



June 12, 2019

Ms. Hope Smythe
Executive Officer
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501-3348

Re: Need for Proposed Seawater Desalination Plant at Huntington Beach

Dear Ms. Smythe:

On June 14, 2019, your office will be presenting information to the Santa Ana Regional Water Quality Control Board (RWQCB) related to the need for the proposed Huntington Beach Desalination Plant (HBDP Project). It is expected that the focus of the discussion will be whether the 2015 Urban Water Management Plan (UWMP), prepared by Municipal Water District of Orange County (MWDOC), demonstrates a need for the HBDP Project consistent with the requirements of the May 2015 amendment to the Statewide Water Quality Control Plan for the Ocean Waters of California (Amended Ocean Plan). The purpose of this letter is to share information from a previous evaluation that concluded that consideration of more recent planning documents is required to make a feasibility determination regarding the need for the project. This previous evaluation is more relevant today than when it was prepared in 2017.

Previous Evaluation:

In Summer 2017, IRWD and its legal counsel conducted an evaluation of the proposed HBDP Project, which included consideration of the requirements of the Amended Ocean Plan and new information that was available from MWDOC's 2016 Orange County Water Reliability Study. The evaluation also considered the requirements for an Environmental Impact Report (EIR) consistent with the California Environmental Quality Act (CEQA). The findings of the evaluation were summarized in a July 2017 letter to the State Lands Commission that was prepared by IRWD's legal counsel at the time from the law offices of Nossaman, LLP. The letter from Nossaman is provided as Exhibit "A" and refers to the Huntington Beach Desalination Plant as the "*Desal Project*". The Executive Summary on page 4 states that:

"CEQA requires preparation of a new or subsequent EIR to address newly available information of substantial importance to the Desal Project that was not known and could not have been known at the time with the exercise of reasonable diligence seven years ago when the 2010 FSEIR was certified. For example, the Municipal Water District of Orange County's (MWDOC) Executive Report: Orange County Water Reliability Study (Dec. 2016) establishes that water supply reliability is

achievable through the year 2040 in supply stressed conditions with implementation of reasonably foreseeable, planned projects and programs by the Metropolitan Water District of Southern California (MWDSC) and its member agencies, in combination with implementation by Orange County water agencies of a cost effective portfolio of projects and programs other than the Desal Project.”

In Exhibit “A”, Nossaman considers the newly available MWDOC study from 2016. Nossaman then calls into question whether RWQCB can rely upon the Final Subsequent Environmental Impact Report (FSEIR), that was prepared for the HBDP Project by the City of Huntington Beach in 2010, in making a feasibility determination that the “identified need for the desalinated water”, as required by the Amended Ocean Plan, is consistent with MWDOC’s 2015 UWMP.

MWDOC’s 2016 Orange County Water Reliability Study is referenced in Exhibit “A” as the “OC Study”. The document refers to the 2015 amendment to the Ocean Plan as the “Desal Amendment”.

MWDOC Water Supply Reliability Studies:

MWDOC’s 2016 study considered the water needs of all of Orange County. The study demonstrated that water supply reliability is achievable in Orange County without the HBDP Project¹. Recently, MWDOC completed a 2018 Update to its Orange County Reliability Study and concluded that the HBDP Project ranked last among eight alternatives evaluated relative to the ability to provide cost effective water supply reliability benefits to Orange County².

The 2016 and 2018 Orange County Water Supply Reliability Study reports are important state-of-the-art planning documents that describe alternative future water supplies available to Orange County. These studies demonstrate that water supply reliability in Orange County is achievable through the implementation of alternatives that are more cost effective than the HBDP Project. Accordingly, the studies should be considered when making a feasibility determination whether there is a need for the project consistent with the Amended Ocean Plan.

Need for Additional CEQA Review:

MWDOC’s 2016 Orange County Water Reliability Study and its 2018 Update were not available when MWDOC prepared its 2015 UWMP and the City prepared its 2010 FSEIR. Nossaman concluded on page 25 of its letter that:

¹ MWDOC’s Executive Report from the 2016 Orange County Reliability Study is available online at: https://www.mwdoc.com/wp-content/uploads/2017/06/OC-Study-Executive-Report_with-Appendices_1-4-2017-FINAL-Low-Resolution.pdf

² MWDOC’s 2018 Update to its Orange County Reliability Study is available online at: https://www.mwdoc.com/wp-content/uploads/2019/02/2018-FINAL-OC-Study-Report_Final-Report_02-01-2019-with-appendices.pdf

“...the new information revealed by the OC Study combined with the adoption of the Desal Amendment requires that a new or subsequent EIR be prepared to support RWQCB analysis and issuance of desalination feasibility determinations regarding the identified need for Product Water based on consideration of adopted regional and local water supply planning documents.”

Accordingly, RWQCB should consider the MWDOC studies and additional environmental review documentation when it determines whether the need for desalinated water from the HBDP Project is consistent with MWDOC's 2015 Urban Water Management Plan.

IRWD's Need for Water:

IRWD is the largest retail water agency in Orange County and has invested significantly in projects that ensure water supply reliability to its customers. IRWD's recycled water projects, groundwater desalter projects and state-of-the-art water banking projects provide substantial reliability benefits. Upon consideration of these projects along with IRWD's own studies of future water supply reliability and the MWDOC studies described above, IRWD has determined that it does not need water from the HBDP Project.

Conclusions:

The information provided in this letter is intended to assist RWQCB in making a feasibility determination related to the need for the HBDP Project. Conclusions from the letter are:

- RWQCB must rely upon an EIR that contains an adequate environmental review when making feasibility determinations related to the HBDP Project;
- CEQA requires preparation of a new or subsequent EIR to address newly available information of substantial importance to the HBDP Project that was not known and could not have been known at the time the 2010 FSEIR was certified;
- MWDOC's 2016 and 2018 Orange County Water Supply Reliability Studies represent information that was not available at the time the 2010 FSEIR was certified and when the MWDOC 2015 Urban Water Management Plan was prepared;
- The MWDOC Orange County Reliability Studies demonstrate that water supply reliability in Orange County is achievable through the implementation of alternatives that are more cost effective than the HBDP Project;
- New information contained in the MWDOC Orange County Reliability Studies requires that a new or subsequent EIR be prepared to support RWQCB feasibility determinations regarding the need for the HBDP Project; and

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- IRWD is the largest water retailer in Orange County and it has determined that it does not need water from the HBDP Project.

We hope that the information provided is helpful to you, your staff and the RWQCB in evaluating the need for the HBDP Project. If you would like to discuss these issues further, feel free to contact me at (949) 453-5632.

Sincerely,



Paul A. Weghorst
Executive Director of Water Policy

Enclosure

EXHIBIT "A"



**VIA EMAIL: CEQA.comments@CSLC.ca.gov
HARD COPY TO FOLLOW**

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Refer To File #: -

July 27, 2017

Jennifer Lucchesi, Esq.
Executive Director
California State Lands Commission
Suite 100-S
100 Howe Avenue
Sacramento 95825

Re: Poseidon Supplemental Environmental Impact Report Comments

Dear Ms. Lucchesi:

As counsel for, and on behalf of the Irvine Ranch Water District (IRWD or District), thank you for the opportunity to provide comments on the Draft Supplemental Environmental Impact Report for the Seawater Desalination Project at Huntington Beach: Outfall/Intake Modifications and General Lease — Industrial Use (PRC 1980.1) Amendment (DSEIR). IRWD is concerned about the Seawater Desalination Project at Huntington Beach (Desal Project),¹ including all of its components, because the District derives the majority its water supply from the Orange County Groundwater Basin (Basin). The District's use of groundwater from the Basin combined with its production and distribution of high quality recycled water are primary factors in IRWD's ability to sustainably and reliably serve the approximately one-half million people in the District's service area daily.

IRWD is not categorically opposed to seawater desalination or the proposed Desal Project. Furthermore, IRWD supports the development of desalination technologies, regulatory streamlining, public acceptance, and pursuit of regional, state, and federal funding programs that would reduce the cost of desalination. Notwithstanding this policy position, as IRWD has publicly expressed for some time, the District is concerned about the potential environmental impacts of the Desal Project, particularly as the project has been changed in the seven years that have passed since it was last subject to comprehensive public review in the City of Huntington Beach's Final Subsequent Environmental Impact Report, State Clearinghouse No. 2001051092 (2010) (2010 FSEIR). As it has been changed since the 2010 FSEIR, including its entirely new and different distribution and delivery components, the Desal Project is reasonably likely to result in significant adverse effects on IRWD's local groundwater supplies and recycled water production, affecting the core of IRWD's mission to provide a high quality, safe, and

¹ The term "Desal Project" is used in this letter to refer generically to the Seawater Desalination Project at Huntington Beach, and is not intended to refer specifically to either the 2010 Desal Project or the Current Desal Project, as defined in the body of this letter below.

reliable water supply to its customers. Consequently, IRWD is compelled to submit comments on the DSEIR.

I. EXECUTIVE SUMMARY.

This section summarizes IRWD's comments on the DSEIR, noting that additional detail, legal authority, and facts are included in the other sections of this letter that follow this Executive Summary.

A. The DSEIR is an Improper Supplement.

The major problem with the DSEIR is that it is fundamentally an improper supplement to the 2010 FSEIR. The California State Lands Commission (CSLC) has improperly considered approval of the application by Poseidon Resources (Surfside) LLC (Applicant), which requests a lease amendment and approval of certain outfall/intake facility modifications (Outfall/Intake Components), in a vacuum within the DSEIR. The DSEIR examines the Outfall/Intake Components as if they were modifications to the Desal Project described and analyzed in the 2010 FSEIR (2010 Desal Project) ignoring:

- Major changes made to the 2010 Desal Project since the 2010 FSEIR (Current Desal Project),² including, without limitation planning and conceptual design of a completely different delivery and distribution system for the desalinated water (Product Water) produced by the Seawater Desalination Plant at Huntington Beach (HB Desal Plant);³ and
- New information and changed circumstances of substantial importance to the Desal Project that have become known since, and hence were not considered in, the 2010 FSEIR.

In light of the foregoing, the CSLC's preparation and use of the DSEIR to evaluate the proposed modifications to the Outfall/Intake Components is improper due to its misplaced reliance upon the 2010 FSEIR and its analysis of the 2010 Desal Project rather than the Current Desal Project. This violates CEQA because:

² The term "Current Desal Project" consists of the 2010 Desal Project plus all modifications to that project since the 2010 FSEIR, including entirely new and different planned distribution and delivery system project components for Product Water, new treatment technologies related to new and different Product Water end use specifications, and modifications to the Outfall/Intake Components under consideration by the CSLC, all of which the Applicant and CEQA reviewing agency rather than those submitting comments under CEQA, remain responsible to comprehensively identify and environmentally review prior to taking discretionary actions. Cal. Code Regs., tit. 14 (CEQA Guidelines), §§ 15121 (informational document), 15124 (project description), 15378 (defining "Project").

³ The definition of the term "Current Desal Project" in this letter is not intended to, and does not replace or relieve the obligation of the Applicant and CEQA reviewing agency to provide a current, accurate, and complete project description, which the DSEIR fails to do in contravention of CEQA as discussed in Section III.C.1. CEQA Guidelines, §§ 15121, 15124, 15378.

