

# San Diego Water Board Response to Comments on South Bay Power Plant Tentative Order No. R9-2010-0062

May 12, 2010 San Diego Regional Water Quality Control Board Meeting

Response to Comments on  
Tentative Order No. R9-2010-0062

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Thursday, May 06, 2010  
South Bay Power Plant

**Commenter:** City of Chula Vista

Jim Sandoval City Manager

Letter date: 21-Apr-10

**Topic:** Support rescission based on WQ issues

**Issue:** Significant, damaging, avoidable impacts on water quality (which are increased in May through August) from the SBPP discharge are sufficient evidence to terminate discharge.

**Comment ID:** 1

*The City of Chula Vista supports the case for the rescission of the South Bay Power Plant (SBPP) discharge permit this year as recommended by your staff. The City also strongly encourages the San Diego Regional Water Quality Control Board (Board) to affirm its earlier position that their decision be made based solely on evidence regarding water quality issues. As stated by the Chula Vista City Council and representatives from multiple jurisdictions throughout south bay, the evidence in the record beginning with the 2004 permit, and the Board Staff Report of March 22, 2010 (Report) clearly demonstrates that there are significant, damaging, and avoidable impacts from the continued operations of the South Bay Power Plant. Furthermore, we agree that the evidence in the record demonstrating higher biological impacts from the use of the bay water as cooling for the SBPP occurring in May through August as sufficient evidence for the Board to terminate the discharge.*

*As the City has stated in the past, the South Bay watershed has co-existed with a SBPP permit that provides SBPP with the ability to operate, but not the right to damage beneficial environmental uses. This damage is effectively described and documented in the Board's own 2004 permit, that we were all led to believe would end last November, and the March 22 RWQCB staff report. Duke/Dynegy's commitment to stop operating the SBPP last year during that 2004 permit process was a key to the City and others not objecting to the permit and not requiring substantial mitigation at that time. The Board should not abdicate its authority or responsibility to protect the bay from further environmental damage either by postponing or altering their decision with respect to issues that are the responsibility of other agencies. South Bay citizens continue to encourage the Board to deliberate and make its findings solely on the basis of water quality issues.*

**Response:** As discussed in the "STAFF REPORT, Dynegy South Bay, LLC, South Bay Power Plant, Evaluation of Water Intake and Wastewater Discharge Effects on San Diego Bay and Consideration of Termination of Discharge" dated March 22, 2010 (Staff Report), there are adverse impacts due to the South Bay Power Plant (SBPP) discharge but, allowing the discharge to continue until December 31, 2010, at the latest does not, in the short term, pose an unacceptable risk to human health and the environment within the meaning of 40 CFR Section 122.64(a)(3). The effects of the discharge are within the range of anticipated effects acknowledged by the Board when it adopted NPDES Order R9-2004-0154 and the Tentative Order concludes that the effects of the

discharge do not, in the short term, endanger the environment. Therefore, the evidence does not support termination of NPDES Order R9-2004-0154 before December 31, 2010 absent an earlier determination by the California Independent System Operator Corporation (CAISO) that Units 1 and 2 are no longer needed to maintain grid reliability (Reliability Must Run or RMR).

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**Commenter:** City of Chula Vista

Jim Sandoval City Manager

Letter date: 21-Apr-10

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**Topic:** Less damage is not mitigation

**Issue:** The discharge reduction is not sufficient mitigation, without which the discharger has incentive to continue operating and even with less capacity the SBPP could run more total hours than recent run time.

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**Comment ID:** 2

*The South Bay has shouldered the burden of the plant for almost fifty years without adequate mitigation or offsets for the damage caused by SBPP and the time has come to establish a time certain when that damage stops and restoration begins. However, Dynegy's failure to plan over the past five-year permit period when Duke/LS Power committed to stop operating the plant demonstrates that providing a "minor modification" permit without substantive mitigation is woefully inadequate. The additional permit period already provided and any additional permit period without immediate and substantial mitigation is an incentive to continue to operate this plant for tremendous financial gain at the expense of our watershed, public access, and the economy of our region. It should be recognized that potentially doing less damage as a result of less operating capacity is not mitigation. Our families fish and kayak in this bay, our bayfront and marine businesses depend on this bay and less damage does not constitute appropriate or reasonable mitigation.*

**Response:** As discussed in the Staff Report, there are adverse impacts due to the SBPP discharge and although these impacts continue to some degree even at the reduced permitted flow rate, the effects of the discharge are within the range of anticipated effects acknowledged by the Board when it adopted NPDES Order R9-2004-0154. The Tentative Order concludes that the effects of the discharge do not, in the short term, rise to the level of endangering the environment to support termination of NPDES Order R9-2004-0154 before it expires on December 31, 2010 absent an earlier determination by the CAISO that Units 1 and 2 are no longer needed to maintain grid reliability. Staff acknowledges that reduced impacts is not equivalent to mitigation and NPDES Order No. R9-2004-0154 did not order mitigation. If Dynegy submits an application to continue discharges beyond 2010, the San Diego Water Board, or State Water Board, as appropriate, will evaluate the proposed intake and discharge to determine whether they will achieve water quality protection in south San Diego Bay under applicable laws and regulations. The San Diego Water Board, or State Water Board, as appropriate, may also, consider whether it has authority to require mitigation for discharges at reduced flow rates.

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**Commenter:** City of Chula Vista

Jim Sandoval City Manager

Letter date: 21-Apr-10

## **Topic: New Permit Requirements**

**Issue:** A new permit application would have to be submitted. The discharge reduction is not sufficient mitigation, and even with less capacity the SBPP could run more total hours than recent run time.

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### **Comment ID: 3**

*The March Staff Report states that, "If Dynegy proposes to discharge from Units 1 and 2 beyond December 31, 2010, a new report of waste discharge/NPDES permit application would need to be submitted to the San Diego Water Board and a new NPDES Order will need to be adopted by the San Diego Water Board which protects the beneficial uses of San Diego Bay and complies with all applicable requirements."*

*The Report goes on to state in several locations under Effects of Discharge that, "Any proposed discharge beyond 2010 must be evaluated to determine whether it poses an unacceptable risk of endangering human health or the environment in the long term." The Report highlights several significant impacts including but not limited to, Temperature where the Report states that, 104 acres of eel grass habitat or 7-8% of total eel bed grass coverage in the bay have been precluded from the discharge channel and other areas of the South Bay from the SBPP discharge, ... and that "these thermal limitations do not fully ensure protection of water quality needed for attainment of the beneficial uses of South San Diego Bay as required by the Basin Plan and State Thermal Plan."*

*As previously stated, the SBPP is one of the largest NPDES permitted discharge sources in the region, let alone San Diego Bay, and the Plant operators have had more than five years to prepare for the end of the 2004 permit and perform the science that should have been required for a new permit. Dynegy's failure to do so now should not be justification to not require adequate mitigation and more egregiously continue the impacts identified by the 2004 report, subsequent monitoring and the recent March RWQCB Staff Report. It should be recognized that potentially doing less damage as a result of less operating capacity is not mitigation. Additionally, the Report does not recognize that even with less capacity the SBPP could effectively run more total hours than the recent historical run time that has contributed to and maintained the existing environmental impacts.*

**Response:** The San Diego Water Board recognizes that there are impacts on San Diego Bay waters from the past and current SBPP discharge. All discharges have some impacts on receiving waters. The receiving water impacts from SBPP are described and acknowledged in the NPDES Order R9-2004-0154 which requires termination of the discharge by December 31, 2010 at the latest. Dynegy will have to apply for and obtain a new NPDES permit from the San Diego Water Board prior to continuing any discharge from SBPP after December 31, 2010. A new NPDES permit would need to be considered in a public hearing process allowing time for all parties to comment on the proposed NPDES permit and for the appropriate Board to consider the comments. Dynegy will need to submit a new application for an NPDES Permit which fully demonstrates compliance with all applicable requirements under the new reduced flow rate. The new application will need to include:

- A demonstration that the beneficial uses of San Diego Bay are reasonably protected,
- Documentation of compliance with all applicable water quality standards, including but not limited to all applicable provisions contained in (1) the San Diego Water Board's Water Quality Control Plan for the San Diego Basin (Basin Plan), including beneficial uses, water quality objectives, and implementation plans; (2) State Water Board plans for water quality control including the Water Quality Control Plan For Control Of Temperature In The Coastal And Interstate Waters And Enclosed Bays And Estuaries

(Thermal Plan), and the Water Quality Control Plan for Enclosed Bays and Estuaries – Part I Sediment Quality ; (3) State Water Board policies for water quality control including the (a) Water Quality Control Policy for the Enclosed Bays and Estuaries of California, (b) Policy For Implementation Of Toxics Standards For Inland Surface Waters and the Enclosed Bays, and Estuaries Of California; (c) Water Quality Control Policy on the Use of of Coastal and Estuarine Waters for Power Plant Cooling” (if effective) and (c) the Statement of Policy with Respect to Maintaining High Quality of Waters in California (State Water Board Resolution No. 68-16 ) and (4) priority pollutant criteria promulgated by the U.S. Environmental Protection Agency (U.S. EPA) through the (a) National Toxics Rule (NTR) (promulgated on December 22, 1992 and amended on May 4, 1995) and (b) California Toxics Rule (CTR),

- An evaluation demonstrating the discharge would be in conformance with CWA Sections 316(a) and 316(b).

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**Commenter:** City of Chula Vista

Jim Sandoval City Manager

Letter date: 21-Apr-10

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**Topic:** Termination and mitigation

**Issue:** Since RWQCB resources are limited, consider appropriate mitigation and specific termination date at the May 12 meeting for transparency.

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**Comment ID:** 4

*The Report further states that, "NPDES Order R9-2004-0154 terminates the discharge from SBPP on December 31, 2010 or the date CAISO determines that RMR services from Units 1 and 2 are no longer needed, whichever occurs first, absent further action by the San Diego Water Board." Given the past comment to the City regarding limited RWQCB Staff resources and the limited time remaining this calendar year it is questionable whether or not a new public permit process for the SBPP could be appropriately conducted by December 31, 2010. Using the May 12, 2010 hearing to establish an appropriate level of required mitigation and declaring a specific end of the discharge permit will be the most transparent step the Board can take to send a clear message that the Board is focused on their responsibility to protect the watershed and its invaluable beneficial uses for all.*

*In closing, the City asserts that the Board has adequate justification for terminating the permit and calls on the Board to establish an absolute final termination date for the discharge permit, and to fund adequate mitigation to address the ongoing water quality impacts at least from November 2009 through the final termination of the permit. The City of Chula Vista does not plan to introduce additional evidence or call additional witnesses. Thank you for your time and consideration.*

**Response:** The tentative Order requires the termination of discharges by December 31, 2010 or the date that CAISO determines that the SBPP units are no longer needed as Reliability Must Run (RMR) units, whichever occurs first. In order to terminate an NPDES permit within its term, the San Diego Water Board has the burden of establishing by a preponderance of the evidence that facts exist which support a finding that the discharges, even at reduced flow rates, endanger human health or the environment and can only be regulated to acceptable levels by terminating the permit. As reflected in the public notices for both the March 10 and May 12, 2010 meetings, the San Diego Water Board is considering staff's recommendation contained in the Tentative Order that the Board conclude that allowing the discharges to continue under NPDES Order R9-2004-0154 (until December 31,

2010, at the latest) does not pose an unacceptable risk of endangering the environment that supports earlier termination. Also as reflected in the public notice for the May 12, 2010 meeting, the Board may also decide to revise findings and terminate the permit earlier than staff recommends, if it determines that the ongoing discharges endanger the environment and warrant earlier termination. Whether the Board has authority or should order Dynegy to undertake mitigation for past discharges or for continued discharges at the current reduced flow rate is not considered by the Tentative Order and is not the subject of the hearing at which the Tentative Order is being considered. If Dynegy submits an application to continue discharges beyond 2010, the San Diego Water Board or State Water Board, as appropriate, will evaluate the proposed intake and discharge to determine whether discharges can be permitted in compliance with applicable laws and regulations. The appropriate Board may also, at that time, consider whether it can require mitigation for discharges at reduced flow rates.

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**Commenter:** California Independent System Operator Corporation

Andrew Ulmer Counsel

Letter date: 21-Apr-10

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**Topic:** Do not terminate the Permit

**Issue:** The SBPP is necessary to serve the electric energy needs of San Diego and Chula Vista.

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Comment ID: 5

*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) 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 Dynegy National Pollutant Discharge Elimination System (NPDES) permit for continued operation of South Bay units 1 and 2. The tentative order would terminate Dynegy'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 Dynegy's NPDES permit at this time. The ISO provides the following comments concerning the tentative order.*

**Response:** Comment noted. The San Diego Water Board recognizes that the reliability of California's electric power grid is an issue of statewide concern and that there is a need to coordinate and balance water quality concerns with electrical demand or transmission grid reliability issues. However, the San Diego Water Board's primary obligation under California's Porter Cologne Water Quality Control Act is to ensure that South Bay Power Plant discharges are in conformance with an NPDES Permit that applies and ensures compliance with all applicable Clean Water Act requirements and implementing US Environmental Protection Agency (EPA) regulations, as well as any more stringent limits necessary to achieve water quality standards. Decisions to adopt or terminate an existing NPDES permit are informed by evaluation of the impacts on waters affected by the proposed or current discharge, although a Board can consider grid reliability issues in making its determinations.

The existing NPDES Order No. R9-2004-0154 was modified in late 2009 based, in part,

upon the finding that the 2004 Order “will remain fully effective and enforceable under an administrative extension until December 31, 2010 absent further action by the Regional Water Board.” (Order No. R9-2009-0178, modifying Order No. R9-2004-0154, Finding No. 4.) and to include the following provision: “The discharges from Units 1 and 2 shall terminate on the date CAISO determines that Reliability Must Run (RMR) services from Units 1 and 2 are no longer needed or December 31, 2010, whichever occurs first, absent further action by the Regional Board.” (New Provision No. 26.) NPDES Order R9-2004-0154 therefore expires on December 31, 2010 and discharges must terminate at the end of 2010 or the date the CAISO determines Units 1 and 2 are no longer designated as RMR, whichever date is earlier. Adoption of tentative Order No. R9-2010-0062 as proposed will not result in termination of discharges any earlier than is otherwise required under NPDES Order R9-2004-0154. Under the Tentative Order, termination of NPDES Order R9-2004-0154 effectively will only occur if the CAISO releases Units 1 and 2 before the end of 2010, in which case the permit would be terminated simultaneously with termination of discharges, but the termination of discharges is the direct result of the provisions in NPDES Order R9-2004-0154. If the RMR designation for Units 1 and 2 remains through the end of the year, the discharges will terminate as required by NPDES Order R9-2004-0154 at the end of 2010 simultaneous with permit expiration at the end of the year. In that circumstance, the permit is not being terminated under 40 CFR section 122.64(a)(3). A clarification making this distinction will be added to the Tentative Order. As provided in the Tentative Order, any proposal to continue discharges beyond 2010 will require adoption of a new NPDES discharge permit following a public hearing.

