

ATTACHMENT B

July 2020

MEMORANDUM OF AGREEMENT

among

**the State Water Resources Control Board,
the California Coastal Commission,
the California State Lands Commission,
the California Department of Fish and Wildlife,
the North Coast Regional Water Quality Control Board,
the San Francisco Bay Regional Water Quality Control Board,
the Central Coast Regional Water Quality Control Board,
the Los Angeles Regional Water Quality Control Board,
the Santa Ana Regional Water Quality Control Board,
the San Diego Regional Water Quality Control Board,
Monterey Bay National Marine Sanctuary,
and the National Marine Fisheries Service's West Coast Region
Regarding Interagency Coordinated Review of
Environmental Documents and Permit Applications
for Seawater Desalination Facilities**

PURPOSE:

The purpose of this Agreement is to facilitate timely and effective coordination among the State Water Resources Control Board (State Water Board), the California Coastal Commission (Coastal Commission), the California State Lands Commission (State Lands), the California Department of Fish and Wildlife (Fish and Wildlife), the North Coast Regional Water Quality Control Board, the San Francisco Bay Regional Water Quality Control Board, the Central Coast Regional Water Quality Control Board, the Los Angeles Regional Water Quality Control Board, the Santa Ana Regional Water Quality Control Board, the San Diego Regional Water Quality Control Board, Monterey Bay National Marine Sanctuary (MBNMS), and the National Marine Fisheries Service's (NMFS) West Coast Region (referred to individually as "Agency" and collectively as "Agencies") during review of environmental documents and permits or lease applications for proposed seawater desalination facilities. This Agreement recognizes the shared and separate authorities of the Agencies and describes the manner in which the Agencies and their staffs will coordinate their respective environmental and permitting or leasing review obligations. The Agreement addresses the following main issues:

- I. Coordinating on desalination project information needs before and during California Water Code (Water Code) section 13142.5(b) determinations, permitting or leasing application reviews, and environmental reviews under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA).
- II. Developing and requesting the information necessary to conduct review of proposed desalination projects.
- III. Maintaining confidentiality of communications, discussions, and records.

- IV. Conducting supplemental agency review for proposed changes to permitted facilities.

This Agreement additionally establishes the process for resolving any disagreements among the Agencies and describes the process for modifying or canceling this Agreement.

WHEREAS:

- I. Pursuant to California's Porter-Cologne Water Quality Control Act, Water Code section 13000 et seq., the State Water Board and the Regional Water Quality Control Boards (Regional Water Boards) are the principal state agencies with primary responsibility for the coordination and control of water quality (Water Code § 13001). Water Code section 13170.2 provides that the State Water Board shall formulate and adopt a Water Quality Control Plan for Ocean Waters of the State (California Ocean Plan).
- II. Pursuant to California's Coastal Act and the California Coastal Zone Management Program, including the California Ocean Plan, the Coastal Commission regulates development within the state's coastal zone through its coastal development permit and federal consistency processes, and through its certification of Local Coastal Programs implemented by local jurisdictions.
- III. Pursuant to section 305(b)(4) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) (16 U.S.C. § 1855(b)(4)), if the Secretary of Commerce receives information that an action authorized, funded, undertaken, or proposed to be authorized, funded, or undertaken by a State or Federal agency would adversely affect any essential fish habitat (EFH) identified under the MSA, the Secretary shall recommend to such agency measures that can be taken by the agency to conserve such habitat. Within the Department of Commerce, the National Oceanic and Atmospheric Administration's (NOAA) NMFS West Coast Region generally provides such conservation recommendations for actions conducted in California. NMFS also engages in conservation and recovery actions for federally-listed species under its jurisdiction pursuant to the Endangered Species Act of 1973 (16 U.S.C. § 1531, et seq.).
- IV. Pursuant to the National Marine Sanctuaries Act (16 U.S.C. § 1431 et seq.) and its implementing regulations, the NOAA Office of National Marine Sanctuaries (ONMS), MBNMS may issue permits and/or authorizations to allow the conduct of certain types of activities that are otherwise prohibited in the Sanctuary. MBNMS regulations prohibit certain activities in the Sanctuary (15 Code of Federal Regulations (CFR) § 922.132) unless a MBNMS permit can be issued, or an authorization for another federal or state permit can be issued, under specified conditions (15 CFR §§ 922.49, 922.132(e)). MBNMS also applies the non-regulatory 2010 desalination guidelines to evaluate desalination projects, as they were developed in partnership with Coastal Commission, NMFS, and other

state and local agencies, to address issues associated with desalination including site selection, construction and operational impacts, plant discharges, and intake systems.

