

February 22, 2010

CLIENT/MATTER NUMBER
114294-0103

Brian Kelly
California Regional Water Quality Control
Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123

Re: Comment Letter: In the Matter of Dynegy South Bay, LLC,
South Bay Power Plant

To Whom It May Concern:

This letter is submitted on behalf of the City of Chula Vista (the "City") in anticipation of the March 10, 2010 public hearing regarding the South Bay Power Plant ("SBPP"). On November 10, 2004, the Regional Water Board adopted Order No. R9-2004-00154 NPDES No. CA0001368 ("Order"), establishing waste discharge requirements for SBPP, located in the City. Dynegy South Bay, LLC ("Dynegy"), operator of the SBPP, submitted a NPDES permit application dated April 10, 2009, for the reissuance of the Order. In accordance with the Order (as amended), the discharges from Units 1 and 2 will terminate on the date California Independent Systems Operator ("CAISO") determines that RMR services from Units 1 and 2 are no longer needed or December 31, 2010, whichever occurs *first*, absent further action by the Regional Board.

As the SBPP is located within its borders, the City has a significant interest in the outcome of the Regional Board's hearing on this matter. In particular, intervening in this matter the City hopes to protect the health and safety of its residents, to protect the environmental well-being of its bayfront and potential future development, and to avoid any inequities from an environmental justice perspective. A detailed outline of the City's position follows.

South Bay Power Plane intake and discharge operations endanger human health and the environment and can only be regulated to acceptable levels by NPDES permit modification or termination pursuant to 40 CFR § 122.64(a)(3).

As described in further detail below, the sole role of the Regional Water Quality Control Board ("RWQCB") is to protect water quality. In fulfilling that role, the RWQCB has the authority and responsibility to regulate once-through cooling ("OTC") discharges in compliance with the Clean Water Act ("CWA") as well as California Law. Pursuant to those obligations the current permit can not be extended or renewed and any new permit must comport with the CWA, the California Water Code and state policy.

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1. The role of the Regional Board is to protect water quality.

In creating the Regional Boards the legislature intended that the primary function of the Boards is to protect water quality. “The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state.” California Water Code § 13000. The Legislature also determined that activities and factors which may affect the quality of the waters of the state shall be regulated [by the SWRCB or the RWQCBs] to attain the highest water quality which is reasonable . . .” *Id.*

According to the Regional Board, its mission is “developing and enforcing water quality objectives and implementing plans that will best protect the area’s waters while recognizing our local differences in climate, topography, geology and hydrology.”

It is a well-established fact that OTC discharge significantly impairs water quality. Without regulation by the Regional Boards of this discharge source, impairment to waters of the state is unreasonable.

2. The RWQCB has the authority and responsibility to regulate OTC discharges in compliance with the Clean Water Act and California Law.

a. Federal Requirements

Section 316(b) of the Clean Water Act regulates the location, design, construction and capacity of cooling water intake structures. Pursuant to CWA Section 402, Section 316(b) is implemented through the National Pollutant Discharge Elimination System (“NPDES”) permit system, which authorizes the point source discharge of pollutants (including heat) to navigable waters. The procedures that the U. S. Environmental Protection Agency (“EPA”) must follow in issuing permits for the discharge of OTC are contained in 40 C. F. R. Part 124. States are required to adopt procedures equivalent to Part 124 in order to be authorized to operate the NPDES permit program at the state level. 40 CFR §123.25(a)(24)-(a)(35).

CWA requires that the RWQCB either issue a new permit or terminate the discharge. Under CWA Section 402(b)(1)(B), an NPDES permit term cannot exceed five years. Pursuant to the terms of the Federal Administrative Procedures Act (“APA”), however, an NPDES permit can be administratively continued beyond its expiration date pending agency action on reissuance, **provided the permittee has timely submitted a complete application for renewal** in accordance with EPA requirements. 5 U.S.C. §558(c); see also 40 C.F.R. § 122.6 (emphasis added).

The OTC NPDES permit for the SBPP was originally issued in 2004 with a 2009 expiration. The permit term was improperly extended on December 16, 2009 to December 31, 2010 in violation of the CWA as there was no new permit application pending at the time of the extension. This permit must terminate on December 31, 2010 unless two events occur: first, Dynegy must

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timely submit a renewal application, and second, the Regional Board may then administratively continue the existing permit in accordance with APA requirements. To date, neither event has occurred.

b. State Requirements

California Water Code (“CWC”) prohibits the discharge of OTC water without valid Waste Discharge Requirements (“WDRs”). No discharge of waste into the waters of the state, whether or not the discharge is made pursuant to WDRs, shall create a vested right to continue the discharge. All discharges of water into water of the state are considered privileges, not rights. CWC § 13263(g).

The current WDR for SBPP terminates on December 31, 2010. The SBPP discharge *must* cease on or before December 31, 2010 unless the RWQCB issues new WDRs pursuant to CWC §13263. CWC §13264 (a)(1).

3. Any new permit must comport with the Clean Water Act, the California Water Code and state policy.

a. Clean Water Act

Clean Water Act Section 316(b) requires that the location, design, construction and capacity of cooling water intake structures reflect the best technology available (“BTA”) for minimizing adverse environment impacts. For nearly three decades permitting authorities have determined the BTA for minimizing environmental impacts associated with cooling water intake structures on a case by case basis. *Entergy Corporation v. RiverKeeper, Inc.* 556 U.S. _____ (2009). The RWQCB must determine a BTA standard for the SBPP and apply that standard to any new NPDES permit it might subsequently issue.

b. California Water Code

California Water Code establishes specific discharge requirements for OTC. “The Regional Board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge . . . with relation to the conditions existing in the disposal area or receiving water upon, or into which, the discharge is made or proposed.” CWC § 13263(a). The WDRs shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241. *Id.*

c. Beneficial Uses

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The beneficial uses of San Diego Bay impaired by the SBPP OTC discharge include, but are not limited to the following (RWQCB Order NO. R9-2004-054 p. 4):

