

December 8, 2009

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814.
Via Electronic mail: commentletters@waterboards.ca.gov

RE: Comment Letter – OTC Policy

Dear State Water Board Members and Staff:

We are writing on behalf of the organizations listed below and our memberships – all of whom are dedicated to the restoration and protection of our coast and ocean. Thank you for all your hard work on the draft regulations and your consideration of comments we have provided during this process. While we are anxious to complete the long-overdue enforcement of Clean Water Act Section 316(b) – we very much appreciate your deliberative approach and broad public outreach.

As directed by the State Water Resources Control Board (“State Board”), we are limiting our comments to issues raised in the recent revisions to the draft “Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling” (hereinafter referenced as “draft cooling water policy,” “regulations” or “policy”) released on November 24, 2009, and the discussion of those amendments at your December 1, 2009 informational hearing.

The discussion of the draft cooling water policy at the State Board’s December 1, 2009 raised significant concerns that we will address below. While we remain concerned with some of the language and substantive amendments proposed in the revisions to the draft cooling water policy, we are equally concerned with the comments made by the industry representatives. The comments from many industry representatives, as well as those of the California Independent Systems Operator (CAISO), lead us to believe the overwhelming trend in the industry will be to expand and take advantage of any ambiguities and “loopholes” in the final regulations.

In light of those concerns, we feel even more compelled to recommend removing some exemptions and revising the current language with the purpose of ensuring full compliance with the purpose of the document – that is, full enforcement of Clean Water Act Section 316(b) and the policies embedded in that law to compel Best Available Technology for reducing marine life mortality and adverse impacts on marine ecological systems caused by entrainment and impingement.

Our detailed comments are attached below. In Summary we:

- Strongly support and appreciate the deletion of the “wholly disproportionate” cost-benefit exemption from the draft regulation;
- Appreciate the Board’s discussion of achieving the goal of “beneficial outcomes” -- but we believe amendments to the current draft are necessary to achieve these goals;

- Generally oppose any special treatment for nuclear facilities, except the provision to ensure public safety;
- Commend the State Water Board staff and the energy agencies for their considerable effort coordinating the Compliance Schedule, and the regulated entities should be held to the schedule except under extremely rare exceptions. While we are not opposed to some reasonable and limited flexibility in meeting the Compliance Dates, we recommend strict enforceable limits and prescribed procedures to ensure only the rare exemption from the timeline; and we
- Recommend some clarification language in the Definitions section.

Thank you for your hard work and diligence working with the public, the regulated community and the energy agencies to craft regulations and a reasonable timeline for finally implementing the mandates of the Clean Water Act section 316(b).

Sincerely,

Joe Geever, CA Policy Coordinator
Surfrider Foundation

Linda Sheehan, Executive Director
California Coastkeeper Alliance

Jim Metropulos, Senior Advocate
Sierra Club California

Mark Gold, Executive Director
Heal the Bay

Kaitlin Gaffney, Pacific Program Director
Ocean Conservancy

Zeke Grader, Executive Director
Pacific Coast Federation of Fisherman's Assn.

Merle Moshiri, President
Residents for Responsible Desalination

Conner Everts, Executive Director
Southern California Watershed Alliance

Rory Cox, California Program Director
Pacific Environment

Terry O'Day, Executive Director
Environment Now

Sara Honadle, Programs Director
Coastal Environmental Rights Foundation

ISSUES AND REVISIONS

1. BENEFIT/COST CONSIDERATIONS

As we have stated in previous written and oral testimony, the State Board is not compelled to allow a “cost-benefit test” as an exemption to strict compliance with the legal mandates of Section 316(b). There were comments made at the December hearing by industry representatives that the US Supreme Court looked favorably upon a cost-benefit test and US EPA’s exercise of the “wholly disproportionate” standard in the past – implying that the Court’s decision should stand as a signal to agencies that it is the standard to apply. We disagree with that read of the Court’s deliberations and decision. To the contrary, it was clear that some cost/benefit test was within the discretion of the US EPA – but was not mandatory.