- V. Pursuant to Public Resources Code sections 6216 and 6301, State Lands has jurisdiction and management control over public lands owned by the State, which include ungranted “sovereign” tide and submerged lands (lands lying below tidal and navigable waters). State Lands may issue leases for uses of such lands that align with regional and statewide public trust needs and values and are in the State’s best interest.
- VI. Pursuant to Coastal Act section 30412, the Coastal Commission, except in limited circumstances, shall not take actions in conflict with any State Water Board or Regional Water Board determinations regarding water quality. Coastal Act section 30412 also establishes that the State Water Board, Regional Water Boards, and the Coastal Commission share jurisdiction of Water Code section 13142.5, which among other requirements, requires that new or expanded coastal power plants or other industrial installations using seawater for cooling, heating or industrial processing shall use the best available site, design, technology, and mitigation measures feasible to minimize intake and mortality of all forms of marine life.
- VII. On May 6, 2015, the State Water Board adopted Resolution No. 2015-0033 that approved the Amendment to the California Ocean Plan Addressing Desalination Facility Intakes, Brine Discharges, and to Incorporate Other Non-substantive Changes (Desalination Amendment). The Desalination Amendment establishes requirements for determining how to select the best available site, design, technology, and mitigation measures feasible to minimize intake and mortality of all forms of marine life associated with the construction and operation of seawater desalination facilities. On January 28, 2016, the Office of Administrative Law approved the regulatory provisions of the Desalination Amendment pursuant to section 11353 of the Government Code. On April 7, 2016, the U.S. Environmental Protection Agency completed review of the Desalination Amendment and approved elements of the receiving water limitation for salinity as revised water quality standards.
- VIII. Review of proposed desalination projects for consistency with the Desalination Amendment will generally be a significant and complex undertaking by the Agencies. The site- and location-specific nature of project review and the involvement of different agencies support the establishment of a coordinated and cooperative interagency process for State and federal agencies involved in this review, for purposes of consistency and efficiency. Although each Agency has a unique, independent role and authority in reviewing and permitting desalination facilities, there are opportunities for the Agencies to collaborate in developing the information needed to conduct their reviews.

- IX. In adopting the Desalination Amendment, the State Water Board directed its staff to propose and pursue a Memorandum of Agreement with relevant agencies to promote interagency collaboration for evaluating siting, design, technology, and mitigation, as part of permitting and approval of seawater desalination facilities. This Agreement fulfills that directive.
- X. Each of the signatory Agencies believes it is in the best interests of the project applicants and the State to coordinate review of proposed seawater desalination facilities, to provide that review in a manner that is both timely and comprehensive, and to ensure each Agency is able to determine project conformity with its respective statutory and regulatory requirements.
- XI. Each signatory Agency believes it is useful to enter into this Agreement to ensure a shared understanding of their respective roles and responsibilities during project review and permitting or leasing of proposed seawater desalination facilities, to maintain clear communication and expectations among the Agencies, and to ensure that the necessary reviews and analyses are conducted in a thorough and timely manner.
- XII. Each signatory Agency believes that disclosure of deliberative and pre-decisional communications, discussions, document drafts, and records that are related to preparation of the Agencies' staff recommendations prior to public release may be contrary to the public interest in that 1) such disclosure may inhibit free and open consultation between and among the Agencies; and 2) such disclosure could generate confusion among members of the public over matters, including but not limited to differences between document drafts.
- XIII. Information contained in communications, discussions, document drafts, and records that are related to preparation of the Agencies' staff recommendations prior to public release are or may be confidential and exempt from mandatory disclosure to the public under the California Public Records Act (PRA; California Government Code §§ 6250 *et seq.*) or the Freedom of Information Act (FOIA; Title 5, United States Code §§ 552 *et seq.*).
- XIV. Pursuant to subdivision (e) of California Government Code section 6254.5, disclosure of PRA-exempt records shall not constitute a waiver of any provisions of the PRA, or other similar provisions of law, when made "to a governmental agency that agrees to treat the disclosed material as confidential. Only persons authorized in writing by the person in charge of the agency shall be permitted to obtain the information. Any information obtained by the agency shall only be used for purposes that are consistent with existing law."
- XV. Pursuant to FOIA Exemption 5 (5 U.S.C. § 552 (b)(5)), "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" and whose disclosure would result in a foreseeable harm are exempt from FOIA disclosure.

