

\$160211

CASE No.

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

VOICES OF THE WETLANDS,

Petitioner,

v.

CALIFORNIA WATER RESOURCES CONTROL BOARD;
CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD – CENTRAL COAST REGION; DUKE
ENERGY MOSS LANDING LLC; and DUKE ENERGY
NORTH AMERICA, LLC,

Respondents.

SUPREME COURT
FILED

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Deputy

PETITION FOR REVIEW

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8.25(b)

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ISSUES PRESENTED

1. May a state agency with delegated federal regulatory authority utilize a cost-benefit analysis and environmental mitigation measures to determine compliance with section 316(b) of the federal Clean Water Act, 33 U.S.C. § 1326(b), when controlling federal court precedent in Riverkeeper v. Environmental Protection Agency (“Riverkeeper I”), 358 F.3d 174 (2d Cir. 2004), and Riverkeeper v. Environmental Protection Agency (“Riverkeeper II”), 475 F.3d 83 (2d Cir. 2007), has expressly prohibited consideration of these factors?

2. Does section 1094.5 of the California Code of Civil Procedure and this Court’s long-standing administrative law precedent in such cases as Western States Petroleum Ass’n v. Superior Court, 9 Cal. 4th 559 (1995), preclude a trial court from ordering interlocutory remand after a full trial on the merits without setting aside the unlawful agency decision and subsequently admitting new, post-decisional information into evidence to support the original unsupported action?

SUMMARY OF WHY REVIEW SHOULD BE GRANTED

The Court of Appeal’s decision in this case raises two important questions of law that warrant consideration by this Court. On both questions, the opinion of the Sixth Appellate District has created a split of

authority among the courts and thrown settled law into confusion. In order to reconcile the substantive conflict between state and federal precedent created by the appellate decision in this case and to provide clarification to lower courts and administrative agencies on the basic principles of California administrative law, Petitioner Voices of the Wetlands (“Voices”) respectfully requests that this Court grant review and reverse the Sixth Appellate District’s decision with respect to both the federal Clean Water Act and the California writ statute.

1. As a matter of substantive law, the decision in this case creates an irreconcilable conflict between an authoritative federal interpretation of the Clean Water Act and the Sixth Appellate District’s reading of the very same statutory provision. As the delegated state agency for implementation of the Clean Water Act, the California Regional Water Quality Control Board (“Regional Board”) must ensure compliance with section 316(b) of the federal statute, which provides, in relevant part, that “the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.” 33 U.S.C. § 1326(b) (emphasis added). In two major federal appellate court decisions over the last few years, the Second Circuit Court of Appeals has affirmed that, in determining “best technology available” under section

316(b) for cooling water intake systems such as the one at issue in this case, permitting agencies may not utilize a cost-benefit analysis and may not rely on environmental mitigation measures to achieve compliance. Despite this controlling federal authority, the Sixth Appellate District affirmed the Regional Board's use of both a cost-benefit analysis and a mitigation program in this case.

The State of California is currently in the process of developing guidance to implement the Riverkeeper decisions, which will affect nearly two dozen major power plants along the California coast. All of these coastal facilities must fully comply with section 316(b) as they design major structural upgrades or face extensions of their five-year Clean Water Act permits. The court's holding in this case injects significant uncertainty into this important and developing area of state regulatory policy and makes it virtually impossible for state agencies, the regulated industry, and the public to determine what standards apply. At stake are literally hundreds of millions of investment dollars, the health of marine ecosystems all along the California coastline, and regulatory certainty as the state moves forward with much-needed improvements to its energy infrastructure. The Court should, therefore, accept this case for review in order to clarify the applicable federal law in California.

