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STATE WATER RESOURCES CONTROL BOARD

Baykeeper, Bayview-Hunters Point Community Advocates, and Communities for a Better Environment,	)	
Petitioners,	)	Petition for Review of Inaction by a Regional Board
Regional Water Quality Control Board-San Francisco Bay Region,	)	
Respondent	)	Water Code § 13160; 13320 23 CCR 2050

INTRODUCTION

Baykeeper, Bayview-Hunters Point Community Advocates (BVHPCA) and Communities for a Better Environment (CBE) (collectively "petitioners") submit this petition for review of the failure of the Regional Water Quality Control Board-San Francisco Bay Region to act on petitioners' letter dated March 28, 2007, attached hereto as Exhibit A, requesting action in response to: (a) the decision in *Riverkeeper, Inc., et al. v. U.S. Environmental Protection Agency*, 475 F.3d 83 (2nd Cir. 2007) ("*Riverkeeper II* ")[1], remanding key portions of the United States Environmental Protection Agency's ("US EPA") Phase II Rule under Clean Water Act section 316(b), 33 U.S.C. § 1326(b), regulating cooling water discharges from existing power plants; and (b) the ensuing memorandum from the US EPA Assistant Administrator directing that permit writers consider the entire rule suspended and requiring permits to be written using Best Professional Judgment ("BPJ"). Petitioners requested that the Regional Board review all permits covered by the Phase II Rule, obtain the information necessary to make the judgments required under the decision and memorandum and apply these judgments to all existing and new permits.

Two of these petitioners -- Communities for a Better Environment and Bayview Hunters Point Community Advocates -- have petitions pending (Files A-1739 and A-1751) reviewing the propriety of the current permit for the Mirant's Potrero power plant. The discharger in that case has contended that it is inappropriate to consider the *Riverkeeper II* decision in reviewing the permit issued prior to that decision. Regardless of the propriety of the prior permit, because of the urgency of assuring Bay protection from ongoing discharges, petitioners asked the Regional Board to use its authority as the

[1] The Riverkeeper II designation is used to distinguish this case from what is commonly referred to as the Riverkeeper I case, *Riverkeeper, Inc. v. United States EPA*, 358 F.3d 174 (2nd Cir. 2004) where the court

permit writer to reopen the Potrero permit as well as consider *Riverkeeper II* in all current and future permits. This petition reviewing the Regional Board's failure to respond therefore compliments the prior petitions.

PETITION ALLEGATIONS

Petitioners, in accordance with 23 CCR 2050, allege the following:

I. NAME AND ADDRESS OF PETITIONER

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II. SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD

Petitioners request review of the San Francisco Regional Water Quality Control Board ("Regional Board") failure to act in response to petitioner's letter of March 28, 2007, attached hereto as Exhibit A. This letter notified the Regional Board of the decision in *Riverkeeper II* and US EPA's direction that the Phase II rule be deemed suspended, to be followed by a formal suspension noticed in the Federal Register, and

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reviewed the "Phase I Rule" affecting new power plants.

that "all permits for Phase II facilities should include conditions under section 316(b) of the Clean Water Act developed on a Best Professional Judgment basis. See 40 C.F .R. § 401 .14." Memo from Benjamin Grumbles, Assistant Administrator to Regional Administrators, 3/20/07, attached hereto as Exhibit A, Attachment B. Petitioners' letter specifically requested the Regional Board:

1. Review the Court's decision and the analysis attached to petitioners' letter to ensure that all future permitting decisions implement the *Riverkeeper II* decision and the direction from the Court;

2. Pursuant to Water Code section13320, take action and reconsider all discharges that are affected by the now-suspended Phase II rule, specifically the permits issued for the Potrero and Pittsburg Power Plants, NPDES Permit Nos. CA0005657 and CA0004880, and revise the tentative order for C&H Sugar Company, NPDES Permit No. CA0005240;

3. Pursuant to Water Code section 13267, require that each discharger covered by the suspended Phase II Rule provide the data necessary to determine what is the best technology available ("BTA") for existing facilities, using the *Riverkeeper II* criteria for determining BTA.

Petitioners have received no reply from the Regional Board to their letter. The Potrero permit has not been reopened.[2] No action has been taken regarding the Pittsburg permit, due to expire on June 19, 2007, and apparently the Regional Board plans no action until at least 2008, even though the permit will have been expired for at least one year, until and unless it receives direction from the State Board.[3]

C&H Sugar is technically a Phase III facility. Petitioners therefore do not in this petition request the State Board's review. However, the recently reviewed C&H Sugar

[2] The Potrero permit is accessible at the Regional Board website athttp://www.waterboards.ca.gov/sanfranciscobay/Agenda/05-10-06/mirantfinalorder.pdf.
[3] The current permit was adopted on June 19, 2002 is retrievable at http://www.waterboards.ca.gov/sanfranciscobay/Agenda/06-19-02/06-19-02-9finalto.doc. The Regional Board schedule for reissuance indicates the permit is awaiting State Board direction: http://www.waterboards.ca.gov/rwqcb2/NPDES/NPDESPermitSchedule04052007.pdf.

permit was in part based upon the Phase II Rule and the State Board on its own motion may want to direct the Regional Board to also review that permit.[4]

III. THE DATE THE REGIONAL BOARD ACTED OR REFUSED TO ACT.

The Regional Board refused to act within 60 days of the mailing and electronic delivery of the letter, March 28, 2007, that is, by the deadline of May 27, 2007 (or the next business day of May 29, 2007). Specifically, no communication has been received regarding the letter.

IV. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER.

The Regional Board issued the permits listed in Section II of this petition based in part upon the Phase II Rule. The Phase II Rule addressed both the technology required to be applied to these facilities cooling systems as well as further studies to identify and address environmental impacts from the facilities' cooling systems.

The *Riverkeeper II* decision rejected the Phase II approach for regulating power plants' cooling system. Petitioners refer to and incorporate herein its letter to the Regional Board and its attachments which discuss in detail the *Riverkeeper II* decision and its impact on Phase II. As Assistant Administrator Grumbles accurately stated in his March 20, 2007 memorandum:

> The Court's decision remanded several provisions of the Rule on various grounds. The provisions remanded include:
>
> - EPA's determination of the Best Technology Available under section 316(b) ;
> - The Rule's performance standard ranges ;
> - The cost-cost and cost-benefit compliance alternatives ;

[4] http://www.waterboards.ca.gov/sanfranciscobay/Agenda/04-11-07/8/C&HFinalOrderPackage.pdf

- The Technology Installation and Operation Plan provision;
- The restoration provisions ; and
- The "independent supplier" provision.