- i. Estuarine Habitat (EST) – Uses of water that support estuarine ecosystems including, but not limited to, preservation or enhancement of estuarine habitats, fish, shellfish, or wildlife (e.g., estuarine mammals, waterfowl, shorebirds). Basin Plan at 2-4. This beneficial use is being impaired through impingement and entrainment of various estuarine species. Any new permit must mitigate these impacts to the “Best Technology Available” standard.
- ii. Marine Habitat (MAR) – Uses of water that support marine ecosystems including, but not limited to, preservation or enhancement of marine habitats, vegetation such as kelp, fish, shellfish, or wildlife (e.g., marine mammals, shorebirds). Basin Plan at 2-4. This beneficial use is being impaired through the destruction of eel grass habitat. Any new permit must mitigate these impacts to the “Best Technology Available” standard.
- iii. Wildlife Habitat (WILD) – Uses of water that support terrestrial ecosystems including, but not limited to, preservation and enhancement of terrestrial habitats, vegetation, wildlife (e.g., mammals, birds, reptiles, amphibians, invertebrates), or wildlife water and food sources. Basin Plan at 2-4. This beneficial use is being impaired through the degradation of over 100 acres of eel grass and the larvae and food sources it provides habitat for, as identified at the time by the Regional Board in its own 2004 permit. Any new permit must mitigate these impacts to the “Best Technology Available” standard.
- iv. Preservation of Biological Habitats of Special Significance (BIOL) – Uses of water that support designated areas or habitats, such as established refuges, parks, sanctuaries, ecological reserves, or Areas of Special Biological Significance (“ASBS”), where the preservation or enhancement of natural resources requires special attention. Basin Plan at 2-4. This beneficial use is being impaired because of its impacts on South Bay National Wildlife Refuge. Any new permit must mitigate these impacts to the “Best Technology Available” standard.
- v. Rare Threatened or Endangered Species (RARE) – Uses of water that support habitats necessary, at least in part, for the survival and successful maintenance of plant or animal species established under state or federal law as rare, threatened or endangered. Basin Plan at 2-5. The beneficial use is being impaired because the OTC threatens the following rare, threatened or endangered species: Least Tern and Brown Pelicans. Any new permit must mitigate these impacts to the “Best Technology Available” standard.

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vi. Shellfish Harvesting (SHELL) – Uses of water that support habitats suitable for the collection of filter-feeding shellfish (e.g., clams, oysters, and mussels) for human consumption, commercial, or sport purposes. Basin at 2-5. The beneficial use is being impaired because the OTC affects the water clarity, temperature and other conditions that would otherwise make this a suitable habitat. Any new permit must mitigate these impacts to the “Best Technology Available” standard.

Because the above-noted beneficial uses are not being achieved, the water quality objectives established in the previous permit are not sufficient going forward. The Regional Board must establish water quality objectives capable of sufficiently protecting these beneficial uses. A relevant example of such water quality objectives are outlined in the SWRCB draft policy for OTC discharges (the “Draft Policy,” attached hereto for reference).

Currently, there are no applicable nationwide standards implementing Section 316(b) for existing power plants. Consequently, as noted above, Regional Boards must implement Section 316(b) on a case-by-case bases, using their best professional judgment. According to the Draft Policy, the SWRCB, best professional judgment is to impose the following compliance alternatives on OTC permits for existing power plants: (i) Reduce intake flow rate at each unit to a level commensurate with that which can be attained by a closed-cycle wet cooling system or 93%, whichever is greater, or (ii) Reduce impingement mortality and entrainment of marine life for the facility by 90%. The City believes the Regional Board should rely on one of these two benchmarks in implementing the Section 316(b) requirements for the SBPP.

4. Other discharge sources

In addition to the waste discharges resulting from the OTC system, the SBPP is the source of several other types of pollutant discharges which must be considered when analyzing water quality. Each of these is discussed in turn below.

a. Air pollution

The SBPP emits significant quantities of pollutants into the atmosphere which settles on area streets, residences and businesses. During any rain event, such pollution ultimately works its way into the bay, as a result of contaminated urban runoff. Such additional contamination exacerbates the already significant effects of the OTC system.

The SBPP is permitted to discharge the following air pollutants each year. *See* Application for Certification, Section 8.1 page 35 (filed June 30,2006).

- i. NOx 103.8 tons
- ii. SO2 11 tons

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- iii. CO 544.6 tons
- iv. VOCs 39.6 tons
- v. PM10 69.2 tons

Much of this atmospheric pollution is washed out of the sky with each rain event and further contributes to pollutants of concern in the urban runoff as it comes together with the OTC discharge. Any new permit issued to SBPP by the Regional Board must address these "Other Waste Discharges."

b. Nuisance

The OTC discharge constitutes a public nuisance because it impinges on other beneficial uses of the bay (such as recreational uses) by prohibiting the redevelopment of the bay front for REC 1 and REC 2 uses. For example, the viability of a proposed convention center and resort at the Chula Vista bay front rests in large part whether the SBPP is allowed to continue operations in its dilapidated and outdated condition. *See* letter from Gaylord Entertainment dated December 11, 2006, attached hereto.

Section 13241 of the CWC states that factors to be considered by the Regional Board in establishing water quality objectives shall include, but not be limited to: (i) past, present, and probable future beneficial uses of water, (ii) environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto, (iii) water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area, (iv) economic considerations, (v) the need for developing housing within the region and (vi) the need to develop and use recycled water.

As an example, these factors relate to the Sweetwater River (in particular factor ii) in particular. The Sweetwater Authority provides drinking water to approximately 187,000 people in National City, Bonita and Chula Vista. A portion of the Sweetwater Authority's water comes from a desalination facility that converts brackish water into potable water for residents and businesses in the area (up to four million gallons per day), and another portion of the water comes from capture and treatment of urban runoff. Continued operation of the SBPP's OTC impairs the ability of the Sweetwater Authority to use these sources of drinking water. Therefore, any new permit issued to SBPP must address the impacts on water quality for these other beneficial uses.