1. The City of Huntington Beach (City) has taken the position that it has no further discretionary approvals to grant related to the Desal Project. It is incumbent upon the CSLC, as the next CEQA responsible agency considering a discretionary action, to assume the role of the lead agency for the purpose of conducting any additional and appropriate analysis needed for the project to comply with CEQA, including, but not limited to, completion of subsequent Environmental Impact Report (EIR).
2. CEQA precludes reliance via a supplemental EIR upon the now stale and outdated 2010 FSEIR. CEQA requires preparation of a new or subsequent EIR because the 2010 Desal Project has fundamentally changed since 2010, and the major changes to the 2010 Desal Project must be comprehensively analyzed consistent with CEQA prior to or concurrently with review of the Outfall/Intake Components. The 2010 Desal Project relied on direct surface distribution of Product Water to the potable delivery systems of Orange County retail water agencies (Surface/Potable Distribution Components). The Current Desal Project is now proposed to distribute and deliver Product Water by injecting it into the groundwater aquifer and blending it with higher quality groundwater. Then Orange County groundwater producers, including IRWD, pump it from the Basin using their own wells and distribute the water through their own potable distribution systems (Recharge Distribution Components⁴). Recharge Distribution represents a major change to the distribution and delivery system component of the 2010 Desal Project that is likely to result in new significant adverse impacts to, among other resources, groundwater quality and supply. Because the Recharge Distribution Components were not a part of the 2010 Desal Project, any impacts associated with them were not analyzed in the 2010 FSEIR.
3. CEQA requires comprehensive, unsegmented evaluation of the Current Desal Project's environmental impacts, feasible alternatives, and feasible mitigation measures. Serial review and approval by responsible agencies, such as CSLC, focused only on the specific Desal Project components within that responsible agency's jurisdiction "piecemeals" the environmental review of the Current Desal Project. The result is a failure to identify the severity of adverse impacts; a failure to identify and consider a reasonable range of alternatives to avoid or reduce ; and a failure to consider and prescribe all feasible and available mitigation measures to reduce adverse impacts of the entire project, as planned.
4. CEQA requires that a new or subsequent EIR (rather than a supplemental EIR) must be prepared to analyze the Outfall/Intake Components in the context of the Current Desal Project, because the Outfall/Intake Components modify the Current Desal Project and not the 2010 Desal Project. Proper evaluation of potential significant adverse impacts of the Outfall/Intake Components requires consideration of the interrelationship and interaction of the various components of the Current Desal Project, including the Recharge Distribution Components and the Outfall/Intake Components. For example, anticipated adverse groundwater quality impacts

⁴ Recharge Distribution Components include OCWD's identified Distribution Option 1A (encompassed within Option 6), *i.e.*, the 100% Recharge Option, and all associated injection wells, pump stations, associated pipelines, and other facilities. OCWD, Workshop #3: Distribution of Poseidon Resources Ocean Desalinated Water (Jul. 6, 2016).

- associated with Recharge Distribution, which result from the injection of Product Water containing a higher total dissolved solids (TDS) concentration into the Basin, might be feasibly mitigated by imposing lower TDS limits on Product Water to protect groundwater quality. Those mitigation measures, however, are likely to impact the design and operation of technology and facilities comprising the Outfall/Intake Components, including those facilities relied upon to collect seawater through the intake for desalination, the treatment process used to create Product Water, and the facilities relied upon to discharge the more concentrated brine produced by enhanced TDS treatment through the outfall.
5. CEQA requires preparation of a new or subsequent EIR to address newly available information of substantial importance to the Desal Project that was not known and could not have been known at the time with the exercise of reasonable diligence seven years ago when the 2010 FSEIR was certified. For example, the Municipal Water District of Orange County's (MWDOC) *Executive Report: Orange County Water Reliability Study* (Dec. 2016)⁵ establishes that water supply reliability is achievable through the year 2040 in supply stressed conditions with implementation of reasonably foreseeable, planned projects and programs by the Metropolitan Water District of Southern California (MWDSC) and its member agencies, in combination with implementation by Orange County water agencies of a cost effective portfolio of projects and programs *other than* the Desal Project. This information calls into question, and requires a subsequent EIR to:
 - reevaluate the 2010 FSEIR project purpose and objectives as carried forward in the DSEIR; and
 - provide the CEQA review required by law to support the Santa Ana Regional Water Quality Control Board (RWQCB) analysis of "identified need for desalinated water" as required by the May 2015 State Water Resources Control Board (SWRCB) amendment (Desal Amendment) to the Statewide Water Quality Control Plan for the Ocean Waters of California (Ocean Plan) addressing desalination facility intakes and brine discharges, and incorporating other non-substantive changes to the Ocean Plan.
 6. CEQA requires preparation of a new or subsequent EIR to identify and evaluate an updated reasonable range of alternatives in light of project changes associated with the Current Desal Project and refinements to the project purpose and objectives set forth in the 2010 FSEIR. New information now exists regarding potentially reasonable alternatives to the Current Desal Project, which are likely to reduce significant adverse impacts associated with that project, including the Orange County Basin Optimization Program described in IRWD's *Reliability Alternatives Report*

⁵ MWDOC, Orange County Water Reliability Study (Dec. 2016), p. 4-1, available at http://www.mwdoc.com/Uploads/OC%20Study%20Executive%20Report_with%20Appendices_1-4-2017%20FINAL%20Low%20Resolution.pdf

(2015),⁶ and a significant number of projects described in MWDSC's *Integrated Water Resources Plan 2015 Update*,⁷ and the Orange County Water District (OCWD) *Long-Term Facilities Plan 2014 Update*.⁸ Further, many alternatives that were rejected in the FSEIR should be reevaluated based on new information because they may comply with the Desal Project's refined purpose and objectives and the RWQCB's assessment of the need for desalinated water now required by the Desal Amendment and are likely to reduce significant adverse impacts associated with the Current Desal Project. These alternatives include Alternative Site, Alternative Ownership and Operation, Alternative Facility Configuration, and Reduced Facility Size previously rejected by the FSEIR and excluded from consideration in the DSEIR.

B. The DSEIR is Inadequate under CEQA for Review of the Outfall/Intake Components.

The DSEIR is also inadequate under CEQA for even the narrow purposes of the CSLC's focused review and approval of the proposed Outfall/Intake Components. The DSEIR violates CEQA even for its focused purpose because it:

1. The DSEIR defines impermissibly narrow project objectives, even for the limited project consisting of the Outfall/Intake Components;
2. The DSEIR fails to consider a reasonable range of alternatives, even for the limited project consisting of Outfall/Intake Components; and
3. The DSEIR fails to identify the Recharge Distribution Components as a reasonably foreseeable future project for purposes of analyzing the cumulative impacts of its approval of the Outfall/Intake Components. This error is prejudicial because the adverse environmental impacts of implementing the 2010 Desal Project, including the Outfall/Intake Components, when considered together with the potential adverse environmental impacts of the Recharge Distribution Components, are reasonably likely to result in cumulatively considerable ground and surface water quality and water supply impacts, which the DSEIR failed to disclose. Consequently, at a minimum, an adequate cumulative impacts assessment must be developed for the DSEIR, and the DSEIR must be recirculated for public review and comment to remedy the error.

⁶ IRWD, *Improving Orange County Water Reliability: Comparing Alternatives* (Aug. 2015) available at <http://www.irwd.com/images/pdf/about-us/public-policy/20150826%20Desal%20Project%20-pager.pdf>

⁷ MWDSC, *Integrated Water Resources Plan 2015 Update*, Report No. 1518 (Jan. 2016), p. 4.4, available to [http://www.mwdh20.com/PDF_About_Your_Water/2015%20IRP%20Update%20Report%20\(web\).pdf](http://www.mwdh20.com/PDF_About_Your_Water/2015%20IRP%20Update%20Report%20(web).pdf)

⁸ OCWD, *Long-Term Facilities Plan 2014 Update* (Nov. 4, 2014), p. 3-20, available at <http://www.ocwd.com/media/3308/long-term-facilities-plan-2014-update.pdf>

II. IRWD'S INTERESTS AND DESAL PROJECT BACKGROUND.

A. IRWD's Interests in High Quality and Reliable Water Supplies.

IRWD is the largest retail water district in Orange County. IRWD's service area includes the City of Irvine and portions of the cities of Tustin, Newport Beach, Costa Mesa, Orange and Lake Forest along with unincorporated areas of Orange County. IRWD's diverse water supply portfolio relies primarily on local groundwater and recycled water, but also includes imported water supplied by MWDSC. Nearly 60 percent of IRWD's total water supply comes from local groundwater wells in the Basin, as well as wells in the Irvine and Lake Forest sub-basins.

To reliably serve a daytime population of more than one-half million, IRWD has planned, designed, constructed, and operates numerous state-of-the-art, conventional, and advanced water treatment, sewage treatment, and water recycling facilities. IRWD has a vested interest in California's water supply reliability and in the implementation of local water supply reliability projects. IRWD operates multiple facilities to produce drinking water, employing technologies such as microfiltration, nanofiltration, reverse osmosis membrane filtration, ultraviolet systems, and other advanced processes, to provide high quality, safe, and highly reliable potable water supplies for its customers.

IRWD's recycled water system is one of the largest in the nation and is used to meet nearly one-third of the total water demand within IRWD's service area. This recycled water system provides an exceptionally reliable and high-quality, non-potable water supply that is used for irrigation, industrial processes, and toilet flushing in more than 80 commercial buildings. Consistent with SWRCB policy,⁹ the use of recycled water is a key component of IRWD's conservation and water use efficiency programs. The use of recycled water extends IRWD's drinking water supplies; reduces the need for additional potable water facilities; reduces the amount of treated wastewater discharged into the ocean; increases water supply reliability; and reduces reliance on more costly sources of water, including imported and desalinated supplies. As part of IRWD's water recycling program, sewage from the community is collected and treated to tertiary standards at both IRWD's MWRP located in Irvine, and the Los Alisos Water Recycling Plant located in Lake Forest. Once treated, recycled water is delivered throughout IRWD's service area through an extensive recycled water distribution system, which is separate from and supplements IRWD's potable water supply and sanitary sewer conveyance systems.

As a leader in water supply reliability planning, IRWD has implemented innovative reliability projects, such as IRWD's groundwater water banking projects in Kern County that are operated in conjunction with innovative water exchange and transfers programs. These projects and programs have been implemented with the objective of IRWD being 100 percent reliable, even under the most severe drought conditions and during major water supply interruptions.

⁹ SWRCB, *Policy for Water Quality Control for Recycled Water*, Resolution No. 2013-0003 (2013).

B. Project Background.

1. The City of Huntington Beach's 2010 FSEIR.

In 2005, the City, acting as the designated CEQA "lead agency," certified a Final Recirculated Environmental Impact Report (2005 REIR) that evaluated the proposed desalination plant as a "co-located" facility at the existing AES Huntington Beach Generating Station (HBGS). 2010 FSEIR, Fig. 1-3. In 2010, the City certified the 2010 FSEIR, which replaced the 2005 REIR, based on "changes to the project and circumstances surrounding the project [that] have occurred, and new [] information [that] has become available." *Id.* at p. 1-1. The 2010 FSEIR evaluates both a co-located desalination plant and a "stand-alone" facility that would continue drawing cooling water through the power plant's open ocean intake system after the power plant stopped using the ocean intake system. *Id.*, Fig. 1-3. The 2010 FSEIR's project description defines the 2010 Desal Project as including the construction and operation of those desalination plant facilities necessary to desalinate seawater, and the facilities and infrastructure necessary to distribute Product Water to Orange County water purveyors. The 2010 Desal Project defined the project as:

- Construction and operation of a 50 million gallon per day (MGD) Desal Plant; and
- Construction and operation of off-site improvements and infrastructure necessary to deliver Product Water via direct surface distribution to Orange County retail water purveyors, including a new water delivery pipeline, underground booster pump stations, and modifications to an existing booster pump station (collectively, the "Surface/Potable Distribution System").

Id. at p. 3-1.

In 2010, and based on the 2010 FSEIR, the CSLC approved the Applicant's request to amend General Lease – Industrial Use PRC 1980.1, allowing the Applicant to use the AES HBGS seawater intake and discharge pipelines for 2010 Desal Project operations. The City takes the position that it lacks continuing jurisdiction over further environmental review of the Current Desal Project because it has no further discretionary approvals to issue.

2. Changes to the 2010 Desal Project Since the 2010 FSEIR.

(a) Introduction of the Recharge Distribution Components.