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**Commenter:** California Independent System Operator Corporation

Andrew Ulmer Counsel

Letter date: 21-Apr-10

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**Topic:** Insufficient grounds for termination

**Issue:** The tentative Order does not identify a valid reason for terminating the permit during its term, or for denying a permit renewal application.

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**Comment ID:** 6

*First, under federal law, the Regional Board may terminate the current NPDES only for limited causes. 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. 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.*

**Response:** The tentative Order does not terminate the permit during its term without cause or require termination of the discharges from Units 1 and 2 any earlier than they must otherwise cease under the terms and conditions of NPDES Order R9-2004-0154. The administratively extended permit expires on December 31, 2010 so technically need not be terminated if discharges continue until that date. However, if the RMR designation is removed prior to that date, the tentative Order results in termination of the permit as of the date RMR designation is removed. The tentative Order has been revised to make this technical clarification. The tentative Order neither denies nor prejudices the outcome of any permit renewal application that Dynegy may choose to submit at a future date. Neither the tentative Order nor the Staff Report evaluate the effect of the discharge continuing beyond the term of the existing permit. The tentative Order states in Finding 11 that the permit renewal process would require that evaluation. Despite urging by commenters to permanently terminate discharges from Units 1 and 2, the San Diego Water Board lacks legal authority to foreclose submittal of or refuse to consider a permit renewal application.

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**Commenter:** California Independent System Operator Corporation

Andrew Ulmer Counsel

Letter date: 21-Apr-10

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**Topic:** Permit Administrative Extension

**Issue:** Discharges Under Order No. R9-2004-0154 May Occur after December 31, 2010 Under Regulations Pertaining to Administrative Extension.

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**Comment ID:** 7

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

*[Dynegy'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."*

*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. The ISO understands that a condition of Dynegy's NPDES permit is that Dynegy is to cease discharges by December 31, 2010, but that condition in effect only sets the expiration date of Dynegy's permit. This condition cannot serve to modify the requirements of federal regulations for the continuation of expired NPDES permits.*

**Response:** The San Diego Water Board is not modifying federal or state regulations applicable to the continuation of expired NPDES permits. NPDES Order R9-2004-0154 requires the discharges from SBPP to terminate on December 31, 2010 or the date that CAISO determines that the SBPP units are no longer needed as RMR units whichever occurs first. California Code of Regulations, title 23, section 2235.4 states "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 federal regulations, at 40 CFR section 122.6 state that the conditions of an expired permit continue if: (1) the permittee has submitted a complete timely application; and (2) the Regional Administrator, through no fault of the permittee, does not issue a new permit before the expiration date of the previous permit." Therefore, absent any prohibition in the permit, the permit will become automatically administratively extended after December 31, 2010 as long as the previous two requirements are met and if the permit is not first terminated by board action.

However, if the permit is administratively extended beyond December 31, 2010, the permit would be extended only with the current terms and conditions in place. The San Diego Water Board disagrees with the commenter's analysis that it may legally continue discharges beyond December 31, 2010 if it submits a timely and complete application for renewal. The minor modification ratified in Order No. R9-2009-0178 adds provision 26 to the permit which states: "[t]he discharges from Units 1 and 2 shall terminate on the date CAISO determines that Reliability Must Run (RMR) services from Units 1 and 2 are no longer needed or December 31, 2010, whichever occurs first, absent further action by the Regional Board." Therefore, if Dynegy submits a timely and complete application but it is not acted upon prior to December 31, 2010, the permit technically would be administratively extended, but under the current terms and conditions which preclude discharges from Units 1 and 2 after December 31, 2010. Absent a new permit authorizing continued discharges prior to 2011, discharges from Units 1 and 2 after December 31, 2010 would violate the permit terms.

The finding in the tentative order which states "Order No. R9-2004-0154 cannot be extended to allow discharges from Units 1 and 2 beyond December 31, 2010," could be more artfully stated, but is technically correct and does not require modification. The staff report has been revised to clarify that the permit is, in fact, susceptible of administrative extension. As stated above, administrative extension applies only to the terms and conditions in the current permit, which prohibits discharges from Units 1 and 2 beyond 2010. The staff report is revised as follows at page 4: "Because the modified NPDES Order requires the discharges from Units 1 and 2 terminate no later than December 31, 2010, and an administrative extension continues only the existing permit terms and conditions, the discharge termination dates established in the modified NPDES Order cannot be administratively extended beyond December 31, 2010, even if the permit itself is administratively extended."

The San Diego Water Board can not amend a permit that is administratively extended to allow continued discharge. Adopting the tentative Order will result in termination NPDES Order R9-2004-0154 at its expiration on December 31, 2010 or termination as of the date that CAISO releases Units 1 and 2 from RMR status, if it releases them prior to the end of 2010.

If Dynegy proposes continued operation of SBPP beyond December 31, 2010, a new complete application for a new NPDES permit under the new reduced flow rate must be submitted which fully demonstrates compliance with all applicable CWA requirements, and implementing US EPA regulations as well as with any more stringent effluent standards or limitations necessary to implement water quality control plans and policies.

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**Commenter:** California Independent System Operator Corporation

Andrew Ulmer Counsel

Letter date: 21-Apr-10

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**Topic:** OTC Policy

**Issue:** 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.

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Comment ID: 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. 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.*

*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.*

**Response:** On May 4, 2010, the State Water Resources Control Board (State Water Board) adopted a final "Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling" (OTC Policy). This OTC Policy establishes uniform requirements for the implementation of CWA Section 316(b), using best professional judgment in determining Best Technology Available for cooling water intake structures at existing coastal and estuarine power plants that must be implemented in NPDES permits and will require SBPP to achieve compliance by December 31, 2012. The reference quoted by the commenter refers to modification to NPDES permits to incorporate compliance schedules contained in the proposed Policy (which, once the Policy is effective, will be the responsibility of the State Water Board, rather than the Regional Water Boards). The OTC Policy also includes some immediate and interim requirements which would have to be incorporated into any future NPDES Permit. The OTC Policy does not address all aspects of power plant discharge impacts. The OTC Policy only addresses intake structures which may be causing environmental harm due to entrainment and impingement. The San Diego Water Board is charged with protecting water quality by

regulating discharges in conformance with applicable state and federal water quality laws and regulations.

It is speculative at this time when the recently adopted OTC Policy will become effective. Adoption of the tentative Order would not directly conflict with the OTC Policy and would not preclude evaluation and issuance of a new permit to authorize continued discharges in compliance with applicable laws and regulations after a public process. The final OTC Policy also affirms that the intent of the OTC Policy “is to ensure that the beneficial uses of the State’s coastal and estuarine waters are protected while also ensuring that the electrical power needs essential for the welfare of the citizens of the State are met” and reiterates that the OTC Policy does not “preclude[] the authority of the Regional Water Boards to regulate discharges from existing power plants through NPDES permits, consistent with water quality standards.” (Introduction to Policy as revised March 22, 2010, ¶¶ 1.G. and 1.N.).

In deciding whether to terminate the existing NPDES Permit Order No. R9-2004-0154, the San Diego Water Board must also consider many other factors including effects on beneficial uses, discharge conformance with water quality objectives and sediment quality objectives, as well as the effect of discharge temperature and turbidity on receiving waters.

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**Commenter:** California Independent System Operator Corporation

Andrew Ulmer Counsel

Letter date: 21-Apr-10

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**Topic:** Do not terminate the Permit

**Issue:** The SBPP is necessary to serve the electric energy needs of San Diego and Chula Vista.

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**Comment ID:** 9

*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.*

**Response:** Comment noted. The San Diego Water Board recognizes that the reliability of California’s electric power grid is an issue of statewide concern and that there is a need to coordinate and balance water quality concerns with electrical demand or transmission grid reliability issues. However, the San Diego Water Board’s primary obligation under California’s Porter Cologne Water Quality Control Act is to ensure that South Bay Power Plant discharges are in conformance with an NPDES Permit that applies and ensures compliance with all applicable Clean Water Act requirements and implementing US Environmental Protection Agency (EPA) regulations, as well as any more stringent limits necessary to achieve water quality standards. Decisions to adopt or terminate an existing NPDES permit are informed by evaluation of the impacts on waters affected by the proposed or current discharge, although a Board can consider grid reliability issues in making its determinations.

The existing NPDES Order No. R9-2004-0154 was modified in late 2009 based, in part, upon the finding that the 2004 Order “will remain fully effective and enforceable under an administrative extension until December 31, 2010 absent further action by the Regional Water Board.” (Order No. R9-2009-0178, modifying Order No. R9-2004-0154, Finding No. 4.) and to include the following provision: “The discharges from Units 1 and 2 shall terminate on the date CAISO determines that Reliability Must Run (RMR) services from Units 1 and 2 are no longer needed or December 31, 2010, whichever occurs first, absent further action by the Regional Board.” (New Provision No. 26.) NPDES Order R9-2004-0154 therefore expires on December 31, 2010 and discharges must terminate at the end of 2010 or the date the CAISO determines Units 1 and 2 are no longer designated as RMR, whichever date is earlier. Adoption of tentative Order No. R9-2010-0062 as proposed will not result in termination of discharges any earlier than is otherwise required under NPDES Order R9-2004-0154. Under the Tentative Order, termination of NPDES Order R9-2004-0154 effectively will only occur if the CAISO releases Units 1 and 2 before the end of 2010, in which case the permit would be terminated simultaneously with termination of discharges, but the termination of discharges is the direct result of the provisions in NPDES Order R9-2004-0154. If the RMR designation for Units 1 and 2 remains through the end of the year, the discharges will terminate as required by NPDES Order R9-2004-0154 at the end of 2010 simultaneous with permit expiration at the end of the year. In that circumstance, the permit is not being terminated under 40 CFR section 122.64(a)(3). A clarification making this distinction will be added to the Tentative Order. As provided in the Tentative Order, any proposal to continue discharges beyond 2010 will require adoption of a new NPDES discharge permit following a public hearing.

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**Commenter:** No More South Bay Power Plant Coalition

Gabriel Solmer      Legal Director for San Diego Coastkeeper      Letter date: 21-Apr-10

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**Topic:** Rescind the Permit by June 1, 2010

**Issue:** Evidence in the Record Demonstrates that the South Bay Power Plant Endangers the South Bay Environment.

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**Comment ID:** 10

*On behalf of the members of the No More Power Plant Coalition, a designated party to these proceedings, we offer the following comments on the Staff Report and Tentative Order for the South Bay Power Plant. We have previously provided documents and testimony to support our position that the South Bay Power Plant must terminate all of its operations by June 1, 2010 to adequately protect the Bay now and into the future. We hereby incorporate by reference our testimony dated February 22, 2010 and March 3, 2010, and provide the following additional comments on the Staff Report and Tentative Order.*

*I. Evidence in the Record Demonstrates that the South Bay Power Plant Endangers the South Bay Environment.*

*Federal regulations authorize state agencies to terminate a NPDES permit during its term or deny a renewal application if the discharge “endangers human health or the environment and can only be regulated to acceptable levels by NPDES modification or termination.” While the staff accepted testimony to address this issue, the Staff Report fails to directly address the “endangerment” standard. Instead, the Staff Report dances around the issue, tentatively concluding that the South Bay Power Plant’s near-term impacts do not pose an “unacceptable risk” to human health or the environment. But*

*the standard is not whether the facility's discharge poses an acceptable risk to human health or the environment—it is whether the discharge "endangers" human health or the environment. By using the term "unacceptable risk," the staff is making it clear that it is balancing harm to the environment against the area's energy needs—a balancing that is not allowed under the law. For example, staff admits that it has not gathered enough information to "determine\*+ at this time whether the SBPP is adversely affecting the DO concentration or percent saturation in San Diego Bay." Yet the staff concludes that the unidentified impacts nevertheless do not pose "unacceptable risk" to human health or the environment over the short term.*

*By failing to assess the facts through the lens of endangerment and focusing instead on an undefined measure of unacceptable risk, the Staff Report fails to clearly demonstrate the full extent of endangerment faced by organisms dependent on the South Bay ecosystem. We urge the Regional Board to acknowledge and incorporate the impacts discussed below into the staff report, and revise the Tentative Order to reflect a June 1, 2010 termination. At a minimum, Sections 3c, 3d, 3e, and 3f of the Staff Report must acknowledge the following facts:*

**Response:** Federal regulations (40 CFR 122.62(b) and 122.64) clearly give causes for termination of an existing NPDES permit during its term, as well for denying a permit renewal application. The San Diego Water Board may terminate an NPDES permit during its term, or deny a renewal application, if it finds by a preponderance of the evidence that the discharge endangers human health or the environment and can only be regulated to acceptable levels by permit termination. The San Diego Water Board has the burden to establish by a preponderance of the evidence that facts exist warranting a determination under this legal standard. However, the assertion by the commenter that the Staff Report fails to assess if the discharge endangers human health or the environment incorrectly portrays the regulatory role of staff when considering if an NPDES permit should be terminated for cause. The San Diego Water Board agrees that there are impacts associated with the discharge and these impacts are documented in the current NPDES Order R9-2004-0154. The Staff Report is focused on assessing whether the discharge, under current operating conditions, poses unacceptable risk to human health and the environment beyond what the current Order acknowledges and permits, or if the discharge results in impacts unanticipated under the current NPDES Order R9-2004-0154 that endanger human health or the environment. In this case, the Tentative Order and Staff Report evaluate the impacts of the current discharge in light of the current regulatory environment in considering whether the discharges for the remainder of the permit term endanger human health or the environment. When it adopted NPDES Order R9-2004-0154, the San Diego Water Board recognized Impacts associated with the discharges and found them to be acceptable. The San Diego Water Board acknowledges that there are continued impacts associated with the discharge. It also recognizes that the maximum permitted discharge of SBPP has been reduced by approximately 60% since NPDES Order R9-2004-0154 was adopted in 2004. The Staff Report has focused on assessing whether the facility has complied with NPDES Order R9-2004-0154 and whether the discharge has had unanticipated impacts, whether new or unanticipated in scope or scale, than the Board acknowledged in NPDES Order R9-2004-0154. The Staff Report and tentative Order conclude that the discharge has not had unanticipated impacts and that allowing the discharges to continue for the remainder of the permit term does not pose an unacceptable risk to the environment that would justify a finding of endangerment under 40 CFR section 122.64(a)(3). The evaluation did not, properly so, consider grid reliability needs, in determining whether there is endangerment to the environment from continued operations.

