GOLDEN GATE UNIVERSITY SCHOOL OF LAW

ENVIRONMENTAL LAW AND JUSTICE CLINIC

April 12, 2010



Sent by E-mail to
commentletters@waterboards.ca.gov
Jeannie Townsend
Clerk to the Board
State Water Resources Control Board
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Re: Comment Letter - OTC Policy
Comments of Bayview Hunter Point Community Advocates and
Communities for a Better Environment Relevant to the Potrero Power Plant

To the State Water Resources Control Board:

The Environmental Law and Justice Clinic at Golden Gate University School of Law submits these comments on behalf of Bayview Hunters Pont Community Advocates and Communities for a Better Environment (collectively "Advocates"). These comments address the March 22, 2010 revision to the proposed "Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling." Part of these comments serve as a follow up to those previously filed by the Advocates on September 25, 2009, while some are directed at new changes made in the revised policy. Again, 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 groups reiterate their support for the Board's overall goal of adopting a policy that protects the State's coastal and estuarine waters without disrupting electrical generation and transmission. While the overall goal is positive, the Board did not adequately respond to our comments regarding the requirements for existing power plants. Nor did it explicitly recognize the impending closure of certain power plants, including Potrero. In addition to these concerns, the Advocates are concerned that the new changes to the policy include less stringent requirements for

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existing power plants as well as a less rigorous system by which facility operators can obtain a suspension of compliance dates with reduced transparency and accountability.

## I. Response Concerning ELJC's Comments of September 25, 2009

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

In revised policy the Board has singled out the Potrero Plant by naming it specifically in the implementation schedule and indicating that its compliance due date would be one year from the effective date of the policy.* Unfortunately, this approach does not go far enough in setting appropriate compliance milestone and does not incorporate either of the two alternatives that were offered in our previous comments. The first alternative Advocates suggested was that retirement be set as the compliance milestone, with a due date of December 31, 2010, per Mirant's settlement agreement with the City and County of San Francisco. The Advocates' second preferred alternative was that the compliance date be the earlier of the two events that will allow the plant to close the completion of the Trans Bay Cable or the recabling of the Martin-Bayshore-Potrero lines. By not incorporating either of these, there is still no recognition of the scheduled retirement of plants such as Potrero in this policy, which gives Mirant too much leeway in determining how it will comply with its directives.

### *2) The Board Has Failed to Respond Adequately in Writing to Public Comments*

The Board should not only receive public comments but also to respond in writing to our comments. While comments might ultimately be rejected, they still must be paid proper consideration and addressed in the Board's response. Without explanation being given for the rejection of commenters' ideas, there is no discourse between the public and government, and no one can be sure whether the needs of the community are being properly addressed. The following subsections explain each area where the ELJC comments of September 25, 2009, were not properly responded to.

#### i. Failure to Respond to the Alternatives Presented for the Potrero Plant's Compliance

Not only did the Board choose not to follow either of the alternatives discussed in Section 1 regarding the Potrero Plant, but it offered no explanation for why it did not do so.

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* E. Table 1. Implementation Schedule. (Page 13)

ii. Failure to Adequately Justify the Compliance Objectives of the Two Tracks

There is still no further explanation given for the 93% compliance objective given for Track 1 or the 83.7% objective of Track 2 despite previous ELJC comments. Although these may be appropriate settings, it is impossible to tell without understanding the Board's reasoning.

iii. Failure to Adequately Justify the Intermediate and Interim Requirements

The Board has still failed to offer any explanation as to why five years is an appropriate benchmark to begin mandating mitigation by facilities not yet in compliance. If a facility, such as Mirant's Potrero Plant, were planning on retiring by this point it would not be required to mitigate any of its impacts. The Board must respond to the Advocates' comments asserting there is no justification this broad exception.

iv. Failure to Consider the Impact on Aquatic Plant Life

The previous Advocates' comment noted that the Policy failed to consider the substantial impact on plant life in its entrainment impacts provision. Aquatic plant life is still not included in the revised OTC Policy; nor is there any discussion as to why it is not included.

## II. Comments on New Changes Made in the Revised Policy

1) *The Standards for the Compliance Alternatives Have Been Reduced Without Justification*

In the previous version of the Policy, Section 2(A)(2) stated that a facility operator was required to demonstrate "to the Regional Water Boards' satisfaction that compliance with Track 1 is *not feasible*" in order to opt for the compliance alternative of Track 2, which was less stringent. Now, the revised Policy has eliminated the requirement that the operator show compliance with Track 1 is not feasible. This allows for up to a 9.3% less required-reduction without any need for the facility owner to justify this choice. The Policy as written offers no explanation why any facility would opt to be bound by the more stringent Track 1 when there is no incentive to do so. Therefore, the Policy should retain the previous version in this matter.

2) *The Final Compliance Dates Can Be Suspended or Postponed Too Easily*

Section 2(B)(2) has been altered to the point where it is unrecognizable from the previous version and has made it significantly easier for facilities to have to their compliance dates temporarily suspended. Previously, the authority to temporarily suspend compliance rested solely in the hands to the State Water Board, where a formal hearing would be held on the matter if CAISO, CEC or CPUC felt the continued operation is necessary to maintain the reliability of the electric system.

Now, "if CAISO determines that continued operation of an *existing power plant* is necessary to maintain the reliability of the electric system in the *short term,"* and CEC or CPUC do not object, a 90-day suspension of the final compliance date will be granted. This approach allows for a facility to operate 3 months beyond its final compliance date without penalty and without any explanation in the policy. More importantly, for suspensions longer than 90 days, the State Water Board hearings would now give great deference to CAISO in determining whether to suspend the final compliance date. Section 2(B)(2)(d) now states that, unless the State Water Board has compelling evidence to do otherwise, when "considering whether to amend or suspend the final compliance dates, the State Water Board shall implement the recommendations of the CAISO." This approach would create a loophole through which CAISO's recommendation would be presumptively adopted to permit a power plan to circumvent the requirements of the Clean Water Act.

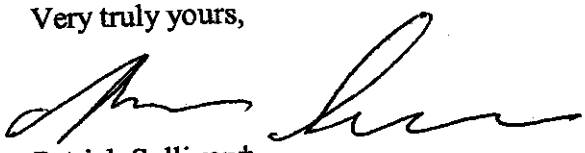
3) *The Implementation Schedule Can Be Too Easily Modified*

In the previous version of the policy, Section 3(B)(4) read simply that "the State Water Board shall consider the SACCWIS' recommendations and direct staff to make modifications, if appropriate, for the State Water Board's consideration." Now, having been relabeled Section 3(B)(5), if the SACCWIS agencies unanimously recommend a change to the implementation schedule, this provision provides that "the State Water Board shall implement the recommendation unless the State Water Board finds that there is compelling evidence not to." Again, like in the compliance date situation, this gives undue deference to another agency and allows this important Policy to be undermined should it prove to be convenient.

Further, if the facility operator has sought to upgrade, used its best efforts to obtain the needed permits, and was unable to, "then the State Water Board shall suspend a final compliance date specified in this policy for a period not to exceed two years." These new additions allow the policy to be too easily circumvented while at the same time there is no basis given for them.

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

Very truly yours,



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