

NO MORE SOUTH BAY POWER PLANT COALITION

*Environmental Health Coalition San Diego Coastkeeper South Bay Forum
Southwest Chula Vista Civic Association Coastal Environmental Rights Foundation
San Diego Audubon Society San Diego Chapter of the Sierra Club
Surfrider Foundation, San Diego Chapter*

November 30, 2009

Chairman and Boardmembers
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

RE: Consideration of Permit Minor Modifications to CA0001368, Order No. R9-2004-0154 for
Dynegy South Bay, LLC- South Bay Power Plant

Dear Members of the Regional Board:

Our organizations represent over 25,000 residents of the San Diego region. We are writing today to express our strongest support for actions to end the 50 years of devastation brought on the Bay from the South Bay Power Plant

The minor modifications alone will not achieve the desired goal of ending the devastation of the discharge from the SBPP as required and additional action must be taken.

To ensure that the power plant discharges are ended, the Board must take further actions at the earliest possible date. The Board should direct staff to:

1. Schedule a hearing for February's meeting to:
 - o Receive testimony on the water quality and environmental impacts of the discharge from the South Bay Power Plant;
 - o Consider DENYING the Waste Discharge Application for any re-issuance of a discharge permit for the South Bay Power Plant, **and**
 - o Deliberate on a Tentative Order for prohibition of the discharge and rescission of the entire discharge permit no later than March 1, 2010.

2. Issue a directive under authority of Water Code Section 13267, to Dynegy, directing that a Workplan to restore and rehabilitate the areas of the Bay impacted by the power plant discharges be developed and funded per the 2004 permit.

Minor Modifications only partially implement the duty of the Board to project water quality.

The minor modifications accomplish half of what was promised to the community and the Regional Board by the discharger in 2004. They end the discharge from units 3 and 4 by January 1, 2010. However, they do not do end the discharge from the other two units early enough and the basis of the action is misguided in that it appears to link the action to CALISO action. The Regional Board should direct staff to set up an action that will allow termination of units 1 and 2 at an earlier date and should link the action to the water quality impacts of the discharge—not some arbitrary, irrelevant, decision of the ISO

We believe that the following tenets must guide your decision-making on this matter.

1. The Regional Board must base decisions on impacts to water quality in making decisions and eliminate discharges that impact water quality negatively where possible and necessary.
2. Evidence is over-whelming that the discharges and intake damages the bay's water quality and beneficial uses and can be eliminated only by termination of all discharges.
3. There evidence that the power plant is no longer needed.
4. ISO's determination of any 'need' for SBPP is irrelevant to the Board's decision making process and cannot be the justification for on-going damage to the Bay.
5. Legal authority exists and compels the Water Board to end this discharge.
6. Environmental Justice guidelines demand you take action to terminate this permit and provide environmental justice for the residents of South Bay area.

In September, the direction of the Board to the staff seemed clear—bring back an opportunity to act on the Waste Discharge application and an Order that could address ending or establishing a schedule for termination of the discharges. Unfortunately, the current minor modifications proposal and meeting notice do not appear to provide a forum for receiving testimony on the environmental impacts of the plant and for acting accordingly - it simply reflects the current plans of California Independent Systems Operator (CALISO) and Dynenergy.

As we have seen based on past experience, CALISO's position changes frequently and without full disclosure of information (as we have described below) but always ensuring the power plant stays available to them no matter what the cost to the local environment, the cost to ratepayers, or any rational 'need' for the plant..

In our view it is also completely improper for the staff to have linked the termination of these damaging discharges to actions of an outside agency. The staff appears to allege a basis for the action in the activities of the CALISO, a non-governmental agency with no public accountability and no responsibility for water quality. The Regional Board cannot hand over its authority to protect water quality to another agency. The Board must regulate this discharge with consideration of its significant impacts to water quality.

Further, in the minor modifications no additional mitigation is required and the modification doesn't even invoke the mitigation requirements contemplated in the existing permit.

By attempting to limit testimony to the permit modifications alone, the hearing process is not what you promised the community in September. We request that the Board take the following actions at the December 16, 2009 hearing:

- Ratify the minor modifications as an interim step to ensure Units 3 and 4 are eliminated by Jan 1, 2010.
- Schedule a hearing for February's meeting to:
 - Receive testimony on the water quality and environmental impacts of the discharge from the South Bay Power Plant;
 - Consider DENYING the Waste Discharge Application for any re-issuance of a discharge permit for the South Bay Power Plant, **and**
 - Deliberate on a Tentative Order for prohibition of the discharge and rescission of the entire discharge permit no later than March 1, 2010.
- Issue a directive under authority of Water Code Section 13267, to Dynegy, directing that a Workplan to restore and rehabilitate the areas of the Bay impacted by the power plant discharges be developed and funded per the 2004 permit.

