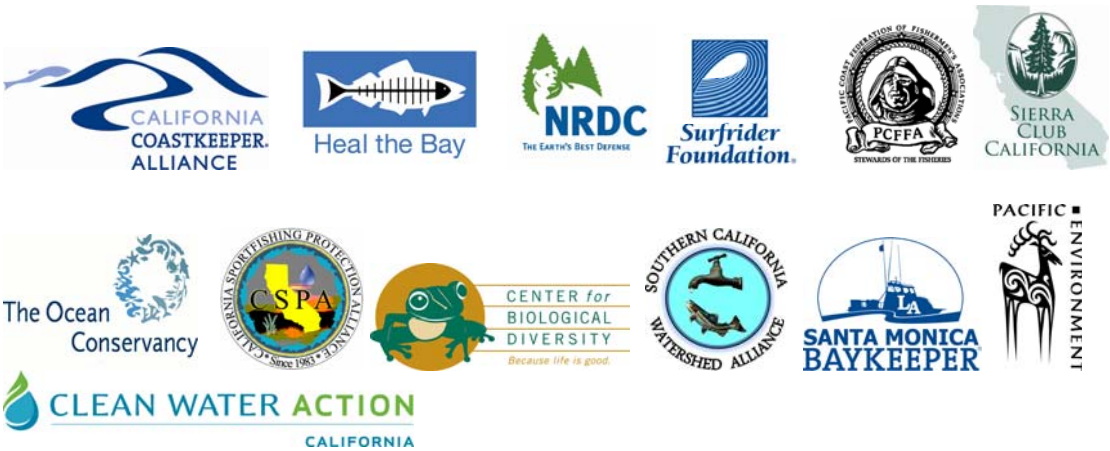

July 5, 2011

Charles Hoppin, Chair and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
***Via electronic mail*: commentletters@waterboards.ca.gov**

Re: Comment Letter: OTC Policy Amendment

Dear Chair Hoppin and Board Members:

On behalf of the undersigned groups, who have been working vigorously with the State Water Resources Control Board ("State Board") for over the past six years to develop, adopt and implement the *Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling* ("Policy") – many of whom have been active on this topic nationally for far longer – we submit these comments on the Proposed Amendment ("Amendment") to the Policy. We attach and incorporate by reference the letter from Heal the Bay *et al* to the SACCWIS and the State Board dated July 1, 2011 regarding the Los Angeles Department of Water and Power (LADWP) Implementation Plan ("Implementation Plan Letter").

The adopted Policy was a thoroughly debated, long-developed, moderate, compromise document, based on five years of exhaustive internal and external research, energy agency oversight, and broad public outreach, and designed to result in the carefully scheduled and certain phase-out of this destructive practice. The next steps under the Policy were for the SACCWIS to review the Implementation Plans, which were to contain (as required by the Policy) sufficient information to allow these experts to conduct their work, and then to report to the State Board with recommendations, which the Board then would consider in assessing potential, grid reliability-related modifications. The current, rushed Amendment process is the antithesis of this deliberative effort, sidestepping the Policy and threatening to significantly undermine its mandated ecosystem protections.

Contrary to the exhaustive public process behind the Policy, the current, hastily-drafted Amendment surfaced mere weeks after the regulated community submitted their Implementation Plans, and *before* the SACCWIS had even begun their required review of the Plans – contrary to the clear letter and intent of the Policy.[1] Indeed, the haste resulted in significant errors and other flaws in the quickly-written Staff Report, which significantly underestimated the relative environmental impacts of the Amendment. The Staff Report was not re-released for public "review" until a mere six business days before the written comment deadline. The revised calculations supporting the changes were only released for public review *two* business days before the comment deadline, a significant omission given their initial and continued errors.

Further compounding the lack of adequate public review, the *only* public SACCWIS hearing related to LADWP's Implementation Plan takes place *after* the written comment deadline on the Amendment. This hurried SACCWIS "review" similarly allowed the public only five business days to review the proposed SACCWIS motion, and *no* formal opportunity for public written comment to SACCWIS. Furthermore, the SACCWIS motion – prepared by the Interagency Working Group – was unaccompanied by any independent SACCWIS review or report[2] providing a grid reliability rationale for changes to the existing Policy, or the grid reliability impacts of the proposed changes. This rushed and impermissibly abbreviated process, which is contrary to the Policy, severely curtails the meaningful public input that the Policy was designed to ensure.

Notably, even with the forced speed of review, the SACCWIS draft Resolution still finds that the Amendment is premature,[3] concluding among other things that the information provided is "insufficient"[4] to allow for a decision as significant as modifying Policy's carefully-set deadlines.

Unlike the clear, independent analysis underlying the adopted Policy, the current Amendment unfortunately follows the model set by the similar proposed Amendment last fall, which was also developed quickly, with little to no new information, and after several political and legislative attempts to undermine the Policy. As we noted last fall, the Policy process must be followed to ensure that our ecosystems are protected, and that the state's energy generation is reliable and sustainable. This includes serious and studied attention to *any* changes in the adopted schedule. The Policy's schedule must be followed absent compelling new information related to grid reliability – information which has yet to surface from LADWP or SACCWIS.

Despite these mandates, the Board has released a Policy Amendment with numerous factual, legal and procedural flaws. Including but not limited to the following, the Amendment:

- was embraced by the State Board and proposed for public review before the SACCWIS review process for LADWP's Implementation Plan had even begun;

[1] *See* Policy Section 3.B.
[2] *Id.* Section 3.B.(2).
[3] Significantly, the excessively swift pace of this proposal has prompted even the City of Los Angeles to call for further review and assessment of the Amendment proposal before action is taken, through a motion by City Council President Pro Tempore Jan Perry before the Energy and Environment Committee of the City Council on June 24th.
[4] Interagency Working Group, "Staff Report," SACCWIS Meeting, Item 4, July 5, 2011, available at: http://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/saccwis/docs/sa_staffrpt2011july05_item4.pdf.

- preempts the Policy's process for reviewing amendment proposals originated through the SACCWIS, and allows for proposals directly flowing from the regulated power plants, without analysis of grid reliability needs or impacts;
- fails to reference new data that clearly demonstrate that the requested changes are related directly to grid reliability issues;
- is based on old LADWP comment letters, due to the fact that the incomplete LADWP Implementation Plan contains little to no new, supported information related to grid reliability;
- prevents the City of Los Angeles from first reviewing the Amendment, despite a specific City Resolution request made for such a public City review;
- fails to include sufficient, required information necessary for SACCWIS to complete a review consistent with Policy requirements, as was concluded by the Interagency Working Group Staff Report and draft SACCWIS Resolution;
- is occurring through a rushed public process with mere days allowed the public for written comments on the final Staff Report, and *no* time allowed for formal, written public comment on the public SACCWIS review;
- prompted rushed and flawed State Board staff analysis of environmental impacts, which necessitated a complete reworking of impacts calculations and re-release of the Staff Report with only six working days of public review before the written comment deadline on the new text, and *two* days of public review of the new calculations before the deadline;
- will result in significant, new impacts for years to the state's ocean, coastal, bay and estuarine ecosystems, impacts that are in direct contravention of the Policy and remain unaccounted for in the still-flawed Staff Report;
- adds a new Section 2.C.(4) that allows facilities with deadlines past 2020 to continue seriously impacting nearshore environments for decades via a new, alternative "interim mitigation" compliance path that is neither "interim," "mitigation," nor "legal" under *Riverkeeper II*[5];
- violates CEQA and administrative law requirements; and
- sets a precedent of unsustainable policymaking based on political pressure rather than deliberative, Policy-driven process.

In summary, we urge the Board to reject the proposed Amendment in its entirety, and move forward with full implementation and continuing review of the Policy according to the Policy's process dictates. Specifically, after the SACCWIS has had sufficient time to: (a) carefully review all of the Implementation Plans, (b) request and receive missing information, and (c) provide the required reports with recommendations to the State Water Board, *only then* should the Water Board consider any amendments to the Policy, with these reports in hand. Deadline extensions should be most carefully scrutinized in light of the fact that the Policy calls for SACCWIS consideration of deadline changes only for purposes of grid reliability, and only if such changes still achieve compliance "as soon as possible." The State Board's December motion asked that LADWP's proposal be "prioritized"; this does not mean rushed to judgment, but rather acted on before other Implementation Plans, if possible. Prioritization does not excuse abandonment of the Policy process and the reasons for empanelment of the expert SACCWIS.

[5] *Riverkeeper, Inc. v. U.S. EPA*, 475 F.3d 83, 110 (2d Cir. 2007) ("*Riverkeeper II*").

We provide further detail on these points below, and we look forward to working with you to ensure the protection of California's coast, Delta and ocean ecosystems consistent with the letter and intent of the Clean Water Act.

I. THE HISTORY OF THE POLICY CALLS FOR CAUTION AND CLEAR SUPPORT IN THE RECORD IN CONSIDERING DEADLINE AMENDMENTS

The development and initial implementation of the Policy over the last six years, with extensive stakeholder and outside technical input, has resulted in a Policy and timeline that should only be amended based on significant new information, review and reporting. The Policy, adopted by the State Board on May 4, 2010 pursuant to Resolution 2010-0020, was a thoroughly debated, long-developed document, based on five years of exhaustive internal and external research and including two expert, independent reports. The extensive public outreach supporting the Policy included seven formal public comment opportunities, numerous workshops and meetings with all stakeholders over the five years of its development, and a comprehensive SED[6] that fully examined the range of impacts of the Policy. Approved by the Office of Administrative Law in early fall 2010, the Policy was designed to create a logically scheduled and certain phase-out of this destructive practice. The Policy faced and passed another industry challenge in late 2010, when the State Board refused to adopt any changes to its provisions without first reviewing the implementation plans and hearing a report from SACCWIS on identified issues of grid reliability.

The State Board's current release of proposed deadline changes in advance of any public review, analysis or report by SACCWIS directly contradicts its prior, careful, open public proceedings and its appropriate refusal just a few months ago to even consider deadline changes without completed Implementation Plans that SACCWIS had reviewed and reported on. Consistent with the long history of the Policy's development and adoption, great care must be taken in building strong foundational support for any proposed changes to the Policy, which must be related to grid reliability.

It is worth reiterating that SACCWIS' work is circumscribed in the Policy to issues related to grid reliability; this was done in order to protect the integrity of the Policy and its exhaustive development process. SACCWIS review and recommendations must focus only on issues specifically pertaining to local area and grid reliability impacts associated with the proposed "implementation schedule," which itself must be completed "as soon as possible, but no later than the dates shown in Table 1."[7] The Policy does not give SACCWIS or its member agencies carte blanche to recommend deadline amendments for any reason (such as cost or fees), but instead only within these narrow confines. Moreover, any changes must be supported by clear evidence provided in the Implementation Plans. If the necessary data are not provided in the Plans, then the SACCWIS necessarily must request and obtain it in order to conduct the expert analysis for which it has been empanelled.

[6] SWRCB, "Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling: Final Substitute Environmental Document" (May 4, 2010) ("SED").
[7] Policy Section 2.B.(1).

II. THE LOS ANGELES CITY COUNCIL'S CALL FOR CITY REVIEW OF LADWP'S PROPOSAL SHOULD BE HEEDED IN LIGHT OF THE REQUIRED CAUTION BEFORE AMENDING THE POLICY

LADWP is a municipally owned utility. As such, its decisions are subject to review and oversight by Los Angeles City government. The Board should fully respect the City of Los Angeles process and timeline for review prior to action on an LADWP request.

In particular, the Los Angeles City Council's Energy and Environment Committee is currently considering a review and initial public hearing on LADWP's proposal, and the Board should provide time for that review before acting on the requested amendments. City Council President Pro Tempore Jan Perry introduced a Resolution (attached) before the Energy and Environment Committee of the Los Angeles City Council on June 24th calling for a thorough LADWP report to the City regarding its plans to comply with the Policy under the current schedule and the proposed Amendment. The Resolution further calls for State Water Board staff participation in this report before the City, as well as an independent City review of LADWP's financial claims under the Policy and the Amendment. Given the ongoing process at Los Angeles City Council, it would be highly inappropriate for the SWRCB to proceed until the Los Angeles City Council's own request for additional information about the operations of its Department of Water and Power have been satisfied.

