

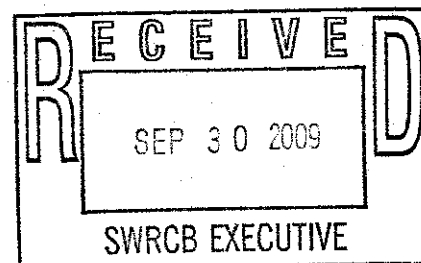
GOLDEN GATE UNIVERSITY

School of Law

Environmental Law and Justice Clinic

September 29, 2009

Sent by E-mail to
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Re: **Comment Letter – OTC Policy**
Comments of Bayview Hunters Point Community Advocates and
Communities for a Better Environment Relevant to the Potrero Power Plant

To the State Water Resources Control Board:

On behalf of Bayview Hunters Point Community Advocates and Communities for a Better Environment, Environmental Law and Justice Clinic at Golden Gate University School of Law submits these comments in regard to the State Water Resources Control Board's June 30, 2009 proposed statewide policy (Policy) on the use of coastal and estuarine waters for power plant cooling. These comments are primarily focused on addressing the community groups' longstanding concerns about the Potrero Generating Station (Potrero Plant), which Mirant Potrero, LLC owns and operates in the City of San Francisco.

Both of these community groups support the Board's overall goal of adopting a policy that protects the State's coastal and estuarine waters without disrupting electrical generation and transmission. The Board should, however, impose more stringent requirements to protect the state's waters, and the Policy should explicitly recognize the impending closure of certain power plants, including Potrero.

BACKGROUND

Bayview Hunters Point Community Advocates (Advocates) is a non-profit California corporation whose principal place of business is San Francisco, California. Advocates works within the Bayview Hunters Point neighborhood of San Francisco to ensure environmental justice, to promote economic alternatives that contribute to the development of environmentally safe neighborhoods and livelihoods, and to secure the political, economic, cultural, and social liberation of this community. Since its founding in the early 1990s, Advocates has successfully undertaken local projects to both encourage greater economic development opportunities and benefit the environment, including working in collaboration with other groups to ensure the closure of the PG&E in Hunters Point, the proper clean up of the plant site, and the

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development of renewable energy. Relevant to the Policy, members of Advocates engage in subsistence fishing in the San Francisco Bay and live near the Potrero Plant.

Communities for a Better Environment (CBE) is a social justice organization with a focus on environmental health and justice, with numerous members in California, including in the area of the Potrero Plant. CBE is primarily concerned with protecting and enhancing the environment and public health by reducing air and water pollution and equipping residents impacted by industrial pollution with the tools to inform, monitor, and transform their immediate environment in California's urban areas.

Both of these organizations have been actively advocating for the closure of the Potrero Plant for nearly a decade, in part because of the significant environmental impacts associated with the facility's use of once-through cooling (OTC). The NPDES permit for Potrero plant's Unit 3 was last issued in 1994 for a five-year term, and the San Francisco Regional Water Quality Control Board administratively extended the permit until 2005. In May 2006, the Regional Board granted the plant a limited extension of the NPDES permit until December 2008. In the order granting that extension, the Regional Board explicitly stated that it intended to "prohibit the discharge of once through cooling water, to the extent allowed by law, unless the Discharger demonstrates that its discharge has no significant adverse environmental effects on the San Francisco Bay." See May 10, 2006 Order (Finding 22). The Regional Board expressed that intention after CBE and Advocates petitioned to bring the Potrero Plant into compliance with section 316(b) of the Clean Water Act. In the Regional Board proceedings, the community groups were supported by the City of San Francisco.

In 2008, because of the continued operation of the Potrero Plant – despite the expiration of the permit and without the necessary demonstration of lack of harm to the Bay from Mirant – the City of San Francisco's Board of Supervisors adopted a resolution opposing the renewal of the Potrero Plant's NPDES permit and urging the Regional Board to decline to extend the permit.¹ Moreover, the Board of Supervisors unanimously enacted an ordinance in 2009, establishing city policy to take all feasible steps to close the facility as soon as possible.² In a recent settlement agreement with the City, Mirant committed to, among other things, a shutdown of the Potrero Plant "as soon as it is no longer needed for electric reliability."³ Because the Potrero Plant is not needed for reliability, it is expected to close by December 31, 2010. Significantly, the California Independent System

¹ San Francisco Board of Supervisors Resolution No. 465-08 (adopted October 28, 2008).

² San Francisco Board of Supervisors Ordinance No. 081600 (adopted May 19, 2009).

³ Settlement Agreement Dated as of August 13, 2009, Between City and County of San Francisco and Mirant Potrero, LLC.

⁴ Draft Joint Agency Staff Paper, at B-2.