We are opposed to any cost-benefit exemption for practical and policy reasons explained in detail in our comment letter submitted on September 30, 2009. We strongly support the elimination of the “Wholly Disproportionate” exemption, or any other cost-benefit test, from the regulations.

While numerous studies have documented the significant loss of marine life through current “once through cooling” systems (OTC), there is an insurmountable challenge to quantifying the benefit of reducing marine life mortality in comparable terms as the cost of retrofitting a generating unit with improved cooling technology. Simply put, the complexities of marine ecological systems coupled with the dynamics of ever-changing ocean physical processes, are difficult to fully understand and quantify. Consequently, the indiscriminate removal of species from the marine environment, during either natural or man-made periods of abundance and scarcity, is not a constant number. Yet it is clearly a significant impact – a fact implicit in the enactment of section 316(b) and substantiated by US EPA and numerous California regulatory agencies. However, converting this significant impact to a dollar figure is a task that is impossible to accomplish with any confidence. Further, California law, such as the Marine Life Protection Act, also recognizes the “intrinsic value” of healthy and relatively undisturbed marine life populations and eco-systems – another economic value that is not easily converted to monetary figures.

Second, compliance through retrofitting existing facilities is more easily quantified in monetary terms. However, considering the considerable opposition to compliance expressed by industry representatives, we believe the cost estimates offered by permit applicants would require rigorous third-party verification. Further, testimony given by the California Energy Commission suggested that the entire fleet of steam generators is in need of replacement with more efficient units – and the marginal cost of cooling towers for re-power projects will be dramatically lower than retrofitting already outdated units.

From a legal and policy perspective, the State Board should fully recognize that OTC was a standard cooling technology when Congress enacted Section 316(b). It follows that OTC was considered an unacceptable cooling technology in 1973 and therefore cannot be considered the “best technology available” now. That OTC is still commonly used in California is testament to industry’s reluctance to embrace the change mandated by Congress. Allowing virtually

unquantifiable cost-benefit exemptions to the regulations results in undermining the policy goal of forcing technological advancements to minimize marine life mortality.

From a practical perspective, quantifying the “benefits” of reducing marine life mortality and the significant disruption of robust marine ecological systems is virtually impossible. Resolving the easily foreseeable conflicts that will arise in each permit proceeding, and differing applications of a cost-benefit exemption by the several Regional Boards, will result in unnecessarily throwing off the Compliance Schedule, resulting in an indefinite delay in enforcement of the law. Thirty-five years of non-compliance with the mandates of 316(b) is an embarrassment. Allowing exemptions after this long delay of enforcement is unacceptable.

In conclusion, we support the exclusion of the “wholly disproportionate” cost-benefit exemption, or any other cost-benefit test, in order to enforce the clear policy goals of section 316(b) – as well as alleviation of concerns that it will be impracticable and result in case-by-case litigation and delay.

2. TRACK 2

First we want to re-emphasize our previous written and oral comments that Track 2 should be an extremely limited exception to Track 1 compliance. We are concerned that the emphasis by representatives from power plant owners and the utilities suggests that Track 2 will be the standard as opposed to the rare exception to the rule. Ensuring full compliance with the intent of the policy and goals of the policy will only be weakened by further amendments to Track 2 requested at the hearing.

We also want to highlight that the Track 2 “90% of 93%” standard is effectively “double-counting” the 10% margin of error accepted by the court in the *Riverkeeper II* decision. As stated above, dry cooling is the “best technology available.” The court was very clear that interpreting the term “best technology available” did not mean “second best.”