2. As a matter of administrative law, the trial court also made two interrelated procedural errors that were affirmed by the Court of Appeal, despite plain statutory language and existing judicial precedent directly to the contrary. Following a full trial on the merits of Voices' petition for writ of mandate pursuant to section 1094.5 of the California Code of Civil Procedure ("CCP"), the trial court held that the Regional Board's finding of compliance with section 316(b) of the Clean Water Act "is not supported by the weight of the evidence." Voices of the Wetlands v. California State Water Resources Control Board, Slip op. at 5, 29, 157 Cal. App. 4th 1268, 69 Cal. Rptr. 3d 487, 497, 510-11 (2007). But the trial court ultimately declined to set aside the unlawful determination as directed by CCP section 1094.5(f). Rather, it ordered an interlocutory remand to the Regional Board without issuing a writ of mandate or setting aside any portion of the illegal permit decision. Id. Slip op. at 6, 29; 69 Cal. Rptr. 3d at 497, 510-11. During the resulting remand process, the Regional Board likewise refused to reopen or reconsider any part of its prior unlawful decision, instead merely accepting new information from the permittee and then affirming through a resolution that the original permit decision and findings were, in its view, supported by the weight of the evidence. Id. When the matter subsequently returned to the trial court, the court admitted all of the new,

post-decisional information into evidence and, based on that evidence, reversed its earlier finding, granting final judgment in Respondents' favor.

The Sixth Appellate District's decision affirming this course of action creates two significant conflicts with existing California precedent. With respect to the post-trial interlocutory remand, the decision in this case is directly contrary to the First Appellate District's decisions in Resource Defense Fund v. Local Agency Formation Comm., 191 Cal. App. 3d 886 (1987), and Sierra Club v. Contra Costa County, 10 Cal. App. 4th 1212 (1992), as well as the Second Appellate District's decisions in Fort Mojave Indian Tribe v. Department of Health Services, 38 Cal. App. 4th 1574 (1995), and Ashford v. Culver City Unified School Dist., 130 Cal. App. 4th 344 (2005). Each of these cases properly read CCP section 1094.5(e) to limit interlocutory remand for the purpose of taking of new evidence to a very narrow set of circumstances that do not exist here. Moreover, the lower courts' admission of post-decisional evidence that was created and submitted for the first time during the interlocutory remand to support the prior agency decision squarely contravenes the plain language of CCP section 1094.5 and well-established jurisprudence on administrative mandamus, including this Court's seminal decision in Western States Petroleum. Because CCP section 1094.5 governs the resolution of nearly

every administrative mandamus proceeding in California, and potentially affects hundreds, if not thousands, of administrative agency decisions made each year, uniform interpretation of the writ statute by this Court is essential.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a decision by the Regional Board to grant a Clean Water Act permit for the construction of two new generating units at the Moss Landing Power Plant, located at the mouth of Elkhorn Slough in Monterey County. Pursuant to the Clean Water Act, the Regional Boards have received delegated responsibility for implementing the federal statute's core regulatory programs, including the issuance of National Pollutant Discharge Elimination System ("NPDES") permits to individual dischargers. 39 Fed. Reg. 26,061 (July 16, 1974); 54 Fed. Reg. 40,664 (Oct. 31, 1989). As a matter of both federal and state law, NPDES permits issued by the Regional Boards must comply with all Clean Water Act requirements. 33 U.S.C. § 1342(b); 40 C.F.R. §§ 123.22-.25; Cal. Water Code §§ 13372, 13377.

As part of the NPDES permit process for the Moss Landing Power Plant expansion, the Regional Board for the Central Coast of California was required to and did make a determination that the proposed "once-through"

cooling water system for the facility constituted the “best technology available” (or “BTA”) for minimizing adverse impacts under section 316(b) of the Clean Water Act. The primary adverse impact associated with traditional once-through cooling systems (as opposed to more modern closed-cycle systems that recirculate and reuse cooling water or rely on air cooling) is the “entrainment” and destruction of the free floating marine organisms in the intake water. Here, the Moss Landing facility’s once-through cooling system withdraws 1.224 billion gallons of water each day from Elkhorn Slough, or approximately 28 percent of the total volume of the Slough and adjacent Moss Landing Harbor on a continuous basis, killing virtually all marine life contained within it, before discharging the heated water into the Monterey Bay National Marine Sanctuary.

