



Pillsbury Winthrop Shaw Pittman LLP  
50 Fremont Street | San Francisco, CA 94105-2228 | tel 415.983.1000 | fax 415.983.1200  
MAILING ADDRESS: P. O. Box 7880 | San Francisco, CA 94120-7880

Margaret Rosegay  
tel 415.983.1305  
margaret.rosegay@pillsburylaw.com

Via FedEx and E-Mail

April 20, 2010

David W. Gibson  
Executive Officer  
California Regional Water Quality Control Board  
San Diego Region  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123-4340

Re: Dynegy South Bay, LLC – Comments on Tentative Order No. R9-2010-0062 (“Order Terminating Order No. R9-2004-0154”)

Dear Mr. Gibson:

Dynegy hereby submits its comments on the above-referenced tentative order, and reiterates its concern over continuing procedural irregularities with this matter. With the postponement of the originally scheduled March 12, 2010 hearing, and the direction to staff to review the evidentiary submittals made by the designated parties and prepare a tentative order setting forth staff’s recommendation with respect to the permit, it appeared that our procedural concerns were being addressed satisfactorily. We appreciate staff’s review of the evidence and the substantive conclusion reached, i.e., that grounds for termination of the permit in advance of the December 31, 2010 expiration date do not exist. Dynegy agrees with that conclusion, and believes the appropriate course of action in the circumstances is for the Board to take no action at all. As discussed below, we have a number of significant concerns with the tentative order as drafted, and do not believe it is necessary to issue any order. Under no circumstance may the Board lawfully terminate the permit at the May 12 hearing.

Further, we understand that the sole purpose of the May 12 hearing is to consider the propriety of South Bay Power Plant (“SBPP”) discharges in the “short term,” i.e., through the end of the year. For the same reason that staff expressly disclaims any consideration of whether SBPP discharges may have unacceptable “longer term” effects on human health or the environment, Dynegy reserves the right to submit comments on the March 22, 2010 Staff Report in connection with any future

proceeding concerning discharges after December 31, 2010. At this point, Dynegy states for the record that it believes the supportive “short term” findings are equally applicable to “longer term” discharges from the plant that might occur after December 31, 2010, in the event the California Independent System Operator (“CAISO”) determines that SBPP is needed to ensure grid reliability beyond that date. Suffice to say, Dynegy does not believe that any of the alleged impacts to beneficial uses or other adverse effects described in the Staff Report are of a magnitude or severity to warrant termination or denial of the permit for discharges in 2010 or beyond.

***I. Termination of the Permit Would be Unlawful.***

Notwithstanding staff’s conclusion and recommendation that grounds for termination do not exist (see Tentative Order, Finding 10), the Notice of Public Hearing states that:

The Board may adopt Tentative Order No. R9-2010-0062 as proposed by staff. Alternatively, the Board may decide, after hearing all of the evidence and testimony, it is appropriate to terminate the Order earlier than its expiration date, notwithstanding staff’s recommendation.

Finally, the Board may decide that no action is required.

Notice of Public Hearing, Section IV (Possible Board Actions) (emphasis added). Dynegy respectfully submits that the second of these options – early termination of the permit – is contrary to applicable regulations and would be unlawful. Based on the procedure followed to date, the only lawful alternatives open to the Board at this point are adoption of the tentative order or no action. Based on our concern over the numerous references to permit termination in the tentative order, we believe “no action” is the only viable course for the Board to take.

As has been stated in each of Dynegy’s comment letters and submittals to the Board in connection with this matter, applicable regulations specify that an NPDES permit cannot be terminated unless specific factual findings are made and included in a proposed Notice of Intent to Deny, which is a form of draft permit requiring a minimum of 30 days public notice and comment. 40 CFR § 124.6(b). The Board cannot lawfully decide at the May 12 hearing to terminate Dynegy’s permit without having before it a tentative order that contains the necessary findings justifying termination. Tentative Order No. R9-2010-0062 (including the March 22, 2010 Staff Report incorporated as Attachment 1) does not contain any findings supporting early termination of the permit. To the contrary, the tentative order contains findings

supporting the continued operation of the plant “in the short term,” i.e., at least until its currently scheduled expiration date.