5. Other economic considerations

The EPA has indicated that one of its top enforcement priorities in 2010 is to ensure environmental burdens are not disproportionately placed on vulnerable populations. *See* Background Paper for Candidate National Enforcement Priority: Environmental Justice, attached hereto for reference. According to the most recent census data, the percentage of Hispanics living

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in Chula Vista is 49% versus 32% for the state as a whole. Similarly, Chula Vista is home to a significant percentage of the power generating capacity for San Diego County, with approximately 1,100 megawatts of power originating in the City. It is unjust to disproportionately impose the burden of an outdated power plant on this significant minority population. Rather, the City should be looking to the future and its need to develop housing within the region, without the specter of an aged, dirty power plant looming over the bay front.

The effects described above require the RWQCB to terminate the SBPP OTC permit no later than December 31, 2010.

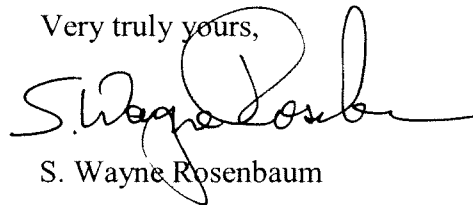
Ensuring the reliability of the state-wide power grid falls to other state agencies, not the RWQCB. While the RWQCB is required to consider the economic and environmental impacts of its decision to issue a new permit, the burden rests with permittee to demonstrate that failure to issue a new permit will create a foreseeable energy emergency which should be given consideration by the RWQCB.

The evidentiary standard on which the RWQCB must base its decisions is that of substantial admissible evidence. To date, neither the permittee, nor any other state agency has provided the RWQCB with information meeting the required evidence standard. Thus, before a new permit can issue, the RWQCB must be presented with substantial admissible evidence of an emergency of such an extreme degree that it would allow the RWQCB to waive its responsibilities to protect water quality in lieu of some other state and federal priority.

Conclusion

The City respectfully submits this comment letter to the Regional Board in the above-entitled matter. The City hopes that the Regional Board seriously consider the concerns raised herein before it makes any decisions regarding the future of the SBPP.

Very truly yours,



S. Wayne Rosenbaum

cc: David Gibson, Executive Director
Margaret Rosegay
Andrew Ulmer
Laura Hunter
Bart Miesfeld

EXHIBIT 1

**STATEWIDE WATER QUALITY CONTROL POLICY ON THE USE OF COASTAL
AND ESTUARINE WATERS FOR POWER PLANT COOLING**

DRAFT

1. Introduction

- A. Clean Water Act Section 316(b) requires that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available (BTA) for minimizing adverse environmental impact. Section 316(b) is implemented through National Pollutant Discharge Elimination System (NPDES) permits, issued pursuant to Clean Water Act Section 402, which authorize the point source discharge of pollutants to navigable waters.
- B. The State Water Resources Control Board (State Water Board) is designated as the state water pollution control agency for all purposes stated in the Clean Water Act.
- C. The State Water Board and Regional Water Quality Control Boards (Regional Water Boards) (collectively Water Boards) are authorized to issue NPDES permits to point source dischargers in California.
- D. Currently, there are no applicable nationwide standards implementing Section 316(b) for *existing power plants*¹. Consequently, the Water Boards must implement Section 316(b) on a case-by-case basis, using best professional judgment.
- E. The State Water Board is responsible for adopting state policy for water quality control, which may consist of water quality principles, guidelines, and objectives deemed essential for water quality control.
- F. This Policy establishes uniform requirements for the implementation of §316(b), using best professional judgment in determining BTA for cooling water intake structures at existing coastal and estuarine power plants that must be implemented in NPDES permits.
- G. The intent of this Policy is to ensure that the beneficial uses of the State's coastal and estuarine waters are protected while also ensuring that the electrical power needs essential for the welfare of the citizens of the State are met. The State Water Board recognizes it is necessary to develop replacement infrastructure to maintain electric reliability in order to implement this Policy.

¹ An asterisk indicates that the term is defined in Section 5 of the Policy.

- H. During the development of this Policy, State Water Board staff has met regularly with representatives from the California Energy Commission (CEC), California Public Utilities Commission (CPUC), California Coastal Commission (CCC), California State Lands Commission (SLC), California Air Resources Board (ARB), and California Independent System Operator (CAISO) to develop realistic implementation plans and schedules for this Policy that will not cause disruption in the State's electrical power supply. The compliance dates for this Policy were developed considering a report produced by the energy agencies (CEC, CPUC, and CAISO), titled "Implementation of OTC Mitigation Through Energy Infrastructure Planning and Procurement Changes", and the accompanying table, titled "Draft Infrastructure Replacement Milestones and Compliance Dates for Existing Power Plants in California Using Once Through Cooling", included in the Substitute Environmental Document for this Policy. The energy agencies' approach seeks to address the replacement, repowering, or retirement of power plants currently using OTC that (1) maintains reliability of the electric system; (2) meets California's environmental policy goals; and (3) achieves these goals through effective long-term planning for transmission, generation and demand resources. The energy agencies have stated that the dates specified in their report may require periodic updates.
- I. To prevent disruption in the State's electrical power supply when the Policy is implemented, the State Water Board will convene a Statewide Advisory Committee on Cooling Water Intake Structures (SACCWIS), which will include representatives from the CEC, CPUC, CAISO, CCC, SLC, ARB, and State Water Board. SACCWIS will review implementation plans and schedules submitted by dischargers pursuant to this Policy, and advise the State Water Board on the implementation of this Policy to ensure that the implementation schedule takes into account local area and grid reliability. The State Water Board recognizes the compliance dates in this Policy may require amendment based on, among other factors, the need to maintain reliability of the electric system as determined by the energy agencies included in the SACCWIS, acting according to their individual or shared responsibilities. The State Water Board retains the final authority over changes to the adopted policy.
- J. While the CEC, CPUC and CAISO each have various planning or permitting responsibilities important to this effort, the approach relies upon use of competitive procurement and forward contracting mechanisms implemented by the CPUC in order to identify low cost solutions for most OTC power plants. The CPUC has authority to order the investor-owned utilities (IOUs) to procure new or repowered fossil-fueled generation for system and/or local reliability in the Long-Term Procurement Plan (LTPP) proceeding. In response to the Policy, the CPUC anticipates modifying its LTPP proceeding and procurement processes to require the IOUs to assess replacement infrastructure needs and conduct targeted requests for offers (RFOs) to acquire replacement, repowered or otherwise compliant generation capacity. LTPP proceedings are conducted on a biennial cycle and plans are normally approved in odd-numbered years. The next cycle,