- XVI. The Agencies share a common interest in performing legally sufficient environmental review of seawater desalination facility projects. Consultation between and among their respective legal staffs and scientific, legal, technical, and other staff experts may be reasonably necessary to accomplish the purposes related to that common interest. Therefore, communications between and among their respective legal staffs regarding the review of environmental documents and permit or lease applications or Water Code section 13142.5(b) compliance for proposed seawater desalination facilities may be exempt from disclosure under the PRA (California Government Code § 6254, subd. (k)) and FOIA (5 U.S.C. § 552 (b)(5)) to the extent permitted by these laws.

THEREFORE:

The above signatory Agencies agree to the following:

- I. **Coordination of environmental review on Water Code section 13142.5(b) determinations and permit or lease applications**
 - A. As soon as practicable upon receipt of draft or final documents regarding proposed seawater desalination projects or proposed changes to existing seawater desalination projects, the first such Agency receiving such documents will notify the other Agencies.
 - B. The Agencies will work together to identify, for each other and for project applicants, appropriate lead staff contacts for each proposed project and the information needed to conduct agency review of each project (as described below).
 - C. The Agencies shall also work together to identify the preferred or required sequence for conducting the permit or leasing decision-making and any associated environmental review for each individual project. Considerations may include the role of the lead agency for purposes of CEQA ("the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect on the environment" [Pub. Resources Code, § 21067]) and the role of the State and applicable Regional Water Board under the Desalination Amendment to identify the "best available site, design, technology, and mitigation measures feasible to minimize the intake and mortality of all forms of marine life."
 - D. Where appropriate, each Agency will request that project applicants submit relevant documents to the involved Agencies in a coordinated manner and in acknowledgement of the Permit Streamlining Act and each Agency's timing requirements and constraints during the environmental review and permitting, leasing, or approval processes.

II. Developing necessary information

- A. The information needed for the State Water Board and Regional Water Boards to determine whether proposed seawater desalination facilities conform to Water Code section 13142.5(b) is described, in part, in the Desalination Amendment. The information required for Coastal Commission permit review is described, in part, in Title 14, California Code of Regulations section 13053.5. Information needed for State Lands surface and submerged lands lease applications may be found on the agency's website at <http://www.slc.ca.gov/Leases-Permits/Leases-Permits.html>.
- B. During the review of either an application or a request for Water Code section 13142.5(b) determination for a proposed seawater desalination facility, each Agency will identify the site-specific and project-specific information needed to conduct its review. To reduce redundancy and to allow applicants to prepare information that will meet multiple agency needs, the Agencies will coordinate their information requests to project applicants, to the extent practicable. Information needed during the reviews may relate to, but not be limited to:
- Determining project and site alternatives that will be consistent with relevant land use requirements and will protect water quality, marine life, and other coastal resources;
 - Identifying design and technology alternatives that will minimize effects on water quality and marine life from construction and operation of seawater desalination facilities;
 - Developing mitigation measures needed to avoid or minimize adverse effects on water quality, marine life, and other coastal resources.

