

ORANGE COUNTY
COASTKEEPER

EDUCATION / ADVOCACY / RESTORATION / ENFORCEMENT

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July 11, 2006

Song Her
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, California 95814



Re: Comment Letter – Proposed Statewide Policy for Once-Through Cooling

To Whom It May Concern:

On behalf of Orange County Coastkeeper, I submit the following comments in regards to the Proposed Statewide Policy on Clean Water Act Section 316(b) Regulations. We have reviewed the Scoping Document as published on June 13, 2006, and have the following specific concerns regarding the Proposed Statewide Policy:

1. The Proposed Statewide Policy Does Create an Incentive for Facilities to Reduce Maximum Flow Conditions.

The Proposed Statewide Policy would require that baseline flow rates be actual flow rates calculated as a mean of the flow rates provided by the Regional Water Board. This calculation allows for baseline flow to be determined as the average intake flow rate during the last NPDES permit cycle. A more stringent alternative method of calculation is also discussed in the Scoping Document, though not adopted. This option suggests that baseline flow should be determined by utilizing the facility's NPDES permitted maximum flow. This option allows for a "built-in" credit for facilities that do not operate at full flow/capacity. The possibility of attaining a credit creates more of an incentive for facilities to take active steps to reduce their flow.

2. The Required Minimum Entrainment Reduction of Sixty Percent as Required by the Proposed Statewide Policy is Insufficient.

The Proposed Statewide Policy requires an overall reduction in entrainment of Ninety Percent (90%). The Proposed Statewide Policy allows for this reduction to be achieved through a combination of up to Thirty Percent (30%) restoration measures and Sixty Percent (60%) reduction in actual entrainment. This standard, though in accordance with the minimum standards promulgated by Section 316(b) of the Clean Water Act does not require facilities to exercise great reductions in entrainment, even though such reductions are feasibly achievable.

3. The Proposed Statewide Policy's Allowance for Restoration Measures is Inconsistent with Section 316(b) of the Clean Water Act.

The Proposed Statewide Policy allows for Thirty Percent (30%) of the required Ninety Percent (90%) reduction in entrainment to be achieved through the employment of restoration measures to restore fish and shellfish populations killed by a cooling water system. Such measures may only be employed if the facility has demonstrated that they can not achieve the required entrainment reduction of Ninety Percent (90%). However, in 2004, the United States Court of Appeals for the Second Circuit found that the option to use restoration measures was "plainly inconsistent with the statute's text and Congressional intent that the 'design' of intake structures be regulated directly, based on the best technology available, and without resort in the first instance to water quality measurements." Further, the Court found that the USEPA exceeded its authority by allowing compliance with the CWA §316(b), 33 U.S.C.S. §1326(b), through restoration methods. Riverkeeper, Inc. v. United States EPA. 358 F.3d 174.

In addition, textual support that restoration measures are not an acceptable means of minimizing the adverse environmental impact of intake structures lies in the Clean Water Act §316(a), 33 U.S.C.S. §1326(a), which allows the Environmental Protection Agency to vary the heat pollution standards applicable to a point source by considering the particular receiving waterbody's capacity to dissipate the heat and preserve a "balanced, indigenous" wildlife population. This is a notable exception to the Clean Water Act, which, as described above, otherwise relies on limitations on what a source can put into the water, not the ultimate effect of that discharge. That Congress provided for a water quality standards approach to thermal discharges but did not include that approach (or make any reference to it) in the very next subsection, counsels against including restoration measures within the best technology available.

4. The Proposed Statewide Policy Does Not Set Forth a Timeline for Compliance.

The Proposed Statewide Policy fails to establish an actual timeline for which all affected facilities must comply.

Conclusion

Thank you for the opportunity to comment on the Proposed Statewide Policy on Clean Water Act Section 316(b) Regulations. As described in detail above, we strongly urge the board to modify the Proposed Policy to take into account the issues outlined above.

Sincerely,

Ray Hiemstra
Associate Director-Programs
Orange County Coastkeeper