

SUBSTANTIVE FILE DOCUMENTS:

- Certified City of Huntington Beach Local Coastal Program.
- City of Huntington Beach Coastal Development Permit (CDP) File No. 10-014.
- Coastal Commission Appeal File No. A-5-HNB-06-101.
- Appeal Applications from Orange County Coastkeeper, Surfrider Foundation, and Residents For Responsible Desalination (collectively the Environmental Group Appellants), and Commissioners Wan and Mirkarimi.

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I. APPELLANT CONTENTIONS

Appellants contend that the project does not conform to several provisions of the City’s LCP related to protection of marine life and water quality, protection of wetlands and environmentally sensitive habitat areas, land use, adequate public services, energy use and development, public recreation, water conservation, protection against seismic events and liquefaction, growth-inducement, and the requirement for mitigation to the maximum extent feasible.

II. LOCAL GOVERNMENT ACTION

The coastal development permit was approved by the City of Huntington Beach City Council on September 20, 2010, concurrent with approval of Tentative Parcel Map #10-013. Previously, on September 7, 2010, the City certified a Final Supplemental Environmental Impact Report for the project. Concurrent with the City's approval of this CDP, it rescinded a CDP it had previously issued to the applicant for a similar project in February 2006.

III. APPEAL PROCEDURES

After certification of a LCP, the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits. Projects within cities and counties may be appealed if they are located within the appealable areas as defined by Section 30603(a) of the Coastal Act. The grounds for appeal are limited to the assertion that "development does not conform to the certified local coastal program." Where the project is located between the first public road and the sea or within 300 feet of the mean high tide line, the grounds of appeal are limited to those contained in Section 30603(b) of the Coastal Act. Those grounds are that the development does not conform to the standards set forth in the certified local coastal program or the access policies set forth in the Coastal Act.

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless it determines that no substantial issue is raised by the appeal. If the staff recommends "substantial issue" and no Commissioner objects, the Commission will proceed to a *de novo* hearing on the merits of the project at the same meeting if the staff has prepared a recommendation on said merits, or at a subsequent meeting if there is no such recommendation.

If the staff recommends "no substantial issue" or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have three minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project at either the same or a subsequent meeting as described above. If the Commission conducts a *de novo* hearing on the permit application, the applicable test for the Commission to consider is whether the proposed development is in conformity with the certified LCP. In addition, for projects located between the sea and the first public road paralleling the sea, Section 30604(c) of the Coastal Act requires a finding that the development conforms to the public access and public recreation policies of Chapter 3.

The only persons qualified to testify before the Commission at the "substantial issue" stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. At the time of the *de novo* portion of the hearing, any person may testify.

IV. MOTION & RESOLUTION

*I move that the Commission determine that Appeal No. A-5-HNB-10-225 raises **NO** substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.*

Staff Recommendation of No Substantial Issue:

Staff recommends a **NO** vote. Failure of this motion will result in a *de novo* hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the appointed Commissioners present.

Resolution to Find Substantial Issue:

The Commission finds that Appeal No. A-5-HNB-10-225 presents a substantial issue with respect to the grounds on which the appeal has been filed under section 30603 of the Coastal Act regarding consistency with the certified local coastal plan and/or the public access and recreation policies of the Coastal Act.

V. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

1. PROJECT DESCRIPTION

The development approved by the City is a desalination facility to be constructed and operated by Poseidon Resources within the AES Power Plant site in Huntington Beach. The project also includes a water delivery pipeline that will be constructed along a route yet to be determined, but that is estimated to range from about eight to 10 miles long. The pipeline would connect the facility to the regional water distribution system. The purpose of the project is to produce from seawater approximately 50 million gallons per day (MGD) of potable water for use within various parts of Orange County.

The approved development includes several buildings and structures that will house pre-treatment facilities, desalination equipment, a product water storage tank, administration offices, and other supporting structures and equipment. These structures would be located in portions of the northern part of the power plant site. Part of the proposed facility footprint includes fuel oil storage tanks formerly used by the power plant. Those tanks would be removed as part of the project. The project also includes pipelines connecting the power plant cooling system with the pre-treatment part of the facility.

To produce potable water, Poseidon would withdraw approximately 100 MGD of seawater from the once-through cooling system currently used by the power plant.¹ The cooling system's 14-foot diameter intake structure extends under the beach and seafloor to approximately 1700 feet offshore where it emerges into the water column, and a similar discharge structure extends under the beach and seafloor to about 1500 feet offshore where it emerges into the water column. With the 100 MGD pulled in by the desalination facility, it would produce 50 MGD of potable water and about 50 MGD of a high-salinity effluent. That effluent, along with up to 6.5 MGD of backwash water and cleaning fluids, would be routed to the outfall and mixed with the power plant cooling water discharge to create a combined discharge with salinities ranging up to more than 20% over ambient seawater salinity.

2. PERMIT JURISDICTION

Most of the land-based portions of the project are located within the Coastal Zone in the City of Huntington Beach and subject to the City's certified Local Coastal Plan (LCP). The project is also within the appeal jurisdiction of the Coastal Commission.² Additionally, a portion of the project is within the Commission's retained jurisdiction – the facility's intake and outfall are within coastal waters and the project involves both a “change in intensity of use” of those waters and a discharge to those waters – so the project will require a permit directly from the Commission.

3. PERMIT HISTORY

In February 2006, the City issued CDP #02-05 to Poseidon for construction and operation of a desalination facility similar to the current project, but at a different location within the power plant site. That CDP was appealed to the Commission, and on April 12, 2006, the Commission found that the appeal raised Substantial Issue with consistency to the City's Local Coastal Program.³ In May 2006, Poseidon submitted a CDP application to Commission staff for those portions of the project within the Commission's retained jurisdiction; however, that application remains incomplete.

