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Division of Water
Quality/SWRCB

December 18, 2015

Kimberly Tenggardjaja, Environmental Scientist
State Water Resources Control Board
1001 I Street, 15th Floor
Sacramento, CA 95814

Sent via electronic mail to: kimberly.tenggardjaja@waterboards.ca.gov

RE: Comment letter - OTC Draft Determination El Segundo

Dear Ms. Tenggardjaja,

The Surfrider Foundation ("Surfrider") is a non-profit grassroots organization dedicated to the protection and enjoyment of our world's oceans, waves and beaches. Surfrider now maintains 20 chapters in California, over 90 chapters worldwide and is fueled by a powerful network of activists. On behalf of our membership, we submit these comments regarding the OTC draft Determination.

We disagree with the State Water Board's Determination that ESP has complied with its interim mitigation obligations pursuant to the OTC Policy as stated within the draft Determination. The Determination sets a dangerous precedent for the remaining 12 facilities that have yet to submit and receive approval for their proposed interim mitigation. And, the Determination does not provide the public with the information and data necessary to verify an accurate mitigation fee.

We recognize that ESP will come into compliance by December 31, 2015, but we cannot ignore ESP's unjustified interim mitigation Determination. We also note that ESP will be required to pay for only three months of interim mitigation. **Under the circumstances, we request that the State Water Board Executive Director revise the draft Determination to deny ESP's asserted compliance with its interim mitigation obligations.** We further ask the Director to bring this issue to the attention of the State Water Board Members and to schedule the item for a public hearing. **Such a material deviation of the OTC Policy's requirements – and the State Water Board's own statements from its August 18, 2015 Board Hearing – should be presented to the full Board for consideration.**

A. THE DRAFT DETERMINATION DOES NOT MEET THE OTC POLICY'S REQUIREMENTS.

The draft Determination does not meet the legal requirements of the OTC Policy. In recent public hearings, the State Water Board did not consider ESP's past mitigation as eligible under Option A of the interim mitigation section. Any past mitigation should only apply to the preceding 11 years of OTC operations, not the marine life impacts occurring from October 1, 2015 through December 31, 2015. And ESP's mitigation fees were spent on studies, not on mitigation efforts directed at restoring and supporting marine life lost as a result of ongoing OTC operations.

- 1. ESP's past mitigation was not identified as eligible for interim mitigation.**
- 2. Past mitigation does not mitigate the impacts of OTC operations occurring since October 1st.**
- 3. ESP's past mitigation did not increase marine life to mitigate ongoing OTC operations.**

The OTC Policy provides a preference for mitigation directed towards *increasing marine life* lost as a result of ongoing OTC use. Interim mitigation Option A (past mitigation) is vague regarding how one shall demonstrate compliance, but the OTC Policy states that Option A can be achieved by "[d]emonstrating to the State Water Board's satisfaction that the owner or operator is compensating for the interim impingement and entrainment impacts through *existing* mitigation efforts."¹ ESP is not compensating for interim impacts through *existing* mitigation efforts. Any previous mitigation payment has already been spent on studies and analyses that are at least a decade old. The OTC Policy requires Option A mitigate current OTC impacts through existing mitigation – something ESP cannot demonstrate.

The State Water Board should look to its own preference as guidance for the adequacy of past mitigation under Option A. The State Water Board states a preference "for mitigation projects directed toward increases in marine life associated with the State's Marine Protected Areas." ESP's mitigation payment did not achieve increasing marine life. Funding from ESP was used by the Santa Monica Bay Restoration Commission (SMBRC) "to improve the understanding of biological dynamics of Santa Monica Bay" by funding several projects:

- Economic valuation study;
- Rocky reef assessment;
- County-wide funding feasibility study;
- Support for the SMBRC Marine Technical Advisory Committee;
- Bight '08 rocky reef survey; and
- Dolphin study.

