

July 26, 2017

Environmental Law Clinic

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**Seawater Desalination Project at Huntington Beach:
Outfall/Intake Modifications and General Lease — Industrial Use
(PRC 1980.1) Amendment (Lease Modification Project)**

Dear Ms. Borack:

Thank you for the opportunity to comment on the Draft Supplemental Environmental Impact Report (“DSEIR”) for Poseidon’s proposed seawater desalination project at the existing Huntington Beach Generating Station (“Project”). Please accept these comments as a supplement to the longer comment letter submitted by California Coastkeeper Alliance, Orange County Coastkeeper, Residents for Responsible Desalination, and California Coastal Protection Network.

Before the formal California Environmental Quality Act (“CEQA”) update process for this Project commenced, we expressed concerns, by way of letter dated October 6, 2016, about the truncated nature and scope of the State Lands Commission’s (“Commission”) proposed environmental review. Unfortunately, these concerns have not been addressed in the DSEIR. Accordingly, we attach our October 2016 correspondence and incorporate it by reference herein to ensure that it is fully part of the administrative record as the Commission evaluates whether to approve amendments to the Project lease. The comments below will not duplicate our earlier legal analysis, but rather highlight and reiterate our serious concerns about the legal infirmity of the DSEIR.

First, in proposing to approve a discretionary lease modification nearly seven years after the Project was approved (but never commenced), the Commission, as a matter of law, necessarily assumes CEQA “lead agency” status for the Project, whether or not it wants to do so. As the original lead agency for the Project, the City of Huntington Beach was charged with preparing and certifying an adequate EIR. At that time, the Commission acted in the limited role of a “responsible agency,” based on the City-certified 2010 EIR, when it made the ancillary decision in October 2010 to execute the requisite trust lands lease. But because the City no longer has jurisdiction or discretionary authority over the Project, any agency that proposes to undertake a new discretionary decision for the same Project steps into the shoes of the original lead agency when, as is clearly the case here, the Project or its circumstances are so changed as to require a subsequent EIR. 14 Cal. Code Regs. § 15052(a). The Commission’s proposed lease modification is such a discretionary decision and thus triggers substitute lead agency obligations.

Under CEQA, there simply is no question that a subsequent EIR is required in this case. The Project has changed significantly since its approval in 2010, as have the circumstances surrounding it. In response to new state law requirements under the Water Code and the California Ocean Plan, the Project proponent has proposed substantial revisions to the Project itself, beyond those changes that necessitate a lease amendment. For instance, the Project proponent now proposes a potable water delivery method that is entirely different from anything considered in the 2010 EIR. Because new delivery options under consideration by the Project proponent and the Orange County Water District would involve significant impacts that were never considered in the original CEQA analysis, this fact alone necessitates a subsequent EIR. 14 Cal. Code Regs. § 15162.

Likewise, intervening events over the last seven years since the CEQA review was completed and the Project approved have dramatically altered the circumstances surrounding the Project and resulted in highly-relevant new information not previously considered by any agency. For instance, local water supply projects and conservation efforts have led to new, substantially reduced water demand forecasting in Orange County. This new information raises serious threshold questions about the need for the Project – or at the very least, for a regional desalination facility of this size. Recent amendments to the California Ocean Plan regarding desalination facilities also expressly require an evaluation of project need. The scope of need, in turn, affects the range of reasonable alternatives that must be considered under CEQA. The range of reasonable alternatives considered is especially relevant and important here because the proposed Project could adversely impact the integrity of California's new network of marine protected areas, which became effective in 2012, after completion of the 2010 SEIR. As the first agency to review the proposed Project and make a new discretionary decision in the shadow of these significant changes, the Commission must fully evaluate the implications and impacts of this new information in its CEQA document, even if other agencies like the Coastal Commission or Regional Water Quality Control Board also have jurisdiction over the Project. See *Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal. 5th 918 (2017).

Second and related, the DSEIR, as currently structured, improperly segments the impacts analysis, in an apparent attempt to avoid evaluating potentially significant changes and new information not previously considered. The Project at issue here is the proposed regional desalination facility, which would (1) extract seawater along with the living public trust marine resources contained in that seawater, (2) process the seawater into potable fresh water and deliver it through a water distribution system, and (3) discharge brine wastes to the ocean. The Commission's lease allows certain activities and the placement of certain equipment on public trust lands for the sole purpose of facilitating the development and operation of this single, integrated desalination facility. Because there is no other purpose or independent utility for the lease – or the lease modification now under consideration – the Commission must, as a matter of law, evaluate the proposed lease modification (as it did the original lease in 2010) as part of the whole Project, not a separate, different, or smaller project.