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**Commenter:** No More South Bay Power Plant Coalition

Gabriel Solmer Legal Director for San Diego Coastkeeper Letter date: 21-Apr-10

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**Topic: Renewal Application**

**Issue:** The Staff Report fails to address the issue of whether the South Bay Power Plant will endanger the South Bay environment if allowed to operate past December 31, 2010.

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**Comment ID:** 11

*Further, the Staff Report fails to address the issue of whether the South Bay Power Plant will endanger the South Bay environment if allowed to operate past December 31, 2010. The staff has admitted in its report that there is a possibility that Dynegy will seek to continue to operate beyond December 31, 2010. But the staff refused to address whether those continued discharges will endanger the environment, instead leaving open that "any proposed discharge beyond 2010, however, must be evaluated to determine whether it poses an unacceptable risk to human health or the environment in the longer term." In fact, the staff's entire analysis seems to hinge on the fact that the South Bay Power Plant has been operating for so long that letting the impacts continue for a few more months can't be that bad, and if Dynegy does ask to discharge longer, staff can revisit the issue later and analyze whether another year... or two or five... would really have that many more negative impacts to the South Bay when the plant has already been wreaking havoc to the environment since the 1960's.*

**Response:** It is inappropriate to prejudge a renewal application for Order No. R9-2004-0154, as it is outside the scope and purpose of tentative Order No. R9-2010-0062, as well as the scheduled May 12, 2010 hearing. Moreover, it would be infeasible to prejudge an application that has not been submitted. Should a renewal application be received, the renewal process, in accordance with federal regulations, will allow ample opportunity for public review and comment. Should a renewal application be received, the consideration of denial of the application or adoption of a new NPDES permit will be done after notice, opportunity to comment, and a public hearing in accordance with federal requirements under 40 CFR 122.64. This consideration is made for NPDES permits following receipt of a renewal application. The San Diego Water Board lacks legal authority to prevent submittal of a future permit renewal application or to refuse to consider such an application once received.

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**Commenter:** No More South Bay Power Plant Coalition

Gabriel Solmer Legal Director for San Diego Coastkeeper Letter date: 21-Apr-10

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**Topic: Low Dissolved Oxygen**

**Issue:** The South Bay Power Plant Causes or Contributes To Low Dissolved Oxygen Levels that Endanger the South Bay Environment and Can only be Brought to Acceptable Levels by Terminating the Plant's Operations.

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**Comment ID:** 12

*A. The South Bay Power Plant Causes or Contributes To Low Dissolved Oxygen Levels that Endanger the South Bay Environment and Can only be Brought to Acceptable Levels by Terminating the Plant's Operations.*

*Dissolved oxygen is one of the most important physical factors in aquatic ecosystems; without sufficient oxygen, most life cannot survive in water. In its discussion of dissolved oxygen, the Staff Report has omitted and misinterpreted several key aspects of the regulatory framework and the physical factors that affect concentrations of dissolved oxygen.*

*The Staff Report provides a confusing description of the water quality regulations pertaining to dissolved oxygen water quality criteria. It begins by referring to the Basin Plan's DO objective for inland surface waters. It goes on to state that "It is not clear if enclosed bays such as San Diego Bay should appropriately be classified as 'Inland surface waters with designated MAR beneficial uses' as implied in the Basin Plan. Inland surface waters are generally fresh water and do not have the beneficial use designation of MARINE. San Diego Bay is considered an enclosed bay with the designated MARINE beneficial use, not inland surface water. The Basin Plan does not explicitly designate a DO objective for enclosed bays like San Diego Bay." Staff is correct that San Diego Bay should not be classified as an 'inland surface water'. This is likely why the Basin Plan designates the Bay as a Coastal Water in Table 2-3 with an existing Beneficial Use of 'MARINE'. Further, the Basin Plan does in fact designate a DO criteria that is appropriate for San Diego Bay. In Appendix C, Table C-1: Inorganic Constituents Water Quality Criteria, DO has a criteria associated with three categories of water bodies: Ocean Waters, Bays and Estuaries, and Inland Surface Waters. Given that San Diego Bay is indisputably a bay and that the Basin Plan has also clearly established an existing beneficial use of MAR for San Diego Bay, we can in fact apply the water quality criteria for bays and estuaries: 'Shall not be less than 5.0 mg/l with designated MAR. The annual mean DO shall not be less than 7 mg/l more than 10% of the time'. While the discharge DO concentrations depicted in the Staff Report do not fall below 5.0 mg/l, all but two are below 7 mg/l. Further, the hourly mean DO graph (figure ES-5) presented in the Tenera Environmental report clearly shows that the DO curve for the SBPP discharge channel does not have the same daily pattern of daily highs reaching up to 9 mg/l that the reference stations do. The DO curve for the SBPP discharge channel is dampened with little variation throughout the day and generally hovers around 5 mg/l.*

*The Staff Report states that DO concentrations in the discharge channel are occasionally higher than the intake, but misinterprets why this counterintuitive result might occur. The concentration of DO in a water column is related to the temperature, salinity, and atmospheric pressure. Given that temperature of the water is higher at the discharge than the intake, and there is no difference between the salinity and pressure between the intake and the discharge, there must be another physical factor affecting the DO at the discharge pipe. The most reasonable explanation lies in the turbulence of the discharge water that in turns aerates the discharge water.*

*The Staff Report omits an important line of reasoning when interpreting available DO data. At no point does the Staff Report really examine why the DO is below saturation levels. One likely explanation for this pattern is that DO consumption is greater than production. This potential is acknowledged in the Tenera Environmental report "It is notable that ... the mean daily DO curves were consistently below the saturation levels for the mean temperatures experienced at the stations. This suggests that DO consumption was typically higher than production at all locations throughout the study."*

*A likely driver of this phenomenon is the biological oxygen demand created by the degradation of organic matter. The power plant discharges both impinged and entrained aquatic life (organic matter) and once or twice a year discharges scraped growth from the forebay and walls and pipes into the discharge channel. This organic matter is decayed by bacterial action, which consumes oxygen in the receiving water. This link between the impacts of biological oxygen demand of waste material and dissolved oxygen is reflected in the State Ocean Plan: "The dissolved oxygen concentration shall not at any time be depressed more than 10 percent from that which occurs naturally, as the result of the discharge of oxygen demanding waste materials." Because Dynegy has never been required to measure BOD, it is not possible to conclude at this time that the discharge is not currently impacting the oxygen regime of the South Bay.*

*We recommend that staff amend the language in the Staff Report at section 3d, page 15 to state that San Diego Bay is a Coastal Water with an existing beneficial use of MAR and an applicable water quality criteria of 5.0 mg/l and an annual mean DO that shall not be less than 7 mg/l more than 10% of*

*the time. The Staff Report should also make note that Plant discharges are too often just at or below the criteria and thus constitutes endangerment to the South Bay ecosystem.*

**Response:** The San Diego Water Board agrees with the commenter's assessment of the importance of dissolved oxygen in aquatic ecosystems. However, the discussion of the appropriateness of a water quality standard for south San Diego Bay as a receiving water in respect to the discharge was discussed and evaluated during the permit re-issuance process for Order nos. R9-2004-0154 and 1996-05. While the Water Quality Control Plan for the San Diego Basin (Basin Plan) does provide objectives under Table C-1, the objectives stem from the Water Quality Objectives section (3-8) in the Basin Plan. The commenter finds the Staff Report in regards to the water quality objective for dissolved oxygen "confusing," which can be attributed to the lack of clarity in the Basin Plan. The Basin Plan states:

"Dissolved oxygen levels shall not be less than 5.0 mg/L in inland surface waters with designated MAR or WARM beneficial uses or less than 6.0 mg/L in waters with designated COLD beneficial uses. The annual mean dissolved oxygen concentration shall not be less than 7 mg/L more than 10% of the time"

While San Diego Bay has a Marine Habitat (MAR) beneficial use, it is clearly not an inland surface water beneficial use. This lack of clarity was discussed during the NPDES re-issuance process for Order No. R9-2004-0154. Receiving water monitoring conducted in San Diego Bay and other enclosed bays and estuaries indicated that the above water quality objective for dissolved oxygen would not be met in areas not subject to a discharge (see NPDES Order R9-2004-0154 Fact Sheet, page 28). As such, extensive discharge and receiving water monitoring of dissolved oxygen is required under NPDES Order R9-2004-0154, and would be considered during a permit re-issuance for the SBPP should permit re-issuance be sought.

Additionally, the San Diego Water Board agrees that the daily dissolved oxygen curve for the discharge is considerably dampened when compared to other areas of the receiving waters that have been monitored. While a diurnal pattern is still present, the daily highs and lows are considerably muted. While staff agree that some of the commenter's suggested possibilities for observed dissolved oxygen levels in the discharge may be correct (e.g. biological oxygen demand, aeration of the discharge, etc...), a full evaluation of dissolved oxygen levels has not been done to compare observed levels at the discharge to those in other areas of the receiving waters and to determine if an effluent limitation would be necessary in a future permit to protect human health and the environment.

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**Commenter:** No More South Bay Power Plant Coalition

Gabriel Solmer      Legal Director for San Diego Coastkeeper      Letter date: 21-Apr-10

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**Topic:** Temperature

**Issue:** The South Bay Power Plant Discharges Cause High Temperatures that Endanger the Environment in South Bay and Can Only Be Brought to Acceptable Levels By Terminating the Plant's Operations.

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**Comment ID:** 13

*B. The South Bay Power Plant Discharges Cause High Temperatures that Endanger the Environment in South Bay and Can Only Be Brought to Acceptable Levels By Terminating the Plant's Operations.*

*The South Bay is a shallow, and for some portions of the year, a warm aquatic environment. Given the already high thermal regime of the South Bay, it is likely that aquatic organisms in the South Bay are*

*already living at or near organisms' maximum metabolic thresholds. Thus, the use of the delta temperature continues to provide a flawed measure of potential impact to organisms living in or downstream of the discharge plume. As a result, the full extent of endangerment to organisms is not known.*

*Staff indicates that changing location of compliance point has decreased heat loading. This conclusion by staff is problematic on several counts. First, the Staff Report bases its conclusion on Dynegy's submittal, Attachment 5 "Assessment of the 2009 Flow Reduction of South Bay Power Plant Intake and Discharge Effect". The Flow Reduction study assesses the effect of flow reduction on the thermal plume of the plant through an evaluation of only eight days of operation in 2003. This is not an adequate sample size from which to draw any strong conclusions. Further, while the Flow Reduction Study concludes that the thermal plume is 63% smaller by volume, it does not actually provide information on how that reduction in volume was calculated or derived from the data given. The Flow Reduction Study discusses a small set of thermal measurements, provides a statistical analysis that compares the delta T (°C) between ambient sites and sites within the area of the discharge plume under various operating conditions, but it does not describe how that translates into a 63% reduction in volume of the thermal plume. Staff seems to acknowledge that there is still insufficient information to understand the extent of the thermal plume ("Additional studies have not been performed to evaluate the effects of the change in the temperature compliance point.... The effects of the smaller volume and lower temperature have not been fully evaluated, but will reduce impact to beneficial uses by an unquantified amount") and yet staff still concludes that there is no short term harm posed by continued operation of the Units 1 and 2.*

*The Staff Report argues that the change in compliance point location has led to a decrease in impacts to the Bay ("In particular, this relocation may have helped in abating some of the detrimental thermal impacts to the discharge channel."). The change in compliance point's impact on whether the discharge's thermal plume is endangering wildlife is still uncertain. The thermal plume discharged from Units 1 and 2 still represents water that is at temperatures that are higher than safe levels for wildlife. For example, research conducted on the thermal tolerances of fish species impacted by San Onofre Nuclear Generating Station's Fish Return System found some species (spotfin croaker and barred sand bass) became stressed at higher temperatures (25–30 °C). Based on the graphs of the temperature measurements of the thermal plume, it is clear that the South Bay Power Plant discharges water at temperatures in ranges that can stress fish. Continued exposure to such elevated temperatures will impose unnecessary stress to wildlife that comes into contact with the thermal plume from Units 1 and 2.*

*We recommend that the Staff Report be amended in the second paragraph of page 12 to state: "given the current temperature of the discharge and the uncertainties surrounding how much the closure of Units 3 and 4 have reduced the impacts to biota, we conclude that the discharge from the South Bay Power Plant represents an endangerment to the South Bay ecosystem."*

**Response:** Please see response to Comment no. 10, Topic: Rescind the Permit by June 1, 2010.

To provide clarification, the Staff Report provides an evaluation of the conclusions by Dynegy regarding changes to the extent of the thermal plume associated with the cease of operation of units 3 and 4. This information was submitted by Dynegy in the 2009 Flow Reduction Study and concluded an estimated thermal reduction of 63%. The commenter is correct in that San Diego Water Board has not fully evaluated the effects of the reduced discharge, though expectations and the limited data submitted suggest impacts to beneficial uses will be reduced. It is important to note that limited data submitted to the San Diego Water Board is due, in part, to the conservative sampling designs associated with the 2004 316(a) analysis, which focused on a worst case discharge scenario in which units 1-4 were operating at maximum capacity. It is expected that reduction of thermal discharges from units 3 and 4 will not increase

impacts beyond those identified under NPDES Order R9-2004-0154. There is insufficient evidence in the record demonstrating that this is not the case to serve as a basis for early permit termination.

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**Commenter:** No More South Bay Power Plant Coalition

Gabriel Solmer      Legal Director for San Diego Coastkeeper      Letter date: 21-Apr-10

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**Topic:** Turbidity

**Issue:** The South Bay Power Plant Causes Turbidity that Endangers the South Bay Environment and Can Only Be Brought to Acceptable Levels by Terminating the Plant's Operations.