With so many provisions of the Phase 11 rule affected by the decision, the rule should be considered suspended. Attachment B to Exhibit A.

The Court's decision did not rest merely on a technical or procedural defect in the Phase II Rule. Instead, the court's decision turned on substantive defects in the Rule, holding that:

- "Cost-benefit" analysis cannot be used in determining Section 316(b) performance standards;
- Restoration measures cannot be used as a substitute for technology standards required under Section 316(b);
- US EPA's regulations for existing facilities ("Phase II regulations) fail to require the "best technology available," which is the standard that must be implemented;
- The United States Environmental Protection "Best technology available" determinations must be based not on the average plant, but on the "optimally operating plant, the pilot plant", bearing in mind the technology-forcing character of the CWA.

While the Court did not explicitly strike the entire Phase II Rule, the rest of the rule has little meaning without these major provisions. All of the study provisions are based upon using an incorrect standard for determining BTA, seeking information relevant to costs and benefits, and the evaluation of alternatives that are no longer permitted, such as restoration or site specific alternative approaches based upon costs deemed invalid by the Court. While there continues to be value for state law purposes in those portions of the study that require raw data of entrainment and impingement, the Assistant

Administrator only affirmed the obvious when he stated the Phase II Rule was effectively suspended in its entirety.

In the absence of the Phase II Rule, the existing law requires that permit writers, such as the Regional Board, use Best Professional Judgment, or BPJ, in implementing requirements for BTA. Thus the Assistant Administrator directed: "In the meantime, all permits for Phase II facilities should include conditions under section 316(b) of the Clean Water Act developed on a Best Professional Judgment basis. See 40 C.F .R. § 401 .14." Attachment B to Exhibit A.

BPJ is not a license for unlimited discretion or an excuse to take no action. Permit writers are still required to implement §316(b) of the Clean Water Act. As noted above, "best technology available" determinations must be based not on the average plant, but on the "optimally operating plant, the pilot plant which acts as a beacon to show what is possible." *Riverkeeper II* at 100. The purpose of BPJ is to determine which technology constitutes a "beacon", not merely the status quo for an average existing cooling system.

Contrary to this mandate, and the specific requests made by petitioners as described in Section II of this petition, the Regional Board has not reopened permits or taken steps to determine what BTA is for Phase II facilities. Indeed, it has made no response at all to petitioners' letter. The Regional Board has not determined what is the technology for optimally operating Phase II facilities, or what is the best "pilot plant." Nor has it sought the information necessary it needs to determine "what is possible."

Instead, it continues to go forward with a study methodology designed to produce results that are now inapplicable to future permit decisions.[5]

Water Code section 13381 entitles the Regional Board to review existing permits when it has good cause to modify a permit. In addition the Regional Board has separate authority to request additional studies tailored to the *Riverkeeper II* criteria for BTA. Cal. Water Code §13267. By failing to use its authority to require proper studies and appropriately apply BTA, the Water Board as discussed below is harming the Bay and delaying application of 316(b)'s requirements as set forth in the *Riverkeeper II* case. In this manner the Regional Board is acting improperly.

V. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED

The petitioners are aggrieved by the Regional Board's action because it allows power plants with once-through cooling systems to continue operating in a manner that adversely affects Bay habitat with near-shore warm-water outflow, discharges of pollutants in toxic amounts and entrainment and impingement harming aquatic life directly. The Regional Board improperly delayed implementation of better technology pending completion of studies that are no longer relevant to 316(b) compliance because dischargers hoped that the studies would show no need for improvement of cooling systems.

Invalidation of the Phase II Rule makes these studies largely irrelevant. First these studies were designed to assess raw data on impingement and entrainment to determine whether they fell within performance ranges that the *Riverkeeper II* court ruled were improperly developed. *Riverkeeper II* at 105-108; 40 C.F.R. § 125.94(b)(1), (2).

[5] It apparently has also not followed the suggestion of the Air Pollution Control Officer to require dry cooling for Bay facilities. See Exhibit B, 9/25/06 letter from Broadbent to Wolfe.

The studies also evaluate various alternatives based upon a cost/benefit analysis which has been ruled illegal by *Riverkeeper II*. *Riverkeeper II* at 101-105. Finally specific alternatives such as restoration or a site specific alternative based upon a cost/benefit analysis were also struck down by the court. *Riverkeeper II* at 108-115.

There is scientific value in obtaining raw data on impingement and entrainment, and such data can be used for applying various state and regional requirements to these permits. However, under federal law, the Phase II studies use the wrong methodology for analyzing this data and place the attention on the wrong initial question. The primary question under *Riverkeeper II* is what is the best technology that is available and what is the performance standard for entrainment and impingement based upon that technology.

Thus, deferring application of best professional judgment for studies that will not resolve the primary technology issue only delays by years the application of technology which will reduce impacts, perhaps completely if closed-cycle cooling is required. Failure to review these permits further exacerbates environmental injustice in Bay Area communities by allowing the continued impairment of beneficial uses of San Francisco Bay waters for subsistence fishing.

Baykeeper is a regional non-profit public benefit corporation organized under the laws of the State of California. Baykeeper's mission is to protect and enhance the water quality of the waters of the San Francisco Bay and Delta for the benefit of their ecosystems and human communities. Baykeeper works to protect the Bay and Delta by investigating pollution problems and bringing enforcement actions against polluters directly when necessary. Baykeeper's members live, work, travel, and recreate near San

Francisco Bay. These members use San Francisco Bay for recreational, educational, scientific, conservation and aesthetic purposes.

Bayview-Hunters Point Community Advocates ("Advocates") is a non-profit organization concerned with the health effects of nearby industry on the residents of the Bayview-Hunters Point neighborhood. "Advocates" works to improve the quality of life in the neighborhood through advocacy, information, community organizing, education and economic development. Its members use the bay, including the shoreline near the Potrero facility, for recreation and other uses, as well as enjoy its aesthetic beauty.

Communities for a Better Environment ("CBE") is an environmental health and justice non-profit organization, promoting clean air, clean water and the development of toxin-free communities. CBE provides grassroots organizing, environmental research and legal assistance to under-served urban communities. Its members use the Bay and enjoy its aesthetic beauty and recreational opportunities, including fishing and boating.

These public interest organizations and their members are adversely affected by the impacts of the power plant facilities described above. They have submitted written comments on these permits and participated in meetings with the Regional Board regarding the review of these permits.