In early 2010, the City started review of a Supplemental Environmental Impact Report to address modifications to the original proposed project. In September 2010, the City certified the Supplemental EIR, rescinded its previously-issued CDP, and issued a new CDP. On October 4 and 5, 2010, Commission staff received timely appeals from the Environmental Group Appellants and from Commissioners Wan and Mirkarimi.

¹ Poseidon's current NPDES permit, which expires in August 2011, allows it to operate at its design capacity only when the power plant cooling system is using at least 126.7 MGD. Power plant operations have varied from very low intake flows when it is not generating electricity to up to 507 MGD. The power plant cooling system is scheduled to be shut down on or before 2020 and replaced with a system that does not use seawater.

² Pursuant to Coastal Act Section 30603, the Commission's appeal jurisdiction includes developments approved by a local government that are located within 100 feet of any wetland, estuary, or stream, within 300 feet of the inland extent of the mean high tideline of the sea where there is no beach, or on tidelands or public trust lands.

³ In its April 2006 decision, the Commission found that substantial issue existed with respect to several of the LCP policies contested in this current appeal, including LCP policies related to protection of marine life and water quality (LCP Policies C6.1.1, C6.1.2, C.6.1.3, C6.1.4, and C6.1.19), protection of environmentally sensitive habitat areas (LCP Policy C7.1.3), energy use and development (LCP Policy C8), and adequate public services (C1.2.3).

4. APPELLANTS' CONTENTIONS & STANDARD OF REVIEW

All appellants contend that approval of the project by the City is inconsistent with policies of the City's certified LCP related to marine resources and water quality, wetlands and environmentally sensitive habitat areas, land use, public services, energy use and development, and the LCP requirement that adverse impacts be mitigated to the maximum extent feasible. Environmental Group Appellants additionally contend the City's approval is inconsistent with LCP policies governing public recreation, growth-inducement, and water conservation. Appellants Wan and Mirkarimi additionally contend the City's approval is inconsistent with LCP policies related to protection against seismic and liquefaction events. The standard of review for this appeal is consistency with the certified LCP of the City of Huntington Beach.

5. APPEAL ISSUES RAISING SUBSTANTIAL ISSUE

5A) Appeal Issue: Marine Biology and Water Quality

LCP Policy C 6.1.1 states:

“Require that new development include mitigation measures to enhance water quality, if feasible and at a minimum, prevent the degradation of water quality of groundwater basins, wetlands, and surface water.”

LCP Policy C 6.1.2 states:

“Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance.”

LCP Policy C 6.1.3 states:

“Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.”

LCP Policy C 6.1.4 states:

“The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain organisms and for the protection of human health shall be maintained and, where feasible, restored.”

LCP Policy C 6.1.19 states:

“Prior to approval of any new or expanded seawater pumping facilities, require the provision of maximum feasible mitigation measures to minimize damage to marine organisms due to entrainment in accordance with State and Federal law.”

These LCP provisions apply to the approved project due to its use of seawater and its new pumping facilities.⁴ The provisions generally require that marine resources and water quality be maintained, enhanced, and where feasible,⁵ restored, and that maximum feasible mitigation measures be required to minimize entrainment. The City's findings state, for a number of reasons, that the project is consistent with the above policies. Appellants contend, for reasons described below, that the project is inconsistent with those policies. The Commission's Findings regarding overall consistency with the above policies are provided below, along with Findings on specific policies and appeal contentions.

For all the above policies, it appears that the City used several criteria or standards of review that were not adequate for defining the significance or severity of the project's impacts for purposes of LCP conformity. In several instances, it also analyzed project impacts in ways that were not sufficient to evaluate the project's conformity to these policies. Examples are provided below.

- **Use of Incorrect Review Standards:** In several instances, the City's nonconformity with the above LCP policies appears to be due to the City's reliance on standards and determinations of significance selected for use in the EIR rather than those required by the LCP. The focus of the EIR was to determine whether the project causes significant impacts; whereas many provisions of the LCP require that any impacts be identified and then mitigated, where feasible. Some of the criteria the EIR used to define a "significant impact" resulted in determinations of significance that fell far short of identifying the kinds of impacts for which the LCP requires avoidance, additional analysis, mitigation, or other measures.

The City acknowledges in the EIR that the project's conformity for purposes of the Coastal Act requires use of a more rigorous standard. The EIR's Response to Comments states that the EIR review was meant to determine whether the project would conflict with applicable plans and policies, and then states:

"[d]etermining whether a conflict may arise that would preclude implementation of a plan or policy is entirely different from the more extensive process that may be involved in making a determination of "conformance" or "consistency" with a particular law, policy or other regulatory program. While it is understood that the Coastal Commission may apply a more rigorous standard in determining conformance of the project with the Coastal Act, such a standard is not required under CEQA."

Even with this acknowledgement, the City used the EIR's less-than-adequate standards to determine LCP conformity. For example, the City's findings for LCP Policy 6.1.2 rely on the EIR's conclusions that the project would cause less than significant entrainment impacts; however, the EIR defined a significant entrainment impact, in part, as whether the project would affect a species' ability to sustain its population, which is a less protective standard than the LCP Policy's requirement that marine resources be "maintained, enhanced, and where feasible, restored". Similarly, regarding the effects of the project's chemical and saline discharges on marine life and coastal waters, LCP Policy C6.1.1 requires that the

⁴ The City's General Plan Coastal Element includes waters of the Pacific Ocean in its definition of "surface waters."