the 2010 LTPP, is estimated to result in a decision by 2011. The subsequent cycle, the 2012 LTPP, would in turn result in a decision by 2013. Once authorized to procure by a CPUC LTPP decision, the IOUs need approximately 18 months to issue an RFO, sign contracts, and submit applications to the CPUC for approval. Approval by the CPUC takes approximately nine months. If the contract involves a facility already licensed through the CEC generation permitting process, then financing and construction can begin. A typical generation permitting timeline is 12 months, but specific issues such as ability to obtain air permits can delay the process. IOUs often give preference to RFO bids with permits already (or nearly) in place. From contract approval, construction usually takes three years, if generation permits are approved, or approximately five years, if generation permits are pending or other barriers present delays. In total, starting from the initiation of an LTPP proceeding (2010 LTPP or 2012 LTPP), seven years are expected to elapse, before replacement infrastructure is operational. Due to the number of plants affected, efforts to replace or repower OTC power plants would need to be phased.

- K. Because the Los Angeles region presents a more complex and challenging set of issues, it is anticipated that more time would be needed to study and implement replacement infrastructure solutions. Therefore, total elapsed time is expected to begin in 2010 and end in 2017 for the Greater Bay Area and San Diego regions, which would be addressed beginning in the 2010 LTPP. For the Los Angeles region, which would be addressed beginning in the 2012 LTPP, total elapsed time is expected to begin in 2012 and end in 2020. A transmission solution is expected to have approximately the same timeframe, but could be delayed by greater potential for significant local opposition. In order to assure that repowering or new power plant development in the Los Angeles basin addresses unique permitting challenges, the SACCWIS will assist the State Water Board in evaluating compliance for power plants not under the jurisdiction of the CPUC or operating within the CAISO Balancing Authority Area.
- L. To conserve the State's scarce water resources, the State Water Board encourages the use of recycled water for cooling water in lieu of marine, estuarine or fresh water.

2. Requirements for *Existing Power Plants**

A. Compliance Alternatives

- (1) Track 1. An owner or operator of an *existing power plant** must reduce *intake flow rate** at each unit, at a minimum, to a level commensurate with that which can be attained by a *closed-cycle wet cooling system**. A minimum 93 percent reduction in *intake flow rate** for each unit is required for Track 1 compliance, compared to the unit's design *intake flow rate**. The through-screen intake velocity must not exceed 0.5 foot per second.

- (2) Track 2. If an owner or operator of an *existing power plant** demonstrates to the Regional Water Boards' satisfaction that compliance with Track 1 is *not feasible**, the owner or operator must reduce impingement mortality and entrainment of marine life for the facility, as a whole, to a comparable level to that which would be achieved under Track 1, using operational or structural controls, or both. For the purposes of this policy, a "comparable level" is a level that achieves at least 90 percent of the reduction in impingement mortality and entrainment required under Track 1.
- (a) Compliance for impingement mortality shall be determined either (1) by monthly verification of through-screen intake velocity not to exceed 0.5 foot per second, or (2) by monitoring required in Section 4.A, below.
- (b) Compliance for entrainment shall be determined by measured reduction in entrainment determined by monitoring required in Section 4.B, below.
- (c) Technology-based improvements that are specifically designed to reduce impingement mortality and/or entrainment and were implemented prior to [the effective date of the Policy] may be counted towards meeting Track 2 requirements.
- (d) Reductions in impingement mortality and entrainment resulting from the replacement of steam turbine power-generating units with *combined-cycle power-generating units**, installed prior to [the effective date of the Policy], may also be counted towards meeting Track 2 requirements.

B. Final Compliance Dates

- (1) *Existing power plants** shall comply with Section 2.A, above, as soon as possible, but no later than, the dates shown in Table 1, contained in Section 3.E, below.
- (2) Based on the need for continued operation of an existing power plant to maintain the reliability of the electric system as annually determined by the CAISO, CEC or CPUC acting according to their individual or shared responsibilities, and communicated to the State Water Board as a formal action of the CAISO or state agency, the State Water Board shall hold a hearing to consider suspension of a compliance date applicable to an existing power plant pending full evaluation of amendments to final compliance dates contained in the policy.

C. Immediate and Interim Requirements

- (1) No later than [one year after the effective date of this Policy], the owner or operator of an *existing power plant** with an offshore intake shall install large organism exclusion devices having a distance between exclusion bars of no

greater than nine inches, or install other exclusion devices, deemed equivalent by the Regional Water Board.

- (2) No later than [one year after the effective date of this Policy], the owner or operator of an *existing power plant** unit that is not directly engaging in *power-generating activities**, or critical system maintenance, shall cease intake flows, unless the owner or operator demonstrates to the Regional Water Board that a reduced minimum flow is necessary for operations.
- (3) The owner or operator of an *existing power plant** must implement measures to mitigate the interim impingement and entrainment impacts resulting from the cooling water intake structure(s), commencing [five years after the effective date of this Policy] and continuing up to and until the owner or operator achieves final compliance. The owner or operator must include in the implementation plan, described in Section 3.A below, the specific measures that will be undertaken to comply with this requirement. An owner or operator may comply with this requirement by:
 - (a) Demonstrating to the Regional Water Board's satisfaction that the owner or operator is compensating for the interim impingement and entrainment impacts through existing mitigation efforts, including any projects that are required by state or federal permits as of [the effective date of this Policy]; or
 - (b) Demonstrating to the Regional Water Board's satisfaction that the interim impacts are compensated for by the owner or operator's participation in funding through a third party of an appropriate mitigation project; or
 - (c) Developing and implementing a mitigation program for the facility, approved by the Regional Water Board, which will compensate for the interim impingement and entrainment impacts.
 - (d) *The habitat production foregone** method, or a comparable alternate method approved by the Regional Water Board, shall be used to determine the habitat and area for a mitigation project.