Administrative Record (“AR”) 303669 (Attachment at 7). A technical working group of biologists jointly convened by the Regional Board and the California Energy Commission determined that the cooling water intake system for the two new units would result in a 13 percent loss of fish larvae and that, when all of the plant’s generating units are considered together, the percentage loss is “several times greater.” AR 303670 (Attachment at 8). The experts and agencies concluded that “[t]hese pelagic organisms are important living material that provide food (primary productivity) for many

creatures in the harbor and slough ecosystems. The loss of this amount of productivity is significant.” Id.

In its subsequent section 316(b) BTA determination for the Moss Landing facility, the Regional Board expressly employed a cost-benefit analysis that weighed the costs of more environmentally protective alternative cooling technologies against the environmental benefits achieved by employing these technologies. Specifically, NPDES permit finding number 48 stated:

The Discharger must use BTA to minimize adverse environmental impacts caused by the cooling water intake system. If the cost of implementing any alternative for achieving BTA is wholly disproportionate to the environmental benefits to be achieved, the Board may consider alternative methods to mitigate these adverse environmental impacts. In this case the costs of alternatives to minimize entrainment impacts are wholly disproportionate to the environmental benefits. However, Duke Energy will upgrade the existing intake structures for the new units to minimize the impacts due to impingement¹ of large fish on the traveling screens and will fund a mitigation package to directly enhance and protect habitat resources in the Elkhorn Slough watershed as explained below.

AR 305756 (Attachment at 1) (emphasis added). Despite the fact that the Second Circuit expressly rejected the use of such an approach in

¹ “Impingement” is different from entrainment in that it involves the trapping of larger marine organisms, such as adult fish, on the intake screens. With the slow velocity of the intake system at Moss Landing and the installation of new screen technology, impingement is not considered by the agencies to be a significant factor there.

Riverkeeper II, as explained below, the appellate court affirmed the Regional Board's use of that very approach in this case. Voices of the Wetlands, Slip op. at 92, 69 Cal. Rptr 3d. at 548.

Moreover, in NPDES permit finding number 49, the Regional Board recognized that technological modifications to the once-through cooling water system “are not sufficient to minimize adverse environmental effects of the intake system and to achieve compliance with the BTA requirements of section 316(b) because the modifications do not address entrainment impacts.” AR 305757 (Attachment at 2) (emphasis added). For this reason, in NPDES permit finding number 50, the Board adopted an acquisition and aquatic habitat “enhancement program” for the express purpose of mitigating biological impacts and achieving compliance with the BTA standard of the Clean Water Act: “The enhancement program . . . will minimize adverse environmental effects of the intake system on the Elkhorn Slough watershed resources so that Duke Energy can comply with Clean Water Act section 316(b).” Id. (emphasis added). NPDES permit finding number 51 makes it clear that the enhancement program was integral to the Regional Board's BTA compliance determination:

Based upon the above findings, implementation of the above described intake modifications, and complete funding of the environmental enhancement program as described in the above finding, constitutes compliance with Clean Water Act section 316(b)

by implementing BTA that minimizes adverse environmental effects.”

AR 305761 (Attachment at 6) (emphasis added). In direct contravention of this controlling permit language (and indeed, without even mentioning it), the appellate court inexplicably affirmed the trial court’s finding that the Regional Board “did not adopt the mitigation plan as an alternative technology for purposes of section 316(b), but instead considered it only for its relevance in monetizing environmental impacts and benefits.” Voices of the Wetlands, Slip op. at 91, 69 Cal. Rptr. 3d at 547.