⁵ "Feasible" is defined in the LCP (and the Coastal Act) as "Capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors."

project “prevent the degradation” of water quality, whereas the EIR standards referenced in the CDP determined whether there were project impacts based on less stringent criteria, such as whether marine organisms experienced “substantial ecological losses of source populations”. The City’s findings on LCP Policy 6.1.3 state that the project’s high salinity effluent will not affect areas that support sensitive species; however, the standard of review for that LCP policy is that the project will maintain healthy populations of all marine species.

In its findings for LCP Policy 6.1.4, the CDP merely states that the project is consistent with this policy because it would not degrade water quality or adversely affect marine life as described in the CDP’s findings on LCP Policies 6.1.1 and 6.1.3. As noted elsewhere in these Findings, however, the CDP’s conclusions about those policies are not adequate for ensuring LCP conformity. Further, the City’s findings do not address the “feasible restoration” aspect of LCP Policy 6.1.4’s standard of review. Regarding LCP Policy C6.1.19,⁶ the CDP states that neither the project’s entrainment nor its high-salinity effluent will negatively influence affected species’ ability to sustain their populations, which is the incorrect standard of review for a policy requiring that damage to marine organisms be minimized. Overall, the standards of review and levels of significance the City used in the EIR cannot be relied upon to determine conformity of the project to these LCP policies.

- **Use of Incomplete/Inaccurate Analyses:** In several instances, the City’s CDP findings relied on EIR analyses that were not adequate to determine the project’s conformity to these LCP policies. For several of the policies, the City’s findings state that the project does not require mitigation measures because the EIR identified the project’s impacts as less than significant. However, because the cited EIR analyses were based on different, and generally less protective, standards of review than required under the LCP, they are not adequate for determining LCP conformity.

These include insufficient analyses of necessary and feasible mitigation measures required pursuant to LCP Policies C6.1.2, 6.1.4, and 6.1.19. For example, the CDP implies that the project intake does not require mitigation measures under LCP Policy 6.1.2 because it is not located within an Area of Special Biological Significance; however, the CDP does not acknowledge, as it should, that the facility’s entrainment affects organisms from not just the immediate area, but from coastal waters up to several dozen miles away with areas of sensitive marine habitats. Similarly, for LCP Policy C6.1.19, which requires maximum feasible mitigation measures in accordance with state and federal law, the City’s findings state that the project is not anticipated to conflict with applicable provisions of state Water Code Section 13142.5 regarding impingement, but the findings do not address that section’s full requirements regarding the project’s entrainment impacts.⁷ For LCP Policy C6.1.4, the City refers to its findings for LCP Policies C6.1.1 and 6.1.3, which, as described elsewhere in these Commission Findings, are not adequate to ensure conformity to those policies.

⁶ The project is subject to LCP Policy C6.1.19 because it includes new pumps to bring seawater into the desalination facility and may include new pumps to replace existing pumps within the power plant.

⁷ Water Code Section 13142.5(b) states: “For each new or expanded coastal powerplant or other industrial installation using seawater for cooling, heating, or industrial processing, the best available site, design, technology, and mitigation measures feasible shall be used to minimize the intake and mortality of all forms of marine life.”

Additionally, several of the City's analyses resulted in what are described as mitigation measures but are more appropriately defined as minor and incidental benefits that are caused by, and are incidental to, the project's adverse impacts. Regarding LCP Policy 6.1.1, for example, the CDP states that the EIR includes a number of mitigation measures meant to improve water quality and prevent water quality degradation; however, the measures cited are those resulting from substantial adverse project-related impacts. For instance, the CDP notes that the project will be "removing bacteria from source water", which is solely an incidental effect of the significant adverse entrainment impacts the project will cause by removing seawater containing fish eggs, larvae, plankton, and other important coastal resources. The CDP also notes that the project will be "reducing thermal footprint of the discharge from the power plant during the co-located operating condition"; however, this is similarly an incidental effect of the project's introduction of 50 MGD of highly saline effluent into the power plant outfall.

For both of the above examples, the measures the City claimed were sufficient for LCP adequacy were not supported by adequate analyses and the resulting findings were used either to require inadequate mitigation or to support the inclusion of incidental effects as adequate mitigation. As a result, neither the City's CDP nor the project EIR on which the City relied for its CDP findings identified or properly evaluated many of the project's expected adverse impacts or the potentially feasible mitigation measures that could be required of the project to avoid or minimize these impacts. The City's approved CDP therefore does not conform to the above LCP policies.

In sum, the project will clearly cause adverse impacts to marine resources, water quality, and other coastal resources in excess of those that would allow consistency with the above LCP policies. The City's approval did not adequately identify the full range of impacts, in part due to using incorrect standards of review, inaccurate determinations of significance, and incomplete analyses of feasibility and needed mitigation measures. As a result, the City did not adequately evaluate the project's impacts to coastal resources and did not identify necessary mitigation measures that would avoid or minimize those impacts. The City's approval is therefore not sufficient to determine whether the project conforms to the above LCP provisions. Based on the record provided by the City and the information provided by the appellants, the Commission finds that substantial issue exists with respect to the project's consistency with the City's certified LCP.⁸

⁸ Note: In its 2006 Substantial Issue Findings for the previous version of this project, the Commission found that substantial issue existed with respect to the project's consistency with LCP Policies C6.1.1, C6.1.2, C6.1.3, C6.1.4, and 6.1.19.

5B) Appeal Issue: Protection of Wetlands & Environmentally Sensitive Habitat Areas

LCP Policy C 6.1.4 states:

“The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain organisms and for the protection of human health shall be maintained and, where feasible, restored.”