This is not a case where the Commission's action is a first modest step in a sequence of speculative actions leading to a potential future project. The desalination facility has correctly been defined as a single CEQA "project" for years, in a single EIR, and the activities that will take place on trust lands under the Commission's jurisdiction are an integral part of that Project. The Commission's new attempt to slice off the lease modification from the rest of the Project and consider only that slice, in order to avoid considering the broader impacts of significant Project changes and new information, is the kind of quintessential "piecemealing" or "segmentation" that the courts have long forbidden. See *Bozung v. Local Agency Formation Com.*, 13 Cal. 3d 263, 283-84 (1975) (explaining CEQA's mandate that "environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences"); *Laurel Heights Improvement Assn. v. Regents of Univ. of California*, 47 Cal. 3d 376, 396 (1989) (holding that EIR must cover all reasonably foreseeable impacts from completion of the project, even if the precise details of that completion have not yet been formally decided). If Commission staff believes that a portion of the Project – e.g., the water delivery system – is too speculative or indeterminate to evaluate at this time, the proper remedy is to wait for additional details from the Project proponent, not to illegally segment the impacts analysis and approve a piece of the Project.

The Commission's misinterpretation of its CEQA obligations in this matter will have profound implications. Under the Commission's approach, each subsequent agency would prepare its own separate partial CEQA update for the Project, meaning that the public will be faced with several different, and potentially incompatible, updated EIRs. This is precisely what the Legislature intended to avoid by requiring that a single lead agency undertake environmental review and that other agencies making subsequent decisions utilize the lead agency's analysis in their processes. This fundamental concept of a single CEQA document applies with equal force to subsequent environmental review performed by a substitute lead agency when a project or its circumstances have changed or when new information of substantial importance comes to light. Having several different agencies draft updated partial EIRs for a single, integrated project deprives the public of an ability to comprehensively understand project impacts and reasonable alternatives or mitigation. It is for this reason that segmenting subsequent CEQA review is not only unlawful, but poor public policy.

Indeed, as the DSEIR itself acknowledges, other agencies undertaking updated CEQA review for the changed Project – including at least the California Coastal Commission, the Regional Water Quality Control Board, and the Orange County Water District – will and by law must rely upon the Commission's DSEIR. Thus, the Commission's erroneous legal determinations about the limited scope of the updated environmental review will serve as the CEQA baseline for all other agencies. If concerned citizens do not challenge this incorrect baseline document now, they may be precluded from doing so when other agencies engage in ancillary CEQA proceedings. For this reason, unless the Commission prepares and recirculates a more robust and thorough subsequent EIR that considers the Project as a whole and the impacts of Project changes,

changed circumstances, and new information, concerned citizens like our clients will have no choice but to seek immediate judicial review of the Commission's CEQA compliance.

We appreciate your further attention to this important matter.

Sincerely yours,

A handwritten signature in blue ink that reads "Deborah A. Sivas". The signature is written in a cursive, flowing style.

Deborah A. Sivas

October 6, 2016

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Via U.S. and Electronic Mail

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**Application for Amendment to Lease No. PRC 1980.1
from Poseidon Resources (Surfside) LLC**

Dear Ms. Lucchesi:

We write on behalf of California Coastkeeper Alliance, Residents for Responsible Desalination, and California Coastal Protection Network in connection with the State Lands Commission (“SLC”) process for evaluating Poseidon Surfside’s application to amend tidelands Lease No. PRC 1980.1 in order to accommodate its proposed Huntington Beach Desalination Project (“Project”). Since 2010, when the City of Huntington Beach approved permits for the facility, Poseidon has significantly altered key facets of the Project. These changes necessitate additional environmental review under the California Environmental Quality Act (“CEQA”). SLC cannot lawfully proceed with consideration of the requested lease amendment until that additional review is completed. Because there are no further discretionary approvals of the Project by the City, we understand that SLC will be stepping into the role of “lead agency” for the requisite additional CEQA review and preparing an updated Environmental Impact Report (“EIR”) for public review and certification. In that role, we urge SLC to fully evaluate all potential impacts associated with proposed changes to the Project.

More specifically, and as discussed below, a substitute lead agency must evaluate all impacts from the Project as a whole in any supplemental or subsequent EIR. That is, the task of additional environmental review cannot be segmented between different agencies; the new lead agency, like the prior one, must prepare and circulate a single updated EIR that can then be relied upon by other responsible agencies taking subsequent discretionary actions. There is no legal authority that would allow SLC to slice off a piece of the Project for additional CEQA review while ignoring other substantial changes to the Project or deferring consideration of those changes to another agency. Accordingly, we urge SLC to follow this simple CEQA principle in moving forward on Poseidon’s requested lease amendment.

