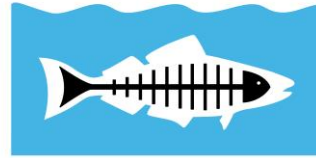


**CALIFORNIA
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Heal the Bay



**COASTAL
ENVIRONMENTAL
RIGHTS
FOUNDATION**



September 23, 2016

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

Sent via electronic mail to: Katherine.Faick@waterboards.ca.gov

RE: Comment letter - OTC Draft Determination Encina Power Station

Dear Ms. Faick,

On behalf of California Coastkeeper Alliance including San Diego Coastkeeper, Heal the Bay, Natural Resources Defense Council, Surfrider Foundation, and Coastal Environmental Rights Foundation, we appreciate the opportunity to provide comments on the State Water Resources Control Board's (State Water Board) Draft Determination (Determination) regarding the interim mitigation for Encina Power Station (Encina). We support the State Water Board's Determination, and agree that Encina must identify a proposed plan to mitigate the interim impingement and entrainment impacts resulting from intake of cooling water required for Encina's operations, including under conditions of co-located operation with the Carlsbad Desalination Plant (Carlsbad).

The Once-Through Cooling (OTC) Policy requires owners or operators of existing power plants to implement measures to mitigate interim impingement and entrainment impacts resulting from their cooling water intake structures. However, Encina is attempting to evade the OTC Policy's requirements by claiming that mitigation required by Carlsbad can act as a substitute for mitigating Encina's own impingement and entrainment impacts.

Carlsbad's mitigation requirements have no bearing on Encina's impacts. When the San Diego Regional Water Board approved Carlsbad's temporary co-located permit, it directed implementation of the Minimization Plan in instances when Carlsbad's intake requirements exceed the volume of water being discharged by Encina, in order to comply with the requirements of Water Code section 13142.5(b). To justify a limited mitigation requirement, the Regional Board noted that "nearly 98 percent of the larvae entrained by the EPS are dead at the point of the desalination plant intake. As a result, a *de minimis* of organisms remain viable which would potentially be lost due to the incremental entrainment effect of the CDP operation."¹ The reviewing court upheld the Regional Board's decision and explicitly held that Carlsbad's mitigation was meant "to specifically address *only those instances* in which the desalination facility's intake requirements *exceed the volume of water being discharged by the EPS*."²

We agree with the State Water Board's Determination that the Minimization Plan, including proposed mitigation, was expressly intended to address those instances where Carlsbad's intake requirements exceed the volume of water being discharged by Encina, and not intended to cover Encina's operations or intake. There is no evidence or findings to indicate that the Regional Water Board approval of Poseidon's Minimization Plan was intended to mitigate for the impacts of impingement and entrainment of marine life associated with cooling water intakes required for Encina's operations. We support and request the

¹ See Order No. R9-2006-0065, Attachment F, Section VII.B.4, at p. F-52.

² *Surfrider v. California Regional Water Quality Control Board* (2012) 211 Cal.App.4th at 572, fn 9.

State Water Board stay firm in its position that Encina identify a proposed plan to mitigate the interim impingement and entrainment impacts resulting from intake of cooling water required for Encina operations, including under conditions of co-located operation with Carlsbad.

While we support the draft Determination, the State Water Board erred in its statement that Carlsbad's intake should not be defined as OTC flow and not subject to Clean Water Act §316(b). In the final paragraph of the Determination, the State Water Board states that it, "agrees and recognizes that any intake flow required solely for CDP is not defined as OTC flow and is not subject to the OTC Policy's interim mitigation requirements. The CDP is not subject to 316(b) requirements..." This statement is not legally accurate, it conflicts with the U.S. EPA's §316(b) regulations, and is a reversal from the State Water Board's 2015 position expressed in the Desalination Ocean Plan Amendment (OPA) Substitute Environmental Document (SED).

The State Water Board's position that Carlsbad's co-location operations are not subject to §316(b) is not legally accurate. §316(b) requires that the location, design, construction, and capacity *of cooling intake structures* reflect the best technology available for minimizing adverse environmental impact. Unlike §13142.5(b) which is explicit to what type of facilities are covered (*i.e.* cooling and industrial facilities), §316(b) expands its coverage to *any facilities* that use "cooling intake structures." Thus, a desalination facility would be covered by §316(b) if the facility is co-located with an OTC facility and is using their cooling intake structure. The plain meaning of §316(b) dictates that Carlsbad is subject to the Clean Water Act's requirements.

The U.S. EPA's regulations dictate that Carlsbad is subject to §316(b). According to the U.S. EPA, §316(b) applies to facilities that use a OTC intake, withdraw at least two million gallons per day of cooling water, and 25 percent or more of the water withdrawn is exclusively for cooling purposes. Therefore, a co-located desalination facility – such as Carlsbad that withdraws 304 MGD – using an OTC facility (Encina) intake structure, which withdraws at least 25 percent of its water for cooling purposes, is subject to §316(b).

The State Water Board's current position is in direct conflict with its own 2015 position formulated in the Desalination OPA. The State Water Board stated in its 2015 SED that:

CWA section 316(b) indirectly applies to desalination facilities co-located with power plants and other industrial cooling water intakes insofar as a cooling water intake structure, used to withdraw water for use by both facilities, must meet the requirements of the federal statute and applicable regulations. Thus, a desalination facility that collects source water through an existing, operational cooling water intake associated with a power plant, or certain other types of industrial facilities, may be required to comply with technology-based standards for minimizing impingement and entrainment impacts.³

The draft Determination is clear that Encina is the host site and *shares the OTC intake* and discharge infrastructure with Carlsbad. Carlsbad uses a steady and sustained flow of 304 MGD from the Encina OTC intake. 304 MGD far exceeds the 25 percent threshold required by the EPA's regulations to hold a co-located facility subject to §316(b). The State Water Board erred in its statement that Carlsbad is not subject to §316(b); however, we do not dispute that the Carlsbad Minimization Plan is intended to mitigate for the impacts of impingement and entrainment when Carlsbad's intake requirements exceed the volume of water being discharged by Encina.

³ STATE WATER RES. CONTROL BD., Substitute Environmental Document: Amendment to the Water Quality Control Plan for Ocean Waters of California: Addressing Desalination Facility Intakes, Brine Discharges, and the Incorporation of Nonsubstantive Changes, pg. 33 (May 6, 2015), *available at* http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2015/rs2015_0033_sr_apx.pdf.

In light of the State Water Board's legally flawed position that Carlsbad is not subject to §316(b), we request the following revision be made to the draft Determination:

However, ~~the~~ State Water Board disagrees with Cabrillo's claim and recognizes that any intake flow required solely for CDP is not defined as OTC flow and is not subject to the OTC Policy's interim mitigation requirements. The CDP is ~~not~~ subject to 316(b) requirements until the CDP has a stand-alone seawater intake. ~~and~~ However, Poseidon's Minimization Plan is intended to mitigate for the impacts of impingement and entrainment when CDP's intake requirements exceed the volume of water being discharged by EPS.

Our organizations support the State Water Board's draft Determination that Encina must identify a proposed plan to mitigate the interim impingement and entrainment impacts resulting from intake of cooling water required for EPS operations, including under conditions of co-located operation with CDP. We look 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,

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