On May 14, 2015, the Orange County Water District (OCWD) Board of Directors approved a term sheet setting forth preliminary and non-binding terms for future negotiations of a possible contract for OCWD to purchase 56,000 acre-feet per year (AFY) of Product Water from the Applicant for distribution to Orange County water retailers and for OCWD to construct and operate the necessary infrastructure to take, store, and deliver Product Water (Term

Sheet). *Term Sheet Water Reliability Agreement: Huntington Beach Seawater Desalination Project* (Term Sheet) (May 2015).¹⁰

Pursuant to the Term Sheet, OCWD has undertaken planning and conceptual design of the Recharge Distribution Components of the Current Desal Project, including but not limited to directly injecting and recharging desalinated water into the Basin,¹¹ then distributing Product Water blended with groundwater to Orange County retail water supply agencies (Direct Recharge Distribution) via the 100% Recharge related infrastructure of Option 1A encompassed within Option 6, and all associated injection wells, pump stations, associated pipelines, and other facilities. OCWD, *Workshop #3: Distribution of Poseidon Resources Ocean Desalinated Water* (Jul. 6, 2016).¹²

In July 2016, the OCWD Board of Directors authorized staff to proceed with — and OCWD staff is currently advancing with — the study, planning, and design of the Recharge Distribution Components for the Current Desal Project; however, no CEQA review of the environmental issues relating to OCWD's recharge and distribution of the Product Water has been performed. The 2010 FSEIR only evaluated the Surface/Potable Distribution System, and no evaluation of the Recharge Distribution Components has been undertaken. In 2016, the OCWD Board of Directors further directed staff to seek commitments from other Orange County retail water agencies to purchase Product Water, but OCWD has not sufficiently reviewed the potential adverse environmental impacts of delivering Product Water to those agencies pursuant to CEQA.

(b) The Orange County Water Reliability Study.

In December 2016, MWDOC published its *Executive Report: Orange County Water Reliability Study (OC Study)*. The *OC Study* comprehensively evaluates current and future water supply and system reliability for Orange County through the year 2040, and makes statewide, regional, and local recommendations for purposes of advancing water reliability for Orange County as a whole. *Id.* at p. 4-1 through 4-3. The *OC Study* concludes that there are multiple paths to achieving water supply reliability without the Desal Project.

¹⁰ Term Sheet Water Reliability Agreement: Huntington Beach Seawater Desalination Project (May 2015), available at <http://www.irwd.com/images/pdf/about-us/Desalination/Revised%20Poseidon%20Term%20Sheet%20May%202015.pdf>.

¹¹ The Orange County Groundwater Basin is the largest groundwater source in Orange County, serving almost 78 percent of the County's total population. The Basin is managed by OCWD, which manages use of the groundwater and recharge of the Basin via the natural, imported, and treated sources of water to which it has access. To augment groundwater recharge, OCWD operates its state-of-the-art Groundwater Replenishment System (GWRS) that purifies wastewater and reintroduces it into the Basin as a saltwater intrusion barrier and to augment water supplies. To supplement recharge and the overall potable water supply, 28 water providers and OCWD purchase water from MWDOC, which, in turn, purchases water from MWDSC. MWDOC, *Orange County Water Reliability Study* (Dec. 2016) p. 1-2.

¹² OCWD, *Workshop #3: Distribution of Poseidon Resources Ocean Desalinated Water* (Jul. 6, 2016), available at http://www.irwd.com/images/pdf/about-us/Desalination/OCWD_Board_Minutes_7-6-2016_Approving_Option6.pdf

In December 2014, MWDOC convened the Orange County Workgroup (the “OC Workgroup”), made up of managers from MWDOC, MWDOC member agencies, OCWD, and the cities of Anaheim, Fullerton, and Santa Ana, and initiated the *OC Study* to comprehensively evaluate current and future water supply and system reliability for all of Orange County. The OC Workgroup met over 25 times, provided key direction and guidance for the *OC Study*, agreed to key assumptions, and reviewed all findings of the *OC Study*. The *OC Study* examined supply and system reliability for three specific areas of the county: Brea/La Habra, Orange County Basin, and South Orange County. *Id.* at p. 1-3.

The *OC Study* evaluates three planning scenarios (Planned Conditions, Moderately Stressed Conditions, and Significantly Stressed Conditions) defined by differing assumptions that the OC Workgroup deemed reasonable, taking into consideration local water supplies, water demands, climate change impacts, and base flows that recharge the Basin. *Id.* at p. 2-6. The OC Workgroup determined that the Moderately Stressed Conditions scenario, without the California WaterFix, called Scenario 2a, was the appropriate baseline for the *OC Study*. *Id.* at p. 2-11.

The OC Workgroup identified a suite of regional water supply projects that would likely be implemented in response to the shortages identified for the baseline. *Id.* at p. 3-1. These regional water supply projects were grouped into regional portfolios of projects that are expected to be implemented by MWDSC and its member agencies (regional Portfolio B) and evaluated for effectiveness in offsetting the shortages identified in Scenario 2a included the following:

- Expanded MWDSC/Palo Verde Irrigation District Programs;
- Other Colorado River Programs and Transfers;
- Central Valley Water District Transfers;
- Carson Indirect Potable Reuse Project;
- City of San Diego Pure Water Program;
- Los Angeles Department of Water and Power Groundwater Replenishment Project;
- Los Angeles Department of Water and Power Groundwater Remediation Project;
- Eastern Municipal Water District Indirect Potable Reuse Project; and
- Other MWDSC member agency projects in design or in advance planning stages.

Id. at p. 3-5 and 3-6.

The *OC Study* concluded with respect to the Brea/La Habra and Basin areas that “remaining shortages after implementing MWDSC regional Portfolio B would be small enough to manage by enhanced groundwater management or additional conservation.” *Id.* at p. 3-6. With respect to the South Orange County area, the *OC Study* documented several illustrative South

Orange County portfolios to show that there are multiple cost effective projects and programs in which both the supply and system reliability needs of South Orange County can be met. *Id.* at p. 3-8. Of importance to the CSLC, the *OC Study* concluded that, even if the WaterFix is not implemented, there are multiple paths to achieving water supply reliability at the MWDC regional level without the Desal Project. See *id.* at p. 4-1.

3. The CSLC's DSEIR for the Outfall/Intake Components.

The Applicant is now seeking the following agency approvals:

- CSLC approval for the Outfall/Intake Components;
- Regional Water Quality Control Board (RWQCB) determination that the Current Desal Project complies with Water Code section 13142.5(b);
- California Coastal Commission (CCC) approval of a coastal development permit; and
- OCWD approval of the purchase and distribution of Product Water.

On May 26, 2017, the CSLC published the DSEIR for public comment. The DSEIR is a focused document that addresses only the Outfall/Intake Components of the Current Desal Project on the legally flawed theory that the scope of the DSEIR need only be commensurate with CSLC's jurisdiction and approval authority. DSEIR, pp. 1-17 – 1-18. Specifically, the DSEIR states its reasoning as: "The Supplemental EIR is intended to provide the Commission with information required to exercise its jurisdictional responsibilities with respect to the Lease Modification Project [Outfall/Intake Components]" DSEIR, p. ES-3. Although it may be expedient to narrowly focus the DSEIR on the Outfall/Intake Components such an approach does not comply with CEQA, and its prohibitions against basing environmental analysis on a stale and outdated project description; it improperly piecemeals the project components rather than analyzing the full project and its reasonably foreseeable impacts. See CEQA Guidelines, §§ 15121, 15328. The DSEIR attempts to remedy these CEQA violations by incorporating by reference the City's 2010 FSEIR but it fails because the project description in the 2010 FSEIR describes the 2010 Desal Project – and not the full extent of the Current Desal Project. See DSEIR, p. 1-17 ("the CSLC is evaluating the incremental effects associated with the proposed Lease Modification Project [Outfall/Intake Components] when evaluating whether such modifications to the approved 2010 Project would result in any significant environmental impacts"). The DSEIR also does not analyze the potential environmental impacts of the Outfall/Intake Components in the context and as a part of, the Current Desal Project, rendering the DSEIR's project description additionally flawed.

4. The Desal Amendment to the Ocean Plan.

After certification of the 2010 FSEIR, the SWRCB adopted the Desal Amendment to the Ocean Plan in May 2015. Among other things, the Desal Amendment created new section III.M of the Ocean Plan governing implementation provisions for desalination facilities. Pursuant to the Desal Amendment, regional water quality control boards must conduct analysis under

Water Code section 13142.5(b) in accordance with the requirements of the Desal Amendment to make “feasibility determinations” regarding desalination facility sites, designs, technologies, and mitigation measures. Further, regional water quality control boards must analyze and make feasibility determinations in consultation with the CSLC, CCC, and other state agencies, regarding the following factors (among others):

- Whether the identified need for desalinated water is consistent with regional and local water planning documents, such as the *OC Study*, and
- The lowest impact design, layout, form and function of desalination project infrastructure.

Desal Amendment §§ III.M.2.b(2), d.

As stated in the DSEIR, the RWQCB has notified the Applicant that it is necessary for the Applicant to submit the information required by the Desal Amendment, and for the RWQCB to conduct the analysis of the Current Desal Project required by the Desal Amendment to make feasibility determinations. DSEIR, p. 1-8. As further acknowledged in the DSEIR, the RWQCB must have sufficient “CEQA documentation or CEQA functional equivalent analysis” to conduct the feasibility analysis determinations required by the Desal Amendment and Water Code section 13142.5(b). DSEIR, p. 1-8.

III. THE DSEIR IS AN IMPROPER SUPPLEMENT BECAUSE NO COMPREHENSIVE ANALYSIS OF THE CURRENT DESAL PROJECT IN ITS ENTIRETY EXISTS.

A. The CSLC is Responsible for Preparing a Comprehensive Update to the 2010 FSEIR.

The City takes the position that it has no further discretionary approvals to grant to the Desal Project, therefore, it has no further duties as the lead agency. Nevertheless, it is clear that other agencies must issue further discretionary approvals for the Desal Project to move forward. In addition to seeking the approval of the Outfall/Intake Components from the CSLC, the Applicant is also seeking permits/approvals from other CEQA responsible agencies, including both the RWQCB and CCC.

The *Interagency Permit Sequencing Framework Agreement (Permitting Agreement)*¹³ by and among the CSLC, RWQCB, and CCC provides that:

[I]n developing its draft Tentative Order [the RWQCB] can rely on the [2010 FSEIR] in combination with CEQA analysis prepared and approved by the State Lands Commission in its evaluation of [the Applicant’s] proposed seawater intake and discharge technology modifications for the purposes of complying with CEQA.

¹³ Interagency Permit Sequencing Framework Agreement (Oct. 2016) available at <http://www.slc.ca.gov/Info/Reports/Seawater/B.pdf>

Permitting Agreement, p. 2. As a matter of law, the CSLC, RWQCB, and other CEQA responsible and trustee agencies must evaluate the impacts of issuing their discretionary permits and approvals under CEQA based on a current, accurate, and comprehensive description of: (1) the Current Desal Project with all changes, modifications and/or new components; (2) currently relevant information and circumstances; and (3) currently available and feasible mitigation measures. Pub. Resources Code § 21166; CEQA Guidelines, §§ 15121, 15378. Therefore, to proceed in compliance with the Permitting Agreement and the requirements of CEQA, it is incumbent upon the CSLC to prepare a new or subsequent EIR that provides sufficient support for its own actions, and those of other CEQA responsible and trustee agencies, and that includes a thorough impacts analysis of new and substantially more severe environmental effects of the Current Desal Project.

CEQA provides that, where a responsible agency is called on to grant a discretionary 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 where:

“(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.”

CEQA Guidelines, § 15052(a). Here, major changes to the 2010 Desal Project, significant new information, and changed circumstances necessitate a subsequent EIR. The assumption of the lead agency's role falls to the next responsible agency to issue a discretionary approval. In this case, the next responsible agency is the CSLC, and as such is required to prepare a new or subsequent EIR that addresses all new and changed components of the project description, including the Recharge Distribution Components, the attendant impacts to groundwater and recycled water quality, and the feasible alternatives and mitigation measures to reduce impacts. CEQA Guidelines, § 15162. No responsible agency – CSLC, RWQCB, or CCC – may grant an approval for the project until the CSLC prepares a new or supplemental EIR with a current, accurate, and complete project description. A complete and accurate project description is “the *sine qua non* of an informative and legally sufficient EIR.” See *Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357, 365 (internal citations omitted).

IRWD recognizes that under the Term Sheet, it was and is anticipated that OCWD would prepare and complete a subsequent EIR for the delivery and distribution system components of the Desal Project. See Term Sheet, p. 6. However, OCWD has not prepared a subsequent EIR – or any CEQA document. Further, OCWD's ongoing planning is for an entirely different distribution and delivery system project component than that analyzed as a part of the 2010 Desal Project in the 2010 FSEIR. See DSEIR, p. 1-11 – 1-12 (OCWD declines to prepare an EIR). As a result, the burden to prepare the subsequent EIR falls upon the CSLC. See CEQA Guidelines, § 15052(a).

