

February 3, 2011

**SUPREME COURT COPY**

Mr. Frederick K. Ohlrich  
Court Administrator and Clerk of the Supreme Court  
Earl Warren Building  
350 McAllister Street  
San Francisco, California 94102

**SUPREME COURT  
FILED**

**FEB 3 - 2011**

**Voices of the Wetlands v. State Water Resources Control Board,  
Case No. S160211**

**Frederick K. Ohlrich Clerk**

Dear Mr. Ohlrich:

~~Deputy~~

Pursuant to the procedure set forth in the Court's January 12, 2011, letter soliciting information on this matter, Petitioner Voices of the Wetlands ("Voices") hereby briefly addresses one point raised by Respondents' January 24, 2011 letter to the Court. As Respondents correctly note, the California State Water Resources Control Board recently adopted a new *Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling* ("Once-Through Cooling Policy"), effective October 1, 2010. While the Once-Through Cooling Policy currently applies to any future National Pollutant Discharge Elimination System ("NPDES") permit issued for the Moss Landing Power Plant, that policy does not apply retroactively to the existing permit and, therefore, cannot moot this case. Equally important, the Once-Through Cooling Policy does not resolve the issue before the Court, for several reasons.

First, the new Once-Through Cooling Policy will be phased in over many years, with each coastal power plant subject to its own compliance deadline. The Moss Landing Power Plant need not come into full compliance with the policy until December 31, 2017. *See Attachment A to Respondents' Letter at 14.* Even at that point, the policy provides for potential delays in compliance under certain circumstances. *Id.* at 6-7. Voices timely challenged the NPDES permit issued in 2000 as unlawful under the Clean Water Act. As mandated by the Clean Water Act, the permit was valid on its face only until October 2005. But the State's allowance of an indefinite administrative extension of the permit means that the Moss Landing Power Plant continues to operate, more than five years after expiration, under the terms of the disputed 2000 NPDES permit. Given the compliance dates established in the new Once-Through Cooling Policy, it is highly likely that the Moss Landing facility will continue to operate under the 2000 permit for at least the next seven years, until the December 31, 2017. Thus, the legality of the 2000 NPDES permit remains an important and pressing issue worthy of this Court's review.

Second, the new Once-Through Cooling Policy imposes certain additional interim measures, starting on October 1, 2015, to mitigate ecological damage until a power plant comes into full compliance with the policy. *Id.* at 7-8. How these mitigation requirements will be implemented by the State remains unclear. Thus, the Court's adjudication of the

propriety and legality of the mitigation measures established in the 2000 NPDES permit for the Moss Landing Power Plant, which lie at the heart of this case, may well have substantial implications for implementation of the new requirements.

Third, although the Once-Through Cooling Policy became effective on October 1, 2010, the industry has already sought an amendment to the policy that would allow the Moss Landing Power Plant, in particular, to continue operating without further “best technology available” or BTA review under section 316(b) of the Clean Water Act and without alteration of the once-through cooling system for the remaining several decades of the facility’s life. *See Staff Report on Proposed Amendment to the Water Quality Control Policy on Use of Coastal and Estuarine Waters for Power Plant Cooling* (Sept. 29, 2010) at 2 (explaining that proposed amendment would allow Moss Landing Power Plant units 1 and 2 “to continue to use once-through cooling at combined cycle units until the unit reaches the end of its useful life”) (available at [http://www.swrcb.ca.gov/water\\_issues/programs/npdes/docs/otc\\_dec2010/sr092910.pdf](http://www.swrcb.ca.gov/water_issues/programs/npdes/docs/otc_dec2010/sr092910.pdf)). The State Water Resources Control Board declined to take up the proposed amendment at its December 14, 2010 meeting and instead deferred further consideration of the issue until later this year. Thus, there remains a real possibility that the Once-Through Cooling Policy could be amended to effectively “grandfather” the section 316(b) determination at issue in this case. The Court’s review of that BTA determination is, therefore, of continuing relevance.

Finally, as Voices noted in its January 24, 2011 letter, the owners/operators of the Moss Landing Power Plant have challenged the new Once-Through Cooling Policy in superior court on numerous theories. *See* Attachment to Voices’ Jan. 24 Letter. Among other things, that pending petition for writ of mandate and complaint for declaratory and injunctive relief alleges that the Once-Through Cooling Policy (1) violates the due process rights of all petitioners in the lawsuit because it “conflicts” with the Regional Water Board’s prior section 316(b) determination for the Moss Landing Power Plant, *id.* at 38-42, and (2) is subject to judicial and collateral estoppel because the Regional and State Water Boards continue to defend their decision in this case and because “the Court of Appeal of California, Sixth Appellate District affirmed the Regional Board’s decision that OTC is BTA at this facility.” *Id.* 42-43.

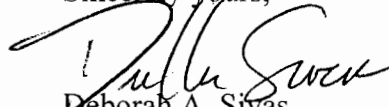
In other words, the owner/operator of the Moss Landing Power Plant owner and other merchant generators are seeking to overturn California’s Once-Through Cooling Policy on the grounds that the lower court’s decision in this case is inconsistent with the new policy, that Respondents are estopped from making any different section 316(b) compliance determination in any future NPDES permit, and that the lower court in this case has definitively adjudicated the section 316(b) issue for the Moss Landing Power Plant in a way that cannot be reevaluated in later permit proceedings. Thus, this Court’s review of the legality of the 2000 NPDES permit is of critical importance, not only to

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future NPDES permits for the Moss Landing Power Plant, but also to the future implementation of the new statewide policy seeking to phase-out once-through cooling.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Deborah A. Sivas". The signature is fluid and cursive, with a large initial "D" and "S".

Deborah A. Sivas

Counsel for Voices of the Wetlands

cc: Anita E. Ruud, Deputy Attorney General  
(Counsel for Respondents State and Regional Water Boards)

Sarah G. Flanagan, Attorney at Law  
(Counsel for Real Party Dynegy Moss Landing, LLC)