



April 21, 2010

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VIA ELECTRONIC MAIL AND HAND DELIVERY

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Mr. David Gibson
Executive Officer, c/o Brian Kelley
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123-4340

**RE: NPDES Permit for the South Bay Power Plant
May 12, 2010 Hearing
(Tentative Order No. R9-2010-0062)**

Dear Mr. Gibson and Honorable Board Members,

The South Bay Power Plant remains necessary to serve the electric energy needs of San Diego and Chula Vista's residents and businesses in a reliable manner. The California Independent System Operator Corporation (ISO)¹ urges the San Diego Regional Water Quality Control Board not to take any action that threatens the continued ability of South Bay to operate.

On March 22, 2010, the Regional Board issued Tentative Order R9-2010-0062 to address Dynege National Pollutant Discharge Elimination System (NPDES) permit for continued operation of South Bay units 1 and 2.² The tentative order would terminate Dynege's NPDES permit as of December 31, 2010 or on the date that the ISO determines that South Bay units 1 and 2 are no longer needed to provide reliability must run service, whichever occurs first. The ISO recommends that the Regional Board not adopt the tentative order or attempt to terminate Dynege's NPDES permit at this time. The ISO provides the following comments concerning the tentative order.

¹ The ISO is a nonprofit public benefit corporation chartered under the laws of the State of California for the purpose of operating and maintaining the reliability of the statewide electric transmission grid for the benefit of the citizens of California.

² Dynege is operating units 1 and 2 at South Bay under its current NPDES permit through an administrative extension of Regional Board Order R9-2004-0154 pursuant to applicable federal and state law. See, 40 Code of Federal Regulations § 122.6; 23 California Code of Regulations Section 2235.4. See also, November 9, 2009 letter from Mr. John Robertus, Executive Director of the San Diego Regional Board to Mr. Daniel Thompson, Vice President of Dynege South Bay, at p. 2.
http://www.swrcb.ca.gov/rwqcb9/public_notices/hearings/npdes_notices/docs/r9_2009_0178/MinorModificationstoOrderR920040154.pdf

First, under federal law, the Regional Board may terminate the current NPDES only for limited causes.³ 40 CFR § 122.64 sets forth the following causes for terminating an NPDES permit during its term, or for denying a permit renewal application.

- (1) Noncompliance by the permittee with any condition of the permit;
- (2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time;
- (3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or
- (4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW [Publicly Owned Treatment Works]).

The tentative order does not identify any of the reasons listed above for terminating Dynegy's NPDES permit. Indeed, the staff report attached to the tentative order finds allowing continued discharges under Dynegy's NPDES permit through the remainder of 2010 does not pose an unacceptable risk to human health or the environment.⁴ Neither the staff report nor the tentative order reflects that permitted discharges will endanger human health or the environment beyond 2010. Accordingly, there are insufficient grounds to terminate Dynegy's NPDES permit.⁵

³ 40 CFR § 123.25 requires that states administering NPDES permits conform with the certain requirements, including the causes for terminating a permit during its term, or for denying a permit renewal application.

⁴ Staff Report dated March 22, 2010 regarding Dynegy South Bay at p. 24.
http://www.swrcb.ca.gov/sandiego/water_issues/programs/npdes/southbay_power_plant/docs/updates_032310/SBPP_Staff_Report_2010.Final.pdf

⁵ The notice of public hearing issued in this matter states that Regional Board may adopt the tentative order or "may decide, after hearing all of the evidence and testimony, it is appropriate to terminate the Order earlier than its expiration date, notwithstanding staff's recommendation." As explained above, there is no noticed reason to terminate Dynegy's NPDES permit on December 31, 2010 or on an earlier date.

Second, the tentative order also makes findings that are inconsistent with legal requirements applicable to NPDES permits. The tentative order states:

[Dynergy's NPDES permit] cannot be extended to allow discharges from Units 1 and 2 beyond December 31, 2010. Continued operations would require that a new permit be issued after notice and opportunity to comment and a public hearing."⁶

This finding is inconsistent with state regulations that allow for an extension of an NPDES permit under specific circumstances. Section 2235.4 of Title 23 of the California Code of Regulations provides:

The terms and conditions of an expired permit are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on continuation of expired permits are complied with.

The Regional Board has no authority to modify this regulation or applicable federal regulations related to the continuation of expired NPDES permits.⁷ The ISO understands that a condition of Dynergy's NPDES permit is that Dynergy is to cease discharges by December 31, 2010, but that condition in effect only sets the expiration date of Dynergy's permit. This condition cannot serve to modify the requirements of federal regulations for the continuation of expired NPDES permits.⁸

Third, the State of California Water Resource Control Board has issued a revised policy on the use of coastal and estuarine waters for power plant cooling.⁹ Section E of the draft policy identifies milestones, including a final compliance date for the owner or operator of South Bay to implement best technology available as defined by the State Board's policy by December 31, 2012. Section 3.C of the revised policy provides:

The Regional Water Boards shall reissue or, as appropriate, modify NPDES permits issued to owners or operators of existing power plants to ensure that the permits conform to the provisions of this Policy.

⁶ Tentative Order R9-2010-0062 at paragraph 2.
http://www.swrcb.ca.gov/sandiego/water_issues/programs/npdes/southbay_power_plant/docs/updates_032310/Rescission_Order_SBPP.Final.pdf

⁷ See generally, 40 CFR § 122.6.

⁸ 40 CFR § 122.6 essentially requires the permittee to submit a complete NPDES permit application in order to trigger continuation of a permit set to expire.

⁹ http://www.swrcb.ca.gov/water_issues/programs/npdes/cwa316.shtml#otc

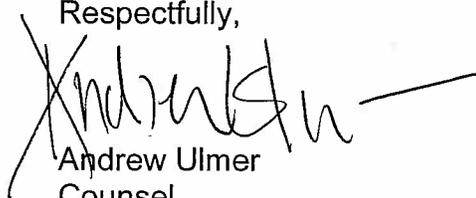
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The State Board is scheduled to consider adopting this policy at a public meeting on May 4, 2010. The ISO urges the Regional Board not to adopt a tentative order that may directly conflict with the State Board's policy as it applies to South Bay.

The ISO continues to work with San Diego Gas & Electric to identify potential resource options that would allow the South Bay units to retire before the Sunrise Powerlink transmission line becomes operational. We anticipate a more definitive assessment on the continued need for South Bay beyond 2010 later this year following the ISO's annual local reliability assessment. The ISO is aware of the widespread interest that exists to decommission the remaining South Bay units. This interest must be balanced with the need for local generation capacity to help manage grid reliability and significant events such as major transmission outages or fires.

Thank you for your consideration of these comments.

Respectfully,

A handwritten signature in black ink, appearing to read "Andrew Ulmer", with a long horizontal line extending to the right.

Andrew Ulmer
Counsel
California Independent System Operator
Corporation

cc: Margaret Rosegay, Esq. (via electronic mail)
Ms. Laura Hunter (via electronic mail)
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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon all of the parties listed on the attached service list via electronic mail.

Dated at Folsom, California this 21st day of April, 2010.

Jane L. Ostapovich
Jane L. Ostapovich

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