III. THE POLICY ONLY ALLOWS FOR DEADLINE EXTENSIONS DUE TO GRID RELIABILITY ISSUES REPORTED ON BY SACCWIS AGENCIES AND SUPPORTED BY NEW DATA: NONE OF THESE CONDITIONS HAVE BEEN MET

The Policy's language on the process for amendment of its deadlines indicates that "local area and grid reliability" concerns are the *only* factors to be considered for deadline changes (*e.g.*, as opposed to cost). In addition, the Policy is clear that SACCWIS – *not* the discharger – makes implementation schedule recommendations to the State Board through a public process for State Board consideration, based on new data in complete Implementation Plans. Each of these required elements is considered below.

A. The Deadlines Can Only Be Changed as a Result of Legitimate Grid Reliability Issues

Section 3 of the Policy articulates the limited purpose of the SACCWIS as follows:

> B. The SACCWIS shall be impaneled no later than January 1, 2011, by the Executive Director of the State Water Board, to advise the State Water Board on the implementation of this Policy *to ensure that the implementation schedule takes into account local area and grid reliability*, including permitting constraints. SACCWIS shall include representatives from the CEC, CPUC, CAISO, CCC, SLC, ARB, and State Water Board.

(Emphasis added.) Section 3 reiterates this sole objective further in Section C. as follows:

C. The State Water Board shall reissue or, as appropriate, modify NPDES permits issued to owners or operators of existing power plants, after a hearing in the affected region, to ensure that the permits conform to the provisions of this Policy.

(1) The permits shall incorporate a final compliance schedule that requires compliance no later than the due dates contained in Table 1, contained in Section 3.E, below. *If the State Water Board determines that a longer compliance schedule is necessary to maintain reliability of the electric system per SACCWIS recommendations* while other OTC power plants are retrofitted, repowered, or retired or transmission upgrades take place, this delay shall be incorporated into the compliance schedule and stated in the permit findings.

There is no support in the Policy for a SACCWIS mandate beyond that specifically described in the Policy itself; *i.e*., to assess compliance schedules in light of grid reliability issues. This is consistent with Policy Section 2.B., which requires compliance "as soon as possible, but no later than the dates shown in Table 1," and which allows for consideration of compliance date changes only as determined by the energy agencies to be "necessary to maintain the reliability of the electric system."[8]

Unfortunately, the Staff Report misstates and unallowably attempts to expand this mandate well beyond the Policy's dictates in order to justify the LADWP deadline change request, attempting to argue on page 15 that:

> The existing policy allows an adaptive management approach for implementation of the Policy, including explicitly contemplating revisions to compliance dates, *while maintaining* electrical grid reliability. It is understood that impacts will continue until BTA implementation occurs.

(Emphasis added.) The Staff Report's reading *impermissibly revises the adopted Policy* by making grid reliability a *subset* of the overall set of reasons that could be used to revise compliance dates, rather than the *sole* reason. To be consistent with the Policy, the Staff Report should instead read, "including explicitly contemplating revisions to compliance dates *to ensure maintenance of* electrical grid reliability." As written, the Staff Report would allow extensions for an unlisted, potentially unlimited number of reasons. Furthermore, extensions, particularly lengthy extensions, are unlikely to ever cause additional reliability concerns, as they would only allow additional capacity to continue to operate without change. As such, the Staff Report's misreading of the Policy nearly completely obviates the purpose of empanelling the SACCWIS.

In sum, the Policy allows for date extensions *only* for grid reliability reasons, not for cost or any other reason (or no reason). Given that it has been determined that there is "insufficient" evidence of grid reliability concerns, the State Board cannot move forward on the amendments. It certainly cannot find that ecosystem "impacts will continue"[9] from many more years of OTC without a justifiable grid reliability reason under the Policy for allowing them to continue.

[8] Note that Section 2.B. only contemplates only *short-term* compliance date suspensions for LADWP, defined as "less than 90 days." Policy Sections 2.B.(2)(c), (a).
[9] Staff Report, p. 17.

B. SACCWIS – Not the Regulated Entity – Makes Recommendations for the SWRCB's Consideration, Based on Completed Implementation Plans with Sufficient Supporting Data and a Meaningful Public Process

Section 3 of the Policy describes the process for SACCWIS review and consideration of completed Implementation Plans in order to develop recommendations for the SWRCB's consideration:

> Section 3.B.(1) SACCWIS meetings shall be scheduled *regularly and as needed*. Meetings *shall be open to the public* and shall be noticed at least 10 days in advance of the meeting. All SACCWIS products shall be made available to the public.
> (2) The SACCWIS *shall review the owner or operator's proposed implementation schedule and report to the State Water Board with recommendations* no later than October 1, 2011. . .
> (5) *The State Water Board shall consider the SACCWIS' recommendations and direct staff to make modifications, if appropriate*, for the State Water Board's consideration. . . . ."

(Emphasis added.)

Importantly, SACCWIS must have completed their review of the Implementation Plans based on sufficient information before issuing its report with recommendations to the State Board. Implementation Plans that simply re-state previously submitted information by definition *cannot* support compliance date changes, such such a recommendation would run counter to the Policy's direction that compliance be achieved "as soon as possible, but no later than the dates shown in Table 1." Specifically, each Implementation Plan must:

> identify the compliance alternative selected by the owner or operator, *describe the general design, construction, or operational measures that will be undertaken* to implement the alternative, and propose a realistic schedule for implementing these measures *that is as short as possible*. If the owner or operator chooses to repower the facility to reduce or eliminate reliance upon OTC, or to retrofit the facility to implement either Track 1 or Track 2 alternatives, the implementation plan shall identify the time period when generating power is *infeasible* and describe measures taken to coordinate this activity through the appropriate electrical system balancing authority's maintenance scheduling process.[10]

Further,

> If the owner or operator selects closed-cycle wet cooling as a compliance alternative, the owner or operator shall address in the implementation plan whether recycled water of suitable quality is available for use as makeup water.[11]

The purpose of this carefully described process is to ensure that the energy experts making up SACCWIS have sufficient information to publicly and independently review and make

[10] Policy Section 3.A.(1) (emphasis added).
[11] *Id*., Section 3.A.(2).

recommendations on Implementation Plans in light of any grid reliability issues, and particularly ensure that all the schedules for all affected plants mesh to avoid creating new grid reliability issues. By its letter and intent, this process was *not* set up to allow the regulated community a second pass at cost arguments, or to take deadline extensions from dischargers and pass them directly through to public comment without the required SACCWIS expert consideration first.

C. The Amendment Fails to Meet the Requirement That Deadlines May Be Changed Only for Grid Reliability Purposes and Based on New Information

Despite the fact that the Policy is quite clear that compliance must be achieved "as soon as possible" but no later than the Table 1 adopted deadlines, and that modifications may only be made for grid reliability purposes, the Staff Report attempts to rewrite the Policy and introduce new considerations to justify the lengthy deadline extensions requested by LADWP.

First, the Staff Report impermissibly allows cost considerations to enter the review. Such issues were exhaustively discussed and decided on and are not new information or associated with grid reliability. Unfortunately, the Staff Report on pages 12-15 unallowably echoes these long-decided issues by claiming that "LADWP has stated that it cannot meet these deadlines without incurring substantial rate increases to the ratepayers." Putting aside the fact that this claim is unsupported and is not new, it is not a grid reliability issue and has no purpose in the extension of deadlines. Moreover, the Policy anticipated such assertions and explicitly states that "cost is not a factor to be considered" in determining whether a facility can comply with Track 1.[12]

Second, the Staff Report appears to rely impermissibly on cost considerations, in part because LADWP's Implementation Plan simply fails to provide the necessary new information on grid reliability. If there were such information, it would presumably have been included the Staff Report; its notable absence is further evidence that LADWP's deadlines should remain in place unless and until reliable information is provided. The Policy requirement to implement flow reductions "as soon as possible" to achieve the Table 1 deadlines precludes any changes without significant *new* information. Indeed, there are numerous inadequacies and unsupported assertions in LADWP's Implementation Plan that prevent either the SACCWIS or the State Board from making the necessary analysis, as discussed in the SACCWIS Staff Report and more particularly in the attached letter by Heal the Bay *et al* to the SACCWIS.

D. The Amendment Fails to Meet the Policy Mandate that SACCWIS – Not the Regulated Entity – Makes Recommendations for the SWRCB's Consideration, Based on New Information in the Implementation Plans and through Public Meetings

1. LADWP's Implementation Plan Is Inadequate for Necessary SACCWIS Analysis and SWRCB Analysis

As noted above, the Implementation Plans must contain the information required in the Policy, and this information must necessarily be reliable and supported. An Implementation Plan is not complete and ready for SACCWIS and SWRCB review if it contains incomplete, inaccurate

[12] Policy Section 5, *Definitions of Terms*.

and/or completely absent information, or unsupported claims in place of actual data. Unfortunately, as noted further below and in the attached letter regarding LADWP's Implementation Plan, LADWP's Plan is incomplete for these reasons, and cannot be acted on by either SACCWIS or the Board until it is revised to provide reliable, new information supporting grid reliability concerns. Among other things, LADWP's Implementation Plan fails to:

- identify (and support with facts and data) the time period when generating power is actually infeasible or describe measures taken to efficiently coordinate this activity to ensure compliance "as soon as possible" (for example, the Plan instead assumes without support that *all* steps must be taken sequentially);
- provide the required "reliability study" (the "study" provided is little more than an estimate of necessary reserve margins and stated preference for Los Angeles ownership);
- indicate how LADWP would "eliminate" once-through cooling, either through dry cooling or wet cooling with recycled water, an issue with potentially significant scheduling ramifications;[13]
- provide flow data by unit to allow for accurate calculation of impacts associated with the deadline extensions (State Board staff had to ask repeatedly for this data for months after Implementation Plan deadline, and only received it informally and weeks after an error-filled Staff Report was released for public comment).

LADWP's Implementation Plan not only fails to provide necessary information needed for SACCWIS and SWRCB review. In addition, much of the data provided is also inaccurate or unsupported. For example, LADWP argues that it needs "every MW" while implementing the Policy. This is an old argument that was never supported and is not supported now.[14] For instance, there are numerous arguments in support of better integrating renewables (such as solar during the peak, sunny summer use periods) so that "every MW" would not be necessary for implementation. The "every MW" assertion and other relevant assertions should be closely examined by the SACCWIS, based on sufficient information (currently not provided), to determine if indeed the requested deadline extensions are necessary for grid reliability purposes and are supported by the evidence in the Implementation Plan.

As part of this analysis, the amount of capacity that LADWP claims is needed to ensure reliable operations throughout implementation of the Policy - as well as the various scenarios available to ensure availability of that capacity - should be carefully examined by the SACCWIS. Given the dearth of relevant information in the LADWP Implementation Plan, and lack of any scenarios or analysis of alternatives to meet the Policy requirement "as soon as possible," SACCWIS would need additional information for such a review. Again, the rushed pace of the current review process prevents the careful development of SACCWIS input, as indicated by the Staff Report and draft Resolution before SACCWIS noting the insufficiency of information on such issues as envisioned and mandated by the Policy.

[13] The LADWP Implementation Plan "did not specify whether dry cooling or wet cooling towers would be used to comply with the Policy." Staff Report, p. 14.

[14] The Staff Report provides a "Rationale" for the proposed Amendment that regurgitates old LADWP letters from 2009 and 2010, which were already rejected (twice) – including the argument that "every MW of capacity from these plants is vital. . . . and any loss of capacity must be made up . . . in essentially the same location." Staff Report, pp. 8-10.

2. The Process Used by the SWRCB Unallowably Reinvents the Policy by Taking Direction from LADWP

Rather than taking up recommendations from SACCWIS regarding schedule modifications potentially necessary for reliability, the SWRCB instead took them directly from LADWP, with the proposed Amendment going out to public comment *before* SACCWIS consideration and recommendation. This is completely contrary to both the letter and intent of Policy, which calls for a deliberate, careful, independent review process involving SACCWIS to consider grid reliability concerns associated with the adopted Policy. It also flouts the Policy's direction that compliance be achieved "as soon as possible" and not later than the Table 1 deadlines. The Board's short-circuiting of the Policy process prevents both careful SACCWIS and public review of the (flawed) LADWP Implementation Plan, hurrying unnecessarily instead to a final hearing.

3. Much of the SACCWIS Evaluation Process Was Held Behind Closed Doors, with a Rushed Public Meeting that Precluded a Formal Written Comment Period, again Contrary to the Policy

Despite the Policy's call for open public SACCWIS deliberations in Section 3.B., there was no SACCWIS public hearing[15] on the Plan until *after* the written public comment deadline on the Amendment. This artificially expedited scheduling severely circumscribes effective public input (again, contrary to the Policy), calling into question again the legitimacy of the current process.

