

City of Garden Grove

INTER-DEPARTMENT MEMORANDUM

To:	Matthew J. Fertal	From:	Keith G. Jones
Dept.:	City Manager	Dept.:	Public Works
Subject:	MOU AMENDMENT, CONFIDENTIALITY AGREEMENT AND LETTER OF INTENT WITH POSEIDON RESOURCES CORPORATION		
		Date:	January 12, 2010

OBJECTIVE

Authorize the Mayor to execute an MOU amendment and a confidentiality agreement and authorize the City Manager to sign a letter of intent with the Poseidon Resources Corporation (Poseidon) for the monitoring of the Huntington Beach Ocean Desalination Project (Project).

BACKGROUND

In May 2008, Poseidon, the Municipal Water District of Orange County and ten participating retail agencies signed an MOU to monitor the Project and negotiate a potential water purchase agreement for water delivered from this Project. The ten participating retail agencies are as follows: City of Anaheim, El Toro Water District, Irvine Ranch Water District, Laguna Beach County Water District, Mesa Consolidated Water District, Moulten Niguel Water District, City of Santa Ana, Santa Margarita Water District, South Coast Water District and Trabuco Canyon Water District. The Project is located on the property adjacent to the AES Power Plant in Huntington Beach and will provide up to 50 million gallons of water per day that meets state and federal drinking water standards. Poseidon will finance the Project with the goal of negotiating long-term water purchasing agreements to sell water to interested water agencies. Recently, new water agencies, such as the City of Fullerton, City of Fountain Valley, Golden State Water Company, City of Seal Beach, City of Westminster, City of Newport Beach, Yorba Linda Water District and the City of Garden Grove have expressed interest in participating in monitoring the Project and negotiating a water purchase agreement.

DISCUSSION

Poseidon requires a letter of intent and an amendment to the MOU. The letter of intent will assist Poseidon in satisfying their financial and regulatory reference requirements. To view the Project's detailed financial data, water agencies will also need to sign a confidentiality agreement. The MOU amendment, letter of intent,

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AND LETTER OF INTENT WITH POSEIDON RESOURCES
CORPORATION

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and confidentiality agreement would enable Water Services Staff to assist in thoroughly monitoring the technical, financial and legal components of this Project to ensure due diligence and cost equity among participating agencies. As the cost of water continues to escalate, it is important for the City to identify and assess alternative water sources that improve supply reliability and offer potential future competitive pricing with import water from the Metropolitan Water District of Southern California.

FINANCIAL IMPACT

There is no impact to the General Fund.

COMMUNITY VISION IMPLEMENTATION

This Project is consistent with the community vision for maintaining and upgrading the City's infrastructure assets to maximize their value, longevity, and usefulness for the community.

RECOMMENDATION

It is recommended that the City Council:

- Authorize the Mayor to execute the MOU amendment and confidentiality agreement.
- Authorize the City Manager to sign a letter of intent.


KEITH G. JONES
Director of Public Works


By: David E. Entsminger
Water Services Manager

Approved for Agenda Listing


Matthew Fertal
City Manager

Attachment 1: MOU Amendment
Attachment 2: Confidentiality Agreement
Attachment 3: Letter of Intent

EXHIBIT A

AMENDMENT TO LIST OF PARTICIPATING RETAIL AGENCIES

THIS AMENDMENT TO THE LIST OF "PARTICIPATING RETAIL AGENCIES" DEFINED IN THE MEMORANDUM OF UNDERSTANDING DATED May 22, 2008 ("MOU"), AS AMENDED, is made by and between Poseidon Resources (Surfside) LLC and its affiliates (collectively, "Poseidon") and City of Garden Grove ("CITY").