The State Water Board incorrectly determined that ESP's payment for Santa Monica Bay-wide studies aligns with the OTC Policy's requirement to compensate for interim impacts. While the studies were positive contributions to better understanding the

¹ State Water Resource Control Board, Once-Through Cooling Policy, pg. 8 (May 2010); available at http://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/otc_2014.pdf

marine environment, none of the studies mitigated OTC impacts by increasing marine life. The State Water Board should not consider past mitigation for studies that did not result in the increase of marine life as appropriate interim mitigation for ESP – or any other OTC facility that has not come into compliance by October 1st, 2015.

Therefore, we request the State Water Board deny ESP's draft Determination; and require ESP comply with its interim mitigation requirements through either Option B or C. If staff is unwilling to deny the determination, we request a formal hearing to bring this issue before the full Board's consideration.

B. THE DRAFT DETERMINATION SETS A DANGEROUS PRECEDENT FOR REMAINING OTC FACILITIES.

ESP's Determination sets a dangerous precedent for future interim mitigation determinations. A review of OTC facilities' implementation plans and relevant documents reveals that six of 13 plants are likely to request credit for existing mitigation projects. Owners or operators of El Segundo Generating Station, Pittsburg Generating Station, Encina Power Station, Mandalay Generating Station, Huntington Beach Generating Station and Ormond Beach Generating Station have all argued in their Implementation Plans or related documentation that they should be given full or partial credit for existing mitigation activities.

If the ESP Determination is approved, other OTC facilities will similarly claim an exemption from their interim mitigation obligations. For example, the Huntington Beach power plant owner-operator has previously paid mitigation fees for re-tooling Units 3 and 4. This is an example of a facility that may request exemption from the new mitigation fee or credit for fees paid in the past. Moreover, it is likely the Huntington mitigation fees may be used as credit for the proposed Poseidon-Huntington seawater desalination facility – which is sited and designed with the expressed purpose to utilize the existing cooling water intake structure well into the future. Huntington Beach is just a continuing example of our concerns regarding crediting past mitigation approved by other agencies for the “interim measures” that must employ stricter standards to be consistent with recent decisions by the State Board to ensure replacement values and adequate compensation. It is also an example of concerns that the past decisions may carry on well into the future if other project proponents using seawater for industrial processes rely on those past decisions.

To prevent the remaining 12 OTC facilities – yet to determine their interim mitigation – from evading their obligations, the State Water Board should deny ESP's Determination. If approved, the State Water Board will undermine the OTC Policy's interim mitigation requirements—rendering that section obsolete.

C. THE STATE WATER BOARD SHOULD DENY THE DRAFT DETERMINATION AND SUBMIT A NEW DETERMINATION WITH PROPER DATA TO VERIFY THE MITIGATION FEE CALCULATION.

ESP's Determination provides inadequate public information for assessing the accuracy of the State Water Board's mitigation calculation. ESP's Determination states that “State Water Board staff calculates that, if ESP were to comply with interim mitigation option B, using the default method for calculating the entrainment fee set forth in Resolution

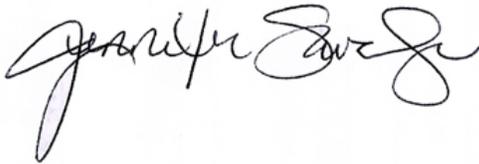
2015-0057, the maximum fee would be approximately \$100,000.” This is the extent of information provide to the public.

To assess interim mitigation on a case-by-case basis, it is necessary to know the actual intake volume, intake velocity, and impingement mass for each facility. To analyze the appropriateness of mitigation projects, it is also necessary to project future intake levels consistent with the requirement to minimize those intakes. In future interim mitigation determinations, the State Water Board should provide the pubic with past, current and projected intake volume, intake velocity, and impingement mass.

To avoid future questioning of the adequacy of interim mitigation fees, we again request the State Water Board **provide the public with the data necessary to verify interim mitigation calculations.** We also request the State Water Board **show its work when calculating the mitigation fee - rather than providing only a final total.**

Our organization looks forward to working with you to ensure the OTC Policy is upheld and continues to phase-out the destructive practice of OTC in California.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer Savage". The signature is fluid and cursive, with a large initial "J" and "S".

Jennifer Savage
Surfrider Foundation
California Policy Manager