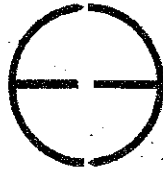


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December 8, 2009

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

VIA E-Mail: commentletters@waterboards.ca.gov

Subject: Comment Letter – November 23, 2009 Draft Statewide Water Quality Control Policy On The Use Of Coastal And Estuarine Waters For Power Plant Cooling

Dear Ms. Townsend:

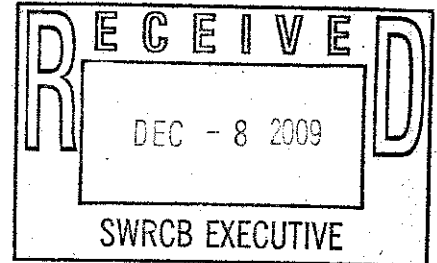
The California Council for Environmental and Economic Balance (CCEEB) is a non-partisan, non-profit organization of business, labor and community leaders that seeks to achieve the State's environmental goals in a manner consistent with a sound economy. As such CCEEB has taken an active role in working with the State Water Resources Control Board (SWRCB) to address proposed policies and permits that affect the operation of coastal power plants subject to the current draft of the above noted Once Through Cooling (OTC) Policy.

This letter provides CCEEB's written comments on the November 23, 2009 version of the proposed "Draft Statewide Water Quality Control Policy On The Use Of Coastal And Estuarine Waters For Power Plant Cooling" and the implications of these changes to the Draft Substitute Environmental Document (DSED).

I. The Exclusion of Economic Considerations from the New Definition of "Not Feasible" is Unjustified and Unprecedented

A. Economic Considerations are Pervasive in the Water Code and State Board Regulations.

The November 23 revised draft version of the OTC Policy (Revised Policy) introduced a new definition of "Not Feasible" which states that "Cost is not a factor to be considered when determining feasibility under Track 1." The only grounds expressly recognized for finding Track 1 compliance infeasible, and



allowing a facility to proceed under Track 2, are physical or legal impossibility, or unacceptable environmental impacts. Moreover, in such cases, Track 2 requirements apply regardless of whether compliance is physically, legally *or* economically infeasible.

The exclusion of economic considerations in determining “feasibility” is unprecedented and flies in the face of the pervasive incorporation of economic considerations in the Water Code. Indeed, it is the fundamental policy of the Porter-Cologne Water Quality Control Act “to attain the highest water quality *which is reasonable, considering all demands* being made and to be made on those waters *and the total values involved*, beneficial and detrimental, *economic and social*, tangible and intangible.” Water Code, § 13000 (emphases added). The State Board’s authority to formulate and adopt state policy for water quality control is subject to the condition that such policy “shall be in conformity with the policies set forth in Chapter 1 (commencing with Section 13000).” Water Code, § 13140. The State Board has no authority to adopt policy that contravenes the intent of the Legislature by jettisoning consideration of all demands on waters, of reasonableness, and of economic and social values.

In *City of Burbank v. State Water Resources Control Board*, 35 Cal. 4th 613 (2005), the California Supreme Court interpreted the Legislature’s intent in considering whether the federal Clean Water Act preempts Water Code sections 13241 (requiring Regional Water Quality Control Boards to consider economic factors when establishing water quality objectives) and 13263 (requiring permit writers to consider section 13241 factors when establishing permit conditions). The Court found that the Water Code’s plain language expressed a clear intent to take economic considerations into account, to the full extent not preempted by federal law. Thus, where the State Board or Regional Boards act to impose a requirement that is *more stringent* than that of federal law, state law mandates consideration of economic factors. *City of Burbank*, 35 Cal. 4th at 625-628. There is, of course, no question that the State Board’s proposed OTC Policy is more stringent than federal law, since EPA has yet to re-establish any federal BTA standards for existing facilities under Clean Water Act Section 316(b). When EPA does develop new Phase II regulations, it may properly apply a cost-benefit analysis in determining what the standards should be, as upheld by the U.S. Supreme Court in *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009).