III. Confidentiality

- A. In consideration for receipt of information or documents pertaining to review of seawater desalination facilities projects, the Agencies agree that to the maximum extent allowed by law, all written communications, discussions, and records that are related to preparation of the Agencies' staff recommendations on specific permit or lease applications or requests for Water Code section 13142.5(b) determinations and that are shared among the Agencies (confidential communications) shall remain confidential among the Agencies. To the extent practicable, Agency staff should mark such documents as confidential when transmitting them to another agency's staff pursuant to this Agreement.
- B. Pursuant to subdivision (e) of section 6254.5 of the Government Code and to the extent permitted by FOIA and other applicable law, the Agencies agree to allow access to confidential communications, discussions, and records only to those persons who are listed in Attachment A, decisionmakers in those persons' chain of command, and Agency legal counsel. An Agency may amend its list of

persons authorized to access such records by submitting a signed document that will be attached as an addendum to Attachment A. Such addenda are not required to be signed by other Agencies and entities signatories to this Agreement. If an individual authorized to access confidential information under this Agreement leaves employment at a signatory Agency, that Agency shall notify the other signatory Agencies immediately in writing.

- C. The Agencies shall not treat inadvertent and/or unintentional disclosure of confidential communications to a third party as a waiver of confidentiality and/or privilege of that information. Once a signatory Agency becomes aware of an inadvertent and/or unintentional disclosure, and subject to the PRA, FOIA and other applicable laws, the information thereby disclosed shall not be further distributed or disclosed to parties other than the Agencies, unless otherwise agreed to by the Agencies. In the event a signatory Agency makes an inadvertent and/or unintentional disclosure, the Agency that made the disclosure shall contact the party or parties to whom the information was disclosed to endeavor to seek return of the information. Inadvertent, unintentional disclosure of information to a third party shall not nullify this Agreement as to any other confidential and/or privileged information not disclosed.
- D. In the event a signatory Agency receives a demand under the PRA, or other potential or actual legal compulsion for disclosure of any portion of confidential communications, that Agency will promptly notify the other signatory Agencies. The Agency shall make reasonable efforts to consult with the other Agencies in determining an appropriate response to the demand, including possible assertion of exemptions under the PRA, FOIA, or other laws as appropriate.
- E. This Agreement shall not restrict the Agencies' use of documents, information, or other work, which was obtained from sources other than the Agencies.
- F. Obligations under this Agreement shall not apply to any portion of confidential communications which, when received, is not exempt from disclosure under the PRA, FOIA, or other law or court order, or which becomes non-exempt while in possession of an Agency through no fault of the Agency (i.e., by operation of law or court order), or which the Agencies jointly determine may be disclosed.
- G. As required by 5 U.S.C. § 2302(b)(13) regarding any restriction with respect to disclosure by a federal government employee, these provisions are consistent with, and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are

incorporated into this agreement and are controlling. This paragraph shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress.

IV. Supplemental agency review for proposed changes to projects

- A. If an applicant proposes substantial changes to its facility after receiving its necessary permit(s) or lease, each Agency will determine whether the proposed changes require additional review or permitting and, if so, will coordinate subsequent review and approval in the manner described above.

V. Resolving disagreements

- A. If there are disagreements among the Agencies regarding the provisions of this Agreement, representatives of each Agency staff will meet to discuss the issues in dispute and shall work towards agreement.
- B. If agreement is not reached within a reasonable time, the executive officers of the involved Agencies or their representatives shall confer in order to attempt to resolve the disagreement.

VI. General agreements

- A. The agencies recognize and acknowledge that each Agency must fulfill its statutory and regulatory responsibilities in accordance with CEQA, NEPA, the Permit Streamlining Act, and other applicable statutes, regulations, guidance and policy, and that nothing in this Agreement affects any of the Agencies' legal obligations or jurisdiction. The Agencies also recognize that each Agency's decisions may affect similar actions of the other Agencies if differing conditions are placed on the respective permits or lease. All Agencies agree, consistent with applicable law, to work together to minimize such conflicts.
- B. The Agencies specifically understand that this Agreement is not a delegation of their respective responsibilities. Each Agency shall retain its respective authority to make its decisions on a proposed or modified desalination facility, consistent with existing laws, regulations and policies.
- C. The Agencies recognize and acknowledge that this Agreement supplements and does not supersede or nullify existing agreements among or between any of the signatory Agencies related to review of proposed desalination projects.
- D. No failure or delay by the Agencies in exercising any right or obligation under this Agreement shall operate as a waiver or preclude exercise of any other or further right or obligation under this Agreement.