The Policy specifically calls for SACCWIS "review" of the proposed implementation schedules, with a report and recommendations to the SWRCB by October 1, 2011. Private staff meetings that excluded the public, with no written report or analysis for review in hand from SACCWIS, plus one SACCWIS public meeting held *after* the written public comment deadline on the Amendment is hardly the meaningful "review" intended by the Policy. This is particularly true in light of the fact that the LADWP Implementation Plan fails to provide the required information demonstrating grid reliability concerns. A meaningful SACCWIS review process would also allow time for the agencies to request necessary, accurate information and then consider it publicly, before recommending any changes to the established Policy.

SWRCB staff recognized this problem in proposing Alternative 2 on page 13 of the Staff Report, which recommends delay until after the final SACCWIS Report on October 1. In proposing this Alternative, the Staff Report states that it "would allow the State Water Board the opportunity to consider other changes to the Policy, such as other changes to the compliance deadlines, simultaneously." Alternative 2 would allow time for LADWP to provide the necessary information for the SACCWIS to consider whether compliance schedule changes were necessary for grid reliability purposes. It also would allow SACCWIS appropriate time to consider the full range of implementation plans together,[16] conduct analysis on any grid impacts from the various compliance

[15] Policy Section 3.B.(1) requires SACCWIS meetings to be "open to the public." The first SACCWIS meeting in early April, which CCKA personally attended, was merely an initial convening and cannot be considered one in which LADWP's proposal was actually considered. This leaves only the July 5th meeting, scheduled for *after* the written public comment deadline on the Amendment, as the sole opportunity for public (and SACCWIS) input and discussion before the previously scheduled July 19th State Board hearing.

[16] For example, LADWP does interconnect with SCE in certain spots, and consideration of such interconnections could inform SACCWIS' analysis of grid reliability issues. *See, e.g.*, California Energy Commission, "Addendum to

schedule scenarios, and then provide a report containing recommendations to the State Water Board. Board changes to the Policy should be made only after that process is complete, not before (as with the current proposal).

The SWRCB's December motion was to table action on LADWP's amendment proposals until after consideration of its Implementation Plan – the expectation being that LADWP would provide a minimally *complete* Implementation Plan that would fully discuss reliability concerns and provide sufficient support for that analysis by SACCWIS and the State Board. LADWP did not do this, and so neither the SWRCB nor SACCWIS is under an obligation to even consider its proposal, let alone approve it.

E. Initial SACCWIS Recommendations Indicate a Lack of Support for Deadline Changes

The OTC Interagency Working Group, acting as staff to the SACCWIS, only recently released a proposed Resolution for SACCWIS review, with potential adoption set for after the close of the written comment period on the Amendment. This process immediately is of concern because the draft recommendations have been prepared and released through private, non-SACCWIS meeting processes, rather through the public SACCWIS process mandated by the Policy. The extremely brief Resolution also completely fails to rise to the level of the "report" called for in Policy Section 3.B.(1), which the SACCWIS was to prepare to ensure that it fully considered grid reliability concerns and claims (including, for example, LADWP's assertion that it needs "every MW" for operation while it is phasing out OTC).

The conclusions of the brief, draft Resolution raise further serious concerns about the abbreviated process, illustrating that even with almost no SACCWIS time for review, significant concerns with the LADWP Amendment proposal are already evident. For example, the Interagency Working Group report finds that:

> [LADWP's] implementation plans *do not contain sufficient information* to determine if the compliance dates in the current Cooling Water Policy are infeasible from a reliability perspective, or if the proposed dates are as soon as possible, as required by the Policy.

(Emphasis added.) At a minimum, additional time is needed for the SACCWIS to request, obtain, review, analyze and draw conclusions from sufficient information provided by the proponent for the Amendment. However, despite their conclusion that there is insufficient information to make any decision on grid reliability issues – the sole purpose of he SACCWIS – the Interagency Working Group still proposes two alternative Resolutions for the SACCWIS, one of which surprisingly makes a grid reliability conclusion based on the aforementioned lack of information. As with the other flawed factual and legal conclusions hastily drawn in this process, this approach raises serious questions about the process overall, and calls for a halt until the Policy process can be followed based on adequate information.

Upgrading California's Electric Transmission System: Issues and Actions for 2005 and Beyond," p. 5 (Oct. 2005), at http://www.energy.ca.gov/2005publications/CEC-700-2005-018/CEC-700-2005-018-AD.PDF.

Both draft Resolutions further demonstrate that it is premature for the SACCWIS or the Water Board to consider the LADWP's April 1, 2001 draft Implementation Plan. The first Resolution's Paragraph 3, along with the second Resolution in its entirety, particularly recognize that the Water Board needs additional data (by generating unit, as noted elsewhere in the document) to show whether LADWP's compliance plan is feasible and satisfies the "as soon as possible" requirement of the Policy. These subparagraphs read as follows:

> 3. The SACCWIS finds that *there is insufficient information to determine whether the implementation dates for LADWP power plants in the current policy are infeasible from a reliability perspective and if the implementation plan* submitted by Los Angeles Department of Water and Power *satisfies the "...as soon as possible..." requirement* contained within Section 2.B(1) of the adopted Cooling Water Policy.
>
> …
>
> 4. The SACCWIS finds that the Los Angeles Department of Water and Power's implementation plan to comply with the State Water Board's Cooling Water Policy *does not demonstrate the local area or grid reliability requirements sufficient to justify modifying the current schedules*. Therefore the SACCWIS recommends that the State Water Board postpone consideration of any modifications to the compliance schedule until further details are available.

(Emphasis added.) These are critical omissions in light of the lengthy extension of implementation time that LADWP is seeking and *cannot* be consistent with a SACCWIS finding of sufficient grid reliability issues to warrant the requested extensions.

Our review of the LADWP's Implementation Plan similarly shows that the premises behind the Implementation Plan are contradictory and opaque at best.[17] By contrast, deadline changes in the Policy must be supported with specific, reliable, complete information. The State Board's current Amendment process must be at a minimum suspended so that the public and the SACCWIS can seek and obtain the necessary information in order to conduct an informed analysis of the LADWP Amendment proposal. In particular, SACCWIS' responsibility – as the experts empanelled to conduct this review and report to the State Board – makes this suspension essential. SACCWIS must be able to report on whether the requested changes are both necessary and acceptable. Without the required data (clearly missing, as found in the draft SACCWIS Resolution), SACCWIS simply cannot conduct its mission as an expert panel required to report to the SWRCB with recommendations on grid reliability issues.

IV. THE PROPOSED AMENDMENTS ARE INCONSISTENT WITH DECEMBER BOARD MOTION

A. The December SWRCB Motion Set Ground Rules for the Amendment

As reported in the Minutes for the December 14th SWRCB meeting, the adopted Board motion on the LADWP request to extend their compliance deadlines reads as follows:

[17] *See* attached letter from Heal the Bay *et al* to the SWRCB dated July 1, 2011.

Motion: Member Doduc moved to table the staff proposal until after the Statewide Advisory Committee on Cooling Water Intake Structures (SACCWIS) has an opportunity to review compliance plans submitted by the facilities and make recommendations to the Board. As part of the motion, staff were directed to request that the SACCWIS prioritize review of the Los Angeles Department of Water and Power's compliance plan.
Seconded by: Vice Chair Spivy-Weber
MOTION CARRIED: 3-2
Item tabled until the SACCWIS recommendations are submitted to the Board.[18]

The State Board Motion adopted on December 14th did not call for the current race to amend. Instead, the Motion tabled the staff proposal until *after* SACCWIS had its opportunity – consistent with the process laid out in the Policy – to review compliance plans submitted by the facilities and make recommendations to the Board. Contrary to the Motion, the proposed date changes in the Amendment were moved directly to the public review process well before SACCWIS review and recommendations, which were then rushed to meet the Board's already-scheduled review of LADWP's request, rather than allowing for careful SACCWIS deliberations *first*. This is particularly perplexing as no date was set in the adopted Motion for completion of the review of LADWP's Implementation Plan. Rather, the Motion merely required staff "to request that the SACCWIS [not the State Board] *prioritize* review of the Los Angeles Department of Water and Power's compliance plan." (Emphasis added.)

Finally, the item was specifically "tabled until the SACCWIS recommendations are submitted to the Board." Given the current draft SACCWIS recommendations, which highlight a lack of "sufficient information" to support a grid reliability reason for extending the life of OTC for many years (thereby creating a significant increase in ecosystem impacts), there is *no* support in the December Motion for moving forward at this time. Indeed, with this information, the Motion would counsel instead a return to the deliberative process laid out in the Policy.

B. The Staff Report Misinterprets the Board Motion and Inappropriately Accelerates Special LADWP Amendments

Despite both the clear language of the Policy and the straightforward direction in the December Motion, the Staff Report contorts the State Board's December decision to justify moving forward on LADWP's request prematurely. Specifically, the Staff Report on page 10 misreads the Motion by saying that the Board's Motion instead "stated the Board would revisit *special provisions* for LADWP *after receiving further data from them, and after their implementation plan had been reviewed by SACCWIS, if possible by July 2011*." (Emphasis added.) Contrary to this reading of the Motion, while July was mentioned at the meeting, the Board specifically adopted a motion with no set date, directing staff only to "prioritize" LADWP's Implementation Plan. Moreover, there is no direction from the Board or the Policy to consider any "special provisions" for LADWP; this would be contrary to the Policy, which allows only for grid reliability issues to prompt potential report and recommendations from SACCWIS agencies regarding schedule changes.

[18] State Water Resources Control Board Meeting Minutes, December 14-15, 2010, available at: http://www.waterboards.ca.gov/board_info/minutes/2010/dec/mins2010dec14_15.pdf.

The Staff Report is correct that further data needs to be received from LADWP in order to consider grid reliability issues, and that SACCWIS needs to review such data and their Implementation Plan as a whole – but these conditions have *not* been met. LADWP did not provide new, adequate data to support changes due to grid reliability concerns; the Staff Report itself can only cite prior LADWP comment letters for any arguments (even flawed ones, as noted above) to support their proposal. As the initial SACCWIS review also indicates, the Implementation Plan also fails to provide information sufficient for SACCWIS to make a reasoned determination, through a meaningful public process.

In sum, there is no support in the Motion for the current, rushed process, which is inconsistent with both the Motion terms themselves as well as the Policy.

V. THE STAFF REPORT'S IMPACTS ANALYSIS IS INCORRECT AND UNDERSTATES THE SIGNIFICANCE OF THE AMENDMENT'S IMPACTS AS COMPARED WITH THE POLICY

A. The Environmental Impacts Calculations Are Based on Inaccurate Assumptions

The Staff Report understates the significance of the Amendment's impacts in several ways, with the first being an unjustified assumption regarding the timeframe for the environmental impacts analysis. The Staff Report assumes, without justification, a 2010 through 2040 timeframe, stating that "the numbers impinged and entrained during the interim period for the Policy and the amendment were compared over the period 2010-2040. This period was chosen as a reasonable timeframe."[19] No support is given for the reason that this timeframe was chosen, or why it was deemed "reasonable." The Amendment, by contrast, states that compliance will occur latest by the end of 2035; there is no reason given for the Staff Report to assume a timeframe beyond that date. In fact, assuming a deadline past the proposed compliance deadlines for each unit "smoothes out" the heightened environmental impacts of the proposed Amendments by spreading them out over an unjustified, excessively lengthy time period. The assumption thus fails CEQA's requirement that the SWRCB prepare an environmental analysis to address *foreseeable* environmental impacts of the methods of compliance.[20] The most foreseeable timeframe for Amendment impacts analysis purposes is the *actual* timeframe in the Amendment for each unit, or from December 31, 2011 (after the SACCWIS reports due October 1st) until the final deadline extensions for each unit (with December 31, 2035 as the very last deadline).

