



California's New Policy on Coastal Power Plants

How does the Board's "once-through cooling" Policy address key environmental concerns?

On May 4, 2010, the State Water Resources Control Board adopted a final Policy (Final Policy) governing the use of coastal and estuarine waters for cooling at 19 California coastal and Delta power plants. The Final Policy put California on track to phase out once-through cooling (OTC) impacts by requiring power plants to employ the Clean Water Act's mandated "best technology available" standard (or a comparable effort) to protect fish and other aquatic life from OTC.

Conservation, fishing and environmental justice groups had raised several issues of significant concern with the Draft OTC Policy released by the State Water Board on March 22, 2010 (Draft Policy). The groups argued that the Draft Policy was deeply flawed and would have failed to meet the Clean Water Act's direction to phase out OTC impacts to coastal and Delta ecosystems. With five years of advocacy and analysis, hours of testimony at the May 4th hearing, and an estimated 10,000 letters from the public calling for a strong Policy before it, the State Water Board adopted a Final Policy that addressed many—though not all—of the most critical issues raised by the coalition.¹

CLEAN WATER ACT COMPLIANCE

Facilities must implement the Clean Water Act's "Best Technology Available" standard unless they make a specific showing Best Technology Available is "not feasible" (ie. cost is not a factor in determining feasibility with Best Technology Available). The Final Policy offers two tracks for power plants to reduce OTC impacts. Track 1 requires the use of the best technology available (BTA), which is generally recognized to be closed-cycle cooling systems. In the Draft Policy, Track 2 was significantly weaker than Track 1 but could be chosen as an option without a showing that BTA was infeasible. Heeding NGO and U.S. EPA concerns, the Water Board voted to once again make Track 1 (BTA) the standard in the Final Policy, and to require facilities to make specific showings of infeasibility (e.g., space constraints, local regulations) to apply Track 2.

Alternative, "Track 2" compliance is now more "comparable to" the Best Technology Available standard, and will be determined unit-by-unit, based on actual, average monthly flow at the plants. Under the Draft OTC Policy the Track 2 standard was weakened considerably by allowing for a compliance determination based on "design flow," averaged over the whole facility rather than unit-by-unit. Since many facilities actually operate well below the decades-old, obsolete maximum flows written into their permits, Track 2 under the Draft OTC Policy would have resulted in few actual reductions of significant OTC impacts at many coastal plants. In the Final Policy, the Board brought the state closer to Clean Water Act compliance by adopting an amendment requiring compliance to be determined based on actual average monthly flow based on numbers from 2000-2005, not decades-old design flow, and on a unit-by-unit basis.

¹ This analysis and description of the final OTC Policy is based solely on the State Water Board's OTC Adoption Hearing on 5/4/2010, and is subject to revision based on the final text of the Policy, once it is formally released.

LOOPHOLES

The Final Policy narrows non-safety related exemptions for nuclear OTC facilities, though potentially expands other possible loopholes for nuclear plant compliance. The Draft Policy deemed permitting, site design, economic and “any other relevant information” as potential reasons for allowing nuclear facilities additional alternatives to compliance with the Policy. It also allowed “any” Nuclear Regulatory Commission (NRC) requirement to provide an additional off-ramp for these facilities. The Final Policy limits consideration of NRC requirements to “safety” requirements, rather than “any,” and deleted the overly broad consideration of “any other relevant information” as a potential justification for alternative compliance that could run counter to the Clean Water Act. However, the Water Board also adopted a provision allowing consideration of whether compliance with the Policy would be “wholly unreasonable” for the nuclear facilities in light of certain factors; this new standard was left undefined in the Final Policy.

Facilities cannot opt-out of compliance with new standards by conducting mitigation. The Draft Policy had allowed the use of mitigation in lieu of compliance with the BTA standard for certain facilities, in contravention of the Second Circuit Court of Appeals decision in *Riverkeeper II* and the U.S. Supreme Court in *Entergy*. The Water Board voted to strike provisions in the Draft Policy allowing mitigation as an alternative to, or credit for, BTA compliance by combined-cycle generation facilities.

IMPLEMENTATION AND ENFORCEABILITY

The Policy reduced the potential for continued deadline extensions. The Draft Policy contained numerous opportunities for facilities to delay compliance with the Clean Water Act. Recognizing the decades of delays in implementation of Section 316(b) and the five years of intensive policy planning to date, the Water Board voted to remove language that would have created a broad, virtually automatic two-year extension for power plants who claimed that they were unable to obtain permits (i.e. unrelated to grid reliability issues). The Board also fixed a provision that could have allowed serial 90-day deadline extensions without hearings. The Board also moved up the deadline for compliance by one year for the Humboldt Bay and South Bay power plants.

The Policy restored the State Water Board’s authority to implement and enforce the Policy consistent with its Clean Water Act mandates. The Draft Policy not only allowed for extension of identified deadlines, it also essentially eliminated the Water Board’s authority and responsibility to act on proposed deadline suspensions and extensions. In the Draft Policy the Water Board was *required* to implement the recommendations of energy oversight entities with regard to deadline extensions, unless it met an unprecedented standard of “compelling evidence” based on a “finding of overriding considerations” that the recommendation was unwarranted. This proposal would have illegally delegated the Water Board’s Clean Water Act responsibilities to other agencies and nonprofit corporations (CAISO). In the Final Policy, the Water Board restored its authority and established a more balanced standard for review of energy entities’ deadline recommendations, committing to “afford significant weight” to such recommendations in making its deadline decisions for compliance with the Clean Water Act.