After exhausting its administrative remedies, Voices filed a petition for writ of mandate in the superior court challenging the Regional Board’s section 316(b) compliance determination on the grounds that it was not supported by the evidence in the record, that it illegally employed a cost-benefit analysis, and that it unlawfully relied upon mitigation measures to satisfy the Clean Water Act. After a full trial on the merits, the superior court concluded that “Finding number 48 is not supported by the weight of the evidence” and initially ordered issuance of a writ of mandate compelling the Regional Board to undertake a thorough and comprehensive analysis of BTA for the facility. Voices of the Wetlands, Slip op. at 5, 29, 69 Cal. Rptr. 3d at 497, 510-11. However, the superior court ultimately did not issue a writ or set aside the unsupported permit finding (or any other portion

of the permit decision); instead, the court merely remanded the matter to the Regional Board. Id. Slip op. at 6, 29, 69 Cal. Rptr. 3d at 497, 510-11.

On remand, the Regional Board did not reopen or reconsider the NPDES decision, permit findings, or section 316(b) determination. Instead, it conducted a hearing to accept new evidence regarding alternative cooling systems and, at the end of the hearing, adopted a resolution stating that the prior permit finding was, in its view, supported by the weight of the evidence. Voices of the Wetlands, Slip op. at 6, 29, 69 Cal. Rptr. 3d at 497, 510-11. Thus, each of the original section 316(b) findings described above (findings 48-51) remained intact and unaffected by the remand process.

The superior court subsequently admitted into evidence the post-decisional information considered by the Regional Board during the remand hearing, and entered judgment in Respondents' favor, thereby reversing its earlier conclusion based on the new evidence and also rejecting Voice's purely legal claims regarding the agency's unlawful reliance on cost-benefit analysis and the enhancement program to comply with section 316(b). Id.

After the appellate court affirmed the trial court's decision on December 14, 2007, Voices timely petitioned for rehearing of the two issues presented by this petition for review. On January 10, 2008, the Sixth Appellate District Court of Appeal denied the petition for rehearing and

made several minor linguistic changes to its original opinion. Voices of the Wetlands v. California State Water Resources Control Board, Order Modifying Opinion and Denying Rehearing.

ARGUMENT

- I. **The Lower Court’s Affirmation of the Regional Board’s Actions in this Case Directly Contravenes Controlling Federal Precedent and Wholly Confuses a Critically Important Area of Law for the State of California.**
 - A. **By Failing to Reject the Use of Cost-Benefit Analysis, the Lower Court Created a Direct Conflict with Federal Decisional Law and Injected Significant Confusion into the Future Regulation of California’s Power Plants.**

There is no question here that the Regional Board employed a cost-benefit analysis in making its section 316(b) compliance determination; the NPDES permit for the Moss Landing expansion project concludes, in finding number 48, that “the costs of alternatives to minimize entrainment impacts are wholly disproportionate to the environmental benefits.” AR 305756 (Attachment at 1). The Sixth Appellate District expressly acknowledged that “the Riverkeeper II court stressed, ‘cost-benefit analysis is not consistent with the requirement of § 316(b) that cooling water intake structures ‘reflect the best technology available for minimizing adverse environmental impact.’” (*Id.* at p. 114.)” Voices of the Wetlands, Slip op. at 85, fn.14, 69 Cal. Rptr. 3d at 544 (quoting Riverkeeper II). Inexplicably,

however, the court went on to conclude that:

[R]egulatory documents and federal decisional law support a construction of section 316(b) that incorporates the wholly disproportionate standard [citing a three-decade-old EPA General Counsel Opinion and First Circuit permit decision]. Even Riverkeeper II, discussed extensively at oral argument, indirectly endorses the wholly disproportionate standard, albeit in dicta . . .”

Slip op. at 92, 69 Cal. Rptr. 3d at 547.² Thus, the lower court’s opinion in this case is internally inconsistent and substantially muddies the legal waters by throwing into question what standards actually apply to NPDES permits for power plant facilities within the State of California.