The Staff Report's second incorrect assumption was calculating the impingement and entrainment impacts using design flow data. Here, at least a reason is provided for this assumption: because design flow constitutes the "worst-case scenario."[21] However, despite the fact that the Staff Report correctly states that "[t]he environmental analysis must address the *reasonably foreseeable* environmental impacts of the methods of compliance,"[22] the Staff Report then ignores this mandate

[19] Staff Report, p. 14.
[20] Pub. Res. Code § 21159.
[21] Staff Report, p. 14.
[22] *Id*., p. 11 (emphasis added). *See also* Public Resource Code § 21159**.** An environmental analysis "must focus on the existing environment, not hypothetical situations." *See City of Carmel-by-the-Sea v. Board of Supervisors*, 183 Cal.App.3d 229, 246-247 (1986); *Environmental Planning & Information Council v. County of El Dorado*, 131 Cal.App.3d 350, 352-355 (1982);*County of Amador v. El Dorado County Water Agency*, 76 Cal.App.4th 931, 955 (1999). This rule is clearly discussed in *Communities for a Better Environment v. South Coast Air Quality Management*

by assuming design flow figures, rather than the more realistic actual flow figures, when calculating the impingement and entrainment impacts of the Amendment.[23] This is significant because the relative increases in environmental impacts between the Amendment and the Policy are again masked by use of the much larger, unforeseeable design flow figures, rather than the more accurate actual flow figures. This flows assumption again "smoothes out" the differences between the Amendment and the Policy and hides the actual percentage increases in environmental impacts between the two, inappropriately favoring the Amendment.

The SWRCB's CEQA analysis must "inform the decision makers and the public about the potential significant environmental effects of a proposed project."[24] If Staff had applied actual flow data to the environmental analysis, the Staff Report would have reported a significantly greater *relative* increase in impingement and entrainment under the Amendment versus the Policy, as discussed further in the next section. The State Board must have complete information on the full environmental impacts of the project based on "reasonably foreseeable" conditions that illustrate the true relative costs of the proposed Amendment.

Third, the Staff Report echoes LADWP's unsupported statement that it would "eliminate" OTC after its compliance deadline,[25] even though the Staff Report admits that it is unclear how LADWP will comply with the Policy ("[t]he LADWP Implementation Plan (Appendix B) did not specify whether dry cooling or wet cooling towers would be used to comply with the Policy").[26] The Staff Report follows by noting that "LADWP staff has confirmed that if wet cooling towers are employed, LADWP would use only recycled wastewater…,"[27] resulting in the elimination of OTC. This is disconcerting for several reasons. First, the Staff Report is making a critical assumption based *not* on the formally approved Implementation Plan, but on a mere telephone communication with "LADWP staff." Does the State Water Board have LADWP management's confirmation that LADWP will use recycled water to comply with the Policy? If so, under what adopted compliance plan? Can the State Board be sure that such an off-the-record assurance will be considered binding by LADWP management in 10-25 years? These questions must be answered as part of LADWP's formal, approved Implementation Plan.

This last-minute, informal communication illustrates again the significant deficiencies of the LADWP Implementation Plan. A Implementation Plan must identify the "selected compliance alternative, describe the general design, construction, or operational measures that will be

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District et al., 48 Cal.App.4th 310 (2010). Here, the lead agency argued that the analytical baseline for a project employing existing equipment should be the maximum allowed capacity of that equipment, even if that equipment is operating below that maximum capacity. *Id*. at 2. The court rejected this assumption, holding that it is improper under CEQA for a lead agency to perform an environmental analysis based on the "maximum capacity allowed under prior equipment permits, rather than the physical conditions actually existing at the time of the analysis." *Id.* The California Supreme Court has repeatedly made it clear, a lead agency must compare a proposed project with what is actually happening, not "merely hypothetical conditions allowable under the permits." *San Joaquin Raptor Rescue Center v. County of Merced*, 149 Cal.App.4th 645, 658 (2007). Despite this mandate, the Staff Report utilizes design flow, even though it admits that "the most realistic" analysis is assuming actual flow. Staff Report, p. 14.

[23] Staff Report, p. 14.

[24] 14 C.C.R. § 15002(a).

[25] Staff Report, p. 14.

[26] *Id*. In fact, the Staff Report analyzed use of wet cooling towers with both recycled water and seawater makeup as potential compliance options, given the lack of clarity from LADWP in terms of compliance.

[27] *Id*.

undertaken to implement the alternative, and propose a realistic schedule for implementing these measures that is *as short as possible*."[28] If the Implementation Plan does not even state whether LADWP is using dry or wet cooling, how can the State Board (or SACCWIS) know whether the proposed schedule is realistic? Certainly there is no way of knowing whether the Amendment is "as short as possible" if the State Board does not know how LADWP will come into compliance. This assumption thus not only contributes to an already-flawed environmental impacts analysis, it also symbolizes the hasty process that led to this Amendment.

Finally, it should be noted that the original Staff Report assumed incorrectly that it could calculate the impacts of changes in deadlines for each *unit* using *facility*-wide flows data, an assumption made in large part because LADWP originally failed to provide the required unit-by-unit data in its Implementation Plan. After repeated requests by staff to LADWP, the data was obtained, and the charts revised. As noted below, unit-by-unit data better illustrates the overall relative increase in impacts of the Amendment over the Policy, though further improvements are needed.

B. The Staff Report's Analysis Was Made Post Hoc, and the Revised Analysis Still Underestimates the Relative Impacts of the Amendment

A fundamental purpose of CEQA is to provide the State Board with information to use in deciding whether to approve a proposed project, *not* to justify an already-decided course of action.[29] Courts "have expressly condemned" CEQA reviews that are "nothing more than post hoc rationalizations to support actions already taken."[30]

On May 20th, the initial Staff Report was issued, recommending that the State Water Board approve the Amendment. In justifying the Staff's recommendation, the initial Report contained environmental impacts tables that attempted to present the impingement and entrainment impacts of both the Policy and the Amendment, unfortunately using the inappropriate assumptions noted above. Table 1 concluded that if the Amendment is approved as recommended under the dry cooling scenario, an additional 87,921 fish impingement mortalities would occur,[31] or a **3%** increase[32] over the existing Policy.

After the initial Staff Report was published for public review, conservation groups brought to Staff's attention inaccuracies in their calculations, as discussed above, including the need for unit-specific flows calculations. Staff later revised the Staff Report with the unit-based flows data provided by LADWP (though still using the design flow and 2010-40 assumptions), finding 420,879 fish impingement mortalities,[33] almost *five times* the original figure, under the dry cooling

[28] *Id.*, p. 2 (emphasis added).
[29] *Laurel Heights Improvement Association of San Francisco, Inc. v. The Regents of the University of California*, 47 Cal.3d 376, 382 (1988).
[30] *Id; see also No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 79 (1974).
[31] Initial Staff Report, p. 15 (this figure was changed in the revised Staff Report based on the new calculations, as noted in the next paragraph).
[32] (total Amendment impingement minus total Policy impingement)/(total Policy impingement), or (87,921)/(2,764,590) = .0318 or 3% (Initial Staff Report figures).
[33] Staff Report, p. 15.

scenario. This represents a **17%** increase[34] in impingement impacts over the Policy, far higher than the originally-reported **3%** increase.

However, if the Staff Report had applied *actual*, unit-by-unit flows (rather than design flows), and the *actual* compliance schedules proposed in the Amendment (rather than the apparently randomly selected 2010-40 timeframe), the calculations would show even more significant increases in environmental impacts. For example, under these assumptions, the Amendment would increase relative impingement impacts by **32%**[35] over the Policy under the dry cooling scenario, almost double the reported **17%**. Similarly, recalculation of the entrainment impacts using actual, unit-based flows and actual proposed Amendment compliance deadlines would result in a relative increase in entrainment impacts of **56%**[36] over the Policy, compared with **15.5%**[37] reported in the Staff Report analysis. These alternate assumptions – actual, unit-by-unit flows and actual proposed Amendment schedules – demonstrate significantly higher relative impacts under the Amendment over the Policy, and should be utilized because they represent conditions that are far more "foreseeable" under CEQA than those used in the Staff Report.

To sum up, in extensive revised calculations published for public review just *two* business days before the final comment deadline, staff presented an increase in impingement impacts over five times that originally analyzed (from 3% to 17%), which is *still* almost half of the impacts calculated using assumptions that more closely track reality (32%). Similarly, the entrainment impacts under the actual timeframe and flows are *over four times greater* than the increase in the original and revised Staff Report, rising from 15.5% to almost 56%. Yet, Staff has not made a single substantive change to the Staff Report's analysis or recommendations in light of the Amendment's significant increase in environmental impacts. As with the other assumptions and findings in the Staff Report, the environmental impacts calculations use assumptions that impermissibly minimize the relative impacts of the proposed Amendment to LADWP's favor. This raises the question of what it would take to recommend *against* adoption of the Amendment. Moreover, the haste at which these detailed, significantly changed calculations were released for public review represents yet another significant restriction on the public's right to weigh in on this important issue, especially given the prior errors in these calculations.

VI. THE NEW SECTION 2.C.(4) ILLEGALLY AND INAPPROPRIATELY ATTEMPTS TO JUSTIFY AND MITIGATE THE SIGNIFICANT IMPACTS OF THE AMENDMENT

A. The Staff Report Characterizes New Section 2.C.(4) as Addressing the Impacts of the Amendment, Contrary to the Facts and Established Case Law

The Staff Report again attempts to justify its unsupported deadline extensions, along with their associated significant environmental impacts, by stating that the Amendment would "provide an approach for *addressing* interim impacts" through the newly proposed studies and test in the

[34] (total Amendment impingement minus total Policy impingement)/(total Policy impingement), or (420,879)/(2,432,534) = .173 or 17%.
[35] *See* Attachment 1, "Environmental Impacts of Amendment Versus Policy."
[36] *Id.*
[37] (total Amendment entrainment minus total Policy entrainment)/(total Policy entrainment) = % of entrainment impact, or (8,945,558,378)/(57,445,258,305) = .1557 or 15.5%.

added Section 2.C.(4).[38] The Staff Report further concludes – with no support or analysis – that "Staff believes there will be a reduction in impingement and entrainment as a result of the implementation of new or improved interim control technologies after 2020" as a result of the studies in new Section 2.C.(4).[39] This is directly contrary to the fact that the implementation of these technologies is at best unclear, which is the reason staff concludes that: "due to the *inability at this time to quantify those reductions* . . . staff did not include [them] in the comparison of IM/E btw the Policy and the amendment."[40] It is also contrary to *Riverkeeper II*'s direct admonition that mitigation not be used in place of direct compliance with Section 316(b), a point extensively discussed in the April 2010 and November 2010 comment letters from CCKA *et al* to the SWRCB.[41] In other words, the Staff Report offers the new Section 2.C.(4) as (illegal under *Riverkeeper II*) mitigation for the proposed deadline extensions, while at the same time indicating that there is no way to determine whether it will have any positive impact at all.

The Staff Report also fails to clarify how the proposed new "interim mitigation" measures in Section 2.C.(4) will fit in with approved interim mitigation in the Policy already. That is, will they be used as a substitute for other interim mitigation provisions? Or is it in addition to the existing interim mitigation? This could be significant, given the extremely uncertain impacts of the new section. For example, Section 2.C.(4)(a) requires a commitment to "eliminate OTC for all units at the facility," but it fails to provide a deadline for compliance (which is essential for accountability) or even call for elimination of OTC as of the adopted deadline for compliance with the Plan. As it stands, the current language could easily be read as "after the unit is taken off line in a few decades," which is clearly not consistent with the Policy or Section 316(b).

As another example of the flaws in proposed Section 2.C.(4), Section 2.C.(4)(b) calls for a study or studies "to evaluate new technologies or improve existing technologies to reduce impingement and entrainment." However, the new section fails to identify: even the most basic parameters of such studies, how much they are to "reduce" I/E, how the studies are consistent with Track 2, and how useful they likely would be in light of numerous findings so far that such techniques fail to provide any real value.[42] Similarly, Section 2.C.(4)(c) calls for these studies to be submitted to the SWRCB along with "a proposal to minimize entrainment and impingement" by the end of 2015, raising questions about issues such as: the definition of "minimize," the need for four years to complete a study and a proposal, the consistency with Track 2, the question of whether the required proposal even has to relate to the studies, and the issue of what the regulated community is required to do if their studies come up with no clear course of action (a likely result, given experience to date).

Finally, Section 2.C.(4)(d) allows for completion of an approved proposal (in the event this happens) "no later than December 31, 2020," raising additional questions such as: Why are nine years needed to do one study and then possibly implement it? What would be done if the study

[38] Staff Report, p. 17 (emphasis added).
[39] *Id*., p. 16 (emphasis added).
[40] *Id.* (emphasis added).
[41] Letter from CCKA *et al* to SWRCB, "Comment Letter: OTC Policy Amendment," pp. 27-29 (Nov. 19, 2010), available at: http://www.cacoastkeeper.org/document/comments-on-revised-otc-policy-nov-2010.pdf.
[42] With respect to entrainment, U.S. EPA found that "screening technologies are significantly less effective than initially thought in reducing entrainment mortality, and could not identify a single technology that represented [BTA] for all facilities," raising the question of how useful these studies are likely to be. Staff Report, p. 3.

failed to come up with an approvable proposal? The Staff Report and the Policy Amendment fail to answer these questions. Instead, they would apparently allow for several decades of continued impacts on coastal ecosystems in exchange for one study and a proposal that could then be rejected with no further requirements. This cannot be termed either "interim," "mitigation," or "legal" under *Riverkeeper II*.