In addition, these organizations to some extent have participated in the review of the studies required in these permits leading to a 316(b) decision on the future of once-through cooling at this site. The Regional Board's failure to review and modify these studies to comply with the *Riverkeeper II* decision and the US EPA's Memorandum, and its failure to apply more stringent technology requirements adversely effect these organizations and its members.

VI. THE SPECIFIC ACTION WHICH PETITIONER REQUESTS

For the reasons set forth herein petitioners respectfully ask that the State Board, after reviewing this matter:

1. Order the Regional Board to review the *Riverkeeper II* decision and the US EPA's Assistant Administrator's Memorandum and reopen all permits that contain conditions based on the now-suspended Phase II Rule -- specifically the permits issued for the Potrero and Pittsburg Power Plants, NPDES Permit Nos. CA0005657 and CA0004880, respectively --to ensure the permits require BTA consistent with the requirements of 316(b) and the *Riverkeeper II* decision using Best Professional Judgment;

2. Order the Regional Board to review the survey data received by EPA in its Phase II rulemaking and to exercise its authority under Water Code section 13267, to require that each discharger covered by the suspended Phase II Rule provide the data available to it necessary to apply Best Professional Judgment and determine what is the Best Technology Available for existing facilities, using the *Riverkeeper II* criteria for determining BTA, including:

    a. Cooling technology used by similar facilities in the United States
    b. Cost of each alternative technology available to similar facilities
    c. Revenues and net profits and power purchase contracts at each Bay Area facility to determine what the industry can reasonably bear;

3. Conduct future permit decisions for Phase II facilities in accord with 316(b) as interpreted by the *Riverkeeper II* decision and US EPA's Memorandum interpreting the decision.

VII. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION.

Petitioners refer to and incorporate herein the analysis of the *Riverkeeper II* case by the Stanford Environmental Law Clinic contained in Attachment A of Exhibit A. One key conclusion of that analysis is that it is inappropriate for California permit writers to delay BTA determinations based upon the comprehensive studies included in Phase II which are now irrelevant, based upon faulty legal standards and now directed to be suspended by EPA.

The impact of the *Riverkeeper II* decision on the technology applicable to Bay Area Phase II facilities is no mere technicality. US EPA in its Phase II Rule failed to require the equivalent of closed-cycle cooling, just as this Regional Board has done. It is astounding that after years of agency investigation and rulemaking a court needs to say to the US EPA, "it is difficult to discern from the record how the EPA determined that the cost of closed-cycle cooling could not be reasonably borne by the industry." *Riverkeeper II* at 103. The *Riverkeeper II* court has seriously questioned why closed-cycle cooling or its equivalent in environmental protection is not mandated for Phase II facilities. Petitioners now pose the same question to the Regional and State Boards.[6]

Any interested party may request that a permit be reopened. 40 C.F.R. § 124.5. The Regional and State Board has broad authority to modify a permit for cause. Cal. Water Code § 13381. US EPA has recognized in regulations applicable to the states that, at a minimum, examples of cause include new information, such as a new guidance 40 C.F.R. § 122.62(a)(2); new regulations, 40 C.F.R. § 122.62(a)(3); and judicial decisions, 40 C.F.R. §122.62(3)(ii).

The State Water Code provisions for modification of waste discharge requirements for cause are broader than the federal examples for grounds for cause cited. The state statute explicitly states grounds for causes listed are "not limited" to those examples. Cal. Water Code § 13381.

The direction that the Phase II Rule be deemed suspended and permit writers use BPJ as a result of a court decision constitutes good cause for reviewing a permit's requirements. In the above-described permits, decisions to defer technology upgrades were made regarding technology based upon the assumption that studies designed under

[6] As has the Bay Area Air Quality Management District, see footnote 5, *supra*.

the Phase II regulations would answer questions regarding how to apply Phase II's criteria for the next permit. Further, studies were designed to answer questions that are no longer relevant, but they were not designed to generate the information necessary for BPJ consistent with *Riverkeeper II.*

The *Riverkeeper II* decision specifically requires that 316(b) be implemented in a manner that provides the best possible technology, however, "EPA must still ascertain whether the industry as a whole can reasonably bear the cost of the adoption of the technology, bearing in mind the aspirational and technology-forcing character of the CWA." *Riverkeeper II* at 100. The federal courts have previously explained that what is reasonably borne by the industry is not necessarily what will avoid the shutdown of outmoded older facilities. See *E.P.A. v. National Crushed Stone Ass'n 449 U.S. 64, 79-80 (1980) ("*Congress foresaw and accepted the economic hardship, including the closing of some plants, that effluent limitations would cause*").*

The Regional Board should obtain information on what is the best possible technology for Phase II facilities by reviewing EPA's Phase II surveys and directing specific information requests to the Bay Area Phase II facilities. In addition, to determine what can be reasonably borne by the industry, specific information must be obtained on the revenues and net profits of the affected facilities, their power purchase agreements which may guarantee a profit for must-run facilities after consideration of required capital expenditures to meet environmental requirements, as well as the industry revenue and net profit figures as a whole. A review of survey data and economic data obtained by EPA in its Phase II Rulemaking may provide this information, as well as specific inquiries to the

affected Bay Area facilities and their owners pursuant to the Regional Board's authority under Water Code section 13267.

While the Regional Board may claim it did apply BPJ, the State Board needs to specifically direct how that judgment is to be applied. BPJ still requires adherence to the statutory requirements in the Clean Water Act. *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 863 F.2d 1420, 1425 (9th Cir. 1988). It must follow the same approach used when EPA sets national regulations for the particular discharge in question. *Trustees for Alaska v. EPA,* 749 F.2d 549, 553 (9th Cir.1984). Those requirements are set out in *Riverkeeper II.*

Thus the State Board is justified and entitled to order the Regional Board to reopen these permits given the complete repeal of the Phase II Rule, first by *Riverkeeper II* and now by US EPA. It should direct that the Regional Board reopen the permits, gather the necessary information and apply BPJ consistent with *Riverkeeper II.*

VIII. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD AND THE DISCHARGER, IF NOT THE PETITIONER.

Copies of this petition have been sent to the Regional Board and to the dischargers referred to in this petition. See attached proof of service by mail.

IX. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PEITION WERE RAISED BEFORE THE REGIONAL BOARD, OR AN EXPLANATION OF WHY THE PETITIONER WAS NOT REQUIRED OR WAS UNABLE TO RAISE THESE SUBSTANTIVE ISSUES OR OBJECTIONS, BEFORE THE REGIONAL BOARD.