The lengthy cost-benefit discussion and holding in Riverkeeper II – a case that consolidated several challenges from around the country, including one in the Ninth Circuit Court of Appeals – could not be clearer: “[T]he language of Section 316(b) itself plainly indicates that facilities must adopt the best technology available and that cost-benefit analysis cannot be justified in light of Congress’s directive.” Riverkeeper II, 475 F.3d at 99 (emphasis added). Cost-benefit analysis “is not permitted under the statute

² Following Voices’ petition for rehearing, in which it discussed this issue at length, the appellate court amended its decision to read: “Even Riverkeeper II, discussed extensively at oral argument, indirectly endorses the wholly disproportionate standard, albeit in dicta and in the context of a cost-cost variance analysis.” Order Modifying Opinion and Denying Rehearing (adding underlined text). As explained below, the Riverkeeper II court properly viewed cost-cost variance analysis as something entirely distinct from the kind of cost-benefit analysis performed here.

because, as noted, Congress has already specified the relationship between cost and benefits in requiring that the technology designated by the EPA be the best available. . . . The Agency accordingly could not make the policy decision, in the face of Congress’s determination that facilities use the best technology available, that an economically feasible level of reduction of impingement mortality and entrainment is not desirable in light of its cost.” Id. 475 F.3d at 100 (emphasis added). And just as EPA is not allowed to engage in a cost-benefit analysis in developing implementing regulations for section 316(b), individual regulatory agencies exceed their statutory authority “in permitting site-specific cost-benefits variances.” Id. 475 F.3d at 114. Delegated state permitting agencies are, therefore, “precluded from undertaking such cost-benefit analysis because the BTA standard represents Congress’s conclusion that the costs imposed on industry in adopting the best cooling water intake structure technology available (i.e., the best-performing technology that can be reasonably borne by the industry) are worth the benefits in reducing adverse environmental impacts.” Id. (emphasis added).

The appellate court in Voices of the Wetlands seems to have confused the concept of “cost-benefit analysis” with the very different and legally distinct concept of “cost-cost variance analysis.” See Footnote 2,

supra, and Order Modifying Opinion and Denying Rehearing (adding language that analogizes the two concepts in response to Voice’s petition for rehearing). In upholding the Regional Board’s use of a “wholly disproportionate” cost-benefit analysis here, the lower court cited to and primarily relied upon footnote 25 in the Riverkeeper II decision. Voices of the Wetlands, Slip op. at 92; 69 Cal. Rptr. 3d at 548. Footnote 25, however, refers not to a cost-benefit analysis, but to a “cost-cost” variance analysis, wherein the permit agency compares the cost of compliance at an individual facility against the cost of compliance at a typical or standard industry facility, as considered by EPA in setting applicable performance standards. Riverkeeper II, 475 F.3d 112-14. In other words, a cost-benefit analysis weighs the costs of compliance at a given facility against the benefits of compliance at that same facility, whereas a cost-cost variance analysis weighs the cost of compliance at a given facility against the typical costs of compliance at other facilities within the same industry. Because the Riverkeeper II court remanded EPA’s cost-cost variance provision for procedural defects, it did not reach the substantive legality of the cost-cost variance provision, but in footnote 25, the Second Circuit hinted that a “wholly disproportionate” test might be an appropriate standard in the event that EPA re-promulgates a cost-cost variance in its new rule. Id. 475 F.3d

at 113, fn.25. Here, no cost-cost variance analysis was invoked or utilized for the Moss Landing section 316(b) determination; indeed, there is not a shred of evidence in the record to suggest that the cost of alternative cooling technology at the Moss Landing facility is in any way extraordinary or divergent from the cost of such technology at other facilities, including those similarly situated California coastal power plants that have committed to closed-cycle cooling for their proposed repowering projects.³

The only other cost concept discussed in Riverkeeper II was something that the Second Circuit called “cost-effectiveness.” As the appellate court recognized in this case, cost-effectiveness comes into play only after the benchmark for performance is established based on what technology can be reasonably borne by the industry (not an individual facility). Voices of the Wetlands, Slip op. at 85, fn.14, 69 Cal. Rptr. 3d at 544 (quoting Riverkeeper II, 475 F.3d at 99). A cost-effectiveness assessment, unlike a cost-benefit analysis, allows the agency to “choose between two (or more) technologies that produce essentially the same

³ See, e.g., Surfwire, “El Segundo Power Plant Moves to Stop Ocean Intake,” July 2, 2007 (noting that NRG Energy has petitioned the California Energy Commission to convert to a cleaner, more efficient closed-cycle cooling system) (available at <http://www.surflife.com/surfnews/surfwire.cfm?id=9934>).

benefits but have markedly different costs.” Riverkeeper II, 475 F.3d at 101.