B. The Broad Applicability of New Section 2.C.(4) Could Illegally Support Additional Deadline Extensions, Contrary to the Policy and *Riverkeeper II*

The new Section 2.C.(4) appears to be added solely to justify the fast-tracked deadline extensions for LADWP, but it is broadly applicable to all deadline extensions past 2020, with potentially significant results. Of the 14 fossil-fueled plants using OTC (after the ones already converted or shutting down), *half* may be now seeking deadline extensions past 2020.[43] Three or more of those requests extend into the 2030s. In other words, the SWRCB is faced with 10- to 20-plus years of compliance deadline requests for half of the non-nuclear facilities at issue, with the new Section 2.C.(4) as "mitigation" even though it would have completely unknown results. This is particularly problematic because there is significant room in the loose language of new Section 2.C.(4) for the facilities to do *nothing* other than a study and a proposal in order to delay compliance for 10- to 20-plus years and call that "addressing the interim impacts." These new, paper justifications are completely inconsistent with the Policy and its call for a schedule of implementation that as "as short as possible."

VII. THE CEQA ANALYSIS IS INADEQUATE

One of the overarching goals of CEQA is to ensure that the public is not deprived of the opportunity to provide input on the new Policy.[44] The public must have a "meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement."[45] The quickly-changing Staff Report and associated impacts calculations, combined with a lack of the required SACCWIS report, deprives the public of the opportunity to review and comment on an adequate presentation and analysis of the Amendment. It also prevents the State Board from meeting CEQA's mandate of making decisions with their "environmental consequences in mind."[46] Here, the Staff Report fails to analyze the impacts of the Amendment on the local, affected ecosystems, instead dismissing them even when the revised calculations showed that they were significantly higher than even the initially calculated increases. Specifically, the Staff Report concludes, without support, that "Staff has identified no new significant environmental effects or *a substantial increase in the severity of previously identified significant effects* that will result from the amendment to the Policy compared to current

[43] The AES plants do not provide the public with end dates due to claimed confidentiality concerns, but their dates are all already at 12/31/2020, so it appears that most or all revisions would be past 2020.
[44] *See, e.g.*, Public Resources Code Sec. 21003(b): "Documents prepared pursuant to this division [must] be organized and written in a manner that will be meaningful and useful to decisionmakers and to the public." Substantial changes in the Policy itself, unsupported by references in the SED, have precluded the public from a meaningful opportunity to provide useful comments on key areas of the Policy that will significantly impact compliance with Section 316(b).
[45] CEQA Guidelines Sec. 15088.5, http://www.ucop.edu/facil/pd/CEQA-Handbook/chapter_02/pdf/2.3.11.pdf*; see also* Public Resources Code Sec. 21092.1.
[46] *Laurel Heights Imp. Ass'n v. Regents*, 47 Cal.3d at 393 (1988).

conditions."[47] Because the Staff Report fails to adequately analyze the reasonably foreseeable environmental consequences of the Amendment, this analysis must be completed before a decision is made to ensure compliance with CEQA.

Since the Staff Report is the functional equivalent of a Negative Declaration[48] for the Amendment, and since such documents "end environmental review," the Staff Report is reviewed under the "fair argument" standard.[49] Under that standard, "if a lead agency is presented with a *fair argument* that a project *may* have a significant effect on the environment, the lead agency shall prepare [further environmental documentation] even though it may also be presented with other substantial evidence that the project will not have a significant effect."[50] Here, the Staff Report violates CEQA because there clearly is a "fair argument" that adoption of the Amendment will have significant environmental effects that have never been analyzed in an environmental document. As the Staff Report admits, the Amendment results in *at least* a 17% increase in impingement over the existing Policy using design flow calculations, and a 25.5% increase in impingement using (more realistic) actual flow calculations.[51] Equally alarming is Staff's conclusion that the Amendment's *additional* billions of entrained aquatic species does not constitute a substantial increase in the severity of previously identified significant effects.[52] Further information and analysis is certainly called for by CEQA to justify moving forward in the face of such impacts.

Unfortunately, the Staff Report provides no explanation for its conclusion that the Amendment creates no significant effect on the environment. The law is clear; a lead agency must find that a project will have a significant effect on the environment where "[t]he project has the potential to ... substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, [or] reduce the number or restrict the range of a rare or endangered plant or animal…"[53] The lack of analysis on these issues is palpable. Even with the significant increases in impacts with the new Appendix D, the revised Staff Report simply concludes without support that the Amendment would not "cause any additional environmental impacts beyond what has been identified in the SED…" and that the "attached Environmental Checklist (See Appendix C) reflects these findings of no additional impact…"[54] This is a clear misstatement. The SED did not analyze an additional 16 years of non-compliance, for example, nor did the SED analyze the mortality of additional billions of aquatic species.

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[47] Staff Report, p. 12 (emphasis added).
[48] "A negative declaration may not be based on a 'bare bones' approach in a checklist. A 'certified program's statement of no significant impact must be supported by documentation *showing* the potential environmental impacts that the agency examined in reaching its conclusions,' and 'this documentation would be similar to an initial study.'" *City of Arcadia,* 135 Cal.App.4th at 1424 n. 11, *citing Snarled Traffic Obstructs Progress v. City and County of San Francisco*, 74 Cal.App.4th 793, 797, fn. 2 (1999) *and* 2 Kostka & Zischke, Practice Under the California Environmental Quality Act (Cont. Ed. Bar 2005) § 21.11 (brackets omitted).
[49] *City of Arcadia,* 135 Cal.App.4th at 1424, *quoting Ocean View Homeowners Ass'n., Inc. v. Montecito Water Dist,* 116 Cal.App.4th 396, 399 (2004).
[50] *No Oil, Inc. v. City of Los Angeles,* 13 Cal.3d 68 (1974).
[51] Staff Report, Appendix D. Note that these figures are still *below* the increases calculated by the undersigned organizations using the *actual* deadlines for each unit, as described above.
[52] *Id.*
[53] *Gentry v. City of Murrieta*, 36 Cal.App.4th 1359, 1409 (1995).
[54] Staff Report, p. 17.

The SED did, however, discuss the current impacts associated with once-through cooling at LADWP facilities, lending further urgency to the need for analysis of the significant, unanalyzed, new impacts associated with the Amendment's proposed deadline extensions. For example, as noted in the SED,

> [t]he Marine Life Protection Act Science Advisory Team (SAT), made up of 20 scientists, in 2009 identified three major water quality threats in the Southern California Bight with regard to placement of Marine Protected Areas (MPAs). In order of priority, these were: (1) intakes/discharges from power generating facilities; (2) storm drain effluents; and (3) wastewater effluents. In their guidance on placement of MPAs, the SAT stated: "Intakes from power generating facilities are the greatest threat because they operate year round or over many months and there is virtually complete mortality for any larvae entrained through the cooling water intake system."[55]

In addition, a California Energy Commission study found that the three power plants in the Santa Monica Bay (Scattergood, El Segundo, and Redondo) consume nearly 13% of the nearshore water in the Bay every six weeks.[56] The threats of OTC are even greater for enclosed bays and estuaries; it is estimated that Alamitos and Haynes and Alamitos Generating Stations together take in the entire volume of Alamitos Bay *every five days*.[57] Any increases to such impacts must be evaluated thoroughly pursuant to CEQA before a decision can be made on the Amendment.

Moreover, it is not the public's burden to prove that the Amendment's impacts will have a significant effect on the environment. A lead agency will "not be allowed to hide behind its own failure to gather relevant data.... CEQA places the burden of environmental investigation on government rather than the public."[58] California courts have repeatedly held that the fair argument standard can be met with limited facts in the record. "If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences."[59] Therefore, when the record shows a limited amount of facts and analysis, a court is more likely to find a fair argument that the Amendment's impacts will have an effect on the environment.

Additionally, it is noteworthy that there is no CEQA analysis in Staff Report of the new Policy language on page 8 regarding "requirements" for facilities wishing to extend their deadlines

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[55] SED, p. 35, citing MLPA Master Plan Science Advisory Team, "Draft Recommendations for Considering Water Quality and MPAs in the MLPA South Coast Study Region" (Draft rev'd May 12, 2009).
[56] California Energy Commission, "Issues and Impacts Associated with Once-Through Cooling at California's Coastal Power Plants: Staff Report," CEC-700-2005-013 (2005).
[57] Tenera Environmental and MBC Applied Environmental Science, "Summary of Existing Physical and Biological Information and Impingement Mortality and Entrainment Characterization Study Sampling Plan for Haynes Generating Station," p.2 (October 2005).
[58] *Gentry v. City of Murrieta*, 36 Cal.App.4th 1359, 1379 (1995).
[59] *Id*. at 1361; *Sundstrom v. County of Mendocino*, 202 Cal.App.3d 296, 311 (1988); see also *Christward Ministry v. Superior Court*, 184 Cal.App.3d 180, 197 (1986) (fact that initial study checklist was incomplete and marked every impact "no" supported fair argument that project would have significant environmental effects).

past 2020. Given that this is being used by staff as an excuse for extending deadlines,[60] this analysis is critical.

In sum, the State Board must prepare and circulate a Subsequent or Supplemental EIR document to ensure that these impacts are properly considered and mitigated as required by CEQA. The CEQA Guidelines address when Subsequent or Supplemental EIRs must be prepared.[61] The instant action meets these requirements because the project has changed in a manner that will cause significant impacts, as described above. The new EIR must be given the same public notice and review period as the original EIR.

Finally, if the proposed Amendment is in fact adopted, the Board's action will set a precedent for State Board review of other regulated entities' requested deadline extensions. The cumulative impacts associated with these changes will be buried in the individual proposals, as they are under the current Amendment. These results are contrary to the adopted Policy and fail to meet courts' high standard for evaluating such changes. Hiding cumulative impact through division of significant changes into smaller sub-projects piecemeals the environmental review and violates the clear requirements of CEQA.[62]

VIII. THE AMENDMENT VIOLATES ADMINISTRATIVE LAW PRINCIPLES AND IS ARBITRARY AND CAPRICIOUS

As discussed at length in our joint November 2010 letter to the SWRCB, in cases where an agency rescinds a previous decision, there is a *heightened duty* to provide a reasoned analysis for the abrupt change of mind, and to provide a rational connection between the facts and the decision to undo what was "a settled course."[63] Notably, the Supreme Court held that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[64]

Here, the State Board actions in advancing the proposed Amendment represent such a reversal of a settled course of implementation in the Policy, requiring a heightened duty for a well-reasoned and supported analysis. As discussed at length above, the Staff Report "analysis" and new Policy provisions together represent a wholesale reinterpretation of and contradiction to the adopted Policy, amounting to a fundamental change in direction. Examples include but are not limited to: the expansion of the sole justification of grid reliability for deadline changes to include reasons based on cost and other excuses; the reversal of the Policy process from SACCWIS-initiated changes to discharger-initiated changes; the reliance on no new information rather than reliable new information raising grid reliability issues; the creation of new (far weaker) "interim mitigation" measures that ostensibly "address" the impacts created by the multi-decade compliance deadline extensions; and the allowance for significantly more environmental impacts than examined pursuant to Policy adoption. Given that the analysis and reasoning for such wholesale changes is absent

[60] As noted above, it is assumed without support that "Staff believes there will be a reduction in impingement and entrainment as a result of the implementation of new or improved interim control technologies after 2020." Staff Report, p. 16.
[61] 14 CCR §§ 15162, 15163.
[62] *Citizens to Preserve Ojai v. Ventura*, 176 Cal.App.3d 421 (1985).
[63] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) ("*State Farm*").
[64] *Id.* at 43, citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

here, adoption of this Amendment would be "arbitrary, capricious, or entirely lacking in evidentiary support, or contrary to required legal procedures."[65]

In light of these facts and law, the proposed Amendment should be denied, and the Policy should stand as written and as supported by the public process and administrative record.