The substantive issues and objections raised in this petition were raised in the letter and attachments contained in Exhibit A, which was sent to the San Francisco Bay Regional Water Quality Control Board by electronic and US Mail.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the State Board direct the Regional Board to review all Phase II facility permits and subsequent Phase II facility permits in accord with the *Riverkeeper II* decision and the direction from the US EPA.

Dated June 15, 2007

Respectfully Submitted,

Alan Ramo, Attorney for Petitioners

Attachments: Proof of service
Exhibit A. 3/28/07 Letter from Baykeeper et al. to Regional Board
Exhibit B. 9/25/06 letter from Broadbent to Wolfe

Exhibit A

BAYKEEPER.

Defending Our Waters—from the High Sierra to the Golden Gate

March 28, 2007

Mr. John Muller, Chair and Board Members
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Sent via electronic mail to info2@waterboards.ca.gov and bwolfe@waterboards.ca.gov

Re: Power Plant Once-Through Cooling Systems: Implications of *Riverkeeper, Inc., et al. v. U.S. Environmental Protection Agency*, No. 04-6692-ag(L) (2nd Cir. Jan. 25, 2007); Request for Action

Dear Chair Muller and Board Members:

We are writing on behalf of Baykeeper, Communities for a Better Environment, Bayview Hunters Point Community Advocates, and San Francisco Community Power to inform you of an important legal decision that impacts permitting for dischargers with cooling water intake structures. This decision, issued in January by a federal Court of Appeals, invalidates several aspects of the U.S. Environmental Protection Agency's (EPA) Phase II rule regulating cooling water intake structures for large existing power plants. As a result, EPA has stated in the attached Riverkeeper Implementation Memorandum, dated March 20, 2007, its intention to suspend the rule and has instructed permit writers, in the interim, to exercise Best Professional Judgment (BPJ) in determining the "best technology available for minimizing adverse environmental impacts" as required by 33 U.S.C. § 1326.

The Court ruled on several key issues that will affect permits in Region 2 as well as the statewide policy being developed by the State Water Resources Control Board. As described in more detail by the attached comprehensive analysis of the decision prepared by the Stanford Environmental Law Clinic and EPA's Riverkeeper Implementation Memorandum, the Court held that:

- "Cost-benefit" analysis cannot be used in determining Section 316(b) performance standards.
- Percent ranges to meet performance standards cannot be used unless based on Best Technology Available.
- Restoration measures cannot be used as a substitute for technology standards required under Section 316(b).
- EPA's regulations for existing facilities ("Phase II regulations) fail to require the "best technology available," which is the standard that must be implemented.

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[illegible] 1 800 KEEP BAY
[illegible]

Practically, the *Riverkeeper II* ruling and EPA's suspension of the Phase II Rule means the following:

- In lieu of the Phase II Rule, Regional Water Boards must exercise their "best professional judgment" in determining the best available technology 316(b) conditions to include in permits. The exercise of that judgment must be based on the plain language of section 316(b), as informed by the Court's interpretation of that language in *Riverkeeper I* and *Riverkeeper II*.
- Best professional judgment can no longer be deferred for Phase II studies, as was erroneously done in the Potrero case, as the entire Phase II study program is now suspended.
- Facilities can no longer use site-specific water quality or cost-benefit analysis or restoration measures to avoid the technology-forcing requirements of the Clean Water Act, so delaying the application of best technology to gather more information about impingement, entrainment or restoration alternatives is improper, as erroneously done in the Potrero permit.
- "Best technology available" determinations must be based not on the average plant, but on the "optimally operating plant, the pilot plant", bearing in mind the technology-forcing character of the CWA.
- California should not utilize the 15 percent capacity exemption that was included in the now-rejected Phase II rule for its new state policy.

We request that you review the Court's decision and the attached analysis to ensure that all future permitting decisions implement the Court's clear direction. We also request, pursuant to Water Code §13320, that you take action and reconsider all permits that contain conditions based on the now-suspended Phase II rule. Specifically, we urge you to reopen the permits issued for the Potrero and Pittsburg Power Plants, NPDES Permit Nos. CA0005657 and CA0004880, and revise the tentative order for C&H Sugar Company, NPDES Permit No. CA0005240.

Further, pursuant to Water Code § 13267, we request that you require that each discharger provide the data necessary for you to determine what is the best available technology for existing facilities, using the Riverkeeper II criteria discussed above. It is our view that a simple survey and analysis will reveal that the optimally operating of these facilities are able to use alternatives to once-through cooling and therefore constitute the best available technology.

Thank you.

Sincerely,

Sejal Choksi, Director of Programs
Baykeeper

Alan Ramo, Director, Environmental Law Clinic
Gate University School of Law, on behalf of Bayview Hunters Point Community

Shana Lazerow, Staff Attorney
Communities for a Better Environment

Steven Moss, Executive Director
San Francisco Community Power

CC:

Mr. Bruce Wolfe, Executive Officer, San Francisco Bay Regional Water Quality Control Board

Ms. Lila Tang, NPDES Division Chief, San Francisco Bay Regional Water Quality Control Board

Mr. Doug Eberhardt, United States Environmental Protection Agency, Region 9

Ms. Nancy Yoshikawa, United States Environmental Protection Agency, Region 9

Attachments:

Stanford Environmental Law Clinic, "Analysis of How the *Riverkeeper II* Decision Affects California Coastal Power Plants."

Memorandum from EPA Assistant Administrator Brian Grumbles to Regional Administrators re implementation of the Riverkeeper II decision (March 20, 2007).

Attachment A

How the Riverkeeper II Decision Affects California Coastal Power Plants
Stanford Environmental Law Clinic

INTRODUCTION

The Second Circuit's recent decision in *Riverkeeper, Inc. v. U.S. Environmental Protection Agency*, Case Nos. 04-6692-6699, 2007 WL 184658 (2d Cir. Jan. 25, 2006) (*Riverkeeper II*) is a major victory in the ongoing effort to protect the nation's aquatic ecosystems from the destructive effects of once-through cooling systems. *Riverkeeper II* reviewed and substantially rejected EPA's "Phase II Rule" for existing facilities under section 316(b) of the Clean Water Act ("CWA"), which requires that the "location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. § 1326(b) (hereinafter "BTA"). The full impact of the *Riverkeeper II* decision on existing power plants along the California coast remains to be determined, but the court's opinion includes three central holdings that are likely to significantly affect future permitting and operation of these facilities.

