



Linda Adams
Secretary for
Environmental
Protection

California Regional Water Quality Control Board

Central Coast Region

895 Aerovista Place, Suite 101, San Luis Obispo, California 93401-7906
Phone (805) 549-3147 • FAX (805) 543-0397
<http://www.waterboards.ca.gov/centralcoast>



Arnold Schwarzenegger
Governor

April 12, 2010

Joanna Jensen
Environmental Scientist
Ocean Unit, Division of Water Quality
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Dear Ms. Jensen:

COMMENTS ON THE MARCH 22, 2010 DRAFT STATEWIDE WATER QUALITY CONTROL POLICY ON THE USE OF COASTAL AND ESTUARINE WATERS FOR POWER PLANT COOLING

Thank you for the opportunity to comment on the March 22, 2010 Draft Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling (Statewide Policy). The Central Coast Regional Water Quality Control Board (Central Coast Water Board) regulates three large power plants (Moss Landing, Morro Bay, and Diablo Canyon) that use ocean and estuarine waters for once-through cooling (OTC) with National Pollutant Discharge Elimination System (NPDES) permits. Central Coast Water Board staff provided a September 3, 2009 comment letter on the June 30, 2009 Draft Statewide Policy. As previously, Central Coast Water Board staff supports the intent of the Statewide Policy to clarify how NPDES permits may address impacts of power plant OTC intakes on marine and estuarine environments and provides the following comments to improve the document. As requested in the public notice, this comment letter is based only on changes in the March 22, 2010 Draft Statewide Policy from the November 23, 2009 Draft Statewide Policy.

We have two main points:

1. The authority to require and oversee mitigation, and determine compliance, must remain with the Regional Boards as part of the NPDES permitting process. This authority cannot be transferred to the State Board or other agencies.
2. The Regional Boards must determine the type and extent of mitigation that is necessary to compensate for OTC impacts and to comply with an NPDES permit the Regional Board issues. The Policy must not limit the types of mitigation that a Regional Board can require.

California Environmental Protection Agency



Central Coast Water Board Staff Does Not Support that the March 22, 2010 Draft Statewide Policy Removes Power Plant Permitting Mitigation Decisions from the Regional Boards

According to the Statewide Policy, beginning five years after the policy's effective date, the owner or operator of an existing power plant must implement interim measures to lessen marine life impingement and entrainment, and must continue to do so until full compliance is achieved. As previously mentioned, Central Coast Water Board staff supports the Statewide Policy requirement for mitigation/compensation (e.g., restoration) during the interim period; however, the interim mitigation should begin at permit reissuance rather than waiting five years.

Central Coast Water Board staff does not support the March 22, 2010 Statewide Policy changes that transfer oversight and decision making regarding adequate interim mitigation from the Regional Boards to the State Water Board (in Section 2.C(3) on pages 8-9). There is no explanation as to why this change occurred, and no explanation of how this bifurcation of State and Regional Board responsibilities would work in practice, including the legal issues. Turning over the critically important, time consuming, and difficult questions of interim entrainment and impingement mitigation from the Regional Water Boards to the State Water Board would likely lead to permitting delays and prevent or delay implementation of mitigation projects and programs. Regional Boards consider the totality of permits when determining whether the permit protects beneficial uses. How can a Regional Board determine beneficial uses are protected when a major aspect of the permit requirements are managed and approved by State Board staff or other agencies? What if the Regional Board disagrees with State Board staff's decisions regarding mitigation and refuses to adopt a permit? What are the legal ramifications?

Regional Water Boards are the NPDES permitting agency for power plant facilities, and mitigation for entrainment and impingement is a major part of the permit process. A Policy that provides the Regional Water Boards with mitigation options, as in the November 23, 2009 Draft Statewide Policy, addresses the goal of statewide consistency while retaining power plant NPDES permitting flexibility for the coastal Regional Water Boards. The flexibility is prudent, as the consensus among marine scientists with extensive experience studying the effects of OTC are that impingement and entrainment impacts from ocean intakes are site specific. The November 23, 2009 Draft Statewide Policy recognized that site specific effects are complex and the Regional Water Boards are best set up to address site specific issues. The Regional Water Boards are also in the best position to determine which mitigation projects leverage with other local regulatory actions and programs, such as TMDLs, storm water management plans, grants, coastal restoration projects, etc., that benefit the coastal environment and watersheds.