Reflecting the state’s fundamental policy, the Water Code and other State Board regulations incorporate economic considerations in determining “feasibility” for a wide range of purposes. For example, pollution prevention plans must incorporate an analysis of the relative costs and benefits of pollution prevention measures, and measures may be withdrawn if *economically impracticable* or technologically infeasible. Water Code, §§ 13263.3(d)(2)(H); 13263.3(d)(3)(I); 13263.3(i). The corrective action program regulations require the Regional Boards to determine whether it is technologically *or economically infeasible* to achieve the background levels of constituents, in order to establish concentration limits above background. 23 Cal. Code Regs. § 2550.4(c). Similarly, containment zones are authorized where it is technically *or economically infeasible* to clean up to water quality objectives, and water quality objectives are not exceeded outside the zone. State Board Res. No. 92-49; 23 Cal. Code Regs. § 2911. When dischargers are required to provide technical reports under Water Code

section 13267, the burden, including costs, of the reports must bear a reasonable relationship to the need for and benefits to be obtained from the reports. Moreover, the Water Code and State Board regulations require "feasibility studies" for a variety of control and conservation projects, and those studies must analyze economic as well as technical factors. See examples listed in Attachment A.

As these examples illustrate, the concepts of technological and economic feasibility are intertwined pervasively throughout the statute and regulations. Both the Legislature and the State Board have recognized the critical importance of considering whether a regulatory requirement or project is, in fact, economically practical as well as physically possible. By contrast, the definition of "Not Feasible" in the Revised Policy would be unique in expressly precluding cost considerations.

B. The Definition of "Feasible" Under CEQA Should Apply to the OTC Policy.

The California Environmental Quality Act (CEQA) provides another widely-recognized definition of "feasibility" which would be appropriate for the OTC Policy: "'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors." CEQA (Pub. Res. Code), § 21061.1; *see also* CEQA Guidelines (14 Cal. Code Regs.), § 15364 (reiterating this definition and adding "legal" to the list of factors). CEQA case law clarifies the types of cost documentation and analysis that suffice to support feasibility determinations on economic grounds. *See, e.g., San Franciscans Upholding the Downtown Plan v. City and County of San Francisco*, 102 Cal. App. 4th 656 (2002); *City of Fremont v. San Francisco Bay Area Rapid Transit District*, 34 Cal. App. 4th 1780 (1995). The CEQA definition is thus well understood and is regularly applied by all agencies in California subject to CEQA, including the State Board. In fact, the CEQA definition, in at least one context, has been adopted into the Water Code itself. *See* Water Code, § 8307(c)(4), applying CEQA Guidelines, § 15364 definition of "feasible" to city and county liability for approving a development project without taking feasible action to prevent flood damage.

II. The Draft Substitute Environmental Document Must Be Revised and Recirculated to Address Environmental Impacts Arising from the Policy Changes

The elimination of the "wholly disproportionate" test and the new definition of "feasibility" to exclude cost considerations are not minor, non-substantive language revisions. On the contrary, these changes have major consequences by potentially forcing more facilities into premature retirement, with attendant environmental impacts.

It is well established that CEQA requires the State Board to consider, and to inform the public regarding, the consequences of agency actions for the environment as a whole. If a policy has adverse environmental impacts on air quality, land use, hazardous

waste generation, etc. as unintended side-effects of protecting water quality, those other impacts must be fully disclosed and evaluated *See, e.g., City of Arcadia v. State Water Resources Control Board*, 135 Cal. App. 4th 1392 (2006). The State Board cannot take action unless it adopts feasible alternatives or mitigation measures to substantially lessen or avoid such impacts, or finds that overriding considerations support the action despite its impacts. CEQA, § 21002; CEQA Guidelines, § 15021. Moreover, when a regulatory agency proposes new standards or requirements for pollution control, CEQA requires the agency to perform an environmental analysis of the reasonably foreseeable methods by which compliance will be achieved, the reasonably foreseeable impacts of those compliance methods, and reasonably foreseeable mitigation measures and alternatives which would avoid or eliminate the impacts. CEQA Guidelines, § 15187.

The Draft Substitute Environmental Document (DSED), released on June 30, 2009, purports to address such issues. The DSED focuses almost exclusively on analyzing the potential environmental impacts arising from the installation of alternative cooling technology at existing facilities. However, that analysis assumes that at least some of the facilities will have the option of making the “wholly disproportionate” demonstration. *See* DSED, p. 13 (“In limited circumstances, a facility may request alternative requirements if it demonstrates that the costs of compliance under Track 1 or Track 2 would be wholly disproportionate to the benefits to be gained”). Incorporating that assumption, the DSED (p. 107) also briefly addresses the risk of “wide area environmental effects” if OTC plant owners find retrofitting economically infeasible and shut down their plants. Even in this cursory discussion, the DSED recognizes that:

“the indirect environmental impacts that could occur due to the proposed Policy would be directly related to the amount of new infrastructure constructed to compensate for any retirements. Depending on how and when the proposed Policy was enacted, the infrastructure needed could range from quite modest to extremely base, from as many as 800 new small power plants in the state at a cost of well over \$10 billion if all OTC plants are retired in 2009, to as little as 135 million dollars in modest, low-impact transmission upgrades in the still unlikely event that all but the nuclear plants are retired in 2015.” DSED, p. 107.