PRINCIPAL HOLDINGS

I. Use of "Cost-Benefit Analysis" Not Permitted

First, the court held as a matter of statutory construction that EPA may use only cost-effectiveness analysis – and *not* cost-benefit analysis – in determining section 316(b) performance standards. The immediate effect of this holding is a court-ordered remand of the Phase II Rule to EPA for clarification of what role cost considerations played in development of the performance standards for "existing facilities." On remand, EPA may revise performance standards in light of the court's holding, or it may attempt to retain the same performance standards by demonstrating that it did not improperly rely on cost-benefit analysis in developing them.

For purposes of immediate future permitting at individual power plants, the most significant effect of this ruling is that facilities will not be able to use cost-benefit analysis to obtain site-specific variances or exemptions from what would otherwise be BTA. Because the site-specific, cost-benefit exemption that was built into the Phase II Rule was one that virtually every California coastal plant was expected to invoke during future NPDES permit renewals or repowering approvals, the Second Circuit decision is likely to substantially alter the course of upcoming permit decisions.

Building on its earlier decision in *Riverkeeper, Inc. v. U.S. EPA*, 358 F.3d 174 (2d Cir. 2004) (hereinafter *Riverkeeper I*) (invalidating the restoration measures provision of the Phase I Rule for "new facilities"), the Second Circuit in *Riverkeeper II* held that EPA cannot employ

cost-benefit analysis in establishing BTA. The court read section 316(b), like other "technology-forcing" sections of the CWA, as embodying congressional intent to move away from an earlier reliance on cost-benefit analysis, in favor of a regulatory regime where "cost is a lesser, more ancillary consideration in determining what technology the EPA should require for compliance under those sections." *Riverkeeper II,* Slip op. at 21. The court termed the latter approach "cost-effectiveness" analysis, rather than "cost-benefit" analysis, explaining that: "Cost-benefit analysis . . . compares the costs and benefits of various ends, and chooses the end with the best net benefits. By contrast, cost effectiveness considerations . . . determine which means will be used to reach a specified level of benefit that has already been established." *Id.*

Under section 316(b), the court held, "Congress has already specified the relationship between costs and benefits in requiring that the technology designated by the EPA be the best available." *Riverkeeper II,* Slip op. at 25. Given this fact, EPA may permissibly consider costs in only two ways – (1) "to determine what technology can be 'reasonably borne' by the industry" and (2) "to engage in cost-effectiveness analysis." Thus, when setting national BTA performance standards, "EPA must first determine the most effective technology that may reasonably be borne by the industry" and, only once this "benchmark for performance" has been determined, EPA "may then consider other factors, including cost-effectiveness, to choose a less expensive technology that achieves *essentially the same results* as the benchmark." Slip op. at 23-24 (emphasis added).[2] EPA cannot, however, decide "that an economically feasible level of reduction of impingement mortality and entrainment is not desirable in light of its cost." Slip op. at 25.

Because it was unclear from the record before the court whether EPA had engaged in improper cost-benefit analysis in establishing national BTA performance standards, the Second Circuit remanded the Phase II Rule performance standards "for clarification of the basis of the Agency's action and possibly for a new determination of BTA." *Riverkeeper II,* Slip op. at 33. In doing so, the court provided some guidance that will be useful in individual permit decisions before new Phase II regulations are promulgated (see "Implications" section below).

II. Use of Percent Ranges to Meet Performance Standards Disapproved

Second, in remanding the Phase II Rule, the Second Circuit expressed serious skepticism about EPA's use of broad performance ranges (80-95 percent reduction in impingement, 60-90 percent reduction in entrainment) to achieve compliance with BTA. The court noted that while EPA is permitted, for reasons of uncertainty, to set performance standards as ranges, it must nevertheless require that each facility minimize environmental impacts "to the best degree it can." *Riverkeeper II,* Slip op. at 34. The problem with the Phase II Rule, the court explained, was that it does not require each facility "to choose

[2] The Second Circuit made it clear that "EPA is by no means *required* to engage in cost-effectiveness analysis." Slip. Op. at 24, fn.12 (emphasis added).

technologies that produce the greatest reduction possible." Slip op. at 35. Rather, it "permits even those facilities that could achieve the upper end of a range to be deemed in compliance if they reach only the lower end," a result that is inconsistent with section 316(b), "particularly when the EPA has acknowledged that many facilities 'can and have' achieved reductions at the high end of the range." Slip op. at 37. As the court explained: "Congress' use of the superlative 'best' in the statute cannot be read to mean that a facility that achieves the lower end of the ranges, but could do better, has complied with the law. The statutory directive requiring facilities to adopt the *best* technology cannot be construed to permit a facility to take measures that produce second-best results." Slip op. at 37-38 (emphasis in original).

Although the court did not specify what ranges would be acceptable, it did provide guidance that should inform individual permit decisions in the interim before new rules are promulgated. The court noted that if EPA elects to retain ranges in the revised Phase II Rule, the "upper end" of the range "should not be set at a level that many facilities 'have achieved' with installation of one or more technologies determined to be BTA but . . . at the best possible level of impingement and entrainment reduction the EPA determines these technologies can achieve." *Riverkeeper II,* Slip op. at 38, fn.21. It went on to conclude that:

> If, at a particular Phase II facility, the adoption of BTA technologies can achieve a 95% reduction in entrainment and impingement, it is unclear why, under our jurisprudence and the clear dictates of the CWA, the EPA should establish a performance standard that has placed the ceiling at the 90% threshold which "many" Phase II facilities "can and have" achieved with the same technology. . . .This would not require every Phase II facility to meet the upper end of the ranges, but only that each Phase II facility achieves the highest reduction it can with the installation of technologies determined by the EPA to be BTA.

Id. This strong language clearly supports the argument that, where a technology is feasible for a particular facility, the reductions achieved by that technology are BTA. In other words, if a technology (*e.g.* closed wet recirculation) is feasible, and that technology results in a 96 percent reduction in impacts, the facility cannot argue that it only needs to achieve 60 percent or 75 percent reductions.

III. Use of Restoration Measures Not Permitted

Third, the court held, again as a matter of statutory interpretation, that restoration measures may not be used as a substitute for technology standards under section 316(b). It based its analysis on its prior holding in *Riverkeeper I* that the restoration provision in the Phase I Rule "contradicts Congress's clearly expressed intent" because it "was not based on a permissible construction of the statute." *Riverkeeper II,* Slip op. at 39. The Second Circuit reiterated its prior holding that "however beneficial to the environment, [restoration measures] have nothing to do with the location, design, the construction, or the capacity of cooling water intake structures, because they are unrelated to the structures themselves. Restoration measures *correct* for the adverse environmental impacts of impingement and entrainment . .

but they do not *minimize* those impacts in the first place." Slip op. at 39-40 (emphasis in original).