B. Substantial Changes to the 2010 Desal Project Require a New or Subsequent EIR.

The 2010 FSEIR cannot be made current with minor modifications via preparation of either an addendum or a supplemental EIR because changes to the 2010 Desal Project and significant new information and circumstances require major rather than minor revisions to the 2010 FSEIR. These revisions include a project description that includes the Recharge Distribution Components and an attendant environmental impacts analysis, updated purpose and objectives based on the new supply reliability information in the *OC Study*, and feasible alternatives and mitigation measures to reduce the Current Desal Project's significant effects. See CEQA Guidelines, §§ 15162, 15163(a), (b). When an EIR already exists and major revisions are required in order to bring the EIR up to date, a subsequent EIR is required.

When one or more further discretionary approvals is required by a lead or responsible agency for a project for which an EIR has already been certified or adopted, the agency must determine whether additional CEQA review is required. Pub. Resources Code, § 21166. Such new CEQA review may, in appropriate cases, consist of either a supplemental or a subsequent EIR. The difference between a subsequent EIR and a supplemental EIR involves the level of changes needed to update the existing EIR to fully and adequately analyze the project in its entirety, as it has changed. CEQA Guidelines, §§ 15162, 15163(a). Specifically,

- A subsequent EIR is required when substantial changes proposed in the project resulting in “new significant environmental effects or a substantial increase in the severity of previously identified significant effects” will require major revisions of the EIR.
- A supplemental EIR is appropriate only when the EIR that is relied upon addresses **the same project** to be considered in the supplemental EIR with minor modifications.

Pub. Resources Code, § 21166(a); CEQA Guidelines, §§ 15162(a)(1), 15163(a), (b); see *City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005, 1016 (supplemental EIR consists of “[only] *minor additions or changes* . . . necessary to make the previous EIR adequately apply to the project in the changed situation []” and must be considered in conjunction with the previous EIR) (emphasis added).

Here, no EIR exists that includes a current, accurate, and complete project description on which a supplemental EIR can rely, due to major changes to the 2010 Desal Project that have occurred since certification of the 2010 FSEIR. The DSEIR, which addresses only the proposed Outfall/Intake Components combined with the outdated 2010 FSEIR, is not a sufficient basis upon which the CSLC can approve the proposed Outfall/Intake Components because this improperly segregates the Outfall/Intake Components of the overall project. In fact, the focused Outfall/Intake Components project actually modifies Current Desal Project, which, to date, has not been properly reviewed pursuant to CEQA. The Current Desal Project, which includes the Recharge Distribution Components as well as the Outfall/Intake Components, has (as documented below in Sections III.C.2 and III.C.3) new and substantially more severe impacts than previously analyzed, necessitating a comprehensive update to the 2010 FSEIR via a new or subsequent EIR. See CEQA Guidelines, § 15162 (requiring a subsequent EIR when

“important revisions of the previous EIR . . . due to the involvement of new significant environmental impacts” that were not previously considered are needed).

Absent a new or subsequent EIR that analyzes the Current Desal Project -- as changed since certification of the 2010 FSEIR -- and its impacts, alternatives, and mitigation measures, the CSLC’s CEQA document is an improper supplement that fails to analyze the environmental impacts of implementing the Outfall/Intake Components of the Current Desal Project in contravention of the CEQA Guidelines. The DSEIR therefore fails to fulfill its essential role as an informational document, and is thus not “sufficient to allow informed decision making” by the CSLC, or by the RWQCB or CCC. *See Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 402-403 (holding that the failure to provide a full and meaningful discussion of impacts and alternatives renders an EIR inadequate under CEQA). Consequently, the CSLC is required to prepare a comprehensive new or subsequent EIR to update the 2010 FSEIR, including a thorough impacts analysis of the new and substantially more severe environmental effects of the Current Desal Project, in addition to a focused analysis of Current Desal Project components within its jurisdiction (i.e., the Outfall/Intake Components).

C. Desal Project Changes Must be Comprehensively – and Not in a Piecemealed Fashion – Reviewed in a Subsequent EIR.

The DSEIR improperly relies on the now stale, inaccurate 2010 FSEIR as its basis. No accurate project description of the entire Current Desal Project, as planned in 2017, is available, nor is a comprehensive evaluation of the Current Desal Project’s environmental impacts, feasible alternatives, or feasible mitigation measures available for the DSEIR to supplement. Furthermore, by seeking environmental review and approval of only the Outfall/Intake Components -- one of many changes made to the 2010 Desal Project -- from a responsible agency (the CSLC), rather than seeking comprehensive environmental review of the entire Current Desal Project from the CSLC, OCWD (based on the Term Sheet) or another lead agency, the Applicant is cleverly avoiding comprehensive CEQA review and the need to consider new feasible alternatives and mitigation measures. A limited environmental review was chosen despite the fact that new feasible alternatives and mitigation measures not considered for the original 2010 Desal Project may be appropriate for the Current Desal Project. Allowing the Applicant to serially seek focused review and approval by responsible agencies, such as the CSLC, with each review focusing only on those specific 2010 Desal Project components within the responsible agency’s jurisdiction, would lead to the approval of the Desal Project without appropriate CEQA review. This method is ultimately likely to lead to the Current Desal Project’s full approval and permitting without full consideration of the degree to which the Current Desal Project, in its entirety (including the introduction of the Recharge Distribution Components or the significant new information and circumstances developed over the last seven years since certification of the 2010 FSEIR), results in new adverse environmental impacts, or requires implementation of new or different alternatives and mitigation measures to avoid and reduce impacts to the fullest extent feasible.

Segmentation or “piecemealing” the environmental review of the Current Desal Project violates CEQA. CEQA Guidelines, § 15378 (EIR must evaluate the “whole of the action”). The purpose of the piecemealing prohibition is to prevent segmented review focused on only certain project components resulting in: (1) a failure to identify the severity of adverse impacts of the

entire project as planned; (2) a failure to identify and consider a reasonable range of alternatives to avoid or reduce impacts of the *entire project as planned*; and (3) a failure to consider and prescribe all feasible and available mitigation measures to reduce adverse impacts of *the entire project as planned*. See, e.g., *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 195–96 (city impermissibly chopped up single project into three separate projects, which was “exactly the type of piecemeal environmental review prohibited by CEQA”).

To fulfill the purposes of and comply with CEQA, the Applicant cannot be allowed to piecemeal the CEQA review of the Current Desal Project by improperly failing to prepare a subsequent EIR when one is required to evaluate the project *in its entirety*. Moreover, the Applicant cannot be allowed to further segment environmental review of the many, various updated components of the Desal Project among a variety of different CEQA responsible agencies, including the CSLC, RWQCB and CCC, while OCWD fails to initiate a full subsequent EIR necessary to review environmental impacts associated with the Current Desal Project, including its delivery and distribution system components, as they have changed since certification of the 2010 FSEIR. See n. 10, *supra*, Term Sheet, pp. 3, 6. The following discussion highlights the differences between the 2010 FSEIR Desal Project and the Current Desal Project, which requires a comprehensive, updated subsequent EIR; the environmental review of which cannot and should not be piecemealed.

1. The Project Description in the 2010 FSEIR and “Supplemented” by the DSEIR is Inaccurate and Incomplete in 2017.

The DSEIR purports to provide supplemental environmental evaluation of changes to the 2010 Desal Project associated with the Outfall/Intake Components as if those changes were being proposed to the 2010 Desal Project as defined in the 2010 FSEIR, rather than as a part of the Current Desal Project. The 2010 FSEIR project description does not include or anticipate replacement of the 2010 Desal Project’s delivery and distribution components with the Recharge Distribution Components approved by OCWD in 2016 for planning, conceptual design and, in the future, further environmental review. More specifically, Section 3.5 of the 2010 FSEIR specifies that the 2010 Desal Project would deliver Product Water via the Surface/Potable Water Distribution System consisting of off-site pipelines connecting to the existing OC-44 water transmission line in three locations including the Newport Beach Reach B and the East Orange feeder .

Contrary to the 2010 FSEIR’s project description, the Recharge Distribution Components (identified by OCWD as Option 6) would require as many as 26 new injection wells in various Basin locations, a pump station, a different pipeline route, and associated infrastructure necessary to inject, store, recover, and deliver groundwater recharged with Product Water. *Workshop #3: Distribution of Poseidon Resources Ocean Desalinated Water, supra*.¹⁴ These facilities, which comprise the Recharge Distribution Components, represent significant changes to the 2010 Desal Project’s Surface/Potable Distribution System evaluated in the 2010 FSEIR; however, the adverse impacts of those components have not been identified or evaluated, nor have potentially feasible alternatives or mitigation measures to reduce those impacts, which

¹⁴ See footnote 12, *supra*.

may reasonably affect project design features of the Current Desal Project, including the Outfall/Intake Components, been studied in in the DSEIR.

These changes to the 2010 Desal Project, which have already been approved by OCWD for inclusion in one form or another as a part of the Current Desal Project, substantially and materially change the environmental impacts of the Current Desal Project as discussed in more detail below. The failure to acknowledge the substitution of the Recharge Distribution Components in place of the 2010 Desal Project's Surface/Potable Distribution System is also anticipated to directly affect the reliability of the DSEIR's environmental evaluation of the Outfall/Intake Components. Nevertheless, these changes to the 2010 Desal Project are not taken into account in the DSEIR's evaluation because the DSEIR relies on the outdated 2010 FSEIR project description rather than preparing and evaluating an updated project description that accurately reflects the Current Desal Project.

"An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. The defined project and not some different project must be the EIR's bona fide subject." *Mira Monte Homeowners Assn. v. County of Ventura, supra* (internal citations omitted). CEQA Guidelines section 15378(a) defines the term "Project" as "the whole of an action, which has a potential for resulting in a physical change in the environment, directly or ultimately," and which is undertaken, supported or approved by a public agency. Subdivision (c) of this section states, "[t]he term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." For example, in *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, the Court held an EIR was inadequate because it failed to include a description of the facilities that would have to be constructed to deliver water to a proposed mining operation. *Id.* at pp. 829-30. The Court noted:

"The construction of additional water delivery facilities is undoubtedly one of the significant environmental effects of the project. As such, a description of the necessary construction had to be included if the EIR was to serve its informational purpose. [Citations.] Because of this omission, some important ramifications of the proposed project remained hidden from view at the time the project was being discussed and approved. This frustrates one of the core goals of CEQA."

Ibid.

All 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." CEQA Guidelines, § 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." *Assn. for a Cleaner Environment v. Yosemite Cmty. Coll. Dist.* (2004) 116 Cal.App.4th 629, 638 (project to close shooting range included cleanup and dismantling); see also *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 165 (project improperly segmented into two projects for CEQA purposes). The task of additional environmental review cannot be segmented into the individual project

components among the different agencies that are responsible for approval. *See generally, Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918 (CEQA requires EIRs to take a comprehensive view and coordinate their analysis with the planning and environmental review processes of other responsible agencies).

As noted, the Current Desal Project includes the Recharge Distribution Components, which replace the Surface/Potable Delivery System, and were not previously evaluated as part of the 2010 Desal Project. In fact, the 2010 FSEIR only briefly discusses the Surface/Potable Delivery System. 2010 FSEIR, p. 3-72 – 3-73. It is entirely clear that the 2010 FSEIR does not contemplate the Recharge Distribution Component or any alternative that would directly or indirectly recharge or replenish the Basin, with Product Water because the 2010 FSEIR incorrectly concludes, without analysis, that: Use of desalinated seawater from the [2010 Desal Project] will not affect any groundwater basin water quality objectives via groundwater spreading, conjunctive use, or the use of recycled water in Orange County.” 2010 FSEIR, p. 4.11-5.