The June 2009 DSED (p. 106), citing a technical consultant report dated April 2008, concludes that the prospect that “OTC plant owners [would] choose en masse to retire their plants” is an “unlikely event.” However, the DSED and the supporting report were based on the draft OTC Policy as then proposed. The November 2009 Revised Policy, by deleting the “wholly disproportionate” test and excluding cost as a factor for determining feasibility, has substantially altered the assumptions on which the prior analysis was based. Specifically, it is reasonably foreseeable that more facilities may become uneconomical and forced into premature retirement. Whether or not the conclusions were justifiable in April 2008 or June 2009, the analysis cannot have incorporated the increased risk of plant retirements based on the November policy revisions and the myriad attendant potential adverse environmental effects that would result from energy shortages in the state. Yet the State Board did not issue a revised DSED, much less a revised technical analysis, to accompany its November 2009 draft Revised Policy.

Regarding the potential indirect “wide area environmental effects” from plant retirements and the need for new infrastructure to compensate, the DSED summarily concludes (p. 107) that “the proposed Policy is not likely to result in significant cumulative impacts to public safety and the environment” because, “[w]ith the exception of a few land use impacts related to zoning issues, power plant construction in California in recent years resulted in no significant, unmitigated impacts to public safety and the environment.” The DSED also notes that “major transmission line projects often result in unmitigated impacts to visual resources,” but concludes that the “vast majority of the upgrades” identified as necessary in the 2008 consultant report “would have no impacts, even during construction.”

That highly misleading statement fails to fulfill the informational purposes of CEQA. First, most recent power plant construction projects in California involve smaller facilities that would not be expected to have substantial project-specific environmental impacts – although the construction of 800 such facilities would certainly contribute to cumulative impacts, as discussed below. Second, approvals for the few larger projects have imposed numerous conditions to mitigate environmental impacts. *See, e.g., California Energy Commission, Final Commission Decision, Colusa Generating Station (06-AFC-9)*, April 2008; *Final Commission Decision, Victorville 2 Hybrid Power Project (07-AFC-1)*, July 2008. By referring only to projects having “no significant, unmitigated impacts”, the DSED misleadingly suggests that these are projects with minimal environmental footprints, failing to disclose the issues addressed in their respective environmental reviews.

Third, and critically important, the DSED (p. 107) represents that new infrastructure is “not likely to result in significant *cumulative* impacts” (emphasis added). However, as CEQA provisions and case law on cumulative impacts make clear, the fact that mitigation for any individual project may reduce that project’s impacts to insignificance does *not* imply that the project does not contribute to significant cumulative impacts. Modest post-mitigation impacts from individual projects can add up to significant cumulative impacts, and even smaller contributions can have great importance if they add to existing environmental problems. *See, e.g., Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3rd 692 (1990); *Communities for a Better Environment v. California Resources Agency*, 103 Cal. App. 4th 98 (2002). Capturing the effects of residual impacts remaining after mitigation is the central purpose of conducting a cumulative impact analysis. By basing its cumulative impact analysis solely on the assertion that “recent power plant construction projects resulted in no significant, unmitigated impacts” (DSED, p. 107) and ignoring those transmission line upgrades that were not in the “no impact” category, the DSED entirely failed to address the cumulative effect of the many projects it contemplates throughout the state, even assuming each of those projects individually has less-than-significant impacts. It is also worth noting that the DSED, as a programmatic CEQA document, did not purport to defer analysis to the project-specific level, but represented that at the programmatic stage it could already be determined that significant cumulative impacts are unlikely. That determination is unsupported and unsustainable based on the conclusory discussion in the DSED.

In summary, the DSED's one-page CEQA analysis of indirect and cumulative impacts is far more abbreviated than CEQA allows. The DSED does acknowledge, albeit cursorily, that the OTC Policy foreseeably could result in increased infrastructure construction. By eliminating the "wholly disproportionate" test and narrowing the definition of "feasibility" to exclude cost, the Revised Policy risks forcing additional facilities into potential retirement. The Revised Policy thus foreseeably could result in further increased infrastructure construction and attendant cumulative impacts. When project changes result in new or substantially more severe environmental impacts that were not analyzed in the initial draft CEQA document, the document must be revised and recirculated for additional public review and comment. CEQA Guidelines, § 15088.5(a). Accordingly, recirculation of the DSED is essential in this instance.

