the changes Poseidon proposed to staff's conditions and included in its Plan would result in lesser mitigation standards than those required of Edison and would not provide equal assurance of mitigation success. The changes Poseidon proposed include the following:¹²

- Staff recommended that Poseidon submit a complete coastal development permit application for its Final Restoration Plan within 24 months of Commission approval of its Preliminary Plan (i.e., the Plan being reviewed herein). Poseidon proposed modified by that recommendation in Section 4 of its Plan to allow submittal of that application either 24 months after issuance of the project coastal development permit or commencement of

¹² For a full comparison, see Exhibit 3, Section 3 of Poseidon's proposed Plan, and Exhibit 2 showing staff's originally recommended conditions.

commercial operations of the desalination facility, whichever is later. This could substantially delay the implementation of mitigation and could result in several years of impacts occurring without mitigation.

- A proposed change to Poseidon's Plan at Section 3.1(d) and at Section 3.2(c) would **allow the Executive Director or Commission to** reduce the required buffer zone at its mitigation sites from ~~no less than~~ **at least** 100 feet wide to an average that could be much less than 100 feet **wide**.
- ~~A proposed change at Section 3.1(i) would allow the Plan to affect endangered species in a way not allowed under the Edison requirements.~~
- Poseidon proposes to change Section 3.3(c) to allow mitigation to occur in up to four sites, rather than up to two sites, as required of Edison, which could fragment the mitigation and reduce its overall value.
- ~~Poseidon also proposed deleting a requirement at Section 5.4 that would require a designed tidal prism be maintained to ensure the wetland mitigation site has adequate tidal action.~~
- ~~Poseidon proposes that any fees it pays for coastal development permits or amendments be credited against the budget needed to implement the mitigation plan.~~

Staff and the ~~MRC~~ **SAP** reviewed these proposed changes and believe they would result in inadequate assurance that successful mitigation would be conducted in a timely manner, **and the Commission did not include those proposed revisions in its Plan approval**. Staff's recommendation, therefore, is **The Commission finds** that the Plan be modified to include the conditions in Exhibit 2.

CONCLUSION

The Commission finds that, as modified as described above and with the conditions in Exhibit 1, the Marine Life Mitigation Plan complies with Special Condition 8 and the marine life protection policies of the Coastal Act. The Commission further finds that implementation of the Plan will ensure the project's entrainment-related impacts will be fully mitigated and will enhance and restore the marine resources and biological productivity of coastal waters in conformity to Coastal Acts Sections 30230 and 30231.

Item W16a Exhibit 1

Approved Marine Life Mitigation Plan (MLMP)

Item W16a – Exhibit 1
Special Condition 8 of E-06-013 – Poseidon Resources
November 21, 2008

APPROVED MARINE LIFE MITIGATION PLAN

INTRODUCTION

Poseidon's Carlsbad desalination facility will be co-located with the Encina Power Station and will use the power plant's once-through cooling intake and outfall structures. The desalination facility is expected to use about 304 million gallons per day (mgd) of estuarine water drawn through the structure. The facility will operate both when the power plant is using its once-through cooling system and when it is not.

This Marine Life Mitigation Plan (the Plan) will result in mitigation necessary to address the entrainment impacts caused by the facility's use of estuarine water. The Plan includes two phases of mitigation – Poseidon is required during Phase I to provide at least 37 acres of estuarine wetland restoration, as described below. In Phase II, Poseidon is required to provide an additional 18.4 acres of estuarine wetland restoration. However, as described below, Poseidon may choose to provide all 55.4 acres of restoration during Phase I. Poseidon may also choose during Phase II to apply for a CDP to reduce or eliminate the required 18.4 acres of mitigation and instead conduct alternative mitigation by implementing new entrainment reduction technology or obtaining mitigation credit for conducting dredging.

CONDITION A: WETLAND RESTORATION MITIGATION

The permittee shall develop, implement and fund a wetland restoration project that compensates for marine life impacts from Poseidon's Carlsbad desalination facility.

1.0 PHASED IMPLEMENTATION

Phase I: Poseidon is to provide at least 37 acres of estuarine wetland restoration. Within two years of issuance of the desalination facility's coastal development permit (CDP), Poseidon is to submit a complete CDP application for a proposed restoration project, as described below.

Phase II: Within five years of issuance of the Phase I CDP, Poseidon is to submit a complete CDP application proposing up to 18.4 acres of additional estuarine wetland restoration, subject to reduction as described in Section 6.0 below.

2.0 SITE SELECTION

In consultation with Commission staff, the permittee shall select a wetland restoration site or sites for mitigation in accordance with the following process and terms.

Within 10 months of the effective date of this permit, the permittee shall submit the proposed site(s) and preliminary wetland restoration plan to the Commission for its review and approval or disapproval.

The location of the wetland restoration project(s) shall be within the Southern California Bight. The permittee shall select from sites including, but not limited to, the following eleven sites: Tijuana Estuary in San Diego County; San Dieguito River Valley in San Diego County; Agua Hedionda Lagoon in San Diego County; San Elijo Lagoon in San Diego County; Buena Vista Lagoon in San Diego County; Huntington Beach Wetland in Orange County, Anaheim Bay in Orange County, Santa Ana River in Orange County, Los Cerritos Wetland in Los Angeles County, Ballona Wetland in Los Angeles County, and Ormond Beach in Ventura County. The permittee may also consider any sites that may be recommended by the California Department of Fish & Game as high priority wetlands restoration projects. Other sites proposed by the permittee may be added to this list with the Executive Director's approval.

The basis for the selection shall be an evaluation of the site(s) against the minimum standards and objectives set forth in subsections 3.1 and 3.2 below. The permittee shall take into account and give serious consideration to the advice and recommendations of the Scientific Advisory Panel (SAP) established and convened by the Executive Director pursuant to Condition B.1.0. The permittee shall select the site(s) that meet the minimum standards and best meet the objectives.

3.0 PLAN REQUIREMENTS

In consultation with Commission staff, the permittee shall develop a wetland restoration plan for the wetland site(s) identified through the site selection process. The wetland restoration plan shall meet the minimum standards and incorporate as many as feasible of the objectives in subsections 3.1 and 3.2, respectively.

3.1 Minimum Standards

The wetland restoration project site(s) and preliminary plan(s) must meet the following minimum standards:

- a. Location within Southern California Bight;
- b. Potential for restoration as tidal wetland, with extensive intertidal and subtidal areas;
- c. Creates or substantially restores a minimum of 37 acres and up to at least 55.4 acres of habitat similar to the affected habitats in Agua Hedionda Lagoon, excluding buffer zone and upland transition area;

- d. Provides a buffer zone of a size adequate to ensure protection of wetland values, and at least 100 feet wide, as measured from the upland edge of the transition area.
- e. Any existing site contamination problems would be controlled or remediated and would not hinder restoration;
- f. Site preservation is guaranteed in perpetuity (through appropriate public agency or nonprofit ownership, or other means approved by the Executive Director), to protect against future degradation or incompatible land use;
- g. Feasible methods are available to protect the long-term wetland values on the site(s), in perpetuity;
- h. Does not result in a net loss of existing wetlands; and
- i. Does not result in an adverse impact on endangered animal species or an adverse unmitigated impact on endangered plant species.

3.2 Objectives

The following objectives represent the factors that will contribute to the overall value of the wetland. The selected site(s) shall be determined to achieve these objectives. These objectives shall also guide preparation of the restoration plan.

- a. Provides maximum overall ecosystem benefits, e.g. maximum upland buffer, enhancement of downstream fish values, provides regionally scarce habitat, potential for local ecosystem diversity;
- b. Provides substantial fish habitat compatible with other wetland values at the site(s);
- c. Provides a buffer zone of an average of at least 300 feet wide, and not less than 100 feet wide, as measured from the upland edge of the transition area.
- d. Provides maximum upland transition areas (in addition to buffer zones);
- e. Restoration involves minimum adverse impacts on existing functioning wetlands and other sensitive habitats;
- f. Site selection and restoration plan reflect a consideration of site specific and regional wetland restoration goals;
- g. Restoration design is that most likely to produce and support wetland-dependent resources;
- h. Provides rare or endangered species habitat;

- i. Provides for restoration of reproductively isolated populations of native California species;
- j. Results in an increase in the aggregate acreage of wetland in the Southern California Bight;
- k. Requires minimum maintenance;
- l. Restoration project can be accomplished in a reasonably timely fashion; and,
- m. Site(s) in proximity to the Carlsbad desalination facility.

3.3 Restrictions

- a. The permittee may propose a wetland restoration project larger than the minimum necessary size specified in subsection 3.1(c) above, if biologically appropriate for the site(s), but the additional acreage must (1) be clearly identified, and (2) must not be the portion of the project best satisfying the standards and objectives listed above.
- b. If the permittee jointly enters into a restoration project with another party: (1) the permittee's portion of the project must be clearly specified, (2) any other party involved cannot gain mitigation credit for the permittee's portion of the project, and (3) the permittee may not receive mitigation credit for the other party's portion of the project.
- c. The permittee may propose to divide the mitigation requirement between a maximum of two wetland restoration sites, unless there is a compelling argument, approved by the Executive Director, that the standards and objectives of subsections 3.1 and 3.2 will be better met at more than two sites.

4.0 PLAN IMPLEMENTATION

4.1 Coastal Development Permit Applications

The permittee shall submit complete Coastal Development Permit applications for the Phase I and Phase II restoration plan(s) that include CEQA documentation and local or other state agency approvals. The CDP application for Phase I shall be submitted within 24 months following the issuance of the Coastal Development Permit for the Carlsbad desalination facility. The CDP application for Phase II shall be submitted within 5 years of issuance of the CDP for Phase I. The Executive Director may grant an extension to these time periods at the request of and upon a demonstration of good cause by the permittee. The restoration plans shall substantially conform to Section 3.0 above and shall include, but not be limited to the following elements:

- a. Detailed review of existing physical, biological, and hydrological conditions; ownership, land use and regulation;

- b. Evaluation of site-specific and regional restoration goals and compatibility with the goal of mitigating for Poseidon's marine life impacts;
- c. Identification of site opportunities and constraints;
- d. Schematic restoration design, including:
 - 1. Proposed cut and fill, water control structures, control measures for stormwater, buffers and transition areas, management and maintenance requirements;
 - 2. Planting program, including removal of exotic species, sources of plants and or seeds (local, if possible), protection of existing salt marsh plants, methods for preserving top soil and augmenting soils with nitrogen and other necessary soil amendments before planting, timing of planting, plans for irrigation until established, and location of planting and elevations on the topographic drawings;
 - 3. Proposed habitat types (including approximate size and location);
 - 4. Assessment of significant impacts of design (especially on existing habitat values) and net habitat benefits;
 - 5. Location, alignment and specifications for public access facilities, if feasible;
 - 6. Evaluation of steps for implementation e.g. permits and approvals, development agreements, acquisition of property rights;
 - 7. Cost estimates;
 - 8. Topographic drawings for final restoration plan at 1" = 100 foot scale, one foot contour interval; and
 - 9. Drawings shall be directly translatable into final working drawings.
- e. Detailed information about how monitoring and maintenance will be implemented;
- f. Detailed information about construction methods to be used;
- g. Defined final success criteria for each habitat type and methods to be used to determine success;
- h. Detailed information about how Poseidon will coordinate with the Scientific Advisory Panel including its role in independent monitoring, contingency planning review, cost recovery, etc.;
- i. Detailed information about contingency measures that will be implemented if mitigation does not meet the approved goals, objectives, performance standards, or other criteria; and,
- j. Submittal of "as-built" plans showing final grading, planting, hydrological features, etc. within 60 days of completing initial mitigation site construction.

4.2 Wetland Construction Phase

Within 6 months of approval of the Phase I restoration plan, subject to the permittee's obtaining the necessary permits, the permittee shall commence the construction phase of the wetland restoration project. The permittee shall be responsible for ensuring that construction is carried out in accordance with the specifications and within the timeframes specified in the approved final restoration plan and shall be responsible for any remedial work or other intervention necessary to comply with final plan requirements.

4.3 Timeframe for Resubmittal of Project Elements

If the Commission does not approve any element of the project (i.e. site selection, restoration plan), the Commission will specify the time limits for compliance relative to selection of another site or revisions to the restoration plan.

5.0 WETLAND MONITORING, MANAGEMENT AND REMEDIATION

Monitoring, management (including maintenance), and remediation shall be conducted over the "full operating life" of Poseidon's desalination facility, which shall be 30 years from the date "as-built" plans are submitted pursuant to subsection 4.1(l).

The following section describes the basic tasks required for monitoring, management and remediation. Condition B specifies the administrative structure for carrying out these tasks, including the roles of the permittee and Commission staff.

5.1 Monitoring and Management Plan

A monitoring and management plan will be developed in consultation with the permittee and appropriate wildlife agencies, concurrently with the preparation of the restoration plan to provide an overall framework to guide the monitoring work. It will include an overall description of the studies to be conducted over the course of the monitoring program and a description of management tasks that are anticipated, such as trash removal. Details of the monitoring studies and management tasks will be set forth in a work program (see Condition B).

5.2 Pre-restoration site monitoring

Pre-restoration site monitoring shall be conducted to collect baseline data on the wetland attributes to be monitored. This information will be incorporated into and may result in modification to the overall monitoring plan.

5.3 Construction Monitoring

Monitoring shall be conducted during and immediately after each stage of construction of the wetland restoration project to ensure that the work is conducted according to plans.

5.4 Post-Restoration Monitoring and Remediation

Upon completion of construction of the wetland(s), monitoring shall be conducted to measure the success of the wetland(s) in achieving stated restoration goals (as specified in the restoration plan(s)) and in achieving performance standards, specified below. The permittee shall be fully responsible for any failure to meet these goals and standards during the facility's full operational years. Upon determining that the goals or standards are not achieved, the Executive Director shall prescribe remedial measures, after consultation with the permittee, which shall be immediately implemented by the permittee with Commission staff direction. If the permittee does not agree that remediation is necessary, the matter may be set for hearing and disposition by the Commission.

Successful achievement of the performance standards shall (in some cases) be measured relative to approximately four reference sites, which shall be relatively undisturbed, natural tidal wetlands within the Southern California Bight. The Executive Director shall select the reference sites. The standard of comparison, i.e., the measure of similarity to be used (e.g., within the range, or within the 95% confidence interval) shall be specified in the work program.

In measuring the performance of the wetland project, the following physical and biological performance standards will be used:

- a. **Longterm Physical Standards.** The following long-term standards shall be maintained over the full operative life of the desalination facility:
 1. **Topography.** The wetland(s) shall not undergo major topographic degradation (such as excessive erosion or sedimentation);
 2. **Water Quality.** Water quality variables [to be specified] shall be similar to reference wetlands;
 3. **Tidal prism.** If the mitigation site(s) require dredging, the tidal prism shall be maintained and tidal flushing shall not be interrupted; and,
 4. **Habitat Areas.** The area of different habitats shall not vary by more than 10% from the areas indicated in the restoration plan(s).
- b. **Biological Performance Standards.** The following biological performance standards shall be used to determine whether the restoration project is successful. Table 1, below, indicates suggested sampling locations for each of the following biological attributes; actual locations will be specified in the work program:
 1. **Biological Communities.** Within 4 years of construction, the total densities and number of species of fish, macroinvertebrates and birds (see Table 1) shall be similar to the densities and number of species in similar habitats in the reference wetlands;
 2. **Vegetation.** The proportion of total vegetation cover and open space in the marsh shall be similar to those proportions found in the reference sites. The percent cover of algae shall be similar to the percent cover found in the reference sites;
 3. **Spartina Canopy Architecture.** The restored wetland shall have a canopy architecture that is similar in distribution to the reference sites, with an equivalent proportion of stems over 3 feet tall;

4. **Reproductive Success.** Certain plant species, as specified by in the work program, shall have demonstrated reproduction (i.e. seed set) at least once in three years;
5. **Food Chain Support.** The food chain support provided to birds shall be similar to that provided by the reference sites, as determined by feeding activity of the birds; and,
6. **Exotics.** The important functions of the wetland shall not be impaired by exotic species.

Table 1: Suggested Sampling Locations

| | Salt Marsh | | | Open Water | | Mudflat | Tidal Creeks |
|-----------------------------|------------|------------|-------|------------|----------|---------|-----------------|
| | Spartina | Salicornia | Upper | Lagoon | Eelgrass | | |
| 1) Density/spp: | | | | | | | |
| – Fish | | | | X | X | X | X |
| – Macroinvert- ebrates | | | | X | X | X | X |
| – Birds | X | X | X | X | | X | X |
| 2) % Cover | | | | | | | |
| Vegetation | X | X | X | | X | | |
| algae | X | X | | | | X | |
| 3) Spartina architecture | X | | | | | | |
| 4) Reproductive success | X | X | X | | | | |
| 5) Bird feeding | | | | X | | X | X |
| 6) Exotics | X | X | X | X | X | X | X |

6.0 ALTERNATIVE MITIGATION

As part of Phase II, Poseidon may propose in its CDP application alternatives to reduce or eliminate the required 18.4 acres of mitigation. The alternative mitigation proposed may be in the form of implementing new entrainment reduction technology or may be mitigation credits for conducting dredging, either of which could reduce or eliminate the 18.4 acres of mitigation.

CONDITION B: ADMINISTRATIVE STRUCTURE

1.0 ADMINISTRATION

Personnel with appropriate scientific or technical training and skills will, under the direction of the Executive Director, oversee the mitigation and monitoring functions identified and required by Condition A. The Executive Director will retain scientific and administrative support staff needed to perform this function, as specified in the work program.

This technical staff will oversee the preconstruction and post-construction site assessments, mitigation project design and implementation (conducted by permittee), and monitoring activities (including plan preparation); the field work will be done by contractors under the Executive Director's direction. The contractors will be responsible for collecting the data, analyzing and interpreting it, and reporting to the Executive Director.

The Executive Director shall convene a Scientific Advisory Panel to provide the Executive Director with scientific advice on the design, implementation and monitoring of the wetland restoration. The panel shall consist of recognized scientists, including a marine biologist, an ecologist, a statistician and a physical scientist.

2.0 BUDGET AND WORK PROGRAM

The funding necessary for the Commission and the Executive Director to perform their responsibilities pursuant to these conditions will be provided by the permittee in a form and manner reasonably determined by the Executive Director to be consistent with requirements of State law, and which will ensure efficiency and minimize total costs to the permittee. The amount of funding will be determined by the Commission on a biennial basis and will be based on a proposed budget and work program, which will be prepared by the Executive Director in consultation with the permittee, and reviewed and approved by the Commission in conjunction with its review of the restoration plan. If the permittee and the Executive Director cannot agree on the budget or work program, the disagreement will be submitted to the Commission for resolution.

The budget to be funded by the permittee will be for the purpose of reasonable and necessary costs to retain personnel with appropriate scientific or technical training and skills needed to assist the Commission and the Executive Director in carrying out the mitigation and lost resource compensation conditions. In addition, reasonable funding will be included in this budget for necessary support personnel, equipment, overhead, consultants, the retention of contractors needed to conduct identified studies, and to defray the costs of members of any scientific advisory panel(s) convened by the Executive Director for the purpose of implementing these conditions.

Costs for participation on any advisory panel shall be limited to travel, per diem, meeting time and reasonable preparation time and shall only be paid to the extent the participant is not otherwise entitled to reimbursement for such participation and preparation. The amount of funding will be determined by the Commission on a biennial basis and will be based on a proposed budget and work program, which will be prepared by the Executive Director in consultation with the permittee, and reviewed and approved by the Commission in conjunction

with its review of the restoration plan. If the permittee and the Executive Director cannot agree on the budget or work program, the disagreement will be submitted to the Commission for resolution. Total costs for such advisory panel shall not exceed \$100,000 per year adjusted annually by any increase in the consumer price index applicable to California.

The work program will include:

- a. A description of the studies to be conducted over the subsequent two year period, including the number and distribution of sampling stations and samples per station, methodology and statistical analysis (including the standard of comparison to be used in comparing the mitigation project to the reference sites);
- b. A description of the status of the mitigation projects, and a summary of the results of the monitoring studies to that point;
- c. A description of four reference sites;
- d. A description of the performance standards that have been met, and those that have yet to be achieved;
- e. A description of remedial measures or other necessary site interventions;
- f. A description of staffing and contracting requirements; and,
- g. A description of the Scientific Advisory Panel's role and time requirements in the two year period.

The Executive Director may amend the work program at any time, subject to appeal to the Commission.