1. Pursuant to the First Amendment to the MOU, executed by all original Parties to the MOU, CITY is hereby added as a full "Participating Retail Agency" under the MOU, as amended. No express approval or authorization by the governing boards of the previously existing Participating Retail Agencies is required.
2. CITY shall be responsible for sending written notice and a photocopy of this Amendment to all previously existing Participating Retail Agencies within 10 days of the date of final execution of this Amendment. CITY shall request an updated list of Participating Retail Agencies from the Municipal Water District of Orange County.
3. CITY understands and agrees that within 30 days of receipt of such written notice, any of the existing Participating Retail Agencies may assert an objection to this Amendment pursuant to the terms of the MOU, and that upon timely objection this Amendment shall be null and void.
4. Each party to this Amendment represents and warrants that (a) it is an entity duly organized, validly existing and in good standing under the laws of the jurisdiction in which it is organized and is qualified to do business in all jurisdictions where it is required to be qualified; (b) it has the necessary power and authority to enter into and perform its obligations under this Amendment and the MOU, as amended; (c) the person(s) signing this Amendment is duly authorized to execute this Amendment on behalf of the party represented; (d) upon execution, this Amendment and the MOU, as amended, will be enforceable against each party in accordance with its terms, except as such enforceability may be inconsistent with applicable laws concerning bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting creditors rights generally; and (e) the execution and delivery of this Amendment and performance by the executing party under the MOU, as amended, is not known to conflict with any agreement, law, rule, regulation, order, judicial decree or administrative code to which such party is subject.

ACKNOWLEDGED AND AGREED:

Dated: _____

CITY OF GARDEN GROVE

By: _____
William J. Dalton
Mayor

ATTEST:

By: _____
City Clerk

Dated: _____

Dated: _____

POSEIDON RESOURCES (SURFSIDE) LLC

By: _____

APPROVED AS TO FORM:

By: 
City Attorney

Dated: 12/18/09

CONFIDENTIALITY AGREEMENT

THIS CONFIDENTIALITY AGREEMENT ("Agreement"), entered into and made effective as of the ____ day of _____, 2009, is by and between City of Garden Grove ("CITY") and POSEIDON Resources (Surfside) LLC ("POSEIDON") (collectively the "Parties").

WITNESSETH:

WHEREAS, the Parties, along with other agencies providing water service (collectively, CITY and such other agencies are referred to as the "Water Agencies"), have entered into discussions and negotiations concerning the possibility of a public-private partnership regarding POSEIDON's Huntington Beach desalination project (the "Project"); and

WHEREAS, in order to proceed with the next stage of the discussions and negotiations, CITY has requested, and POSEIDON is willing to provide, certain information that POSEIDON considers proprietary and confidential; and

WHEREAS, POSEIDON wishes to protect its proprietary and confidential information against unauthorized use and disclosure by CITY;

NOW, THEREFORE, in consideration of the mutual promises and covenants made herein, and with the intent to be legally bound hereby, the Parties agree as follows:

1. Confidential Information. The term "Confidential Information," as used in this Agreement, shall mean information, other than information described in one or more of clauses (a) through (d) below in this Section, that is provided by POSEIDON to CITY. When POSEIDON provides Confidential Information in documentary form, whether hardcopy or electronic, it shall clearly mark it "Confidential." When POSEIDON provides Confidential Information to CITY verbally, it shall notify CITY of the confidential nature of the information in writing prior to or immediately after verbally conveying the information. In addition to the foregoing requirements, each item of Confidential Information provided either in documentary form or verbally shall be accompanied by a writing stating the grounds for POSEIDON's assertion that the information is of the nature described in Section 6 below and is not within any of the exclusions listed in clauses (a) through (d) in this Section. POSEIDON shall have the right to determine, in its sole judgment, what information it will provide to CITY. Confidential Information shall not include the following:
 - (a) Information that, at the time of disclosure by POSEIDON, is publicly available or generally known or available to third parties, or information that later becomes publicly available or generally known or available to third parties through no act or omission by CITY;