History of Project

In 2005, the City of Huntington Beach, acting as the designated CEQA “lead agency” for the Project, certified an EIR that evaluated the proposed desalination plant as a

“co-located” facility at the existing power plant. In 2010, the City certified a Subsequent Environmental Impact Report (“SEIR”) for a “stand-alone” project that would continue drawing cooling water through the power plant’s open ocean intake system after the power plant stopped using this system. Since then, Poseidon has proposed substantial changes to the Project that were not evaluated in the EIR or SEIR. In particular, Poseidon now proposes to:

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

None of these significant changes have been evaluated in any existing EIR or SEIR. Further, since certification of the 2010 SEIR, there are significant changes in the surrounding area that will contribute to cumulative impacts from the Project, including, but not limited to, cumulative air quality impacts already identified by SLC.

Although the City has no further discretionary approvals to grant for the Project, several other agencies do. In addition to the tidelands lease amendment from SLC, Poseidon also is seeking a coastal development permit from the Coastal Commission and a National Pollutant Discharge Elimination System (“NPDES”) permit and Waste Discharge Requirements from the Regional Water Quality Control Board, among other approvals. Each of these agencies will, and as a matter of law must, rely on the additional CEQA review that SLC completes to address the proposed changes to the Project.

Legal Responsibilities

Since more than one public agency may have discretionary approval authority for a project, CEQA includes rules for determining each agency’s obligations. The agency with “principal responsibility” for carrying out or approving a project serves as the CEQA “lead agency” for purposes of complying with the statutory requirements. Cal. Pub. Res. Code § 21067. CEQA requires the lead agency must conduct a thorough review of the project in question, even though additional review might later be undertaken by other agencies with jurisdiction over specific resources, and must provide a comprehensive analysis on which other agencies may rely. Save San Francisco Bay Assn. v. San Francisco Bay Conservation etc. Com., 10 Cal. App. 4th 908, 921 (1992).

By contrast, a CEQA “responsible agency” is “a public agency, other than the lead agency, which has responsibility for carrying out or approving a project,” *id.* § 21069, and a CEQA “trustee agency” is a state agency that has jurisdiction by law over natural resources affected by a project that are held in trust for the people of the State of California. *Id.* § 21070. A responsible agency generally consults with the lead agency about the CEQA process, provides comments on the draft EIR, and complies with CEQA by considering the final EIR certified by the lead agency and by reaching its own conclusion on whether and how to approve the project. 14 C.C.R. § 15096(a)-(b). Normally, the local land use authority functions as the lead agency, while specialized state agencies (e.g., State Lands Commission, Regional Water Quality Control Board, Caltrans, etc.) act as responsible or trustee agencies.

Once a lead agency is selected, that agency shoulders the burden of complying with CEQA in all respects. In particular, “the lead agency is responsible for considering the effects of all activities involved in a project and, if required by CEQA, preparing the draft and final EIR’s and certifying the final EIR for a project.” *Riverwatch v. Olivenhain Mun. Water Dist.*, 170 Cal. App. 4th 1186, 1201 (2009) (emphasis added). In contrast, “[r]esponsible agencies generally rely on the information in the CEQA document prepared by the lead agency [e.g., an EIR] and ordinarily are not allowed to prepare a separate EIR or negative declaration.” *Id.* In other words, “while the lead agency is responsible for considering all environmental impacts of the project before approving it, a responsible agency has a more specific charge: to consider only those aspects of a project that are subject to the responsible agency’s jurisdiction.” *Id.* 1201, 1206 (emphasis added).

Here, the City of Huntington Beach initially assumed lead agency status for the Project, preparing and certifying both the original EIR and the SEIR in connection with its issuance of a coastal development permit and a conditional use permit. For the reasons discussed above, substantial changes to the Project not evaluated in those prior documents necessitate additional CEQA review. It does not appear, however, that there are any additional discretionary approvals pending before the City. Under such circumstances, the CEQA Guidelines provide as follows:

Where a responsible agency is called on to grant an approval for a project subject to CEQA for which another public agency was the appropriate lead agency, the responsible agency shall assume the role of the lead agency when any of the following conditions occur:

...

- (2) The lead agency prepared environmental documents for the project, but the following conditions occur:
- (A) A subsequent EIR is required pursuant to Section 15162,
 - (B) The lead agency has granted a final approval for the project, and
 - (C) The statute of limitations for challenging the lead agency's action under CEQA has expired.