Central Coast Water Board staff does support the mitigation options listed in Section 2.C(3) of the March 22, 2010 Draft Statewide Policy including the interim mitigation

option of funding projects that implement, monitor, maintain, and manage Marine Protected Areas (MPAs). Additionally, Central Coast Water Board staff also strongly supports the habitat production foregone method as an option in the decision making process for restoration projects. Mitigation based on such approaches provides many environmental benefits and is an integral part of power plant NPDES permitting decisions. For example, with mitigation funds related to the Moss Landing Power Plant's withdrawal of OTC water, the Elkhorn Slough Foundation has preserved and enhanced thousands of acres of wetlands and surrounding watersheds in and around Elkhorn Slough. This almost immediate payment of several million dollars in mitigation funds to the Elkhorn Slough Foundation was a major reason the Central Coast Water Board approved the permit.

Putting the mitigation decision to an unknown future date and to staff of other regulatory agencies out of the jurisdiction of the Central Coast Water Board will increase the uncertainty of mitigation, increase the controversy and confusion regarding jurisdiction, and increase permitting delays.

Although Regional Water Board staff appreciates the feedback and guidance from State Water Board staff, State Water Board staff cannot decide for Regional Boards the level of adequate mitigation for entrainment and impingement impacts in power plant permitting. It is nonsensical to separate out the main issue in the permitting process and put it under the jurisdiction of the State Board and other agencies. If State Water Board staff is going to take on the responsibility to decide NPDES power plant mitigation requirements and compliance, then the State Water Board should issue the power plant permits.

The purpose of a statewide policy is to provide guidance to the State and Regional Boards; the purpose is not to transfer jurisdiction for certain aspects of a permit to the State Board and other agencies.

Issues Related to the Nuclear Facilities and Wholly Disproportionate Demonstration

The Statewide Policy provides special allowances for California's two nuclear facilities including Diablo Canyon Power Plant. In April of 2009, the U.S. Supreme Court reversed the Riverkeeper II decision, and held that Clean Water Act section 316(b) does allow some cost-benefit analysis in setting the national performance standards for existing OTC water intake structures and also for site-specific variances from those standards. Consistent with the Supreme Court decision, the Statewide Policy includes allowances for a wholly disproportionate demonstration in nuclear power plant permitting. During NPDES permitting cycles extensive studies have been done regarding the feasibility of converting Diablo Canyon Power Plant to closed cycle cooling. Staff determined, based on multiple reviews, including evaluations by independent engineers that we hired, that a closed cycle cooling system at Diablo Canyon is not feasible or "available" pursuant to Section 316(b). The record on this issue is thorough. Additionally, during the process of developing a state OTC policy,

experts testified that implementing closed cycle cooling may not be possible and/or cost effective and that mitigation may be the only effective solution to address OTC effects from Diablo Canyon. Additional evaluation of whether a closed cooling system is feasible at Diablo Canyon is not necessary (unless there is new technology to consider). Central Coast Water Board staff supports that the Statewide Policy allows for mitigation to compensate for OTC impacts from Diablo Canyon Power Plant but the Statewide Policy Section 3.D(9) appears to limit this mitigation only to funding the implementation, monitoring, maintenance, and management of the State's Marine Protected Areas. Central Coast Water Board staff supports this type of mitigation, but as an option. Other mitigation projects may be available and may be more protective of beneficial uses, and they should be considered by the Regional Board when adopting a permit, especially considering the large amount of mitigation that may be necessary to compensate for entrainment impacts from Diablo Canyon Power Plant. Again, the mitigation decision, which is the basis for determining whether beneficial uses are protected, must be made by the Regional Board as part of the permitting process.

In summary, Central Coast Water Board staff generally supports the Statewide Policy and the document does a good job of describing acceptable immediate and interim permit compliance options. However, Regional Water Boards must retain all permitting authority and decision making related to mitigation. With the Statewide Policy in place to allow for mitigation, NPDES permits issued by Regional Water Boards would be sound and environmental benefits from mitigation would occur sooner rather than later. State Water Board would retain its ability to ensure adequate mitigation and permitting authority through the petition process when necessary.

Thank you again for the opportunity to comment on the Statewide Policy, if you have questions please contact **Peter von Langen at (805) 549-3688** or pvonlangen@waterboards.ca.gov or Michael Thomas at (805) 542-4623 or mthomas@waterboards.ca.gov.

Sincerely,



Michael Thomas
Assistant Executive Officer

S:\Legislation Review\March 2010 Comments to State Board OTC policy finl.doc