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To: <Jrobertus@waterboards.ca.gov>, <vrodriguez@waterboards.ca.gov>, <dbarke...>
Date: 9/1/2009 2:04 PM
Subject: SDCK opposition to reissuance of Order R9-2004-0154 (South Bay Power Plant) for Sept 9th meeting
Attachments: SDCK_SBPP Renewal Opposition_09.01.09.pdf; SBPP request to reopen and enforce - final.pdf

Please find the attached opposition to reissuance of Order No. R9-2004-0154, item 7 on the September 9th agenda.

Ms. Gabriel Solmer, Esq.

Legal Director

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Join San Diego Coastkeeper for the 14th annual Ocean Gala
<<http://www.oceangala.org/oceangala/overview.html>> at The US Grant in downtown San Diego on October 24, 2009 to celebrate the heritage of our region's watersheds



September 1, 2009

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

RE: NPDES Permit Application for Renewal of NPDES Waste Discharge Requirements for permit No. CA0001368, Order No. R9-2004-0154 for Dynegy South Bay, LLC- South Bay Power Plant

Dear Chairman Wright and Boardmembers:

On behalf of San Diego Coastkeeper, a grassroots organization dedicated to protecting and restoring the region's bays, coastal waters and watersheds, I am writing to strongly urge you to deny reissuance of new NPDES water discharge permit for the South Bay Power Plant. This is a discharge that can be and must be terminated.

Coastkeeper has joined with many environmental and community groups in advocating for an end to the devastation caused by the plant's chemical and thermal impacts since 2004. We fully support and incorporate by reference Environmental Health Coalition's August 31 letter to the Board. Our August 6, 2007 letter outlining additional concerns about the plant's impacts and permit compliance is also attached.

There is no reason to continue the devastating cooling operations of the SBPP for another five years. The South Bay Power Plant has blighted South Bay communities long enough. The use of the sensitive Bay waters for cooling the power plant is destructive and not only undermines recovery of the Bay in general, but especially impacts the fish nursery function of South Bay. The plant's air emissions continue to contribute to our poor air quality and the location of the plant frustrates important development for local communities.

We strongly urge you to deny a five-year NPDES renewal for the South Bay Power Plant once it expires this November and schedule this discharge for termination.

Thank you for consideration of our comments.

Sincerely,

Gabriel Solmer
Legal Director
San Diego Coastkeeper

cc. Mr. John Robertus, Executive Officer

San Diego Coastkeeper is a nonprofit 501(c) (3) organization (Tax I.D. #33-0647946).

San Diego Bay Council

A coalition of environmental organizations dedicated to protection and restoration of San Diego coastal waters

August 6, 2007

John Robertus, Executive Officer
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, California 92123

Re: Request to Reopen and Enforce Order No. R9-2004-0154 (NPDES Permit No. CA0001368) for Dynegy South Bay, LLC South Bay Power Plant

Dear Mr. Robertus,

We write on behalf of the San Diego Bay Council and its member organizations: Environmental Health Coalition; San Diego Coastkeeper; The Surfrider Foundation, San Diego Chapter; San Diego Audubon Society; and Sierra Club, San Diego Chapter; to request reopening and enforcement of Order No. R9-2004-0154, NPDES Permit No. CA 0001368 (“Permit”). The Permit establishes waste discharge requirements for South Bay Power Plant (“SBPP”), operated by Dynegy South Bay, LLC (“Discharger”). The Discharger has violated and continues to violate Permit conditions, as well as state and federal law. Accordingly, the Regional Water Quality Control Board (“Board”) must take the following two actions: (1) reopen the Permit in order to resolve its partial non-compliance with Section 316(b) of the Clean Water Act, 33 U.S.C. § 1326(b) (“Section 316(b)”), as clarified by recent changes to federal law, and (2) enforce the Permit’s still-valid discharge conditions, including its milestone provisions, until modified or superseded.

1. Request to Reopen Order No. R9-2004-0154 (NPDES Permit No. CA 0001368)

Prior to its adoption in 2004, members of the San Diego Bay Council submitted comments raising concerns about the Permit. Recent changes to federal law now invalidate Permit provisions, specifically those relying on Environmental Protection Agency (“EPA”) regulations allowing for the use of (A) restoration measures in lieu of “best technology available” (“BTA”) under Section 316(b) and (B) site-specific cost-benefit analysis to determine BTA. As you know, the United States Court of Appeals for the Second Circuit recently invalidated these and other parts of EPA’s so-called “Phase II” regulations for existing facilities (Riverkeeper, Inc. v. U.S. Environmental Protection Agency, 475 F.3d 83 (2nd Cir. 2006) (“Riverkeeper II”). Because of this significant clarification in federal law and policy, it is imperative that the Board reopen the SBPP Permit.