Again, we request that the Regional Board hold the meeting in Chula Vista so that impacted communities can come and speak to you.

The evidence is clear—the discharge has major, negative impacts on water quality.

That the discharge causes significant damage to the Bay is already well established by the Regional and State Boards. We site the evidence documenting these impacts in the 2005 proceeding's. The Fact Sheet is a good record of the evidence and analysis of what is known about the power plant discharge. Even if the discharge is reduced, impacts will continue. Specifically, this statement is relevant:

It is evident that the impacts on Beneficial Uses due to the discharge of once-through-cooling water cannot be eliminated except through termination of the discharge... ..¹

Based on the evidence already in the record from the 2005 proceeding, the State's OTC policy proceeding and the extensive evidence outlined in the December 1, 2009 Coastkeeper letter, the Board could make the finding that the discharge negatively impacts the Bay and must be completely terminated by March 1, 2009.

ISO's determination of any 'need' for SBPP is irrelevant and cannot be relied on as the basis for on-going damage to the Bay.

While we do not believe that the machinations of CALISO and the RMR are relevant to your decision, we know that they have engaged your staff with this. We would like to share the following history with you so that you can put their claims in some perspective. Our concern with the Minor Mods is that they only reflect the story about the 'need' for the power plant that Dynegy and ISO are telling **today**. Unfortunately, these entities cannot be trusted to keep their word in this regard. Our distrust is directly related to our experience with these groups and their failure to make good on promises in the past. CALISO, in particular, has a different story about the need for the power plant and when the RMR can be removed each time they are asked.

¹ Fact Sheet, page 18

In January 2008, CALISO wrote Chula Vista Mayor Cheryl Cox that a combination of several projects could allow the removal of RMR. These projects were listed as the Otay Mesa Power Plant, Sunrise Powerlink, SDGE contracted peaking units. They stated that from the CAISO's perspective **two out of three** of the projects must occur before the RMR designation at the SBPP can be removed by 2010.² (For information 2 out of 3 have occurred and they have not removed all of the RMR)

In July of that year, they responded to MMC corporation in much the same way but invoked the need for 'black start and dual fuel' replacement energy....a requirement not mentioned in the January letter.³

By April, 2009 they told Senator Denise Ducheny that essentially that to remove RMR before all **three** projects were constructed would take two out of three plus 400 to 500 MW in region and that now it could be needed until the end of 2013.⁴

In September, they appeared before you with a chart of 'simple math' demonstrating the need for only 186 MW of the plant in 2010 based on the 2007 California Energy Commission worst-case projections.

SAN DIEGO 2010 LOAD & RESOURCE PROFILE

| 2010 Load | Import Capability (L-1; with SWPL out) | Firm Capacity (in Service) | DR | Non Firm Capacity (573 Otay Mesa and 94 Pala) | Generation contingency (G-1=Otay or G-1=Palomar) | LCR Need (Load – Imports + G-1) | Gen. surplus (Total gen. + CPUC-approved DR - LCR need) | Min. South Bay Gen (708-gen surplus) |
|-----------|--|----------------------------|----|---|--|---------------------------------|---|--------------------------------------|
| 5134 | 2500 | 2977 | 85 | 0 | 565 firm | 3199 | -137 | 708 |
| | | | | 573 (w Otay Mesa) | 573 w non-firm | 3207 | 428 | 280 |
| | | | | 657 (w Otay Mesa & Pala) | 573 w non-firm | 3207 | 522 | 186 |

However, the following week, the California Energy Commission downgraded the estimated peak demand for 2010 by 171 MW and new contracts were approved for SDGE by the PUC wiping out any need for any units that use the Bay water for cooling. These actions eliminate the need for any of SBPP to remain on RMR status for 2010—but ISO did not eliminate all of the RMR.

² CAISO to Mayor Cheryl Cox, January 18, 2008

³ CAISO to Jane Luckardt of MMC, July 24, 2008

⁴ ISO to Senator Denise Ducheny, April 1, 2009

Generation Calculation Based On New CEC Peak Demand Estimates⁵

| A | B | C | D | E | F | G |
|---|---------------------------------|---------------------------------|-----------|---|---|---|
| CEC's Peak Demand estimates for 2010 | Imports with SWPL output | Firm Capacity minus SBPP | DR | New Capacity by June 1 573MW Otay 94 MW Pala 25 MW Celerity TOTAL 692 | G-1 Contingency Depends on how largest generator is calculated | Surplus Energy in the region MW OVER peak demand |
| Worst day in 10 years) 4963 | 2500 | 2269 | 85 | 692 | 573 Otay | +10 |
| Worst day in 5 years 4863 | 2500 | 2269 | 85 | 692 | 573 Otay | +110 |
| Worst day in 2 years 4513 | 2500 | 2269 | 85 | 692 | 573 Otay | +469 |

This calculation is based on ISO's own 'math, do not include the following expected resources or emergency reserves coming on-line to address future growth.