The immediate effect of this holding is that coastal power plants will not be able to employ restoration measures to offset the continued use of once-through cooling systems. That is, the question of whether a once-through cooling system constitutes BTA for a particular plant cannot be tied to any agreement by the plant to provide non-technology mitigation. Again, this ruling is likely to change the course of future coastal plant permitting. Based on the "habitat equivalency method" first employed at the Moss Landing plant and subsequently refined at Morro Bay and elsewhere, it seemed that California's Regional Water Boards had been poised to allow, if not encourage, the use of restoration offsets as a way to meet section 316(b) BTA requirements. *Riverkeeper II* now prevents them from doing so.

IMPLICATIONS FOR UPCOMING PERMIT RENEWALS

Because it is possible that new regulations will not be finalized for years, Regional Water Boards should follow the court's guidance in exercising their "best professional judgment"[3] for NPDES permit renewals or new NPDES permits for repowering at California coastal facilities[4] and the State Water Board should likewise utilize the court's guidance in adopting new statewide policy. The following points, drawn from the holding in *Riverkeeper II*, may be relevant to various upcoming permit decisions:

- **Site-Specific Cost-Benefit Analysis Is Not Permitted Under Any Circumstances.** Many coastal facilities in California have argued that alternative cooling systems are not feasible or reasonable based on cost-benefit analysis. In particular, they contend that the environmental benefits of retrofitting existing facilities or installing alternative systems for repowered facilities are insignificantly small compared to the costs of

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[3] In the absence of valid EPA implementing regulations as a result of the remand, permit-writers must fall back on their "best professional judgment" in issuing NPDES permits that comply with section 316(b). Even if non-challenged portions of the rule remain in place, the performance standards have now been invalidated by the court, and Regional Water Boards will have to exercise best professional judgment in determining BTA for upcoming individual permits. The exercise of that judgment must be based on the plain language of section 316(b), as informed by the Second Circuit's interpretation of that language in *Riverkeeper I* and *Riverkeeper II*.

[4] Last time the section 316(b) implementing regulations were struck down for procedural defects and remanded in 1977, it took EPA nearly three decades (and the prompting of another lawsuit) to reissue them. Based on past history, therefore, state permitting agencies may be continuing to apply the best professional judgment standard for some time to come. That will almost certainly be true for the next round of NPDES permitting for several of California's coastal plants over the next one to two years.

construction/operation and, therefore, are not justified. *Riverkeeper I* and *Riverkeeper II* now make it unmistakably clear that this type of analysis is not permitted, and that Regional Water Boards can no longer engage in the type of "reasonableness" calculations underlying permit decisions at facilities like Moss Landing.[5]

- **Permits Should Move Forward Based on Statute and Riverkeeper II Direction, Rather Than Wait For Current Comprehensive Demonstration Studies To Be Completed.**
  Most, if not all, new and draft permits for California coastal facilities anticipated conducting cost-benefit analyses following completion of comprehensive demonstration studies, as set out in the now largely-invalidated Phase II Rule. A primary purpose of these comprehensive demonstration studies (CDS) was to defer immediate compliance with BTA in order to conduct a cost evaluation study, a benefits valuation study, and a site-specific technology plan that would enable individual facilities to satisfy the now-impermissible cost-benefit exemption. Regional Water Boards generally have been allowing facilities a phase-in period (until January 2008) to complete these studies and, for this reason, are not requiring immediate compliance with BTA standards in the permits presently pending before them. With cost-benefit analysis now deemed impermissible and the associated benefit valuation studies in the CDS's now largely moot, there appears to be no reason for Regional Water Boards to defer analysis of BTA and compliance with section 316(b) pending completion of such studies.

- **Restoration Measures May Not Be Utilized To Offset/Mitigate OTC Impacts.**
  Another unequivocal holding of *Riverkeeper I* and *Riverkeeper II* is that Regional Water Boards may not employ restoration measures to offset the impacts of once-through cooling in lieu of requiring an alternative cooling technology that is BTA. For example, over the last several years, the Regional Water Boards have developed and refined an approach to restoration known as the "habitat equivalency method." Under this approach, the Board calculates the loss of biomass due to once-through cooling, multiplies that loss by the size of the area (*e.g.*, estuary) affected, and thereby derives the theoretical number of acres that need to be restored to in order to offset the impacts of the cooling system. It then assigns a dollars-per-acre cost for restoration and multiplies that value by the number of lost acres to arrive at a total monetary contribution that the facility must make to mitigate biological impacts. Such a methodology appears to be entirely inconsistent with, and prohibited under, the *Riverkeeper* decisions.

- **BTA Determinations Must Be Based On The Best Technology That An Individual Plant Can Achieve.** As the Second Circuit noted, EPA itself has

[5] In a challenge to that very issue, the Monterey County Superior Court wrongly affirmed the Regional Water Board's use of a cost-benefit approach at Moss Landing. That case is presently pending on appeal before the state appellate court in San Jose.

recognized that impact reductions on the order of 95 percent (as compared to once-through cooling systems) can be and have been achieved at many facilities, suggesting (without actually deciding) that such reduction levels may well constitute BTA. Elsewhere in its decision, the court explained that, in determining what technology costs can be "reasonably borne" by industry, the "benchmark for performance" is "not the average plant, but the optimally operating plant, the pilot plant which acts as a beacon to show what is possible . . . bearing in mind the aspirational and technology-forcing character of the CWA." *Riverkeeper II,* Slip op. at 23-24. These statements, and the court's repeated admonition that Congress intended each facility to achieve the "best" impact reduction possible, make it clear that California coastal plants generally should be held to a very high performance standard. Absence some exceptional showing by these plants that they physically cannot achieve the same 90-95 percent entrainment reductions achieved elsewhere, there is no legal justification under the Second Circuit's statutory interpretations for Regional Water Boards to set a lower standard of compliance in determining BTA.

- **While A Site-Specific "Cost-Cost"Analysis May Be Permissible, An Alternative To BTA Can Only Be Allowed Upon A Demonstration That The Facility's Costs Are Truly Extraordinary.** The court read section 316(b) to disallow cost-benefit analyses; individual plants arguably may still be allowed under *Riverkeeper II* to utilize some form of "cost-cost" analysis (*i.e.*, comparing the costs for a specific facility to the costs developed by EPA in the determination of BTA) to take an action other than what is otherwise considered BTA.[6] Once a BTA determination is made for a facility based on the strict limits articulated by the court (*e.g.*, can the facility physically accommodate technology that requires 90-95% reductions?), there appear to be two questions that the Regional Water Boards would have to have answered in any cost-cost analysis. First, the applicant would have to provide cost and revenue data that would support its request for an exemption. This sounds obvious, but in fact the Regional Boards have not requested such information, and the plant owners have routinely claimed that such information is confidential and not a legitimate part of the permitting process. Especially given the remand of EPA's cost estimates based on a lack of opportunity for public comment, Regional Water Boards should only consider cost-effectiveness analysis requests if the applicant provides the relevant financial data for the facility and makes that data available for public review.

