



EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

Santa Ana Regional Water Quality Control Board

September 12, 2017

Mr. Scott Maloni, Vice President
Poseidon Water
5780 Fleet Street, Suite 140
Carlsbad, CA 92008

smaloni@poseidonwater.com

RE: NEUTRAL THIRD PARTY REVIEW FOR PROPOSED HUNTINGTON BEACH DESALINATION PROJECT

Dear Mr. Maloni:

As you know, on August 28, 2017, the Santa Ana Regional Water Quality Control Board (Santa Ana Water Board or board) deemed complete Poseidon Water's (Poseidon's) application for a California Water Code section 13142.5(b) determination and Report of Waste Discharge (ROWD) for renewal/reissuance of the National Pollutant Discharge Elimination System Permit (NPDES) for the proposed Huntington Beach Desalination Project (Project). This represents an important milestone for the Project and was the result of significant effort by and collaboration between Poseidon and Santa Ana Water Board and State Water Resources Control Board (State Water Board) staffs (collectively, Water Boards staff). As Water Boards staff shifts its focus from the completeness determination to the adequacy of the section 13142.5(b) determination application and ROWD, I am sending this letter to address outstanding issues related to the neutral third party review of analysis and studies submitted as part of Poseidon's section 13142.5(b) determination application.

A critical component of Water Boards staff's consideration of the Water Code section 13142.5(b) determination application is the completion of a neutral third party review of certain models and studies submitted by Poseidon as part of its application. In May 2017, Water Boards staff initiated discussions with Poseidon regarding this neutral third party review and agreed to use a separate process to the Water Boards' internal peer review process (more detail below) in order to expedite the process.¹ For the past

¹ Chapter III.M.2.a.(1) of the State Water Board's Water Quality Control Plan for Ocean Waters (Ocean Plan) provides that, in reviewing application materials for a desalination facility, a regional water quality control board (regional water board) may "require an owner or operator to hire a neutral third party entity to review studies and models and to make recommendations to the regional water board."

several months, Poseidon and Water Boards staff have diligently worked with CONCUR, Inc.² to initiate this neutral third party review in a timely manner. While much progress has been made in terms of how the process will function, Poseidon and the Santa Ana Water Board staff have reached an impasse regarding selection of the neutral third party reviewers and the final questions for the reviewers.

The main source of the impasse regarding the selection of the neutral third party reviewers is Poseidon's continued objection to Dr. Peter Raimondi as a potential neutral third party reviewer, as set forth most recently in Poseidon's September 8, 2017 letter to Michael Lauffer, Chief Counsel of the State Water Board.³ While Poseidon does not dispute that Dr. Raimondi possesses the education and unique set of skills and experience to effectively review the relevant studies and models, Poseidon contends that Dr. Raimondi cannot be considered a neutral or unbiased reviewer because the State Water Board previously relied on his expertise in developing some aspects of the *Amendment to the Water Quality Control Plan for Ocean Waters of California Addressing Desalination Facility Intakes, Brine Discharges, and Incorporating Other Nonsubstantive Changes* (Desalination Amendment) and because Dr. Raimondi has been hired by the State Lands Commission and the California Coastal Commission to review certain aspects of the Project as part of Poseidon's separate applications before these agencies.

In consultation with the State Water Board's Office of Chief Counsel, I have evaluated the bases of Poseidon's objections to Dr. Raimondi and find that they are without merit. State agencies, such as the Santa Ana Water Board, California Coastal Commission, and State Lands Commission, are by definition neutral entities. Engagement by these agencies to answer specific scientific questions related to the Project does not, in and of itself, create bias or a conflict of interest. Poseidon has not identified any specific materials that indicate Dr. Raimondi is biased and/or has a conflict of interest that would render him incapable of providing a neutral third party review. The fact that Dr. Raimondi has already reviewed aspects of the proposed project for other agencies does not mean that he will be reviewing his own work; rather, it means that he has familiarity with the project. Moreover, and perhaps more importantly, agreeing to disqualify Dr. Raimondi as biased or otherwise non-neutral solely due to his prior work for state agencies would set a questionable precedent for determining neutrality for third party reviewers in the future.

In order to move forward, Poseidon suggested that additional reviewers from their list of suggested neutral third party reviewers complete the review in conjunction with Dr. Raimondi and then collaboratively develop a joint report. Water Boards staff agreed to this solution and, during the ensuing weeks, all parties, including CONCUR, worked independently and as a group to identify a set of qualified neutral third party reviewers who collectively possess the necessary skills and expertise to meet the Santa Ana

² Poseidon selected CONCUR (<https://www.concurinc.com/>) to facilitate the neutral third party review process.