As a result, the DSEIR’s project description precludes environmental analysis of a fully and accurately described project by the CSLC. In addition, the 2010 Desal Project description, relied upon by the DSEIR, is insufficient because it does not take into account the end use(s) of Product Water. Taking the end use(s) of Product Water into consideration as a part of the DSEIR’s project description is critical to effective analysis of potential significant impacts associated with the Desal Project and all of its components. For example, an evaluation of the end use(s) of the desalinated water is necessary to determine:

- Acceptable target concentrations of boron, TDS, and salts for Product Water, which in turn drive treatment facilities that must be included in the design of the Desal Project and any associated modifications to the use and design of Outfall/Intake Components, and
- Blending water requirements for Product Water, which in turn drive facilities related to providing source water for blending that must be included in the design of the Desal Project and any associated modifications to the use and design of Outfall/Intake Components.

Identification of all project design features of the Current Desal Project that are necessary for enhanced treatment of boron, TDS, and salts and for delivery of blending source water, and evaluation of the relationship between those project design features and the Outfall/Intake Components, is required for an accurate evaluation of adverse impacts of, and appropriate mitigation for, both the Current Desal Project as a whole, and of the discrete Outfall/Intake Components of the Current Desal Project. (Trussell Technologies, Inc., Technical Memorandum: Review of the Proposed Water Quality Requirements for the Huntington Beach Desalter, Apr. 13, 2016, pp. 74-75.)¹⁵

¹⁵ Trussell Technologies, Inc., *Review of Proposed Water Quality Requirements for the Huntington Beach Desalter* (Apr. 13, 2016), available at <http://www.irwd.com/images/pdf/about-us/Desalination/Trussell%20Tech%20Final%20Report%20for%20OCWD%2020160413.pdf>.

Similarly, while it may have been appropriate to use drinking water standards to set TDS limits for the Surface/Potable Distribution component of the 2010 Desal Project in the 2010 FSEIR, when the Product Water (with TDS concentrations of 350 mg/l to 500 mg/l as described in the Term Sheet) will be used to recharge groundwater that is of better quality (currently about 270 mg/l in the vicinity of IRWD wells), it is essential to set lower TDS limits for Product Water so as not to degrade baseline groundwater quality in the Basin.¹⁶ Different TDS limits may affect the design and use of technology and facilities relied upon to:

- collection of seawater through the intake for desalination;
- treatment of seawater to create Product Water; and
- discharge treatment effluent with higher concentrations of pollutants (brine) through the outfall and back to the ocean.

The conditions, technologies, and treatment processes involved in the desalination process that must be incorporated into the Desal Plant to accommodate the new Recharge Distribution Components are all a part of the Current Desal Project. Without a description of these project components, the DSEIR project description is inaccurate and incomplete and consequently impossible to evaluate from an environmental compliance perspective. See *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 734 (holding that failure to consider the expansion of the wastewater treatment plant as part of the project under consideration resulted in an inaccurate project description and incomplete identification and analysis of the environmental effects). In addition, failure to identify end use omits a discussion of the impacts associated with Current Desal Project infrastructure needed to deliver, store, and distribute Product Water. MWDSC, *Integrated Water Resources Plan 2015 Update* (hereinafter, "2015 IRP"),¹⁷ 2015, p. 44 ("[F]actors affecting [desalinated seawater] cost include the types of processes needed to meet water quality goals as well as the length of pipeline and pumping requirements for integrating desalinated seawater into the distribution system.")¹⁸

The construction and interrelated operation of the Outfall/Intake Components, Desal Plant design features, and Recharge Distribution system design features (including recharge facilities and the infrastructure needed to recover and distribute water from the ground) are all part of a single project that must be considered together in a comprehensive, updated subsequent EIR. To comply with CEQA, therefore, the CSLC must prepare a new or subsequent EIR for the entire project that covers impacts from all substantial changes to the Desal Project, including changes to aspects of the Desal Project that do not involve the Outfall/Intake Components.

¹⁶ Please note that IRWD does not concede that TDS levels meeting drinking water standards are sufficiently protective even for direct distribution because an elevation in TDS levels in the influent entering the MWRP as compared to influent without Product Water is reasonably likely to adversely affect IRWD's recycled water program as discussed in Section III.C.3.

¹⁷ See footnote 7 *supra*.

¹⁸ *Id.*

The other responsible agencies must also be able to rely on the subsequent EIR for any additional discretionary approvals. In particular, the new facilities comprising the Recharge Distribution Components – the pipeline, the groundwater injection wells, and groundwater production and conveyance facilities – are facilities required to attain the Desal Project purpose and objectives (as described in the 2010 FSEIR and DSEIR), they unquestionably are part of the same project for CEQA purposes. *Tuolumne Cty. Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1226 (“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, the CSLC must evaluate these facilities as part of its project description in an updated or new subsequent EIR. *Rural Landowners Assn. v. City Council* (1983) 143 Cal.App.3d 1013, 1024-25 (where the responsible agency stepped into the shoes to prepare a subsequent or supplemental EIR, all parts of project, including new parts, had to be evaluated).

2. Impacts Associated with the Construction and Operation of the Recharge Distribution Components Must be Evaluated.

The manner in which Product Water is integrated with existing potable water distribution systems can affect the existing distribution systems, project operations, and recycled water systems, and can be a determining factor stranding water supply infrastructure. See *2015 IRP*, p. 48. Construction and operation of the facilities comprising the Recharge Distribution Components, including up to 26 new injection wells, was not considered in the 2010 FSEIR or the DSEIR, and such facilities would result in significant new and substantially more severe impacts. Construction-phase effects would include significant ground disturbance with potential biological resource, and cultural/paleontological impacts, and involve the use of heavy equipment with potential air quality impacts. Operations-phase effects of such facilities may include hydrogeologic impacts as well as ground and surface water quality impacts, groundwater mounding impacts, and water supply impacts, as further discussed in Section III.C.3. See *City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005 (holding that agency’s failure to prepare additional CEQA analysis when the EIR did not address the impact of three new wells violated CEQA and rendered the agency’s project approval unlawful); *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818 (holding EIR on proposed mining operation inadequate because it failed to include a description of the facilities that will have to be constructed to deliver water to mining operation).

3. The Recharge Distribution Components Would Significantly Adversely Affect Water Quality and Water Supply.

Water Quality Impacts. The 2010 FSEIR only evaluated the Surface/Potable Distribution System as a part of the 2010 Desal Project. In response to OCWD’s planning and consideration of the Recharge Distribution Components, IRWD has identified multiple potential significant adverse impacts from the Current Desal Project related to water quality. These potential adverse water quality impacts associated with the Recharge Distribution Components include the potential to:

- Degrade high quality groundwater in contravention of the SWRCB Anti-Degradation Policy (Resolution No. 68-16);

- Reduce the quality of water delivered to IRWD customers; and
- Encumber IRWD's continued ability to comply with individual National Pollutant Discharge Elimination System (NPDES) Permit standards for discharge of recycled water due to elevated concentrations of TDS in Product Water.

As explained in Section III.C.1, the 2010 FSEIR only analyzed the introduction of Product Water into the potable water system and direct delivery to water supply retailers (i.e., surface/potable distribution). Consequently, the 2010 FSEIR did not evaluate Desal Project impacts to groundwater quality. Instead, the 2010 FSEIR only analyzed Product Water quality impacts vis-à-vis their compliance with regulatory drinking water standards, and not in comparison to Basin groundwater quality objectives or existing groundwater quality conditions. See 2010 FSEIR, § 4.11.

As documented in IRWD preliminary study results that were presented to OCWD by IRWD and its consultants on March 8, 2016, the recharge of Product Water is reasonably likely to significantly degrade the quality of groundwater within the Basin. Thomas Harder & Company; HDR, Inc., *Preliminary Analysis Impact of Desalinated Seawater Use to IRWD's Recycled Water* (IRWD Presentation to OCWD) (Mar. 8, 2016).¹⁹ The 2010 FSEIR predicts that boron is expected to be present in the Product Water at concentrations of approximately 0.6–1.0 mg/L (2010 FSEIR, p. 4.11-13) and the Term Sheet specifies Product Water will have concentrations at levels of 0.75-1.0 mg/L. *Term Sheet Water Reliability Agreement: Huntington Beach Seawater Desalination Project* (Term Sheet) (May 2015,) Att. A.²⁰ These Product Water boron concentrations exceed:

- Current Basin groundwater quality objectives for boron of 0.75 mg/L (RWQCB, Water Quality Control Plan for Santa Ana Basin, Region 8, (Basin Plan), updated Feb. 2016, p. 4-21);²¹ and
- Current concentrations of boron in groundwater pumped from the Basin, which range from .08 mg/l to 0.138 mg/l as measured by IRWD at the Dyer Road Wellfield between September 27, 2016 and April 4, 2016.

In addition, TDS concentrations in the Product Water are anticipated to range from 350 to 500 mg/L (Term Sheet, Att. A), exceeding:

¹⁹ OCWD, Preliminary Analysis Impact of Desalinated Seawater Use to IRWD's Recycled Water (Mar. 8, 2016) available at <http://www.irwd.com/images/pdf/about-us/Desalination/Desalination%20Preliminary%20Impact%20Presentation%20March%202016.pdf>

²⁰ Term Sheet, Attachment A (May 2015) available at <http://www.irwd.com/images/pdf/about-us/Desalination/Attachment%20A%20Water%20Reliability%20Agreement%20Term%20Sheet%20May%202015.pdf>

²¹ RWQCB, Water Quality control Plan for Santa Ana Basin, Region 8 (Feb. 2016) available at http://waterboards.ca.gov/santaana/water_issues/programs/basin_plan/docs/2016/Chapter_4_Feb_2016.pdf

- Current concentrations of TDS in Basin groundwater in the vicinity of IRWD's well facilities, which are approximately 270 mg/L on an average annual basis as measured by IRWD at the Dyer Road Wellfield in calendar year 2016.

Accordingly, recharging Product Water into the Basin, is reasonably likely to increase the boron and TDS loads, and significantly degrade the existing and future high quality groundwater within the Basin in the proximity of IRWD wells. Such water quality degradation would unreasonably adversely impact the beneficial use of groundwater by increasing the concentration of those pollutants. These groundwater quality impacts must not only be analyzed and mitigated in a properly prepared new or subsequent EIR pursuant to CEQA, but must also be analyzed for violation of the SWRCB Antidegradation Policy (Resolution No. 68-16) and the Basin Plan.

In addition to the potential significant adverse impacts that recharging Product Water will have on boron and TDS concentrations in the groundwater Basin, the recovery and use of the groundwater recharged with Product Water is also likely to significantly and adversely affect the quality of potable water delivered to IRWD customers, which was never evaluated in the 2010 FSEIR or DSEIR. Customer use of the lower quality potable water will result in sewage being delivered to the MWRP that is also higher in boron and TDS concentrations. Higher concentrations of these pollutants in sewage are likely to adversely impact the quality of recycled water produced at the MWRP and distributed through IRWD's recycled water system.

These potential adverse impacts on recycled water production and use were not analyzed in the 2010 FSEIR or the DSEIR but IRWD has contracted with consultants Thomas Harder & Company and HDR, Inc. to preliminarily, and subject to full CEQA review, evaluate and determine the potential for significant adverse impacts of Product Water pollutant concentrations on the quality of recycled water produced for and served to IRWD customers. On March 8, 2016, IRWD's consultants participated with IRWD in presenting to OCWD their preliminary analysis regarding the impact of recharging Product Water on the quality of groundwater and recycled water produced at MWRP. IRWD Presentation to OCWD. The results of this study indicate that the increases in concentrations of boron and TDS in the groundwater that IRWD extracts from the Basin resulting from recharge with Product Water is likely to increase those pollutants in recycled water produced by IRWD. These increased pollutant concentrations in IRWD's recycled water, in turn, are likely to result in significant impacts to:

- ornamental and agricultural plants irrigated with recycled water throughout IRWD's service area (Trussell Technologies, Inc., Technical Memorandum: Review of the Proposed Water Quality Requirements for the Huntington Beach Desalter, Apr. 13, 2016, pp. 74-75);
- surface receiving waters in reservoirs accepting discharges of recycled water, based on the potential for exceedances of IRWD's NPDES permit requirements governing such discharges (RWQCB, Order No. RS-2015-0024/NPDES No. CA8000326).

These impacts not only must be evaluated in a properly prepared new or subsequent EIR pursuant to CEQA, but the potential adverse impacts to IRWD's recycled water program

due to decreased demand for recycled water must also be analyzed for contravention of SWRCB Policy for Water Quality Control for Recycled Water (Resolution 2013-0003).