  The second issue is what standard the Regional Water Boards should apply in evaluating the plant's costs as different and unique. The Phase II Rule allowed an

[6] The Second Circuit did not seem to have a conceptual problem with this so-called "cost-cost" analysis, but remanded the cost estimates for several hundred facilities on the grounds that EPA had not provided adequate public notice and opportunity for comment, and because of the remand on the BTA determination. Slip op. at 48. Thus, it appears that while use of a cost-cost analysis by permitting agencies may be permissible, the permit writers arguably could not rely on EPA's cost estimates for a particular plant.

exemption from BTA where the permitting agency determines that the costs of compliance "are significantly greater than the costs considered by" EPA in establishing performance standards. Because the court remanded the rule for clarification of the economic analysis used by EPA, it did not reach the legality of this site-specific variance provision. However, it did express its "discomfort" and "substantial concerns" with the "significantly greater than" standard. *Riverkeeper II*, Slip op. at 48, fn.25. Because the "significantly greater than" standard seems unlikely to pass muster with the court in the long run, and because it is so subjective as to be meaningless, the Regional Water Boards should not utilize or rely on it future permit decisions. Rather, the overwhelming thrust of the court's analysis suggests that cost considerations may come into play in a site-specific context, if at all, only when the facility can show it faces truly unique or extraordinary economic circumstances as compared to other facilities.[7]

ADDITIONAL IMPLICATIONS FOR THE STATE WATER BOARD POLICY DEVELOPMENT PROCESS

In considering a new statewide policy on coastal power plant cooling systems, the State Water Board should consider not only the foregoing implications of the *Riverkeeper* decisions, but also the following additional issues that follow from the Second Circuit's logic:

- **California Should Not Utilize The 15 Percent Capacity Exemption That Was Included In The Now-Rejected Phase II Rule.** Although *Riverkeeper II* did not address the issue of the 15 percent capacity exemption contained in the Phase II Rule, the decision arguably has implications for that provision. In particular, EPA exempted from the entrainment performance standards any facility with a "capacity utilization" rate of less than 15 percent, on the grounds that the impacts are insignificant and that the costs of compliance are not "economically practicable." Given the Second Circuit's decision that EPA may not use economic practicability in setting BTA, EPA's justification for this exemption is now highly suspect. Some of the older, inefficient California coastal facilities are serving as "peaker" plants and may well attempt to qualify for the 15 percent capacity utilization variance (*e.g.*, Morro Bay). Without the "economic practicability" argument to rely upon, California should not be authorizing such blanket exemptions.[8]

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[7] Such an approach is entirely consistent with the general policy notion that all similarly-situated facilities should compete on a level playing field. The fact that coastal power plants historically have been allowed to utilize public resources (*e.g.*, cold Pacific Ocean water) free of charge while externalizing the true costs of this activity (*e.g.*, destruction of coastal ecosystems) should not lock California into that same economically distorting policy going forward.

[8] Of course, there is substantial evidence that the blanket assumption of insignificant impact by these low-capacity plants is also erroneous. For example, several of the coastal power plants that would be exempt from the state policy based on a 15% capacity factor are

- **California Should Reject Industry's Arguments That Once-Through Cooling Does Not Significantly Affect Aquatic Ecosystems Or That A Significant Number of Organisms Survive The Process.** During State Water Board workshops in 2005 and 2006, the power industry repeatedly argued that coastal plants are not having a substantial impact on marine ecosystems and that the state should not assume that all biomass entrained in such facilities is destroyed. The industry made similar arguments in *Riverkeeper II* that were ultimately rejected by the court. Given the court's affirmation of EPA's assumptions and judgment with respect to biological impacts, there is no reason for the State Water Board to reassess the same industry arguments in developing state policy.

  For instance, industry argued that EPA's Phase II Rule arbitrarily focused on the number of aquatic organisms entrained rather than on population-level impacts (*e.g.*, arguing that millions of larvae are produced and very few survive to adulthood, and that fishing has a bigger impact). *Riverkeeper II* reiterated the court's earlier ruling in *Riverkeeper I* that EPA's judgment on this issue was "eminently reasonable" and the court would not "second-guess" it. *Riverkeeper II*, Slip op. at 68-69. Similarly, the Second Circuit rejected industry's contention that EPA improperly presumed that all entrained organisms are killed. The court found that "[i]t is thus clear that the EPA acted well within its discretion in presuming zero entrainment survival after the Agency had reviewed a substantial body of complex scientific data, and acknowledging that the evidence is inconclusive, it adopted a conservative approach. *Riverkeeper II*, Slip op. at 72.

- **Nuclear Facilities Can Be Included In Any New State Policy.** Although the *Riverkeeper II* decision discusses nuclear facilities only briefly, it nevertheless confirms that such facilities can be covered by any forthcoming state policy. The industry in *Riverkeeper II* argued that EPA had not properly accounted for alleged disproportionate impacts of the Phase II Rule on nuclear plants. The court rejected this challenge, concluding that the rule had adequately provided for a site-specific compliance alternative for nuclear facilities. That provision requires a demonstration by the facility, based on consultation with the Nuclear Regulatory Commission, that compliance would result in a conflict with a safety requirement. Upon such a

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located in southern California. However, in southern California, peak larval abundance coincides directly with peak energy needs in the state – during the summer. The relative abundance of fish larvae and eggs is so great during the summer in southern California that even if plant operations were restricted to the summer months, they would still account for the majority of year-long entrainment impacts. (MBC Applied Environmental and Tenera Environmental, *AES Huntington Beach L.L.C. Generating Station Entrainment and Impingement Study Final Report* (April 2005), Section 4.4.3, "Entrainment Results; Ichthyoplankton and Station Data for California Cooperative Oceanic Fisheries Investigations Survey Cruises," *see* data at http://swfsc.nmfs.noaa.gov/FRD/CalCOFI/On-LineDataSystem/documentation.htm#data.)