LCP Policy C6.1.20 states:

“Limit diking dredging, and filling of coastal waters, wetlands, and estuaries to the specific activities outlined in Policy 30233 and 30607.1 of the Coastal Act and to those activities required for the restoration, maintenance, and/or repair of the Municipal Pier and marina docks. Conduct any diking dredging and filling activities in a manner consistent with Section 30233 and 30607.1 of the Coastal Act.”

LCP Policy C7.1.3 states:

“Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.”

LCP Policy C7.1.4 states:

“Require that new development contiguous to wetlands or environmentally sensitive habitat areas include buffer zones. Buffer zones shall be a minimum of one hundred feet setback from the landward edge of the wetland, with the exception of the following:

A lesser buffer may be permitted if existing development or site configuration precludes a 100 feet buffer, or conversely, a greater buffer zone may be required if substantial development or significantly increased human impacts are anticipated. In either case, the following factors shall be considered when determining whether a lesser or wider buffer zone is warranted. Reduced buffer zone areas shall be reviewed by the Department of Fish and Game prior to implementation.

- a) Biological significance of adjacent lands: The buffer should be sufficiently wide to protect the functional relationship between the wetland and adjacent upland.*
- b) Sensitivity of species to disturbance: The buffer should be sufficiently wide to ensure that the most sensitive species will not be disturbed significantly by permitted development, based on habitat requirements of both resident and migratory species and the short and long term adaptability of various species to human disturbance.*
- c) Susceptibility of parcel to erosion: The buffer should be sufficiently wide to allow for interception of any additional material eroded as a result of the proposed development based on soil and vegetative characteristics, slope and runoff characteristics, and impervious surface coverage.*

- d) *Use existing cultural features to locate buffer zones: The buffer zones should be contiguous with the environmentally sensitive habitat areas and make use of existing features such as roads, dikes, irrigation canals, and flood control channels where feasible.*”

LCP Policy C.7.1.5 states, in relevant part:

“Notify County, State and Federal agencies having regulatory authority in wetlands and other environmentally sensitive habitats when development projects in and adjacent to such areas are submitted to the City.”

The above-referenced LCP policies require protection of wetlands and environmentally sensitive habitat areas and limit the kinds of development that may be approved in or near those areas. The City’s findings do not evaluate the project’s conformity to wetland protection components of LCP Policies C6.1.4 and C6.1.20. For LCP Policies C7.1.3 and C7.1.4, the City states that the project has been located to avoid significant impacts to the nearby Magnolia Marsh through setbacks and buffers, berms, grading, redirection of stormwater, and other measures. For LCP Policy C7.1.5, the City states that the project does not conflict with this policy because it involves no development in wetlands.

Appellants contend that the City’s approval is inconsistent with the above policies for three main reasons – first, that the City did not properly delineate wetlands present within the project footprint and therefore did not adequately avoid and mitigate for wetland impacts; second, that the City’s noise studies were inadequate to identify possible impacts to wetland-dependent wildlife species; and third, that the lack of an identified pipeline route makes it impossible to know whether the potential river crossing or the locations of pipelines and pump stations might adversely affect wetlands in a manner inconsistent with the above LCP policies.

Regarding the first appeal issue – the potential presence of wetlands within the project footprint – the project EIR evaluated site wetlands in a manner inconsistent with the Commission's wetland delineation methods.⁹ As a result of the City’s reliance on the EIR, the CDP findings do not properly identify the project’s potential impacts to wetlands and do not adequately address the project’s conformity to these LCP policies. Further, and contrary to Commission staff guidance, observations during a Commission staff site visit, and previous Commission determinations regarding similar wetland issues nearby, the EIR does not adequately examine site hydrology and improperly asserts that wetland vegetation at the site is not acting as wetland

⁹ The City’s definition of wetlands is similar to that of the Coastal Commission. The City’s General Plan Coastal Element defines wetlands as: “Land which may be covered periodically or permanently with shallow water and includes saltwater marshes, freshwater marshes, open or closed brackish water marshes, mudflats, and fens. Wetlands are lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification, wetlands must have one or more of the following attributes:

1. At least periodically, the land supports predominantly hydrophytes; or
2. The substrate is predominantly undrained hydric soil; or
3. The substrate is non-soil and is saturated with water or covered by shallow water at some time during the growing season of each year.

vegetation.¹⁰ Because the EIR erroneously concludes that there are no wetland areas that would be affected by the project, the CDP apparently omits the necessary findings regarding those areas and the findings needed to determine the project's conformity to the above policies. At the very least, additional evaluation is necessary to make a conclusive wetland determination at the site and to properly assess the project's conformity to the LCP wetland protection policies.

Regarding the second appeal issue about the impacts of project-related noise on nearby wetlands, the City heard testimony at its September 7, 2010 CEQA hearing that the project's noise studies misidentified the baseline noise levels in the project area and underestimated the effects on nearby residences of project-related noise from several types of pumps, construction equipment, and other machinery. At that hearing, Poseidon offered to conduct further studies after the facility started operating and to mitigate for any noise impacts that were at decibel levels above those allowed for residences. This proposed modification, however, does not address likely or potential noise effects on sensitive species in nearby wetland areas that are in some cases closer to the project site than the nearest residences. Some of the EIR's apparently underestimated noise levels at the nearby residences are at or above City noise standards, which suggests that nearby wetland species could experience noise at even higher levels. The EIR identified species known to exist in the wetlands include the endangered Belding's Savannah Sparrow and California least tern, several raptors (Cooper's hawk, Sharp-shinned hawk, Northern harrier, etc.), and other birds. However, the EIR did not identify noise standards for wetlands or environmentally sensitive habitat areas and did not identify those nearby areas as sensitive noise receptors. As a result, the EIR did not evaluate potential noise impacts on species in nearby wetland or environmentally sensitive habitat areas. Because these expected noise levels are likely to disturb or adversely affect various species – e.g., breeding and nesting birds – or may require additional buffering or mitigation measures, the City's findings do not ensure conformity to the above LCP policies.