The treatment of sewage and production of recycled water using current technologies available at the MWRP would not be effective to remove or reduce the significant increases in boron and TDS concentrations that are reasonably likely to occur upon implementation of the Recharge Distribution Components to the same low levels currently characterizing IRWD's recycled water. The magnitude of these increases would be dependent upon the end use of Product Water, *e.g.*, how and where Product Water is injected into the Basin, and cannot be determined until detailed plans for injection alternatives are made available. Nevertheless, increased concentrations of TDS in Product Water are reasonably likely to result in IRWD recycled water discharged into storage reservoirs exceeding RWQCB permit requirements for TDS. See RWQCB, Order No. RS-2015-0024/NPDES No. CA8000326. These potential adverse surface water quality impacts must be evaluated in a properly prepared new or subsequent EIR pursuant to CEQA.

Water Supply Impacts. Another potentially significant adverse impact of OCWD recharging a large volume of Product Water into the Basin as a component of the Current Desal Project is that it would impair the ability to capture and recharge the Basin aquifer using above average storm water flows and above average base flows that occur in the Santa Ana River. Even with the additional wells and groundwater recovery infrastructure that OCWD has described as comprising the Recharge Distribution Components, as described in Section III.C.2, recharging the Basin aquifer with a large volume of Product Water on a long-term basis would likely result in much higher groundwater levels and shallower depths to groundwater in the Basin. Continuous long-term recharge of the Basin aquifer with Product Water would maintain high groundwater levels, which would provide limited available aquifer capacity to store above average storm water and above average base flows in the Santa Ana River. Storm water and freshwater base flows are a current primary source of recharge to the Basin and are relied upon by the groundwater producers. The recharge of the Basin using Product Water rather than storm flows and base flows would in effect result in many hundreds of thousands of acre-feet of Santa Ana River water being lost to the ocean that otherwise would have been recharged into the Basin over the life of the Desal Project. This loss of access to an existing source of water that is currently used by the groundwater producers is another significant environmental impact, and the potential impact to beneficial uses also needs to be evaluated in a properly prepared, comprehensive new or subsequent EIR pursuant to CEQA.

In summary, the DSEIR fails to comply with CEQA requirements triggering the preparation of a subsequent EIR, and fails as an informational document because it does not disclose or address the Current Desal Project's potentially significant adverse water quality and water supply impacts. The impacts associated with construction and operation of the Recharge Distribution Components are not evaluated in any CEQA document prepared for any iteration of the Desal Project to date, and neither the 2010 FSEIR nor the DSEIR address the Recharge Distribution Components. The CSLC is responsible for preparing a subsequent EIR that includes the 2010 Desal Project changes, including construction and operation of facilities necessary to implement the Recharge Distribution Components as a part of its project description, and evaluates the potential environmental effects therefrom.

D. Significant New Information Necessitates Preparation of a Subsequent EIR.

As discussed in Section II.B.2.b, MWDOC published the *OC Study* in 2016, which documents that water supply reliability in Orange County is achievable through 2040 with implementation of regional and local banking, groundwater management, indirect potable reuse, and wastewater recycling plans and programs. This new information should be evaluated in a new or subsequent EIR because this information requires major changes to the 2010 FSEIR by calling into question the validity of the Desal Project purpose and objectives as carried forward into the DSEIR, and presents new or considerably different project design features, mitigation measures, and alternatives available to reduce one or more significant adverse impacts of the Desal Project. See Pub. Resources Code § 21166; CEQA Guidelines, §§ 15162, 15163(a), (b).

CEQA requires additional review if new information of substantial importance to the project, which was not known and could not have been known at the time with the exercise of reasonable diligence when EIR was certified, becomes available. Pub. Resources Code § 21166(c). New information relevant to a project is of substantial importance and requires preparation of a new or subsequent EIR if new information shows that any one of the following conditions exists:

- The project will have one or more new significant effects not evaluated in the prior EIR;
- Significant effects previously examined in the prior EIR will be substantially more severe than shown in the prior EIR; or
- New or considerably different feasible project design features or mitigation measures, or new or considerably different alternatives not previously examined in the prior EIR would substantially reduce one or more significant adverse impacts that the applicant declines to adopt.²²

See CEQA Guidelines § 15162(a)(3); see also 2 Kostka & Zischke, Practice Under the California Environmental Quality Act (Cont.Ed.Bar 2015) § 19.18.

1. The Orange County Water Reliability Study Constitutes New Information Regarding Sufficient Water Supply and System Reliability in Orange County for the Foreseeable Future and Calls into Question the 2010 FSEIR Project Purpose and Objectives.

As documented in the *OC Study*, water supply and system reliability can be achieved throughout the county through MWDSC and MWDSC member agency planned projects and programs and by optimizing the use of the Basin using methods that are consistent with existing OCWD policies for managing the Basin. *Id.* at p. 3-6 – 3-8. Among the *OC Study's* recommendations are: advocacy for the WaterFix, regional storage and water banking, water recycling, groundwater production, and groundwater indirect potable reuse. *Id.* at p. 4-1.

²² New and more severe environmental impacts not addressed in the 2010 SEIR or the DSEIR, particularly to Basin groundwater quality and IRWD's recycled water program, are discussed in Section III.C.3.

The *OC Study* identifies a suite of regional water supply projects that would likely be implemented by MWDSC and MWDSC member agencies in response to the shortages identified for the baseline Scenario 2a. *Id.* at p. 3-1. The OC Workgroup evaluated the regional portfolio of projects for effectiveness in offsetting the shortages identified in Scenario 2a. *Id.* at p. 3-5 – 3-6. The *OC Study* concludes the following:

- With respect to the Brea/La Habra and Basin areas, “remaining shortages after implementing MWDSC regional Portfolio B would be small enough to manage by enhanced groundwater management or additional conservation.”
- With respect to the South Orange County area, there are multiple cost effective projects and programs in which both supply and system reliability needs of South Orange County can be met.

Id. at pp. 3-6, 3-8. In other words, the Desal Project is not needed to meet Orange County water supply and system reliability goals through 2040.

2. A New or Subsequent EIR Must be Prepared to Update the 2010 FSEIR Project Purpose and Objectives Based on New Information of Substantial Importance to the Desal Project in the *OC Study* and the Desal Amendment.

The new information in the *OC Study* revealed that water supply reliability is achievable with implementation of MWDSC and MWDSC member agencies’ likely plans and programs in combination with a cost effective South Orange County portfolio of projects and programs. This revelation is of substantial importance to the Desal Project because it calls into question the continued viability of the project purpose and objectives identified in the 2010 FSEIR as carried forward into the DSEIR, *i.e.*, “to . . . strengthen regional self-reliance and satisfy regional water supply planning goals.” 2010 FSEIR, pp. 3-80, 3-95; DSEIR, p. 2-3. Based on the conclusions of the *OC Study*, the Desal Project is not needed to satisfy these purposes or objectives because there are portfolios of projects and programs other than the Desal Project which, in combination, are sufficient through the year 2040 to:

- Reduce local dependence on MWDSC water because *MWDSC water is available in amounts sufficient to meet reliability goals*;
- Improve regional self-reliance because *Orange County groundwater management, conservation, and regional and local water projects provide for ongoing self-reliance*; and
- Meet water supply and system reliability regional planning goals.

In light of this new information, a new or subsequent EIR must be prepared based on updated project purpose and objectives that accurately reflect this new information of substantial relevance to the Desal Project regarding Orange County’s water supply reliability.

The 2010 FSEIR project objectives as incorporated into the DSEIR are grounded in outdated and inaccurate assumptions regarding a water supply problem that does not exist,

namely: there is a foreseeable and unaddressed water supply shortage in Orange County. Because these 2010 FSEIR and DSEIR objectives are grounded in the inaccurate assumption that there is a water supply problem, the 2010 SEIR objectives inevitably resulted in identification of a range of alternatives that constitute a solution to the problem, even if though current information shows that the problem does not exist. See CEQA Guidelines, § 15124(b) (project objectives are directly related to the range of alternatives analyzed in an EIR); *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 669 (holding the definition of project objectives improperly limited the analysis of alternatives where assumptions underlying the project objective could become inaccurate or unattainable at any time). The CSLC is required to prepare a new or subsequent EIR with updated project purpose and objectives that accurately reflect the new information of substantial importance to the Desal Project regarding water supply reliability in the *OC Study*.

Further, the new information revealed by the *OC Study* combined with the adoption of the Desal Amendment requires that a new or subsequent EIR be prepared to support RWQCB analysis and issuance of desalination feasibility determinations regarding the identified need for Product Water based on consideration of adopted regional and local water supply planning documents. Pursuant to the Desal Amendment, the RWQCB must analyze, in consultation with the CSLC, CCC, and other responsible and trustee agencies, whether an identified need for Product Water exists. Desal Amendment § III.M.2.b(2). This RWQCB determination must be reviewed in CEQA documentation or a CEQA functional equivalent. DSEIR p. 1-8. In light of the new information in the *OC Study* and the requirements of the Desal Amendment, the CSLC must prepare a new or subsequent EIR because:

- CEQA review and documentation is required for the RWQCB's Desal Amendment feasibility determinations;
- the Desal Amendment requires coordination between the RWQCB and the CSLC in completing the feasibility analysis and issuing those determinations; and
- CSLC agreed in the Permitting Agreement to facilitate the CEQA review necessary for issuance of required RWQCB approvals.

In addition, a new or subsequent EIR must take into account the findings of the *OC Study* regarding the ability to provide reliable water supply in Orange County without reliance on the Desal Project.

3. A New or Subsequent EIR Must Analyze a Revised Reasonable Range of Alternatives in Light of Changes to the Desal Project and New Information of Substantial Importance to that Project.

To comply with CEQA, a new or subsequent EIR must both evaluate the new supply reliability information in the *OC Study* and the resulting proper formulation of (i) project purpose and objectives, (ii) a new project description that accurately reflects the Recharge Distribution Components and all associated conveyance, injection, storage, recovery, and delivery infrastructure. A new or subsequent EIR must also evaluate the Outfall/Intake Components, (iii) associated potentially significant impacts, and (iv) an updated reasonable range of

alternatives designed to reduce or eliminate significant project impacts. CEQA Guidelines, § 15126.6(a); *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477 (scope of the alternatives analysis must be considered in light of the nature of the project, the project's impacts, relevant agency policies, and other material facts).

The discussion of mitigation and alternatives is “the core of an EIR.” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. One of CEQA’s principal objectives is to ensure that public agencies systematically identify both the significant effects of proposed projects and the feasible mitigation measures and alternatives that will avoid or substantially lessen such effects. Pub. Resources Code, § 21002. New information of substantial importance to Desal Project implementation, related refinements to the Desal Project purpose and objectives, and new information regarding the Current Desal Project, including the Recharge Distribution Components and associated new and more substantial impacts, all require an updated identification and evaluation of feasible alternatives that meet project purpose and objectives and reduce significant adverse impacts.

(a) New Alternatives Recommended for Evaluation.

Based on a required updated and refined Desal Project purpose and objectives, and new information relevant to the Desal Project presented by the *OC Study*, the 2015 IRP,²³ IRWD’s August 26, 2015 research paper titled “Improving Orange County Water Reliability: Comparing Alternatives” (IRWD 2015 Reliability Alternatives Report) (Aug. 26, 2015),²⁴ and OCWD’s Long-Term Facilities Plan 2014 Update (OCWD Facilities Plan) (Nov. 19, 2014),²⁵ the new or updated subsequent EIR should explore the following alternatives for meeting the Desal Project’s updated purpose and objectives, that are likely to reduce significant adverse impacts associated with the Desal Project:

1. **The Orange County Basin Optimization Program.** The Orange County Basin Optimization Program would optimize water storage within the Basin by maximizing purchases of MWDSC water in years when available, with the goal of storing more water in the Basin. This would keep the Basin fuller and closer to the top of the current Basin operating range. This program, in combination with managing the Basin with OCWD’s existing management tools (e.g., the Basin Production Percentage (BPP) and the Replenishment Assessment), would result in maintaining higher groundwater levels during non-shortage years. During water short years, this stored water could then be utilized to the benefit of the Groundwater Producers. This approach would provide ample supplies during a multi-year MWDSC Water Supply Allocation. By directly serving MWDSC Tier-1 treated water during wet years in-lieu of pumping groundwater when Basin recharge facilities are full, and recharging MWDSC Tier-1 untreated water when there is extra recharge capacity in the Basin, the supplies stored in the Basin would increase. This would provide a much more cost-effective approach to improving Orange County’s water supply reliability than either the 2010 Desal Project or the Current Desal Project. The details and feasibility of Orange County Basin Optimization Program are documented in the IRWD 2015 Reliability Alternatives Report.