3.0 ANNUAL REVIEW AND PUBLIC WORKSHOP REVIEW

The permittee shall submit a written review of the status of the mitigation project to the Executive Director no later than April 30 each year for the prior calendar year. The written review will discuss the previous year's activities and overall status of the mitigation project, identify problems and make recommendations for solving them, and review the next year's program.

To review the status of the mitigation project, the Executive Director will convene and conduct a duly noticed public workshop during the first year of the project and every other year thereafter unless the Executive Director deems it unnecessary. The meeting will be attended by the contractors who are conducting the monitoring, appropriate members of the Scientific Advisory Panel, the permittee, Commission staff, representatives of the resource agencies (CDFG, NMFS, USFWS), and the public. Commission staff and the contractors will give presentations on the previous biennial work program's activities, overall status of the mitigation project, identify problems and make recommendations for solving them, and review the next upcoming period's biennial work program.

The public review will include discussions on whether the wetland mitigation project has met the performance standards, identified problems, and recommendations relative to corrective measures necessary to meet the performance standards. The Executive Director will use information presented at the public review, as well as any other relevant information, to determine whether any or all of the performance standards have been met, whether revisions to the standards are necessary, and whether remediation is required. Major revisions shall be subject to the Commission's review and approval.

The mitigation project will be successful when all performance standards have been met each year for a three-year period. The Executive Director shall report to the Commission upon determining that all of the performance standards have been met for three years and that the project is deemed successful. If the Commission determines that the performance standards have been met and the project is successful, the monitoring program will be scaled down, as recommended by the Executive Director and approved by the Commission. A public review shall thereafter occur every five years, or sooner if called for by the Executive Director. The work program shall reflect the lower level of monitoring required. If subsequent monitoring shows that a standard is no longer being met, monitoring may be increased to previous levels, as determined necessary by the Executive Director.

The Executive Director may make a determination on the success or failure to meet the performance standards or necessary remediation and related monitoring at any time, not just at the time of the workshop review.

4.0 ADDITIONAL PROCEDURES

4.1 Dispute Resolution

In the event that the permittee and the Executive Director cannot reach agreement regarding the terms contained in or the implementation of any part of this Plan, the matter may be set for hearing and disposition by the Commission.

4.2 Extensions

Any of the time limits established under this Plan may be extended by the Executive Director at the request of the permittee and upon a showing of good cause.

CONDITION C: SAP DATA MAINTENANCE

The permittee shall make available on a publicly-accessible website all scientific data collected as part of the project. The website and the presentation of data shall be subject to Executive Director review and approval.

Item W16a Exhibit 2

Staff's Proposed Draft MLMP Conditions (June 2008)

CDP E-06-013
Condition Compliance
Special Condition 8

Exhibit 2

July 24, 2008

| |
|-----------------------------|
| EXHIBIT NO. 2 |
| APPLICATION NO. E-06-013 |
| Condition Compliance |
| Special Condition 8 |

Staff's Proposed Draft MLMP Conditions

This is a modified version of conditions the Commission required of Southern California Edison in implementing its wetland restoration project at San Dieguito Lagoon pursuant to Coastal Development Permit xx

Staff provided these conditions to Poseidon on June 20, 2008 and recommended Poseidon include them in its Marine Life Mitigation Plan to present to the Commission. The modifications shown in ~~strike through~~ and underline reflect differences between Poseidon's proposal and Edison's and provide updated wetland mitigation standards since the Commission's approval of Edison's project. Staff's notes to Poseidon are shown in [*brackets and bold italics*].

CONDITION A: WETLAND RESTORATION MITIGATION

The permittee shall develop, implement and fund a wetland restoration project that compensates for ~~past, present and future fish~~ marine life impacts from ~~SONGS Units 2 and 3, as identified by the Marine Review Committee~~ Poseidon's Carlsbad desalination facility.

1.0 SITE SELECTION AND PRELIMINARY PLAN

In consultation with Commission staff, the permittee shall select a wetland restoration site and develop a preliminary plan in accordance with the following process and terms.

Within 9 months of the effective date of this permit, the permittee shall submit the proposed site and preliminary wetland restoration plan to the Commission for its review and approval or disapproval.

1.1 Site Selection

The location of the wetland restoration project shall be within the Southern California Bight. The permittee shall evaluate and select from sites including, but not limited to, the following eight sites: Tijuana Estuary in San Diego County, San Dieguito River Valley in San Diego County, Huntington Beach Wetland in Orange County, Anaheim Bay in Orange County, Santa Ana River in Orange County, Los Cerritos Wetland in Los Angeles County, Ballona Wetland in Los Angeles County, and Ormond Beach in Ventura County. Other sites proposed by the permittee may be added to this list with the Executive Director's approval.

The basis for the selection shall be an evaluation of the sites against the minimum standards and objectives set forth in subsections 1.3 and 1.4 below. The permittee shall take into account and give serious consideration to the advice and recommendations of an Interagency Wetland Advisory Panel, established and convened by the Executive Director. The permittee shall select the site that meets the minimum standards and best meets the objectives.

1.2 Preliminary Restoration Plan

[Note: This is the type of Preliminary Plan we anticipate you'll provide for the August hearing. The Plan should include the elements in Sections 1.2 – 1.4 below.]

In consultation with Commission staff, the permittee shall develop a preliminary wetland restoration plan for the wetland site identified through the site selection process. The preliminary wetland restoration plan shall meet the minimum standards and incorporate as many as possible of the objectives in subsections 1.3 and 1.4, respectively.

The preliminary wetland restoration plan shall include the following elements:

- a. Review of existing physical, biological, and hydrological conditions; ownership, land use and regulation.
- b. Site-specific and regional restoration goals and compatibility with the goal of mitigating for ~~SONGS impact to fish~~ Poseidon's marine life impacts.
- c. Identification of site opportunities and constraints.
- d. Conceptual restoration design, including:
 1. Proposed grading and excavation; water control structures; planting; integration of public access, if feasible; buffers and transition areas; management and maintenance requirements.
 2. Proposed habitat types (including approximate size and location).

3. Preliminary assessment of significant impacts of design (especially on existing habitat values) and net habitat benefits.
4. Evaluation of steps for implementation e.g. permits and approvals, development agreements, acquisition of property interests.
5. A graphic depiction of proposed plan.

[Note: As part of the elements above, the Preliminary Plan should describe the current and anticipated relationship between Poseidon's proposed mitigation and Edison's, including applicable conditions of the MOA and any written agreements between Poseidon, Edison, and/or the JPA, measures included that will ensure Poseidon's mitigation will not adversely affect Edison's mitigation, coordination with Edison's Scientific Advisory Panel, etc.]

1.3 Minimum Standards

The wetland restoration project site and preliminary plan must meet the following minimum standards:

- a. Location within Southern California Bight.
- b. Potential for restoration as tidal wetland, with extensive intertidal and subtidal areas;
- c. Creates or substantially restores a minimum of ~~150 acres (60 hectares)~~ 55.4 to 68.2 acres of wetlands habitat similar to the affected habitats in Agua Hedionda Lagoon, excluding buffer zone and upland transition area; ***[Note: the acreage figures are from Pete Raimondi's evaluation at the 80% and 95% confidence levels.]***
- d. Provides a buffer zone of a size adequate to ensure protection of wetland values, and not less than at least 100 feet wide, as measured from the upland edge of the transition area.
- e. Any existing site contamination problems would be controlled or remediated and would not hinder restoration.
- f. Site preservation is guaranteed in perpetuity (through appropriate public agency or nonprofit ownership, or other means approved by the Executive Director), to protect against future degradation or incompatible land use.
- g. Feasible methods are available to protect the longterm wetland values on the site, in perpetuity.
- h. Does not result in loss of existing wetlands.
- i. Does not result in impact on endangered species.

1.4 Objectives

The following objectives represent the factors that will contribute to the overall value of the wetland. The selected site shall be that with the best potential to achieve these objectives. These objectives shall also guide preparation of the restoration plan.

- a. Provides maximum overall ecosystem benefits e.g. maximum upland buffer, enhancement of downstream fish values, provides regionally scarce habitat, potential for local ecosystem diversity.
- b. Provides substantial fish habitat compatible with other wetland values at the site.
- c. Provides a buffer zone of an average of at least 300 feet wide, and not less than 100 feet wide, as measured from the upland edge of the transition area.
- d. Provides maximum upland transition areas (in addition to buffer zones);
- e. Restoration involves minimum adverse impacts on existing functioning wetlands and other sensitive habitats.
- f. Site selection and restoration plan reflect a consideration of site specific and regional wetland restoration goals.
- g. Restoration design is that most likely to produce and support wetland-dependent resources.
- h. Provides rare or endangered species habitat.
- i. Provides for restoration of reproductively isolated populations of native California species.
- j. Results in an increase in the aggregate acreage of wetland in the Southern California Bight.
- k. Requires minimum maintenance.
- l. Restoration project can be accomplished in a timely fashion.
- m. Site is in proximity to ~~SONGS~~ the Carlsbad desalination facility.

1.6 Restrictions

(a) The permittee may propose a wetland restoration project larger than the minimum necessary size specified in subsection 1.3(c) above, if biologically appropriate for the site, but the additional acreage must (1) be clearly identified, and (2) must not be the portion of the project best satisfying the standards and objectives listed above.

(b) If the permittee jointly enters into a restoration project with another party: (1) the permittee's portion of the project must be clearly specified, (2) any other party involved cannot gain mitigation credit for the permittee's portion of the project, and (3) the permittee may not receive mitigation credit for the other party's portion of the project.

(c) The permittee may propose to divide the mitigation requirement between a maximum of two wetland restoration sites, unless there is a compelling argument, approved by the Executive Director, that the standards and objectives of subsections 1.3 and 1.4 will be better met at more than two sites.

[Note: We'll probably recommend the text below, or similar, as conditions for the Commission to adopt in August to determine what will be required as follow-up to the Preliminary Plan to ensure it results in an adequate Final Plan – that is, while you may include them in your Plan for August, we'll probably handle them as conditions for approval.]

2.0 FINAL PLAN AND PLAN IMPLEMENTATION

2.1 Final Restoration Plan

Within ~~12-24~~ months *[Note: based on anticipated 18-month CEQA process]* following the Commission's approval of a site selection and preliminary restoration plan, the permittee shall submit a complete Coastal Development Permit application for a final restoration plan along with CEQA documentation ~~generated in connection with and~~ local or other state agency approvals, ~~to the Executive Director of the Coastal Commission for review and approval.~~ *[Note: the changes above reflect a difference between SONGS and Poseidon's processes. With SONGS, Edison applied for a CDP for its Preliminary Plan after Marine Resource Committee review and Commission approval of the selected site and applied for a CDP for its Final Plan. With Poseidon, your CDP application for the mitigation site work will come after CEQA is done and after other approvals are obtained.]* The final restoration plan shall substantially conform to the approved preliminary restoration plan as originally submitted or as amended by the Commission pursuant to a request by the permittee. The final restoration plan shall include, but not be limited to the following elements:

- a. Detailed review of existing physical, biological, and hydrological conditions; ownership, land use and regulation.
- b. Evaluation of site-specific and regional restoration goals and compatibility with the goal of mitigating for ~~SONGS impacts to fish~~ Poseidon's marine life impacts.
- c. Identification of site opportunities and constraints.

[Note: the above three elements should include a complete description of the relationship between Poseidon's mitigation and Edison's, and any legal/contractual relationships between

Poseidon, Edison, the JPA, and other involved entities. This should also describe how Poseidon's ongoing sampling, monitoring, maintenance, contingency planning, etc. may be associated with Edison's.

d. Schematic restoration design, including:

1. Proposed cut and fill, water control structures, control measures for stormwater, buffers and transition areas, management and maintenance requirements.
2. Planting Program, including removal of exotic species, sources of plants and or seeds (local, if possible), protection of existing salt marsh plants, methods for preserving top soil and augmenting soils with nitrogen and other necessary soil amendments before planting, timing of planting, plans for irrigation until established, and location of planting and elevations on the topographic drawings.
3. Proposed habitat types (including approximate size and location).
4. Assessment of significant impacts of design (especially on existing habitat values) and net habitat benefits. [*Note: this should include a description of any effects on existing habitat values within Poseidon's mitigation site (e.g., are there existing wetlands within your site that would be altered by your project?) and Edison's site, along with proposed measures to mitigate those impacts – e.g., methods, locations, etc.*]
5. Location, alignment and specifications for public access facilities, if feasible.
6. Evaluation of steps for implementation e.g. permits and approvals, development agreements, acquisition of property rights.
7. Cost estimates.
8. Topographic drawings for final restoration plan at 1" = 100 foot scale, one foot contour interval.
9. Drawings shall be directly translatable into final working drawings.

g. Detailed information about how monitoring and maintenance will be implemented.

h. Detailed information about construction methods to be used.

i. Defined final success criteria for each habitat type and methods to be used to determine success.

j. Detailed information about how Poseidon will coordinate with the SONGS Scientific Advisory Panel, including its role in independent monitoring, contingency planning review, cost recovery, etc.

- k. Detailed information about contingency measures that will be implemented if mitigation does not meet the approved goals, objectives, performance standards, or other criteria.
- l. Submittal of "as-built" plans showing final grading, planting, hydrological features, etc. within 60 days of completing initial mitigation site construction.

[Note: the additions above reflect conditions generally included in more recent mitigation plans or needed to coordinate with Edison's efforts.]

2.2 Wetland Construction Phase

Within 6 months of approval of the final restoration plan, subject to the permittee's obtaining the necessary permits, the permittee shall commence the construction phase of the wetland restoration project. The permittee shall be responsible for ensuring that construction is carried out in accordance with the specifications and within the timeframes specified in the approved final restoration plan and shall be responsible for any remedial work or other intervention necessary to comply with final plan requirements.

2.3 Timeframe for Resubmittal of Project Elements

If the Commission does not approve any element of the project (i.e. site selection, restoration plan), the Commission will specify the time limits for compliance relative to selection of another site or revisions to the restoration plan.

3.0 WETLAND MONITORING, MANAGEMENT AND REMEDIATION

Monitoring, management (including maintenance), and remediation shall be conducted over the "full operating life" of ~~SONGS Units 2 and 3~~ Poseidon's desalination facility. ~~"Full operating life" as defined in this permit includes past and future years of operation of SONGS units 2 and 3 including the decommissioning period to the extent there are continuing discharges. The number of past operating years at the time the wetland is ultimately constructed, shall be added to the number of future operating years and decommission period, to determine the length of the monitoring, management and remediation requirement.~~

The following section describes the basic tasks required for monitoring, management and remediation. Condition II-D specifies the administrative structure for carrying out these tasks, including the roles of the permittee and Commission staff.

3.1 Monitoring and Management Plan

A monitoring and management plan will be developed in consultation with the permittee and appropriate wildlife agencies, concurrently with the preparation of the restoration plan, to

provide an overall framework to guide the monitoring work. It will include an overall description of the studies to be conducted over the course of the monitoring program and a description of management tasks that are anticipated, such as trash removal. Details of the monitoring studies and management tasks will be set forth in a work program (see Section II-D).

3.2 Pre-restoration site monitoring

Pre-restoration site monitoring shall be conducted to collect baseline data on the wetland attributes to be monitored. This information will be incorporated into and may result in modification to the overall monitoring plan.

3.3 Construction Monitoring

Monitoring shall be conducted during and immediately after each stage of construction of the wetland restoration project to ensure that the work is conducted according to plans.

3.4 Post-Restoration Monitoring and Remediation

Upon completion of construction of the wetland, monitoring shall be conducted to measure the success of the wetland in achieving stated restoration goals (as specified in restoration plan) and in achieving performance standards, specified below. The permittee shall be fully responsible for any failure to meet these goals and standards during the facility's full operational years of SONGS Units 2 and 3. Upon determining that the goals or standards are not achieved, the Executive Director shall prescribe remedial measures, after consultation with the permittee, which shall be immediately implemented by the permittee with Commission staff direction. If the permittee does not agree that remediation is necessary, the matter may be set for hearing and disposition by the Commission.

Successful achievement of the performance standards shall (in some cases) be measured relative to approximately four reference sites, which shall be relatively undisturbed, natural tidal wetlands within the Southern California Bight. The Executive Director shall select the reference sites. The standard of comparison i.e. the measure of similarity to be used (e.g. within the range, or within the 95% confidence interval) shall be specified in the work program.

In measuring the performance of the wetland project, the following physical and biological performance standards will be utilized:

- a. Longterm Physical Standards. The following longterm standards shall be maintained over the full operative life of SONGS Units 2 and 3 the desalination facility.
 - 1) Topography. The wetland shall not undergo major topographic degradation (such as excessive erosion or sedimentation).

- 2) **Water Quality.** Water quality variables (to be specified) shall be similar to reference wetlands.
 - 3) **Tidal prism.** ~~The designed tidal prism shall be maintained, and tidal flushing shall not be interrupted.~~ *[Note: this is Edison's requirement, but could be part of Poseidon's obligation based on the agreement you develop with Edison.]*
 - 4) **Habitat Areas.** The area of different habitats shall not vary by more than 10% from the areas indicated in the final restoration plan.
- b. **Biological Performance Standards.** The following biological performance standards shall be used to determine whether the restoration project is successful. Table 1, below, indicates suggested sampling locations for each of the following biological attributes; actual locations will be specified in the work program.
- 1) **Biological Communities.** Within 4 years of construction, the total densities and number of species of fish, macroinvertebrates and birds (see table 1) shall be similar to the densities and number of species in similar habitats in the reference wetlands.
 - 2) **Vegetation.** The proportion of total vegetation cover and open space in the marsh shall be similar to those proportions found in the reference sites. The percent cover of algae shall be similar to the percent cover found in the reference sites.
 - 3) **Spartina Canopy Architecture.** The restored wetland shall have a canopy architecture that is similar in distribution to the reference sites, with an equivalent proportion of stems over 3 feet tall.
 - 4) **Reproductive Success.** Certain plant species, as specified by in the work program, shall have demonstrated reproduction (i.e. seed set) at least once in three years.
 - 5) **Food Chain Support.** The food chain support provided to birds shall be similar to that provided by the reference sites, as determined by feeding activity of the birds.
 - 6) **Exotics.** The important functions of the wetland shall not be impaired by exotic species.

Table 1: Suggested Sampling Locations

| | Salt Marsh | | | Open Water | | Mudflat | Tidal Creeks |
|-----------------|------------|------------|-------|------------|----------|---------|-----------------|
| | Spartina | Salicornia | Upper | Lagoon | Eelgrass | | |
| 1) Density/spp: | | | | | | | |
| Fish | | | | X | X | X | X |
| Macroinverts | | | | X | X | X | X |
| Birds | X | X | X | X | | X | X |
| 2) % Cover | | | | | | | |
| Vegetation | X | X | X | | X | | |
| algae | X | X | | | | X | |
| 3) Spar. arch. | X | | | | | | |
| 4) Repro. suc. | X | X | X | | | | |
| 5) Bird feeding | | | | X | | X | X |
| 6) Exotics | X | X | X | X | X | X | X |

...

CONDITION D: ADMINISTRATIVE STRUCTURE

[Note: The conditions below will likely vary based on the relationship you develop with Edison and the JPA regarding monitoring, review, administration, etc.]

1.0 ADMINISTRATION

Personnel with appropriate scientific or technical training and skills will, under the direction of the Executive Director, oversee the mitigation and monitoring functions identified and required by conditions II-A through C. The Executive Director will retain approximately two scientists and one administrative support staff to perform this function.

This technical staff will oversee the preconstruction and post-construction site assessments, mitigation project design and implementation (conducted by permittee), and monitoring activities (including plan preparation); the field work will be done by contractors under the

Executive Director's direction. The contractors will be responsible for collecting the data, analyzing and interpreting it, and reporting to the Executive Director.

The Executive Director shall convene a scientific advisory panel to provide the Executive Director with scientific advice on the design, implementation and monitoring of the wetland restoration and artificial reef. The panel shall consist of recognized scientists, including a marine biologist, an ecologist, a statistician and a physical scientist.

2.0 BUDGET AND WORK PROGRAM

The funding necessary for the Commission and the Executive Director to perform their responsibilities pursuant to these conditions will be provided by the permittee in a form and manner determined by the Executive Director to be consistent with requirements of State law, and which will ensure efficiency and minimize total costs to the permittee. The amount of funding will be determined by the Commission on a biennial basis and will be based on a proposed budget and work program, which will be prepared by the Executive Director in consultation with the permittee, and reviewed and approved by the Commission. If the permittee and the Executive Director cannot agree on the budget or work program, the disagreement will be submitted to the Commission for resolution.