- Redesignation of G-1 (>200 MW)
- Lake Hodges Pumped Storage 40 MW
- Wellhead peaker 45 MW

On October, 9 2009 the letter from CALISO to Regional Water Board supported Dynegey's request for an extension of the NPDES permit "for a minimum of one year....ISO will require RMR services from the extended RMR units until such a time as replacement capacity within the San Diego Gas and Electric service area is available"⁶ which they do not define and thus attempting to leave the whole question open-ended. However, it appears that they told Jim Avery from SDGE that once the Pala peakers were on-line and a transmission improvement was done the final RMR units could be removed by March or April of 2010.⁷

While we are glad that the RMR was removed on units 3 and 4, this only came after intense scrutiny of their activities by many elected representatives, regulators and the public. It is instructive to note that left to their own devices, CALISO was proposing continue with full designation of RMR until this Board sent a message to them that they questioned the continued operation of this plant. Then they quickly removed two units in what, we can only guess, is an attempt to stave off further action by you. Please don't fall for this chicanery again.

⁵ B+C+D+E-F must equal or exceed A (peak demand) or Imports (minus Southwest Power Link) + in-basin generation + Demand Response – Largest in-basin generator must equal or exceed worst case estimated peak demand

⁶ CALISO to John Robertus, Regional Board, October 9, 2009

⁷ Email from Jim Avery to Jim Detmers recounting conversation, dated October 12, 2009 and attached.

By November, 2009 ISO describes the timeline to Cindy Gomppers-Graves of South County Economic Development Corporation in terms of "...months and years...."as the horizon they are considering before the rest of the RMR is removed.⁸

While we know who gets the impacts of operating the SBPP (the community and the Bay) it is less clear who gets the benefit of the energy. In interview with the Union Tribune, Greg Fishman of CALISO would not confirm that the energy from SBPP was for the benefit of our local region and that it is hard to determine where the energy goes⁹. We would request that you ask them (if they even come to the meeting) how often grid problems in Los Angeles or out-of-basin demands cause them to call up the SBPP.

Representations to Federal Energy Regulatory Commission

We do take some heart in the **official** representation that Dynegy has filed with the Federal Energy Regulatory Commission (FERC). Given that this appears to be an official communication, we think that you should ask CAISO and Dynegy about it. In Dynegy's filing to the FERC it is represented that

"...the CAISO has informed South Bay that it may wish to terminate the RMR Agreement prior to the conclusion of the 2010 Contract Year due to other generation scheduled to become commercial during the term of the 2010 Contract Year."¹⁰

Unlike CAISO's other claims, this one is being represented in an official process. This 'other generation' should be identified and CAISO should be held to their representation.

The Regional Board should understand that a lucrative contract was issued and justified in part because the RMR contracts were allegedly going away. In our reading of this filing, it appears that Dynegy will recoup upwards of \$36 million for non-operational expenses alone¹¹. Taken together with the operational funding and their revenue profits, Dynegy will receive \$52 million¹² this year to have two, inefficient, environmentally destructive, aged power plants, that aren't even needed, on stand by-- a very lucrative deal for Dynegy, a very bad deal for the Bay and community. Again, we feel compelled to remind you that they were not required to do extensive retrofitting and mitigation as part of the 2004 permit because it was supposed to be the last.

⁸ CALISO to Gomppers-Graves, SCEDC, November 2, 2009

⁹ San Diego Union Tribune, *South Bay Power Plant Closer to being decommissioned*, October 14, 2009

¹⁰ Filings of Dynegy South Bay with the FERC for revisions to their RM rate schedules, October 30, 2009, p.3

¹¹ Ibid, Schedule Q

¹² Ibid, Appendix B, Enclosure 1

Regional Board should Issue a 13267 letter to Dynegy directing that a workplan to restore and rehabilitate the bay be developed and funded per the 2004 permit.

If the Board keeps this permit in place with the Minor Mods, it should initiate the 13267 letter that was contemplated when the current permit was issued. Mr. Robertus' representation to on November 18th that this intention was only to address impacts of removing the discharge was incorrect or he was referring to another section of the permit. The plain language in the Fact Sheet speaks for itself.

It is evident that the impacts on Beneficial Uses due to the discharge of once-through-cooling water cannot be eliminated except through termination of the discharge.....Duke Energy will be required to take measures to abate the detrimental impacts of the SBPP discharge to the discharge channel. Duke Energy will also have to propose measures to restore the Beneficial Uses of south San Diego Bay and to rehabilitate the damage caused to the biological resources of the Bay. In an action separate from the adoption of the Order, the Regional Board will consider the issuance of a CWC Section 13267 letter to Duke Energy directing it to provide a Workplan that proposes specific abatement and restoration measures. Duke Energy will be responsible for the financial costs associated with the implementation of the abatement and restoration measures. Duke Energy will be required to develop and implement the abatement and restoration Workplan in consultation with representatives of the USEPA, Department of Fish and Game (DFG), U.S. Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), RWQCB/SWQCB, and the California Coastal Commission.¹³

Legal authority exists for the Water Board to end this discharge.