²³ See footnote 7, *supra*.

²⁴ See footnote 6, *supra*.

²⁵ See footnote 8, *supra*.

The Orange County Basin Optimization Program would meet the project objectives identified on page 3-95 of the 2010 FSEIR as follows:

- Provide a reliable local source of potable water to Orange County that is sustainable independent of climatic conditions and the availability of imported water supplies or local groundwater supplies because *the stored water would reliably offset MWDSC water delivery reductions during water short years over a wide range of conditions.*
- Provide Basin recharge water that not only meets the drinking water requirements of the Safe Drinking Water Act and the California Department of Public Health, but would also avoid the adverse groundwater and surface water quality impacts as well as water supply impacts discussed in Section III.C.3 that could result from recharge of the Basin with Product Water because *MWDSC water used to directly or indirectly recharge the Basin would comply with the applicable regulatory requirements that protect groundwater and surface water, including Basin Plan objectives, NPDES permit limitations, and the Antidegradation Policy.*
- Avoid water supply impacts discussed in Section III.C.3 that could result from the use of Product Water to recharge the Basin because *management of purchases of MWDSC water would be governed by the capacity of, and the need to recharge the Basin and to maximize the use of storm water and base flows in the Santa Ana River, rather than a contractual obligation to purchase and use all Product Water every year for the next 50 years.*
- Decrease energy use, ecosystem, and biologic resource pressures and adverse impacts associated with production of new Product Water by *relying on existing water resources and by optimizing storage using supplies that are already available.*
- Minimize demands on the existing imported water system *because increased demands for imported water when optimizing the storage and use of the Basin would be extremely small when compared to MWDSC's 1.8 to 1.9 million acre-feet annual sales.*

2. **Implementation of the MWDSC IRP Recommendations.** The 2015 IRP forecasts improvements to water supply reliability in Orange County resulting from implementation of adaptive management strategy as applied to the development of local supplies and conservation in MWDSC's service area, as described in the *2015 IRP*, as along with the MWDSC and MWDSC member agency projects and programs discussed above in Sections II.B and III.D.1.

The MWDSC IRP recommended adaptive management strategy is best described in the *2015 IRP* as follows:

"The fundamental goal of the IRP is for Southern California to have as reliable a water system for tomorrow as the region has enjoyed for decades, regardless of the challenges that emerge along the way. Metropolitan plans to meet this goal

through an adaptive management strategy that is the cornerstone of the 2015 IRP Update.” 2015 IRP, p. VI.

“Adaptive water management, as opposed to a rigid set of planned actions over the coming decades, is the most nimble and cost-effective manner for Metropolitan and local water districts throughout Southern California to effectively prepare for the future.” *Id.* at p. IX.

“This strategy for continued water supply reliability includes a diversified portfolio of actions that calls for stabilizing and maintaining imported supplies; meeting future growth through increased water conservation and the development of new – and protection of existing – local supplies; pursuing a comprehensive transfers and exchanges strategy; building storage in wet and normal years to manage risks and drought; and preparing for uncertainty with Future Supply Actions.” *Id.* at p. 6.5.

The implementation of this diversified portfolio of actions would ensure water supply reliability in Orange County and avoid significant adverse impacts associated with the Desal Project and the water supply impacts resulting from the Recharge Distribution Components discussed in Section III.C.3.

3. **OCWD’s Groundwater Replenishment System Final Expansion Project (GWRS Expansion).** The OCWD Facility Plan identifies the GWRS Expansion as a water reuse project that creates additional drought-proof drinking water supply by expanding highly purified recycled water facilities from 100 million gallons per day (MGD) to 130 MGD at the lowest cost of water for Southern California.²⁶ The GWRS Expansion would provide an additional 33,600 AFY supply of recharge water. *Id.*, App. 1, p. 1. On July 19, 2017, the OCWD Board awarded a contract for the final design of the GWRS Expansion. This project would avoid the significant adverse impacts associated with the Desal Project and the water supply impacts resulting from the Recharge Distribution Components discussed in Section III.C.3.

4. **Western Wellfield Project.** The OCWD Facility Plan identifies that,

“[T]here are a number of ways to decrease outflow to Los Angeles County by increasing production near the county line. Potential projects include: 1) Coastal Agencies paying for well construction and connection costs for wells in northwest Orange County and then connecting these wells to the West OC Water Board Pipelines to service the Coastal Agencies; 2) Increasing the Basin Production Percentage of producers in the vicinity of the county line, such as Fullerton and Anaheim, thereby shifting pumping closer to the county line; and 3) OCWD constructing four production wells near the county line and building a discharge pipeline to the West OC Water Board Pipeline.²⁷ The objective of this project is to decrease groundwater losses to Los Angeles County.”

²⁶ See footnote 8, *supra*.

²⁷ See footnote 8, *supra*.

Id., App. 1, p. 6. The reduction of losses to Los Angeles County would help ensure water supply reliability in Orange County and avoid the significant adverse impacts associated with the Desal Project and the water supply impacts resulting from the Recharge Distribution Components discussed in Section III.C.3.

5. **Deep Aquifer Recovery and Treatment.** IRWD operates its Deep Aquifer Treatment facility to make use of the good quality water located in the deep aquifer that has a brownish tint imparted from the remains of ancient vegetation. The use of supplies located in the Deep Aquifer does not substantially impact storage in the main aquifer of the Basin and could therefore be relied upon to improve water supply reliability in Orange County. The increased use of water in the Deep Aquifer would help to ensure water supply reliability in Orange County and avoid the significant adverse impacts associated with the Desal Project and the water supply impacts resulting from the Recharge Distribution Components discussed in Section III.C.3.

(b) Alternatives Rejected in the 2010 FSEIR Recommended for Reevaluation.

To be consistent with the refined Desal Project purpose and objectives, as well as new and available information relevant to the Desal Project presented by the *OC Study*, Term Sheet, 2015 IRP, IRWD 2015 Reliability Alternatives Report, the alternatives discussed above, and the DSEIR, the updated new or subsequent EIR should reevaluate the following alternatives which were rejected in the FSEIR because they comply with the Desal Project's purpose and objectives, including improving Orange County's water supply reliability, and are likely to reduce significant adverse impacts associated with the Desal Project:

- Alternative Site
- Alternative Ownership and Operation
- Alternative Facility Configuration
- Reduced Facility Size

The DSEIR improperly eliminates from further consideration the first three listed alternatives because they would entail onshore components outside the jurisdiction of the CSLC's approval of the Outfall/Intake Components and, it is claimed, are therefore beyond the scope of the DSEIR. DSEIR, pp. 5-9 – 10. Elimination of these alternatives is based on an inaccurate and incomplete project description that defines the CSLC's approval under consideration as limited to changes to the 2010 Desal Project and comprised only of the Outfall/Intake Components. The elimination ignores the changes to the Product Water delivery and distribution through the Recharge Distribution Components that make up the Current Desal Project as it exists in 2017. If the CSLC had prepared a subsequent EIR as required under CEQA, including an accurate, complete, and unsegmented project description consisting of the changes to the 2010 Desal Project, including the Recharge Distribution Components and the Outfall/Intake Components, these three alternatives would not have been eliminated from further consideration.

Furthermore, the DSEIR wrongly concludes that these alternatives need not be considered because they are outside of the CSLC's Lease Premises. *See id.* at p. 5-7. It is

inconsistent with CEQA's purpose to ignore off-site alternatives simply because on-site alternatives are being considered. *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1179. As such, the Alternative Site, Alternative Ownership and Operation, and Alternative Facility Configuration alternatives should be further evaluated for their consistency with the CEQA screening criteria in a new or subsequent EIR prepared pursuant to CEQA to determine whether one or more should be carried forward for further analysis as alternatives to eliminate or reduce significant project impacts.

The DSEIR also improperly eliminates from further consideration the Reduced Facility Size Alternative. The 2010 FSEIR's Reduced Facility Size Alternative, which would produce approximately 25 MGD or half of the Product Water produced by the preferred alternative), is rejected as an alternative in the DSEIR on the grounds that it would not (i) contribute desalinated water to satisfy regional water supply planning goals; (ii) improve water supply reliability; or (iii) avoid or reduce significant impacts. DSEIR, Tab. 5-2. Not only does the DSEIR fail to explain why a Reduced Facility Size Alternative that produces 25 MGD does not meet project objectives, but it also fails to take into account the new water supply and system reliability documented in the *OC Study* as discussed in Sections II.B.2 and III.D.1.

Contrary to the DSEIR's conclusory statement that the Reduced Facility Size Alternative would not meet project objectives, the Reduced Facility Size Alternative meets the majority, if not all, of the Desal Project's objectives as stated in the DSEIR and the 2010 FSEIR by: (1) using proven technology to provide a long-term water source and (2) contributing desalinated water to satisfy regional water supply planning goals. See DSEIR, p. ES-6 (summarizing the project objectives); CEQA Guidelines section 15126.6(c) (a potentially feasible alternative may be eliminated from further consideration if it fails to meet *most* of the basic project objectives or is unable to avoid significant environmental effects of the project under review); *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1304 (alternative could not be eliminated from consideration solely because it would impede to some extent the attainment of the project's objectives). Furthermore, the DSEIR fails to explain how a Reduced Facility Size Alternative would not reduce significant environmental impacts to ocean water quality and marine biological resources, regional air quality impacts associated with construction of the Desal Project. See DSEIR, p. 5-4; *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.*, *supra*, at p. 404 (conclusory comments used to eliminate alternatives from further consideration does not foster informed decision-making and informed public participation).

The DSEIR is devoid of any legally relevant basis for eliminating the Reduced Facility Size Alternative from further consideration. The DSEIR's decision to summarily dismiss a smaller facility as incapable of meeting regional water supply goals or improving water supply reliability is without basis. The DSEIR also fails to identify the specific "regional water supply planning goals" that cannot be met with a smaller facility, or to include a consistency analysis supporting its conclusion that a smaller facility is inconsistent with such goals. As the California Supreme Court recently held in *Cleveland National Forest Foundation v. San Diego Association of Governments*, Case No. S223603, 2017 Cal. LEXIS 5125 (Jul. 13, 2017), to be adequate, an EIR must include a fact-based analysis of project consistency with long-term planning objectives. *Id.* at p. *31. The DSEIR's conclusory discussion and rejection of the Reduced Facility Size Alternative fails to meet CEQA's substantive and procedural requirements.

(c) Alternatives that are Not Recommended for Evaluation because They are Unlikely to Reduce Adverse Impacts.

Based on the updated and refined Desal Project purpose and objectives, and the changes and potential adverse impacts of the 2010 Desal Project, a new or subsequent EIR must evaluate feasible alternatives that could reduce one or more of the significant adverse impacts of the Current Desal Project. These potential impacts include groundwater quality, surface water quality, and water supply impacts resulting from the Recharge Distribution Components discussed in Section III.C.3. Information developed as a part of OCWD's ongoing planning and conceptual design work on a delivery system for Product Water, as required by the Term Sheet, indicates that one alternative to the Current Desal Project that may be evaluated is a Desal Project incorporating "In-Lieu Distribution Components" as the delivery system for Product Water in place of the Surface/Potable Distribution System and/or the Recharge Distribution Components. (In-Lieu Distribution Alternative). OCWD includes this type of distribution method in its Option 6 proposal, which would deliver Product Water to the coastal groundwater producing agencies in lieu of those agencies producing groundwater from the Basin. This would result in the in-lieu recharge of the aquifer. Although this alternative may be recommended for evaluation, it will not avoid or mitigate the significant adverse environmental impacts of the Current Desal Project which must be avoided to protect the existing high quality local water supplies.