The budget to be funded by the permittee will be for the purpose of reasonable and necessary costs to retain personnel with appropriate scientific or technical training and skills needed to assist the Commission and the Executive Director in carrying out the mitigation and lost resource compensation conditions (II-A through C) approved as part of this permit action. In addition, reasonable funding will be included in this budget for necessary support personnel, equipment, overhead, consultants, the retention of contractors needed to conduct identified studies, and to defray the costs of members of any scientific advisory panel(s) convened by the Executive Director for the purpose of implementing these conditions.

Costs for participation on any advisory panel shall be limited to travel, per diem, meeting time and reasonable preparation time and shall only be paid to the extent the participant is not otherwise entitled to reimbursement for such participation and preparation. Total costs for such advisory panel shall not exceed \$100,000 per year adjusted annually by any increase in the consumer price index applicable to California.

The work program will include:

- a. A description of the studies to be conducted over the subsequent two year period, including the number and distribution of sampling stations and samples per station, methodology and statistical analysis (including the standard of comparison to be used in comparing the mitigation projects to the reference sites.)

- b. A description of the status of the mitigation projects, and a summary of the results of the monitoring studies to that point.
- c. A description of the performance standards that have been met, and those that have yet to be achieved.
- d. A description of remedial measures or other necessary site interventions.
- e. A description of staffing and contracting requirements.
- f. A description of the Scientific Advisory Panel's role and time requirements in the two year period.

The Executive Director may amend the work program at any time, subject to appeal to the Commission.

3.0 ANNUAL REVIEW

A duly noticed public workshop will be convened and conducted by the Executive Director or the Commission each year to review the status of the mitigation projects. The meeting will be attended by the contractors who are conducting the monitoring, appropriate members of the Scientific Advisory Panel, the permittee, Commission staff, representatives of the resource agencies (CDFG, NMFS, USFWS), and the public. Commission staff and the contractors will give presentations on the previous year's activities, overall status of the mitigation projects, identify problems and make recommendations for solving them, and review the next year's program. The permittee shall report on the status of the behavioral barrier devices.

The public review will include discussions on whether the artificial reef and wetland mitigation projects have met the performance standards, identified problems, and recommendations relative to corrective measures necessary to meet the performance standards. The Executive Director will utilize information presented at the annual public review, as well as any other relevant information, to determine whether any or all of the performance standards have been met, whether revisions to the standards are necessary, and whether remediation is required. Major revisions shall be subject to the Commission's review and approval.

The mitigation projects will be successful when all performance standards have been met each year for a three-year period. The Executive Director shall report to the Commission upon determining that all of the performance standards have been met for three years and that the project is deemed successful. If the Commission determines that the performance standards have been met and the project is successful, the monitoring program will be scaled down, as recommended by the Executive Director and approved by the Commission. A public review shall thereafter occur every five years, or sooner if called for by the Executive Director. The work program shall reflect the lower level of monitoring required. If subsequent monitoring shows that

a standard is no longer being met, monitoring may be increased to previous levels, as determined necessary by the Executive Director.

The Executive Director may make a determination on the success or failure to meet the performance standards or necessary remediation and related monitoring at any time, not just at the time of the annual public review.

CONDITION E: MRC DATA MAINTENANCE

The scientific data collected by the MRC will be stored in the Commission library in San Francisco, and at the Los Angeles County Museum of Natural Science, or at an alternative location in Southern California, as determined by the Executive Director; and will be made available for public use. The permittee shall purchase the necessary computer equipment for the Commission and the Southern California location to store and retrieve the data, and shall fund appropriate staff training on data storage and retrieval at both locations.

Item W16a
Exhibit 3

Poseidon's August 2, 2008
Proposed MLMP and
attachments



POSEIDON RESOURCES

August 2, 2008

**Agenda Item
W 5b**

VIA OVERNIGHT DELIVERY

Chairman Krue and Honorable Commissioners
California Coastal Commission
North Central Coast District
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

RECEIVED

AUG 04 2008

CALIFORNIA
COASTAL COMMISSION

Re: Carlsbad Desalination Project CDP Application No. E-06-013
Special Condition 8: Marine Life Mitigation Plan

Dear Chairman Krue and Honorable Commissioners:

Poseidon Resources (Channelside) LLC ("Poseidon") requests that the Commission approve Poseidon's proposed Marine Life Mitigation Plan ("MLMP") attached hereto as Exhibit A, which Poseidon has prepared pursuant to Special Condition 8 of the above-referenced Coastal Development Permit (the "Permit") for the Carlsbad Seawater Desalination Facility (the "Project"). The Commission approved the Permit at its November 15, 2007 hearing, including Special Condition 8, which requires the Applicant to submit a Marine Life Mitigation Plan for Commission review and approval before the Permit will issue.

Following months of extensive collaboration with experts, Commission Staff, and state and local agencies,¹ Poseidon submitted its MLMP to the Commission on July 3, 2008. The MLMP contains the following elements that ensure Poseidon will implement and fund a wetland restoration project or projects that not only fully mitigate any Project impacts to marine life, but also provide additional mitigation that creates, enhances, and restores aquatic and wetland habitat consistent with Coastal Act Sections 30230 and 30231 and Special Condition 8:

- Contains **performance standards and objectives** that are consistent with those applied in Edison's San Onofre Nuclear Generating Station ("SONGS") project;

¹ Poseidon has consulted with the Department of Fish and Game, the Department of Transportation, the State Lands Commission, the San Diego Regional Water Quality Control Board, the City of Carlsbad, Coastal Commission Staff, and the U.S. Fish and Wildlife Service, among others.

These materials have been provided to Coastal Commission Staff

Poseidon Resources Corporation
501 West Broadway, Suite 840, San Diego, CA 92101, USA
619-595-7802 Fax: 619-595-7892
Project Office: 4600 Carlsbad Boulevard, Carlsbad, CA 92008

- Provides for up to **42.5 acres of wetland restoration**, which is consistent with California Energy Commission ("CEC") methodology and Commission precedent;
- Implements a **phased mitigation program** to ensure that Poseidon is incentivized to incorporate emerging technologies that are not currently available into Project operations to **further reduce marine impacts**;
- Requires Poseidon to submit a new Coastal Development Permit application for Phase I of the restoration project **within 24 months** of MLMP approval;
- Ensures long-term **performance, monitoring, and protection** of the mitigation measures; and
- Allows for the Commission to **determine in the future** whether Lagoon dredging should entitle Poseidon to restoration credit applicable to all or part of its Phase II mitigation obligations.

On July 24, 2008, Commission Staff released its Staff Report recommending approval of the MLMP if it is modified and amended to include Staff's recommendations. In response to the Staff Report, Poseidon revised the MLMP to address substantially all of Staff's concerns (excluding the three issues discussed in the remainder of this letter), and to ensure that the MLMP substantially complies with Staff's recommendations.² For the Commission's convenience, we have attached as Exhibit B a document that sets forth the issues raised in the Staff Report and how Poseidon responded to those issues, including citations to the changes made to the MLMP. Poseidon's proposed MLMP is attached hereto as Exhibit A in redline format showing all of the changes made in response to the Staff Report that are discussed in Exhibit B. These documents demonstrate that Poseidon has made significant compromises to its positions regarding the MLMP to address and resolve Staff's concerns.

A. Key Differences With Staff Report

Poseidon believes there remain only three key differences between Poseidon's MLMP and Staff's position in the Staff Report that require the Commission's further consideration, including:

- (1) the amount of mitigation acreage;
- (2) whether mitigation may be phased; and

² Poseidon forwarded these revisions to Staff on July 31, 2008 and hoped to have Staff confirm, prior to finalizing this letter, that these revisions addressed their concerns, but Staff cancelled the planned conference call to discuss these changes.

- (3) whether the Commission should have the discretion to decide at a later date if Poseidon may receive restoration credit for dredging the Agua Hedionda Lagoon (the "Lagoon").

Poseidon contends that the MLMP's proposed 42.5 acres of mitigation is soundly based on CEC methodology; that the phased approach to mitigation ensures the Project's marine life impacts will be fully mitigated during all Project operating scenarios; and that the Commission should be allowed to determine whether Poseidon may receive restoration credit for evidence demonstrating the environmental benefits attributable to Lagoon dredging at the time Poseidon actually requests such credit (if ever) for its Phase II obligations. Accordingly, for those reasons and the reasons summarized below and set forth in detail in Exhibit C ("Marine Life Mitigation Rationale"), Poseidon requests that the Commission not adopt Staff's recommended modifications and instead adopt Poseidon's MLMP as revised and attached hereto as Exhibit A.

B. Poseidon's Restoration Acreage is Consistent with Commission Practice

Independent review has confirmed that Poseidon's proposed 42.5 acres is sufficient restoration to fully mitigate the Project's marine life impacts, consistent with Coastal Act Sections 30230 and 30231. Poseidon's entrainment study, which provides the basis for Poseidon's proposed 42.5 acres of wetland restoration, was reviewed by the Coastal Commission's independent expert, Dr. Pete Raimondi of UC Santa Cruz. Dr. Raimondi confirmed, among other things, that: (1) Poseidon's study design is consistent with recent entrainment studies conducted in California;³ and (2) using CEC methodology, the habitat restoration required to mitigate the Project's "stand-alone" operations would be 42.5 acres. This methodology is also consistent with the peer-reviewed and approved methodology the CEC applied to the Morro Bay Power Plant and the Moss Landing Power Plant.

Notably, Commission Staff originally recommended that Poseidon use CEC methodology to determine Project mitigation acreage, but Staff is now recommending a substantial *increase* in the mitigation acreage by *applying a new standard that has never been peer-reviewed and which adjusts variables in the modeling estimates*. Specifically, Dr. Raimondi suggested that in order to provide a *greater* level of assurance that impacts to lagoon and ocean species will be mitigated, Poseidon could restore a total of 55.4 to 68.2 acres, which would provide an unprecedented level of mitigation for the Project's "stand-alone" impacts that the Commission has never applied before. This "enhanced mitigation" proposal is not consistent with CEC methodology and established, peer-reviewed methodology and precedent. Notably, Dr. Raimondi has not advocated that the Commission should apply the "enhanced mitigation" methodology, and has appropriately left to the Commission the decision of which methodology should be used.

³ As Set forth in the Staff Report, "Dr. Raimondi was able to determine that the study's sampling and data collection methods were consistent with those used in other recent entrainment studies conducted in California pursuant to the protocols and guidelines used by the U.S. EPA, Regional Water Quality Control Boards, California Energy Commission, and Coastal Commission." (Staff Report re: Condition Compliance for CDP No. E-06-013; Special Condition 8: Submittal of Marine Life Mitigation Plan, July 24, 2008, at p. 8.)

C. Phased Mitigation is Appropriate for this Project

Poseidon's phased approach to mitigation would fully compensate for the Project's impacts to marine life under either of the power plant's operating scenarios. The initial phase would provide 37 acres of wetland restoration, which would fully compensate for Project-related impacts during the period when both the Encina Power Station ("EPS") and the Project are operating ("Phase I"). The second phase would provide up to 5.5 acres of additional restoration to address any additional unmitigated impacts occurring if the Project ever operates "stand-alone"; that is, when the EPS is decommissioned or when the EPS is providing less than 15% of the water needed for the Project based on the EPS's average water use over any three-year period ("Phase II").

- **Phase I Substantially Over-mitigates Project Impacts.** The 37 acres provided under Phase I would fully mitigate the Project's impacts as long as at least 13% of the Project's seawater requirements are provided by the EPS. In the last 18 months, the EPS would have provided over 65% of the water needed for the Project. Based on that number, the 37 acres provided by Poseidon under Phase I would have been about 2.5 times the mitigation actually required. Through the phased approach to mitigation, Poseidon will substantially over-mitigate its impacts while the EPS continues to operate.
- **Phase II Mitigation Provides New Opportunities to Reduce Impacts.** Under Phase II, the MLMP ensures that Poseidon will fully mitigate its "stand-alone" impacts by requiring Poseidon to: (1) analyze the environmental effects of ongoing Project operations; (2) use that analysis to investigate and evaluate reasonably feasible technologies that are unavailable today, which may reduce any marine life impacts; (3) provide its analysis of environmental effects and its evaluation of any reasonably feasible technologies to reduce impacts to the Commission; and (4) undertake Lagoon dredging obligations, if feasible. The Commission will then be able to determine if actual Project operations have less of an impact to marine life than originally estimated, if Poseidon can further reduce the Project's impacts through reasonably feasible technologies, or if Poseidon should receive restoration credit for demonstrated environmental benefits attributable to dredging (as discussed further in Section D below). Based on these determinations, the Commission may proportionally reduce Poseidon's habitat restoration obligation for Phase II mitigation. Accordingly, phased mitigation will incentivize Poseidon to investigate new technologies that are not available today to reduce impacts so that it can potentially reduce its restoration obligation, and it will enable the Commission to make mitigation decisions based on the Project's actual operational impacts rather than estimates. If the mitigation obligation is not reduced, the MLMP requires Poseidon to restore an additional 5.5 acres of wetland habitat subject to the same performance standards and objectives required under Phase I.

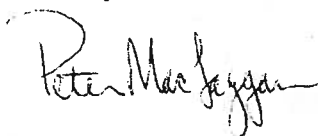
D. Lagoon Dredging Credit Should Be Evaluated in the Future

Pursuant to Poseidon's MLMP, the Commission may decide at a later date whether Poseidon should receive any restoration credit for assuming Lagoon dredging obligations. Poseidon has not requested that dredging credit be applied to its mitigation obligations now; on the contrary, Poseidon is asking the Commission only to leave open the possibility of allowing such credit in the future if Poseidon assumes dredging obligations. The Staff Report, however, recommends that the Commission should decide *now* that Poseidon's potential dredging is not subject to restoration credit because dredging is inconsistent with Special Condition 8's requirement that mitigation be in the form of creation, enhancement or restoration of wetland habitat.

The Staff Report, however, fails to acknowledge that Lagoon dredging is necessary to preserve the Lagoon's beneficial uses, and that sand dredged from the Lagoon would be used to maintain, restore and enhance habitat for grunion spawning and enhance opportunities for public access and recreation along the shoreline. Moreover, the Commission has applied dredging credit in the past for the SONGS project. Further, approval of the MLMP would not constitute approval of a particular dredging proposal or grant of dredging credit. Rather, any dredging proposal would require a separate Coastal Development Permit pursuant to Special Condition 12, so it would be premature for the Commission to analyze dredging that Poseidon cannot perform. Accordingly, it is perfectly appropriate for the Commission to determine whether Poseidon should receive restoration credit for dredging at the time it applies for such credit in the future (if ever).

We appreciate the Commission's consideration of these important issues and respectfully request that the Commission approve Poseidon's proposed Marine Life Mitigation Plan attached hereto as Exhibit A at its August 6, 2008 meeting.

Sincerely,



Peter MacLaggan
Poseidon Resources

Attachments

cc: Tom Luster;
Rick Zbur, Esq.

POSEIDON RESOURCES

**Agenda Item
W 5b**

EXHIBITS TO POSEIDON'S
AUGUST 2, 2008
RESPONSE TO STAFF REPORT
REGARDING THE
MARINE LIFE MITIGATION PLAN

Exhibit A. Marine Life Mitigation Plan

Exhibit B Responses to Issues Identified in July 24, 2008
Staff Report

Exhibit C Marine Life Mitigation Plan Rationale

These materials have been provided to California Coastal Commission Staff

EXHIBIT A

MARINE LIFE MITIGATION PLAN

CONDITION A: WETLAND RESTORATION MITIGATION

The permittee shall develop, implement and fund a wetland restoration project that compensates for marine life impacts from Poseidon's Carlsbad desalination facility.

1.0 PHASED IMPLEMENTATION

Poseidon's Carlsbad desalination facility will function under two operating scenarios: (1) using the Encina Power Station's seawater intake while the Power Station continues to operate ("Phase I"); and (2) as a stand-alone facility ("Phase II"). The permittee's restoration project shall be phased to address marine life impacts from each of the applicable operating scenarios.

To mitigate marine life impacts for Phase I operations, the permittee shall develop, implement and fund a 37-acre wetland restoration project consistent with the terms and conditions set forth in this Plan. The permittee's additional obligations to mitigate marine life impacts for Phase II operations, which may include up to 5.5 acres of additional wetland restoration, are set forth in section 6.0. Combined, mitigation for Phase I and Phase II would require up to 42.5 acres of wetland restoration.

1.1 Technology Review During Phase I Operations

On or before April 30 of each year following the commencement of the Carlsbad desalination facility's commercial operations, the permittee shall provide the Executive Director with data demonstrating the Encina Power Station's cooling water intake for the prior calendar year. On or before April 30 following the first three years of the Carlsbad desalination facility's commercial operations, the permittee shall also provide the Executive Director with the calculation demonstrating the Power Station's average water use during the prior three-year period. The permittee shall thereafter provide the Executive Director with that calculation annually, on or before April 30, until either of the occurrence of either of the "Phase II Pre-Conditions," as defined in subsection 1.2 below.

Consistent with the permittee's approvals from the State Lands Commission, the permittee shall perform the following ten years after the commencement of commercial operations, unless either of the "Phase II Pre-Conditions" occur before that time (as defined in subsection 1.2 below):

- a. Conduct a new analysis of the environmental effects of ongoing desalination facility operations ten years after the commencement of commercial operations. The analysis

shall provide information about the project's actual impacts from operations, taking into account all project features and mitigation measures;

- b. Using that analysis, the permittee shall investigate and evaluate new and developing technologies that are reasonably feasible and unavailable today, which may further reduce any marine life impacts; and
- c. Within 24 months of the date that the permittee commenced its analysis of the environmental effects of ongoing desalination facility operations, the permittee shall provide that analysis and its evaluation of potential and reasonably feasible technologies to the Commission for review. The determination of feasibility shall consider costs, potential impacts, and acceptability to the Encina Power Station, among other things.

Upon receiving the analysis of environmental effects of ongoing desalination facility operations and the evaluation of new and available technologies from the permittee, the Commission may request a hearing to determine whether those technologies are reasonably feasible and whether the permittee can implement any of the technologies to reduce marine life impacts. If the Commission determines that any such technologies are reasonably feasible and may further reduce marine impacts, this Marine Life Mitigation Plan may, after a public hearing before the Commission, be amended to require implementation of reasonably feasible technologies.

1.2 Implementation of Phase II Mitigation

The permittee's Phase I mitigation obligations will not be affected by whether or not the permittee is ultimately required to undertake mitigation for Phase II. If either the Encina Power Station stops using its existing seawater intake for cooling water, or the Encina Power Station's use of its seawater intake provides less than 15% of Poseidon's needed water based on the Power Station's average water use over any three-year period ("Phase II Pre-Conditions"), then the permittee shall also undertake the Phase II mitigation obligations set forth in section 6.0.

2.0 PHASE I SITE SELECTION

In consultation with Commission staff, the permittee shall select a wetland restoration site for Phase I mitigation in accordance with the following process and terms.

Within 10 months of the effective date of this permit, the permittee shall submit the proposed site and preliminary Phase I restoration plan to the Commission for its review and approval or disapproval.

The location of the wetland restoration project shall be within the Southern California Bight. The permittee shall select from sites including, but not limited to, the following eleven sites:

Tijuana Estuary in San Diego County; San Dieguito River Valley in San Diego County; Agua Hedionda Lagoon in San Diego County; San Elijo Lagoon in San Diego County; Buena Vista Lagoon in San Diego County; Huntington Beach Wetland in Orange County, Anaheim Bay in Orange County, Santa Ana River in Orange County, Los Cerritos Wetland in Los Angeles County, Ballona Wetland in Los Angeles County, and Ormond Beach in Ventura County. The permittee may also consider any sites that may be recommended by the California Department of Fish & Game as high priority wetlands restoration projects.

The basis for the selected site shall be an evaluation of the site against the minimum standards and objectives set forth in subsections 3.1 and 3.2 below. The permittee shall take into account and give consideration to the advice and recommendations of the scientific advisory panel established and convened by the Executive Director pursuant to Condition B.1.0. The permittee shall select the site that meets the minimum standards and best meets the objectives.

2.1 Preliminary Phase I Restoration Plan

In consultation with Commission staff, the permittee shall develop a preliminary wetland restoration plan for Phase I mitigation of the wetland site identified through the site selection process. The preliminary Phase I restoration plan shall meet the minimum standards and incorporate as many as possible of the objectives in subsections 3.1 and 3.2, respectively.