D. Nuclear-Fueled Power Plants*

If the owner or operator of an existing *nuclear-fueled power plant** demonstrates that compliance with the requirements for *existing power plants** in Section 2.A, above, of this Policy would result in a conflict with a safety requirement established by the Nuclear Regulatory Commission (Commission), with appropriate documentation or other substantiation from the Commission, the Water Board will make a site-specific determination of best technology available for minimizing adverse environmental impact that would not result in a conflict with the Commission's safety requirement.

3. Implementation Provisions

A. With the exception of *nuclear-fueled power plants**, which are covered under 3.D, below, no later than [six months after the effective date of this Policy], the owner or operator of an *existing power plant** shall submit an implementation plan to the State and Regional Water Boards.

(1) The implementation plan shall identify the compliance alternative selected by the owner or operator, describe the general design, construction, or operational measures that will be undertaken to implement the alternative, and propose a realistic schedule for implementing these measures that is as short as possible. If the owner or operator chooses to repower the facility to reduce or eliminate reliance upon OTC, or to retrofit the facility to implement either Track 1 or Track 2 alternatives, the implementation plan shall identify the time period when generating power is infeasible and describe measures taken to coordinate this activity through the appropriate electrical system balancing authority's maintenance scheduling process.

(2) If the owner or operator selects *closed-cycle wet cooling** as a compliance alternative, the owner or operator shall address in the implementation plan whether recycled water of suitable quality is available for use as makeup water.

B. The SACCWIS shall be impaneled no later than [three months after the effective date of this Policy], by the Executive Director of the State Water Board, to advise the State Water Board on the implementation of this Policy to ensure that the implementation schedule takes into account local area and grid reliability. SACCWIS shall include representatives from the CEC, CPUC, CAISO, CCC, SLC, ARB, and State Water Board.

(1) SACCWIS meetings shall be scheduled regularly and as needed. Meetings shall be open to the public and shall be noticed at least 10 days in advance of the meeting. All SACCWIS products shall be made available to the public.

(2) The SACCWIS shall review the owner or operator's proposed implementation schedule and report to the State Water Board with recommendations no later than [one year after the effective date of this Policy].

(3) The SACCWIS will report to the State Water Board with recommendations on modifications to the implementation schedule at least every two years starting in 2013. If members of SACCWIS do not believe the full committee recommendations reflect their concerns they may issue minority recommendations that the State Water Board shall consider as part of the SACCWIS recommendations.

- (4) The State Water Board shall consider the SACCWIS' recommendations and direct staff to make modifications, if appropriate, for the State Water Board's consideration.
- C. The Regional Water Boards shall reissue or, as appropriate, modify NPDES permits issued to owners or operators of *existing power plants** to ensure that the permits conform to the provisions of this Policy.
- (1) The permits shall incorporate a final compliance schedule that requires compliance as soon as possible, but no later than, the deadlines contained in Table 1, contained in Section 3.E, below. The compliance schedule shall be as short as possible, given the type of facilities being constructed, and industry experience with the time typically required to construct similar facilities; and, taking into account the amount of time reasonably required for the discharger to implement actions, such as designing, permitting, securing, financing and constructing facilities. If the State Water Board determines that a longer compliance schedule is necessary to maintain reliability of the electric system per SACCWIS recommendations while other OTC power plants are retrofitted, repowered, or retired or transmission upgrades take place, this delay shall be incorporated into the compliance schedule and stated in the permit findings.
 - (2) The Regional Water Boards shall reopen the relevant permits and modify the final compliance schedules, if appropriate, based on modifications to the policy approved by the State Water Board.
 - (3) If an owner or operator selects Track 2 as the compliance alternative, the NPDES permit shall include a monitoring program that complies with Section 4 of this Policy.
- D. No later than [three months of the effective date of this Policy] the Executive Director of the State Water Board, using the authority under section 13267(f) of the Water Code, shall request that Southern California Edison (SCE) and Pacific Gas & Electric Company (PG&E) conduct special studies for submission to the State Water Board.
- (1) The special studies shall investigate alternatives for the *nuclear-fueled power plants** to meet the requirements of this Policy, including the costs for these alternatives.
 - (2) The special studies shall be conducted by an independent third party, selected by the Executive Director of the State Water Board.
 - (3) The special studies shall be overseen by a Review Committee, established by the Executive Director of the State Water Board no later than [three months of the effective date of the Policy], which shall include, at a minimum,

representatives of SCE, PG&E, SACCWIS, the environmental community, and staffs of the State Water Board, Central Coast Regional Water Board, and the San Diego Regional Water Board.

- (4) No later than [one year after the effective date of this Policy], the Review Committee, described above, shall provide a report for public comment detailing the scope of the special studies, including the degree to which existing, completed studies can be relied upon.
- (5) No later than [three years after the effective date of this Policy] the Review Committee shall provide a report for public comment detailing the results of the special studies and shall present the report to the State Water Board.
- (6) Meetings of the Review Committee shall be open to the public and shall be noticed at least 10 days in advance of the meeting. All products of the Review Committee shall be made available to the public.
- (7) The State Water Board shall consider the results of the special studies, including costs and feasibility, in evaluating the need to modify this Policy with respect to the *nuclear-fueled power plants**

E. Table 1. Implementation Schedule

	Milestone	Responsible Entity/Party	Due Date²
1	Request SCE and PG&E to conduct special studies to investigate compliance options for <i>nuclear-fueled power plants</i> * [Section 3.D]	State Water Board Executive Director	[three months after the effective date of the Policy]
2	Establish Review Committee [Section 3.D(3)]	State Water Board Executive Director	[three months after the effective date of the Policy]
3	Establish SACCWIS [Section 3.B]	State Water Board Executive Director	[three months after the effective date of the Policy]
4	Submit a proposed implementation plan to the State and Regional Water Boards [Section 3.A]	Owner/operators of existing fossil-fueled power plants	[six months after the effective date of the Policy]

² These compliance dates were developed considering information provided by the CEC, CPUC, CAISO, and the Los Angeles Department of Water and Power (LADWP).