The In-Lieu Distribution Components would deliver and distributed Product Water directly to Orange County retail water supply agencies in the current groundwater conveyance system in-lieu of recovering supply from groundwater pumping from the Basin, incidentally resulting in additional recharge to the Basin due to decreased groundwater pumping. As studied and documented by IRWD, implementation of the In-Lieu Distribution Component, like implementation of the Recharge Distribution Components, would result in significant adverse impacts to IRWD's recycled water quality and system. This information has been presented to OCWD and the Applicant in IRWD's March 8, 2016 presentation of preliminary analysis results, as well as adverse water supply impacts. IRWD Presentation to OCWD.

Because Product Water that is much higher in TDS and boron would be delivered in lieu of high quality groundwater as potable water to IRWD customers, customer use of the lower quality potable water will result in sewage that is also higher in boron and TDS concentrations being delivered to the MWRP as influent. Treatment of influent that is much higher in these pollutants is reasonably likely to result in adverse impacts on the quality of recycled water produced at the MWRP and then distributed throughout IRWD's recycled water system because the MWRP treatment facilities cannot remove these pollutants. As noted in Section III.C.3. above, IRWD and its consultants have preliminarily evaluated the potential adverse impacts of Product Water pollutants on the quality of recycled water produced for, and served to IRWD customers. Further, IRWD has made these results public. For example, IRWD has shared them with OCWD and the Applicant in a letter dated March 8, 2016. See IRWD Presentation to OCWD. This preliminary evaluation indicates that the higher constituent levels in Product Water would not be sufficiently removed during the MWRP treatment process, which in turn is expected to result in:

- Significant adverse impacts to ornamental and agricultural plants irrigated with recycled water throughout IRWD's service area, which is likely to reduce demand for recycled water in contravention of SWRCB Policy for Water Quality Control for Recycled Water;²⁸ and
- Discharges into recycled water storage reservoirs exceeding NPDES permit requirements for TDS and adversely affecting surface water reservoirs. See RWQCB Order No. RS-2015-0024/NPDES No. CA8000326.

IV. THE CSLC CANNOT LAWFULLY APPROVE THE OUTFALL/INTAKE COMPONENTS BASED ON THE DSEIR, WHICH IS INADEQUATE.

Even if it were somehow legally appropriate for the CSLC to conduct focused CEQA review addressing only the Outfall/Intake Components rather than preparing a comprehensive new or subsequent EIR, the DSEIR is inadequate even the narrow purposes of the CSLC's focused review and approval of the proposed Outfall/Intake Components. As documented in this Section IV, the DSEIR fails as an informational document because it (i) defines impermissibly narrow project objectives, (ii) fails to consider a reasonable range of alternatives, (iii) fails to incorporate a sufficient cumulative impacts analysis, and (iv) fails to identify, fully evaluate, and consider appropriate mitigation for a number of environmental impacts associated with implementation of the Outfall/Intake Components under consideration by the CSLC.

A. The Statement of Project Objectives in the DSEIR is Impermissibly Narrow.

The statement of project objectives must relate to the underlying purpose of the project under review. CEQA Guidelines, § 15124(b); *Habitat & Watershed Caretakers v. City of Santa Cruz*, *supra*, 213 Cal.App.4th at p. 1299. The DSEIR includes among the project objectives "obtaining the necessary approvals" from the RWQCB and the CCC. DSEIR, p. 2-3. This objective does not illuminate the underlying purpose of the Desal Project. See *Habitat & Watershed Caretakers v. City of Santa Cruz*, *supra*, 213 Cal.App.4th at p. 1299. The DSEIR identifies the following underlying purposes of the Project: to affordably provide a long-term, reliable source of water, to reduce local dependence on imported water, and to contribute desalinated water to satisfy regional water supply planning goals. See DSEIR, p. 2-3.

The DSEIR's definition of the project objectives in terms of obtaining the regulatory approvals (e.g., coastal development permit) specifically necessary to construct and operate intakes, wedgewire screens, and a multiport diffuser for the Desal Project unduly limits the selection of feasible alternatives that can satisfy the underlying project purpose, *i.e.*, to provide an affordable and reliable regional water supply. See CEQA Guidelines, § 15124(b) ([project objectives are directly related to the range of alternatives analyzed in an EIR]). Such a narrow characterization of project objectives is also improper because it jettisons the CSLC's goal to ensure a **cost-effective**, reliable local water supply and presupposes the approval of the Desal Project. As a result, and as further discussed in Section IV.B, the DSEIR is invalid because it fails to consider a range of alternatives that allows for informed decision-making. See *Mann v.*

²⁸ SWRCB, Policy for Water Quality Control for Recycled Water (Jan. 2013) available at http://www.waterboards.ca.gov/water_issues/programs/water_recycling_policy/docs/rwp_revto.pdf

Community Redevelopment Agency of the City of Hawthorne (1991) 233 Cal.App.3d 1143, 1151.

B. The Alternatives Analysis is Inadequate.

The alternatives analysis in the DSEIR is inadequate because it fails to identify the rationale for selecting those potentially feasible alternatives eliminated from further consideration and fails to include a reasonable range of alternatives. These errors are fatal to the DSEIR and for this reason, the DSEIR must be revised to include an adequate alternatives analysis and recirculated for public review and comment.

1. The DSEIR Fails to Disclose the CSLC's Rationale for Selecting Potentially Feasible Alternatives.

An EIR is required to explain the rationale for selecting the alternatives to be discussed. CEQA Guidelines, § 15126.6(c). The DSEIR identifies the following six potentially feasible alternatives and concludes that each alternative fails to meet one or more screening criteria set forth in CEQA Guidelines section 15126.6:

- Intake Pipeline Extension (increased construction-related impacts)
- Two-port Diffuser (feasibility)
- Beach Well Intake (increased impacts)
- Subsurface Infiltration Gallery Intake (increased impacts)
- Alternative Discharge Location (technically infeasible)
- Alternative Discharge Design – Diffuser (does not reduce impacts).

DSEIR, pp. 5-6 – 8, Tab. 5-2. However, the DSEIR fails to explain the rationale for selecting these particular alternatives or identify the impacts that may be avoided with the implementation of these alternatives. Indeed, three of the six potentially feasible alternatives would result in greater environmental impacts than the Desal Project. For these reasons, the alternatives analysis in the DSEIR must be revised to fully document the logic behind the selection of potentially feasible alternatives in order that the public and decision-makers may determine whether the alternatives considered are consistent with CEQA's principal objective of avoiding potentially significant impacts where feasible.

2. The Range of Alternatives Evaluated is Unreasonable.

An EIR must describe a reasonable range of alternatives. CEQA Guidelines, § 15126.6(a). The scope of the alternatives analysis must be considered in light of the nature of the project, the project's impacts, relevant agency policies, and other material facts. *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477. The key criterion in judging the adequacy of the range of alternatives analyzed in an EIR is whether the alternatives considered provide enough variation with respect to environmental concerns to allow for

informed decision-making. *Mann v. Community Redevelopment Agency of the City of Hawthorne* (1991) 233 Cal.App.3d 1143, 1151.) The DSEIR fails this test.

The alternatives carried forward for detailed analysis in the DSEIR are the No Project Alternative — an alternative that is legally required to be included in an EIR — and alternative engineering designs of the two Outfall/Intake Components (Rotating Brush-Cleaned, Stainless Steel Wedgewire Screens Alternative and the Six-Port Diffuser Alternative). The range of alternatives is unreasonable because it fails to present enough of a variation to allow for informed decision-making. See *Mann v. Community Redevelopment Agency of the City of Hawthorne*, *supra*, 233 Cal.App.3d at p. 1151.

3. The DSEIR Fails to Evaluate Significant Environmental Impacts.

The DSEIR fails to identify, fully evaluate, and consider feasible mitigation measures for a number of significant environmental impacts associated with implementation of the Outfall/Intake Components, including air quality, greenhouse gas emission, energy use, noise, transportation and hazardous conditions impacts.

C. The DSEIR Fails to Identify and Address Cumulative Impacts Likely to be Associated with the Reasonably Foreseeable Recharge Distribution Components.

Although the proper characterization of the Recharge Distribution Components under CEQA is as an element of the Current Desal Project, the CSLC is required by CEQA to at least identify the Recharge Distribution Components as a reasonably foreseeable project for purposes of conducting an analysis of potentially significant adverse cumulative impacts.

The cumulative impacts analysis of the DSEIR is required to, but has not identified and analyzed the Recharge Distribution Components as a reasonably foreseeable future project. Supplemental EIRs are required to identify all reasonably foreseeable or “probable future projects producing related or cumulative impacts [with the project under review], including, if necessary, those projects outside the control of the agency.” *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396-397; CEQA Guidelines, § 15130, subd. (b)(1)(A). A project need not be formally approved, nor precisely defined in order to qualify as a reasonably foreseeable future project. *Ibid.* A significant investment of time and financial resources in preparation for formal regulatory review of a project is sufficient to qualify a project as reasonably foreseeable. 2 Kostka & Zischke, Practice Under the California Environmental Quality Act, § 13.42, p. 13-43.

The Recharge Distribution Components under development by OCWD are reasonably foreseeable, as reflected in OCWD’s Board minutes, staff presentations, and other materials. See, e.g., OCWD, *Workshop #3: Distribution of Poseidon Resources Ocean Desalinated Water* (Jul. 6, 2016). OCWD staff’s presentation at an OCWD Board of Directors meeting held on July 6, 2016 indicates that OCWD had committed Recharge Distribution Components as a method of distributing Product Water, having invested considerable staff resources toward refining, planning, and conceptually designing this proposal. *Id.*, Slide 4. In short, there is “telling evidence” that OCWD had formulated “a reasonably definite proposal for the development” of

the Recharge Distribution Components long before CSLC issued the Notice of Preparation of the DSEIR. *Laurel Heights*, supra, 47 Cal.3d at p. 397.

The DSEIR states that although the 2010 FSEIR analyzed construction and operation of a distribution and delivery system component of the 2010 Desal Project, the only reason that the Recharge Distribution Components are not considered at least as a reasonably foreseeable projects in the cumulative impacts analysis of the DSEIR is because the CSLC deems them to be “speculative” as “OCWD staff placed on hold any plans to begin an extensive environmental impacts analysis” of the Recharge Distribution Components. DSEIR pp. 1-2, 3-7. Whether or not an agency has, for the moment and subject to reconsideration at any time, placed environmental review of a project on hold is not the test for whether it is a reasonably foreseeable project for purposes of cumulative impacts analysis. Instead, the test is whether there is “telling evidence” that OCWD had formulated “a reasonably definite proposal for the development” of the Recharge Distribution Components. *Id.* The available information regarding the Recharge Distribution Components is sufficiently developed for evaluation of potential adverse cumulative groundwater and surface water quality, as well as recycled water impacts. However, that cumulative impacts analysis has not been conducted in the DSEIR.

For the above reasons, the DSEIR is required, at a minimum, to consider the Recharge Distribution Components as part of the cumulative impacts analysis in the DSEIR. See CEQA Guidelines, § 15130, subd. (b)(1)(A). Failure to include the Recharge Distribution Components among the list of probable future projects and to conduct, at a minimum, an analysis of potentially significant cumulative water quality and water supply impacts associated with those components renders the DSEIR inadequate. In the event that for some reason CSLC is not required to prepare a new or subsequent EIR to fully evaluate the Current Desal Project, this inadequacy of the DSEIR can only be remedied by the preparation of a proper cumulative impacts analysis that considers the Recharge Distribution Components as a reasonably foreseeable project, and recirculation of the DSEIR.

V. CONCLUSION.

For all of the above reasons, an updated new or subsequent EIR that includes a complete and accurate project description and discussion of environmental effects, statement of purpose and objectives, and appropriate and feasible mitigation measures and alternatives to reduce Current Desal Project impacts must be prepared and circulated for public comment.

If you have any questions, please contact Mary Lynn Coffee at (949) 833-7800.

Sincerely,



Mary Lynn Coffee
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MLC:snc

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July 27, 2017
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cc: Mike Markus, General Manager, Orange County Water District
Hope Smythe, Executive Director, Santa Ana Regional Water Quality Control Board
John Ainsworth, Executive Director, California Coastal Commission