Nonetheless, we are not opposed to setting Track 1 reduction standards on “wet cooling” technology because we believe it is consistent with the court’s definition of a “cost effectiveness” exception to the absolute best technology for minimizing entrainment and impingement. But, if the State Board is applying the court’s rationale for allowing a “margin of error” in US EPA’s Phase 2 “performance standards” – that 10% margin of error should be applicable to the performance of “dry cooling” systems, not the second best alternative of “wet cooling” systems. **We recommend changing the current draft to reflect that Track 2 compliance “...achieves at least a 90% reduction of the best technology available, which would be the reduction of entrainment and impingement commensurate with a dry cooling system.”**

We also want to re-state and condition our objection to the Track 2 allowance of “operational” changes to existing OTC cooling systems. As noted above and repeatedly stated in previous comments, OTC cannot be considered “best technology available” – and simply changing the operation of non-compliant technology is not consistent with the clear mandate in section 316(b) to compel the industry to implement BTA.

Nonetheless, we appreciate the Board’s discussion that the regulations should be focused on the “beneficial outcome”. However, as explained below, even setting aside the legal question of whether “operational” changes to OTC is consistent with enforcing section 316(b) – we are concerned the “beneficial outcomes” will not result from the current draft of Track 2.

The changes in the provisions in Track 2 still fail to ensure the stated goal of reducing entrainment at these exempted facilities by 90% of the required reductions in Track 1.

Track 2 changes the Track 1 requirement that each “unit” of a power station transitions to “wet cooling” or some structural equivalent for reducing marine life mortality. Instead, facilities eligible for the draft Track 2 compliance would be compelled to a reduction of less marine life mortality (the odd 90% of 93% reduction target, which equates to approximately 84%) for the entire “facility.” We assume this “facility-wide” inconsistency is to allow a broader set of “operational changes” options. This provision becomes a troublesome loophole when read in conjunction with Section 4(B) -- defining the methods for establishing entrainment baselines, and monitoring operations for achieving the reduction of entrainment. The proposed baseline assessments are a “guess” at larval composition and abundance in the “source water” and are subject to significant error as they do not accurately account for reproductive variability, seasonal larval concentrations and dynamic physical ocean changes. Compliance monitoring is also subject to error from not accounting for all the differing and poorly understood survival strategies of the myriad marine life entrained – as well as their response to dynamic physical ocean changes.

Given the complexity of the marine environment and ecological systems, and the inherent risk of inaccurate baseline assessments and monitoring for proof of meeting the mandatory reductions in marine life mortality, **we strongly urge the Board to revise Section 4(B)**. It is widely accepted that the intake volume is the primary cause of entrainment¹. Therefore, intake volume is a reliable proxy for actually attempting to calculate entrainment and associated reductions. **Should the State Board choose to interpret 316(b) in a way that allows “operational changes” in place of technological improvements to reduce marine life mortality², we strongly urge the following amendment of the compliance measurement for Track 2 from actual entrainment reductions to flow reductions as a measurement for entrainment. In place of the current language, we recommend:**

- **Establishing a baseline for each facility that is calculated as an average of the monthly “generational flow” from data collected over the 5-year period preceding adoption of this regulation. For generators that have re-powered some or all of their units to combined-cycle generators, the baseline data would be an average of five**

¹ The Expert Review Panel convened to inform this policy agreed that flow was an appropriate proxy for entrainment.

² We reserve the right to judicial review of the use of “operational changes” in place of Best Technology Available for compliance with the mandates of Clean Water Act section 316(b) and CA Water Code section 13142.5(b).

years of monthly “generational flow” prior to commencing operation of the new generators³;

- **The Track 2 standard for reducing marine life mortality commensurate with the achievement of implementing the “best technology available”, including the court’s exception for a “margin of error”, would be a reduction of “generational flow” by 90%, per month, from the baseline defined above.**

“Generational flow” should be defined in the policy as the intake flow required for the generation of electrical power as currently articulated in the definition of “power-generating activities.” Generational flow is different from “actual flow”, which also includes intake flow for maintenance operations. So, as defined in the “Immediate Requirements” at Section 2(C)(2), it is reasonable to accommodate an exception for “critical” system maintenance.