The preliminary Phase I restoration plan shall include the following elements:

- a. Review of existing physical, biological, and hydrological conditions; ownership, land use and regulation.**
- b. Site-specific and regional restoration goals and compatibility with the goal of mitigating Poseidon's marine life impacts.**
- c. Identification of site opportunities and constraints.**
- d. Conceptual restoration design, including:**
 - 1. Proposed grading and excavation; water control structures; planting; integration of public access, if feasible; buffers and transition areas; management and maintenance requirements.**
 - 2. Proposed habitat types (including approximate size and location).**
 - 3. Preliminary assessment of significant impacts of design (especially on existing habitat values) and net habitat benefits.**

4. Evaluation of steps for implementation e.g. permits and approvals, development agreements, acquisition of property interests.

5. A graphic depiction of proposed plan.

3.0 PHASE I PLAN REQUIREMENTS

In consultation with Commission staff, the permittee shall develop a **final** wetland restoration plan for the wetland site identified through the site selection process for Phase I. The wetland restoration **based on the preliminary Phase I plan, which the permittee shall submit to the Commission as part of the Coastal Development Permit Application described in Section 4.0.** The **final** plan shall **also** meet the minimum standards and incorporate as many as feasible of the objectives in subsections 3.1 and 3.2, respectively.

3.1 Minimum Standards

The Phase I wetland restoration project site and preliminary plan must meet the following minimum standards:

- a. Location within Southern California Bight;
- b. Potential for restoration as tidal wetland, with extensive intertidal and subtidal areas;
- c. Creates or substantially restores a minimum of 37 acres of habitat similar to the affected habitats in Agua Hedionda Lagoon, excluding buffer zone and upland transition area;
- d. Provides a buffer zone of a size adequate to ensure protection of wetland values, and **substantially** at least 100 feet wide, as measured from the upland edge of the transition area. The Executive Director or the Commission may make exceptions to the 100-foot buffer requirement in certain locations if they determine that the exceptions are de minimis, or that a lesser buffer is sited and/or designed to prevent impacts that would significantly degrade wetland areas and that they are compatible with the continuance of those areas;
- e. Any existing site contamination problems would be controlled or remediated and would not hinder restoration;
- f. Site preservation is guaranteed in perpetuity (through appropriate public agency or nonprofit ownership, or other means approved by the Executive Director), to protect against future degradation or incompatible land use;
- g. Feasible methods are available to protect the long-term wetland values on the site, in perpetuity;

- h. Does not result in a net loss of existing wetlands; and
- i. Does not result in an adverse, impact on endangered animal species, or an adverse unmitigated impact on endangered plant species.

3.2 Objectives

The following objectives represent the factors that will contribute to the overall value of the wetland. The selected site shall be determined to achieve these objectives. These objectives shall also guide preparation of the restoration plan.

- a. Provides substantial maximum overall ecosystem benefits, e.g. substantial maximum upland buffer, enhancement of downstream fish values, provides regionally scarce habitat, potential for local ecosystem diversity;
- b. Provides substantial fish habitat compatible with other wetland values at the site;
- c. Provides a buffer zone of at least an average of at least 300 feet wide, depending on the feasibility at the selected site(s), and not less than 100 feet wide, as measured from the upland edge of the transition area, subject to the exemptions set forth in subsection 3.1(d);
- d. Provides substantial maximum upland transition areas (in addition to buffer zones);
- e. Restoration involves minimum adverse impacts on existing functioning wetlands and other sensitive habitats;
- f. Site selection and restoration plan reflect a consideration of site specific and regional wetland restoration goals;
- g. Restoration design is that most likely to produce and support wetland-dependent resources;
- h. Provides potential habitat for rare or endangered species;
- i. Provides for restoration of reproductively isolated populations of native California species;
- j. Results in an increase in the aggregate acreage of wetland in the Southern California Bight;
- k. Requires minimum maintenance;
- l. Restoration project can be accomplished in a reasonably timely fashion; and
- m. Site is in proximity to the Carlsbad desalination facility.

3.3 Restrictions

(a) The permittee may propose a wetland restoration project larger than the minimum necessary size specified in subsection 3.1(c) above, if biologically appropriate for the site, but the additional acreage must (1) be clearly identified, and (2) must not be the portion of the project best satisfying the standards and objectives listed above.

(b) If the permittee jointly enters into a restoration project with another party: (1) the permittee's portion of the project must be clearly specified, (2) any other party involved cannot gain mitigation credit for the permittee's portion of the project, and (3) the permittee may not receive mitigation credit for the other party's portion of the project.

(c) The permittee may propose to divide the mitigation requirement between a maximum of ~~four~~two wetland restoration sites, unless the Executive Director determines that the standards and objectives of subsections 3.1 and 3.2 will be better met at more than ~~four~~two sites.

4.0 PHASE I PLAN IMPLEMENTATION

4.1 Coastal Development Permit Application

The permittee shall submit a complete Coastal Development Permit application for the Phase I restoration plan along with CEQA documentation and local or other state agency approvals by either 24 months following the issuance of the Coastal Development Permit for the Carlsbad desalination facility, ~~or the commencement of commercial operations at the facility, whichever is later.~~ The Executive Director may grant an extension to this time period at the request of and upon a demonstration of good cause by the permittee. The restoration plan shall substantially conform to Section 3.0 above and shall include, but not be limited to the following elements:

- a. Detailed review of existing physical, biological, and hydrological conditions; ownership, land use and regulation;
- b. Evaluation of site-specific and regional restoration goals and compatibility with the goal of mitigating for Poseidon's marine life impacts;
- c. Identification of site opportunities and constraints;
- d. Schematic restoration design, including:
 1. Proposed cut and fill, water control structures, control measures for stormwater, buffers and transition areas, management and maintenance requirements;
 2. Planting Program, including removal of exotic species, sources of plants and or seeds (local, if possible), protection of existing salt marsh plants, methods for preserving

top soil and augmenting soils with nitrogen and other necessary soil amendments before planting, timing of planting, plans for irrigation until established, and location of planting and elevations on the topographic drawings;

3. Proposed habitat types (including approximate size and location);
4. Assessment of significant impacts of design (especially on existing habitat values) and net habitat benefits;
5. Location, alignment and specifications for public access facilities, if feasible;
6. Evaluation of steps for implementation e.g. permits and approvals, development agreements, acquisition of property rights;
7. Cost estimates;
8. Topographic drawings for final restoration plan at 1" = 100 foot scale, one foot contour interval; and
9. Drawings shall be directly translatable into final working drawings.
- g. Detailed information about how monitoring and maintenance will be implemented;
- h. Detailed information about construction methods to be used;
- i. Defined final success criteria for each habitat type and methods to be used to determine success;
- j. Detailed information about how Poseidon will coordinate with any other agency or panel that will have a role in implementing and monitoring the restoration plan, including the respective roles of the parties in independent monitoring, contingency planning review, cost recovery, etc.;
- k. Detailed information about contingency measures that will be implemented if mitigation does not meet the approved goals, objectives, performance standards, or other criteria; and
- l. Submittal of "as-built" plans showing final grading, planting, hydrological features, etc. within 60 days of completing mitigation site construction.

4.2 Wetland Construction Phase

Within 12 months of approval of the Phase I restoration plan, subject to the permittee's obtaining the necessary permits, the permittee shall commence the construction phase of the wetland restoration project. The permittee shall be responsible for ensuring that construction is carried out in accordance with the specifications and within the timeframes specified in the approved

restoration plan and shall be responsible for any remedial work or other intervention necessary to comply with plan requirements.

4.3 Timeframe for Resubmittal of Project Elements

If the Commission does not approve any element of the project (i.e. site selection, restoration plan), the Commission will specify the time limits for compliance relative to selection of another site or revisions to the restoration plan.

5.0 PHASE I WETLAND MONITORING, MANAGEMENT AND REMEDIATION

Monitoring, management (including maintenance), and remediation shall be conducted over the "full operating life" of Poseidon's desalination facility, which shall be 30 years from the date "as-built" plans are submitted pursuant to subsection 4.1(1).

The following section describes the basic tasks required for monitoring, management and remediation for Phase I. Condition B specifies the administrative structure for carrying out these tasks, including the roles of the permittee and Commission staff.

5.1 Monitoring and Management Plan

A monitoring and management plan will be developed in consultation with the permittee and appropriate wildlife agencies, concurrently with the preparation of the restoration plan for Phase I, to provide an overall framework to guide the monitoring work. It will include an overall description of the studies to be conducted over the course of the monitoring program and a description of management tasks that are anticipated, such as trash removal. Details of the monitoring studies and management tasks will be set forth in a work program (see Condition B).

5.2 Pre-restoration site monitoring

Pre-restoration site monitoring shall be conducted to collect baseline data on the wetland attributes to be monitored. This information will be incorporated into and may result in modification to the overall monitoring plan.

5.3 Construction Monitoring

Monitoring shall be conducted during and immediately after each stage of construction of the wetland restoration project to ensure that the work is conducted according to plans.

5.4 Post-Restoration Monitoring and Remediation

Upon completion of construction of the wetland, monitoring shall be conducted to measure the success of the wetland in achieving stated restoration goals (as specified in restoration plan) and in achieving performance standards, specified below. The permittee shall be fully responsible for any failure to meet these goals and standards during the facility's full operational years. Upon determining that the goals or standards are not achieved, the Executive Director shall prescribe remedial measures, after consultation with the permittee, which shall be implemented by the permittee as soon as practicable with Commission staff direction. If the permittee does not agree with the remedial measures prescribed by the Executive Director, or that remediation is necessary, the matter may be set for hearing and disposition by the Commission.

Successful achievement of the performance standards shall (in some cases) be measured relative to approximately four reference sites, which shall be relatively undisturbed, natural tidal wetlands within the Southern California Bight. The reference sites and the standard of comparison, i.e. the measure of similarity to be used, shall be specified in the work program.

In measuring the performance of the wetland project, the following physical and biological performance standards will be utilized:

- a. Longterm Physical Standards. The following long-term standards shall be maintained over the full operative life of the desalination facility:
 - 1) Topography. The wetland shall not undergo major topographic degradation (such as excessive erosion or sedimentation);
 - 2) Water Quality. Water quality variables [to be specified] shall be similar to reference wetlands; and
 - 3) Tidal Prism. If the plan requires dredging, the permittee shall provide such dredging for the duration of the "full operating life" of the project (as defined in Section 5.0), in exchange for a dredging credit consistent with the credit provided to Edison for the SONGS restoration project, and any designed tidal prism shall be maintained, and tidal flushing shall not be interrupted.
 - 4) ~~3)~~ Habitat Areas. The area of different habitats shall not vary by more than 10% from the areas indicated in the restoration plan.
- b. Biological Performance Standards. The following biological performance standards shall be used to determine whether the restoration project is successful. Table 1, below, indicates suggested sampling locations for each of the following biological attributes; actual locations will be specified in the work program:

- 1) Biological Communities. Within 4 years of construction, the total densities and number of species of fish, macroinvertebrates and birds (see Table 1) shall be similar to the densities and number of species in similar habitats in the reference wetlands;
- 2) Vegetation. The proportion of total vegetation cover and open space in the marsh shall be similar to those proportions found in the reference sites. The percent cover of algae shall be similar to the percent cover found in the reference sites;
- 3) Spartina Canopy Architecture. The restored wetland shall have a canopy architecture that is similar in distribution to the reference sites, with an equivalent proportion of stems over 3 feet tall;
- 4) Reproductive Success. Certain plant species, as specified by in the work program, shall have demonstrated reproduction (i.e. seed set) at least once in three years;
- 5) Food Chain Support. The food chain support provided to birds shall be similar to that provided by the reference sites, as determined by feeding activity of the birds; and
- 6) Exotics. The important functions of the wetland shall not be impaired by exotic species.

Table 1: Suggested Sampling Locations

| | Salt Marsh | | | Open Water | | Mudflat | Tidal Creeks |
|--------------------|------------|------------|-------|------------|----------|---------|-----------------|
| | Spartina | Salicornia | Upper | Lagoon | Eelgrass | | |
| 1) Density/spp: | | | | | | | |
| Fish | | | | X | X | X | X |
| Macroinvertebrates | | | | X | X | X | X |
| Birds | X | X | X | X | | X | X |
| 2) % Cover | | | | | | | |
| Vegetation | X | X | X | | X | | |
| Algae | X | X | | | | X | |
| 3) Spar. arch. | X | | | | | | |
| 4) Repro. suc. | X | X | X | | | | |
| 5) Bird feeding | | | | X | | X | X |
| 6) Exotics | X | X | X | X | X | X | X |

6.0 MITIGATION REQUIRED AFTER PHASE II PRECONDITION

6.1 Reasonably Feasible Technologies

Following the occurrence of either of the Phase II Pre-Conditions, as defined in subsection 1.1, the permittee shall:

- a. Conduct a new analysis of the environmental effects of ongoing desalination facility operations. The analysis shall provide information about the project's actual impacts from operations, taking into account all project features and mitigation measures;
- b. Using that analysis, the permittee shall investigate and evaluate new and developing technologies that are reasonably feasible and unavailable today, which may further reduce any marine life impacts;
- c. Within 24 months of the occurrence of the applicable Phase II pre-condition, the permittee shall provide that analysis and its evaluation of potential and reasonably feasible technologies to the Commission for review. The determination of feasibility shall consider costs, potential impacts, and acceptability to the Encina Power Station, among other things; and
- d. The analysis and evaluation provided to the Commission shall also include an evaluation of whether the 37 acres of wetland restoration implemented by the permittee has fully or only partially mitigated marine life impacts for stand-alone operations, taking into account actual operating conditions from facility operations for Phase I and potential reductions to impacts that would occur as a result of any new and reasonably feasible technologies that the permittee may implement pursuant to this subsection 6.1.

Upon receiving the evaluation of new and available technologies from the permittee, the Commission may request a hearing to determine whether those technologies are reasonably feasible and whether the permittee can implement any of the technologies to reduce marine life impacts. If the Commission determines that any such technologies are reasonably feasible and may further reduce marine impacts, this Marine Life Mitigation Plan may be amended after a public hearing before the Commission to require implementation of reasonably feasible technologies. The Commission also may determine the additional mitigation, if any, required after implementation of available technologies to reduce marine life impacts from Phase II operations.

6.2 Additional Mitigation

The permittee also shall comply with the following mitigation measures after the occurrence of either Phase II Pre-Condition:

- a. If within 24 months of the occurrence of the applicable Phase II Pre-Condition, the permittee assumes dredging obligations of the Agua Hedionda Lagoon from the Encina Power Station or other applicable entity, the permittee shall provide evidence to the Executive Director in the form of a contract or other agreement that demonstrates the permittee's assumption of dredging obligations, along with an evaluation of the permittee's dredging activities and supporting documentation for the proposed mitigation credit the permittee is seeking for this activity. Pursuant to Special Condition 12 of this Permit, the permittee shall not dredge the Agua Hedionda Lagoon without obtaining a new Coastal Development Permit approval from the Commission for dredging activities. If such dredging obligations are assumed, the Commission shall evaluate and determine the mitigation credit the permittee is entitled to receive for Lagoon dredging using substantially the same methodology the Commission used for the San Onofre Nuclear Generating Station's dredging approvals. If the Commission's evaluation set forth in subsection 6.1 determines that there is any remaining mitigation obligation following the implementation of reasonably feasible technologies to reduce marine impacts, the credit for Lagoon dredging shall be applied to satisfy any remaining mitigation obligation of the permittee; or
- b. If the permittee does not assume the dredging obligations for the Agua Hedionda Lagoon (for any reason other than delays by the Commission in issuing the Coastal Development Permit for dredging) and the analysis and evaluation set forth in subsection 6.1 identifies that additional wetland restoration is necessary to mitigate Phase II impacts not fully mitigated by the 37-acre restoration project, then within 24 months of the occurrence of the applicable Phase II Pre-Condition, the permittee shall apply for a new Coastal Development Permit to perform additional wetland mitigation to mitigate marine life impacts for Phase II operations that meets the following criteria:
 - (i) the Phase II wetland mitigation shall credit the 37-acres of restoration required under this Plan for Phase I, and may require additional mitigation of up to an additional 5.5 acres. The Commission shall proportionally reduce the potential 5.5 acre restoration requirement based on: (1) any reduction to marine life impacts caused by the permittee's implementation of reasonably feasible technologies, as set forth in subsection 6.1; and (2) any demonstration that actual plant operations have caused less marine life impacts than originally anticipated during the project's initial evaluation;
 - (ii) the permittee shall apply for a new Coastal Development Permit to perform the wetland restoration, and the restoration shall be of habitat similar to the affected habitats in Agua Hedionda Lagoon, excluding buffer zone and upland transition area, and consistent with the objectives and restrictions in subsections 3.1 (excluding subsection 3.1(c)), 3.2 and 3.3 above;

- (iii) the permittee shall select a wetland restoration site for Phase II mitigation in a manner generally in accordance with section 2.0 above;
- (iv) the restoration plan for Phase II mitigation shall be generally in accordance with the requirements in section 4.0 above, and shall be monitored in a manner generally in accordance with that set forth in section 5.0 above; and
- (v) Phase II wetland restoration shall be included in and administered as part of the same administrative structure created for Phase I mitigation and set forth in Condition B of this Plan.

CONDITION B: ADMINISTRATIVE STRUCTURE

1.0 ADMINISTRATION

Personnel with appropriate scientific or technical training and skills will, under the direction of the Executive Director, oversee the mitigation and monitoring functions identified and required by Condition A. The Executive Director will retain scientific and administrative support staff to perform this function, as specified in the work program.

This technical staff will oversee the preconstruction and post-construction site assessments, mitigation project design and implementation (conducted by permittee), and monitoring activities (including plan preparation); the field work will be done by contractors under the Executive Director's direction. The contractors will be responsible for collecting the data, analyzing and interpreting it, and reporting to the Executive Director.

The Executive Director shall convene a scientific advisory panel to provide the Executive Director with scientific advice on the design, implementation and monitoring of the wetland restoration. The panel shall consist of recognized scientists, including a marine biologist, an ecologist, a statistician and a physical scientist.

2.0 BUDGET AND WORK PROGRAM

The funding necessary for the Commission and the Executive Director to perform their responsibilities pursuant to these conditions will be provided by the permittee in a form and manner reasonably determined by the Executive Director to be consistent with requirements of State law, and which will ensure efficiency and minimize total costs to the permittee. The amount of funding will be determined by the Commission on a biennial basis and will be based on a proposed budget and work program, which will be prepared by the Executive Director in consultation with the permittee, and reviewed and approved by the Commission in conjunction with its review of the restoration plan. Permit application fees paid by the permittee for Coastal

Development Permits (or amendments thereto) for the restoration program shall be credited against the budget to be funded by the permittee. If the permittee and the Executive Director cannot agree on the budget or work program, the disagreement will be submitted to the Commission for resolution.

The budget to be funded by the permittee will be for the purpose of reasonable and necessary costs to retain personnel with appropriate scientific or technical training and skills needed to assist the Commission and the Executive Director in carrying out the mitigation. In addition, reasonable funding will be included in this budget for necessary support personnel, equipment, overhead, consultants, the retention of contractors needed to conduct identified studies, and to defray the costs of members of any scientific advisory panel(s) convened by the Executive Director for the purpose of implementing these conditions.

Costs for participation on any advisory panel shall be limited to travel, per diem, meeting time and reasonable preparation time and shall only be paid to the extent the participant is not otherwise entitled to reimbursement for such participation and preparation. The amount of funding will be determined by the Commission on a biennial basis and will be based on a proposed budget and work program, which will be prepared by the Executive Director in consultation with the permittee, and reviewed and approved by the Commission in conjunction with its review of the restoration plan. Total costs for such advisory panel shall not exceed \$100,000 per year adjusted annually by any increase in the consumer price index applicable to California. If the permittee and the Executive Director cannot agree on the budget or work program, the disagreement will be submitted to the Commission for resolution.

The work program will include:

- a. A description of the studies to be conducted over the subsequent two year period, including the number and distribution of sampling stations and samples per station, methodology and statistical analysis (including the standard of comparison to be used in comparing the mitigation project to the reference sites);
- b. A description of the status of the mitigation projects, and a summary of the results of the monitoring studies to that point;
- c. A description of up to four reference sites;
- d. A description of the performance standards that have been met, and those that have yet to be achieved;
- e. A description of remedial measures or other necessary site interventions;
- f. A description of staffing and contracting requirements; and

- g. A description of the scientific advisory panel's role and time requirements in the two year period.