Operator has indicated that new infrastructure is expected to replace the need for Unit 3 as early as March of 2010.⁴

COMMENTS ON THE POLICY

1) The Policy Should Expressly Recognize the Retirement of the Potrero Plant

The Policy incorrectly omits facility retirement as a compliance alternative for existing power plants, although the Draft Substitute Environmental Document (DSED) recognizes this fact.⁵ A number of plants are already considering retirement as an option to reduce and eliminate environmental impacts from the use of OTC, as the DSED recognizes. Many of these plants have been operating for many decades using inefficient and outdated technology, and now it appears that electric reliability demands on many of these plants will soon be replaced. It would seem that decommissioning these facilities is the most natural and reasonable outcome given these developments and should therefore be expressly recognized in the Policy.

Specific to the Potrero Plant, the Policy's proposed compliance date is one year from the effective date of the Policy, which may be later than when the Potrero plant can be shut down. As the DSED recognizes,⁶ the implementation schedule (Table 1) should be revised to reflect the latest available data concerning local electric reliability requirements. Retirement should be listed as the appropriate compliance milestone for the Potrero Plant, and the due date thus should be changed to December 31, 2010, reflecting Mirant's agreement with the City of San Francisco. Alternatively, the compliance date could be the earlier of the two events that will allow the plant to close – the completion of the Trans Bay Cable or the recabing of the Martin-Bayshore-Potrero lines.

Advocates and CBE, however, support the Policy's proposed requirement that all plants – whether retirement is being chosen as a compliance option or not – comply with the requirements in the Policy. Where a power plant chooses retirement as a compliance alternative, the Policy should require – as it now appears to – that the plant submit an implementation plan to account for the possibility that the plant is required to continue operating beyond the target closure date for reasons relating to electric reliability. This requirement for a plan will ensure compliance with the Clean Water Act, should retirement fail to occur. Such a requirement should not be burdensome for the power plants

⁵ DSED, at 70, 72.

⁶ DSED, at 72.

because the Policy envisions a generous lead time for implementation of the compliance measures.

2) Comments on Public Participation

Advocates and CBE want to ensure that the Regional Board responsible for reviewing the submissions from the power plants provide the public with a sufficient opportunity to review the submissions, receive public comments, and respond to them. The Board's responses to public comments should be supported with sufficient statement of basis to ensure that the Board adequately considers such comments.

3) Comments on Specific Provisions

a) Section 2. Requirements for Existing Power Plants

- i) The Policy fails to provide adequate justification for its compliance objectives of 93% reduction in Track 1 and 82.7% in Track 2.
- ii) The Policy erroneously sets Closed-Cycle Cooling (CCC) as the best technology available without providing adequate justification for its decision. The Policy must clarify why it has made this decision even though dry cooling has been demonstrated as superior technology.
- iii) The mitigation requirements set forth in the "Immediate and Interim Requirements" provide an unnecessary exemption for any facility with a compliance date within five years of the effective date of the Policy.⁷ The Policy provides no justification for allowing such a broad cushion for mitigation of interim impacts. Under the proposed scheme, Mirant would not be required to mitigate any of its interim impacts. The Policy's justification for this exemption is insufficient.

b) Section 4. Wholly Disproportionate Demonstration

- i) The Policy fails to provide adequate justification for the inclusion of this provision considering the Policy's ultimate goal of phasing out OTC altogether. Moreover, in the event that the State Board can provide adequate justification for this provision, the Policy should explain the basis for choosing 8500 Btu as the baseline measure for facility eligibility. The Policy should also clarify how this figure is to be calculated to avoid confusion and to ensure that this provision is not improperly invoked.

⁷ DSED, at 78.

c) Track 2 Monitoring Provisions

- i) The Policy fails to consider in its monitoring provisions the substantial impacts that OTC has on plant life. Any environmental impact assessment of OTC that fails to consider affected aquatic plant life is simply inadequate. For example, the discharge of organisms that are impinging "clouds the water around the discharge area, blocking light from the ocean . . . which further kills plant and animal life by curtailing light and oxygen."⁸

The monitoring provisions should similarly require that impacts to water flows be considered. Hydrological cycles differ depending on the season and the time of the day and month; and thus withdrawals and discharges that alter the variability may impact the ecosystem's health.⁹ Even though intakes and discharges into the ocean may not be as dramatic as those from and into lakes and rivers, impacts on plant and animal life from the practice should still be monitored.

CONCLUSION

In closing we would like to reaffirm our general support for the State Board's cooperative efforts in addressing this important issue. Nevertheless, we believe that it is incumbent upon the State Board to adopt a more aggressive compliance schedule for the Potrero Plant consistent with the latest available information concerning local electric reliability needs, in light of the indisputable harm caused by the use of OTC.

Thank you for taking our comments into consideration, and we look forward to your response.

Very truly yours,



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Helen Kang

⁸ Benjamin K. Sovacool & Kelly E. Sovacool, "Preventing National Electricity-Water Crisis Areas in the United States," 34 Colum. J. of Envtl. L. 333, 350 (2009).
⁹ *Id.* at 352.

* John Harrington is a student certified under the State Bar Rules governing the Practical Training of Law Students, working under the supervision of Professor Helen H. Kang.