

Chair Joaquin Esquivel and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

DATE: April 17, 2023

RE: Comment Letter – Once Through Cooling Policy Amendment

Sent via electronic submission to: commentletters@waterboards.ca.gov

Dear Chair Esquivel and Members of the Board,

On behalf of the Los Cerritos Wetlands Land Trust, we are writing in regard to the proposed extension of the Once Through Cooling (OTC) Policy deadlines. As outlined below, we believe some clarification and modifications to the draft amendment of the OTC Policy are necessary before approval of the deadline extensions.

Los Cerritos Wetlands Land Trust is dedicated to the protection and restoration of the Los Cerritos Wetlands. The health of the Los Cerritos Wetlands has been degraded through decades of the on-going withdrawal of cooling water from both the AES-Alamitos and Los Angeles Department of Water and Power Haynes power plants.

Currently, there is an effort to complete comprehensive restoration plans for the wetlands. Restoration of a fully functioning wetlands ecosystem relies on discontinuing the entrainment and impingement mortality of aquatic organisms associated with operation of the OTC pumps.

Below is an outline of concerns about the proposed extension of the OTC deadlines. Included are recommendations for modifying the proposal to ensure the extensions are legally sound, and that the on-going mitigation results in replacement of the organisms lost from operating the cooling system. In brief:

1. The deadline extensions must be set as a “date certain” for compliance with the OTC Policy. Any delays beyond the proposed new deadline extensions must be treated as a violation, resulting in punitive costs for the power plants;
2. The mitigation fees must be adjusted to ensure the funding results in full replacement of the aquatic life destroyed in the cooling water intake; and
3. Mitigation fees should be used for in-kind and in-place restoration projects where feasible. For example, fees from AES-Alamitos must be dedicated to restoration of the Los Cerritos Wetlands.

LEGAL AUTHORITY

As stated above, and for the reasons below, we believe the proposed OTC extensions need to include a more definitive end-date to avoid legal challenges. To comply with the OTC Policy and the Clean Water Act section 316(b), mitigation cannot be substituted for best available technology to minimize marine life mortality.

The OTC Policy was adopted under the State's delegated authority to enforce the federal Clean Water Act (CWA). However, that delegated enforcement authority does not allow the State to amend the federal law and indefinitely extend compliance with the law.

In 2007, the Second Circuit Federal Appeals Court provided clear guidance in interpreting and enforcing CWA 316(b) in *Riverkeeper v US EPA*.¹ The appeals court was clear that mitigation cannot be substituted for the use of best technology available to minimize environmental harm.

When the OTC Policy was adopted in 2010, it included a phased implementation plan to ensure against power disruptions as numerous OTC power plants came into compliance. And it included establishment of the Statewide Advisory Committee on Cooling Water Intake Structures (SACCWIS), primarily consisting of energy agencies, to recommend a timeline for completion of the transition away from OTC. That approach to full enforcement was not challenged in the courts.

Despite the energy agencies' schedule for discontinuing operation of the fleet of OTC units, as the deadline approached in 2020, SACCWIS requested, and was granted, a three-year extension to 2023 based on continued mitigation payments. Again, there were no legal challenges.

Despite numerous opportunities over the last 13 years to upgrade the electrical generation and transmission systems, SACCWIS, for the third time, is rewriting the compliance schedule. And once again, these deadline extensions rely on conditions to continue mitigation as a substitute for full compliance with CWA 316(b).

Further, the SAACWIS recommendation appears to rely on recently enacted State law. The Legislature's enactment of AB 205 appears to assume authority to create an energy "reserve" that may utilize continued operation of OTC power plants, in clear violation of CWA 316(b), as articulated in the *Riverkeeper* decision. Generally, federal law preempts state law when there is a contradiction. And here, through the creation of the energy "reserve" and the request for extensions of the compliance deadlines, the State is effectively proposing to contradict the clear mandates of the Clean Water Act section 316(b).