Any amendment to the work program requested by the permittee shall require an amendment to the Coastal Development Permit for the restoration plan, unless the Executive Director determines that no Coastal Development Permit amendment is necessary or required. Any amendment to the work program proposed by the Executive Director shall be made in consultation with the permittee. If the permittee and the Executive Director cannot agree on an amendment to the work program, the disagreement will be submitted to the Commission for resolution.

The Executive Director may amend the work program at any time, subject to appeal to the Commission.

3.0 ANNUAL REVIEW AND PUBLIC WORKSHOP REVIEW

The permittee shall submit a written review of the status of the mitigation project to the Executive Director each year on April 30 for the prior calendar year. The written review will discuss the previous year's activities and overall status of the mitigation project, identify problems and make recommendations for solving them, and review the next year's program.

Every fifth year, the Executive Director or the Commission shall also convene and conduct a duly noticed public workshop to review the status of the mitigation project. The meeting will be attended by the contractors who are conducting the monitoring, appropriate members of the Scientific Advisory Panel, the permittee, Commission staff, representatives of the resource agencies (CDFG, NMFS, USFWS), and the public. Commission staff and the contractors will give presentations on the previous five years' activities and the overall status of the mitigation project, identify problems and make recommendations for solving them, and review the next period's program.

The workshop review will include discussions on whether the wetland mitigation project has met the performance standards, identified problems, and recommendations relative to corrective measures necessary to meet the performance standards. The Executive Director will utilize information presented at the public review, as well as any other relevant information, to determine whether any or all of the performance standards have been met, whether revisions to the standards are necessary, and whether remediation is required. Major revisions shall be subject to the Commission's review and approval.

The mitigation project will be successful when all performance standards have been met each year for a three-year period. The Executive Director shall report to the Commission upon determining that all of the performance standards have been met for three years and that the

project is deemed successful. If the Commission determines that the performance standards have been met and the project is successful, the monitoring program will be scaled down, as recommended by the Executive Director and approved by the Commission. The work program shall reflect the lower level of monitoring required. If subsequent monitoring shows that a standard is no longer being met, monitoring may be increased to previous levels, as determined necessary by the Executive Director.

The ~~Commission~~ **Executive Director** may make a determination on the success or failure to meet the performance standards or necessary remediation and related monitoring at any time, not just at the time of the workshop review.

4.0 ADDITIONAL PROCEDURES

4.1 Dispute Resolution

In the event that the permittee and the Executive Director cannot reach agreement regarding the terms contained in or the implementation of any part of this Plan, the matter may be set for hearing and disposition by the Commission.

4.2 Extensions

Any of the time limits established under this Plan may be extended by the Executive Director at the request of the permittee and upon a showing of good cause.

EXHIBIT B

RESPONSES TO ISSUES IDENTIFIED IN JULY 24, 2008 STAFF REPORT

In response to Commission Staff's specific concerns regarding Poseidon's proposed Marine Life Mitigation Plan ("MLMP"), as identified on page 15 of the July 24, 2008 Staff Report, Poseidon has modified its MLMP to address Staff's concerns. Below we have listed each of Staff's identified concerns, followed by Poseidon's response. In addition to the responses herein, Exhibit A is a redline of Poseidon's MLMP that shows the changes Poseidon has made in response to Staff's concerns. Note that this document does not address the three issues discussed in Poseidon's letter responding to the Staff Report: mitigation acreage, phased mitigation and restoration credit for lagoon dredging.

I. Responses to Bullet Points on Page 15: In this section, Poseidon has responded to each of the bullet points listed on page 15 of the Staff Report.

Issue 1: *Staff recommended that Poseidon submit a complete coastal development permit application for its Final Restoration Plan within 24 months of Commission approval of its Preliminary Plan (i.e., the Plan being reviewed herein). Poseidon modified that recommendation in Section 4 of its Plan to allow submittal of that application either 24 months after issuance of the project coastal development permit or commencement of commercial operations of the desalination facility, whichever is later. This could substantially delay the implementation of mitigation and could result in several years of impacts occurring without mitigation.*

- **Poseidon Response to Issue 1:** In Section 4.1 of Poseidon's MLMP, Poseidon has revised its Plan so that the Coastal Development Permit for the Final Restoration Plan will be submitted within 24 months of Commission approval of its Preliminary Plan.

Issue 2: *A proposed change to Poseidon's Plan at Section 3.1(d) and at Section 3.2(c) would reduce the required buffer zone at its mitigation sites from no less than 100 feet wide to an average that could be much less than 100 feet.*

- **Poseidon Response to Issue 2:** Poseidon has removed the word "substantially" from Section 3.1(d) so that it is evident that buffer zones will be at least 100 feet wide. (See Poseidon's MLMP, Page 4 of 16.)

Issue 3: *A proposed change to Section 3.1(i) would allow the Plan to affect endangered species in a way not allowed under the Edison requirements.*

- **Poseidon Response to Issue 3:** Poseidon has revised Section 3.1(i) to indicate that Poseidon's Plan will not result in an adverse impact on endangered animal species, and that it will require mitigation for Plan impacts on endangered plant species. (See Poseidon's MLMP, Page 5 of 16.) The formulation of this provision in the Edison plan does not take into account that substantially all wetlands restoration projects will have impacts on sensitive plant species, which would likely be mitigated through relocation

to upland areas. The Edison plan's formulation would not allow mitigation in any area where there is a sensitive plant. Accordingly, Poseidon modified this language to ensure there are no adverse impacts to endangered animals, but to allow for mitigation and relocation of sensitive plants.

Issue 4: *Poseidon proposes to change Section 3.3(c) to allow mitigation to occur in up to four sites, rather than up to two sites, as required of Edison, which could fragment the mitigation and reduce its overall value.*

- **Poseidon Response to Issue 4:** Poseidon has revised Section 3.3(c) to allow mitigation to occur only at up to two sites without Executive Director approval. (See Poseidon's MLMP, Page 6 of 16.)

Issue 5: *Poseidon also proposed deleting a requirement at Section 5.4 that would require a designed tidal prism to be maintained to ensure the wetland mitigation site has adequate tidal action.*

- **Poseidon Response to Issue 5:** Poseidon has revised its Plan to include a requirement at Section 5.4(a)(3) that would require a designed tidal prism be maintained if the Plan requires dredging. (See Poseidon's MLMP, Page 9 of 16.)

Issue 6: *Poseidon Proposes that any fees it pays for coastal development permits or amendments be credited against the budget needed to implement the mitigation plan.*

- **Poseidon Response to Issue 6:** Poseidon has revised Condition B, Section 2.0 to remove its proposal regarding the crediting of fees paid for coastal development permits or amendments. (See Poseidon's MLMP, Pages 13-14 of 16.)

II. Responses to Staff's Recommendation to Include Conditions in Exhibit 2: In this section we have responded to Staff's comment on page 15 of the Staff Report that Poseidon's Plan should be modified to include the conditions in Exhibit 2 by identifying each of the differences between Poseidon's Plan and Staff's Exhibit 2, followed by Poseidon's response.

- Poseidon's Plan removes the requirement in Section 2.0 that would require Poseidon to submit the proposed site and preliminary plan to the Commission within 9 months of the effective date of the approval, and removes Exhibit 2's "Preliminary Plan" requirements set forth in Staff's Exhibit 2 at §1.2.
 - **Poseidon Response:** Poseidon has revised its Plan to include the "Preliminary Plan" requirements (Poseidon's MLMP § 2.1, Pages 3-4 of 16.) and has modified its Plan so that a proposed site and preliminary plan will be submitted to the Commission within 10 months of the effective date of the approval. (See Poseidon's MLMP § 2.0, Page 2 of 16.)
- Poseidon's Plan adds three potential restoration sites (Agua Hedionda, San Elijo, and Buena Vista) for a total of 11 sites in Section 2.0.

- **Poseidon Response:** This remains part of Poseidon's proposal because these sites are in close proximity to the Project site, and have been recommended as potential mitigation sites by local and state agencies.
- Poseidon's Plan allows Poseidon to consider other sites that may be recommended by the Department of Fish and Game ("DFG") as high-priority wetlands restoration projects, while Staff's MLMP only allows additional sites to be considered with approval from the Executive Director. (Section 2.0.)
 - **Poseidon Response:** This remains part of Poseidon's proposal to allow consideration of sites that could be proposed by DFG.
- Poseidon's MLMP has objectives of providing "substantial" upland buffer and upland transition areas, as compared to Staff's objective of providing "maximum" upland buffer and upland transition areas. (See Poseidon's MLMP §§ 3.2(a),(d).)
 - **Poseidon Response:** Poseidon has revised Sections 3.2(a) and (d) of its Plan to incorporate Staff's proposed "maximum" language. (See Poseidon's MLMP, Page 5 of 16.)
- Poseidon's Plan deletes Staff's Objective in Section 3.2(c) of providing a buffer zone of an average of at least 300 feet wide, and includes a 100 feet-wide Objective.
 - **Poseidon Response:** Poseidon has revised Section 3.2(c) so that the Objective provides for a buffer zone that is an average of 300 feet wide, depending on the feasibility at the selected site(s), and not less than 100 feet wide. (See Poseidon's MLMP, Page 5 of 16.) This modification addresses Staff's concerns and will allow Poseidon to have necessary flexibility in selecting the mitigation site(s).
- Poseidon proposes commencing restoration construction within 12 months of approval of the restoration plan (Poseidon's MLMP § 4.2), while Staff proposes construction within 6 months of approval of the restoration plan (Staff's Exhibit 2 at § 2.2).
 - **Poseidon Response:** This remains part of Poseidon's proposal because it is a more reasonable estimate of time that will be required to undertake the restoration efforts.
- Poseidon's Plan adds a provision to assure that the mitigation is in place for 30 years, and therefore adds a definition of the facility's "full operating life" of 30 years from the date as-built plans are submitted. (See Poseidon's MLMP § 5.0)
 - **Poseidon Response:** This remains part of Poseidon's proposal because it provides clarity for Poseidon's responsibilities and obligations under the Plan.
- Poseidon modifies the requirement that the Executive Director will retain approximately two scientists and one administrative support staff to oversee the plan's mitigation and monitoring functions, and provides that the Executive Director shall retain staff as set forth in the "work program." (See Poseidon's MLMP Condition B § 1.0, Page 13 of 16.)

- **Poseidon Response:** This remains part of Poseidon's proposal because Poseidon does not believe this amount of staffing is necessary given the significantly smaller scope of Poseidon's restoration obligations compared to SONGS. Poseidon's proposal provides that the work program will identify the necessary staffing.
- Poseidon's Plan removes the cap on total costs for the advisory panel of \$100,000 per year contained in Staff's Exhibit 2, and requires the Executive Director to submit a proposed budget for the advisory panel to the Commission for approval on a biennial basis, and provides that any disagreement over the budget to be submitted to the Commission for resolution. (Poseidon's MLMP Condition B § 2.0.)
 - **Poseidon Response:** Poseidon has revised Condition B Section 2.0 to include Staff's language regarding the \$100,000 cap, but has retained its procedures for the budget due to the fact that the scope of Poseidon's restoration obligations will be significantly smaller than Edison's, and the budget for the advisory panel should bear a reasonable relationship to the scope of restoration. (See Poseidon's MLMP, Page 14 of 16.)
- Poseidon's Plan modifies the Executive Director's ability to amend the work program. (Poseidon's MLMP Condition B § 2.0.)
 - **Poseidon Response:** Poseidon has modified Condition B, § 2.0 so that it is now consistent with the language in Staff's Exhibit 2. (See Poseidon's MLMP, Page 15 of 16.)
- Poseidon's Plan requires submission of a written review of the restoration project's previous year by April 30 instead of an annual public workshop. Poseidon provides for a public workshop every fifth year, regardless of whether the project's performance standards have been met. (Poseidon's MLMP Condition B § 3.0, Pages 15-16 of 16.) Staff's Exhibit 2 provides for an annual public workshop, and would lower the frequency of this obligation to a five year review once performance standards are achieved.
 - **Poseidon Response:** This remains part of Poseidon's proposal because of the substantially limited size of the Poseidon's restoration project as compared to Edison's SONGS restoration project, and the significant cost already imposed on Poseidon's mitigation program.
- Poseidon's Plan gives the Commission, rather than the Executive Director, the authority to determine the success or failure to meet the performance standards, or necessary remediation and related monitoring.
 - **Poseidon Response:** Poseidon has modified Condition B, § 3.0 so that it is consistent with the language in Staff's Exhibit 2. (See Poseidon's MLMP, Page 10 of 16.)
- Poseidon's Plan adds a general dispute resolution provision that would allow any disputes to be heard by the Commission. (Poseidon's MLMP Condition B § 4.1, Page 16 of 16.)

- **Poseidon Response:** This remains part of Poseidon's proposal because it retains and states the permittee's implicit rights.
- Poseidon's MLMP allows for time extensions by the Executive Director at Poseidon's request upon a showing of good cause. Poseidon's MLMP Condition B § 4.2, Page 16 of 16.)
 - **Poseidon's Response:** This remains part of Poseidon's proposal.

EXHIBIT C

MARINE LIFE MITIGATION PLAN RATIONALE

In addition to the reasons set forth in Poseidon's letter to the Commission, below Poseidon has provided more detailed support for its position that the Commission should accept Poseidon's arguments concerning mitigation acreage, mitigation phasing and dredging over those offered by Staff. Accordingly, and for the following reasons, Poseidon respectfully asks the Commission to adopt Poseidon's Marine Life Mitigation Plan ("MLMP") as amended and set forth in Exhibit A, and without Staff's requested modifications from the Staff Report.

I. POSEIDON'S RESTORATION ACREAGE IS CONSISTENT WITH COMMISSION PRACTICE

Independent review has confirmed that Poseidon's proposed 42.5 acres is sufficient restoration to fully mitigate the Project's marine life impacts. Poseidon's entrainment study, which provides the basis for Poseidon's proposed 42.5 acres of wetland restoration, was reviewed by the Coastal Commission's independent expert, Dr. Pete Raimondi of UC Santa Cruz. Dr. Raimondi confirmed, among other things, that: (1) Poseidon's study design is consistent with recent entrainment studies conducted in California; (2) using CEC methodology and Coastal Commission precedent, the habitat restoration required to mitigate the Project's "stand-alone" operations would be 42.5 acres (37 acres to compensate for Agua Hedionda Lagoon ("Lagoon") species impacts, and 5.5 acres to compensate for open ocean species impacts); and (3) habitat mix for mitigation should include mudflat/tidal channel and open water habitat. This methodology is also consistent with the peer-reviewed and approved methodology the CEC applied to the Morro Bay Power Plant and the Moss Landing Power Plant.

Notably, Commission Staff originally recommended that Poseidon use CEC methodology to determine the Project's mitigation requirement. Staff, however, is now recommending a substantial *increase* in the mitigation acreage by applying a new standard that has not been peer-reviewed and which adjusts variables in the modeling estimates. Specifically, Dr. Raimondi suggested that in order to provide an even *greater* level of assurance that impacts to lagoon and ocean species will be mitigated, Poseidon could restore 12.9 to 25.7 acres above the 42.5 acres required under CEC methodology – for a total of 55.4 to 68.2 acres – to provide an unprecedented level of mitigation for the Project's "stand-alone" impacts that the Commission has never applied before. This "enhanced mitigation" proposal is inconsistent with CEC methodology and established, peer-reviewed methodology and precedent. Notably, Dr. Raimondi has not advocated that the Commission should apply the "enhanced mitigation" methodology, and has appropriately left to the Commission the decision of which methodology should be used.

In contrast to the "enhanced mitigation" proposal, Poseidon's restoration acreage methodology conforms entirely to Commission-accepted precedent, and Staff has not identified any mitigation projects using this methodology that have resulted in under-compensation for marine impacts. Poseidon's Area Production Foregone ("APF") calculation is extremely conservative because it assumes that the proportional mortality resulting from entrainment occur

across the entire area of the Lagoon. In fact, the habitat areas in the Lagoon for the three species used to calculate the APF estimate are all much smaller than the entire Lagoon. Accordingly, an averaging approach was used because it accounts for the uncertainty associated with the estimates of the exact areas of habitat associated for each species. This methodology is considered conservative and conforms entirely to standards and procedures used for APF determination at the Moss Landing project.

Staff has also suggested that if Poseidon does not use Staff's "enhanced mitigation" proposal, that Poseidon should be required to apply a mitigation ratio (such as 2:1 or 3:1) to its mitigation acreage so that Poseidon considers mitigation that may be "out of kind" or provided at some distance from the affected area. Staff, however, has not and cannot provide examples of any California entrainment mitigations that have applied a mitigation ratio on top of a conservative "in-kind" approach to mitigation that is consistent with CEC methodology, such as the mitigation acreage contained in the MLMP. Moreover, the MLMP ensures that Poseidon will provide "in-kind" restoration in the Southern California Bight similar to the affected area in the Lagoon.

For these reasons, Poseidon asks the Commission to approve its 42.5 acreage calculation over that proposed by Staff to ensure that the Project's mitigation is consistent with prior Commission approvals rather than subject to an obligation that is based on un-proven methodology.

II. PHASED MITIGATION IS APPROPRIATE FOR THIS PROJECT

Poseidon's phased approach to mitigation would fully compensate for the Project's impacts to marine life under either of the power plant's operating scenarios. The initial phase of the mitigation plan would provide 37 acres of wetland restoration, which would fully compensate for Project-related impacts during the period when both the Encina Power Station ("EPS") and the Project are operating ("Phase I"). The second phase would provide up to 5.5 acres of additional restoration to address any additional unmitigated impacts occurring from Project operations when the EPS is decommissioned or when the EPS is providing less than 15% of the water needed for the Project based on the EPS's average water use over any three-year period¹ ("Phase II"). Below, Poseidon has identified the benefits of phased mitigation for this Project and explained why Staff's arguments against phasing are unsupported and inconsistent with the benefits that phasing would provide.

A. Phase I Mitigation Over-mitigates Project Impacts

Under Phase I, Poseidon would restore 37 acres of wetland habitat similar to the affected habitats in Agua Hedionda Lagoon. Using CEC and prior Coastal Commission methodology, the Phase I mitigation would mitigate 87% of the total requirements for the Project's "stand alone" operations (when the EPS has ceased operating). Accordingly, the Phase I mitigation

¹ This threshold is very conservative. The Phase I restoration project would fully mitigate the Project's impacts as long as at least 13% of the Project's seawater requirements are provided by the EPS. Poseidon's MLMP is conservative in that it requires Poseidon to implement Phase II mitigation if the EPS is providing an average of less than 15% of the Project's seawater requirements over a three-year period.

would fully mitigate the Project's impacts as long as at least 13% of the Project's seawater requirements are provided by the EPS. By providing this level of mitigation while the Project and the power plant are both operating, Poseidon will perform more mitigation than what is necessary to mitigate this stage of the Project's operations. For example, in the last 18 months the EPS would have provided over 65% of the water needed for the Project. Based on that number, Poseidon would have been required to provide only 14.9 acres of mitigation using CEC methodology and Commission precedent. Poseidon's Phase I restoration of 37 acres would be approximately 2.5 times the mitigation actually required. Therefore, through the phased approach to mitigation, Poseidon is actually providing the substantial majority of the mitigation required for the Project's stand-alone operations up front.

B. Phase II Mitigation Provides New Opportunities to Reduce Impacts

The MLMP requires Poseidon to implement mitigation measures for Phase II (including up to 5.5 acres of additional restoration) if the EPS stops using its existing seawater intakes for cooling purposes, or if the intakes provide less than 15% of Poseidon's needed water based on the EPS' average water use over any three-year period ("Phase II Pre-Conditions"). To ensure that the Commission is aware of the amount of water the EPS is providing to the Project, and when Phase II mitigation should commence, the MLMP requires Poseidon to submit that information to the Executive Director annually.