- (b) Information that CITY can demonstrate was in its possession prior to disclosure by POSEIDON;
 - (c) Information received by CITY from a third party who, to CITY's knowledge and reasonable belief, did not acquire such information on a confidential basis either directly or indirectly from POSEIDON; and
 - (d) Information CITY can demonstrate was independently developed by it or a third party or for it or a third party and that was not obtained, in whole or in part, from POSEIDON.
2. Disclosure and Use of Confidential Information. CITY shall not, without POSEIDON's prior written consent, disclose to any third party, firm, corporation or entity such Confidential Information, provided, however, CITY may discuss Confidential Information with other Water Agenc(ies) that have entered into a confidentiality agreement with POSEIDON. Internally, the CITY shall limit the disclosure of the Confidential Information to only those officers, employees and agents (including its governing board or committees, attorneys, accountants, bankers and consultants) of the CITY reasonably necessary to evaluate the Confidential Information and/or the Project. If CITY internally evaluates Confidential Information and/or the Project with its governing board or committees, CITY shall do so without disclosing the Confidential Information in a public meeting, to the extent permitted by Section 54950 *et seq.* of the California Government Code. Should CITY staff determine that a need exists to disclose Confidential Information in a public meeting, CITY will notify POSEIDON of this need and identify the information to be disclosed prior to posting the agenda for the meeting. CITY shall use the Confidential Information received from POSEIDON under this Agreement only for the purpose of its internal evaluation of the Project. In complying with its obligations under this Agreement, CITY shall use reasonable means to prevent unauthorized disclosure and to protect the confidentiality of the Confidential Information. Notwithstanding CITY's exercise of its right to discuss Confidential Information with another Water Agenc(ies) that have entered into a confidentiality agreement with POSEIDON, CITY shall not have any obligation with regard to limiting or preventing disclosure of Confidential Information by such other Water Agenc(ies) or with regard to such other Water Agenc(ies)' performance of their confidentiality agreements, and CITY's and such other Water Agenc(ies)' obligations under their respective confidentiality agreements shall not be construed as joint and several.
3. Required Disclosure. In the event CITY is requested or required by oral questions, interrogatories, requests for information or documents, subpoena, civil investigation, demand or similar process to disclose any Confidential Information received pursuant to this Agreement, CITY will notify POSEIDON immediately of such request(s) and will use reasonable efforts to lawfully delay disclosure until an appropriate protective order may be sought by POSEIDON and/or a waiver of compliance with the provisions of this Agreement granted by POSEIDON;

provided, however, such measures shall not include initiating or defending litigation or otherwise contesting the validity of a demand for disclosure pursuant to law or order of a court or regulatory body, unless CITY and POSEIDON first reach agreement regarding the engagement of legal counsel for CITY and the payment of CITY's legal and related expenses in such litigation or contest. If by the earlier of seven (7) days after being notified by CITY of such request(s) or two (2) days prior to the disclosure date, POSEIDON does not either grant a waiver or seek a protective order, then CITY may comply with the request(s) and such disclosure of Confidential Information will not constitute a breach of this Agreement.

4. Return of Documents. Either Party may elect at any time to terminate this Agreement. CITY will return any and all Confidential Information upon written request from POSEIDON, including all originals, copies, translations, transcriptions or any other form of said material, without retaining any copy or duplicate thereof. To the extent permitted by law and if POSEIDON has not requested the return thereof pursuant to the preceding sentence, CITY shall promptly destroy any and all electronic and hardcopy versions of Confidential Information, as well as any documents consisting of excerpts or portions of materials previously identified by POSEIDON as Confidential Information. CITY will not retain any Confidential Materials in its agency files.
5. Survival of Obligations. Regardless of any termination of any business relationship between the Parties, the obligations and commitments established by this Agreement shall remain in full force and effect for four (4) years from the day and year first hereinabove written or until such time as the Parties have entered into an agreement providing otherwise.
6. Nature of Information. CITY hereby accepts the representations of POSEIDON that the Confidential Information is of a special, unique, unusual, extraordinary, and intellectual character, that money damages would not be a sufficient remedy for any breach of this Agreement by CITY, and that specific performance and injunctive or other equitable remedies for any such breach shall be available to it. The Parties also acknowledge that the interests of POSEIDON in such Confidential Information may be irreparably injured by disclosure of such Confidential Information. The remedy stated above may be pursued in addition to any other remedies applicable at law or equity for breach of this Agreement. Should litigation be instituted to enforce any provision hereof, the Party that prevails will be entitled to recover all costs, including reasonable legal fees, expert costs and costs of investigation.
7. Governing Law. The laws of the State of California shall govern this Agreement.
8. No Other Agreement. It is expressly understood that this Confidentiality Agreement is not and shall not be construed as any form of a letter of intent or agreement to enter into any type of transaction.