Regarding the third appeal issue about the potential for additional wetland impacts due to subsequent selection of pipeline routes and pump station locations, neither the CDP nor EIR adequately address this issue for purposes of LCP conformity. Because the CDP relies on the inadequate EIR approach to wetland delineation, it is not apparent whether there are additional wetlands that may be affected in or near the possible pipeline routes, and therefore no certainty as to potential impacts or necessary mitigation measures.

Therefore, based on the record provided by the City and the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project's consistency with the above policies of the City's certified LCP.¹¹

¹⁰ The EIR's conclusions contradict site characteristics identified by the Commission's ecologist, Dr. Jonna Engel, on a site visit in the spring of 2009 during which she identified evidence of wetland vegetation and hydrology.

¹¹ Note: In its 2006 Substantial Issue Findings for the previous version of this project, the Commission found that substantial issue existed with respect to the project's consistency with LCP Policy C7.1.3.

5C) Appeal Issue: Land Use

LCP Policy C1.2.1 states:

“Accommodate existing uses and new development in accordance with the Coastal Element Land Use Plan and the Development and Density Schedule Table C-1.”

The City’s findings state that “[t]he project is consistent with this policy because it is consistent with the Coastal Element Land Use Plan and Density Schedule.” The Land Use Plan designates the project site as “Public”, and the City states that the project falls within this designation because the project is similar to a utility, which is allowed under this designation.¹² Appellants contend that the City’s CDP findings regarding this policy are insufficient to determine conformity to the LCP, since the findings merely assert that the project is consistent with the policy. Appellants also contend that the City’s approval does not conform to this LCP policy because the project is not an allowable type of development under the Land Use Plan’s site designation. Appellants further contend that allowing an industrial and non-public, non-utility use such as this project at this site would require an amendment to the City’s LCP.

Note: See related appeal issues on land use designation below in Section 5D – Energy Use and Development.

The City’s application of this policy is inconsistent with the LCP in at least two ways:

- First, the City partially supports its conclusion that the project is similar to a utility by referencing the City’s zoning code that allows “water or wastewater treatment plants...and similar facilities of public agencies or public utilities.”¹³ However, this zoning code appears to allow only water treatment plants of public agencies or public utilities, which does not include the proposed project. The project is not public, as it is owned by a private entity. The City acknowledges that the project is not subject to oversight or regulation by the state Public Utilities Commission (PUC), so it is not a utility for purposes of state law, and neither the CDP nor the EIR cite the PUC as a permitting or regulating agency.¹⁴
- Second, in some instances, the City’s review identifies the project as something other than a utility, including an “industrial use”, which is not allowed under the Land Use Plan’s site designation.¹⁵ The City notes that the project will be subject to a “commercial/industrial” capital fee tax and the EIR incorporates the project’s NPDES permit, which describes the project as an “industrial” facility conducting “industrial” activities and allowing the use of affected ocean waters for “industrial service supply” (that permit also specifically exempts

¹² Pursuant to the City’s Zoning Code at Chapter 214, uses allowed under the Public and Semipublic classification are: Cemetery, Cultural Institutions, General Day Care, Government Offices, Hospitals, Maintenance & Service Facilities, Park & Recreation Facilities, Public Safety Facilities, Religious Assembly, General Residential Care, Public or Private Schools, Major Utilities, and Minor Utilities.

¹³ Referenced in the City’s findings for LCP Policy C10.1.4.

¹⁴ At the time of the City’s adoption of the relevant policy, the power plant site was owned by Southern California Edison, which was regulated as a utility by the state Public Utilities Commission.

¹⁵ The City’s Zoning Code at Section 214.06 prohibits uses that are not listed within the designation.

those waters from municipal and domestic supply). The U.S. EPA additionally categorizes the facility for NPDES purposes as an industry.¹⁶ The City also notes that the project is subject to state Water Code Section 13142.5, which applies to industrial facilities. Further, Poseidon categorizes itself as something other than a “utility” – for example, in its City business license as a “government administrator of general economic programs” (through SIC Code 9611), and as a “manufacturing/industrial” entity rather than a “utility” in its declarations to the California Secretary of State.¹⁷ Finally, the City and Poseidon have apparently disagreed as to whether the project is subject to certain City taxes or is exempt because Poseidon is a “water corporation,” not a utility.

It is therefore not clear from the City’s record whether the project is a utility, a non-allowed industrial use, or some other use. At the very least, additional evaluation is necessary to address these inconsistencies and to conclusively determine whether the project conforms to this LCP policy or whether the proposal may require an amendment to the land use designation. Therefore, based on the record provided by the City and the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project’s consistency with LCP Policy C1.2.1 (see also the discussion of the site designation for energy facility expansion in Appeal Issue 5D – Energy Use and Development).¹⁸

5D) Appeal Issue: Energy Use and Development

LCP Policy C8 state:

“Accommodate energy facilities with the intent to promote beneficial effects while mitigating any potential adverse effects.”

LCP Policy C8.2.2 states:

“Require the mitigation of adverse impacts from new technologies employed in electricity generation to the maximum extent feasible.”

LCP Policy C8.2.4 states:

“Accommodate coastal dependent energy facilities with the Coastal Zone consistent with Sections 30260 through 30264 of the Coastal Act.”

LCP Policy C8.3.1 states:

“Promote the use of solar energy and encourage energy conservation.”