“Generational flow” is appropriate for both the baseline and reduction compliance proxy, as power plants may falsely elevate “actual flows” in order to minimize compliance – and consequently minimize the “beneficial outcome” discussed by the Board. For example, El Segundo Generating Station units 1 and 2 ceased producing power in 2002, yet maintained a higher annual flow intake in 2002 than 2001. **Basing entrainment reductions on generational flow would not allow for such flow adjustments and achieve results consistent with the intent of the Board’s discussion and goal of “beneficial outcomes” from operational changes rather than the arguably legal mandate of technological changes.**

We feel very strongly that generational flow as an entrainment “proxy” would improve the simplicity and accuracy for reducing entrainment by avoiding all the limitations of current efforts to calculate source water populations, actual entrainment baselines, and monitoring protocols to prove mandatory reductions⁴. We also believe this approach to establishing a proxy based on monthly “generational flow” for both the baseline over a five-year period, and the mandatory reductions, will improve the goal of reducing operational changes during periods of peak biological productivity – as well as improve the approximation of compensating for environmental and ecological variability over multiple years.

3. COMPLIANCE DATES/IMPLEMENTATION SCHEDULE

As expressed by the Board in an earlier hearing, we remain concerned that the industry appears focused on provisions in the policy, and recommended amendments, that allow exemptions to the goal of compelling the “best” technological improvements to their cooling water systems that minimize marine life mortality. With that in mind, we are opposed to ambiguities for meeting the

³ In regard to the comments made by representatives of the Moss Landing Power Station that they had invested in OTC for their re-power project in reliance on decisions made by the Regional Board, we want to point out that the use of OTC at the plant was challenged for compliance with Section 316(b) and the legal challenge is, as yet, not finally resolved. Certainly, the owners were on notice that their investments and reliance on an unresolved challenge to the permit were taken at their own risk.

⁴ As we have stated before, there must be different “reference site” baselines and monitoring protocols for the Interim Requirement to compensate for past mortality and the mortality that will occur during the Implementation Schedule.

reasonable compliance deadlines that both ensure grid reliability and enforce Section 316(b) as soon as possible.

Staff very carefully integrated energy and coastal resources agencies into the policy implementation through the SACCWIS and this is an important advisory body. Given the cooperative and extensive effort to devise the SACCWIS, provision 2(B)(2) in the proposed changes seems redundant to the advisory role of the SACCWIS, as CAISO, CPUC and the CEC already have the ability to address grid issues through the SACCWIS. **We urge you to remove provision 2(B)(2). Giving these agencies individual discretion to recommend changes in compliance dates may cause unnecessary delays in compliance and take away from the goals of the policy.**

Further, we are strongly opposed to an automatic stay (or noticed stay) at the individual request of CAISO, which was raised in public comment at the December 1, 2009 workshop. The SACCWIS already has discretion to recommend changes to the policy compliance timeline, and the policy clearly states that SACCWIS meetings can be convened as needed and that if any member of the SACCWIS has a dissenting opinion from the group, a minority report can be issued.

We are also concerned with the alternative approach discussed by the Board that a hearing could be convened within thirty days to consider and possibly accommodate an amendment to the Compliance Dates. We are not opposed to an expeditious resolution of these potential requests for changes in the prescribed schedule. However, we feel that, while the powerplant operators, utilities and the SACCWIS may be prepared to present to the Board in thirty days -- having been the parties who prepared the request -- that short time period is an undue hardship on the public and public-interest organizations to research and prepare comments and effectively participate in the public debate. **Any potential request for changes to the Compliance Dates can be predicted far enough in advance to allow meaningful participation by the public; therefore adequate notice and time for review should be granted if such a provision is added to the policy.**

We suggest the request for a waiver to the Compliance Dates be: 1) published for public review immediately upon receipt by SACCWIS and 2) scheduled for review and public comment at the next scheduled SACCWIS meeting, but not sooner than 90 days.

4. IMMEDIATE AND INTERIM REQUIREMENTS

We are generally supportive of the “Immediate and Interim Requirements” in Section 2(C)(2) of the regulations. We hope that it is clear to the State Board, Regional Boards, regulated entities and the public that some provisions in this section are “immediate” and “on-going” (e.g.; sub-section (2)) and other provisions are “immediate” and “interim” (e.g.; sub-section (3)).