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**Comment ID:** 14

*C. The South Bay Power Plant Causes Turbidity that Endangers the South Bay Environment and Can Only Be Brought to Acceptable Levels by Terminating the Plant's Operations.*

*The Staff Report correctly acknowledges that "The distribution of particle sizes within soft sediment marine environments is a significant factor affecting the composition of infaunal assemblages, and the suspension of fine sediments by currents can increase turbidity thus decreasing light penetration through the water column and affect the growth of bottom vegetation. Although the SBPP discharge is not likely to cause increases in the amount of suspended material in the South Bay, it can influence the distribution of turbid water within the South Bay." In that light, the Tenera Environmental report concluded that turbidity levels are indeed higher in the southeastern portion of the South Bay and that while the plant has a marginal impact on the production of turbidity, it does affect the transport of turbidity in the area south of the Chula Vista Wildlife Reserve.*

*Unfortunately, the Staff Report again misinterprets some key points when examining available data. The Staff Report relies on distribution maps of turbidity in the South Bay when discharge volume is at 601 mgd (full capacity) and 441 mgd (reduced capacity but not as low as that expected from closure of units 3 & 4). Staff jumps to the conclusion that "due to the reduced flow rate, turbidity effects are expected to be less than shown by the figure with flow at 441 mgd." This conclusion is erroneous – although the turbidity distribution map does indicate that the total extent of turbidity is decreased for the 441 mgd flow, it appears that turbidity NTUs increase in the center of the distribution – approximately in the area that is currently devoid of eelgrass. Thus, it would appear that the reduced flow has concentrated the turbidity into one area of the Bay, which in turn may be actually increasing the threat to the resources. The only remedy for this situation would be to completely shut down the flow and thereby eliminate the turbidity caused by the discharge.*

**Response:** The San Diego Water Board does not fully agree with the commenter's assessment regarding an increase in localized turbidity and thus impacts at points closer to the discharge due to reduced flow volumes. The figure in the Staff Report depicts the net turbidity effect, and the areas that show increases in localized turbidity under reduced flow are modeled in the 2004 316(a) Report as locations of naturally high turbidity due to bottom shearing and wind direction. The impact of the SBPP discharge upon the distribution of turbidity within the south central portion of San Diego Bay, and thus impacts upon eelgrass in those locations, is expected to be reduced under reduced flow regimes. It is important to note, as stated in the Staff Report, that in the area of the discharge nearest the SBPP, discharge temperatures alone may limit the occurrence of eelgrass, though it is likely that the synergistic effect of temperature and turbidity may still limit eelgrass growth within the largest area of impact. Additionally, as stated in the response to Comment no. 13 (Temperature), data submitted to date reflecting

discharge conditions under operation of only units 1 and 2 has been limited. Thus, it is expected that reduction of discharges from units 3 and 4 will not increase impacts beyond those identified under Order No. R9-2004-0154. There has been insufficient evidence submitted in the record to establish this is not the case and to justify early termination of the permit.

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**Commenter:** No More South Bay Power Plant Coalition

Gabriel Solmer      Legal Director for San Diego Coastkeeper      Letter date: 21-Apr-10

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**Topic:** Eel Grass

**Issue:** These Physical Changes to the Environment Have Endangered Eelgrass.

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Comment ID: 15

*D. These Physical Changes to the Environment Have Endangered Eelgrass.*

*The above discussed physical factors are important because of the impact that they can have on the organisms that depend on this habitat. The South Bay is the most important area for eelgrass beds – a keystone habitat for the Bay. The changes that the South Bay Power Plant has caused to the physical environment of the South Bay have led to measurable negative impacts to the eelgrass beds in the South Bay and constitute “endangerment.”*

*The Staff Report correctly acknowledges that the discharge plume has negatively affected the eelgrass beds in the area of the discharge channel due to turbidity and perhaps more significantly, because of temperature “In the area of the discharge channel nearest the South Bay Power Plant summer season discharge temperatures alone may limit the occurrence of eelgrass, and thus turbidity may not be a significant factor in structuring eelgrass habitat within these areas. Published scientific literature has shown that eelgrass suffers reduced growth at temperatures above 25-30 degrees C (86 F) and temperatures of 35 degrees C (95 F) or higher would contribute to direct mortality.” Yet despite the monitoring data that clearly demonstrates that temperatures are regularly elevated well into levels that would reduce growth and even above temperatures that would cause direct mortality, the Staff Report still concludes that there is no unacceptable risk to eelgrass. This conclusion is based on the presumption that the reduced flows will reduce the risk but acknowledges that they cannot quantify by how much. Thus staff has taken the least protective approach, one that cannot be justified given the importance of eelgrass to the overall health and resilience of the Bay.*

*We recommend that staff remove the following statement from page 18: “but is certainly less than the amount caused by flows of 601 MGD or 441 MGD”, as it is not certain. We also recommend that Staff include language at page 19 (first paragraph) that states “Based upon the above evidence, we conclude that the continued discharge from the SBPP represents an endangerment to the South Bay ecosystem”.*

**Response:** The San Diego Water Board agrees with the commenter’s assessment of the importance of eelgrass as a “keystone” habitat within south San Diego Bay. The Staff Report conclusion that overall impacts to eelgrass would be less under reduced flow conditions is based upon a predicted reduction in thermal discharges, as well as the modeled reductions in turbidity distributions. However, the commenter is correct in their assessment that it is not “certain(ly)” that preclusion will be reduced. While the synergistic effects of turbidity and temperature will likely still limit the distribution of eelgrass within portions south San Diego Bay, the extent of limitation modeled under the 316(a) report does not consider other factors which may preclude recolonization of

eelgrass from areas impacted by the discharge (e.g. presence of byssal mats from *M. senhousia*). Additionally, a reduced discharge may not restrict the presence of eelgrass, but may still result in suboptimal conditions for growth. Thus, the Staff Report has been modified to clarify that a reduction is not certain. However, the impacts to eelgrass were identified and acknowledged in NPDES Order no. 2004-0154 in Finding 14 and 19 and in the fact sheet (see also Response to Comment 10, Rescind the Permit by June 1, 2010).

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**Commenter:** No More South Bay Power Plant Coalition

Gabriel Solmer      Legal Director for San Diego Coastkeeper      Letter date: 21-Apr-10

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**Topic:** Seasonal Impacts

**Issue:** Endangerment is not equal across the year – there are seasonal impacts that must be considered.

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**Comment ID:** 16

*E. Endangerment is not equal across the year – there are seasonal impacts that must be considered.*

*Perhaps the most important omission of the Staff Report is that it assumes that because the South Bay Power Plant has been harming the South Bay for several decades, continued discharge until December will not make it worse. In other words, staff has assumed that there are no factors to consider that make the next few months different from previous months. However, we know this is a false assumption. There are seasons where endangerment is significantly greater than others.*

*May through August is a period of time where larval fish concentrations are much higher than other times of the year. This pattern of increased larval numbers has been documented in Southern California. The implications of this biological pattern are significant to the discussion of short-term endangerment, and one that is not mitigated by the closure of Units 3 and 4. In its Draft Final Substitute Environmental Document for its Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling, the State Water Resources Control Board acknowledges:*

*A facility's [capacity utilization rate] is not necessarily indicative of the impact it may have on the aquatic environment since the potential for harm is not equally distributed throughout the year, particularly for entrainment; spawning typically peaks in spring and early summer throughout the state....Data show, however, that it is possible to operate less than 15 percent of the time and cause a greater impact than would be assumed if entrainment was uniform at all times.*

*In addition to potentially greater risk of higher entrainment during these critical months, these larval organisms (along with other organisms) will have to deal with the greater metabolic stress of higher temperature regime and lower oxygen profiles. Thus, the next few months represent a critical window for organisms in the South Bay.*

*Available data on the overall health of fish populations in the South Bay add a considerable degree of urgency to the short term threat faced by South Bay wildlife. A fisheries inventory of San Diego Bay clearly indicates that species richness, total catch and total biomass of fish in the South Bay have been steadily decreasing since 1995.*

**Response:** Please see Response to Comment 10.

It should be noted that the San Diego Water Board does not disagree with the comment regarding temporal differences in impacts due to differences in larval production and

south San Diego Bay ambient temperatures during the late spring and summer season. However, the temporal differences are not new and the Board previously evaluated and permitted the discharges despite these recognized impacts.

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**Commenter:** No More South Bay Power Plant Coalition

Gabriel Solmer      Legal Director for San Diego Coastkeeper      Letter date: 21-Apr-10

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**Topic:** Known Unknowns

**Issue:** The Staff Report Fails to Acknowledge the Known Unknowns.

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Comment ID: 17

*F. The Staff Report Fails to Acknowledge the Known Unknowns.*

*The Staff Report fails to acknowledge that there is significant information that is lacking to fully understand the true extent of endangerment. As mentioned previously, the South Bay Power Plant has never been required to measure Biological Oxygen Demand (BOD), a critical indicator of biological impacts. Further, Dynegy has never been required to monitor for the potential harmful by-products of the chlorine discharged by the facility. Without monitoring data, Dynegy cannot continue to claim that the chlorine discharged by the plant is broken down into 'harmless ions'. Just because monitoring is not done, does not mean that the substances are not forming. We know from research in other areas that chlorine is known to break down, complex with other substances, and form new compounds, such as trihalomethanes and haloacetic acids, also known as disinfection by-products. The chlorination by-products are toxic and can remain so for long periods. However, the Staff Report does not address what we currently do not know about the impacts of the plant's discharge or incorporate that into the Staff Report's assessment of potential endangerment.*

*To accurately assess the true and continued impact of the continued discharge, these pieces of information must be known. If they are not known, staff should take the most protective stance and assume that the discharge is posing a current risk.*

**Response:** As stated in the response to Comment no. 10, the Staff Report is focused on assessing whether the discharge causes impacts that were unanticipated under NPDES Order R9-2004-0154 in evaluating whether the discharges, if allowed to continue through the permit term, endanger human health and the environment. As discussed in response to Comment 7, when considering termination of an existing permit, the San Diego Water Board has the burden to establish by a preponderance of the evidence that the discharge endangers the environment and can only be addressed through modification or early termination of the discharge. Because there is no documentation of impacts from the discharges beyond those anticipated and permitted by the Board in NPDES Order R9-2004-0154, the staff recommendation in the tentative Order is not to terminate the discharges earlier than NPDES Order R9-2004-0154 provides. Speculation regarding unknown impacts under NPDES Order R9-2004-0154 is not sufficient documentation of impacts beyond what the Board previously permitted and therefore does not justify early termination of the discharges. The inclusion of Biological Oxygen Demand (BOD) and chlorine monitoring as NPDES permit requirements is appropriately addressed during a NPDES permit issuance or re-issuance process. Should a renewal application for Order no. 2004-0154 be received, the San Diego Water Board or State Water Board, as appropriate, will consider the inclusion of monitoring requirements for BOD and chlorine.

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**Commenter:** No More South Bay Power Plant Coalition

Gabriel Solmer      Legal Director for San Diego Coastkeeper      Letter date: 21-Apr-10

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**Topic:** Lack of Appropriate Baseline

**Issue:** The Staff Report Misunderstands the Significance of the Lack of Appropriate Baseline.

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Comment ID: 18

*G. The Staff Report Misunderstands the Significance of the Lack of Appropriate Baseline.*

*The lack of appropriate background conditions by which to compare the impacts of the South Bay Power Plant has been and continues to be a significant flaw in all of the assessments of the South Bay Power Plant's impacts – this flaw is unfortunately carried through the Staff Report. The Staff Report argues that the discharge of sewage until 1963 and lack of adequate additional water quality data makes it difficult to establish a real 'baseline' by which to compare the South Bay Power Plant. The Staff Report further argues that the environmental reports have used "an accepted method of identifying reference stations for comparison with discharge stations." However, the Staff Report does not recognize that previous studies still chose open water stations for comparison to the SBPP sites in areas that are known to be affected by the discharge, thus invalidating them as an appropriate comparison by which to measure the impacts of the discharge plume. The Staff Report does recognize that the inappropriate former location of the compliance point has resulted in effects "not being fully characterized in the portion of San Diego Bay between the property line and the old compliance point in the middle of the southeast portion of San Diego Bay." Yet the Staff Report does not take the next step to state that we do not currently have an appropriate set of data for comparison to fully understand the true extent of harm caused by the South Bay Power Plant.*

*Throughout the Staff Report, there is a clear accumulation of facts that, if interpreted correctly, would lead directly to a conclusion that the South Bay Power Plant discharge is endangering the South Bay ecosystem.*

**Response:** The San Diego Water Board strongly disagrees with the commenter's assertion that the Staff Report "misunderstands the significance of the lack of an appropriate baseline." The question of what to utilize as a baseline, as well as a lack of pre-anthropogenic quantitative information, can be a significant challenge in any scientific study. The commenter misinterprets the Staff Report statement "an accepted method of identifying reference stations for comparison with discharge stations," as a blanket approval by staff of all reference stations in all prior studies as "baseline" condition. This is not the case. The method of utilizing reference sites is done for comparative purposes and multiple assumptions underlie the selection of reference sites. Additionally, when studies are submitted for review purposes, staff consider the appropriateness of the selection of reference sites and the precision of those sites for comparison with the discharge conditions. The lack of baseline conditions does not preclude consideration for issuance or reissuance of NPDES permits.

The Staff Report does state that sewage was discharged into San Diego Bay until 1963. Additionally, other industrial discharges and untreated storm flows from developed areas were discharged during the same time period. The comment requests the Staff Report acknowledge that no data is available to "fully understand the true extent of harm caused by the South Bay Power Plant" because there is no baseline data available. Quantitative data to "fully understand the true extent of harm caused by the South Bay Power Plant," would presumably need to be acquired under pre-

anthropogenic discharge conditions and post-discharge conditions to date. Speculation regarding the condition of receiving waters prior to 1960 under pre-plant conditions absent other discharges, and providing a distinction in the Staff Report regarding a lack of quantitative site data at that time, does not provide sufficient support to terminate the discharges earlier than provided in NPDES Order R9-2004-0154 under 40 CFR 122.64 (see response to Comment 10). Thus, no change has been made to the Staff Report.

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**Commenter:** No More South Bay Power Plant Coalition

Gabriel Solmer      Legal Director for San Diego Coastkeeper      Letter date: 21-Apr-10

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**Topic:** OTC Policy No More South Bay Power Plant

**Issue:** The State Water Board's Once Through Cooling Policy May Negatively Impact the Regional Board's Ability to Protect the South Bay Environment by Terminating the South Bay Power Plant's Discharges.