III. Referring to the initial implementation target dates as Final Compliance Dates for inclusion in NPDES Permits could subject individual permit holders to citizen suits.

Section 505 of the Clean Water Act provides for citizen suits as follows:

"§ 505. Citizen suits (33 USC 1365)

(a) Authorization; jurisdiction. Except as provided in subsection (b) of this section and section 309(g)(6) [33 USCS § 1319(g)(6)], any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act [33 USCS §§ 1251 et seq.] or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act [33 USCS §§ 1251 et seq.] which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act [33 USCS § 1319(d)]."

While CCEEB does not believe there is a viable cause of action, we are concerned that if a "Final Compliance Date" as shown in Table 1 is included in an NPDES permit, 3rd parties may be able to bring legal action to enforce that provision of the permit without regard to whether that date has been confirmed by the appropriate balancing authority (CAISO or the Board of Water and Power Commissioners of the City of Los Angeles) as not raising a grid reliability concern. Such a suit could place a federal judge

rather than the Water Board in the decision role and disrupt this Draft Policy's "adaptive management strategy."

We believe that the dates in Table 1 should more appropriately be regarded as Preliminary Target dates and not be included in NPDES permits until after a reliability determination has been made by the appropriate balancing authority.

IV. The 11/23/09 Draft Policy changes are inconsistent with the Legislature's interest in assuring reliability in the South Coast as indicated by the enactment of AB 1318.

The change in Section 2.B. of the Draft policy to schedule "...a hearing to consider suspension of a compliance date applicable to an existing power plant" after being notified by an energy agency of a grid reliability concern is an insufficient safeguard of grid reliability. The CAISO suggestion that a compliance date be stayed upon notice by the ISO of a reliability concern should be the minimum response to an expression of concern. The responsibility to determine grid reliability matters should rest with the respective balancing authority. The State Board has no expertise to make such determinations and should defer to the appropriate balancing entity in all instances. Holding a hearing to "consider" suspension of a compliance date merely adds risk that a determination will be made contrary to the advice of the balancing entity.

Grid reliability should be as great a concern to the Board as the water quality objectives of this Draft Policy. The Legislature is also concerned about how to maintain grid reliability in the South Coast Air Basin and has enacted the following statutory provision to require the Air Resources Board to report and inform the Legislature how California can maintain grid reliability while implementing 316 (b) requirements, Climate Change requirements, renewable energy requirements and other program requirements.

39619.8. On or before July 1, 2010, the state board, in consultation with the Public Utilities Commission, the State Energy Resources Conservation and Development Commission, the State Water Resources Control Board, and the Independent System Operator, shall prepare and submit to the Governor and the Legislature a report that evaluates the electrical system reliability needs of the South Coast Air Basin and recommends the most effective and efficient means of meeting those needs while ensuring compliance with state and federal law, including, but not limited to, all of the following policies and requirements:

(a) The California Global Warming Solutions Act of 2006 (Division 25.5 (commencing with Section 38500)).

(b) Section 316(b) of the federal Clean Water Act, and any policies and regulations adopted by the State Water Resources Control Board as these regulations applied to thermal powerplants within the basin.

(c) State and federal air pollution laws and regulations, including, but not limited to, any requirements for emission reductions credits for new and modified sources of air pollution.

(d) Renewable energy and energy efficiency requirements adopted pursuant to Division 1 (commencing with Section 201) of the Public Utilities Code and Division 15 (commencing with Section 25000) of the Public Resources Code.

(e) Division 13 (commencing with Section 21000) of the Public Resources Code.

(f) The resource adequacy requirements for load-serving entities established by the Public Utilities Commission pursuant to Section 380 of the Public Utilities Code.

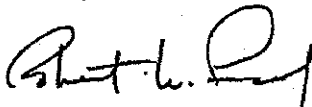
In light of this clear indication that the Legislature wants individual agency policies to reflect the impacts and goals of other agencies' policies, the State Board should not adopt a policy that clearly works in contradiction to the policies and codes listed above.

V. The Draft Policy still fails to recognize the independent grid balancing authority of the Board of Water and Power Commissioners of the City of Los Angeles.