Milestone		Responsible Entity/Party	Due Date ²
5	Provide a report for public comment, detailing the scope of the special studies on compliance options for <i>nuclear-fueled power plants</i> * [Section 3.D(4)]	Review Committee	[one year after the effective date of the Policy]
6	Review the owners or operators' proposed implementation schedules and report to the State Water Board with recommendations [Section 3.B(2)]	SACCWIS	[one year after the effective date of the Policy]
7	Humboldt Bay Power Plant in compliance	Owner/operator	[one year after the effective date of the Policy]
8	Potrero Power Plant in compliance	Owner/operator	[one year after the effective date of the Policy]
9	Install large organism exclusion devices with a distance between exclusion bars of no greater than nine inches, or equivalent device [Section 2.C(1)]	Owner/operators of <i>existing power plants</i> * with offshore intakes	[one year after the effective date of the Policy]
10	Cease intake flows for units not directly engaging in <i>power-generating activities</i> * or critical system maintenance, or demonstrate to the Regional Water Board that a reduced minimum flow is necessary for operations [Section 2.C(2)]	Owner/operators of <i>existing power plants</i> *	[one year after the effective date of the Policy]
11	South Bay Power Plant in compliance	Owner/operator	12/31/2012
12	Report to State Water Board on results of special studies on compliance options for <i>nuclear-fueled power plants</i> * [Section 3.D(5)]	Review Committee	[three years after the effective date of the Policy]
13	Report to State Water Board on status of implementation of Policy [Section 3.B(3)]	SACCWIS	3/31/2013
14	Commence to implement measures to mitigate the interim impingement and entrainment impacts due to the cooling water intake structure(s) [Section 2.C(3)]	Owners/operators of <i>existing power plants</i> *	[five years after the effective date of the Policy]

	Milestone	Responsible Entity/Party	Due Date²
15	Report to State Water Board on status of implementation of Policy [Section 3.B(3)]	SACCWIS	3/31/2015
16	El Segundo, Haynes, and Morro Bay power plants in compliance	Owner/operator	12/31/2015
17	Report to State Water Board on status of implementation of Policy [Section 3.B(3)]	SACCWIS	3/31/2017
18	Power plants in CPUC 2010 LTPP Cycle in compliance: Encina, Contra Costa, Pittsburg, Moss Landing [Section 1.J]	Owner/Operator	12/31/2017
19	Harbor and Scattergood generating stations in compliance	Owner/operator	12/31/2017
20	Report to State Water Board on status of implementation of Policy [Section 3.B(3)]	SACCWIS	3/31/2019
21	Power plants in CPUC 2012 LTPP Procurement Cycle in compliance: Huntington Beach, Redondo, Alamitos, Mandalay, Ormond Beach [Section 1.J]	Owner/operator	12/31/2020
22	Report to State Water Board on status of implementation of Policy [Section 3.B(3)]	SACCWIS	3/31/2021
23	Diablo Canyon Power Plant in compliance	Owner/operator	12/31/2024
24	San Onofre Nuclear Generating Station in compliance	Owner/operator	12/31/2022

4. Track 2 Monitoring Provisions

A. Impingement Impacts: The following impingement studies are required to comply with Section 2(A)(2)(a)(2):

- (1) A baseline impingement study shall be performed, unless the discharger demonstrates, to the Regional Water Board's satisfaction, that prior studies accurately reflect current impacts. Baseline impingement shall be measured on-site and shall include sampling for all species impinged. The impingement study shall be designed to accurately characterize the species currently impinged and their seasonal abundance to the satisfaction of the Regional Water Board.

- (a) The study period shall be at least 12 consecutive months.
 - (b) Impingement shall be measured during different seasons when the cooling system is in operation and over 24-hour sampling periods.
 - (c) When applicable, impingement shall be sampled under differing representative operational conditions (e.g., differing levels of power production, heat treatments, etc.).
 - (d) The study shall not result in any additional mortality above typical operating conditions.
- (2) After the Track 2 controls are implemented, to confirm the level of impingement controls, another impingement study, consistent with section 4.A(1)(a) to (d), above, shall be performed and reported to the Regional Water Board.
 - (3) The need for additional impingement studies shall be evaluated at the end of each permit period. Impingement studies shall be required when changing operational or environmental conditions indicate that new studies are needed, at the discretion of the Regional Water Board.
- B. Entrainment Impacts: The following entrainment studies are required to comply with Section 2(A)(2)(b):
- (1) A baseline entrainment study shall be performed, unless the discharger demonstrates, to the Regional Water Board's satisfaction, that prior studies accurately reflect current impacts. Baseline sampling shall be performed to determine larval composition and abundance in the source water, representative of water that is being entrained. The source water shall be determined based on oceanographic conditions reasonably expected after Track 2 controls are implemented. Baseline entrainment sampling shall provide an unbiased estimate of larvae entrained at the intake prior to the implementation of Track 2 controls.
 - (a) Entrainment impacts shall be based on sampling for all *ichthyoplankton** and *meroplankton** species. Individuals collected shall be identified to the lowest taxonomical level practicable. When practicable, genetic identification through molecular biological techniques may be used to assist in compliance with this requirement. Samples shall be preserved and archived such that genetic identification is possible at a later date.
 - (b) The study period shall be at least 12 consecutive months, and sampling shall be designed to account for variation in oceanographic conditions and larval abundance and behavior such that abundance estimates are reasonably accurate.