IX. CONCLUSIONS

As we stated in our joint November 2010 comment letter to the State Board on the prior attempt at premature amendments to the Policy:

> [w]ith the Implementation Plans (which under the Policy may include requests for deadline extensions *needed to ensure grid reliability*) in hand, the State Board may have useful, *new* information before it to consider any potential adjustments in deadlines. *If identified based on such new information*, adjustments to the Policy could also be considered in a *measured public process that includes proper environmental review and documentation. Preempting that process before it has begun, as is proposed by the Amendment before us, is unsound, unsustainable policymaking* that violates numerous state and federal laws.

(Emphasis added.) The overarching Policy directives with regard to careful, deliberate public process, consistent with the Policy provisions, and supported by sound, new data, have been rejected in the instant process. In sum: (a) LADWP has provided no new information related to grid reliability issues associated with its proposed deadline changes; (b) the Amendment fails to include any analysis by or recommendations resulting from SACCWIS because it was in fact released before SACCWIS review, in a reversal of the Policy direction; and (c) the hurried and abbreviated SACCWIS review – which found a lack of "sufficient" information provided in the LADWP Implementation Plan – has obviated the purpose of having an expert energy panel review the Implementation Plans for grid reliability issues. For these reasons and the reasons articulated above, there is simply no support for making a decision on the Amendment now, in the face of such Policy contradictions and lack of data, as well as in light of the City of Los Angeles' own interest in reviewing the Amendment more closely.

Rather than approve the Amendment, we urge the State Board instead to seek and LADWP to provide the necessary information to make the LADWP Implementation Plan sufficiently complete in general, and more specifically justifiable in terms of a grid reliability perspective, *if in fact* there are any grid reliability issues. We also urge the State Board to allow the SACCWIS process to move forward as called for in the Policy, with the necessary grid reliability information in front of the SACCWIS and with the time to consider the new information in context with the rest of the proposals, so that the SACCWIS may prepare the required report and recommendations to the State Board for which it was established. We also urge the State Board to consider such SACCWIS reports and recommendations carefully, and to prepare a sufficiently comprehensive environmental

[65] *Stauffer Chemical Co. v. Air Resources Control Board*, 128 Cal.App.3d 789, 796 (1982); *see also City of Arcadia v. State Water Resources Control Board* 135 Cal.App.4th 1392, 1409 (2006) (applying writ of mandate standard under Cal. Civil Code §1085); *see also* 5 U.S.C. § 706(2)(A); *see also Se. Alaska Conservation Council v. Army Corps of Eng'rs (SEACC)*, 486 F.3d 638, 643 (9th Cir. 2007).

impacts analysis of any resulting deadline changes associated with grid reliability, so that the final State Board decision is adequately informed.

California's coastal, bay, and estuarine ecosystems deserve the attention and direction given by a fully implemented Policy to their continued health. The Policy's mandates must be followed to ensure this result and to support a reasoned, deliberative policymaking process that complies with the law. Thank you for your attention to these comments.

Sincerely,

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cc: Statewide Advisory Committee on Cooling Water Intake Structures

Attachment 1: Environmental Impacts of Amendment versus Policy
Attachment 2: Letter from Heal the Bay *et al* to SACCWIS, "LADWP Implementation Plan" (July 1, 2011)
Attachment 3: Motion Presented by Los Angeles City Council Member Jan Perry, 9th District to the Los Angeles City Council Committee on Energy and the Environment (June 24, 2011)

ATTACHMENT 1:

Environmental Impacts of Amendment versus Policy

Attachment 1: Environmental Impacts of Amendment Versus Policy*

Results: Amendment results in 32% increase in impingement impacts, and 56% increase in entrainment impacts, over impacts of Policy

Unit	Deadline Policy	Deadline Amndmnt	Diff. (yrs)	Actual Flow, MGD	Impingement (#fish/ MGD)	Entrainment (#larval fish/MG)	Impingement Policy (# fish)[1]	Impingement Amndmnt (# fish)[2]	Entrainment Policy (#larval fish)[3]	Entrainment Amndmnt (#larval fish)
Harbor 5	12/31/2015	12/31/2031	16	47	0.4945	3962	33,933	169,663	347,996,723	1,359,362,200
Haynes 1&2	12/31/2019	12/31/2027	8	221	0.1893	12305	122,159	244,318	8,496,508,982	15,881,325,200
Haynes 5&6	12/31/2019	12/31/2013	-6	236	0.1893	12305	130,450	32,613	8,479,621,600	2,119,905,400
Haynes 8	12/31/2019	12/31/2035	16	210	0.1893	12305	116,079	348,236	8,601,785,640	22,636,278,000
Scattergood 1&2	12/31/2020	12/31/2024	4	155	0.8226	2797	418,847	605,002	1,468,469,752	2,057,123,575
Scattergood 3	12/31/2020	12/31/2015	-5	135	0.8226	2797	364,803	162,134	1,240,399,575	551,288,700
TOTALS							1,186,271	1,561,966	28,634,782,272	44,605,283,075

*Table is calculated pursuant to a scenario of "zero impacts" under the Amendment post-compliance deadline, though the LADWP compliance strategy has not been definitively determined. Entrainment and impingement figures are from the SED, Tables 2 and 3, and Staff Report, Appendix D, p. 2.

[1]Assume start date 12/31/11 and no impingement after the applicable deadline. So 4 yrs*(365 days/yr)(47 MG/day)(0.4945 fish/MG) = 33,933 fish impinged up to 2015 under the Policy for Harbor 5.

[2]*E.g* ., Harbor 5 under the Amendment would be 20 yrs*(365 days/yr)(47 MG/day)(0.4945 fish/MG) = 169,663 fish impinged.

[3]Assume start date 12/31/11 and: (a) 93% reduction (Track 1) at Policy deadline and (b) OTC eliminated as of the Amendment deadline. So the Policy is in two parts; first (for Harbor): 4 yrs*(365 days/yr)(47 MG/day)(3,962 larval fish entrained/MG) = 271,872,440 larval fish entrained up to 2015. Second, multiply that figure by 0.07, divide out the number of years (4) to make it annual, then multiply by the difference between the Policy and Amendment deadlines (16), and add to the first figure for the total. If the Amendment shuts down the OTC before the Policy, calculation assumes 93% reduction until the Policy deadline.

ATTACHMENT 2:

Letter from Heal the Bay *et al* to SACCWIS, "LADWP Implementation Plan" (July 1, 2011)

Heal the Bay * Natural Resources Defense Council * Santa Monica Baykeeper *
Surfrider Foundation * California Coastkeeper Alliance

July 1, 2011

Charlie Hoppin, Chair and Board Members
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Via email: commentletters@waterbaords.ca.gov

Re: Los Angeles Department of Water and Power Implementation Plan

Dear Chair Hoppin and Board Members:

Thank you for the opportunity to comment on Los Angeles Department of Water and Power's (LADWP) Implementation Plan for the State Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling (Policy).

As you are aware, the Policy requires each generator to submit an Implementation Plan identifying the compliance alternative selected, describing "the general design, construction, or operational measures that will be undertaken to implement the alternative," and proposing a compliance schedule "that is as short as possible." Policy 3.A.(1). The Implementation Plans are then submitted to the Statewide Advisory Committee on Cooling Water Intake Structures (SACCWIS), whose purpose is to review and ensure each plan takes into account the local area and grid reliability issues and potentially to make recommendations to the State Water Resources Control Board (State Board) on implementation strategies and schedules, in so far as there are legitimate grid reliability concerns.

LADWP submitted an Implementation Plan (Plan) on April 1, 2011, for its three coastal power plants, Harbor, Haynes, and Scattergood. In its Plan, LADWP expresses intent to comply with the Policy under Track 1 by eventually phasing out the use of once-through cooling (OTC) at all of its facilities and requests significant deadline extensions for compliance.

Power Plant	**Deadline in Adopted Policy**	**LADWP's Proposed Extension**
Harbor	2015	2031
Haynes	2019	Unit 5&6: 2013 Unit 1&2: 2027 Unit 8: 2035
Scattergood	2020	Unit 3: 2015 Unit 1&2: 2024

The Implementation Plan is inadequate in general, and more particularly fails to provide sufficient rationale for such extensive delays and leaves unresolved how exactly LADWP will eliminate OTC at each of its plants. Thus, LADWP has not met its burden to "describe the general design, construction, or operational measures that will be undertaken" to implement the Track 1 alternative that it has chosen. Policy section 3.A.(1). It is impossible to adequately comment on the Plan or its implications for local or grid reliability, when essential details—such as whether the plant will be combined-cycle, what size it will be, whether there will be changes in generation capacity, whether it will be used for peaking, etc.—are left open.

Prior to the required SACCWIS review, State Board staff has proposed amendments to the Policy based on LADWP's Implementation Plan which accommodate all of LADWP's requested deadline extensions. This order of process does not follow the Policy, and leaves no opportunity for meaningful analysis by the SACCWIS or any other party. Instead, the SACCWIS and public are left only to review the minimal information provided in the LADWP Implementation Plan, without any significant independent analysis. Given that the SACCWIS meeting to review the Implementation Plan and the comment deadline to the State Water Board on the proposed amendment to the Policy are both on July 5, 2011, we are necessarily submitting these comments without knowledge of the SACCWIS actions or recommendations. The manner in which this amendment has been rushed clearly undermines the ability of the SACCWIS to function as planned or stakeholder groups to appropriately participate in the process.

We are committed to working with the State Board and power plant owners and operators to ensure that the Policy is implemented in a reasonable timeframe while safeguarding reliability. Although LADWP expresses intent to eventually phase out the use of OTC, which we find commendable, the proposed timeline is not justified by the information provided in the Implementation Plan, is unreasonable, and contravenes the Policy and the Clean Water Act (CWA). The extent of this proposed delay, without sufficient justification, completely contravenes the Policy, and the careful multi-year research and development process that went into the Policy design. Thus, we urge the State Board to refrain from amending the Policy until LADWP provides the SACCWIS with the detailed information necessary for the SACCWIS to conduct a meaningful review, including examining alternatives to the proposed timeline to accelerate compliance with the Policy,

The undersigned groups submit the following comments regarding LADWP's Implementation Plan for your consideration:

- As written, LADWP's Plan fails to provide adequate justification for extending compliance deadlines;
- The immediate and interim mitigation measures are unsubstantiated, inaccurate, and do not conform to the Policy;
- LADWP attempts to exploit the flexibility built into the OTC Policy to avoid meaningful compliance deadlines;
- Phasing out the use of OTC and integrating an increased number of renewable sources of energy are potentially complimentary, not necessarily contradictory as LADWP suggests;
- LADWP impermissibly attempts to use cost and potential rate increases to justify compliance timeline adjustment.

I. LADWP Fails to Provide Justification for an Extended Schedule

The Policy requires implementation plans to "identify the compliance alternative selected by the owner or operator, describe the general design, construction, or operational measures that will be undertaken to implement the alternative, and propose a realistic schedule for implementing these measures that is as short as possible." Policy 3.A.(1). For plants that choose to repower or eliminate once-through cooling, the implementation plans are to "identify the time period when generating power is infeasible and describe measures taken to coordinate this activity through the appropriate electrical system balancing authority's maintenance scheduling process." *Id*. Further, when "closed-cycle wet cooling is used as a compliance alternative, the owner or operator shall address in the implementation plan whether recycled water of suitable quality is available for use as makeup water." Policy 3.A.(2). LADWP fails to provide even the most basic information about how it intends to meet the Policy requirements. For each of LADWP's plants, the technology of the repowered units is "to be determined", the amount of power to be generated is "to be determined", the electrical characteristic of

the new repowered generating units is "to be determined," and the information regarding air permits and required offsets "has not yet been initiated." LADWP Implementation Plan p. 26-31. The only thing presented as certain in the Implementation Plan is that LADWP needs more time to comply – decades longer than the Policy currently permits for some of its units. LADWP is promising to end all use of OTC by 2035, fifteen years after the 2020 deadline that the Policy currently mandates, without providing any of the information required by the Policy and necessary for a meaningful SACCWIS review.

A. Claims that Grid Reliability Require an Extended Schedule Are Unsubstantiated

As currently drafted, LADWP's Implementation Plan fails to give clear and justifiable reasons as to why more time is needed for compliance. LADWP claims that an extended compliance schedule is required in order to sustain grid reliability, but does not substantiate these claims. In some cases, the plan goes so far as to say that decades of delay are necessary before LADWP can even begin to *plan* what sort of plants will be used to replace the existing OTC fossil plants.