We do not agree that the procedural requirements in the federal regulations concerning notice of intent to terminate have been satisfied by the notice and tentative order and hearing process provided in this case. Notice of the grounds for termination has never been provided in this case, for the simple reason they do not exist. Indeed, Finding 10 of Tentative Order No. R9-2010-0062 concludes that,

allowing discharges to continue for the remainder of the permit term does not, in the short term, pose an unacceptable risk to human health or the environment within the meaning of 40 CFR section 122.64(a)(3) and therefore will not be terminated earlier than the end of the permit term.

Were the Board to take the extraordinary and unprecedented step of terminating the SBPP permit at the conclusion of the May 12 hearing, at a minimum, the Board must stay the effectiveness of its decision for at least 30 days to allow time for Dynegy and other aggrieved parties to seek emergency administrative and judicial review of the Board’s decision.

The Tentative Order accurately notes that any application to operate Units 1 and 2 after the current permit expiration date must also be evaluated under 40 CFR § 122.64(a)(3). As such, Dynegy’s application for renewal of the permit cannot lawfully be denied unless grounds for termination are found to exist under this section. On this point, we note that the Tentative Order would improperly terminate Order No. R9-2004-0154 on December 31, 2010, as it contains no findings consistent with those required by section 122.64(a)(3). The Staff Report states repeatedly that it does not consider the significance of any “longer term” effects associated with the plant’s continued use of bay water for cooling beyond 2010, and that any such effects will need to be evaluated. Absent grounds for termination, the most the Board can do is maintain the status quo.

As the Board is aware, the State Water Resources Control Board is expected to adopt its proposed Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling (the “OTC Policy”) on May 4, 2010. Assuming the OTC Policy is approved by the Office of Administrative Law and otherwise takes effect, the Policy will establish new state standards with respect to impingement and entrainment effects of once-through cooling, which standards must be implemented in accordance with the compliance schedule set forth in the Policy. The final draft of the OTC Policy establishes a compliance date for SBPP of December 31, 2012, and requires that this date be incorporated into the plant’s NPDES permit.

Termination of the SBPP permit would be blatantly contrary to the State's expected OTC Policy and highly disruptive of the coordinated, interagency efforts to address the retrofitting or eventual phase-out of coastal power plants. The impingement and entrainment effects associated with the SBPP at its current level of operation are dramatically less than the levels assumed by the State Board during development of the OTC Policy and even significantly below those described by Tenera its March 1, 2010 Rebuttal Technical Memorandum. As depicted in Attachment 1 to this letter, the SBPP's annual average flow for 2010 is approximately 54 MGD (less than one-fourth of its permitted level), and the plant's estimated annual capacity factor is a mere two percent (2%). Accordingly, there is utterly no factual basis for concluding that SBPP's continued use of San Diego Bay water for cooling poses an unacceptable risk to human health or the environment such that the plant must be shut down without regard to the reliability-must-run ("RMR") status of Units 1 and 2. As evidenced by the compliance schedule established in the OTC Policy and other technical evidence submitted by Dynegy, the impingement and entrainment effects associated with SBPP are not sufficient to support termination of the permit under 40 CFR § 122.64(a)(3), whether before or after December 31, 2010.

The NPDES regulations clearly specify exclusive grounds for termination, none of which exist at South Bay. The NPDES regulations are also clear that a permit cannot be terminated unless a Notice of Intent to Deny is issued containing the necessary findings, and the proposed denial has been subject to 30 days notice and comment. Those steps have not been taken and thus termination of the permit as envisioned under Option 2 is contrary to applicable law.

**II. Discharges Under Order No. R9-2004-0154 May Occur after December 31, 2010 Under Regulations Pertaining to Administrative Extension.**

Dynegy also disagrees with statements in the Tentative Order and in the Staff Report that SBPP's permit cannot be administratively extended and that all discharges from the plant must terminate December 31, 2010 absent further action by the Board. We have discussed this issue with staff counsel and understand that staff now agrees the permit may be administratively extended. However, staff continues to maintain that the language in the permit stating that "discharges from Units 1 and 2 shall terminate on the date CAISO determines that [RMR] services . . . are no longer needed or December 31, 2010, whichever occurs first" effectively trumps the administrative extension. This interpretation cannot be sustained.

Under applicable federal regulations, Dynegy may lawfully continue to discharge under Order No. R9-2004-0154 after December 31, 2010 if a complete application for

renewal of the permit is submitted on or before June 30, 2010. The minor modifications made by the Executive Officer on November 9, 2009 (and later ratified by the Board) did not effect a *de facto* termination of the permit such that discharges could not continue after that date under administrative extension of the permit.