14 C.C.R. § 15052(a). The assumption of the lead agency role falls to the next agency to issue a discretionary approval, which in this case appears to be SLC.¹

Given the substantial changes in the proposed Project since the SEIR was certified, there simply is no question that a subsequent EIR must be prepared to inform the SLC's discretionary decision on any lease amendment. All EIRs, including subsequent EIRs, must evaluate the "whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." 14 C.C.R. § 15378. "From this principle, 'it is clear that the requirements of CEQA 'cannot be avoided by chopping up proposed projects into bite-sized pieces' which, when taken individually, may have no significant adverse effect on the environment." Ass'n for a Cleaner Env't v. Yosemite Cmty. Coll. Dist., 116 Cal. App. 4th 629, 638 (2004) (project to close shooting range included cleanup and dismantling); see also Christward Ministry v. Superior Court, 184 Cal. App. 3d 180, 195–96 (1986) (city impermissible chopped up single project into three separate projects, which was "exactly the type of piecemeal environmental review prohibited by CEQA"); Citizens Ass'n for Sensible Dev. of Bishop Area v. County of Inyo, 172 Cal. App. 3d 151, 165 (1985) (project improperly segmented into two projects for CEQA purposes).

To comply with CEQA, therefore, SLC must prepare a subsequent EIR for the whole project that covers impacts from all substantial changes to the Project, including changes to aspects of the Project that do not involve the tidelands lease, because all other responsible agencies must rely on the subsequent CEQA document for any additional discretionary approvals. In particular, as noted above, we understand that the substantial changes to the Project include a pipeline to carry desalinated water away from the site for injection into the groundwater aquifer. Because these new aspects – the pipeline and the groundwater injection – are necessary steps in Poseidon's objective to produce and sell desalinated water, they unquestionably are part of the same project for CEQA purposes. Tuolumne Cty. Citizens for Responsible Growth, Inc. v. City of Sonora, 155 Cal. App. 4th 1214, 1226 (2007) ("The relationship between the particular act and the remainder of the project is sufficiently close [to constitute a single project under CEQA] when the proposed physical act is among the "various steps which taken together obtain an objective."). As such, SLC must evaluate them in its updated EIR. Rural Landowners Assn. v. City Council, 143 Cal. App. 3d 1013, 1025 (1983) (where responsible agency stepped into the shoes to prepare a subsequent or supplemental EIR, all parts of project, including new parts, had to be evaluated).

¹ Although there has been some suggestion that the Orange County Water District should assume lead agency status, that course of action makes no sense. The Water District will presumably be the last agency to take a discretionary action – purchase of the water from the Project – after Poseidon obtains all necessary government approvals and permits. Thus, one of the state permitting agencies must complete and certify a subsequent EIR long before the Water District makes a final discretionary decision.

In carrying out its updated environmental review, therefore, SLC must evaluate any and all aspects of the revised Project that were not previously considered in the EIR or SEIR, including substantial new cumulative impacts in the vicinity of the Project. CEQA requires environmental review of indirect and cumulative impacts, as well as direct impacts. Indirect impacts are “secondary effects” that are the reasonably foreseeable result of a project even though they “are later in time or farther removed in distance.” 14 C.C.R. § 15358(a)(2); Bakersfield Citizens for Local Control v. City of Bakersfield, 124 Cal. App. 4th 1184, 1205 (2004). A cumulative impact “is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” 14 C.C.R. §15130. “One of the most important environmental lessons evident from past experience is that environmental damage often occurs incrementally from a variety of small sources.” Kings County Farm Bureau v. City of Hanford, 221 Cal. App. 3d 692 (1990). Thus, without “meaningful cumulative analysis” and control, “piecemeal development would inevitably cause havoc in virtually every aspect of the urban environment.” San Franciscans for Reasonable Growth v. City and County of San Francisco, 151 Cal. App. 3d 61 (1984).

In short, the law is clear that when SLC steps into the City of Huntington Beach’s shoes, it must play the full role of a lead agency and consider all reasonably foreseeable direct, indirect and cumulative impacts from the Project, including from those aspects of the Project that may fall under the approval jurisdiction of another responsible agency. This result makes sense from a policy perspective, as well. Just as CEQA requires a single initial lead agency for each project and a single EIR upon which all other responsible agencies may rely, the same rules apply to a subsequent or supplemental EIR. The agency that steps into the lead agency shoes must prepare a single document that evaluates impacts from the whole project. Deferring evaluation of some project impacts simply because another responsible agency has later approval authority would deprive the public and decisionmakers of the ability to comprehensively understand the project’s full environmental impacts, in violation of CEQA. A decision to proceed on the lease amendment application with only a partially updated EIR would render SLC’s actions vulnerable to a viable legal challenge.

CONCLUSION

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

Jennifer Lucchesi, Executive Officer
California State Lands Commission
October 6, 2016

Page 6

Thank you for your attention to this important matter. We and our clients look forward to reviewing a draft SEIR that covers all proposed changes in the Project and to fully participating in the CEQA public process.

Sincerely yours,

A handwritten signature in blue ink that reads "Deborah A. Sivas". The signature is written in a cursive style with a large initial "D" and "S".

Deborah A. Sivas