Wetland habitat restoration under Phase II would credit the 37 acres of restoration already provided for under Phase I, and provide assurances that stand-alone operations are fully mitigated in Phase II. Once either of the Phase II Pre-Conductions occur, the MLMP requires Poseidon to: (1) analyze the environmental effects of ongoing Project operations; (2) use that analysis to investigate and evaluate reasonably feasible technologies that are unavailable today, which may reduce any marine life impacts; and (3) provide its analysis of environmental effects and its evaluation of any reasonably feasible technologies to reduce marine life impacts to the Commission within 24 months. Accordingly, the Commission will be able to determine if Poseidon can further reduce the Project's impacts to marine life through reasonably feasible technologies, and may proportionally reduce Poseidon's habitat restoration obligation for Phase II mitigation based on that mitigation.²

In addition, Poseidon may assume dredging obligations of the Agua Hedionda Lagoon from the EPS within 24 months of the occurrence of either Phase II Pre-Condition, if feasible.³ If Poseidon assumes dredging obligations, it will provide evidence of its obligations to the Commission, along with an analysis of how Lagoon dredging is beneficial to the Lagoon and

² Note that in the event the Phase II Pre-Conditions do not occur, Poseidon's approval from the State Lands Commission requires Poseidon to undertake a substantially similar evaluation of environmental effects of ongoing Project operations and to investigate and evaluate new and developing technologies that are unavailable today to reduce any marine life impacts ten years after Project operations commence. Accordingly, if the State Lands Commission requires Poseidon to implement any such technologies that constitute "development", such development would be subject to Coastal Commission review and approval.

³ Since Special Condition 12 of the Project's Coastal Development Permit requires Poseidon to obtain a new Permit approval from the Coastal Commission for any dredging activities, the Commission shall have oversight over any Lagoon dredging.

how such dredging activities may entitle Poseidon to some amount of restoration credit. (See Section C below).

In the event that Poseidon does not assume Lagoon dredging obligations (for example, if the EPS never fully ceases use of its intakes but operates the intakes at very low levels and continues to dredge the Lagoon), Poseidon's MLMP requires it to develop a plan within 24 months in which: (1) the Commission shall evaluate whether Poseidon's 37 acres of wetland restoration under Phase I has fully mitigated the Project's stand-alone operations; and (2) the Commission may reduce Poseidon's Phase II restoration based on the reduction to marine impacts caused by Poseidon's implementation of new, reasonably feasible technologies (as discussed above).

Accordingly, phased MLMP implementation would provide a tremendous incentive for Poseidon to investigate and invest in new technologies and opportunities to further reduce Project impacts and avoid additional mitigation costs. If Poseidon is required to provide all of the mitigation for the "stand-alone" operations upfront, there is substantially less incentive to invest in additional avoidance measures. In addition, the opportunity for the Commission to consider these issues once Project operations have commenced is another valuable benefit of phased implementation of the MLMP: with phased mitigation, Poseidon, the Commission and other regulatory agencies would have an opportunity to measure the actual impacts of the Project, and to evaluate new opportunities to further reduce the impacts and refine the scope of the Phase II mitigation as necessary to ensure the "stand-alone" Project impacts are fully mitigated.

If the Commission determines that none of the above-opportunities are feasible or if these opportunities in combination with the Phase I mitigation plan do not fully mitigate the "stand-alone" Project impacts, then the MLMP requires Poseidon to restore up to an additional 5.5 acres consistent with the performance standards and objectives used for the 37 acres provided under Phase I restoration.

C. Phased Mitigation is Not Speculative

Commission Staff argue in the Staff Report that the Commission should require Poseidon to provide all mitigation up-front, rather than in two phases, because it considers "phasing to be speculative in that it is tied to unknown future operations of the power plant." Staff's argument is without merit. As set forth in MLMP Section 1.1, Poseidon will be obligated to provide the Executive Director annually with data demonstrating the power plant's seawater intake for the prior year, which will ensure that the Commission is always informed of the power plant's operations. Since the MLMP requires Poseidon to undertake Phase II mitigation when the power plant is decommissioned or when it provides less than 15% of the Project's water over a three-year period, the Commission will have the necessary data about power plant operations so that it will not need to "speculate" about when Poseidon will need to implement Phase II mitigation.

Staff also contends in the Staff Report that tying phased mitigation to the power plant's operations would be "inappropriate" because the power plant is not a co-applicant on the Project's Permit. Poseidon's Permit application and the Commission's approval, however, provide that the desalination facility's intake would be connected to the power plant's discharge

channel. Accordingly, the discharge from the power plant, to the extent it is available, will serve the Project's needs. In the past 18 months, the power plant would have provided over 65% of the water needed for the Project. It is both appropriate and there is no prohibition on allowing the phased approach proposed by Poseidon.

In addition to the reasons discussed above, a phased approach to mitigation for this Project is based on sound policy for the following three reasons:

- (1) EPS will operate indefinitely: As discussed above, while the EPS continues to operate, it will provide a significant portion of the seawater required for the Project, and the need for Project mitigation would be proportionally reduced. The power plant's generating capacity is subject to "Reliability Must Run" status, as contracted by the California Independent System Operator (Cal-ISO), which is meant to provide electrical grid reliability. At the October 2007 State Lands Commission meeting, an EPS representative testified that the units will remain in service indefinitely and that Cal-ISO would determine when they are no longer needed for grid stability. Further, in a July 12, 2007 letter to the Commission, EPS stated that at least two of its generating units "can be reliably operated for the foreseeable future." Because the power plant will continue to operate in some capacity and provide water to the Project, requiring more than 37 acres of mitigation up-front would substantially over-mitigate the Project's impacts for many years.
- (2) Phasing allows the Commission to retain authority and evaluate impacts: Due to the phased approach, the Commission would have ongoing involvement in the implementation of the MLMP alongside other regulatory agencies. This will allow the Commission to evaluate the impacts of the Project's *actual* operations, rather than relying on estimates, and will enable the Commission to more accurately determine what additional mitigation should be required to fully mitigate the Project's marine impacts (if any).
- (3) Other regulatory agencies retain authority to evaluate and address impacts: The Regional Water Quality Control Board ("Regional Board") and the State Lands Commission have indicated that upon decommissioning of the power plant, they will undertake an environmental review of the Project to determine what, if any, additional design, technology or mitigation measures should be required. Further, and to the extent that there are modifications to the Project as a result of power plant decommissioning or to comply with State Lands Commission or Regional Board requirements, such modifications would also be subject to review by the Coastal Commission for Coastal Act compliance.

For these reasons, Poseidon asks the Commission to reject Staff's argument about phasing, and to approve Poseidon's MLMP as set forth in Exhibit A, without Staff's recommended changes from the Staff Report.

III. LAGOON DREDGING CREDIT SHOULD BE EVALUATED IN THE FUTURE

Pursuant to Poseidon's proposed MLMP, the Commission may decide at a later date whether Poseidon should receive any restoration credit for assuming dredging obligations of the Agua Hedionda Lagoon. Poseidon has not requested that dredging credit be applied to its mitigation obligations now; on the contrary, Poseidon is asking the Commission only to leave open the possibility of allowing such credit in the future if Poseidon assumes dredging obligations. Staff argues, however, that the Commission should decide now that Poseidon's potential dredging is not subject to restoration credit – even though approval of the MLMP does not involve any dredging approval.

Staff argues that Lagoon dredging would be inconsistent with Special Condition 8's requirement that mitigation be in the form of creation, enhancement or restoration of wetland habitat, but that argument is not supported by the evidence. The Lagoon supports a wide range of beneficial uses, including over 300 acres of marine wetlands and a variety of recreational activities, and needs to be dredged for those uses to continue. The sand dredged from the Lagoon would be placed on adjacent beaches so as to maintain, restore and enhance habitat for grunion spawning and enhance opportunities for public access and recreation along the shoreline. In recognition of the value these uses, the Commission previously granted wetlands restoration credit for inlet maintenance for Edison's SONGS project, and this precedent allowed one acre of restoration credit for every 3.3 acres of tidally exchanged wetlands supported by dredging. As applied to Poseidon, such credit would represent seventeen times the required 5.5 acres of mitigation required under Phase II. The MLMP does not specify the amount of restoration credit Poseidon should receive for dredging, and ultimately the Commission would need to determine the amount of credit to which Poseidon is entitled (if any) if Poseidon applies for such credit.

Finally, Staff argues that credit for dredging cannot be granted because EPS is obligated to dredge the Lagoon, and there is neither an agreement with EPS for Poseidon to undertake dredging nor is EPS a co-applicant for the Project. As discussed above, Poseidon is not asking for dredging credit now, only the possibility of such credit in the future, and Poseidon would provide the Commission with any dredging agreement with EPS, or a new Coastal Development Permit Application that may include EPS as a co-applicant, at the time it requests such credit. Accordingly, Staff's argument is without merit, and Poseidon asks the Commission to approve the MLMP as proposed by Poseidon in Exhibit A.

Item W16a
Exhibit 4

Transcript of
August 6, 2008 hearing
(Commission deliberations
only)

1 whoever makes the motion.

2 CHAIR KRUE: Exactly.

3 EXECUTIVE DIRECTOR DOUGLAS: Right.

4 CHAIR KRUE: Exactly, and your process sounds
5 rational, but then it might even take longer. I am not sure.

6 EXECUTIVE DIRECTOR DOUGLAS: Yes, those are the
7 points of differences, right.

8 CHAIR KRUE: Okay.

9 You don't get to speak, Mr. Geever.

10 MR. GEEVER: Mr. Chairman, I am going to ask you
11 for an exception.

12 CHAIR KRUE: No, I am not going to give any
13 exceptions tonight, at this hour, no, sir, cannot do it.

14 MR. GEEVER: I wanted to take issue with --

15 CHAIR KRUE: Well, you are not entitled to
16 rebuttal. We have closed the public hearing, first of all.

17 MR. GEEVER: Okay.

18 CHAIR KRUE: Thank you, sir.

19 Okay, Commissioner Hueso.

20 [MOTION]

21 COMMISSIONER HUESO: Thank you.

22 I am going to move that we approve the Marine Life
23 Mitigation Plan attached to the staff recommendation, as
24 Exhibit 1, if modified as shown in Section 1.1 below, and
25 Exhibit 2 of this memorandum as compliant with Special

1 Condition 8 of CDP E-06-013.

2 And, I will have some modifications.

3 CHAIR KRUEER: Okay, it has been moved by
4 Commissioner Hueso, seconded by --

5 Is there a "seconded" to your motion?

6 Anyone want to "seconded" it.

7 COMMISSIONER LOWENTHAL: Second.

8 CHAIR KRUEER: Seconded by Commissioner Lowenthal.
9 Would you like to speak to your motion?

10 COMMISSIONER HUESO: I would actually like to go
11 through some of the modifications with staff, and maybe go
12 over some of their recommendations that they have made, just
13 to understand how they apply it.

14 We have gone over this in the discussion, but I
15 would like to go over, for example, Modification No. 1, says
16 Poseidon shall create or restore between 55 and 68 acres of
17 coastal estuarine wetland habitat within the Southern
18 California bite.

19 My question to staff about that, I mean, there
20 were a lot of complaints about there not being a specific
21 area, and staff also followed up that there aren't really
22 expressed locations, in terms of where this mitigation will
23 take place. In your recommendation, is that still the
24 condition, in terms of we don't know where this is going to
25 take place?

1 **ENVIRONMENTAL SPECIALIST LUSTER:** Staff consulted
2 with the SONGS Scientific Advisory Panel, and our recommend-
3 ation is based on input we got from the panel.

4 The conditions that the Commission imposed on
5 Edison for the San Dieguito site, those were issued before
6 Edison had selected its site, and so we feel that if Poseidon
7 meets the same conditions that Edison was held to, and
8 selects a site within the Southern California bite, that
9 would provide adequate assurance that subsequent plans that
10 come to you would be sufficient.

11 **COMMISSIONER HUESO:** So, we can still work out
12 locations, in terms of optimizing the location, and there is
13 the benefit of the improvements.

14 **ENVIRONMENTAL SPECIALIST LUSTER:** Right, as long
15 as they are held to the same conditions SONGS was.

16 **COMMISSIONER HUESO:** And, getting to this specific
17 acreage, you put a range of 55 to 68, that was your
18 recommendation. Now, that is not a very, very specific
19 number. Is that based on, again, putting the burden on the
20 applicant to come back with a plan that mitigates the impacts
21 of the project?

22 **ENVIRONMENTAL SPECIALIST LUSTER:** Staff felt that
23 that was a decision for the Commission.

24 The two figures are based on the levels of
25 confidence that derive from the study. If the Commission

1 wants 80 percent confidence that they would insure full
2 mitigation for the impacts, the 55 acres, staff believes,
3 would be sufficient. If you want 95 percent confidence in
4 your decision, then you go with the higher number.

5 So, the Commission could either decide on a
6 specific figure, this evening, or if Poseidon came back
7 later, with a mitigation proposal, somewhere within that
8 range, that would be the other option.

9 COMMISSIONER HUESO: So, is it so accurate, is it
10 possible to get 95 percent with 37 acres? You are saying, is
11 it impossible? is it improbable? is it that accurate? in
12 terms of the possibility of getting the kind of mitigation
13 that we want within a certain amount of acreage? Can that be
14 achieved through a very intense mitigation monitoring of a
15 specific acreage amount?

16 ENVIRONMENTAL SPECIALIST LUSTER: If you don't
17 mind I will ask Dr. Raimondi to answer that.

18 COMMISSIONER HUESO: Sure.

19 ENVIRONMENTAL SPECIALIST LUSTER: He has far more
20 expertise.

21 MR. RAIMONDI: There are really two issues here,
22 you have addressed one of the. One of them is the amount of
23 acreage that is required, and the other is insuring that it
24 works, because, clearly, you could put in 50, 70, 100 acres
25 and if it doesn't work, you get no compensation.

1 The key thing here is using the information that
2 Poseidon provided, and just using what I laid out there --
3 and again, we are not using any data that didn't come from
4 Poseidon -- the 80 percent really is 55 acres, and the 95
5 really is 68. In addition, you would still need to monitor
6 it, to make sure that it works, because 68 acres of garbage
7 is no compensation.

8 So, there are two issue, really.

9 COMMISSIONER HUESO: So, in terms of maybe hearing
10 from Poseidon's representatives, in terms of what they can
11 guarantee, in terms of providing the adequate mitigation for
12 the project, you are saying you can do it with 42.5 acres is
13 the claim that you are making?

14 MR. ZBUR: Yes, I mean I think we think that based
15 upon the standards that were used for the Morro Bay Plant,
16 and for the Moss Landing Plant, that the acreage amount
17 consistent with that would be 42.5 acres.

18 COMMISSIONER HUESO: And, what level of mitigation
19 would 42 acres provide?

20 MR. ZBUR: It would provide --

21 COMMISSIONER HUESO: In terms of a percentage?

22 MR. ZBUR: It would present 100 percent mitigation
23 for the stand-alone operations.

24 COMMISSIONER HUESO: If monitoring showed that it
25 didn't, would that mean that you are not let off the hook.

1 You would have to come back and do some work?

2 MR. ZBUR: Well, I think that one of the concerns
3 that we have about the adoption of the staff recommendation
4 is that it, basically, is just a very vague recommendation,
5 if we conform it to the SONGS approach, which had a lot of
6 details, which were related to a much, much larger
7 restoration program, including very significant costs.

8 So, one of the things that we were hoping you
9 would do is to use the -- start with the Poseidon plan, and
10 if you wanted to make changes with respect to the acreage,
11 and I think we want -- phasing is an important thing. Not
12 having any phasing, really restricts the number of sites that
13 we can do, that we can get entitled and ready to go on line,
14 within the 24 months that the plan has required.

15 I mean, one of the things that is very important
16 for us is that we are able to not delay the operation of the
17 plant, and in order to not delay the operation of the plant,
18 we need as broad a number of sites, as possible, and
19 obviously, we are requiring all of that up front, so it
20 potentially restricts the number of sites, and that makes it
21 less likely --

22 COMMISSIONER HUESO: And, that would be required
23 to come back to the Coastal Commission for approval, for each
24 project?

25 MR. ZBUR: What the Poseidon proposal does is it

1 would require 37 acres up front. We would have to come back
2 to the Coastal Commission within 24 months for a CDP for that
3 project, at least 37 acres.

4 COMMISSIONER HUESO: That is 24 for the 37 acres?
5 and, then?

6 MR. ZBUR: And, then, the Poseidon proposal was
7 that we would have to do the additional acreage at the time
8 that there was stand alone operations occurring, which would
9 be that the power plant would completely shut down, or
10 provides less than 15 percent of the water.

11 And, I actually wanted to dispute, there is a lot
12 of information on the record which we can site, that provides
13 explanation as to what the basis was of those figures.

14 COMMISSIONER HUESO: So, how did you come up with
15 the 42.5? that is the 37 plus the 5.5 acres?

16 MR. ZBUR: Yes, the 37 plus the 5.5 acres. The 42
17 acres is using the CEC methodology that was used for the
18 Morro Bay and Moss Landing. The 37 acres was, in part,
19 picked because the San Dieguito site, which is not the site
20 that we will, necessarily, go to -- there are still issues
21 with respect to permitting on that site -- but, we know that
22 we can get 37 acres out of the San Dieguito site, if we can
23 resolve issues with the JPA and some of the other entities
24 involved in the site.

25 COMMISSIONER HUESO: So, under of the staff's

1 recommended modifications, now where it says, under 1.1 on 1
2 we have to come up with a determination on the acres, and on
3 No. 2 in conformity with Exhibit 2 -- and we will get to that
4 a little bit later -- and in No. 3 it says when the 60 days
5 of the Commission's approval of the modified plan, Poseidon
6 shall submit for Executive Director's review an approval and
7 review -- excuse me -- of a revised plan that includes these
8 modifications.

9 So, that is not necessarily -- you are asking for
10 24 months, as opposed to 60 days? does that condition apply
11 to that?

12 MR. ZBUR: I didn't think we had any disagreement
13 with the staff on the timing of when the CDP had to come
14 back.

15 ENVIRONMENTAL SPECIALIST LUSTER: Right, and the
16 60 days refers to once we decide on a plan this evening, that
17 Poseidon returns within 60 days, and that incorporates all of
18 the changes that are made. If we end up with some
19 conditions, some Poseidon has proposed, and some staff has
20 proposed, that there is one plan that encapsulates all of
21 that.

22 COMMISSIONER HUESO: So, that would be taken care
23 of by No. 3? there is no disagreement on timing for that?

24 ENVIRONMENTAL SPECIALIST LUSTER: I don't think
25 there is any disagreement.

1 **COMMISSIONER HUESO:** Special Condition No. 2, that
2 refers to Exhibit 2, are there any disagreements on Item No.
3 2?

4 **ENVIRONMENTAL SPECIALIST LUSTER:** Yes, staff's
5 recommendation in Exhibit 2, those are the conditions that
6 the Commission required of SONGS. Staff modified some of
7 those conditions to reflect some updates, and mitigation
8 approaches, and you know, removed references to SONGS and
9 Edison and replaced them with Poseidon.

10 **COMMISSIONER HUESO:** Why are we referencing SONGS,
11 specifically, because of their approach to the mitigation?
12 what you are doing is recommending that exact same approach?

13 **ENVIRONMENTAL SPECIALIST LUSTER:** Yes, going back
14 a ways, over the last several months we have been working
15 with Poseidon and up until about a month ago, Poseidon's
16 proposal was to mitigate at San Dieguito adjacent to the
17 SONGS restoration site, and they had come up with a very
18 detailed preliminary plan, showing the number of acres of the
19 different types of habitat, hydraulic analyses, showing the
20 change in tidal flows, that sort of thing. And, so we were
21 basing our approach, up until then on consistency with the
22 adjacent SONGS restoration site. It all changed in the last
23 month.

24 We now no longer have that site as the selected
25 mitigation area, but in consulting with the SONGS scientists,

1 we believe that the conditions that SONGS was held to would
2 be applicable to Poseidon if they did estuarine restoration
3 somewhere else in the Southern California bite.

4 So, that is how we ended up with proposing the
5 SONGS conditions.

6 COMMISSIONER HUESO: Okay, and what part of those
7 conditions can't you achieve?

8 MR. ZBUR: The SONGS conditions?

9 COMMISSIONER HUESO: Yes.

10 MR. ZBUR: I think what you have attached to the
11 motion that we suggested that you make, included many things
12 to respond to the staff's concerns relating to the
13 inconsistencies within the SONGS plan. I don't think that
14 there are very many, but I am trying to figure out what they
15 are, frankly.

16 I think the only change, really, is with respect
17 to how significant the funding and -- you know, the SONGS
18 plan required the funding of a number of scientists, and
19 really very frequent reports back to the Commission about the
20 restoration plan. And, I think our plan, because it is a
21 much smaller restoration effort, did not anticipate imposing
22 that kind of costs, I mean, the number of scientists that
23 would be employed full time with annual reports -- workshops,
24 it wasn't even reports -- workshops back to the Commission.