¹⁶ The EPA Facilities Registry System identifies the project as “SIC Code 4941: Industrial Group – Water Supply (link accessed 10/29/10) http://iaspub.epa.gov/enviro/fii_query_dtl_disp_program_facility?p_registry_id=110027244480

¹⁷ See Poseidon’s filings pursuant to Government Code 86104 at <http://cal-access.sos.ca.gov/Lobbying/Employers>.

¹⁸ Note: In its 2006 Substantial Issue Findings for the previous version of this project, the Commission found that a substantial issue exists with respect to the project’s consistency with the LCP land use policies.

The CDP findings for LCP Policy C8 state that the project is configured to accommodate both the existing power plant and its potential future plans to expand or switch to a different cooling system. The City did not evaluate the project for consistency with LCP Policy C8.2.2. For LCP Policy C8.2.4, the City states that the project is not an energy project, but that it has been configured to accommodate an existing energy facility and is therefore consistent with the policy. The City states that the project is consistent with LCP Policy C8.3.1 because the project will reduce energy used to pump water into Orange County (see also Appeal Issue 5E below). Appellants contend that the City's approval is inconsistent with the above policies for several reasons, including inadequate or inaccurate review to determine consistency with these policies and designation under both City and Coastal Commission policies of the entire power plant site as being available for power plant expansion. For LCP Policy C8.3.1, appellants contend that the City's conclusions about net energy use resulting from the project are based on an erroneous analysis and that the project EIR is internally inconsistent regarding this analysis.

The City's findings and the supporting EIR do not provide an adequate assessment for determining conformance to these policies. LCP Policy C8.2.4 incorporates by reference Coastal Act policies that designate the entire power plant site, including the area the City slated for the desalination facility, as being available for power plant expansion. The LCP's Coastal Element (at page IV-C-75) additionally states that vacant land adjacent to the power plant provides an opportunity for its potential expansion. The City's findings state only that the project was configured to accommodate the existing plant, with inadequate recognition of potential future expansion. Siting the desalination facility adjacent to the power plant may affect the ability of the plant to expand or to make the upcoming required changes to its cooling system; however, the City's review does not adequately describe how much of the area of the site may be needed for expansion, a new system, or both. Further, because the City did not evaluate the project's potential conflict with LCP Policy C8.2.2, it did not adequately address the project's likely non-conformity with this policy's requirement to address the expected new cooling technology needed at the power plant. Reducing the area available on the site will constrain the plant's options for either expansion or new and less environmentally harmful cooling technology, and therefore is not consistent with the first three policies above.¹⁹ Regarding LCP Policy C8.3.1, and as described in Appeal Issue 5E below, because the City conducted an inaccurate analysis of the project's expected energy use, it downplays the project's likely substantial effects on local energy supplies and is not supportive of energy conservation.

Therefore, and based on the record provided by the City, the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project's consistency with the City's certified LCP.

¹⁹ The Commission previously identified areas inland of the existing power plant as suitable for expansion in its 1978 consideration of a proposal by Southern California Edison to construct additional combined-cycle power units at Huntington Beach.

5E) Appeal Issue: Adequate Public Services

LCP Policy C1.1.1 states:

“With the exception of hazardous industrial development, new development shall be encouraged to be located within, contiguous or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services, and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources.”

LCP Policy C1.2.3 states:

“Prior to the issuance of development entitlement, the City shall make the finding that adequate services (i.e., water, sewer, roads, etc.) can be provided to serve the proposed development, consistent with the policies contained in the Coastal Element, at the time of occupancy.”

These LCP provisions require in general that new development be sited in areas able to accommodate it or in areas with adequate public services, and that the development not result in significant adverse effects. The City’s CDP findings state that the project is consistent with LCP Policy C1.1.1 because it is to be located in close proximity to the Huntington Beach Generating Station and that it is consistent with LCP Policy C1.2.3 because there are adequate services available. Appellants contend that the City’s findings are inadequate to support the project’s consistency with the requirements of these LCP policies to avoid potential adverse effects and to ensure the availability of needed public services.

Regarding LCP Policy C1.1.1, which requires that projects avoid significant adverse impacts, the City’s approval does not adequately acknowledge or evaluate the expected adverse impacts resulting from the project extending the life of the intake and discharge used by the power plant cooling system. The project would extend and expand the system’s impacts to marine life and water quality due to its planned continual use (24 hours per day, 365 days per year) for several additional decades, which represents a significant increase over the power plant system’s current relatively intermittent operations and its currently scheduled retirement on or before 2020 (see also the discussion of the project’s marine life and water quality impacts in Appeal Issue 5A above).

Regarding the policies’ requirements related to adequate public services, the City’s findings essentially state that the project will be consistent with these policies because adequate services can be provided. Those findings refer to Section 4.6 – Public Services and Utilities – of the project EIR; however, neither the assertion in the City’s findings nor the EIR analyses show that the City’s approval is consistent with these policies, particularly as they relate to the facility’s expected electricity use. The EIR states that the facility’s continual use of from 30 to 35 megawatts of electricity (or about 306,680 megawatt hours per year, which is equal to that used by about a quarter-million households) will result in a net reduction of electricity because the project will eliminate the electricity used by the State Water Project (SWP) to import water into Orange County – that is, because the project will provide 56,000 acre-feet of water annually for Orange County, the SWP will reduce its pumping and its electricity demand.

For several reasons, however, the City's analysis and conclusion are incorrect and understate the project's impact on local electricity supplies.²⁰ First, no element of the project ensures reduced SWP water imports into Southern California or Orange County, so there is no basis for the City's assumption of reduced electricity use, either locally or at the state level. As the Coastal Commission determined earlier this year regarding Poseidon's similar assertions for its Carlsbad project,²¹ the project does not ensure a one-for-one reduction of water imports to Southern California and would therefore not necessarily reduce electricity use.