LADWP claims that more time is needed because units cannot be taken off-line during the repowering process. The Implementation Plan repeatedly states: "[a]t no time can any of the existing units be taken off line (shut down) for years at a time to repower and change from OTC to closed cycle cooling." Plan at 2. The Plan makes no mention of why the planning, permitting and pre-construction phases cannot more completely overlap. Furthermore, the Plan does not indicate why options short of full repowering of every unit are not considered. LADWP starts with the presumption that repowering is its only option, and fails to analyze or provide discussion of additional options, such as retirement, replacement, power purchases, transmission upgrades or retrofitting with closed-cycle cooling in the interim before repowering. Even if LADWP's preferred compliance route is repowering, no substantiation is provided for why they need as much as a 15 year extension of the Policy's compliance schedule. Detailed unit by unit information is necessary to adequately assess if any extension is merited, and if it is, what the appropriate extension should be for each unit.

The Policy does not require repowering, but contemplates that a generator may decide to retrofit a facility at the time of eliminating (or reducing) OTC. Policy section 3.A(1). The Board should not confuse LADWP's possible business decisions to eventually repower plants for a legitimate reliability concern with the existing timeline. LADWP has not provided any justification for its desire to repower with a closed-cycle cooling system for compliance (especially for units that were recently repowered) over closure, power purchase, transmission improvement or retrofitting with closed cycle wet cooling. Other options for compliance may be faster, cheaper and have additional environmental benefits and should at least be considered in the Implementation Plan. These options could help LADWP reach compliance "as soon as possible", as required by the Policy (Policy section 2.B.(1)), and could potentially decrease costs (though again, cost is not a factor in assessing deadline changes).

The State Board anticipated that LADWP might require more time to "study and implement replacement infrastructure solutions" and already has provided an extra three years for compliance beyond what is required of the Greater Bay Area and San Diego Regions in the final Policy. Policy section 1.K. In its Implementation Plan, LADWP does not address the fact that the Policy already built in sequential compliance based on a grid reliability analysis. Perhaps the most significant question unanswered in its analysis is whether, after repowering several units, the same number of units is necessary for grid reliability. More efficient units, increased renewable energy, and greater energy efficiency investments will all change the status quo and may result in increased capacity margins (for example, the El Segundo Generating Station Units 1 & 2 repowering project increased capacity from 350

MW to 560 MW).[1] LADWP attached a reliability report to their implementation plan, but the report only discusses capacity requirements for 2010, it does not discuss scenarios or alternatives for power management to meet the Policy requirements as soon as possible. In its most recent grid reliability study submitted to the State Board on February 3, 2011, LADWP did not discuss this issue.

LADWP also repeatedly asserts that there is insufficient space at the generating plants to simultaneously build closed cycle units. However, insufficient evidence is provided for this assertion, as only rudimentary site maps and repower schematics are provided in the Implementation Plan. Moreover, a 2008 Tetra Tech study commissioned by the Ocean Protection Council to examine feasibility of conversion to alternative cooling systems at OTC plants in California, which includes a space constraint analysis, deems retrofit to closed-cycle wet cooling feasible at Scattergood, Harbor and Haynes Generating Stations.[2] As the regulated party asking for a significant deadline extension, LADWP should be required to provide a more detailed justification about the space constraints to Policy compliance; especially given the Tetra Tech study findings.

Further, LADWP claims that the plants are "locked in" and input from an outside system is impossible. LADWP states, "as a result of the increased urbanization, the internal transmission lines are 'locked in' [t]here is no real estate for adding new, or making substantial upgrades to the existing, local transmission lines within the City." Plan at 7. However, these assertions are made without any detailed information on current or past electricity sales and purchases, or technological limitations of transmission upgrades (for example can the transmission lines carry more power without the need for more real estate?).

LADWP also claims that the Policy threatens the balance of its entire transmission system, asserting that "the schedule as stipulated in the Policy would threaten LADWP's grid reliability by requiring critical units to be shut down that would cause an imbalance to the voltage support of the system. [t]his would result in a total shut down of the transmission system." Plan at 1. However, LADWP fails to explain how or when the system would be imbalanced. LADWP also does not address whether it is possible for a temporary shut-down to be mitigated by another plant increasing its level of operation or through other temporary solutions. Further justification for its claims are needed for the SACCWIS and State Board to give it due consideration. While it is possible that some delay could be warranted, the lack of analysis and information in the current Implementation Plan does not support the lengthy extension that LADWP requests. The significant length of the proposed delay, without sufficient justification, completely contravenes the Policy and the careful multi-year research and development process that went into the Policy design.

Additionally, when considering LADWP's proposed compliance schedule extension, the State Board should keep focused on the fact that the Policy was designed to minimize the impacts of OTC on marine life. However, evaluation of the additional marine life impacts associated with LADWP's proposal is not included in the Implementation Plan. The marine life mortality effects of the compliance deadline extension proposed by LADWP must be evaluated within the context of the objectives of the original Policy and adequately mitigated before this proposal is considered by the State Board.

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[1] NRG, *El Segundo Generating Station California 316(b) Implementation Plan* (March 30, 2011) *Available at* http://www.swrcb.ca.gov/water_issues/programs/ocean/cwa316/powerplants/el_segundo/docs/esgs_ip2011.pdf.

[2] Tetra Tech, Inc., *California's Coastal Power Plants: Alternative Cooling System Analysis* (February 2008) *Available at* http://www.swrcb.ca.gov/water_issues/programs/ocean/cwa316/docs/acs_analysis2008/fullreport.pdf.

B. LADWP Inappropriately Attempts to Use Cost and Potential Rate Increases to Justify Compliance Timeline Adjustment

LADWP raises several claims regarding cost and potential rate increases in an attempt to justify extending the compliance deadlines. However, the Policy explicitly states that "cost is not a factor to be considered when determining feasibility under Track 1." Policy section 5 Definitions of Terms. Additionally, cost considerations were already examined in the technical feasibility study conducted in 2008 by Tetra Tech, Inc.,[3] where it was found technically and logistically feasible that the Haynes[4], Harbor[5], and Scattergood[6] plants could be retrofit to closed-cycle cooling.

Even if cost were allowed to be considered under Track 1 compliance, LADWP fails to provide adequate justification for claims related to compliance cost and potential rate increases. LADWP does not provide any information on costs of various technology options for each plant, what portion of those costs are attributable to the policy (rather than based on other economic, reliability or environmental benefits of transitioning away from older inefficient plants) or economic figures related to potential rate increases. In fact, on numerous occasions, LADWP has claimed that compliance with the Policy will cost the agency billions of dollars, but has not provided a comprehensive budget that details this claim, even in response to a 2010 Public Records Act request on this topic by Santa Monica Baykeeper.

C. Other Mandates Do Not Excuse LADWP from Timely Compliance

LADWP inappropriately uses other mandates as excuses for further delay. For example, LADWP claims that its renewable energy goals render the OTC Policy impossible; however, phasing out the use of OTC and integrating an increased number of renewable sources of energy are potentially complimentary, not necessarily contradictory, as LADWP suggests. For example, repowering to a more efficient and faster starting form of energy generation using closed-cycle cooling will improve the overall efficiency of a plant and reduce start-up time, thereby improving the capacity of plants to support integration of renewable resources. Additionally, some renewable energy projects, if appropriately integrated and forecasted, can significantly reduce the need for fossil peaking plants. Furthermore, renewable energy mandates are likely to increase as time goes on—the State Board should not accept LADWP's assumption that all renewable energy integration needs will end in 2020, at which point earnest attempts to comply with the OTC policy could begin. In all likelihood, renewable energy and other environmental mandates will continue to increase after 2020. LADWP is under various mandates for improved environmental performance, including air quality requirements, a renewable power standard and the greenhouse gas emissions performance standard. However, the mere presence of these mandates says nothing about whether they complement each other or compete in driving LADWP to a more sustainable electric system. If the state provides LADWP an exemption from these policies at the suggestion that the standards may provide management difficulties, LADWP would be under no obligation at all. While legitimate reliability concerns should be the subject of analysis and potential timeline modification, unless LADWP is held to meaningful standards, they will likely be unable to make the changes necessary to meet any, let alone all, of these mandates.

LADWP states that its repower of Haynes Units 5 and 6 (already underway) will reduce overall use of OTC by 42% compared to 1990 usage by 2013. Plan at 3. Moreover, after the completion of the Scattergood Unit 3 project, targeted to be completed by 2015, LADWP claims that its "overall OTC usage will be reduced by 56% compared to 1990 usage." Plan at 3. However, LADWP fails to provide

[3] *Id*. at ES-1.
[4] *Id*. at F-1.
[5] *Id*. at E-1.
[6] *Id*. at O-1.

information on how these flow reduction numbers were calculated (e.g. if they were based on actual flow or design flow). If these statistics are based on design flow, for example, then the numbers are exaggerated, as these facilities are not operating at the capacity of design flow.

D. The Proposed Deadline Extensions Would Increase Damage to Marine Resources

LADWP has "revised the repowering sequence at the Scattergood Generating Station so the largest OTC unit will be replaced first," resulting in an extra 10% overall OTC reduction. Plan at ES-9. Although the revised Scattergood compliance schedule is favorable to reducing the impacts of OTC, LADWP's compliance timeline extension request for Haynes is in direct contravention of the intent of the Policy to minimize marine life mortality. The entrainment and impingement of marine life in LADWP's generating plants is some of the most harmful in the state. Haynes generating plant has the highest estimated annual larval entrainment in the state at 3,649,208,392 individuals. Scattergood has an estimated annual entrainment of 365,258,133 individuals. Impingement is also very high at LADWP's facilities.[7] It is critical that any deadline extension be considered in terms of potential reductions or increases in marine life mortality caused by the adjustments. LADWP's Plan does not provide adequate explanation as to why an extension is needed, and certainly does not provide adequate justification for the increase damage to marine life and resources that would result from a decades-long compliance deadline extension.

II. LADWP's Immediate and Interim Mitigation Measures Are Unsubstantiated, Inaccurate, and Do Not Conform to the Policy

A. Reducing Flow in Non-Generating Units

The Policy requires existing units with offshore intakes to install large organism exclusion devices (Policy 2.C.(1)) and requires units that are not directly engaged in power-generating activities or critical system maintenance to cease intake flows by October 1, 2011, unless the facility "demonstrates to the State Water Board that a reduced minimum flow is necessary for operations." Policy 2.C.(2). Instead of providing the details required by the Policy, LADWP provides conclusory, unsupported statements that "water needs to flow through the system [at all three coastal power plants] at all times" without providing an explanation as to why it cannot employ flow mitigation measures, such as variable speed pumps that are used at other facilities, including Pittsburg and Contra Costa Generating Stations. Plan at 33. LADWP appears to fall back on grid reliability as its reasoning, but as mentioned above, fails to adequately justify why all plants require intake flow at all times of the year, especially at times where demand is significantly lower and that some of LADWP's generators operate as peaker plants, not baseload plants.[8] The Plan should not be accepted without this basic information.

B. Studies and Fees Are Not Adequate Interim Mitigation Measures

The Policy requires existing plants to "implement measures to mitigate the interim impingement and entrainment impacts resulting from the cooling water intake structures, commencing [October 1, 2015] and continuing up to and until the owner or operator achieves final compliance." Policy 2.C.(3).

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[7] State Water Resources Control Board & California Environmental Protection Agency, *Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling, Final Substitute Environmental Document* (May 4, 2010) [herinafter Final SED]. *Available at* http://www.swrcb.ca.gov/water_issues/programs/ocean/cwa316/docs/cwa316may2010/sed_final.pdf

[8] The Final SED states that Harbor and Haynes Units 5 and 6 operate as peaker plants. *Id.* at 53, table 11. http://www.swrcb.ca.gov/water_issues/programs/ocean/cwa316/docs/cwa316may2010/sed_final.pdf

Specific interim mitigation measures must be included in the generator's implementation plan under the Policy.