In particular, Riverkeeper II rejected, as a matter of statutory interpretation, the use of restoration measures and site-specific cost-benefit analysis as substitutes for BTA under Section 316(b). First, the Court held that restoration measures may not be used as a substitute for technological improvements because “[r]estoration measures correct for the adverse environmental impacts of impingement and

entrainment . . . but they do not minimize those impacts in the first place” (475 F.3d at 109 (emphasis in original)). The Riverkeeper II decision thus flatly rejected the use of restoration measures on the grounds that “a rule permitting compliance with the statute through restoration measures allows facilities to avoid adopting any cooling water intake structure technology at all, in contravention of the Act’s clear language as well as its technology-forcing principle” (id. at 100 (emphasis in original)).

Similarly, with respect to the use of site-specific cost-benefit analysis in establishing BTA, Riverkeeper II held that the “the language of section 316(b) itself plainly indicates that facilities must adopt the best technology available and that cost-benefit analysis cannot be justified in light of Congress’s directive” (475 F.3d at 98-99 (emphasis in original)). The Court noted that the EPA is “precluded from undertaking such cost-benefit analysis because the BTA standard represents Congress’s conclusion that the costs imposed on industry in adopting the best cooling water intake structure technologically available . . . are worth the benefits in reducing adverse environmental impacts” and because a cost-benefit approach impermissibly regulates on the basis of water quality rather than best technology (id. at 114). Thus, permit-writing agencies “cannot authorize site-specific determinations of BTA based on cost-benefit analysis” (id.).

In response to Riverkeeper II, the EPA suspended operation of its Phase II regulations for determining BTA (National Pollutant Discharge Elimination System--Suspension of Regulations Establishing Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 72 FR 37107 (July 9, 2007) (to be codified at 40 C.F.R. pt. 122, 125)). In place of its Phase II regulations, the EPA has directed permit-writers to utilize their “best professional judgment” (“BPJ”) in drafting permit conditions to comply with Section 316(b) (id.). Because it may be years before replacement regulations are available, it is not appropriate to wait for new guidance before moving forward with BTA determinations in existing permits.

Currently, the Permit defers a BTA finding pending the preparation of a Comprehensive Demonstration Study (“Study”) that incorporates the concepts of restoration measures and considerations of site-specific cost-benefit analysis from the Phase II regulations (Permit at E-1; Permit Fact Sheet at F.2.b(1-4)). The purpose of the Study is to “characterize impingement mortality and entrainment, describe the operation of the cooling water intake structures at SBPP, and confirm that the technologies, operational measures, and/or restoration measures . . . will meet one of the five compliance alternatives listed in the new [Phase II] rule” (id. (emphasis added)). The Permit’s Study requirement is plainly inconsistent with federal law because it is tied to a now-invalidated rule. Clearly, the Study constitutes an unnecessary expenditure of resources that could be better used to achieve actual compliance with Section 316(b) as interpreted by Riverkeeper II.

Seeing this, Board staff took it upon itself to suspend the Study and the related Proposal for Information Collection (“PIC”) requirements in Permit Section E.1 (letter from John Robertus, Executive Officer, to Daniel Thompson, Dynegy Vice President (June 1, 2007)). Commendably, this suspension forestalls a pointless waste of resources. However, it fails to resolve the permit’s underlying non-compliance with federal law. After Riverkeeper II an existing facility such as SBPP still must adopt BTA in order to continue its operations. The Permit rests on BTA findings that allow for consideration of restoration measures and site-specific cost-benefit analyses. However, the use of these considerations to determine BTA is not permissible according to the Court in Riverkeeper II. Therefore, the Board must reopen the Permit in order to determine BTA using BPJ, excluding impermissible considerations. Accordingly, the Discharger’s PIC and the Permit’s Study requirement should be modified to support this BTA determination, rather than be suspended or discarded (see Duke Energy South Bay, LLC, 316(b)

Proposal for Information Collection for South Bay (San Diego) Power Plant (Nov. 8, 2005)). Mere suspension of Permit provisions cannot bring the Permit into compliance with Section 316(b).

Accordingly, pursuant to the authority granted to the Board in the Porter Cologne Act, the Permit should be reopened. Section 13263(e) of the California Water Code provides that "upon application by any affected person, or on its own motion, the regional board may review and revise [waste discharge] requirements" (Cal. Water Code § 13263(e)). The partial invalidation of the Phase II regulations by the Second Circuit and the EPA's subsequent suspension of the regulations in their entirety, as well as the clear statutory guidance provided by Riverkeeper II, constitute a change in federal policies and regulations triggering the necessary reopening of the Permit. In April of this year, we brought to your attention the general implications of Riverkeeper II (letter from San Diego Coastkeeper to the Board (April 10, 2007)). The members of the San Diego Bay Council now formally petition for the reopening of NPDES permit CA 0001368 for review and revision to conform to the requirements of Section 316(b) following the Riverkeeper II decision.