Dynegy updated its permit application in October 2009 to take into consideration the imminent retirement of Units 3 and 4 and its then expectation that Units 1 and 2 would not be needed by the CAISO to ensure grid reliability after December 31, 2010. Consistent with that intention, Dynegy understood the Executive Officer's minor modification to accomplish two objectives: (1) prohibit discharges from Units 3 and 4 after December 31, 2009, and (2) reflect a new permit expiration date of December 31, 2010. This understanding is confirmed by Finding 34 of SBPP's NPDES permit, as modified, which states:

By letters dated October 16, 2009 and October 19, 2009, Dynegy provided information regarding the schedule for shutdown and closure of the South Bay Power Plant. . . . Based on available information and on a CAISO request to provide a provision in the 2010 RMR contract that would allow the CAISO to terminate the contract for Units 1 and 2 prior to December 31, 2010, Dynegy believes that a NPDES discharge permit that would expire on December 31, 2010 would be sufficient to meet the CAISO's stated reliability requirements. Dynegy requested to continue operation of Units 1 and 2 under the current NPDES permit at a reduced maximum flow rate of 225 million gallons per day (MGD) until December 31, 2010 absent further action by the Regional Board. (Emphasis added.)

There is no ambiguity in this language. Consistent with Finding 34, the Public Notice for the May 12 hearing describes December 31, 2010 as "the expiration date of Order No. R9-2004-0154."

At no time prior to issuance of the Tentative Order and the Staff Report did staff ever advise Dynegy that it would be unable to rely on the provisions regarding administrative extension of permits in the event the CAISO determined that Units 1 and 2 were in fact needed for RMR services after December 31, 2010. In fact, Paragraph 16 of the Standard Provisions applicable to the SBPP permit (see Order No. R9-2004-0154, Attachment 2, ¶16) expressly allows for continuation of the expired permit in accordance with 40 CFR § 122.6 and 23 CCR § 2235.4. This provision was not modified or deleted as a result of the minor modifications, and was actually ratified by the Board on December 16, 2009. Staff's argument that the permit can be administratively extended, but by its own terms still precludes the previously permitted discharges, is nonsensical and contrary to basic rules of

construction. The only reasonable interpretation of these provisions is that the discharges from Units 1 and 2 may continue after December 31, 2010, subject to the same effluent limitations to which they were subject prior to expiration of the permit.

Dynegy did not understand the minor modification to effect a "termination" of the permit as of December 31, 2010, and does not believe the Executive Officer's action, or the ratification by the Board, can legally have that result. "Termination" of a permit is an enforcement mechanism, and one that is considered by EPA to be a "harsh mechanism that will be only be used in extreme circumstances." See 45 Fed. Reg. 33290, 33300. Because the plant is in full compliance and there has never been any enforcement activity relating to the plant, Dynegy had no reason to suspect that the wording used in the minor modification that "the discharges from Units 1 and 2 shall terminate . . . [on] December 31, 2010, absent further action by the Regional Board" was intended to, or could, effect a "termination" of the permit on that date. By its plain language, that wording simply means that absent timely steps to renew the permit, the discharges would be required to end (terminate) on that date, by virtue of the expiration of the permit. Dynegy's understanding of the reference to "further Board action" was that the staff would seek Board ratification of any subsequent administrative extension. If, as now suggested by staff, this can just as plausibly be interpreted as a reference to the Board's authority to terminate the permit prior to or on December 31, 2010, that authority is, of course, expressly limited by the terms of 40 CFR § 122.64(a). As discussed in Section I above, those requirements have not been met.

In its testimony before the Board and in discussions with staff, Dynegy has clearly stated that it must and will take all actions necessary to maintain its authorization to operate the plant until the CAISO releases the remaining units from RMR status. Dynegy did not waive its rights to administrative extension of the permit when it updated its permit application in October of last year, and there is nothing in the permit as modified which indicates those provisions were deemed waived. The statement in the November 9, 2009 letter that "the Regional Water Board understands that Dynegy has consented to all of these modifications" is true only insofar as the minor modifications comport with Dynegy's understanding of them. Dynegy did not, and under no circumstance would it, consent to the termination of its own permit while it remains under a contractual obligation to the CAISO to maintain authorization to operate the plant.