We raised significant concerns regarding the use of "interim mitigation measures" in our joint letter to the State Board dated November 19, 2010.[9] As we noted in our letter,

> [f]or many facilities it may now be the case that "interim" mitigation is in fact long-term mitigation with no BTA implementation in sight – in other words, *de facto* illegal use of mitigation and restoration in lieu of BTA [under *Riverkeeper II*]. . . . While we support interim mitigation measures that have clear, enforceable, effective interim and final BTA-focused deadlines which demonstrably lead to compliance "*as soon as possible*," we do *not* support the illegal use of mitigation *in place of* BTA. . . . The State Board's SED already described a 10-year compliance period as "lengthy";[10] years on top of that shifts from an implementation schedule to noncompliance. "Mitigation" cannot be used to justify extended avoidance of BTA.[11]

Even if these actions could be termed legal "interim mitigation actions," LADWP's Plan only addresses interim mitigation measures for impingement at Scattergood, relying on a velocity cap that was previously installed. It fails to address the Policy's call for interim mitigation for entrainment at any of its facilities or impingement at its two other coastal power plants. Instead, LADWP merely proposes to "foster the development of new technologies, and improvements to existing technologies, through jointly-sponsored pilot studies." Plan at 34. Conducting pilot studies does not meet the requirement to employ effective interim mitigation measures. LADWP must be required to either implement appropriate, effective, legal mitigation measures by October 1, 2015, consistent with the Policy, or, where such measures are illegal mitigation in lieu of BTA under Riverkeeper II, must implement BTA "as soon as possible."

LADWP also proposes to provide funding to the California Coastal Conservancy as interim mitigation until final compliance with the Policy is achieved. At $3.00 per one million gallons withdrawn by each unit, LADWP proposes to pay approximately $389,273 per year, starting in October 2015 and decreasing until LADWP's final proposed deadline of 2035. Despite LADWP's claim that this is the State Board's "preferred mitigation method" (Plan at 35), the Policy only anticipated mitigation fees as an interim measure until 2020 or shortly thereafter. Furthermore, there is no basis for selecting $3/MG as the selected figure.[12] In fact, this figure is astoundingly low considering the cost of compliance with the Policy as analyzed by TetraTech. [13] Table 28 of the SED presents a summary of annual facility costs for the plants finding that "the TetraTech study evaluated each facility with respect to technologies that can achieve a 90-95% reduction if IM/E impacts as discussed in the 2006 Ocean Protection Council resolution."[14] Examples of 20-year annualized compliance costs reported in Table 28 for the combined cycle LADWP units are: $6,000,000/yr for Haynes and $2,700,000/yr for Harbor. An example of 20-year

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[9] Letter from CCKA *et al* to State Water Resources Control Board, "Comment Letter – OTC Policy Amendment," pp. 27-30 (Nov. 19, 2010), available at: http://www.cacoastkeeper.org/document/comments-on-revised-otc-policy-nov-2010.pdf.

[10] SED, p. 83.

[11] Letter from CCKA *et al* to State Water Resources Control Board, "Comment Letter – OTC Policy Amendment" at 28.

[12] As we noted in our November 19th letter, "there is no rational basis – or indeed, *any basis whatsoever* – provided in the Staff Report for public review for this apparently randomly selected figure of $3/MG." *Id,*

[13] Tetra Tech, Inc., *California's Coastal Power Plants: Alternative Cooling System Analysis*, February 2008, p. ES-4. *Available at*: http://www.swrcb.ca.gov/water_issues/programs/ocean/cwa316/docs/acs_analysis2008/fullreport.pdf. Accessed June 21, 2011.

[14] Final SED, supra note 4, at 121.

annualized costs reported for a simple cycle fossil-fueled plant is $18,600,000/yr for Scattergood. LADWP provides no rationale for setting this fee so low, besides the obvious fact that it provides a much cheaper alternative to compliance with the Policy. The State Board is solely responsible for ensuring that a fee is consistent with *Riverkeeper II* and, if so, developing the supporting analysis for setting an appropriate interim mitigation fee amount. This fee must be directly tied at a minimum to the environmental costs associated with OTC operations, and must be set at a level high enough (*i.e*, in consideration of the above figures) enough to avoid incentivizing delay.

III. LADWP Attempts to Exploit the Flexibility Built into OTC Policy to Avoid any Meaningful Compliance Deadline

The State Board should not allow LADWP to use its long-term intent to eliminate OTC as an excuse for the significantly delaying compliance. Section 3.B of the Policy provides that "The SACCWIS shall be impaneled no later than January 1, 2011, by the Executive Director of the State Water Board, to advise the State Water Board on the implementation of this Policy to ensure that the implementation schedule takes into account local area and grid reliability, including permitting constraints." It also specifically calls for the SACCWIS to provide recommendations with modifications to the implementation plan when merited by grid reliability and permitting issues[15] "every year starting in 2012." Policy 3.B.(4). This flexibility was built into the policy due to concerns about grid reliability raised by LADWP and other generators during the policy development process. However, LADWP has ignored this provision and made four attempts, both legislatively and administratively, to force extension of its compliance deadlines, rather than work within the appropriate Policy process to provide extensions for grid reliability purposes.

Before any adjustments to the compliance schedule can be considered, SACCWIS must review the proposed implementation plan and issue a report to the State Board with recommendations no later than October 1, 2011. Policy section 3.B.(2). The SACCWIS process is intended to address local area and grid reliability concerns only. These considerations are subject to the mandate in section 3.A.(1) of the Policy, which requires the implementation plan to "propose a realistic schedule for implementing these measures that is *as short as possible*." (emphasis added).

Accordingly, LADWP, must both demonstrate *a need* for an extended schedule based clearly on grid reliability issues and a schedule that is *as short as possible.* Without such a demonstration, recommended delays will have additional environmental impacts without any appropriate justification. Because LADWP has failed to justify the need for an extension, it is impossible for SACCWIS, the Board, the public or other regulatory agencies to properly evaluate its proposed deadline extension.

LADWP's efforts to evade the Policy process should not be accepted by the State Board, and LADWP should be required to provide the necessary data and analysis to justify its claims regarding grid reliability, as required by the Policy. The State Board should only allow deadline extensions that are in fact necessary for grid reliability and are *as short as possible*. Failure to do so will have significant negative environmental impacts set a poor precedent for other generators that plan to pursue similar compliance timeline adjustment requests.

IV. Additional Detail is Needed Within LADWP's Proposed Compliance Timeline

LADWP fails to explain why there is so little overlap in the tasks outlined in the compliance timeline. For example, chart 1 in the Implementation Plan outlines LADWP's proposed tasks associated with its proposed compliance schedule extension. Plan at 14. It is not clear why all of the tasks need to be

[15] *Id.*

done in a linear fashion, and why some of them cannot be conducted simultaneously. For example, Tasks 3 (CEQA process), 4 (preparing the request for proposals) and 5 (preparing the City Council ordinance for design/build contracts) should be able to be conducted concurrently, as part of the preparation phase for repower or retrofit of all the OTC facilities. LADWP predicts that the CEQA process (Task 3) will take 18 months, while preparing the request for proposals (Task 4) will take seven months, and preparing the City Council ordinance (Task 5) will take an additional month. Plan at 14. Additionally, the Plan states that Tasks 9 (equipment procurement) and 10 (demolition) can be done simultaneously, yet Chart 1 separately allocates 20 months for equipment procurement and 18 months for demolition. Plan at 14. Conducting these tasks concurrently would expedite compliance by several years. The timeline should be streamlined to show that these activities can be done concurrently, therefore saving an additional year or more on the compliance timeline.

LADWP also fails to explain why its grid reliability assessment and proposed timeline differs so much from the 2008 Jones & Stokes Grid Reliability Report commissioned by the Ocean Protection Council and State Water Resources Control Board. That report estimates that it should actually take LADWP ***less*** time than privately owned plants to repower, stating that "planning time for developing new or repowered resources may be somewhat shortened compared to the private sector because the same entity would propose the plant and approve its cost recovery rates, but its siting, regulatory approval, construction, and testing processes and timelines are essentially identical to that of private developers."[16] Additionally, that report found that new power plants or transmission projects for LADWP should be quite similar to that for any other developers: "about 5 years for a new power plant, and about 7 years for a new transmission line."[17]

V. Conclusion

After years of policy development process and extensive consultation with energy agencies, the State Water Board adopted a very moderate compliance schedule that fully considered stakeholder written and oral comments, workshops, and outside technical reports. The timeline was developed with considerations of grid reliability, cost and environmental impacts. Despite this moderation and compromise, and the numerous objective studies conducted to assess both economic and grid reliability issues, LADWP has made repeated attempts to circumvent the Policy and significantly extend its own deadlines. This Implementation Plan is yet another attempt to carve out an unwarranted extension for LADWP, without meaningful justification. LADWP has not offered any new information for the State Water Board or the SACCWIS to justify claims that a 15+ year deadline extension is warranted. The Plan should not be allowed to move forward without the basic information that it is currently lacking.

The Policy was designed to minimize the impacts of OTC on marine life; yet, evaluation of additional marine life mortality directly resulting from LADWP's proposal is not included in the Implementation Plan and is dismissed as having "no additional impact to the environment beyond those identified in the SED for the Policy" by the State Board Staff. Draft Staff Report at 17. The marine life mortality effects of the compliance deadline extension proposed by LADWP must be properly evaluated within the context of the objectives of the original Policy and adequately mitigated before this proposal is considered by the State Board. Furthermore, if the State Board and SACCWIS choose to move forward without requiring that adequate justification and ecological impact analysis be provided by LADWP to support its proposed compliance deadline extension, it will set a terrible precedent for future compliance schedule adjustment requests from OTC operators throughout the state.

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[16] Jones & Stokes, *Electric Grid Reliability Impacts from Regulation of Once-Through Cooling in California, prepared for the Ocean Protection Council and State Water Resources Control Board,* p.16 (April 2008), *Available at* http://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/reliability_study.pdf

[17] *Id.*

Sincerely,

Mark Gold
President
Heal the Bay

Noah Long
Energy Program Staff Attorney
Natural Resources Defense Council

Liz Crosson
Executive Director/Baykeeper
Santa Monica Baykeeper

Joe Geever
California Policy Coordinator
Surfrider Foundation

Linda Sheehan
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Alison Dettmer, SACCWIS, California Coastal Commission
Richard Corey, SACCWIS, California Air Resources Board
Mike Tollstrup, SACCWIS, California Air Resources Board
Melissa Jones, SACCWIS, California Energy Commission
Julie Fitch, SACCWIS, California Public Utilities Commission
Jan Perry, Council President Pro Tempore, Los Angeles City Council

ATTACHMENT 3:

Motion Presented by Los Angeles City Council Member Jan Perry, 9th District to the Los Angeles City Council Committee on Energy and the Environment (June 24, 2011)

ENERGY & ENVIRONMENT

MOTION

In May 2010, the State Water Resources Control Board (SWRCB) adopted a Statewide Once-Through Cooling (OTC) policy that requires operators of power plants that use OTC to minimize its use in order to reduce environmental impacts. OTC relates to the use of marine water to cool power plant turbines as they generate electricity. Once the turbines are cooled, the marine water is discharged to the ocean. The OTC process results in harmful impacts to marine life.

On June 4th, 2011, representatives from the Natural Resources Defense Council (NRDC) expressed their concerns to the Energy and Environment Committee and the Board of Water and Power Commissioners regarding the Department of Water and Power's (DWP) alternate OTC compliance plan. They indicated that the proposed plan would allow the DWP a longer period to comply with the SWRCB's requirements and thereby pose ongoing impacts to marine life.

The DWP has stated that an alternate OTC compliance plan is necessary since the existing requirements are operationally infeasible and would result in significant impacts to service. The DWP also stated that a phased compliance period would allow the Department to effectively repower their generating units and eliminate the use of OTC.

Both the NRDC and the DWP have provided viable arguments with regard to the OTC matter and its effects on the environment and utility operations.

On July 19th, 2011, the SWRCB plans to consider an amendment to its existing OTC policy relative to granting the DWP an adjusted compliance period. In order to ensure that this matter is fully assessed and that the best interests of the City and the environment are maintained, it is necessary that the DWP report to the Council regarding the OTC matter.

In addition, the City Administrative Officer should be requested to provide a financial review of the existing OTC policy and the proposed alternate policy on the Department's operations. Furthermore, representatives of the SWRCB should be requested to participate in the Council's review of the OTC matter by providing background as to the existing policy and the proposed alternate compliance schedule.

I THEREFORE MOVE that the Department of Water and Power (DWP) be requested to report to the Council in 15 days relative to the Statewide Once-Through Cooling (OTC) policy and the proposed amendment to the policy which the State Water Resources Control Board (SWRCB) plans to consider on July 19th, 2011.

I FURTHER MOVE that the City Administrative Officer be instructed to report as to the financial impact of the existing OTC policy and the proposed amendment to the policy on the DWP's operations.

I FURTHER MOVE that representatives from the SWRCB be requested to participate in any Council hearing of the OTC matter to provide information as to the existing OTC policy and the proposed amendment to the policy.

PRESENTED BY: _____
JAN PERRY
Councilmember, 9th District

SECONDED BY: _____