2. Request to Enforce Order No. R9-2004-0154 (NPDES Permit No. CA 0001368)

Despite the need to reopen the Permit and modify its provisions related to BTA assessment, the Board must enforce still-valid Permit conditions, including its milestone provisions. The Discharger has sidestepped numerous Permit provisions, and blatantly violated several of its most significant conditions. On July 2 and 3, 2007, Coastkeeper reviewed all correspondence and reports regarding the Permit from November 2004 to the present. During this document review, Coastkeeper identified the following permit violations (list not exhaustive):

A. Illegal Discharges

- 1) Exceeded the absolute limit on total residual chlorine in cooling water discharge for three months, prohibited by the Permit at B.1(d) (see Monthly Monitoring Reports from the Discharger to the Board (May 2005, October 2006, and November 2006));
- 2) Discharged fuel oil to navigable water on November 11, 2005, prohibited by the Permit at B.2(a), B.2(e), and D.1(a)(1) (see Monthly Monitoring Report from the Discharger to the Board (November 2005));
- 3) Exceeded instantaneous combined cooling water effluent flow rate limit of 601.13 MGD on multiple days during a single month, prohibited by the Permit at A.7 (see Monthly Monitoring Report from the Discharger to the Board (July 2006)).

B. Non-Compliant Reports

- 1) Failed to report continuous data for cooling water effluent flow rate, required by the Permit's Monitoring and Reporting Program ("MRP") at A.15, in conjunction with C.2 (see Monthly Monitoring Reports from the Discharger to the Board (January 2004 through May 2007));
- 2) Failed to identify the individual(s) who performed chlorine, toxicity, monthly waste water, and monthly copper sampling, required by the MRP at A.10(b) (see Monthly Monitoring Reports from the Discharger to the Board (January 2004 through May 2007));
- 3) Submitted chlorination logs containing insufficient information to determine chlorination times and durations, required by the MRP at A.15 and E, thereby failing to demonstrate compliance with the Permit's chlorine residual limitations, detailed in the Permit's Fact Sheet

at F.5, *Total Chlorine Residual in Cooling Water*, para. 3 (see Monthly Monitoring Reports from the Discharger to the Board (January 2004 through May 2007)).

C. Omitted Reports

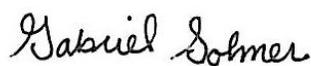
- 1) Failed to report exceedances, required by the Permit at G.6(g) and MRP at A.9 (see supra Illegal Discharges at A.1 and A.3);
- 2) Failed to submit two semi-annual Progress Reports and a final Progress Report regarding implementation of its Workplan for Relocation of Thermal Discharge Limitations Compliance Point to the Property Line (Station S2), required by the Permit at E.2, para. 3;
- 3) Failed to submit two semi-annual Progress Reports and a final Progress Report regarding implementation of its Workplan for Compliance with Final Copper Effluent Limitations, required by the Permit at E.3, para. 2;
- 4) Failed to submit annual reports of monitoring data in 2005, 2006, and 2007, required by the MRP at A.15, F and G.1;
- 5) Failed to submit annual reports of laboratory analyses quality assurance activities in 2005, 2006, and 2007, required the MRP at A.12; and
- 6) Omitted table summarizing monthly receiving water monitoring results for metals in for three months, required by the MRP at A.16, in conjunction with letter from the Board to the Discharger (February 8, 2005) (see Monthly Monitoring Reports from the Discharger to the Board (March, April, and May 2007)).

Additionally, the Discharger has indicated that it does not intend to comply with the final effluent limitation for copper milestone that becomes effective in November 2007 (see November 9, 2006 letter from the Discharger to John Robertus, Board Executive Officer). The Discharger justified this non-compliance by insisting that it will likely retire SBPP before the Permit's expiration in 2009 (id.). However, the July 26, 2007 San Diego Association of Governments (SANDAG) Regional Energy Working Group recently discussed a possible extension of SBPP's energy production contracts into 2010. The Discharger cannot justify its illegal discharges and non-compliant operations by asserting that it will retire SBPP at some time in the future, especially as its future operations are currently under discussion.

Having imposed waste discharge requirements, the Board must enforce its Permit. The Permit states that "noncompliance constitutes a violation of the Clean Water Act (CWA) and the California Water Code and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a report of waste discharge submitted in application for permit modification or reissuance" (Permit at F.2). The members of the San Diego Bay Council hereby formally petition for enforcement of Order No. R9-2004-0154, NPDES permit CA 0001368.

Thank you for your prompt consideration of this matter. We look forward to your timely action.

Sincerely,



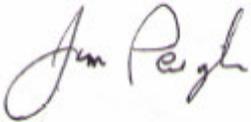
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