



December 21, 2015

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

Received
12-21-2015
Division of Water
Quality/SWRCB

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

RE: Comment letter - OTC Draft Determination El Segundo

Dear Ms. Tenggardjaja,

On behalf of California Coastkeeper Alliance, which represents 12 California Waterkeeper groups spanning the coast from the Oregon border to San Diego, we appreciate the opportunity to provide comments on the State Water Resources Control Board's (State Water Board) Draft Determination (Determination) regarding the interim mitigation for El Segundo Power (ESP).

Within the draft Determination, the State Water Board is approving the \$1 million paid by ESP as compliance for the OTC Policy's interim mitigation requirements. We must oppose the State Water Board's Determination that ESP has complied with its interim mitigation obligations pursuant to the OTC Policy. While we recognize the fact that ESP came into compliance with the OTC Policy by December 31, 2015, the Determination does not meet the legal requirements of the OTC Policy. The Determination sets a dangerous precedent for the remaining 12 facilities that have yet to submit and receive approval for their proposed interim mitigation. And, the Determination does not provide the public with the information and data necessary to verify an accurate mitigation fee.

We recognize that ESP will come into compliance by December 31, 2015 – and thereby will ultimately only be required to pay for 3 months of interim mitigation – we cannot ignore ESP's unjustified interim mitigation Determination. We respectfully request that the State Water Board Executive Director revise the draft Determination to deny ESP's asserted compliance with its interim mitigation obligations. In the alternative, we ask the Director to bring this issue to the attention of the State Water Board Members, and to schedule the item for a public hearing. Such a material deviation of the OTC Policy's requirements – and the State Water Board's own statements from its August 18, 2015 Board Hearing – should be presented to the full Board for consideration.

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

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

1. *ESP's past mitigation was not identified as eligible for interim mitigation.*

At the State Water Board's August 18th, 2015 hearing, we raised substantive concerns regarding the lack of guidance or criteria for determining whether an OTC facility would be eligible for applying past mitigation to its interim mitigation requirements. Additionally in our written comments, we specifically noted that ESP would attempt to argue its past mitigation should be applied to mitigate its current OTC impacts. However, our concerns went unaddressed because the State Water Board believed only two OTC facilities were eligible for applying past mitigation – those two facilities did not include ESP.

When we raised our concerns regarding past mitigation at the August hearing¹, Chair Marcus asked staff how many projects would be eligible for applying past mitigation to the interim mitigation requirements. The response from staff was they knew of only two facilities that would be eligible for applying past mitigation to the interim mitigation requirements: San Onofre Nuclear Generating Station (SONGS) and Moss Landing Power Plant. The Board members relied upon staff's assertion, and concluded that additional guidance was moot and unnecessary since all past mitigation had been decided.

The State Water Board has materially changed its position regarding which facilities are eligible for applying past mitigation to its interim mitigation. Our organization, the Board Members, and other stakeholders relied on staff's assertion that they would only allow two facilities to use past mitigation. The State Water Board's ESP Determination directly conflicts with the assertions made at the August 18th hearing; we therefore request this draft Determination be either revised to deny past mitigation, or schedule this issue for a Board hearing.

2. *Past mitigation does not mitigate the impacts of OTC operations occurring since October 1st.*

As specified in the OTC Policy, the compliance deadline for ESP is December 31, 2015. ESP has requested to comply through interim mitigation option A, and has requested to use a previous \$1 million payment to satisfy the OTC Policy's interim mitigation requirements for ESP. However, this payment was for impacts that occurred at the time of the California Energy Commission (CEC) licensing requirement, not impacts that are happening now, between October 1st and their compliance deadline.

ESP's past mitigation is for impacts occurring over the last 11 years. In 2005, the California Energy Commission (CEC) required ESP to provide up to \$5 million in funding to the Santa Monica Bay Restoration Commission (SMBRC) as part of a condition of certification for a license to repower units for OTC in El Segundo. ESP paid \$1 million of its required \$5 million mitigation payment before the CEC rescinded the mitigation requirement due to ESP's repowering. Regardless of whether the CEC rescinded the \$5 million, ESP has been causing marine life mortality for 11 years since the CEC relicensed the facility. The \$1 million payment is de minimus compared to the marine life impacts that have been occurring at El Segundo for the last 11 years since the CEC approved ESP's relicensing.

3. *ESP's past mitigation did not increase marine life to mitigate ongoing OTC operations.*

The OTC Policy provides a preference for mitigation directed towards *increasing marine life* lost as a result of ongoing OTC use. We acknowledge that interim mitigation Option A (past mitigation) is vague regarding how one shall demonstrate compliance, which was the basis for our concerns in our July comments, and at the August hearing, requesting better guidance and criteria regarding past mitigation. The OTC Policy states that Option A can be achieved by “[d]emonstrating to the State Water Board’s satisfaction that the owner or operator is compensating for the interim impingement and entrainment impacts through *existing* mitigation efforts.”² ESP is not compensating for interim impacts through

¹ See State Water Board, August 18th Board Hearing, approximately 3 hours and 30 minutes into the hearing; available at: http://www.waterboards.ca.gov/board_info/media/aug2015/swrcb_brdmtg081815.shtml.