- E. Nothing in this Agreement is intended to alter existing law as to each Agency's responsibility to bear its own costs in any future litigation, or to impose any additional financial obligations or commitments on the Agencies. Nor do the Agencies assume any affirmative duty to disclose any information to one another or to any other entity, except as expressly set forth in this Agreement or as otherwise required by law or court order.
- F. This Agreement is for the benefit of the Agencies party to it, and is not intended to benefit or to be enforceable by any third party.

VII. Counterparts

- A. This Agreement may be executed in counterparts, and each counterpart shall be considered an original, and all of which, taken together shall constitute one and the same agreement. The State Water Board shall be responsible for receiving and retaining the executed signature pages of each party and for providing a copy of the dated and executed agreement to each of the signatories. A signed copy of this Agreement delivered by facsimile, e-mail or other means of electronic transmission shall be deemed to have the same legal effect as delivery of the original signed copy of this Agreement.

VIII. Amendments

- A. This Agreement may be amended by mutual consent of the signatory Agencies, including any amendment to add a new signatory Agency. Amendments to this Agreement may be executed as set forth in section VII above. However, an agency may at any time amend or supplement the listing of authorized persons in Attachment A by submitting official correspondence so requesting. Such addenda to Attachment A as provided in section III. B. of this Agreement.

IX. Cancellation

- A. Any Agency may end its involvement and obligations under this Agreement by providing 30-day written notice to the others. However, the provisions of this Agreement pertaining to confidentiality will continue to apply to all confidential communications during the pendency of this Agreement. Except as provided by applicable law, the terminating Agency shall return all copies of confidential communications provided pursuant to this Agreement upon request by the Agency or Agencies who provided the information.

CONCURRENCE

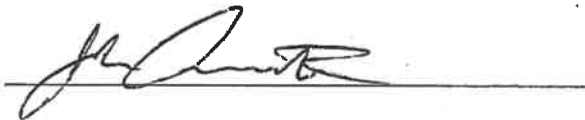
The Agencies agree to the terms of this Agreement, as evidenced by the signatures of their representatives below.

Signed,



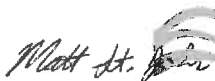
Eileen Sobeck, Executive Director
State Water Resources Control Board

Date: 11/15/19



John Ainsworth, Executive Director,
California Coastal Commission

Date: 12-16-2019



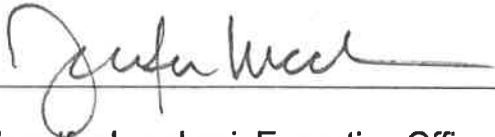
Digitally signed by Matt
St. John

Date: 2020.04.29 17:10:50

Water Boards

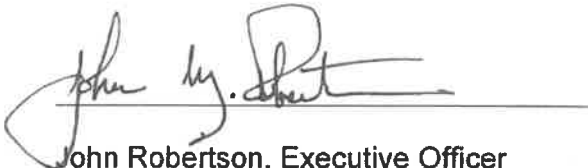
Matthias St. John, Executive Officer
North Coast Regional Water Quality
Control Board

Date: _____



Jennifer Lucchesi, Executive Officer
California State Lands Commission

Date: 11/25/2019



John Robertson, Executive Officer
Central Coast Regional Water Quality
Control Board

Date: 11-25-19

Michael Montgomery, Executive Officer
San Francisco Bay Regional Water Quality
Control Board



Digitally signed by
Michael Montgomery
Date: 2019.12.03 10:47:55
-08'00'

Date: _____



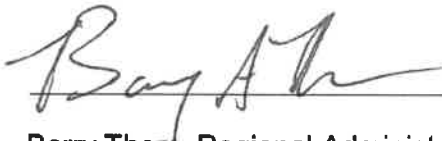
Hope Smythe, Executive Officer
Santa Ana Regional Water Quality
Control Board