Any interim mitigation requirements should be based on actual impingement and entrainment data, as monitoring is key to identifying past and present damages and appropriate mitigation measures. This approach should include a regional reference location component to better determine ecological productivity in areas unaffected by once-through cooling and more accurately assess impingement and entrainment impacts. Ecological impact assessment based on current impingement and entrainment rates is not appropriate because it rewards power plants

that have already caused large ecological impacts by not holding them accountable for these environmental damages. Although we urge the State Board to utilize flow as a proxy for entrainment to determine Track 2 compliance, impingement and entrainment monitoring is still critical for the determination of appropriate mitigation measures.

Further, the policy must make it clear that power plants must implement an impingement and entrainment monitoring program over the life of their permits. While generational flow is the best proxy for entrainment, an understanding of actual impact reductions (both impingement and entrainment) should be built into compliance monitoring. Currently, the policy requires monitoring for only a year, which does not adequately account for seasonal and annual variability (e.g. La Nina, El Nino and other potential factors affecting variability). Monitoring over the permit lifecycle is the typical requirement for all coastal sewage treatment plants. Even stormwater monitoring requirements have increased over the last 19 years. Requiring coastal power plants to routinely monitor their impingement and entrainment impacts on coastal marine resources must become standard operating procedure.

In addition, we remain opposed to the amendment to sub-section (3)(c). As we have expressed repeatedly, the science of “restoration scaling” is in a constant state of improvement – as is most science. Therefore, references to “habitat production foregone” or so-called “comparable alternatives” is unnecessarily restrictive and does not recognize the current advances in “restoration-scaling methodology” nor adequately allow for future advances in the scientific community. Further, we believe that it is the intent of the policy to achieve “full replacement” value for the loss of marine life from entrainment and impingement. Finally, we agree with concerns raised by industry representatives that funding habitat restoration and/or habitat creation projects will potentially exceed the replacement of marine life they are liable for. In contrast to the static calculation of “habitat production foregone”, alternative restoration-scaling methodologies may include a time variable such as “discounting for present value” and other variables that will allow a more accurate compensation calculation. **Therefore, we strongly urge deleting the current language in sub-section (3) (C) and replacement with:**

“The best available restoration-scaling methodology approved by the Regional Water Board shall be used to determine the habitat and area to meet the full replacement value of marine life lost to operation of the facility’s cooling system.”

An important component of the amended language above is the elimination of the term “mitigation.” It is our belief that the intent of the policy is to compel “restorative measures” to fully compensate for the loss of marine life. Given that assumption, **we strongly urge removal of the terms “mitigate” and “mitigation” in the section -- and replacement with the term “restorative measures to fully replace marine life losses”.**

These amendments will not only help to clarify the interim requirements of this policy for existing facilities. These amendments will additionally avoid future inconsistencies in interpreting the term “mitigate” and it’s meaning in CA Water Code Section 13142.5(b), and the enforcement of that section, for withdrawals of seawater for “new” industrial facilities – including coastal generators. The law is settled that “after the fact restoration” is not a legal substitute for “best available technology.” We agree with the limited application of restorative measures for compensation of past marine life mortality and the interim mortality until the

Compliance Dates are achieved. However, “mitigation” for new facilities cannot be interpreted to include “after the fact restoration.”

The Board need not rule on the meaning of “mitigate” in the context of CA Water Code Section 13142.5(b) in this policy adoption. Nonetheless, we strongly urge the Board to adopt these amendments because the changes simply clarify the language and better ensure uniform implementation of the intended policy by the several Regional Boards.