demonstration, the permitting agency would then make a site-specific BTA determination that avoids the conflict. The *Riverkeeper II* decision certainly allows California to incorporate the same kind of provision into any statewide policy. Arguably, the state can also include additional safeguards designed to ensure protection of the marine ecosystem in the event that a site-specific alternative is necessary.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 20 2007

MEMORANDUM

OFFICE OF WATER

SUBJECT: Implementation of the Decision in *Riverkeeper, Inc. v. EPA*, Remanding the Cooling Water Intake Structures Phase II Regulation

FROM: Benjamin Grumbles, Assistant Administrator

TO: Regional Administrators

The purpose of this memorandum is to provide guidance on the status of the Cooling Water Intake Structures Phase II regulation under section 316(b) of the Clean Water Act ("Phase II rule" or "Rule"). The Phase II rule set national standards for cooling water withdrawals by large, existing power producing facilities ("Phase II facilities"). See 40 C.F.R. Part 125 Subpart J; 69 Fed. Reg. 41576 (July 6, 2004).The Second U.S. Circuit Court of Appeals recently issued its decision in the litigation over the Phase II regulation. See Riverkeeper, Inc., v. EPA, No. 04-6692, (2d Cir. Jan. 25, 2007).

The court's decision remanded several provisions of the Rule on various grounds. The provisions remanded include:

- EPA's determination of the Best Technology Available under section 316(b);
- The Rule's performance standard ranges;
- The cost-cost and cost-benefit compliance alternatives;
- The Technology Installation and Operation Plan provision;
- The restoration provisions; and
- The "independent supplier" provision.

With so many provisions of the Phase II rule affected by the decision, the rule should be considered suspended. I anticipate issuing a Federal Register notice formally suspending the Rule in the near future.[1] In the meantime, all permits for Phase II facilities should include conditions under section 316(b) of the Clean Water Act developed on a Best Professional Judgment basis. See 40 C.F.R. § 401.14.

If you have questions regarding the application of section 316(b) at Phase II facilities, please contact either Janet Goodwin with the Office of Science and Technology at 202-566-1060 (goodwin.janet@epa.gov) or Deborah Nagle with the Office of Wastewater Management at 202-564-1185 (nagle.deborah@epa.gov).

[1] In the event that the court's decision is overturned prior to publication of the Federal Register notice, then I will not proceed to effect the suspension; if the court's decision is overturned after publication of the notice, the Agency will take appropriate action in response.

Exhibit B

BAY AREA
AIR QUALITY
MANAGEMENT
DISTRICT

ALAMEDA COUNTY
Tom Bates
Scott Haggerty
Janet Lockhart
Nate Miley

CONTRA COSTA COUNTY
Mark DeSaulnier
Mark Ross
(Vice-Chair)
Michael Shimansky
Gayle B. Uilkema
(Chair)

MARIN COUNTY
Harold C. Brown, Jr.

NAPA COUNTY
Brad Wagenknecht

SAN FRANCISCO COUNTY
Chris Daly
Jake McGoldrick
Gavin Newsom

SAN MATEO COUNTY
Jerry Hill
(Secretary)
Carol Klatt

SANTA CLARA COUNTY
Erin Garner
Yoriko Kishimoto
Liz Kniss
Patrick Kwok

SOLANO COUNTY
John F. Silva

SONOMA COUNTY
Tim Smith
Pamela Torliatt

Jack P. Broadbent
EXECUTIVE OFFICER/APCO

September 25, 2006

Bruce Wolfe, Executive Officer
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Subject: **Dry cooling investigation, Mirant Potrero Power Plant NPDES permit, Regional Board Order R2-2006-0032**

Dear Mr. Wolfe:

It has come to my attention that the Regional Water Quality Control Board has recently adopted permit conditions that seek to phase out once-through cooling of Potrero Unit 3 unless the facility demonstrates it has no significant impact on San Francisco Bay. These conditions also require an assessment of alternative cooling technology by November 2007. The purpose of this letter is to request that the technology assessment include a thorough analysis of dry cooling. Dry cooling is an alternative to once-through cooling that could protect the Bay while avoiding potential air quality problems.

You may remember, Air District staff commented on this issue in the Bay Conservation and Development Commission review of proposed Potrero Unit 7. The Bay Commission's March 27, 2002 report to the Energy Commission found that either dry cooling or wet/dry cooling would be a feasible alternative to once-through cooling. However, unlike dry cooling, wet/dry cooling uses an evaporative cooling process that vents vapor containing fine particulate matter (PM_{10}) to the atmosphere. Wet/dry cooling for Unit 7 was projected to emit approximately eleven tons of PM_{10} annually. The new emissions would occur in an area where PM_{10} exceeds ambient air quality standards. These considerations led the Bay Commission to believe that dry cooling would be preferable to wet/dry cooling.

If you have any questions, please contact Mr. Peter Hess, Deputy Air Pollution Control Officer at (415) 749-4971. Thank you for your consideration of this request.

Sincerely,

Jack P. Broadbent
Air Pollution Control Officer/ Executive Officer

cc: Greg Karras

PROOF OF SERVICE

I, Fe Gonzalez, declare that I am at least 18 years of age and not a party to the above entitled action. My business address is 536 Mission Street, San Francisco, CA 94105. On June 15, 2007, I served the **PETITION FOR REVIEW OF INACTION BY A REGIONAL BOARD** to which this proof of service is attached, by Certified U.S. Mail with Return Receipt at the San Francisco Post Office and by electronic mail addressed to the following:

State Water Resources Control Board
Office of Chief Counsel
Attention: Jeannette L. Bashaw
Legal Secretary
P.O. Box 100
Sacramento, CA 95812-0100
jbashaw@waterboards.ca.gov

On the same date, I also served copies of the above document to the following persons by U.S. Mail at the San Francisco Post Office:

Dave Hansell, Plant Manager
Mirant California, LLC
Potrero Power Plant
1201-A Illinois St.
San Francisco, CA 94107

Plant Manager
MIRANT DELTA, LLC
PITTSBURG POWER PLANT
696 West 10th Street
Pittsburg, California 94565

Bruce Wolfe, Executive Director
San Francisco Bay Regional Water Quality Control Board
1515 Clay St. Suite 1400
Oakland, CA 94612

Elizabeth A. Lake
Peter W. Landreth
Holland & Knight LLP
50 California Street, Suite 2800
San Francisco, CA 94111

Elizabeth Miller Jennings, Staff Counsel
Marleigh Woods, Staff Counsel
State Water Resources Control Board
1001 I Street, 22nd floor
Sacramento, CA 95814

Dorothy Dickey
Yuri Won
California Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on June 15, 2007, at San Francisco, California.

Fe Gonzalez