Date: 12/10/19



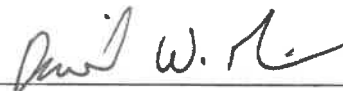
Renee Purdy, Executive Officer
Los Angeles Regional Water Quality
Control Board

Date: 12/3/19



Barry Thom, Regional Administrator
National Marine Fisheries Service, West
Coast Region

Date: December 6, 2019



Dave Gibson, Executive Officer
San Diego Regional Water Quality
Control Board

Date: 19 November 2019



John Armor, Director
NOAA's Office of National Marine
Sanctuaries

Date: 2/18/2020



Charlton Bonham, Director
California Department of Fish and
Wildlife

Date: July 13, 2020

****NOTE: If the person signing this Confidentiality Agreement on behalf of the Agency is not "the person in charge of the agency," please include a written delegation of authority authorizing the person to sign on his/her behalf. The California Public Records Act, section 6254.5, subd. (e) states in part that "[o]nly persons authorized in writing by the person in charge of the agency shall be permitted to obtain the information."**

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Attachment A

**Specific Agency Personnel Authorized to Access Information Determined to be
Confidential**

State Water Resources Control Board

Marnie Ajello
Tamarin Austin
Jonathan Bishop
Daniel Ellis*
Leslie Hart
Shahla Farahnak
Afrooz Farsimadan
Jennifer Fordyce
Sophie Froelich
Catherine George Hagan
Nathan Jacobsen
Renan Jauregui
Michael Lauffer
Diana Messina
Laura McLellan
Karen Mogus
Adriana Nunez
Teresita Sablan
Scott Seyfried
Eileen Sobeck
Jan Stepek
Emel Wadhvani
Claire Waggoner
Yuri Won
Marleigh Wood
Philip Wyels
Vincent Vu
Stephanie Yu

California Coastal Commission

Alison Dettmer
Kate Huckelbridge
Laurie Koteen
Tom Luster*
Louise Warren

California State Lands Commission

Alexandra Borack*
Brian Bugsch
Lucinda Calvo

Colin Connor
Maren Farnum
Kenneth Foster
Jamie Garrett
Eric Gillies
Pamela Griggs
Wendy Hall
Cynthia Herzog
Cheryl Hudson
Benjamin Johnson
Grace Kato
Jennifer Lucchesi
Jennifer Mattox
Drew Simpkin

California Department of Fish and Wildlife

Arn Aarreberg
Loni Adams
Amanda Canepa
Coriana Flannery
Becky Ota*
Brian Owens
Eric Wilkins

North Coast Regional Water Quality Control Board

Mona Dougherty*
Matthias St. John
Claudia Villacorta

San Francisco Bay Regional Water Quality Control Board

Thomas Mumley
Bruce Wolfe

Central Coast Regional Water Quality Control Board

Phil Hammer
Harvey Packard
John Robertson
Matt Keeling
Peter von Langen*

Los Angeles Regional Water Quality Control Board

Mazhar Ali
Rosario Aston
Cris Morris
Cassandra Owens*
Renee Purdy

Jenny Newman

Santa Ana Regional Water Quality Control Board

Jayne Joy
Julio Lara*
Terri Reeder
Hope Smythe
Mark Smythe
Ann Sturdivant
Lauma Willis

San Diego Regional Water Quality Control Board

David Barker
Eric Becker
Darren Bradford
Kelly Dorsey
David Gibson
Joann Lim
Alan Monji
Ben Neill*
Brandi Outwin-Beals
Keith Yeager

National Marine Fisheries Service, West Coast Region

Bryant Chesney*
Joe Dillon
Deanna Harwood
Mandy Ingham
Kathryn Kempton
Scott Rumsey
Penny Ruvelas
Gary Stern
Barry Thom
Lisa Van Atta
Chris Yates

NOAA's Office of National Marine Sanctuaries

Lauren Bregman
Karen Grimmer*
Jessica Kondel
Paul Michel

*Lead contact