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**Comment ID:** 19

*II. The State Water Board's Once Through Cooling Policy May Negatively Impact the Regional Board's Ability to Protect the South Bay Environment by Terminating the South Bay Power Plant's Discharges.*

*On March 22, 2010, the State Water Quality Control Board issued a final draft policy on the use of coastal and estuarine waters for power plant cooling. This new once-through-cooling policy (the "OTC" policy), if approved, will have significant negative impacts on this Board's ability to protect the South Bay environment from further degradation by the South Bay Power Plant.*

*If the OTC policy goes into effect as written, the Regional Board will no longer have control to determine, using best professional judgment, whether South Bay Power Plant is implementing the Best Technology Available, as the Clean Water Act requires. Once the OTC policy goes into effect, it sets out two different ways South Bay Power Plant could reduce impingement and entrainment impacts through technology-based or operational changes. Neither Track 1 nor Track 2 reflects Best Technology Available because they allow a facility to reduce intake flow compared to the facility's design rate—not the facility's actual flow rate. Further, facilities are free to elect either Track 1 or the less protective Track 2, without showing that the more protective Track 1 is infeasible.*

*The OTC Policy also strips the Regional Board of its discretion in determining how soon the South Bay Power Plant must achieve necessary improvements. Instead, the policy mandates that South Bay Power Plant has until December 31, 2012 to reduce the plant's impingement and entrainment impacts. However, the OTC policy gives CAISO discretion to unilaterally extend South Bay Power Plant's compliance date for up to 90 days if CAISO determines that continued operation of South Bay Power Plant is "necessary to maintain the reliability of the electric system in the short term." CAISO could push back the compliance date by more than 90 days unless that State Water Board finds "compelling evidence not to follow a recommendation and makes a finding of overriding considerations." The Regional Board would have no say in whether or not the compliance date gets extended, regardless of the negative impacts or endangerment to the environment that would occur during the extension. Further, the OTC policy mandates that any NPDES permit that the Regional Board issues for the South Bay Power Plant must contain a provision allowing CAISO to suspend the compliance date without reopening the permit.*

*The most recent draft of the OTC policy is not only bad policy, but it violates the Clean Water Act and California law. Opponents of the policy in its current form have submitted a 40-page comment letter detailing the extensive problems with the policy that could lead to litigation if the policy is not fixed. The State Water Quality Control Board will be considering the draft policy on May 4, and, if approved, the*

*policy would then move to the Office of Administrative Law and the Environmental Protection Agency. We sincerely hope that the policy will be fixed to restore the Regional Board's ability to protect water quality before the policy becomes effective.*

*Fortunately, this Board can, and must avoid the drawn out and uncertain OTC process in regard to the South Bay Power Plant. The Regional Board can retain the ability to protect the South Bay and to remove the South Bay Power Plant's impacts by terminating the South Bay Power Plant's discharge before the OTC policy goes into effect. As explained above, the South Bay Power Plant's discharges have endangered—and continue to endanger—the environment in the South Bay. If the Regional Board acts now, exercising its ability to terminate the discharge based on the current endangerment, as well as the additional harm the plant will cause during this year's larval season, it can ensure the termination of a harmful discharge regardless of how the OTC Policy resolves.*

**Response:** If the State Water Board's recently adopted OTC policy becomes legally effective, the State Board will have determined what constitutes best technology available for purposes of implementing CWA section 316(b). Under the final OTC policy, the State Water Board has assumed responsibility for issuance of NPDES-related decisions for the SBPP, as well as all other affected coastal power plants. Until the final Policy is effective, the San Diego Water Board retains its authority to adopt NPDES permits requiring that discharges comply with applicable laws and regulations in protecting water quality. The San Diego Water Board could decide to deny a permit for continued discharges based upon water quality considerations despite a CAISO determination that the SBPP is needed for grid reliability. Once the OTC Policy is effective, the State Water Board retains these rights. The San Diego Water Board is not fully aware of the CAISO's processes for evaluating local reliability needs, but is not persuaded by the commenter that termination of the permit within the permit term, earlier than proposed in the tentative Order and before the effective date of the final OTC Policy, would somehow prevent the CAISO from identifying the SBPP units as needed for maintenance of grid reliability, taking them out of consideration for grid reliability needs. Moreover, early termination of the permit can be the subject of a petition to the State Water Board, which has authority to stay Regional Water Board decisions while it reviews such decisions on their merits.

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**Commenter:** No More South Bay Power Plant Coalition

Gabriel Solmer      Legal Director for San Diego Coastkeeper      Letter date: 21-Apr-10

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**Topic:** Rescind the Permit by June 1, 2010

**Issue:** Evidence in the Record Demonstrates that the South Bay Power Plant Endangers the South Bay Environment.

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**Comment ID:** 20

*III. The Regional Board Should Terminate the South Bay Power Plant's Discharge Before CAISO Begins its Process to Designate Facilities as Reliability—Must Run for 2011.*

*The Regional Board should terminate South Bay Power Plant's discharge by June 1 because the discharge is endangering the environment. This date would also avoid the possibility of South Bay Power Plant receiving another year of unnecessary "Reliability Must Run" designation.*

*Because the plant's discharge is endangering the environment, the Regional Board should terminate South Bay Power Plant's discharge permit before CAISO completes its analysis for determining Reliability Must Run for 2011, which will most likely occur in September 2010. This will ensure that*

*CAISO does not include South Bay Power Plant in the list of available power sources for 2011. While the Regional Board has the power to terminate South Bay Power Plant's discharge permit even if CAISO designates the facility Reliability Must Run for 2011, there will be fewer complications if South Bay Power Plant is taken out of consideration for 2011 Reliability Must Run status before CAISO completes its 2011 analysis.*

*The Regional Board may terminate the South Bay Power Plant discharge before the end of the year without jeopardizing local power reliability because sufficient new power sources—96 MW from Orange Grove and 25 MW from Celerity—have become available. Further, CAISO's determination that the plant was necessary to ensure the reliability of the region's power supply was based on an inflated draft estimate of power needs that the California Energy Commission has since corrected and reduced. The California Energy Commission released corrected forecasts for the region in December 2009, reducing the 1-in-10 peak demand forecast by 160 MW from the number CAISO used to make its RMR analysis for 2010. Further, the Reliability Must Run contract between CAISO and Dynegy also contemplates that the RMR contract could be terminated before the end of the year, and specifically sets out procedure for terminating the contract if any of the facility's permits are terminated.*

*But CAISO has not yet released Dynegy from its Reliability Must Run contract for the remainder of 2010 even though: 1) at least 120 MW of additional power has become available in the region so far this year, 2) CAISO used a number 160 MW greater than necessary to assure local power reliability when it completed its RMR analysis for 2010 and 3) CAISO's current contract with Dynegy provides that it could terminate the plant's RMR designation prior to the end of the year. While CAISO and Dynegy may have convinced the Regional Board last December that their plans were to shut down the South Bay Power Plant this year, neither has followed through with that plan. In fact, CAISO's testimony states that CAISO plans to continue forcing South Bay Power Plant to operate "at least through December 31, 2010."*

*Even though CAISO itself initially touted to the Regional Board that its analysis was "simple math," when confronted with corrected "simple math," CAISO changed its tune, claiming that there are other reasons to keep South Bay Power Plant running through 2010 even though other power sources could replace it. Interestingly, CAISO never addressed the Coalition's point that its RMR designation for 2010 used an energy needs forecast 160 MW greater than the number California Energy Commission adopted in December 2009 for the region. Further, CAISO criticized the Coalition's simple math by saying that it included "resource additions that are not currently operational," without specifying which sources it thinks the Coalition got wrong. On the contrary, the Coalition's "simple math" in its testimony included 573 MW from Otay, 94 MW from Pala/Orange Grove, and 25 MW from Celerity—all of which are currently available. Because the South Bay Power Plant endangers the environment and stopping the plant's operations would not harm the region's power stability, the Regional Board should terminate the plant's discharges by June 1.*

**Response:** Federal regulations (40 CFR 122.62(b) and 122.64) clearly give causes for termination of an existing NPDES permit during its term, as well for denying a permit renewal application. The San Diego Water Board may terminate an NPDES permit during its term, or deny a renewal application, if it finds by a preponderance of the evidence that the discharge endangers human health or the environment and can only be regulated to acceptable levels by permit termination. The San Diego Water Board has the burden to establish by a preponderance of the evidence that facts exist warranting a determination under this legal standard. However, the assertion by the commenter that the Staff Report fails to assess if the discharge endangers human health or the environment incorrectly portrays the regulatory role of staff when considering if an NPDES permit should be terminated for cause. The San Diego Water Board agrees that there are impacts associated with the discharge and these impacts are documented in the current NPDES Order R9-2004-0154. The Staff Report is focused on assessing whether the discharge, under current operating conditions, poses

unacceptable risk to human health and the environment beyond what the current Order acknowledges and permits, or if the discharge results in impacts unanticipated under the current NPDES Order R9-2004-0154 that endanger human health or the environment. In this case, the Tentative Order and Staff Report evaluate the impacts of the current discharge in light of the current regulatory environment in considering whether the discharges for the remainder of the permit term endanger human health or the environment. When it adopted NPDES Order R9-2004-0154, the San Diego Water Board recognized Impacts associated with the discharges and found them to be acceptable. The San Diego Water Board acknowledges that there are continued impacts associated with the discharge. It also recognizes that the maximum permitted discharge of SBPP has been reduced by approximately 60% since NPDES Order R9-2004-0154 was adopted in 2004. The Staff Report has focused on assessing whether the facility has complied with NPDES Order R9-2004-0154 and whether the discharge has had unanticipated impacts, whether new or unanticipated in scope or scale, than the Board acknowledged in NPDES Order R9-2004-0154. The Staff Report and tentative Order conclude that the discharge has not had unanticipated impacts and that allowing the discharges to continue for the remainder of the permit term does not pose an unacceptable risk to the environment that would justify a finding of endangerment under 40 CFR section 122.64(a)(3). The evaluation did not, properly so, consider grid reliability needs, in determining whether there is endangerment to the environment from continued operations.

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**Commenter:** No More South Bay Power Plant Coalition

Gabriel Solmer      Legal Director for San Diego Coastkeeper      Letter date: 21-Apr-10

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**Topic:** Renewal Application is Moot

**Issue:** To Provide Procedural Certainty, the Regional Board Should Deny Dynegy's Renewal Application as Moot.

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Comment ID: 21

*IV. To Provide Procedural Certainty, the Regional Board Should Deny Dynegy's Renewal Application as Moot.*

*The evidence shows that the South Bay Power Plant is endangering the South Bay environment and should be terminated by June 1. Staff has recommended that the discharge be allowed to continue to the earlier of December 31, 2010 or when CAISO removes the plant from Reliability Must Run status. If the Regional Board chooses not to terminate the discharge before December 31, 2010, it must take decisive action regarding Dynegy's renewal application to provide procedural certainty to all parties on a going-forward basis.*

*The Coalition strongly recommends that the Regional Board deny South Bay Power Plant's renewal application as moot. While Dynegy initially filed a renewal application seeking to discharge for the full 5-year permit term, Dynegy modified that request last October and now has only asked for permission to operate until December 31, 2010. Because the Regional Board has extended order R9-2004-0154 to expire on December 31, 2010, the Regional Board has effectively already granted Dynegy the relief that it seeks and the permit renewal application is moot because granting or denying the renewal application in its current form would have no effect.*

*However, the Regional Board must make clear in any adopted order that if Dynegy desires to operate after December 31, 2010, it must file a new, fully-supported renewal application to discharge within the*

*appropriate timeframe. That application would need to include studies of the current levels of impingement and entrainment from Units 1 and 2 supported by actual data—not estimates based on prior data from when all four units were operating. Further, Dynegy could no longer rely on outdated studies from 2004 to justify operating the plant beyond the current permit term. It would need to submit new studies on the plant's impacts to eelgrass and impacts to temperature, dissolved oxygen, biological oxygen demand, and turbidity; all at the facility's existing compliance point.*

*If the Regional Board fails to act on Dynegy's renewal application or leaves the application active, Dynegy is free to seek an extension of the renewal application at any time. This means that on December 30, 2010, Dynegy could send a letter to the Regional Board asking for the application to be extended another year—or worse for another five years. The Regional Board could then continue to allow Dynegy to discharge under R9-2004-0154 or an "emergency order" until the Regional Board did the necessary work to issue Dynegy a new permit. In other words, without specific action to the contrary by the Regional Board, we could find ourselves in the very same position we were a year ago.*

**Response:** It is inappropriate to prejudge a renewal application for Order No. R9-2004-0154, as it is outside the scope and purpose of tentative Order No. R9-2010-0062, as well as the scheduled May 12, 2010 hearing. Moreover, it is infeasible to evaluate an application that has not been submitted. Should a renewal application be received, the renewal process, in accordance with federal regulations, will allow ample opportunity for public review and comment. Should a renewal application be received, the consideration of denial of the application or adoption of a new NPDES permit will be done after notice, opportunity to comment, and a public hearing in accordance with federal requirements under 40 CFR 122.64. This consideration is made for NPDES permits following receipt of a renewal application. The San Diego Water Board lacks legal authority to prevent submittal of a future permit renewal application or to refuse to consider such an application once received. The San Diego Water Board does not have authority to issue and "emergency" NPDES permit authorizing discharges beyond 2010.