Further, even if the SWP were to reduce its electrical use due to the project, the project itself would continue to demand 30 to 35 megawatts of electricity. The EIR bases its review on the project obtaining electricity from either the adjacent power plant or from the grid; however, neither the EIR nor the CDP assess how the desalination facility's local demand on electricity from the power plant would affect coastal resources and how or whether such use would conform to the requirement of LCP Policy C.1.2.3 to be consistent with the City's Coastal Element policies. For example, if the power plant produces more electricity than it would otherwise to provide power to the adjacent desalination facility, it would result in more entrainment than it would otherwise, at least until the power plant's current cooling system is retired. However, neither the City's CDP nor EIR identifies measures to avoid or mitigate this impact, and the resulting increased operations of the power plant may not be consistent with the marine biology provisions of the City's Coastal Element.

Appellants additionally contend that the City's approval does not conform to LCP Policy C1.2.3 because the City did not identify a selected pipeline route for the project, and it is therefore not possible to determine whether pipeline-related impacts and needed mitigation for those impacts will conform to that policy. Depending on the yet-to-be selected route, the project could cause additional adverse effects due to a potential river crossing or due to the likelihood of liquefaction along some areas of the route. Either of those elements could require more substantial excavations or construction methods than contemplated by the City, and those methods could result in more significant harm or disruption to public services than was addressed in the City's review. For example, evidence provided to the City during its review suggests that pipeline placement along roadways in areas with high liquefaction potential could require much more extensive excavations (in both width and depth) than the City evaluated, which could lead to major public access disruptions and could render all or some of the routes infeasible. It is not apparent from the record that the City adequately considered this information (see also Appeal Issue 5G below).

²⁰ Note: The City's analysis for these policies is also inconsistent with its findings regarding the project's growth-inducing impacts. See Appeal Issue 5H below.

²¹ See the Commission's "Final Adopted Findings for R2-E-06-13 – Request For Revocation on Poseidon's Carlsbad Desalination Facility", February 2010. The Commission found for the Carlsbad project, which uses the same proposed approach as this Huntington Beach proposal for energy and greenhouse gas reduction, that, at best, the region's main water importer – the Metropolitan Water District of Southern California – might occasionally forego marginal transfers or purchases of imported water if it deems Poseidon's supply more suitable. Additionally, many of those transfers or purchases are not necessarily foregone, but are instead stored for later transport to Southern California, which would require the use of electricity that the CDP incorrectly presumes would not be needed.

Therefore, based on the record provided by the City, the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project's consistency with the above policies of the City's certified LCP.²²

5F) Appeal Issue: Effects on Public Recreation

LCP Policy C3.1 states:

“Preserve, protect, and enhance, where feasible, existing public recreation sites in the Coastal Zone.”

The City's findings state that the project is consistent with this policy because it will have a negligible impact on parks and recreational facilities. With regard to the project's effects on fishing due to its intake of seawater and its discharge of high-salinity effluent, the CDP states that fish with high commercial or recreational value are uncommon in the source water and that nearby areas do not support sensitive species. Applicants contend that the project's continuance of the system used by the power plant to draw in and discharge seawater causes adverse effects that run counter to this policy's requirement to protect existing recreational fishing opportunities.

Regarding the intake, and as noted by the appellants, the City's findings are inconsistent with conclusions of numerous state and federal agencies about the adverse effects of open water intakes on marine life. The findings are also inconsistent with the entrainment study done at this power plant showing its effects on commercially- and recreationally-important species, such as halibut, crab, and others. The most recent entrainment study for the power plant showed that the intake drew in and killed organisms originating along the Southern California shoreline from up to several dozen miles away, which is a much larger source water area than considered in the City's findings.

Regarding the discharge, concerns raised during the City's review include the potential that the project's high-salinity effluent will adversely affect marine life. The effluent's salinity concentration is expected to be about 40 parts per thousand, which is about 20 percent higher than ambient seawater salinity and about 10 percent higher than naturally-occurring variability. Discharge modeling shows that the project will create areas of higher than natural salinity covering from about five to several dozen acres of nearshore benthic habitat, and affecting similarly-sized areas of the nearshore water column. The City's findings state that this would not represent substantial ecological effects or water quality degradation because those immediate areas do not include special biological areas or endangered or threatened species and because many of the species present in the nearby waters are also present in higher-salinity waters elsewhere – e.g., in the Gulf of California. However, this conclusion does not address the likelihood that local organisms not acclimated to higher salinities may avoid areas within the effluent plume, resulting in loss of foraging habitat as well as loss of recreational fishing opportunities within that area. The findings also state that any species exposed to elevated salinities would have low exposure times and that the areas represent insubstantial foraging areas; however, the City has not cited *in situ* tests or monitoring results to support such findings.

²² Note: In its 2006 Substantial Issue Findings for the previous version of this project, the Commission found that substantial issue existed with respect to the project's consistency with LCP policy C1.2.3.

Therefore, and based on the record provided by the City, the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project's consistency with the City's certified LCP.

5G) Appeal Issue: Adequate Protection Against Seismic Events and Liquefaction

LCP Policy C10.1.4 states:

“Require appropriate engineering and building practices for all new structures to withstand ground shaking and liquefaction such as those stated in the Uniform Building Code.”

The City's findings state that its approval provides consistency with this policy because it requires the project to meet all appropriate and adequate building standards related to ground shaking and liquefaction and because it will be consistent with applicable provisions of the Uniform Building Code. Appellants contend that the City's findings are inadequate because the project does not yet include an identified pipeline route, and the City can therefore not yet determine what measures are needed to withstand potential liquefaction. Appellants further contend that the City did not adequately address testimony provided at its September 7, 2010 CEQA hearing documenting that the City's approval would not sufficiently avoid liquefaction impacts.