- (2) After the Track 2 controls are implemented, to confirm the level of entrainment controls, another entrainment study (with a study design to the Regional Water Board's satisfaction) shall be performed and reported to the Regional Water Board.
- (3) The need for additional entrainment studies shall be evaluated at the end of each permit period. Entrainment studies shall be required when changing operational or environmental conditions indicate that new studies are needed, at the discretion of the Regional Water Board.

5. Definition of Terms

Closed-Cycle Wet Cooling System – Refers to a cooling system, which functions by transferring waste heat to the surrounding air through the evaporation of water, thus enabling the reuse of a smaller amount of water several times to achieve the desired cooling effect. The only discharge of wastewater is blowdown, which is either boiler water or re-circulating cooling water for the purpose of limiting the buildup of concentrations of materials in excess of desirable limits established by best engineering practice.

Combined-cycle power-generating units - Refers to several units within a power plant which combined generate electricity through a two-stage process involving combustion and steam. Hot exhaust gas from one or two combustion turbines is passed through a heat recovery steam generator to produce steam for a steam turbine. The turbine exhaust steam is condensed in the cooling system and may or may not be returned to the power cycle. Combined cycle power units are generally more fuel-efficient and use less cooling water than steam boiler units with the same generating capacity.

Existing power plant(s) – Refers to any power plant that is not a *new power plant*.*

Habitat Production Foregone – Refers to the product of the average *proportional mortality** and the estimated area of the water body that is habitat for the species' source population. *Habitat production foregone** is an estimate of habitat area production that is lost to all entrained species. For example, if the average *proportional mortality** of estuarine species is 17 percent and the area of the source water estuary is 2000 acres, then the *habitat production foregone** is equal to 17 percent of 2000 acres, which is 340 acres.

Ichthyoplankton – Refers to the planktonic early life stages of fish (i.e., the pelagic eggs and larval forms of fishes).

Intake Flow Rate – Refers to the instantaneous rate at which water is withdrawn through the intake structure, expressed as gallons per minute.

Meroplankton – Refers to that component of the zooplankton* community composed of the pelagic larvae of benthic invertebrates.

New power plant – Refers to any plant that is a “new facility”, as defined in 40 C.F.R. §125.83 (revised as of July 1, 2007), and that is subject to Subpart I, Part 125 of the Code of Federal Regulations (revised as of July 1, 2007)(referred to as “Phase I regulations”).

Not Feasible – Cannot be accomplished because of space constraints or the inability to obtain necessary permits due to public safety considerations, unacceptable environmental impacts, local ordinances, regulations, etc. Cost is not a factor to be considered when determining feasibility under Track 1.

Nuclear-Fueled Power Plant(s) – Refers to Diablo Canyon Power Plant and/or San Onofre Nuclear Generating Station.

Power-generating Activities – Refers to activities directly related the generation of electrical power, including start-up and shut-down procedures, contractual obligations (hot stand-by), hot bypasses, and critical maintenance activities regulated by the Nuclear Regulatory Commission. Activities that are not considered directly related to the generation of electricity include (but are not limited to) dilution for in-plant wastes, maintenance of source-and receiving water quality strictly for monitoring purposes, and running pumps strictly to prevent fouling of condensers and other power plant equipment.

Proportional Mortality – the proportion of larvae killed from entrainment to the larvae in the source population.

Zooplankton – For purposes of this Policy, refers to those planktonic invertebrates larger than 200 microns.

EXHIBIT 2

RECEIVED

GAYLORD ENTERTAINMENT

APR 30 2007

Bennett Westbrook, Senior Vice President, Development, Design & Construction

Conservation &
Environmental Services



December 11, 2006

The Honorable Cheryl Cox
Chula Vista Mayor
276 Fourth Avenue
Chula Vista, CA 91910

via email

Honorable Board of Port Commissioners
Unified Port of San Diego
P.O. Box 120488
San Diego, CA 92112-0488

Dear Mayor Cox and Port Commissioners:

We have noted that the Port District staff has pulled the various Port Board agenda items relating to South Bay Replacement Project, LLC's proposed replacement of the existing South Bay Power Plant in Chula Vista. We understand that this was done to allow time for further study of the project, by the staff of both the Port District and the City of Chula Vista. Given this period of further study, I thought that this would be an appropriate time to share Gaylord Entertainment's views on the subject.

As you know, we are working with your respective staffs to deliver a world-class hotel convention center resort at the Chula Vista bayfront, as part of the master plan for this project. In reviewing the current state of affairs for the power plant and its replacement, the first and foremost conclusion that we come to is the incompatibility of our plans with the continued existence of the power plant in its current location and configuration. We can only echo the commonly-held sentiment that the facility as it is today is an eyesore that detracts from the entire bayfront experience. We are certain that this facility would negatively impact the guest experience at our hotel, if it were to remain in existence by the time of our opening. As a result, I am writing today to express our strong opposition to any plan or course of action that leads to the existing power plant remaining for any period of time after the first quarter of the year 2011. I cannot conceive of a situation in which Gaylord would commit to continue the pursuit of our Chula Vista project, if future decisions regarding the plant were to lead to this undesirable outcome.

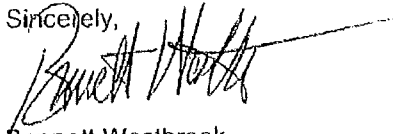
We understand that the California Energy Commission will be instrumental in determining the future of any power generation that occurs on the Chula Vista bayfront. We also understand the importance of ensuring a continuous and adequate supply of power to the south San Diego region, which will benefit all of the tenants and residents of the bayfront. If the Commission concludes, however, that there is not a justification for continuing power generation within the bayfront master plan site, we would hope that a higher and better use for the proposed relocation parcel could be found. My

Gaylord Entertainment Company
One Gaylord Drive, Nashville, TN 37214
Telephone 615-316-6436 Facsimile 615-316-6557
Email: bwestbrook@gaylordentertainment.com

assumption would be that you would share this view, since we share a common interest is developing the bayfront into a destination attraction that is unrivalled on the West Coast. The site that the replacement power plant would occupy presents opportunities for many other uses that would contribute towards this goal.

