

**RESPONSE TO PUBLIC COMMENTS ON THE DRAFT DETERMINATION TO APPROVE MITIGATION MEASURES FOR ENCINA POWER STATION TO COMPLY WITH REQUIREMENTS OF THE WATER QUALITY CONTROL POLICY ON THE USE OF COASTAL AND ESTUARINE WATERS FOR POWER PLANT COOLING (ONCE-THROUGH COOLING POLICY)**

Comment letter	Commenter	Submitted by
<b>Comment letters submitted by September 23, 2016 comment deadline</b>		
1	California Coastkeeper Alliance Heal the Bay Natural Resources Defense Council Surfrider Foundation Coastal Environmental Rights Foundation	Sean Bothwell Steven Johnson Elizabeth Murdock Angela Howe Livia Borak

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1.1	<p>We agree with the State Water Board’s Determination that the Minimization Plan, including proposed mitigation, was expressly intended to address those instances where Carlsbad’s intake requirements exceed the volume of water being discharged by Encina, and not intended to cover Encina’s operations or intake. There is no evidence or findings to indicate that the Regional Water Board approval of Poseidon’s Minimization Plan was intended to mitigate for the impacts of impingement and entrainment of marine life associated with cooling water intakes required for Encina’s operations. We support and request the State Water Board stay firm in its position that Encina identify a proposed plan to mitigate the interim impingement and entrainment impacts resulting from intake of cooling water required for Encina operations, including under conditions of co-located operation with Carlsbad.</p>	<p>Comment noted.</p>
1.2	<p>The State Water Board’s position that Carlsbad’s co-location operations are not subject to §316(b) is not legally accurate. §316(b) requires that the location, design, construction, and capacity of <i>cooling intake structures</i> reflect the best technology available for minimizing adverse environmental impact. Unlike §13142.5(b) which is explicit to what type of facilities are covered (<i>i.e.</i> cooling and industrial facilities), §316(b) expands its coverage to <i>any facilities</i> that use “cooling intake structures.” Thus, a desalination facility would be covered by §316(b) if the facility is co-located with an OTC facility and is using their cooling intake structure. The plain meaning of §316(b) dictates that Carlsbad is subject to the Clean Water Act’s requirements.</p> <p>The U.S. EPA’s regulations dictate that Carlsbad is subject to §316(b). According to the U.S. EPA, §316(b) applies to facilities that use a OTC intake, withdraw at least two million gallons per day of cooling water, and 25 percent or more of</p>	<p>While the 2015 Substitute Environmental Document for the Amendment to the Water Quality Control Plan for the Ocean waters of California Addressing Desalination Facility Intakes, Brine Discharges, and the Incorporation of Other Non-Substantive Changes includes some statements regarding the relationship between power plants subject to section 316(b) and its regulations and co-located desalination facilities and could be construed as ambiguous, California case law interpreting applicability of the two statutes in question is not. In <i>Surfrider Foundation v. California Regional Water Quality Control Board</i> (2012) 211 Cal.App.4th 557, the Court considered a challenge to the San Diego Regional Water Quality Control Board’s approval of the co-located Poseidon Carlsbad desalination facility (CDP) and determination pursuant to Water Code section 13142.5(b). The Court specifically noted: “The parties agree that the Clean</p>

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	<p>the water withdrawn is exclusively for cooling purposes. Therefore, a co-located desalination facility – such as Carlsbad that withdraws 304 MGD – using an OTC facility (Encina) intake structure, which withdraws at least 25 percent of its water for cooling purposes, is subject to §316(b).</p> <p>The State Water Board’s current position is in direct conflict with its own 2015 position formulated in the Desalination OPA. The State Water Board stated in its 2015 SED that:</p> <p>CWA section 316(b) indirectly applies to desalination facilities co-located with power plants and other industrial cooling water intakes insofar as a cooling water intake structure, used to withdraw water for use by both facilities, must meet the requirements of the federal statute and applicable regulations. Thus, a desalination facility that collects source water through an existing, operational cooling water intake associated with a power plant, or certain other types of industrial facilities, may be required to comply with technology-based standards for minimizing impingement and entrainment impacts.</p> <p>The draft Determination is clear that Encina is the host site and <i>shares the OTC intake</i> and discharge infrastructure with Carlsbad. Carlsbad uses a steady and sustained flow of 304 MGD from the Encina OTC intake. 304 MGD far exceeds the 25 percent threshold required by the EPA’s regulations to hold a co-located facility subject to §316(b). The State Water Board erred in its statement that Carlsbad is not subject to §316(b); however, we do not dispute that the Carlsbad Minimization Plan is intended to mitigate for the impacts of impingement and entrainment when Carlsbad’s intake requirements exceed the volume of water being</p>	<p>Water Act does not apply in this case because it does not concern the cooling water intake for a power plant.” <i>Surfrider</i>, 211 CalApp.4<sup>th</sup> at 578, fn. 18. The Court went on to explain why “crucial differences in the statutory language” rendered case law analyzing Clean Water Act section 316(b) inapplicable to a decision implementing California Water Code section 13142.5(b). Thus, the commenter’s request that the State Water Board revise the draft mitigation determination to state that the CDP is subject to section 316(b) as a co-located operation is contrary to the California Ocean Plan and case law.</p>

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	<p>discharged by Encina.</p> <p>In light of the State Water Board's legally flawed position that Carlsbad is not subject to §316(b), we request the following revision be made to the draft Determination:</p> <p><i>However, <del>t</del>The State Water Board disagrees with Cabrillo's claim and recognizes that any intake flow required solely for CDP is not defined as OTC flow and is not subject to the OTC Policy's interim mitigation requirements. The CDP is <del>not</del> subject to 316(b) requirements until the CDP has a stand-alone seawater intake. <del>and</del> However, Poseidon's Minimization Plan is intended to mitigate for the impacts of impingement and entrainment when CDP's intake requirements exceed the volume of water being discharged by EPS.</i></p>	