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**Commenter:** No More South Bay Power Plant Coalition

Gabriel Solmer      Legal Director for San Diego Coastkeeper      Letter date: 21-Apr-10

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**Topic:** Rescind the Permit by June 1, 2010

**Issue:** Evidence in the Record Demonstrates that the South Bay Power Plant Endangers the South Bay Environment.

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Comment ID: 22

*V. Conclusion*

*In light of the above, we urge the Board to terminate Dynegy's NPDES permit and Order R9-2004-00154 as of June 1, 2010 because the South Bay Power Plant is endangering the environment in South Bay and the only way to bring the impacts to an acceptable level is to stop operating the plant. The Coalition recommends that the Staff Report add the language suggested above to accurately reflect the negative impacts—that rise to the level of endangerment—that the South Bay Power Plant has had and will continue to have on the South Bay environment so long as the plant continues to operate.*

*Should the Regional Board choose to ignore the evidence that the South Bay Power Plant is endangering the environment in the South Bay and decide not to terminate the permit as of June 1, 2010, Order R9-2004-00154 will terminate upon its expiration on the earlier of December 31, 2010 or the date when CAISO releases Units 1 and 2 from "Reliability Must Run" status.*

**Response:** Federal regulations (40 CFR 122.62(b) and 122.64) clearly give causes for termination of an existing NPDES permit during its term, as well for denying a permit renewal application. The San Diego Water Board may terminate an NPDES permit during its term, or deny a renewal application, if it finds by a preponderance of the evidence that the discharge endangers human health or the environment and can only be regulated to acceptable levels by permit termination. The San Diego Water Board has the burden to establish by a preponderance of the evidence that facts exist warranting a determination under this legal standard. However, the assertion by the commenter that the Staff Report fails to assess if the discharge endangers human health or the environment incorrectly portrays the regulatory role of staff when considering if an NPDES permit should be terminated for cause. The San Diego Water Board agrees that there are impacts associated with the discharge and these impacts are documented in the current NPDES Order R9-2004-0154. The Staff Report is focused on assessing whether the discharge, under current operating conditions, poses unacceptable risk to human health and the environment beyond what the current Order acknowledges and permits, or if the discharge results in impacts unanticipated under the current NPDES Order R9-2004-0154 that endanger human health or the environment. In this case, the Tentative Order and Staff Report evaluate the impacts of the current discharge in light of the current regulatory environment in considering whether the discharges for the remainder of the permit term endanger human health or the environment. When it adopted NPDES Order R9-2004-0154, the San Diego Water Board recognized Impacts associated with the discharges and found them to be acceptable. The San Diego Water Board acknowledges that there are continued impacts associated with the discharge. It also recognizes that the maximum permitted discharge of SBPP has been reduced by approximately 60% since NPDES Order R9-2004-0154 was adopted in 2004. The Staff Report has focused on assessing whether the facility has complied with NPDES Order R9-2004-0154 and whether the discharge has had unanticipated impacts, whether new or unanticipated in scope or scale, than the Board acknowledged in NPDES Order R9-2004-0154. The Staff Report and tentative Order conclude that the discharge has not had unanticipated impacts and that allowing the discharges to continue for the remainder of the permit term does not pose an unacceptable risk to the environment that would justify a finding of endangerment under 40 CFR section 122.64(a)(3). The evaluation did not, properly so, consider grid reliability needs, in determining whether there is endangerment to the environment from continued operations.

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**Commenter:** No More South Bay Power Plant Coalition

Gabriel Solmer      Legal Director for San Diego Coastkeeper      Letter date: 21-Apr-10

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**Topic:** Renewal Application

**Issue:** The Staff Report fails to address the issue of whether the South Bay Power Plant will endanger the South Bay environment if allowed to operate past December 31, 2010.

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**Comment ID:** 23

*To provide all parties with procedural clarity on a going-forward basis, the Regional Board should act on Dynegy's renewal application, denying it as moot. Should the Regional Board not terminate the current discharge on June 1, 2010 as recommended, the Board should specifically state that if Dynegy seeks to discharge after R9-2004-00154 expires, Dynegy is required to submit a new, complete application to discharge, fully supported by new studies of the existing facility's impingement and entrainment impacts, impacts to eelgrass, and impacts to temperature, dissolved oxygen, biological*

oxygen demand, and turbidity; all at the facility's existing compliance point.

**Response:** It is inappropriate to prejudge a renewal application for Order No. R9-2004-0154, as it is outside the scope and purpose of tentative Order No. R9-2010-0062, as well as the scheduled May 12, 2010 hearing. Moreover, it would be infeasible to prejudge an application that has not been submitted. Should a renewal application be received, the renewal process, in accordance with federal regulations, will allow ample opportunity for public review and comment. Should a renewal application be received, the consideration of denial of the application or adoption of a new NPDES permit will be done after notice, opportunity to comment, and a public hearing in accordance with federal requirements under 40 CFR 122.64. This consideration is made for NPDES permits following receipt of a renewal application. The San Diego Water Board lacks legal authority to prevent submittal of a future permit renewal application or to refuse to consider such an application once received.

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**Commenter:** Dynegy, Inc

Margaret Rosegay Attorney, Pillsbury Winthrop Shaw Pittmann Letter date: 20-Apr-10

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**Topic:** Termination would be unlawful

**Issue:** Grounds for termination of the permit in advance of the December 31, 2010 expiration date do not exist.

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**Comment ID:** 24

*Dynegy hereby submits its comments on the above-referenced tentative order, and reiterates its concern over continuing procedural irregularities with this matter. With the postponement of the originally scheduled March 12, 2010 hearing, and the direction to staff to review the evidentiary submittals made by the designated parties and prepare a tentative order setting forth staff's recommendation with respect to the permit, it appeared that our procedural concerns were being addressed satisfactorily. We appreciate staff's review of the evidence and the substantive conclusion reached, i.e., that grounds for termination of the permit in advance of the December 31, 2010 expiration date do not exist. Dynegy agrees with that conclusion, and believes the appropriate course of action in the circumstances is for the Board to take no action at all. As discussed below, we have a number of significant concerns with the tentative order as drafted, and do not believe it is necessary to issue any order. Under no circumstance may the Board lawfully terminate the permit at the May 12 hearing.*

**Response:** As discussed in the Staff Report, there are adverse impacts due to the SBPP discharge and although these impacts continue to some degree even at the reduced permitted flow rate, the effects of the discharge are within the range of anticipated effects acknowledged by the Board when it adopted NPDES Order R9-2004-0154. The tentative Order concludes that the effects of the discharge do not, in the short term, rise to the level of endangering the environment to support termination of NPDES Order R9-2004-0154 before it expires on December 31, 2010 absent an earlier determination by the CAISO that Units 1 and 2 are no longer needed to maintain grid reliability.

However, in accordance with the public hearing notice, after the San Diego Water Board hears from all parties and considers all of the evidence submitted, the Board may decide that it disagrees with staff's conclusion and find there are sufficient facts warranting a determination that the discharges can only be regulated to an acceptable level by permit termination earlier than the current permit or tentative Order provide.

The Board may legally make such a determination if it finds, based on a preponderance of the evidence it hears, that the facts establish that continued discharges endanger human health or the environment and can only be regulated to acceptable levels by permit termination within the meaning of 40 CFR section 122.64(a)(3). The public notice identified the following issues as the subject of the hearing: (1) whether the intake and discharge operations at SBPP endanger human health or the environment and can only be regulated to acceptable levels by permit modification or termination and (2) whether any effects identified in item (1) provide a sufficient basis for the San Diego Water Board to require earlier termination. The notice also recognizes that the Board may modify the tentative Order to reach a conclusion on these issues that differs from staff's recommendation. Therefore the parties and the public have been on notice to submit all evidence and testimony relevant to these issues and that the Board may make such a decision after hearing all of the evidence and testimony. If the Board were to revise findings to support a conclusion to terminate the permit earlier than staff recommends, all designated parties will have an opportunity to review and comment on the findings prior to adoption and may also comment about the effective date of such an order.

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**Commenter:** Dynegy, Inc

Margaret Rosegay Attorney, Pillsbury Winthrop Shaw Pittmann Letter date: 20-Apr-10

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**Topic:** Long Term

**Issue:** Dynegy does not believe that any of the alleged impacts to beneficial uses or other adverse effects described in the Staff Report are of a magnitude or severity to warrant termination or denial of the permit for discharges in 2010 or beyond.

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**Comment ID:** 25

*Further, we understand that the sole purpose of the May 12 hearing is to consider the propriety of South Bay Power Plant ("SBPP") discharges in the "short term," i.e., through the end of the year. For the same reason that staff expressly disclaims any consideration of whether SBPP discharges may have unacceptable "longer term" effects on human health or the environment, Dynegy reserves the right to submit comments on the March 22, 2010 Staff Report in connection with any future proceeding concerning discharges after December 31, 2010. At this point, Dynegy states for the record that it believes the supportive "short term" findings are equally applicable to "longer term" discharges from the plant that might occur after December 31, 2010, in the event the California Independent System Operator ("CAISO") determines that SBPP is needed to ensure grid reliability beyond that date. Suffice to say, Dynegy does not believe that any of the alleged impacts to beneficial uses or other adverse effects described in the Staff Report are of a magnitude or severity to warrant termination or denial of the permit for discharges in 2010 or beyond.*

**Response:** Dynegy is correct that the staff has not evaluated or made a final recommendation on whether the reduced discharge endangers human health and the environment in the longer term. Any discharge from SBPP after December 31, 2010, would need to be covered by a new NPDES Permit. This new NPDES Permit would need to be adopted in a public process allowing time for all parties to comment. There is ample documentation in the existing NPDES Permit Order No. R9-2004-0154 that beneficial uses were not being adequately protected under the full flow rate of 601 MGD. Dynegy will need to submit a new application for an NPDES Permit which fully demonstrates

compliance with all applicable requirements under the new reduced flow rate. The new application will need to include:

- A demonstration that the beneficial uses of San Diego Bay are reasonably protected,
- Documentation of compliance with all applicable water quality standards, including but not limited to all applicable provisions contained in (1) the San Diego Water Board's Water Quality Control Plan for the San Diego Basin (Basin Plan), including beneficial uses, water quality objectives, and implementation plans; (2) State Water Board plans for water quality control including the Water Quality Control Plan For Control Of Temperature In The Coastal And Interstate Waters And Enclosed Bays And Estuaries (Thermal Plan), and the Water Quality Control Plan for Enclosed Bays and Estuaries – Part I Sediment Quality ; (3) State Water Board policies for water quality control including the (a) Water Quality Control Policy for the Enclosed Bays and Estuaries of California, (b) Policy For Implementation Of Toxics Standards For Inland Surface Waters and the Enclosed Bays, and Estuaries Of California; (c) Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling” (if effective) and (c) the Statement of Policy with Respect to Maintaining High Quality of Waters in California (State Water Board Resolution No. 68-16 ) and (4) priority pollutant criteria promulgated by the U.S. Environmental Protection Agency (U.S. EPA) through the (a) National Toxics Rule (NTR) (promulgated on December 22, 1992 and amended on May 4, 1995) and (b) California Toxics Rule (CTR),
- An evaluation demonstrating facility operations would be in conformance with CWA Sections 316(a) and 316(b).

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**Commenter:** Dynegy, Inc

Margaret Rosegay Attorney, Pillsbury Winthrop Shaw Pittmann Letter date: 20-Apr-10

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**Topic:** Termination would be unlawful

**Issue:** Grounds for termination of the permit in advance of the December 31, 2010 expiration date do not exist.

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**Comment ID:** 26

*I. Termination of the Permit Would be Unlawful.*

*Notwithstanding staff's conclusion and recommendation that grounds for termination do not exist (see Tentative Order, Finding 10), the Notice of Public Hearing states that:*

*The Board may adopt Tentative Order No. R9-2010-0062 as proposed by staff. Alternatively, the Board 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.*

*Finally, the Board may decide that no action is required.*

*Notice of Public Hearing, Section IV (Possible Board Actions) (emphasis added). Dynegy respectfully submits that the second of these options – early termination of the permit – is contrary to applicable regulations and would be unlawful. Based on the procedure followed to date, the only lawful alternatives open to the Board at this point are adoption of the tentative order or no action. Based on our concern over the numerous references to permit termination in the tentative order, we believe “no*

*action” is the only viable course for the Board to take.*

*As has been stated in each of Dynegy’s comment letters and submittals to the Board in connection with this matter, applicable regulations specify that an NPDES permit cannot be terminated unless specific factual findings are made and included in a proposed Notice of Intent to Deny, which is a form of draft permit requiring a minimum of 30 days public notice and comment. 40 CFR § 124.6(b). The Board cannot lawfully decide at the May 12 hearing to terminate Dynegy’s permit without having before it a tentative order that contains the necessary findings justifying termination. Tentative Order No. R9-2010-0062 (including the March 22, 2010 Staff Report incorporated as Attachment 1) does not contain any findings supporting early termination of the permit. To the contrary, the tentative order contains findings supporting the continued operation of the plant “in the short term,” i.e., at least until its currently scheduled expiration date.*

*We do not agree that the procedural requirements in the federal regulations concerning notice of intent to terminate have been satisfied by the notice and tentative order and hearing process provided in this case. Notice of the grounds for termination has never been provided in this case, for the simple reason they do not exist. Indeed, Finding 10 of Tentative Order No. R9-2010-0062 concludes that,*

*allowing discharges to continue for the remainder of the permit term does not, in the short term, pose an unacceptable risk to human health or the environment within the meaning of 40 CFR section 122.64(a)(3) and therefore will not be terminated earlier than the end of the permit term.*

*Were the Board to take the extraordinary and unprecedented step of terminating the SBPP permit at the conclusion of the May 12 hearing, at a minimum, the Board must stay the effectiveness of its decision for at least 30 days to allow time for Dynegy and other aggrieved parties to seek emergency administrative and judicial review of the Board’s decision.*

*The Tentative Order accurately notes that any application to operate Units 1 and 2 after the current permit expiration date must also be evaluated under 40 CFR § 122.64(a)(3). As such, Dynegy’s application for renewal of the permit cannot lawfully be denied unless grounds for termination are found to exist under this section. On this point, we note that the Tentative Order would improperly terminate Order No. R9-2004-0154 on December 31, 2010, as it contains no findings consistent with those required by section 122.64(a)(3). The Staff Report states repeatedly that it does not consider the significance of any “longer term” effects associated with the plant’s continued use of bay water for cooling beyond 2010, and that any such effects will need to be evaluated. Absent grounds for termination, the most the Board can do is maintain the status quo.*

**Response:** As discussed in the Staff Report, there are adverse impacts due to the SBPP discharge and although these impacts continue to some degree even at the reduced permitted flow rate, the effects of the discharge are within the range of anticipated effects acknowledged by the Board when it adopted NPDES Order R9-2004-0154. The tentative Order concludes that the effects of the discharge do not, in the short term, rise to the level of endangering the environment to support termination of NPDES Order R9-2004-0154 before it expires on December 31, 2010 absent an earlier determination by the CAISO that Units 1 and 2 are no longer needed to maintain grid reliability.