More importantly, the Board has authority under Water Code Section 13243 and federal regulations¹⁴ to prohibit a discharge. The magnitude of the impacts from this discharge over-rule consideration of impacts on staff resources. The evidence supporting termination of this discharge is abundant and the authority is clear. Best Professional Judgment is an acceptable standard for decision-making and a finding is easy to make to support this action given that your staff has already found, using Best Professional Judgment, that the only way to end the impacts to beneficial uses is to terminate the discharge.¹⁵

Termination of the discharge will not impact turtles

We would like to take this opportunity to dispel concern related to the relationship between the power plant discharges and the presence of the turtles. The real problem for turtles is the excessive hot water in the summer that drives them deeper into the bay where they were more likely to get hit by boats¹⁶. In terms of the relationship to the hot water in winter, comments from Jeffrey Seminoff from Southwest Fisheries Science Center were summarized in an article this way...*According to his findings, the turtles are in the bay for the bounty of eel grass. That thing about the tropical power-plant waters is a rumor*

¹³ NPDES SBPP 2004 Fact Sheet, Page 18

¹⁴ See C.F.R. Section 122.64 (a) (Deering 2009).

¹⁵ Fact Sheet, P. 18

¹⁶ Pers. Communication, Tina Fege, NMFS

he says. He goes on to explain that sea turtles travel thousands of miles foraging for food. The Navy plants eel grass out in the Bay. "Imagine you are a sea turtle," he said. "Wouldn't you stay here too?"¹⁷ In addition, turtles have been seen in La Jolla Cove¹⁸ and at Seal Beach in winter months where there are no heated water discharges and water is much colder than in south San Diego Bay.

The SBPP often does not run at highest level most of the time in recent years. A review of 2008 data from the plant shows that 57% of the time the average hourly megawatts (MW) produced by the plant were less than 200. The plant was not running at all for a full 19 days in 2008 and for 25 days in 2007.

Below shows the analysis of average and maximum hours by month in 2008 and days of no operation in 2008 and 2007¹⁹:

| Month | Average Hourly Load | Days of no operation 2008 | Days of no operation 2007 |
|-----------|---------------------|---------------------------|---------------------------|
| January | 248.4 | | 3 |
| February | 112.8 | | 5 |
| March | 39.8 | 5 | 3 |
| April | 89.8 | 4 | 2 |
| May | 90.2 | | 4 |
| June | 58.9 | 10 | 6 |
| July | 62.3 | | |
| August | 81.7 | | |
| September | 175.2 | | 1 |
| October | 211.3 | | 1 |
| November | 160.3 | | |
| December | 161.5 | | |
| Overall | 124.5 | 19 | 25 |

The Community considers this issue a high priority.

As you have heard, this is a high priority for the community. The continued presence of this plant is an egregious environmental injustice.²⁰ We are very disappointed that you have refused to hold this meeting in Chula Vista. As a result, there are hundreds of people who will not be offered the

¹⁷ Reader Article, April 30, 2009

¹⁸ You-Tube video <http://www.youtube.com/watch?v=curVK13r3r4>

¹⁹ EPA Clean Air Markets Data and Maps
<http://camdataandmaps.epa.gov/gdm/index.cfm?fuseaction=prepackaged.results>

²⁰ A Tale of Two Power Plants: An Environmental Justice perspective on recreational access to water and fishing for South Bay Communities, EHC Fact Sheet, December, 2009.

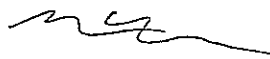
opportunity to provide their input on this very important decision. We repeat our request that you direct staff to hold another hearing at your next meeting in February, in Chula Vista, to discuss the proper date for Recission of the existing NPDES permit.

Then and only then, can we know for certain when the community and the bay receive the relief they need and deserve.

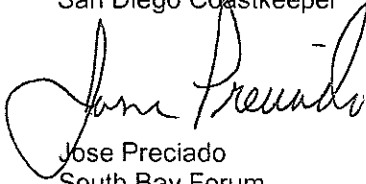
Sincerely,



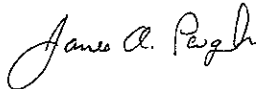
Laura Hunter
Associate Director
Environmental Health Coalition



Bruce Reznik
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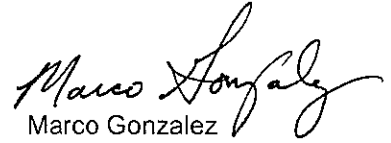
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