9. No License or Rights. Neither this Agreement, nor the transfer of Confidential Information hereunder, shall be construed as granting to CITY any license or rights to any information or data now or hereafter owned or controlled by POSEIDON.
10. Except as may be required by law, without the prior consent of POSEIDON, CITY will not (a) confirm or deny any statement made by a third party regarding the Confidential Information, (b) disclose to any person the fact that Confidential Information has been made available to it by POSEIDON, or (c) disclose any of the terms or conditions of this Agreement.

IN WITNESS WHEREOF, the Parties hereto have entered into this Agreement on the day and year first herein above written.

Dated: _____

CITY OF GARDEN GROVE

By: _____

William J. Dalton
Mayor

ATTEST:

By: _____
City Clerk

Dated: _____

Dated: _____

POSEIDON RESOURCES (SURFSIDE) LLC

By: _____

APPROVED AS TO FORM:

By:  _____
City Attorney

Dated: _____



CITY OF GARDEN GROVE

PUBLIC WORKS

January 12, 2010

Mr. Andrew Kingman
Chief Financial Officer
Poseidon Resources
501 W. Broadway Suite 2020
San Diego, CA 92101

William J. Dalton
Mayor

Steven R. Jones
Mayor Pro Tem

Dina Nguyen
Council Member

Bruce A. Broadwater
Council Member

Andrew Do
Council Member

Re: Letter of Intent Regarding Potential Water Purchase Agreement

Dear Mr. Kingman:

The purpose of this letter (the "Letter of Intent") is to set forth certain non-binding understandings between the City of Garden Grove ("City") and Poseidon Resources ("Poseidon") relating to an interest in the potential purchase of up to 10,000 acre feet of desalinated water from a seawater desalination plant to be built by Poseidon at its site in the City of Huntington Beach.

1. Water Purchase Agreement. City along with, several other Orange County retail water agencies (the "Participating Retail Agencies"), and Poseidon have entered in a Memorandum of Understanding (Attached as Exhibit B) to review the Participating Retail Agencies interest in purchasing desalinated water from the Huntington Beach Project ("Project"). City and Poseidon are interested in beginning good faith negotiations of a long-term water purchase agreement (the "Water Purchase Agreement").

2. No Liability. Except for the obligation to negotiate in good faith and for Section 3 below, the provisions of this Letter of Intent are non-binding and do not constitute and will not give rise to any legally binding obligation on the part of the Parties hereto. Nothing contained in this Letter of Intent shall be deemed or construed to be an agreement or obligation of either party to conclude negotiations by the execution of the Water Purchase Agreement. The provisions of this Letter of Intent do not create any rights on the part of either Party.

3. Costs. Each of the Parties shall be responsible for its own costs and expenses relating to the review, negotiation and documentation and of a

Water Purchase Agreement except as otherwise agreed in the Memorandum of Understanding.

4. Permitting. Poseidon and City each currently have an interest in the expedited development of the Project. City will cooperate with Poseidon as appropriate in Poseidon's efforts to obtain all necessary regulatory approvals and permits to enable the timely construction of the Project

5. Governing Law. This Letter of Intent shall be governed by and construed in accordance with the laws of the State of California without reference to its conflicts of laws principles.

6. Counterparts. This Letter of Intent may be executed in one or more counterparts, each of which, when executed and delivered, shall be an original, but all of which together shall constitute but one and the same instrument.

If this Letter of Intent properly reflects our understanding, please indicate by signing in the space provided below and returning a copy to the undersigned.

Sincerely,

City of Garden Grove

By: _____
City Manager

AGREED AND ACCEPTED:
Poseidon Resources

By: _____

Andrew Kingman
Chief Financial Officer