However, in accordance with the public hearing notice, after the San Diego Water

Board hears from all parties and considers all of the evidence submitted, the Board may decide that it disagrees with staff's conclusion and find there are sufficient facts warranting a determination that the discharges can only be regulated to an acceptable level by permit termination earlier than the current permit or tentative Order provide. The Board may legally make such a determination if it finds, based on a preponderance of the evidence it hears, that the facts establish that continued discharges endanger human health or the environment and can only be regulated to acceptable levels by permit termination within the meaning of 40 CFR section 122.64(a)(3). The public notice identified the following issues as the subject of the hearing: (1) whether the intake and discharge operations at SBPP endanger human health or the environment and can only be regulated to acceptable levels by permit modification or termination and (2) whether any effects identified in item (1) provide a sufficient basis for the San Diego Water Board to require earlier termination. The notice also recognizes that the Board may modify the tentative Order to reach a conclusion on these issues that differs from staff's recommendation. Therefore the parties and the public have been on notice to submit all evidence and testimony relevant to these issues and that the Board may make such a decision after hearing all of the evidence and testimony. If the Board were to revise findings to support a conclusion to terminate the permit earlier than staff recommends, all designated parties will have an opportunity to review and comment on the findings prior to adoption and may also comment about the effective date of such an order.

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**Commenter:** Dynege, Inc

Margaret Rosegay Attorney, Pillsbury Winthrop Shaw Pittmann Letter date: 20-Apr-10

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**Topic:** OTC Policy

**Issue:** 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.

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**Comment ID:** 27

*As the Board is aware, the State Water Resources Control Board is expected to adopt its proposed Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling (the "OTC Policy") on May 4, 2010. Assuming the OTC Policy is approved by the Office of Administrative Law and otherwise takes effect, the Policy will establish new state standards with respect to impingement and entrainment effects of once-through cooling, which standards must be implemented in accordance with the compliance schedule set forth in the Policy. The final draft of the OTC Policy establishes a compliance date for SBPP of December 31, 2012, and requires that this date be incorporated into the plant's NPDES permit.*

*Termination of the SBPP permit would be blatantly contrary to the State's expected OTC Policy and highly disruptive of the coordinated, interagency efforts to address the retrofitting or eventual phase-out of coastal power plants. The impingement and entrainment effects associated with the SBPP at its current level of operation are dramatically less than the levels assumed by the State Board during development of the OTC Policy and even significantly below those described by Tenera its March 1, 2010 Rebuttal Technical Memorandum. As depicted in Attachment 1 to this letter, the SBPP's annual average flow for 2010 is approximately 54 MGD (less than one fourth of its permitted level), and the plant's estimated annual capacity factor is a mere two percent (2%). Accordingly, there is utterly no factual basis for concluding*

*that SBPP's continued use of San Diego Bay water for cooling poses an unacceptable risk to human health or the environment such that the plant must be shut down without regard to the reliability-must-run ("RMR") status of Units 1 and 2. As evidenced by the compliance schedule established in the OTC Policy and other technical evidence submitted by Dynegy, the impingement and entrainment effects associated with SBPP are not sufficient to support termination of the permit under 40 CFR § 122.64(a)(3), whether before or after December 31, 2010.*

**Response:** On May 4, 2010, the State Water Resources Control Board (State Water Board) adopted a final "Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling" (OTC Policy). This OTC Policy establishes uniform requirements for the implementation of CWA Section 316(b), using best professional judgment in determining Best Technology Available for cooling water intake structures at existing coastal and estuarine power plants that must be implemented in NPDES permits and will require SBPP to achieve compliance by December 31, 2012. The reference quoted by the commenter refers to modification to NPDES permits to incorporate compliance schedules contained in the proposed Policy (which, once the Policy is effective, will be the responsibility of the State Water Board, rather than the Regional Water Boards). The OTC Policy also includes some immediate and interim requirements which would have to be incorporated into any future NPDES Permit. The OTC Policy does not address all aspects of power plant discharge impacts. The OTC Policy only addresses intake structures which may be causing environmental harm due to entrainment and impingement. The San Diego Water Board is charged with protecting water quality by regulating discharges in conformance with applicable state and federal water quality laws and regulations.

It is speculative at this time when the recently adopted OTC Policy will become effective. Adoption of the tentative Order would not directly conflict with the OTC Policy and would not preclude evaluation and issuance of a new permit to authorize continued discharges in compliance with applicable laws and regulations after a public process. The final OTC Policy also affirms that the intent of the OTC Policy "is to ensure that the beneficial uses of the State's coastal and estuarine waters are protected while also ensuring that the electrical power needs essential for the welfare of the citizens of the State are met" and reiterates that the OTC Policy does not "preclude[] the authority of the Regional Water Boards to regulate discharges from existing power plants through NPDES permits, consistent with water quality standards." (Introduction to Policy as revised March 22, 2010, ¶¶ 1.G. and 1.N.).

In deciding whether to terminate the existing NPDES Permit Order No. R9-2004-0154, the San Diego Water Board must also consider many other factors including effects on beneficial uses, discharge conformance with water quality objectives and sediment quality objectives, as well as the effect of discharge temperature and turbidity on receiving waters.

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**Commenter:** Dynegy, Inc

Margaret Rosegay Attorney, Pillsbury Winthrop Shaw Pittmann Letter date: 20-Apr-10

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**Topic:** Termination would be unlawful

**Issue:** Grounds for termination of the permit in advance of the December 31, 2010 expiration date do not exist.

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**Comment ID:** 28

*The NPDES regulations clearly specify exclusive grounds for termination, none of which exist at South Bay. The NPDES regulations are also clear that a permit cannot be terminated unless a Notice of Intent to Deny is issued containing the necessary findings, and the proposed denial has been subject to 30 days notice and comment. Those steps have not been taken and thus termination of the permit as envisioned under Option 2 is contrary to applicable law.*

**Response:** As discussed in the Staff Report, there are adverse impacts due to the SBPP discharge and although these impacts continue to some degree even at the reduced permitted flow rate, the effects of the discharge are within the range of anticipated effects acknowledged by the Board when it adopted NPDES Order R9-2004-0154. The tentative Order concludes that the effects of the discharge do not, in the short term, rise to the level of endangering the environment to support termination of NPDES Order R9-2004-0154 before it expires on December 31, 2010 absent an earlier determination by the CAISO that Units 1 and 2 are no longer needed to maintain grid reliability.

However, in accordance with the public hearing notice, after the San Diego Water Board hears from all parties and considers all of the evidence submitted, the Board may decide that it disagrees with staff's conclusion and find there are sufficient facts warranting a determination that the discharges can only be regulated to an acceptable level by permit termination earlier than the current permit or tentative Order provide. The Board may legally make such a determination if it finds, based on a preponderance of the evidence it hears, that the facts establish that continued discharges endanger human health or the environment and can only be regulated to acceptable levels by permit termination within the meaning of 40 CFR section 122.64(a)(3). The public notice identified the following issues as the subject of the hearing: (1) whether the intake and discharge operations at SBPP endanger human health or the environment and can only be regulated to acceptable levels by permit modification or termination and (2) whether any effects identified in item (1) provide a sufficient basis for the San Diego Water Board to require earlier termination. The notice also recognizes that the Board may modify the tentative Order to reach a conclusion on these issues that differs from staff's recommendation. Therefore the parties and the public have been on notice to submit all evidence and testimony relevant to these issues and that the Board may make such a decision after hearing all of the evidence and testimony. If the Board were to revise findings to support a conclusion to terminate the permit earlier than staff recommends, all designated parties will have an opportunity to review and comment on the findings prior to adoption and may also comment about the effective date of such an order.

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**Commenter:** Dynegey, Inc

Margaret Rosegay Attorney, Pillsbury Winthrop Shaw Pittmann Letter date: 20-Apr-10

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**Topic:** Permit Administrative Extension

**Issue:** Discharges Under Order No. R9-2004-0154 May Occur after December 31, 2010 Under Regulations Pertaining to Administrative Extension.

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**Comment ID:** 29

*II. Discharges Under Order No. R9-2004-0154 May Occur after December 31, 2010 Under Regulations Pertaining to Administrative Extension.*

*Dynegy also disagrees with statements in the Tentative Order and in the Staff Report that SBPP's permit cannot be administratively extended and that all discharges from the plant must terminate December 31, 2010 absent further action by the Board. We have discussed this issue with staff counsel and understand that staff now agrees the permit may be administratively extended. However, staff continues to maintain that the language in the permit stating that "discharges from Units 1 and 2 shall terminate on the date CAISO determines that [RMR] services . . . are no longer needed or December 31, 2010, whichever occurs first" effectively trumps the administrative extension. This interpretation cannot be sustained.*

*Under applicable federal regulations, Dynegy may lawfully continue to discharge under Order No. R9-2004-0154 after December 31, 2010 if a complete application for renewal of the permit is submitted on or before June 30, 2010. The minor modifications made by the Executive Officer on November 9, 2009 (and later ratified by the Board) did not effect a de facto termination of the permit such that discharges could not continue after that date under administrative extension of the permit.*

*Dynegy updated its permit application in October 2009 to take into consideration the imminent retirement of Units 3 and 4 and its then expectation that Units 1 and 2 would not be needed by the CAISO to ensure grid reliability after December 31, 2010. Consistent with that intention, Dynegy understood the Executive Officer's minor modification to accomplish two objectives: (1) prohibit discharges from Units 3 and 4 after December 31, 2009, and (2) reflect a new permit expiration date of December 31, 2010. This understanding is confirmed by Finding 34 of SBPP's NPDES permit, as modified, which states:*

*By letters dated October 16, 2009 and October 19, 2009, Dynegy provided information regarding the schedule for shutdown and closure of the South Bay Power Plant. . . . Based on available information and on a CAISO request to provide a provision in the 2010 RMR contract that would allow the CAISO to terminate the contract for Units 1 and 2 prior to December 31, 2010, Dynegy believes that a NPDES discharge permit that would expire on December 31, 2010 would be sufficient to meet the CAISO's stated reliability requirements. Dynegy requested to continue operation of Units 1 and 2 under the current NPDES permit at a reduced maximum flow rate of 225 million gallons per day (MGD) until December 31, 2010 absent further action by the Regional Board. (Emphasis added.)*

*There is no ambiguity in this language. Consistent with Finding 34, the Public Notice for the May 12 hearing describes December 31, 2010 as "the expiration date of Order No. R9-2004-0154."*

*At no time prior to issuance of the Tentative Order and the Staff Report did staff ever advise Dynegy that it would be unable to rely on the provisions regarding administrative extension of permits in the event the CAISO determined that Units 1 and 2 were in fact needed for RMR services after December 31, 2010. In fact, Paragraph 16 of the Standard Provisions applicable to the SBPP permit (see Order No. R9-2004-0154, Attachment 2, ¶16) expressly allows for continuation of the expired permit in accordance with 40 CFR § 122.6 and 23 CCR § 2235.4. This provision was not modified or deleted as a result of the minor modifications, and was actually ratified by the Board on December 16, 2009. Staff's argument that the permit can be administratively extended, but by its own terms still precludes the*

*previously permitted discharges, is nonsensical and contrary to basic rules of construction. The only reasonable interpretation of these provisions is that the discharges from Units 1 and 2 may continue after December 31, 2010, subject to the same effluent limitations to which they were subject prior to expiration of the permit.*

*Dynegy did not understand the minor modification to effect a "termination" of the permit as of December 31, 2010, and does not believe the Executive Officer's action, or the ratification by the Board, can legally have that result. "Termination" of a permit is an enforcement mechanism, and one that is considered by EPA to be a "harsh mechanism that will be only be used in extreme circumstances." See 45 Fed. Reg. 33290, 33300. Because the plant is in full compliance and there has never been any enforcement activity relating to the plant, Dynegy had no reason to suspect that the wording used in the minor modification that "the discharges from Units 1 and 2 shall terminate . . . [on] December 31, 2010, absent further action by the Regional Board" was intended to, or could, effect a "termination" of the permit on that date. By its plain language, that wording simply means that absent timely steps to renew the permit, the discharges would be required to end (terminate) on that date, by virtue of the expiration of the permit. Dynegy's understanding of the reference to "further Board action" was that the staff would seek Board ratification of any subsequent administrative extension. If, as now suggested by staff, this can just as plausibly be interpreted as a reference to the Board's authority to terminate the permit prior to or on December 31, 2010, that authority is, of course, expressly limited by the terms of 40 CFR § 122.64(a). As discussed in Section I above, those requirements have not been met.*

*In its testimony before the Board and in discussions with staff, Dynegy has clearly stated that it must and will take all actions necessary to maintain its authorization to operate the plant until the CAISO releases the remaining units from RMR status. Dynegy did not waive its rights to administrative extension of the permit when it updated its permit application in October of last year, and there is nothing in the permit as modified which indicates those provisions were deemed waived. The statement in the November 9, 2009 letter that "the Regional Water Board understands that Dynegy has consented to all of these modifications" is true only insofar as the minor modifications comport with Dynegy's understanding of them. Dynegy did not, and under no circumstance would it, consent to the termination of its own permit while it remains under a contractual obligation to the CAISO to maintain authorization to operate the plant.*

*Accordingly, Dynegy does not interpret the terms of the permit, as modified, to preclude operation after December 31, 2010 if a permit renewal application is timely pending. If Dynegy does not timely submit an application for renewal of the permit, it may not discharge after December 31, 2010. However, there is nothing in either the minor modification or the Board's ratification order which states that the permit – as opposed to "the discharges" – will terminate on December 31, 2010. In fact, to the contrary, Finding 27 states that "the Regional Board will conduct a public hearing to consider rescinding Order No. R9-2004-0154 upon termination of all discharges from the South Bay Power Plant." If the permit were automatically terminated as of December 31, 2010, there would be no need for a rescission hearing.*

**Response:** The San Diego Water Board is not modifying federal or state regulations applicable to the continuation of expired NPDES permits. NPDES Order R9-2004-0154 requires the discharges from SBPP to terminate on December 31, 2010 or the date that CAISO determines that the SBPP units are no longer needed as RMR units whichever occurs first. California Code of Regulations, title 23, section 2235.4 states "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 federal regulations, at 40 CFR section 122.6 state that the conditions of an expired permit continue if: (1) the permittee has submitted a complete timely application; and (2) the Regional Administrator, through no fault of the permittee, does not issue a new permit before the expiration date of the previous permit." Therefore, absent any prohibition in the permit, the permit will become automatically administratively extended after December 31, 2010 as long as the previous two requirements are met and if the permit is not first terminated by board action.