The State's delegated authority to enforce the CWA does not extend to amending the federal law. The State cannot continue to rely on mitigation as a substitute for full enforcement of the federal law indefinitely. Given that this is the third time SAACWIS has attempted to establish deadlines for full enforcement of CWA 316(b), there is a reasonable argument that the State is not complying with the mandates set by the federal courts. Further, the enactment of State law, AB 205, to include the on-going operation of the OTC power plants in an energy "reserve" mode, suggests this is not an unforeseen emergency, as claimed in the SACCWIS report, rather a well thought out plan to continue use of the OTC plants without any provision for technology upgrades to those facilities. Ironically, AB 205 is simply evidence that the State is ignoring the mandate to employ best available technology and the supremacy of federal law, instead relying on continued use of mitigation in the name of energy reliability.

¹ *Riverkeeper Inc. v US EPA*, 475 F.3d 83 (2d Cir. 2007)

We understand the complexities of transitioning the electric power generation and transmission system. However, we believe the question of authority must be resolved before approving the current SACCWIS recommendation for extensions. **The State Water Board must include language in the draft amendment that sets the proposed extension as a date-certain for discontinuing the use of the remaining OTC systems.** Allowing the SACCWIS to set deadline schedules three times, including this proposed extension, with no definitive and enforceable end date, is evidence that the State is effectively failing to enforce the federal law. Allowing an extension for a fourth time would be proof of that failure.

IN-KIND and IN-PLACE MITIGATION

The original OTC Policy included a mitigation calculation formula and a provision for delegating a fixed amount of the cumulative mitigation funds to on-going efforts to maintain the State's network of Marine Protected Areas (MPAs). We fully support the effort to establish and maintain MPAs. However, we believe the proposed OTC Policy amendment, necessary to extend the several deadlines, should include an amendment to the mitigation calculation as well as the allocation of those mitigation fees.

Specifically, the intake mortality resulting from operation of OTC units at AES-Alamitos has a direct adverse impact on the Los Cerritos Wetlands vegetation and wildlife. The cooling water intake for AES-Alamitos is located in the inland reach of the wetlands in Alamitos Bay – the Los Cerritos Wetlands.

MPAs are designed to work as a “source and sink” network, allowing marine life to exponentially increase biological reproductive capacity and transport that increased productivity to help repopulate areas of the coast open to fishing as well as down-current MPAs. However, these marine MPAs have no direct benefit for estuarine wetlands. In short, where the intake is located in a coastal wetland, MPAs offer no “replacement value” to the water body directly impacted by operation of OTC.

Therefore, we strongly encourage the State Water Board to amend the OTC Policy to expressly state that mitigation funds should be allocated to local restoration projects that result in replacing marine life in the water body affected by the operation of the OTC facility. **Specifically, the mitigation fees collected from AES-Alamitos must be deposited with the California Coastal Conservancy and earmarked for restoration of the Los Cerritos Wetlands.**

MITIGATION FEE CALCULATION

Finally, we were encouraged to hear at the March 7, 2023 workshop of the State Water Board that staff has begun an effort to amend the mitigation calculation to better ensure the funds result in full replacement value. However, until that new mitigation fee formula is available, we cannot support the overall extension amendment.

We strongly encourage State Water Board staff to finalize the new mitigation fee calculation so that it is available for public comment prior to the hearing on the proposed extension. We believe this is a reasonable request given the importance of the new formula.

CONCLUSION

We understand the difficulty of transitioning the electrical generation and transmission system to ensure reliable service while complying with the Clean Water Act mandates. We hope the three amendments we are recommending to the draft of the proposed deadline extensions allow for both important goals:

1. The deadline extensions must be expressed as a “date certain” for compliance with the OTC Policy. Any further delays beyond the proposed extensions must be treated as a violation, resulting in punitive costs for the power plants;
2. The mitigation fees must be adjusted to ensure the funding results in full replacement of the aquatic life destroyed in the cooling water intake. Mitigation fees and guidelines must be included in the OTC Policy amendment with the proposed extensions; and
3. The OTC Policy should be amended to expressly state that mitigation fees should be used to replace in-kind and in-place restoration projects. For example, fees from AES-Alamitos must be dedicated to restoration of the Los Cerritos Wetlands.

We very much appreciate the State Water Board’s attention to these comments.

Sincerely,

Elizabeth Lambe
Executive Director
Los Cerritos Wetlands Land Trust