We appreciate your consideration of our views on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Bennett Westbrook", with a long horizontal line extending to the right.

Bennett Westbrook

cc: Lee Babcock
Laurie Madigan
Randa Coniglio

EXHIBIT 3



Background Paper for Candidate National Enforcement Priority: Environmental Justice (EJ) January 2010

Why is environmental justice a significant concern?

Administrator Lisa Jackson has strongly voiced her intent to address the burdens pollution has disproportionately placed on vulnerable populations, including children, communities of color, Native Americans, and the poor, and to seek their full partnership in identifying and eliminating the sources of pollution in their neighborhoods, schools and homes. She has further said that EPA would take special pains to connect with those who have been historically underrepresented in EPA decision making, including the disenfranchised in our cities and rural areas, communities of color, native Americans, people disproportionately impacted by pollution, and small businesses, cities and towns working to meet their environmental responsibilities. Although the environmental and health threats vary, environmental justice issues are prevalent in communities across the country.

Rationale:

Environmental & Human Health Significance

This priority candidate would further support the Agency's commitment to protect vulnerable communities. It would empower communities, giving them a role in the process of ensuring compliance at facilities which directly affects their lives. Making EJ a separate enforcement priority should not diminish the importance of, or take the place of, incorporating EJ concerns in all of the national enforcement priorities. Rather, it would signify OECA's commitment to apply enforcement tools as an important means of protecting at-risk communities.

Non-compliance Data

The types of non-compliance data vary from community to community and cannot be specified until the communities of focus are identified. Notwithstanding this unknown, an at-risk community has the problems and issues often caused by non-compliance. A placed based enforcement approach looks at communities holistically to identify non-compliance affecting the community.

What is EPA's role in ensuring compliance in Underserved Communities?

EPA is responsible for providing equal protection from environmental and health hazards to all individuals. If EPA fails to fulfill this responsibility, it is likely that these underserved communities will remain vulnerable to environmental and health hazards.

How Would this Priority Work?

This national enforcement priority candidate would be geographically based rather than sector based. Each region would identify a disadvantaged community in a geographic area in which EPA would perform targeted enforcement (including targeting of facilities within national priority sectors). The

region would work with the community to identify environmental and health threats within that geographic area to achieve maximum compliance with environmental regulations in order to protect human health and the environment. By including the community input in the project, there is a greater likelihood of engaging state and local regulatory partners on high-profile, highly impacted areas where multiple jurisdictional authorities should be applied in a more coordinated fashion. With our partners, EPA would address these threats over a defined time frame, using an integrated strategy that makes appropriate use of all of the compliance assurance tools it has at its disposal (inspections, compliance assistance, compliance monitoring, administrative and civil actions). It would also coordinate enforcement efforts with other available means (e.g., community involvement, supplemental environmental projects, stewardship and voluntary programs) to address issues that can't be effectively met through enforcement alone. Because of the unique issues facing each community, the statutory authorities used and the actions taken will vary from region to region.

The following are examples of how EPA has directed targeted enforcement to benefit underserved communities. These are potential models for this proposed national enforcement EJ priority. For other examples of how enforcement may be targeted to benefit underserved or sensitive communities, please refer to the following three proposals: 1) Air Toxics; 2) Farmworker Protection from Pesticides; and, 3) Pesticides Use at Day Care Facilities. These proposals are available at <http://www.epa.gov/compliance/data/planning/priorities/index.html>.

Huntington Port (Regions 3, 4, 5 and National Enforcement Investigation Center). In this project, EJ screening has been incorporated into the targeting phase for specific facilities, and was considered in selecting the geographic area. EPA intends to use an integrated strategy that covers smaller facilities primarily through compliance assistance, so that we have a comprehensive enforcement presence. (See 'Guide for Addressing Environmental Problems: Using an Integrated Strategic Approach,' EPA 2007)

- "Toxic" Schools Enforcement Review (Region 5, others). In this project, Region 5 is reviewing information on certain schools and surrounding facilities in light of a USA Today report raising concerns about air toxics impacts on schools. Other regions and the Office of Air Quality Protection Standards are also looking at this information. This review could lead to geographically-targeted enforcement, depending on findings. Given that this issue is nationwide, and has already been identified by EJ coordinators as an area where regions should work together, this project would lend itself to testing a national approach to place-based targeting.
- Los Angeles Area Enforcement Collaborative. EPA Region 9 and the CA Department of Toxic Substance Control (DTSC) are leading a multi-media effort to focus inspection and enforcement authorities along a 23-mile stretch from the ports of Los Angeles and Long Beach via the I-710 corridor to East Los Angeles. Approximately a million people live along this corridor in 15 small cities. The majority of the population are people of color and low-income. To date, at the end of the first of 3 years, Region 9 has successfully lined up resources and commitments of various media programs within the region for next year's inspection cycle. Concurrently, CA's DTSC, with resources from an EPA environmental justice grant, has enlisted the support of other key agencies such as the Air Resources Board, the South Coast Air Quality District and the LA Regional Water Quality Control Board to be able to respond to community concerns about specific sources in the focus area. The most innovative feature of this approach is the role that community, neighborhood organizations and local governments are playing in helping both agencies target resources most effectively.

- City of Houston. EPA Region 6 and Houston have collaborated to develop a monitoring/surveillance/enforcement strategy to address concerns of high levels of hazardous air pollutants (HAPs) in and around the Houston area. In November 2007, the city's Mayor and Health Director requested EPA's participation in addressing benzene emissions by developing a risk based approach to conducting real time monitoring, surveillance, and compliance activities. EPA designated Houston as an authorized representative in February, 2008, which authorized the city to enter onto the premises of major stationary sources to support EPA with inspection and monitoring activities. Houston signed a confidentiality agreement with EPA in September 2008 in order to participate in enforcement activities related to the initiative. Activities included fence-line monitoring, and if a benzene plume was identified, EPA and Houston followed up with an on-site visit to monitor and help detect potential specific sources, followed by information requests and enforcement, if appropriate.