Finally, we agree with the industry representatives that it would be most efficient and effective to calculate the costs of “full replacement value” for the past and interim marine life mortality, and require that sum of money be deposited with a third-party with on-going expertise in restorative measures. Power plant operators are not experts in the science and lack experience in projects to meet restoration of marine life populations and robust and healthy ecological systems. Further, we believe the government of California can best prioritize and allocate funds more efficiently and effectively from regional or statewide planning and implementation. **To that end, we strongly encourage designating the California Coastal Conservancy as the recipient of compensation costs paid by power plant owners, and that the funding be earmarked for habitat restoration and/or creation projects to meet full replacement value. To the extent the funds are spent on on-going or future projects, it should be required that the addition of these funds account for additional replacement value above what would have been achieved in the absence of the funding. Lastly, these funds should be deposited in the Coastal Trust Fund of the State Coastal Conservancy. The Coastal Fund has the proper structure to best assure that the monies dedicated to restoration are applied in full and in a continuous and adaptive manner.**

5. NUCLEAR FACILITY SPECIAL CONSIDERATIONS

We agree, in general, that the nuclear facilities mandate special consideration to ensure public safety. Therefore, **we agree with section 2(D) that compliance with the regulations by nuclear power plants needs to be deemed safe by the Nuclear Regulatory Commission. We also agree that it is the facility’s burden to show, through some documentation by the NRC, that compliance with the regulations would create a public safety hazard before any exceptions to the rule are considered.**

However, we strongly disagree with the special considerations of “cost” in Section 3 (D) (1) and (D) (7). At the December 1, 2009 hearing, neither the representatives of the nuclear facilities, nor the Board’s staff, offered an adequate explanation or rationale explaining why “costs” are any more of a “feasibility” issue for nuclear facilities than others. In fact, because the nuclear facilities are owned and operated by utilities, they are not included in the State’s de-regulation of the industry and consequently can actually recuperate not only their costs, but also a reasonable return on the investment in cooling water technological upgrades. Arguably, “cost” is less of a concern for the nuclear facilities than other generators.

Further, because the nuclear facilities operate as baseload generators and constitute a major part of the cumulative cooling water withdrawals in the State, exemptions to the rule for these facilities will have a dramatic impact on achieving not only the legal mandate to implement “best

technology available” – but would even undermine the Board’s discussion of achieving “beneficial outcomes” commensurate with BTA through other operational means.

In that vein of discussion, we were not impressed with the Diablo Canyon statistics offered at the December 1, 2009 hearing showing a high percentage of the total water withdrawn statewide -- yet a relatively lower percentage of entrained organisms statewide. Diablo Canyon representatives did not offer any baseline data prior to operation of the OTC system – so the lower entrainment numbers may be evidence of a massive mortality event in the area surrounding the facility at commencement of operation. Further, as noted above, 316(b) embodies a technology-forcing policy. It is not dependent on a showing of a certain level of impact at a given facility before the law applies.

Therefore, we strongly urge the Board to remove any reference to cost considerations in Section 3 (D). We also urge the Board to adopt a policy that, aside from the special consideration of public safety concerns, eliminates any special considerations or exemptions for the nuclear facilities. We absolutely abhor the implication and inherent threat that seems to follow the logic of “too big to fail” that has plagued the financial industry. It would turn sound public policy on its head to allow the facilities withdrawing the lion’s share of seawater in the State to somehow use the greatest violation as a rationale for special exemptions.

6. DEFINITIONS

“Not Feasible” - We appreciate the inclusion of a definition to clarify the considerations of what is “not feasible” – an important consideration in strictly limiting the facilities eligible for Track 2. As we have state above, we remain concerned that the posture and comments from industry representative indicate a trend towards utilizing Track 2 as the rule, rather than the intended rare exception to the rule.

With that in mind, the definition of “Not Feasible” (and similar language in Section 2 (C)(1)) is overly-broad and does not provide any review standard to ensure “due diligence”.

In the current draft, the list of factors to consider includes: “space constraints, inability to obtain necessary permits due to public safety considerations, unacceptable environmental impacts, local ordinances, regulations, etc.”