25 So, I think that is the major change that remains

1 isn't it? plus the phasing and the number of acres.

2 **COMMISSIONER HUESO:** Couldn't you propose that as
3 part of your mitigation plan? I mean, tell me here where it
4 is that specific, where it calls out a specific number of
5 scientists, and project management staff, and the other
6 things you alluded to?

7 **MR. ZBUR:** Well, basically, it is not in our plan.
8 It is in, basically, the old SONGS plan. There is a general
9 recommendation, and a staff recommendation that we make this
10 consistent with the SONGS plan.

11 It is in Section 1.0 Administration, and 2.0
12 Budget and Work Program. There are differences between the
13 SONGS approach, which required --

14 **EXECUTIVE DIRECTOR DOUGLAS:** Mr. Chairman, if I
15 may, I think this is going to be virtually impossible for us
16 to work through tonight.

17 **COMMISSIONER HUESO:** I agree, I mean --

18 **EXECUTIVE DIRECTOR DOUGLAS:** I think, if you would
19 just work on major issues --

20 **COMMISSIONER HUESO:** Exactly.

21 **EXECUTIVE DIRECTOR DOUGLAS:** -- and then ask us to
22 work with Poseidon, in terms of how we implement it, I think
23 that is what everybody is looking to at the end of the day.

24 You know what our recommendations are on the
25 points of contention. If you go with our recommendation on

1 acreage, fine, we will work through what the nature of the
2 plan will have to be. If you go through each one of these,
3 at least you will be able to act on the plan tonight, and we
4 then come back and work through some of the details of what
5 exactly has to be in the plan, relative to whether or not it
6 is exactly tracking with the SONGS approach, or not.

7 But, that is something that we can work out. You
8 have to decide the fundamental questions here, and if we have
9 a dispute over any of those other items, we can bring those
10 back to you, too. But, at least, in terms of what you have
11 got before you, and what you have asked us to bring to you,
12 was something that you could act on today that would lead to
13 the issuance of the permit, and we were trying to do that.

14 I think the best way for you to go through it is
15 to address the issues in contention.

16 MR. ZBUR: I think we would be comfortable in
17 working out the issues with the staff, in terms of consistent
18 with the SONGS, as they really are not that different.

19 I think the one thing we would ask that the
20 Commission consider as part of the motion is that the detail
21 with respect to the budget is something that we could work
22 out with the staff, and potentially that would be -- the
23 budget, in terms of how much we have to spend could be
24 determined at the time the CDP comes forward.

25 COMMISSIONER HUESO: And, would you like a

1 specific acreage amount to be decided today? or could that be
2 done through your discussions with the applicant?

3 EXECUTIVE DIRECTOR DOUGLAS: I think that is
4 pretty fundamental. I get the sense, from talking with them,
5 that that is what they want you to decide, and we would like
6 that guidance, too.

7 COMMISSIONER HUESO: Well, I am going to propose
8 then, a --

9 CHAIR KRUEER: Well, you have prefaced your --

10 COMMISSIONER HUESO: Okay.

11 COMMISSIONER LOWENTHAL: [Inaudible]

12 COMMISSIONER POTTER: Mr. Chair, if I might, I am
13 prepared to move through these items in an amending form, and
14 then we can give direction accordingly.

15 CHAIR KRUEER: Well, just a --

16 Yes, go ahead, sir.

17 COMMISSIONER LOWENTHAL: [Inaudible]

18 COMMISSIONER POTTER: Unless there is the desire
19 to belabor this kind of conversation, anyway.

20 CHAIR KRUEER: Commissioner Lowenthal, you don't
21 have a problem with Commissioner Potter going?

22 COMMISSIONER LOWENTHAL: No.

23 CHAIR KRUEER: Okay, thank you.

24 [MOTION]

25 COMMISSIONER POTTER: Okay, I offer an amending

1 motion that the restoration acreage be 55.4 acres.

2 I need a "second" and then I will speak to it,
3 briefly.

4 COMMISSIONER HUESO: I'll second it.

5 CHAIR KRUEER: It has been moved by Commissioner
6 Potter, seconded by Commissioner Hueso.

7 COMMISSIONER POTTER: My concern is that wetland
8 restoration, I am compelled by the testimony by staff that
9 the higher percentage of success is with the 55 or 68 number.
10 That said, I also am concerned that this deal of like-kind
11 restoration, that they not get credit for a restoration
12 project that is not similar to this wetland.

13 The attachment that is here, Exhibit A, it does go
14 through a fairly involved criteria, with minimum standards
15 and objectives. I believe that that incorporated with the
16 increased acreage would get us to a successful wetland
17 mitigation project. That is my logic.

18 CHAIR KRUEER: Okay, and the "second"
19 Commissioner Hueso, no question, please. Do you want to
20 speak to it?

21 COMMISSIONER HUESO: No.

22 CHAIR KRUEER: Okay, any other Commissioners?
23 Yes, Commissioner Shallenberger.

24 COMMISSIONER SHALLENBERGER: Question to the maker
25 of the motion. If it turns out that this doesn't adequately

1 -- I mean, are there any performance standards that you are
2 proposing to put in so that we know whether or not at the end
3 of monitoring that 55.4 has, in fact, mitigated it?

4 COMMISSIONER POTTER: I think the CDP that comes
5 in is going to be conditioned for the project, is due in 24
6 months, and is going to have all of those necessary standards
7 as part of that CDP application, that is my belief.

8 COMMISSIONER SHALLENBERGER: My question is which
9 one rules? In other words, if we adopt the 5.4 now, and --

10 COMMISSIONER POTTER: It is 55.4.

11 COMMISSIONER SHALLENBERGER: -- 55.4, sorry, and
12 right you are, and when we, in 24 months when we get the CDP,
13 and the performance standard show that maybe that doesn't --

14 COMMISSIONER POTTER: It is proposed --

15 EXECUTIVE DIRECTOR DOUGLAS: No, if I may.

16 CHAIR KRUEER: Yes, Director Douglas.

17 EXECUTIVE DIRECTOR DOUGLAS: The way that I
18 understand this would work is that 55.4 acres is what they
19 have to restore. There are performance standards that have
20 to be met, and to the extent that those performance standards
21 aren't met, they have to take remedial action, but that
22 doesn't necessarily mean an increase. It means that they
23 have to go back and make the changes that are necessary to
24 make it function to the level that it meets the performance
25 standards. And, that is built into the --

1 **COMMISSIONER POTTER:** And, specific to that, the
2 5.0 in here, with the wetlands monitoring management
3 remediation, reads monitoring management remediation shall be
4 conducted over the full operating life of Poseidon's
5 desalination facility, which shall be 30 years.

6 So, there is never going to be a lapse of non-
7 monitoring or mitigation.

8 **CHAIR KRUEER:** Okay.

9 Commissioner Wan.

10 **COMMISSIONER WAN:** Yeah, along the lines of what
11 Commissioner Shallenberger was talking about, you know, I
12 don't have -- I think the problem here is that, as it has
13 been pointed out, we don't really have the plan in front of
14 us. We have the elements here of what will be a plan, and
15 that makes things very difficult and very uncomfortable,
16 because you can say, well, they will come in in 24 months,
17 and they will be required to do 55.4 acres of restoration,
18 and there will be some performance standards, of which I
19 don't know what they are now.

20 There will be monitoring, of which I, essentially,
21 don't know what that monitoring is, and then they will be
22 required to meet these performance standards on these 55.4
23 acres, but what happens if it turns out that they can't? what
24 happens if it turns out that after all is said and done,
25 because at this point, we do not even know where these acres

1 are going to be located, so it is very difficult to really
2 know if it is adequate. What happens then? and there is
3 where I am really uncomfortable with what we are doing now.

4 I was going to talk about the total issue of
5 uncertainty, and whether you use 50 percent uncertainty, or
6 80 percent in the 50 percent, plus mitigation.

7 But, even if you go with the 55.4 it is the
8 uncertainty because we don't have a plan in front of us now.
9 We are putting off the actual plan for 24 months that I don't
10 know how you can do it.

11 CHAIR KRUEER: Okay.

12 Commissioner Reilly.

13 COMMISSIONER REILLY: Well, the uncertainty isn't
14 with performance standards or whether they are going to be
15 able to do it. The uncertainty has to do with the impact of
16 their project. And, it is not going to change.

17 Whatever performance standards we put on their
18 mitigation, for success, is not going to change the analysis
19 or the level of confidence that this Commission needs to be
20 able to set mitigation acreage, so those are two separate
21 issues, I believe.

22 And, you know, when this comes back, and you know
23 a couple of us were here for Edison -- little grayer than we
24 were then -- but, we were here, and when this comes back what
25 is going to be before the Commission is adoption of an entire

1 restoration plan, you know, agreement on baselines, agreement
2 on what performance standards we are going to use on this,
3 and I am sure we are going to go back to some of the ones we
4 have done before, and take a look at that. We are going to
5 make decision on status reports. We are going to make
6 decision on workshops and what period of time we do them
7 over, and so all of those things will be before us, along
8 with we will have an identification, hopefully, by then, of
9 the sites that are involved, and but none of that has to do
10 with setting the acreage. The acreage is based on the
11 analysis, and the percentage level of confidence we have
12 based on uncertainties.

13 I don't have a problem with going forward with
14 this.

15 CHAIR KRUEER: Okay, thank you, Commissioner
16 Reilly.

17 EXECUTIVE DIRECTOR DOUGLAS: And, this is the
18 approach that we took in San Onofre.

19 CHAIR KRUEER: And, I am going to call for the
20 question.

21 COMMISSIONER HUESO: I do want to include the
22 concept of phasing into --

23 COMMISSIONER POTTER: I am going to move each one
24 individually.

25 CHAIR KRUEER: Phasing is in there.

1 Okay, with that, again the maker and seconder are
2 asking for a "Yes" vote on the amending motion.

3 Would the Clerk call the roll.

4 **SECRETARY MILLER:** Commissioner Blank?

5 **COMMISSIONER BLANK:** Yes.

6 **SECRETARY MILLER:** Commissioner Burke?

7 **COMMISSIONER BURKE:** Yes.

8 **SECRETARY MILLER:** Commissioner Lowenthal?

9 **COMMISSIONER LOWENTHAL:** Yes.

10 **SECRETARY MILLER:** Commissioner Hueso?

11 **COMMISSIONER HUESO:** Yes.

12 **SECRETARY MILLER:** Commissioner Kram?

13 **COMMISSIONER KRAM:** [Absent]

14 **SECRETARY MILLER:** Commissioner Neely?

15 **VICE CHAIR NEELY:** Yes..

16 **SECRETARY MILLER:** Commissioner Potter?

17 **COMMISSIONER POTTER:** Aye.

18 **SECRETARY MILLER:** Commissioner Reilly?

19 **COMMISSIONER REILLY:** Yes.

20 **SECRETARY MILLER:** Commissioner Shallenberger?

21 **COMMISSIONER SHALLENBERGER:** No.

22 **SECRETARY MILLER:** Commissioner Wan?

23 **COMMISSIONER WAN:** No.

24 **SECRETARY MILLER:** Commissioner Achadjian?

25 **COMMISSIONER ACHADJIAN:** Aye.

1 SECRETARY MILLER: Chairman Kruer?

2 CHAIR KRUEER: Yes.

3 SECRETARY MILLER: Nine, two.

4 CHAIR KRUEER: Nine, two, the motion passes.

5 Next, on this.

6 COMMISSIONER POTTER: Yes, Mr. Chair --

7 CHAIR KRUEER: Yes, Commissioner Potter.

8 [MOTION]

9 COMMISSIONER POTTER: -- before the tech crew took
10 away the chart of options, and decided it was better to look
11 at us -- okay, there we go.

12 I believe the next issue was the phased
13 implementation, and I am prepared to move the phased
14 implementation approach, that is proposed in the Poseidon
15 recommendation, and if I get a "second" I'll speak to it.

16 COMMISSIONER HUESO: Second.

17 COMMISSIONER POTTER: The original approach was to
18 take the 37.5 and then the balance up to the 42 and phase
19 that. I am under the impression that they can do the 37 in
20 the 2-year period, so then it leaves, basically, the balance
21 between the 37 and 55, so whatever that is -- and my math
22 says it is 18.4, so that would be the second phase.

23 And, the details of that is to be worked out by
24 staff. What staff wanted was direction on these items, and
25 so for that reason I would throw that out as the approach.

1 CHAIR KRUER: Okay, Commissioner Hueso?

2 Commissioner Reilly.

3 COMMISSIONER REILLY: I would be willing to
4 support that if the Phase 2 had a time certain placed on it.
5 And, you know, we are talking about bringing it back within 2
6 years. They are anxious to get this project up and going, I
7 understand, and in their concern, they may not be able to get
8 -- well, they were concerned that they weren't going to be
9 able to get 42.5 acres, I am assuming they are concerned they
10 are not going to be able get 55.4 within a 2-year period.

11 I am willing to let them come back with 37 on a
12 Phase 1, but from the time of that approval of Phase 1, I
13 don't think we should let more than 5 years pass before we
14 require the Phase 2 to come back.

15 COMMISSIONER POTTER: And, I would include that --

16 CHAIR KRUER: Is that okay with you, Commissioner
17 Potter, as the maker of the motion?

18 COMMISSIONER POTTER: -- in my recommendation.

19 CHAIR KRUER: Commissioner Hueso, is that okay
20 with you?

21 COMMISSIONER HUESO: Yes.

22 CHAIR KRUER: Okay, is there anyone else who wants
23 to speak to that amending motion?

24 Commissioner Lowenthal.

25 COMMISSIONER LOWENTHAL: So, with the acreage

1 change to 55.4 what would Phase 2 acreage be?

2 COMMISSIONER POTTER: It would be 18.4.

3 COMMISSIONER LOWENTHAL: So, it will be clearly
4 the difference as what is in the report?

5 COMMISSIONER POTTER: Yes.

6 CHAIR KRUEER: Yes, and thank you, Commissioner
7 Lowenthal.

8 EXECUTIVE DIRECTOR DOUGLAS: What I understand the
9 motion to be is that the initial acreage is 37, that has to
10 be done, and then according to their suggestion for phasing,
11 which is when the power plant goes down --

12 COMMISSIONER POTTER: No, that got changed to 5
13 years.

14 EXECUTIVE DIRECTOR DOUGLAS: Okay, so the second
15 phase comes in when?

16 COMMISSIONER POTTER: Within 5, that is per the
17 Reilly idea.

18 COMMISSIONER REILLY: Five years after your
19 approval on Phase 1.

20 EXECUTIVE DIRECTOR DOUGLAS: All right, that is
21 more workable, thank you.

22 CHAIR KRUEER: Commissioner Wan.

23 COMMISSIONER WAN: I still have a problem with the
24 phasing, although with the time certain, it is a little bit
25 better, because we are going to have a long period of time

1 where are going to have impacts, and we are not going to have
2 any mitigations for those impacts.

3 And, in part, that is because I don't know when
4 this is going to come on line, relative to these dates, and
5 you have to remember, that if you start with 37 acres 2 years
6 from now, it takes time to build it, and it takes even more
7 time, quite a few years, before it is actually functioning.

8 So, we are now looking at 2 years before they
9 start, to, probably, you know, 5 or 6 years down the road
10 before we even start to get anything out of the first phase,
11 and if you add some time on it, by the time you get, quote,
12 full mitigation, if you ever do, you are talking about 10
13 years, and you have had all of those impacts you haven't
14 accounted for.

15 And, so pushing this out, remember it takes time
16 for all of this. Pushing it out this way really leaves us
17 with a whole lot of impacts to that ocean without any
18 mitigation.

19 CHAIR KRUEER: Commissioner Reilly.

20 COMMISSIONER REILLY: I don't disagree with what
21 Commissioner Wan said, but I would point out that SONGS
22 operated for 20 years before we got that mitigation, so and
23 we finally got it, and it is happening, and I think there is
24 a balance here between being able to move forward on this
25 project, for the local water needs, and our being able to

1 nail down the mitigation that fully mitigates what is going
2 on, in terms of impacts.

3 EXECUTIVE DIRECTOR DOUGLAS: And, I might add that
4 the 5-year component is 5 years from what?

5 COMMISSIONER REILLY: Adoption of Phase 1.

6 EXECUTIVE DIRECTOR DOUGLAS: The permit for Phase
7 1. It may be that they decide, in looking at that, that it
8 is better to do it all at once, and they may, indeed, find an
9 area that is big enough to accommodate the whole thing, so
10 that would be an option open to them.

11 But, at least, this way, it is workable and we
12 don't get into the ambiguity of when does it trigger, and
13 when does it not.

14 CHAIR KRUEER: Commissioner Scarborough, then
15 Commissioner Shallenberger.

16 COMMISSIONER SCARBOROUGH: That was -- thank you,
17 Chair, that was part of my question, was it 2 plus 5, or how
18 did you get to the 5 plus 5, but I also wondered what would
19 be the association, or the relationship between the 5 years,
20 versus when the power plant does, potentially, close? I
21 didn't understand why Poseidon had chosen the plant closing,
22 and was wondering if I could enquire with them why that was
23 chosen, and how it relates to 5?

24 CHAIR KRUEER: Okay.

25 MR. ZBUR: The reason why we had suggested doing

1 the phasing at the plant closing is because, essentially, at
2 that time we think there will be other kinds of technologies
3 we can put in place that would reduce the potential impinge-
4 ment entrainment impacts that we don't have now, because we
5 have to, basically, rely on the power plant flow, so that is
6 why we thought that at that point we would have a technology
7 incentive to avoid additional mitigation by doing it through
8 avoidance and technology.

9 So, that is why we prefer doing it at the power
10 plant closure.

11 COMMISSIONER SCARBOROUGH: What is the estimated
12 time of that? time frame?

13 MR. ZBUR: It is uncertain. I mean, it could be a
14 few years, or it could be a long time. According to the
15 methodology, we are fully mitigated in the interim on the 37
16 acres, under the 50 percent compensated criteria, we would be
17 fully mitigated, 2.5 times mitigated at the get go, until --
18 that is where that 15 percent number came from. We are fully
19 mitigated until you get to the power plant only operating 15
20 percent of the time.

21 COMMISSIONER REILLY: That is where we got the 7
22 years.

23 CHAIR KRUE: Commissioner Shallenberger.

24 COMMISSIONER SHALLENBERGER: Yes, I would like to
25 hear from staff, Dr. Raimondi, about what you think about the

1 phasing? and how workable that is?

2 MR. RAIMONDI: I am not going to comment about the
3 motivation for the phasing, but the practicality of it, as we
4 have had some experience with SONGS.

5 In the SONGS permit there was language that
6 allowed there to be restoration, and up to 2 wetland areas.
7 There was the initial phase where there was the selection of
8 the wetlands, where restoration could be done, and in the
9 end, Southern California Edison, and their partners, decided
10 it was logistically more easily to do it at a single wetland
11 for all sorts of reasons. It minimized the monitoring, it
12 minimized the costs associated with the permitting, it
13 minimized the construction costs, it was just cheaper to do
14 it.

15 Another thing about it, and again, it is going to
16 matter how you decide to do the monitoring, but with SONGS
17 they are on the hook for working for what they call the full
18 operating life of the plant.

19 So with phasing you are going to have two
20 sequences. You will have the first 37 acres, which will go
21 for a 30-year period, if you adopt that, and then the second
22 17 or 16 acres that will be out of phase with that, and will
23 go longer, so that becomes problematic from a monitoring
24 standpoint, financially, as well, because you have to carry
25 the monitoring longer.

1 **COMMISSIONER SHALLENBERGER:** But, it is
2 problematic to the project proponent, not to us, in terms, I
3 mean, they could decide to do them all at once.

4 **MR. RAIMONDI:** Yes, but there is a stronger issue,
5 and that is it is way better. It is possible, and I am
6 sympathetic to them, at this point, about being able to find
7 the acreage, but it is way better for the system if it is 55
8 rather than two pieces. You are going to have much more
9 likelihood of it working, and it is probably going to link
10 into other restorations, so from an ecological point of view,
11 bigger is better.

12 **CHAIR KRUEER:** Right, okay.

13 **COMMISSIONER POTTER:** Well, just as the maker, to
14 that issue. It is a real estate issue. I mean if the
15 opportunity is out there, and during this period of working
16 with staff, they realize we would do better to do it in one
17 fell swoop, fine then come back and tell us that.

18 I understand the logic behind what you are saying,
19 but it is going to be more of a property acquisition problem
20 is my suspicion.

21 **CHAIR KRUEER:** Okay.