However, if the permit is administratively extended beyond December 31, 2010, the permit would be extended only with the current terms and conditions in place. The San Diego Water Board disagrees with the commenter's analysis that it may legally continue discharges beyond December 31, 2010 if it submits a timely and complete application for renewal. The minor modification ratified in Order No. R9-2009-0178 adds provision 26 to the permit which states: "[t]he discharges from Units 1 and 2 shall terminate on the date CAISO determines that Reliability Must Run (RMR) services from Units 1 and 2 are no longer needed or December 31, 2010, whichever occurs first, absent further action by the Regional Board." Therefore, if Dynegy submits a timely and complete application but it is not acted upon prior to December 31, 2010, the permit technically would be administratively extended, but under the current terms and conditions which preclude discharges from Units 1 and 2 after December 31, 2010. Absent a new permit authorizing continued discharges prior to 2011, discharges from Units 1 and 2 after December 31, 2010 would violate the permit terms.

The finding in the tentative order which states "Order No. R9-2004-0154 cannot be extended to allow discharges from Units 1 and 2 beyond December 31, 2010," could be more artfully stated, but is technically correct and does not require modification. The staff report has been revised to clarify that the permit is, in fact, susceptible of administrative extension. As stated above, administrative extension applies only to the terms and conditions in the current permit, which prohibits discharges from Units 1 and 2 beyond 2010. The staff report is revised as follows at page 4: "Because the modified NPDES Order requires the discharges from Units 1 and 2 terminate no later than December 31, 2010, and an administrative extension continues only the existing permit terms and conditions, the discharge termination dates established in the modified NPDES Order cannot be administratively extended beyond December 31, 2010, even if the permit itself is administratively extended."

The San Diego Water Board can not amend a permit that is administratively extended to allow continued discharge. Adopting the tentative Order will result in termination NPDES Order R9-2004-0154 at its expiration on December 31, 2010 or termination as of the date that CAISO releases Units 1 and 2 from RMR status, if it releases them prior to the end of 2010.

If Dynegy proposes continued operation of SBPP beyond December 31, 2010, a new complete application for a new NPDES permit under the new reduced flow rate must be submitted which fully demonstrates compliance with all applicable CWA requirements, and implementing US EPA regulations as well as with any more stringent effluent standards or limitations necessary to implement water quality control plans and policies.

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**Commenter:** Dynegy, Inc

Margaret Rosegay Attorney, Pillsbury Winthrop Shaw Pittmann Letter date: 20-Apr-10

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**Topic: Change the Name of the Tentative Order**

**Issue:** The name of the order (“An Order Terminating Order No. R9-2004-0154”) is inappropriate.

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Comment ID: 30

*Proposed Changes to Tentative Order and Staff Report*

*In light of the foregoing, Dynegy believes that the appropriate course of action is for the Board to take no action – the third option identified in the Notice of Public Hearing. However, if the Board decides to adopt an order reflecting staff’s findings and recommendations for the “short term,” there are a number of corrections that must be made to the Tentative Order and Staff Report, as listed below.*

*1. The name of the order (“An Order Terminating Order No. R9-2004-0154”) is inappropriate. The tentative order does not make any findings that warrant termination of the permit, and in fact concludes that termination is not warranted. This tentative order cannot lawfully terminate the permit and must be renamed.*

**Response:** The name of the Order is appropriate..

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**Commenter:** Dynegy, Inc

Margaret Rosegay Attorney, Pillsbury Winthrop Shaw Pittmann Letter date: 20-Apr-10

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**Topic: Permit Administrative Extension**

**Issue:** Discharges Under Order No. R9-2004-0154 May Occur after December 31, 2010 Under Regulations Pertaining to Administrative Extension.

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Comment ID: 31

*2. Revise Finding 2 to clarify that the Board’s December 16, 2009 action did not terminate the permit effective December 31, 2010, but rather specified December 31, 2010 as the permit’s new expiration date. Delete the provisions of this finding which erroneously conclude that Order No. R9-2004-0154 cannot be administratively extended, and clarify that discharges after December 31, 2010 may continue either pursuant to an administrative extension of the permit or pursuant to a renewed permit adopted by the Board. Similarly, omit the statements on page 4 and page 23 of the Staff Report indicating that Order No. R9-2004-0154 cannot be administratively extended beyond December 31, 2010. As of the date of this submittal, Dynegy has been unable to obtain confirmation from the CAISO that Units 1 and 2 will not be designated RMR for calendar year 2011. For this reason, Dynegy intends to submit an application for renewal of its permit on or before June 30, 2010, in the expectation that a draft permit will be presented to the Board for adoption prior to the end of the year. If for some reason action is not taken on the application before the end of the year, Dynegy expects that it will be entitled to continue discharging under the rules applicable to administrative extension of permits.*

**Response:** The San Diego Water Board is not modifying federal or state regulations applicable to the continuation of expired NPDES permits. NPDES Order R9-2004-0154 requires the

discharges from SBPP to terminate on December 31, 2010 or the date that CAISO determines that the SBPP units are no longer needed as RMR units whichever occurs first. California Code of Regulations, title 23, section 2235.4 states "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 federal regulations, at 40 CFR section 122.6 state that the conditions of an expired permit continue if: (1) the permittee has submitted a complete timely application; and (2) the Regional Administrator, through no fault of the permittee, does not issue a new permit before the expiration date of the previous permit." Therefore, absent any prohibition in the permit, the permit will become automatically administratively extended after December 31, 2010 as long as the previous two requirements are met and if the permit is not first terminated by board action.

However, if the permit is administratively extended beyond December 31, 2010, the permit would be extended only with the current terms and conditions in place. The San Diego Water Board disagrees with the commenter's analysis that it may legally continue discharges beyond December 31, 2010 if it submits a timely and complete application for renewal. The minor modification ratified in Order No. R9-2009-0178 adds provision 26 to the permit which states: "[t]he discharges from Units 1 and 2 shall terminate on the date CAISO determines that Reliability Must Run (RMR) services from Units 1 and 2 are no longer needed or December 31, 2010, whichever occurs first, absent further action by the Regional Board." Therefore, if Dynegy submits a timely and complete application but it is not acted upon prior to December 31, 2010, the permit technically would be administratively extended, but under the current terms and conditions which preclude discharges from Units 1 and 2 after December 31, 2010. Absent a new permit authorizing continued discharges prior to 2011, discharges from Units 1 and 2 after December 31, 2010 would violate the permit terms.

The finding in the tentative order which states "Order No. R9-2004-0154 cannot be extended to allow discharges from Units 1 and 2 beyond December 31, 2010," could be more artfully stated, but is technically correct and does not require modification. The staff report has been revised to clarify that the permit is, in fact, susceptible of administrative extension. As stated above, administrative extension applies only to the terms and conditions in the current permit, which prohibits discharges from Units 1 and 2 beyond 2010. The staff report is revised as follows at page 4: "Because the modified NPDES Order requires the discharges from Units 1 and 2 terminate no later than December 31, 2010, and an administrative extension continues only the existing permit terms and conditions, the discharge termination dates established in the modified NPDES Order cannot be administratively extended beyond December 31, 2010, even if the permit itself is administratively extended."

The San Diego Water Board can not amend a permit that is administratively extended to allow continued discharge. Adopting the tentative Order will result in termination NPDES Order R9-2004-0154 at its expiration on December 31, 2010 or termination as of the date that CAISO releases Units 1 and 2 from RMR status, if it releases them prior to the end of 2010.

If Dynegy proposes continued operation of SBPP beyond December 31, 2010, a new complete application for a new NPDES permit under the new reduced flow rate must be submitted which fully demonstrates compliance with all applicable CWA requirements, and implementing US EPA regulations as well as with any more stringent effluent standards or limitations necessary to implement water quality control plans and policies.

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**Commenter:** Dynegy, Inc

Margaret Rosegay Attorney, Pillsbury Winthrop Shaw Pittmann Letter date: 20-Apr-10

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**Topic:** Dynegy Permit Changes 3-5

**Issue:** Suggested changes to NPDES Order R9-2004-0154

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Comment ID: 32

3. *Revise Finding 5 to omit the statement that the Staff Report contains the rationale for terminating Order No. R9-2004-0154 on December 31 or earlier if the CAISO determines that Units 1 and 2 are no longer designated as RMR. As demonstrated by evidence in the record, once the CAISO determines that Units 1 and 2 are no longer required for reliability purposes, Dynegy's lease with the Port will terminate and Units 1 and 2 will be permanently retired. In that circumstance, there is no need to "terminate" the permit. The Staff Report does not contain any findings that continued operation of the plant before or after December 31, 2010 would pose an unacceptable risk to human health or the environment and thus does not contain any rationale for terminating Order No. R9-2004-0154 on or before December 31, 2010, or on any other date.*

4. *Revise Finding 12 to state "The San Diego Water Board has notified all known interested parties of its intent to allow continued discharge from Units 1 and 2 in accordance with Order No. R9-2004-0154."*

5. *Revise Finding 14 to state "This decision pertaining to an NPDES permit is exempt from the provisions of CEQA . . ."*

6. *Revise the ordering language to state: "IT IS HEREBY ORDERED that grounds for termination of the discharge prior to December 31, 2010 do not exist and that the Discharger may continue to discharge in accordance with the terms of Order No. R9-2004-0154 as long as Units 1 and 2 are designated as reliability must run units by the CAISO. Order No. R9-2004-0154 will expire on December 31, 2010 unless administratively extended or renewed prior to that date."*

**Response:** Finding 5 does not need to be changed. The rationale for terminating the permit is that the permit already requires the discharge to terminate on December 31, 2010 or the date that CAISO determines that the SBPP units are no longer needed as RMR units whichever occurs first. The existing NPDES Order No. R9-2004-0154 was modified in late 2009 based, in part, upon the finding that NPDES Order R9-2004-0154 "will remain fully effective and enforceable under an administrative extension until December 31, 2010 absent further action by the Regional Water Board." (Order No. R9-2009-0178, modifying Order No. R9-2004-0154, Finding No. 4.) and to include the following provision: "The discharges from Units 1 and 2 shall terminate on the date CAISO determines that Reliability Must Run (RMR) services from Units 1 and 2 are no longer needed or December 31, 2010, whichever occurs first, absent further action by the Regional Board." (New Provision No. 26.) NPDES Order R9-2004-0154 therefore expires on December 31, 2010 and discharges must terminate at the end of 2010 or the date the CAISO determines Units 1 and 2 are no longer designated as RMR, whichever date is earlier. Adoption of Tentative Order No. R9-2010-0062 as proposed will not result in termination of discharges any earlier than is otherwise required under NPDES Order R9-2004-0154. Under the tentative Order, termination of NPDES Order

R9-2004-0154 effectively will only occur if the CAISO releases Units 1 and 2 before the end of 2010, in which case the permit would be terminated simultaneously with termination of discharges, but the termination of discharges is the direct result of the provisions in NPDES Order R9-2004-0154. If the RMR designation for Units 1 and 2 remains through the end of the year, the discharges will terminate as required by NPDES Order R9-2004-0154 at the end of 2010 and the permit will expire at the end of the year. In that circumstance, NPDES Order R9-2004-0154 is not being terminated under 40 CFR section 122.64(a)(3). A clarification making this distinction will be added to the tentative Order. As provided in the tentative Order, any proposal to continue discharges beyond 2010 will require adoption of a new discharge permit following a public hearing.

It would be inappropriate to revise Finding 12 to state "The San Diego Water Board has notified all known interested parties of its intent to allow continued discharge from Units 1 and 2 in accordance with Order No. R9-2004-0154." The purpose of the tentative Order is to terminate the permit so Finding 12 states that interested parties were notified of the termination. The current, administratively extended permit, only authorizes discharges until, at the latest, the end of 2010. Applicable regulations do not authorize modification of the permit to allow continued discharges from the SBPP after 2010. Absent issuance of a new permit, following a public comment period and hearing, discharges beyond 2010 would be unlawful.

Finding 14 does not need to be changed. This is standard CEQA language for the termination of a permit.

The ordering language does not need to be changed. NPDES Order No. R9-2004-0154 requires the discharges from SBPP to terminate on December 31, 2010 or the date that CAISO determines that the SBPP units are no longer needed as RMR units whichever occurs first. Contrary to the commenter's assertion, the San Diego Water Board believes that in no case can SBPP continue to discharge under NPDES Order No. R9-2004-0154 after December 31, 2010. Even if Dynegy submits a complete application in a timely manner which would normally administratively extend the permit, the permit still requires the discharge to terminate on December 31, 2010 at the latest. NPDES Order No. R9-2004-0154 is already administratively extended because the original expiration date was November 10, 2009. The San Diego Water Board can not amend a permit that is administratively extended.

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**Commenter:** Political Delegation for Chula Vista

Bob

Filner

U.S. Congressmen, 51st district

Letter date: 20-Apr-10

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**Topic:** Terminate the Discharge by June 1, 2010

**Issue:** We would like to offer our strong support for the rescission of the South Bay Power Plant (SBPP) discharge permit this year as recommended by your staff. We also wish to emphasize that we expect to see permanent closure of this plant by the end of 2010.

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**Comment ID:** 33

*We would like to offer our strong support for the rescission of the South Bay Power Plant (SBPP) discharge permit this year as recommended by your staff. We also wish to emphasize that we expect to see permanent closure of this plant by the end of 2010.*

*Furthermore, we strongly support the termination of the remaining two operating units of the South Bay Power Plant as early as possible. We believe that the evidence in the record demonstrating higher biological impacts from cooling use of the bay water occurring from May through August is sufficient evidence for the Board to terminate the discharge as of June 1, 2010. However, the Board must terminate the permit this year to ensure that the plant does not continue to operate beyond the end of 2010.*

*The evidence in the record is clear and compelling---there are significant, damaging and avoidable impacts from the continued operations of the South Bay Power Plant. Beyond the environmental impacts, the economic blight and the toll that the power plant has taken on the lives of South Bay residents cannot be overstated. It is time to allow our community to enter a new, cleaner, healthier era.*

*We urge you to rescind the discharge permit of the SBPP on May 12. Thank You for your consideration.*

**Response:** As discussed in the Staff Report, there are adverse impacts due to the SBPP discharge but, allowing the discharge to continue until December 31, 2010, at the latest does not, in the short term, pose an unacceptable risk to human health and the environment within the meaning of 40 CFR Section 122.64(a)(3). The effects of the discharge are within the range of anticipated effects acknowledged by the Board when it adopted NPDES Order R9-2004-0154 and the Tentative Order concludes that the effects of the discharge do not, in the short term, endanger the environment. Therefore, the evidence does not support termination of NPDES Order R9-2004-0154 before December 31, 2010 absent an earlier determination by the California Independent System Operator Corporation (CAISO) that Units 1 and 2 are no longer needed to maintain grid reliability (Reliability Must Run or RMR).

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