² State Water Resource Control Board, Once-Through Cooling Policy, pg. 8 (May 2010); available at http://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/otc_2014.pdf.

existing mitigation efforts. Any previous mitigation payment has already been spent on studies and analyses that are at least a decade old. The OTC Policy requires Option A mitigate current OTC impacts through existing mitigation – something ESP cannot demonstrate.

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

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

The State Water Board incorrectly determined that ESP’s payment for Santa Monica Bay-wide studies aligns with the OTC Policy’s requirement to compensate for interim impacts. While the studies were positive contributions to our understanding of the marine environment, none of the studies mitigated OTC impacts by increasing marine life. The State Water Board should not consider past mitigation for studies that did not result in the increase of marine life as appropriate interim mitigation for ESP – or any other OTC facility that has not come into compliance by October 1st, 2015.

The ESP Determination approving past mitigation to count towards current interim OTC impacts should not be approved. ESP should not be eligible for past mitigation given the State Water Board’s August 18th statements that only two OTC facilities – neither of which is ESP – are eligible under Option A. Furthermore, past mitigation does not mitigate the impacts of OTC operations occurring since October 1st, 2015. And lastly, ESP’s mitigation payment was used for marine studies – not projects to increase marine life as a result of OTC activities. Therefore, *we request the State Water Board deny ESP’s draft Determination; and require ESP comply with its interim mitigation requirements through either Option B or C. If staff is unwilling to deny the determination, we request a formal hearing to bring this issue before the full Board’s consideration.*

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

ESP’s Determination sets a dangerous precedent for future interim mitigation determinations. Our review of OTC facilities’ implementation plans and relevant documents reveals that six of thirteen plants are likely to request credit for existing mitigation projects. Owners or operators of El Segundo Generating Station, Pittsburg Generating Station, Encina Power Station, Mandalay Generating Station, Huntington Beach Generating Station, and Ormond Beach Generating Station have all argued in their Implementation Plans or related documentation that they should be given full or partial credit for existing mitigation activities. In our July 13th, 2015 comment letter, we warned the State Water Board that these facilities will attempt to evade interim mitigation requirements by claiming past mitigation. Yet with this knowledge, they stated at the August 18th hearing that only two facilities would be eligible under Option

If the ESP Determination is approved, other OTC facilities will similarly claim an exemption from their interim mitigation obligations. For example, the Huntington Beach power plant owner-operator has previously paid mitigation fees for re-tooling Units 3 and 4. This is an example of a facility that may request exemption from the new mitigation fee or credit for fees paid in the past. Moreover, it is likely the Huntington mitigation fees may be used as credit for the proposed Poseidon-Huntington seawater desalination facility – which is sited and designed with the expressed purpose to utilize the existing cooling water intake structure well into the future. Huntington Beach is just a continuing example of our

concerns regarding crediting past mitigation approved by other agencies for the “interim measures” that must employ stricter standards to be consistent with recent decisions by the State Board to ensure replacement values and adequate compensation. It is also an example of concerns that the past decisions may carry on well into the future if other project proponents using seawater for industrial processes rely on those past decisions.

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

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

ESP’s Determination provides inadequate public information for assessing the accuracy of the State Water Board’s mitigation calculation. ESP’s Determination states that “State Water Board staff calculates that, if ESP were to comply with interim mitigation option B, using the default method for calculating the entrainment fee set forth in Resolution 2015-0057, the maximum fee would be approximately \$100,000.” This is the extent of information provide to the public.

To assess interim mitigation on a case-by-case basis, it is necessary to know the actual intake volume, intake velocity, and impingement mass for each facility. To analyze the appropriateness of mitigation projects, it is also necessary to project future intake levels consistent with the requirement to minimize those intakes. In our July 13th comment letter, we recommended that the State Water Board request that plant owners and operators provide their future projections as well detailed information about steps already taken to minimize intake volumes pursuant to OTC Policy interim compliance. In future interim mitigation determinations, the State Water Board should provide the pubic with past, current and projected intake volume, intake velocity, and impingement mass.

Since we were not given current data on ESP’s operations, we can only rely on past data. ESP’s last implementation plan indicated that they were utilizing 607 MGD: using the \$4.60/MG entrainment average for the 92 days of interim OTC operations (10/1-12/31) x 607 MGD = \$256,882. This is just the entrainment value, it does not include the impingement fee nor the project management and monitoring fee. We therefore are left suspect as to how the State Water Board came to a \$100,000 mitigation fee. To avoid future questioning of the adequacy of interim mitigation fees, we again request the State Water Board provide the public with the data necessary to verify interim mitigation calculations. We also request the State Water Board show its work when calculating the mitigation fee – rather than providing only a final total.

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

Sincerely,



Sean Bothwell
Policy Director
California Coastkeeper Alliance