³ No inquiries have been made regarding Dr. Raimondi's, or any other potential third party reviewer's, availability to serve as a neutral third party reviewer. Thus, it is unknown at this time whether Dr. Raimondi would be available as a reviewer.

Water Board's needs with respect to the neutral third party review. The final list of reviewers included reviewers identified by both Poseidon and the Water Boards staff. Unfortunately, following what I believed was a path forward to initiate the neutral third party review, Poseidon continues to object to Dr. Raimondi's inclusion as part of the group of neutral third party reviewers.

In addition to the selection of the neutral third party reviewers, Poseidon and the Santa Ana Water Board are also at an impasse regarding the questions and content for the neutral third party reviewers. Water Boards staff has shared with Poseidon the neutral third party reviewer questions and content and has carefully considered Poseidon's feedback. At this point the Santa Ana Water Board considers the documents containing the questions and content for the reviewers to be final and is ready to proceed with the neutral third party review, and, as such, we will not be accepting any additional comments on or suggested edits to the questions or content.

At this point, given the delays associated with the current neutral third party review process, including the impasse regarding the selection of the neutral third party reviewers and final documents, I am concerned that the CONCUR process will not result in the timely completion of the neutral third party review. As mentioned above, this neutral third party review is critical to Water Boards staff's evaluation of Poseidon's application for a Water Code section 13142.5(b) determination and NPDES permit. Therefore, in order to ensure that Water Boards staff has the benefit of this neutral third party review when providing recommendations to the Santa Ana Water Board regarding Poseidon's application, I have decided to seek this neutral third party review using the State Water Board's existing peer review process. Information regarding the State Water Board's peer review process can be found at the following website:
http://www.waterboards.ca.gov/water_issues/programs/peer_review/.

The existing State Water Board's peer review process is neutral and involves a conflict of interest disclosure and review. It is important to note that the peer review program is administered by State Water Board staff who are different and independent from those who have been working collaboratively with the Santa Ana Water Board staff to review Poseidon's application.⁴ While, as part of the State Water Board's peer review process, the Water Boards staff identifies the skills and subjects of expertise needed to complete the review, the University of California ultimately selects the peer reviewers. The Santa Ana Water Board staff has utilized the State Water Board's peer review process in the past for various matters, and I am confident that this process will produce excellent results.

⁴ The Water Board's peer review program is administered by the State Water Board's Office of Research, Planning and Performance, while the State Water Board's Division of Water Quality staff in the Statewide Policies and Planning Unit has been assisting the Santa Ana Water Board staff in reviewing Poseidon's application.

I look forward to continuing to work collaboratively and productively with Poseidon moving forward, and should you have any questions, please do not hesitate to contact me at 951-782-4493 or Lauma Willis at 951-782-4920.

Sincerely,



Hope A. Smythe
Executive Officer
Santa Ana Regional Water Quality Control Board

cc: via e-mail

Jonathan Bishop, State Water Resources Control Board
Jonathan.Bishop@waterboards.ca.gov

Karen Larsen, State Water Resources Control Board
Karen.Larsen@waterboards.ca.gov

David Rice, State Water Resources Control Board
David.Rice@waterboards.ca.gov

Marleigh Wood, State Water Resources Control Board
Marleigh.Wood@waterboards.ca.gov

Phil Wyels, State Water Resources Control Board
Philip.Wyels@waterboards.ca.gov

Shahla Farahnak, State Water Resources Control Board
Shahla.Farahnak@waterboards.ca.gov

Lauma Willis, Santa Ana Regional Water Quality Control Board
Lauma.Willis@waterboards.ca.gov

Milasol Gaslan, Santa Ana Regional Water Quality Control Board
Milasol.Gaslan@waterboards.ca.gov

Kathleen Fong, Santa Ana Regional Water Quality Control Board
Kathleen.Fong@waterboards.ca.gov

Julio Lara, Santa Ana Regional Water Quality Control Board
Julio.Lara@waterboards.ca.gov

Claire Waggoner, State Water Resources Control Board
Claire.Waggoner@waterboards.ca.gov

Daniel Ellis, State Water Resources Control Board
Daniel.Ellis@waterboards.ca.gov

Kimberly Tenggardjaja, State Water Resources Control Board
Kimberly.Tenggardjaja@waterboards.ca.gov

Stan Williams, Poseidon Water, swilliams@poseidonwater.com

Scott McCreary, CONCUR, Inc., scott@concurinc.net

Christopher W. Garrett, LATHAM & WATKINS LLP, Christopher.Garrett@lw.com