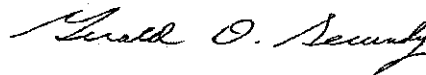
The three OTC power plants operated by the Los Angeles Department of Water and Power are not subject to the CAISO balancing authority. Decisions regarding energy supply and reliability for the LADWP service territory are overseen by the Board of Water and Power Commissioners of the City of Los Angeles. This fact should be acknowledged and made an element of this policy. "Advice" regarding the ability to comply with the Policy Implementation Schedule without impacting energy supply and grid reliability should be issued by the Commission.

Thank you for considering our comments.

Sincerely,



Robert W. Lucas
Waste & Water Quality Project Manager
Attachment A



Gerald D. Secundy
President

cc: Susan Kennedy, Chief of Staff, Office of the Governor
Dan Pellissier, Deputy Cabinet Secretary, Office of the Governor
Linda Adams, Secretary for California Environmental Protection Agency
Cindy Tuck, Undersecretary for California Environmental Protection Agency
Michael Peevey, President and Members of Public Utilities Commission
Michael Chrisman, Secretary for Natural Resources Agency
Karen Douglas, Chair and Members of the Energy Commission
Yakout Mansour, CEO, California ISO
Jackson Gualco, The Gualco Group, Inc.

ATTACHMENT A

Examples of Water Code and Regulatory References to Consideration of Costs and Economic Feasibility

- Pollution Prevention Plan – Plan shall include analysis of relative costs and benefits of pollution prevention activities. (Water Code §§ 13263.3(d)(2)(H); 13263.3(d)(3)(I))
- Pollution Prevention Plan – Pollution prevention measure may be withdrawn, on approval by the state board or regional board, if the discharger determines that the measure is economically impracticable or technologically infeasible; where practicable and feasible, the measure shall be replaced with another that will likely achieve similar pollution prevention objectives. (Water Code § 13263.3(i))
- Investigation of Water Quality – When requiring dischargers to provide reports, the burden, including costs, of the reports shall bear a reasonable relationship to the need for and benefits to be obtained from the reports. (Water Code § 13267)
- State Flood Control – City/county liability for approving development without taking feasible action to prevent flood damage; “feasible” means “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.” (Water Code § 8307(c)(4), quoting 14 Cal. Code Regs. § 15364)
- Groundwater Recharge Facilities – Project proposals shall include an estimate of reasonable cost and benefit of the project, including a feasibility report, which shall set forth the economic justification and the engineering, hydrogeologic, and financial feasibility of the project. (Water Code § 12928(b)(1); § 13458(c)(1), (2), (6); § 78673(a)(2))
- Agricultural Water Management Plans – Plans shall identify cost-effective and economically feasible measures for water conservation and recycling, with a schedule prepared by the supplier to implement those water management practices that it determines to be cost-effective and economically feasible. (Water Code § 10826(c), (e))
- Water Development Projects – Plans for conservation and utilization of water resources to include solutions for the water problems of each portion of the State as deemed expedient and economically feasible. (Water Code § 12616)
- Water Development Projects – Loans available for projects that are economically justified feasible from an engineering and geologic standpoint. (Water Code §§ 12879.4(c)(1); 12923)

- Water Conservation Program – Project proposals shall include an estimate of reasonable cost and benefit of the project, including a feasibility report which shall set forth the engineering and financial feasibility of the project (Water Code § 79155(b)(1)(2))
- Water Replenishment Districts – District shall determine the feasibility of projects by reviewing a cost-benefit analysis based upon reasonable assumptions. (Water Code § 60231(b))
- Discharges of Hazardous Waste to Land – For a corrective action program, the regional board shall establish a concentration limit for a constituent of concern that is greater than the background value only if the regional board finds that it is technologically or economically infeasible to achieve the background value and that the constituent will not pose a substantial hazard as long as the concentration limit is not exceeded. (23 Cal. Code Regs. § 2550.4(c))
- Containment Zone Amendment of Resolution No. 92-49: Cleanup and Abatement – The regional board may designate containment zones where it is technically or economically infeasible to clean up to water quality objectives, and where the discharger can contain pollutants within the designated zone so that water quality objectives are not exceeded outside the zone. (23 Cal. Code Regs. § 2911)
- Flood Protection Program – Feasibility studies shall determine the engineering, hydrogeologic, environmental, economic and financial feasibility of a flood protection project proposed for implementation. "Feasibility study" means "an investigation resulting in a report that provides the information for design and implementation of a project, and demonstrates whether the described approach is economically and technically feasible and appropriate for implementation." (23 Cal. Code Regs. § 499.2(h))