22 Commissioner Lowenthal, and then we are going to
23 call for the question, if that is okay with everybody, unless
24 there is somebody who hasn't spoken yet.

25 **COMMISSIONER LOWENTHAL:** I wanted to just be clear

1 on when the second -- I know we have the 5-year time frame,
2 but just from the proponent's presentation there were
3 different triggering mechanisms, so under our new scheme what
4 would actually trigger Phase 2?

5 EXECUTIVE DIRECTOR DOUGLAS: It would be 5 years
6 from the first phase, that is, the 37 acres, which has to
7 come in for a permit within 24 months, as I understand it,
8 right, and then once that permit is issued, that is what I
9 understand, then the 5-year period is triggered.

10 But, I would suggest that the maker of the motion
11 also incorporate in it that if they want to do the entire
12 amount together, that that would be okay, they don't have to
13 wait.

14 COMMISSIONER POTTER: I literally stated that 3
15 minutes ago, but that is my intention, and I think everybody
16 else concurs, that if they come back and can do it great,
17 okay.

18 EXECUTIVE DIRECTOR DOUGLAS: Okay.

19 CHAIR KRUEER: Okay, and we are going --
20 Ms. Schmeltzer, we are going to call for the
21 question. I thought I mentioned.

22 CHIEF COUNSEL SCHMELTZER: I am sorry, I just did
23 want to make sure, on this timing question, I thought I heard
24 the Executive Director say two different things.

25 There is the provision of coming in for a permit.

1 within 24 months, and it being issued within the 24 months --

2 COMMISSIONER POTTER: Specific to the 37, and if
3 they want to go ahead and try to do more at that time, for
4 economy sake, then fine, they can go to the full 55.4, but
5 they have an option to go ahead and do it in a phase.

6 CHIEF COUNSEL SCHMELTZER: Right, and I understand
7 that, but if they just do the 37 within the first 24 months,
8 that the trigger is not -- the trigger is within 24 months.
9 It is not if the permit takes longer than that to issue.

10 COMMISSIONER POTTER: No.

11 EXECUTIVE DIRECTOR DOUGLAS: No, my understanding
12 was, that they have to come in for a permit within 24 months,
13 and then it depends on what the Commission does. They may
14 have conditions about the issuance of that permit. My
15 understanding was that the 5 years starts from the issuance
16 of the permit.

17 COMMISSIONER REILLY: That is correct.

18 COMMISSIONER POTTER: Correct.

19 CHAIR, KRUEER: That is correct, Mr. Douglas, thank
20 you.

21 Yes, Commissioner.

22 COMMISSIONER SCARBOROUGH: I am not sure where you
23 are headed with your phasing in your motions, where does the
24 dredging fit into this?

25 COMMISSIONER POTTER: I was going to that in the

1 next --

2 CHAIR KRUEER: We will get to -- I think we are
3 going to call the question, here, and then we will get to the
4 other amending, if there are other amending things.

5 Again, the amending motion, the maker and seconder
6 are asking for a "Yes" vote.

7 Would the Clerk call the roll, please.

8 MR. ZBUR: Mr. Chair, can I just so there is not a
9 dispute on this, can I just make sure there is clarity on
10 what the timing is on the motion. We are assuming it is 24
11 months --

12 COMMISSIONER POTTER: I am hoping it gets moved
13 sometime tonight.

14 MR. ZBUR: -- 24 months -- well, only because I --
15 24 months to get our application in, which is what we thought
16 it was, and then from the date that the permit is issued, so
17 if it takes 9 months or a year to get the permit approved,
18 from the date the permit is issued, then the 5 years runs,
19 and then I assume that we have to get another permit
20 application in within that 5 years?

21 COMMISSIONER POTTER: That is correct.

22 CHAIR KRUEER: Correct.

23 MR. ZBUR: Thank you for that clarification.

24 CHAIR KRUEER: Okay, thank you.

25 Would the Clerk call the roll, please.

1 SECRETARY MILLER: Commissioner Burke?
2 COMMISSIONER BURKE: Yes.
3 SECRETARY MILLER: Commissioner Lowenthal.
4 COMMISSIONER LOWENTHAL: Yes.
5 SECRETARY MILLER: Commissioner Hueso?
6 COMMISSIONER HUESO: Yes.
7 SECRETARY MILLER: Commissioner Kram?
8 COMMISSIONER KRAM: Yes.
9 SECRETARY MILLER: Commissioner Neely?
10 VICE CHAIR NEELY: Yes.
11 SECRETARY MILLER: Commissioner Potter?
12 COMMISSIONER POTTER: Aye.
13 SECRETARY MILLER: Commissioner Reilly?
14 COMMISSIONER REILLY: Yes.
15 SECRETARY MILLER: Commissioner Shallenberger?
16 COMMISSIONER SHALLENBERGER: Yes.
17 SECRETARY MILLER: Commissioner Wan?
18 COMMISSIONER WAN: Yes.
19 SECRETARY MILLER: Commissioner Achadjian?
20 COMMISSIONER ACHADJIAN: Aye.
21 SECRETARY MILLER: Commissioner Blank?
22 COMMISSIONER BLANK: Yes.
23 SECRETARY MILLER: Chairman Kruer?
24 CHAIR KRUER: Yes.
25 SECRETARY MILLER: Unanimous.

1 CHAIR KRUEER: Okay, the amending motion passes.
2 Commissioner Potter, do you have anymore amending
3 motions?

4 COMMISSIONER POTTER: I am going to actually ask
5 for staff clarification on these last two items. I think
6 they blend together.

7 Staff is saying that new technologies not appropo,
8 or in this consideration, and the applicant is saying they
9 would like the ability to utilize new technology.

10 And, the other one is this dredging credits, can
11 you explain what the conflicts are here?

12 EXECUTIVE DIRECTOR DOUGLAS: What I understand,
13 relative to the new technology, that is that if they can come
14 up the way that they had originally proposed it, if they come
15 up with technology that shows that they can filter the water
16 and avoid entrainment impacts, because of new technology,
17 that there ought to be some adjustment in the mitigation
18 requirement.

19 It seems to me that one way you could address
20 that, and you know, we have some sympathy for that position.
21 Obviously, if we could avoid the impacts altogether, that
22 would be the best. But, if in that 5-year period, for the
23 second phase, they can come up with technology that shows
24 that they are not having impacts, you could then factor that
25 into whether or not it necessary to add that. But, take that

1 into account in the permit that would be applied for in the
2 Phase 2.

3 COMMISSIONER POTTER: Okay, with that said, I move
4 that we amend to allow to encourage the use of new
5 technologies --

6 CHAIR KRUER: Commissioner Potter.

7 COMMISSIONER POTTER: He spoke, I didn't preface.

8 CHAIR KRUER: Let me, just to be clear on it. I
9 am not sure about that.

10 Let me just go to Vice Chair Neely for one second,
11 and then I am coming right back to you for your motion.
12 There is a question of you prefacing.

13 COMMISSIONER POTTER: I would like to know where
14 in the law you can't speak anyway. I think that is something
15 that Rusty Arias made up from his stay in the state assembly.

16 VICE CHAIR NEELY: Mr. Chairman, I don't have any
17 questions at this time.

18 CHAIR KRUER: Okay, Commissioner Potter.

19 [MOTION]

20 COMMISSIONER POTTER: All right, I'll move to
21 amend, and incorporate in the motion that we encourage the
22 use of new technologies under the framework that was
23 expressed by the Executive Director.

24 COMMISSIONER HUESO: I'll second it.

25 COMMISSIONER POTTER: With the intent of lessening

1 the impact.

2 CHAIR KRUEER: Just a second.

3 Commissioner Potter has made the motion, and
4 recommending a "Yes" vote, and Commissioner Hueso seconded
5 that motion.

6 Commissioner Potter, would you like to speak to
7 that motion?

8 COMMISSIONER POTTER: No, I think Mr. Douglas and
9 I worked pretty well on that item. That was exactly what I
10 wanted him to say, so thank you.

11 COMMISSIONER REILLY: Mr. Chairman.

12 CHAIR KRUEER: That is why it was prefaced.

13 COMMISSIONER REILLY: Let me ask.

14 Staff is going to be incorporating the concept of
15 the 2-year application, and the 5 years afterwards, is staff
16 willing, in discussing that 5 years, willing to incorporate
17 language that suggests that they look into new technology to
18 lessen impacts, and that as part of that 5-year hearing, if
19 they are able to do that, could be a review of mitigation
20 requirement?

21 EXECUTIVE DIRECTOR DOUGLAS: Well, that is what I
22 discussed, and I think that is what the motion would do, and
23 we don't have a problem with that.

24 COMMISSIONER REILLY: Are you willing to just
25 incorporate that into the staff?

1 **EXECUTIVE DIRECTOR DOUGLAS:** I would rather have
2 the Commission do it.

3 **COMMISSIONER REILLY:** That's fine, okay.

4 **CHAIR KRUEER:** Commissioner Wan.

5 **COMMISSIONER WAN:** I just have a question on this
6 one, and that is, I am assuming it is always okay, if you can
7 avoid the entrainment, that is the best, because the fact is
8 -- I don't care what you say -- no matter what mitigation you
9 perform, no matter how you try to compensate for it, you
10 never get full compensation. So, the best thing is always
11 avoidance, so I am certainly not opposed to that.

12 The question I want to make sure is that when they
13 come back for the review, that we are talking about a review
14 that requires some kind of proof, and not just a statement,
15 "We want to use it." That there is going to be some real
16 scientific analysis done to make sure that that is the case,
17 because up until now there doesn't seem to be anything that
18 has been developed that can avoid the entrainment, and we
19 went through that in great and painful detail when we did
20 SONGS.

21 So, I am not aware of it, and I just want to make
22 sure that we know how this is going to be handled.

23 **EXECUTIVE DIRECTOR DOUGLAS:** Obviously, the proof
24 would have to be that there are reductions in impacts, or
25 elimination of impacts, in order for us to consider -- if

1 this motion passes -- a reduction of the Phase 2 mitigation
2 requirement.

3 But, this leaves that open, and it is up to them
4 to try to find that technology, and again, if they decide
5 right up front, we are not going to worry about that, we are
6 just going to do the 55.4 acres, then it becomes a moot
7 point.

8 CHAIR KRUEER: Okay.

9 EXECUTIVE DIRECTOR DOUGLAS: But, it leaves open
10 that opportunity.

11 CHAIR KRUEER: Okay, I am going to call on the
12 amending motion.

13 Priscilla's got her pen up, and we'll need a brief
14 break.

15 Call the roll, please, on the amending motion, on
16 the technology.

17 SECRETARY MILLER: Commissioner Lowenthal?

18 COMMISSIONER LOWENTHAL: [inaudible]

19 VICE CHAIR NEELY: Speak up, she can't hear you.

20 COMMISSIONER LOWENTHAL: Yes.

21 SECRETARY MILLER: Commissioner Hueso?

22 COMMISSIONER HUESO: Yes.

23 SECRETARY MILLER: Commissioner Kram?

24 COMMISSIONER KRAM: Yes.

25 SECRETARY MILLER: Commissioner Neely?

1 VICE CHAIR NEELY: Yes.
2 SECRETARY MILLER: Commissioner Potter?
3 COMMISSIONER POTTER: Aye.
4 SECRETARY MILLER: Commissioner Reilly?
5 COMMISSIONER REILLY: Yes.
6 SECRETARY MILLER: Commissioner Shallenberger.
7 COMMISSIONER SHALLENBERGER: Yes.
8 SECRETARY MILLER: Commissioner Wan?
9 COMMISSIONER WAN: Yes.
10 SECRETARY MILLER: Commissioner Achadjian?
11 COMMISSIONER ACHADJIAN: Aye.
12 SECRETARY MILLER: Commissioner Blank?
13 COMMISSIONER BLANK: Yes.
14 SECRETARY MILLER: Commissioner Burke?
15 COMMISSIONER BURKE: Yes.
16 SECRETARY MILLER: Chairman Kruer?
17 CHAIR KRUER: Yes.
18 SECRETARY MILLER: Unanimous.
19 CHAIR KRUER: The amending motion passes.
20 Commissioner Potter, any more?

21 [MOTION]

22 COMMISSIONER POTTER: I am going to move that the
23 dredging restoration credit be at the Commission's
24 discretion, and if I get a "second" I'll speak to it.
25 COMMISSIONER HUESO: Second.

1 CHAIR KRUER: Moved by Commissioner Potter,
2 seconded by Commissioner Hueso.

3 Commissioner Potter, would you like to speak to
4 your motion?

5 COMMISSIONER POTTER: I think my concern is, and
6 this is sort of an open ended question, that whether they can
7 even get ownership of the dredging operations, and can
8 incorporate that in, remains pretty much unanswered, and may
9 remain there for awhile.

10 So, if there does seem to be a dredging plan that
11 comes forward, and we can get something tangible there about
12 how is going to be operated? who is going to do it? when it
13 is going to occur? all of those ingredients, then it is up to
14 the Commission to decide if that is something that we want to
15 entertain at that time. That is my thought behind it.

16 CHAIR KRUER: Okay, Commissioner Potter or
17 Commissioner Hueso, anything else?

18 Anyone else? Commissioner Wan.

19 COMMISSIONER WAN: Just very quickly, if you are
20 going to leave this open for the discretion -- and I think I
21 heard Commissioner Potter say this, but I just want to make
22 sure -- there is one thing, there is a big difference between
23 dredging connected with maintaining the project, and dredging
24 for mitigation, because as in SONGS it is required for the
25 mitigation, and as long as the dredging credit is understood,

1 it is for whatever future project they are going to be
2 dredging for, not for the desal plant, then I would find that
3 acceptable.

4 COMMISSIONER POTTER: That is --

5 COMMISSIONER WAN: You understand the distinction?

6 CHAIR KRUEER: Commissioner Reilly.

7 COMMISSIONER REILLY: If I understood the staff
8 correctly, earlier, your statement was if dredging becomes
9 part of the project, and becomes a reality, as opposed to a
10 possibility, then staff would do a full analysis of that
11 activity, at that time, both in terms of impacts and in terms
12 of benefits, and be prepared to make recommendations relative
13 to whether additional conditions had to be added, or benefits
14 would be accorded to that.

15 I guess, I would prefer to wait to see what
16 happens with that issue, before we pre-judge it, that's all.

17 EXECUTIVE DIRECTOR DOUGLAS: That is the way we
18 understand it, and this motion would just say that they could
19 come in for credit for dredging, but they would have to prove
20 that it warrants it, so that is fine with us.

21 CHAIR KRUEER: Okay.

22 Call for the question.

23 Clerk, would you call the roll, please. They are
24 asking for a "Yes" vote, on the amending motion.

25 SECRETARY MILLER: Commissioner Hueso?

1 COMMISSIONER HUESO: Yes.
2 SECRETARY MILLER: Commissioner Kram?
3 COMMISSIONER KRAM: Yes.
4 SECRETARY MILLER: Commissioner Neely?
5 VICE CHAIR NEELY: Yes.
6 SECRETARY MILLER: Commissioner Potter?
7 COMMISSIONER POTTER: Aye.
8 SECRETARY MILLER: Commissioner Reilly?
9 COMMISSIONER REILLY: No.
10 SECRETARY MILLER: Commissioner Shallenberger?
11 COMMISSIONER SHALLENBERGER: Yes.
12 SECRETARY MILLER: Commissioner Wan?
13 COMMISSIONER WAN: No.
14 SECRETARY MILLER: Commissioner Achadjian?
15 COMMISSIONER ACHADJIAN: Aye.
16 SECRETARY MILLER: Commissioner Blank?
17 COMMISSIONER BLANK: Aye.
18 SECRETARY MILLER: Commissioner Burke?
19 COMMISSIONER BURKE: No.
20 SECRETARY MILLER: No?
21 COMMISSIONER BURKE: [Inaudible]
22 SECRETARY MILLER: Commissioner Lowenthal?
23 COMMISSIONER LOWENTHAL: Yes.
24 SECRETARY MILLER: Chairman Kruer?
25 CHAIR KRUE: Yes.

1 SECRETARY MILLER: Nine, three.

2 CHAIR KRUEER: Nine, three, the amending motion
3 passes.

4 And, now we will need back to the main motion,
5 okay. Back to the motion, and again the maker and the
6 seconder are asking for a "Yes" vote.

7 Commissioner Wan has her hand up.

8 COMMISSIONER WAN: Just on the main motion, this
9 is not an amending motion, and I just want a quick
10 explanation as to why I am going to vote "No" and the reason
11 I am going to vote "No" is that I don't believe, if you look
12 at this whole thing, that we really are getting the kind of
13 assurances we need that this is real mitigation, and the
14 reason is -- and that this is adequate mitigation -- this is
15 going to be doing, this facility, once it becomes a stand
16 alone facility, essentially, what once-through cooling does,
17 and once-through cooling has been found by the courts to be a
18 violation of the *Porter Cologne Act*, and I don't see how -- I
19 don't even know why you bother to phase out the power plant,
20 if you are just going to substitute something that is going
21 to do exactly the same thing. It is not acceptable, because
22 it is not protective of the ocean.

23 Our oceans are under horrific assault, and this
24 kind of thing is simply not appropriate, particularly, when
25 we get a plan that is -- we deferred our decision, we passed

1 the power plant, deferred the decision on the mitigation, and
2 now we are again with all of the things that we had in the
3 amending motions, deferring the real plan for another 2
4 years.

5 We will not see a full plan, and I don't think you
6 can approve a mitigation without the appropriate plan, and if
7 I had a full plan in front of me, it might be different, but
8 I don't, and without that I don't have the confidence to know
9 just the real extent of the mitigation that is going to take
10 place here.

11 And, let me, again, say mitigations here, as
12 elsewhere, does not give you complete compensation.

13 CHAIR KRUEER: Okay, would the Clerk call the roll
14 on the main motion, please, as amended by the Commission.

15 SECRETARY MILLER: Commissioner Kram?

16 COMMISSIONER KRAM: Yes.

17 SECRETARY MILLER: Commissioner Neely?

18 VICE CHAIR NEELY: Yes.

19 SECRETARY MILLER: Commissioner Potter?

20 COMMISSIONER POTTER: Aye.

21 SECRETARY MILLER: Commissioner Reilly?

22 COMMISSIONER REILLY: Yes.

23 SECRETARY MILLER: Commissioner Shallenberger?

24 COMMISSIONER SHALLENBERGER: Yes.

25 SECRETARY MILLER: Commissioner Wan?

1 COMMISSIONER WAN: No.
2 SECRETARY MILLER: Commissioner Achadjian?
3 COMMISSIONER ACHADJIAN: Aye.
4 SECRETARY MILLER: Commissioner Blank?
5 COMMISSIONER BLANK: Yes.
6 SECRETARY MILLER: Commissioner Burke?
7 COMMISSIONER BURKE: Yes.
8 SECRETARY MILLER: Commissioner Lowenthal?
9 COMMISSIONER LOWENTHAL: Yes.
10 SECRETARY MILLER: Commissioner Hueso?
11 COMMISSIONER HUESO: Yes.
12 SECRETARY MILLER: Chairman Kruer?
13 CHAIR KRUER: Yes.
14 SECRETARY MILLER: Eleven, one.
15 CHAIR KRUER: Okay, the Commission hereby approves
16 the main motion, as amended by the Commission.
17 We will take a break.

18 *

19 *

20 [Whereupon the hearing concluded at 7:35 p.m.]

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1. The first part of the report deals with the general situation of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

2. The second part of the report deals with the financial situation of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

3. The third part of the report deals with the social situation of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

4. The fourth part of the report deals with the educational situation of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

5. The fifth part of the report deals with the health situation of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

6. The sixth part of the report deals with the agricultural situation of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

7. The seventh part of the report deals with the industrial situation of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

8. The eighth part of the report deals with the commercial situation of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

9. The ninth part of the report deals with the legal situation of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

10. The tenth part of the report deals with the administrative situation of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

11. The eleventh part of the report deals with the foreign relations of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

12. The twelfth part of the report deals with the internal security of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

13. The thirteenth part of the report deals with the public works of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

14. The fourteenth part of the report deals with the public health of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

15. The fifteenth part of the report deals with the public education of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

16. The sixteenth part of the report deals with the public industry of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

17. The seventeenth part of the report deals with the public commerce of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

18. The eighteenth part of the report deals with the public law of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

19. The nineteenth part of the report deals with the public administration of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.

20. The twentieth part of the report deals with the public works of the country and the progress of the work during the year. It also mentions the results of the various committees and the work of the different departments.