Accordingly, Dynegy does not interpret the terms of the permit, as modified, to preclude operation after December 31, 2010 if a permit renewal application is timely pending. If Dynegy does not timely submit an application for renewal of the permit, it may not discharge after December 31, 2010. However, there is nothing in either the

minor modification or the Board's ratification order which states that the permit – as opposed to "the discharges" – will terminate on December 31, 2010. In fact, to the contrary, Finding 27 states that “the Regional Board will conduct a public hearing to consider rescinding Order No. R9-2004-0154 upon termination of all discharges from the South Bay Power Plant.” If the permit were automatically terminated as of December 31, 2010, there would be no need for a rescission hearing.

*Proposed Changes to Tentative Order and Staff Report*

In light of the foregoing, Dynegy believes that the appropriate course of action is for the Board to take no action – the third option identified in the Notice of Public Hearing. However, if the Board decides to adopt an order reflecting staff’s findings and recommendations for the “short term,” there are a number of corrections that must be made to the Tentative Order and Staff Report, as listed below.

1. The name of the order (“An Order Terminating Order No. R9-2004-0154”) is inappropriate. The tentative order does not make any findings that warrant termination of the permit, and in fact concludes that termination is not warranted. This tentative order cannot lawfully terminate the permit and must be renamed.
2. Revise Finding 2 to clarify that the Board’s December 16, 2009 action did not terminate the permit effective December 31, 2010, but rather specified December 31, 2010 as the permit’s new expiration date. Delete the provisions of this finding which erroneously conclude that Order No. R9-2004-0154 cannot be administratively extended, and clarify that discharges after December 31, 2010 may continue either pursuant to an administrative extension of the permit or pursuant to a renewed permit adopted by the Board. Similarly, omit the statements on page 4 and page 23 of the Staff Report indicating that Order No. R9-2004-0154 cannot be administratively extended beyond December 31, 2010. As of the date of this submittal, Dynegy has been unable to obtain confirmation from the CAISO that Units 1 and 2 will not be designated RMR for calendar year 2011. For this reason, Dynegy intends to submit an application for renewal of its permit on or before June 30, 2010, in the expectation that a draft permit will be presented to the Board for adoption prior to the end of the year. If for some reason action is not taken on the application before the end of the year, Dynegy expects that it will be entitled to continue discharging under the rules applicable to administrative extension of permits.
3. Revise Finding 5 to omit the statement that the Staff Report contains the rationale for terminating Order No. R9-2004-0154 on December 31 or earlier if the CAISO determines that Units 1 and 2 are no longer designated as RMR. As demonstrated by evidence in the record, once the CAISO determines that Units 1 and

2 are no longer required for reliability purposes, Dynegy's lease with the Port will terminate and Units 1 and 2 will be permanently retired. In that circumstance, there is no need to "terminate" the permit. The Staff Report does not contain any findings that continued operation of the plant before or after December 31, 2010 would pose an unacceptable risk to human health or the environment and thus does not contain any rationale for terminating Order No. R9-2004-0154 on or before December 31, 2010, or on any other date.

4. Revise Finding 12 to state "The San Diego Water Board has notified all known interested parties of its intent to allow continued discharge from Units 1 and 2 in accordance with Order No. R9-2004-0154.

5. Revise Finding 14 to state "This decision pertaining to an NPDES permit is exempt from the provisions of CEQA . . ."

6. Revise the ordering language to state: "IT IS HEREBY ORDERED that grounds for termination of the discharge prior to December 31, 2010 do not exist and that the Discharger may continue to discharge in accordance with the terms of Order No. R9-2004-0154 as long as Units 1 and 2 are designated as reliability must run units by the CAISO. Order No. R9-2004-0154 will expire on December 31, 2010 unless administratively extended or renewed prior to that date."

\* \* \* \* \*

Thank you for your consideration of these comments.

Very truly yours,



Margaret Rosegay

Attachment (1)

cc: Laura Hunter, No More Power Plant Coalition  
Wayne Rosenbaum, Esq., Foley & Lardner, for the City of Chula Vista  
Andrew Ulmer, Esq., CAISO

David W. Gibson  
April 20, 2010  
Page 9

Michael Lauffer, OCC, SWRCB  
Alexis Strauss, EPA, Region 9  
David Smith, EPA Region 9

Dan Thompson, Dynegy  
Randy Hickok, Dynegy  
Barb Irwin, Dynegy  
Len Cigainero, Dynegy  
Andreas Leskovsek, Dynegy