This list is non-exhaustive by concluding with “etc”. We strongly encourage the Board to eliminate the non-conclusive “etc” and adopt an exhaustive list. Or, if there is sound reasoning for an open-ended list, in the alternative, the Board should adopt a non-exhaustive list with some clear sidebars for inclusion of more issues to be considered. However, because we cannot imagine other compelling considerations in making a determination of “not feasible” – we have no sidebar language to offer. Hence, our preference for concluding the list with the considerations already identified and eliminating the open-ended “etc” at the end.

Further, given the apparent trend in the industry’s focus on exemptions to the rule, there is a major concern that a facility can “game” the “not feasible” considerations by simply not attempting to comply through exhausting every conceivable opportunity. For example, for those

operators resistant to complying with Track 1, there is an incentive to passively accept the denial of a permit without creatively exhausting all remedies. An example may be the recent denial of air quality credits for the El Segundo re-power project. Because NRG was compelled in their own interest to remedy the permit problem, we understand they now have voluntarily offered to de-commission one more of their units to create the air quality credits needed to complete the re-power project. We are deeply concerned that this type of creativity and diligence to alleviate the considerations listed in the “not feasible” definition, in a strategic effort to be granted the Track 2 exception to the rule, will not be commonplace.

We strongly recommend some standard to ensure full diligence in exploring ways to comply with other laws while still complying with this cooling water policy. Therefore, we recommend inserting language at the appropriate place to guide the Regional Boards to exercise Best Professional Judgment and seek the assistance of an unbiased third-party review if necessary.

“Feasibility” - We also strongly support the clarification that “cost” is not a factor in “feasibility.” However, as stated above, there is a conflict created by allowing “cost” as a factor to be considered for nuclear facilities. **We recommend eliminating the conflicting rules by eliminating cost as a factor for the nuclear facilities to create an even playing field and consistent application of the policy and regulations.**

“Power Generating Activities” – We support the definition of “Power-generating Activities”. We believe the intent of eliminating the unnecessary mortality through the “immediate” and “on-going” mandate in Section 2 (C) (2) for running the pumps only for power-generating activities and critical system maintenance could be improved by clarifying in the Definition section that the pumps cannot be run for co-located industrial uses other than power generation. **We strongly believe that if the Board’s discussion of “beneficial outcomes” is to be achieved, the elimination of marine life mortality from enforcement of this rule for the electrical generating industry cannot be undermined by allowing other industrial seawater withdrawals to take the electrical industry’s place.**

“Intake Flow Rate - Track 1 of the Draft Policy sets a standard for reducing “intake flow rate” and highlights the definition of this term. However, there is no clear guidance defining when the reduction of intake flow rate is applicable. We assume from the prohibitions in the “Immediate and Interim Requirements” that prohibit seawater intakes during times when the generating unit is not generating electricity (with the limited exception for “critical system maintenance”) that the definition and regulation of intake flow rate in Track 1 is applicable to times when the units are generating electricity. A minor clarification of the definition would eliminate any confusion. **The definition for “intake flow rate” should be clarified to read “refers to the instantaneous rate at which water is withdrawn through the intake structure, expressed as gallons per minute per kilowatt hour generated.”**

CONCLUSION

We want to quickly conclude where we started: we genuinely appreciate the effort spent to draft regulations that will finally achieve the goals of implementing Best Technology Available that

Congress established over 35 years ago. We especially want to recognize and congratulate the staff of the State Water Board and the energy agencies for diligently working out a reasonable compliance schedule that ensures grid reliability and the mandate to minimize marine life mortality at our coastal power plants as soon as possible.

We think our recommendations are consistent with the goals the Board has articulated during the several hearings. With a balance of strengthening the regulations in places and eliminating loopholes – while simultaneously allowing the limited flexibility for unforeseeable circumstances to meet the Compliance Schedule – California will be able to proudly proclaim a major step towards eliminating a significant adverse impact on our precious coast and ocean.

Thank you for your work to date, as well as your careful consideration and acceptance of our good faith effort to meet that tricky balance of strict enforcement and flexibility where it is absolutely necessary.