The EIR review is based on pipelines being located largely within existing public streets, easements, or other rights-of-way and states that the alignments will not disturb native vegetation or adversely affect sensitive resources. It identifies anticipated traffic effects as being limited to no more than two traffic lanes during construction, and further states that a project-specific geotechnical evaluation will be needed before pipelines are placed. At the same time, the City has identified the project site and the entire area surrounding the power plant site, including portions of likely pipeline routes, as having high liquefaction potential.²³ Testimony provided to the City suggests that soil and subsurface characteristics within potential pipeline routes may require trenching that is much more extensive (in both width and depth) than evaluated in the EIR and may require a type of fill that is incompatible with roadways. Both the additional trenching and alternative fill could result in significant disruptions to traffic and coastal access, as well as substantially increase the project's construction-related and air quality impacts. It does not appear that the City evaluated these concerns sufficiently to ensure conformity to this LCP policy, and, in fact, put off until some future date the geotechnical analysis needed to identify and mitigate potential impacts. Therefore, based on the record provided by the City, the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project's consistency with the City's certified LCP.

²³ See the “Liquefaction Potential” Map at page IV-C-93 of the City's General Plan Coastal Element.

5H) Appeal Issue: Mitigation to the Maximum Extent Feasible

LCP Policy C1.1 states:

“Ensure that adverse impacts associated with coastal zone development are mitigated or minimized to the greatest extent feasible.”

The City’s findings for this LCP Policy state that all the project’s potential adverse impacts have either been mitigated or have been minimized to the greatest extent feasible.²⁴ As described in the appeal issues above, appellants contend that the City failed to address or adequately mitigate many of the project’s potential or likely impacts, resulting in non-conformity with the above-referenced policies as well as with LCP Policy C1.1.

In addition, appellants contend that the City’s findings are contradictory with regards to the project’s anticipated growth-inducement, and that these contradictory findings prevent conformity to this policy. The City evaluates the project both as not being growth-inducing – for example, in its analyses of the project’s electrical use and greenhouse gas emissions – and as being growth-inducing – in the EIR’s discussion of growth-inducement and the associated Statement of Overriding Considerations. The City’s analyses inconsistently determined both that the project would provide “replacement water” – that is, it would only replace an existing source of water – as well as “new water” – that is, it would result in new water being brought into the area, resulting in potential additional growth. As a result of this inconsistency, it is not clear that the City’s review evaluated all potential mitigation measures that may be needed to address the project’s impacts. Therefore, based on the record provided by the City, the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project’s consistency with the City’s certified LCP.

5I) Appeal Issue: Coastal Dependency

LCP Policy C1.1.2 states:

“Coastal dependent developments shall have priority over other developments on or near the shoreline. Coastal-related developments should be accommodated within reasonable proximity of the coastal-dependent uses they support.”

The City’s findings state that the project is a coastal-dependent development because it needs to be sited on or adjacent to the ocean in order to function at all. The City states the project is similar to other coastal-dependent developments, such as electrical generating facilities, refineries, and offshore oil and gas production. Appellants contend that the City is incorrect in categorizing the project as coastal-dependent since it does not need to be “on or adjacent to the sea in order to function at all.”²⁵

²⁴ The findings also note, however, that the City adopted a Statement of Overriding Considerations to address adverse impacts related to growth-inducement and construction that have not been mitigated to a level of insignificance.

²⁵ The City’s Coastal Element defines “coastal dependent” as “any development or use which requires a site on, or adjacent to, the sea to be able to function at all.”

While the current proposed project would rely in part on existing coastal-dependent infrastructure – i.e., the intake and discharge of the power plant – the desalination facility itself would be located about a quarter-mile from the ocean, not “on or adjacent” to the ocean. Further, as evidenced by many desalination facilities that are similarly set back from the shoreline and by many inland desalters that draw brackish water from inland aquifers, desalination facilities do not necessarily require a location “on or adjacent” to the ocean. The City’s findings do not make it clear that this particular project is coastal dependent. Therefore, based on the record provided by the City, the information provided by the appellants, and for the reasons cited above, the Commission finds that a substantial issue exists with respect to the project’s consistency with the City’s certified LCP.

6. APPEAL ISSUES NOT RAISING SUBSTANTIAL ISSUE

6A) Appeal Issue: Water Conservation

LCP Policy C6.1.12 states:

“Periodically review the City’s policies on water conservation, including the Water Conservation Ordinance, to ensure the use of state of the art conservation measures for new development and redevelopment, and retrofitting of existing development, where feasible and appropriate, to implement these measures.”

The City states that the project is consistent with this policy in that it must comply with applicable provisions of the City’s Water Conservation Ordinance. Appellants contend the City’s approval is inconclusive regarding consistency with this policy.

The policy primarily provides direction to the City to ensure it updates elements of City requirements related to water conservation. The City’s Water Conservation Ordinance is one of those elements, and includes conservation provisions applicable to new and existing development, such as limits on water use, timing of landscape watering, limits on new development during severe declared water shortages, and other similar measures. Because the policy provides guidance to the City rather than to particular new projects, the City’s approval does not result in an inconsistency with this policy. Further, as noted in the City’s findings, the approved project will be subject to applicable provisions of the Water Conservation Ordinance. Therefore, based on the record provided by the City, the information provided by the appellants, and for the reasons cited above, the Commission finds that *no* substantial issue exists with respect to the project’s consistency with LCP Policy C6.1.12.