In explaining the very limited role that cost effectiveness can play in EPA’s setting of technology benchmark standards, the Second Circuit took great pains to distinguish such cost-effectiveness analysis from impermissible cost-benefit analysis:

While the statutory language suggests that the EPA may consider costs in determining BTA, in that a technology that cannot not be reasonably borne by the industry is not “available” in any meaningful sense, cost-benefit analysis is not similarly supported by the language or purpose of the statute. Section 316(b) expressly requires a technology-driven result, . . . not one driven by cost considerations or an assessment of the desirability of reducing adverse environmental impacts in light of the cost of doing so. A selection of BTA based on cost-benefit considerations is thus impermissibly cost-driven, but a selection based in part on cost-effectiveness considerations, while taking cost into account, remains technology-driven. The statute therefore precludes cost-benefit analysis because “Congress itself defined the basic relationship between costs and benefits.” . . . Moreover, this conclusion is further supported by the fact that Congress in establishing BTA did not expressly permit the Agency to consider the relationship of a technology’s cost to the level of reduction of adverse environmental impact it produces. “When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.”

Riverkeeper II, 475 F.3d at 99 (citations omitted).⁴

⁴ Again, there was never any argument or evidence in this case that the Regional Board studied or set benchmark performance standards for the industry or undertook a cost-effectiveness analysis. Indeed, the local Regional Board hardly has the resources to attempt such an enormous

The appellate court's apparent misunderstanding or misapplication of Riverkeeper II to allow for the use of a wholly disproportionate cost-benefit test, in spite of the Second Circuit's unequivocal rejection of such an approach as a matter of statutory interpretation, places California's only judicial interpretation of section 316(b) squarely at odds with federal case law precedent and threatens a serious state-federal conflict as the State Water Resources Control Board struggles to implement section 316(b) in light of the federal case law.⁵ See <http://www.swrcb.ca.gov/npdes/cwa316.html>. Even, or especially, in the absence of comprehensive state policy in this arena, Regional Boards throughout California will be subject to directly

effort, which is why the federal EPA and, in a more recent and limited way, the State Water Resources Control Board, have sought to undertake this task.

⁵ In addition to the State Water Board, other California agencies are closely involved in ongoing discussion and analysis of power plant cooling systems, including the California Ocean Protection Council, which adopted a resolution on the adverse impacts of once-through cooling at California's 21 coastal power plants and called for a new approach (see Resolution of the California Ocean Protection Council Regarding the Use of Once-Through Cooling Technologies in Coastal Waters, April 20, 2006; available at <http://www.resources.ca.gov/copc/>); the California Energy Commission, which has undertaken various reports and analyses (reports available at <http://www.energy.ca.gov/publications/searchReports.php>); and the State Lands Commission, which also adopted a resolution calling for phase-out (available at http://www.energy.ca.gov/siting/once_through_cooling.html or archives.slc.ca.gov/Meeting_Summaries/2006_Documents/04-17-06/ITEM_SANDEXHIBITS/R71ExhA.pdf). Such widespread regulatory interest in the subject of this case highlights the need for this Court to review the muddled holding of the appellate court.

conflicting guidance from Riverkeeper II and Voices of the Wetlands, sewing confusion and uncertainty among state regulators, the regulated community, and the public, and surely increasing the potential for gridlock and litigation over the future of coastal energy facilities. Accordingly, Petitioner urges this Court to harmonize state and federal law by reviewing the lower court's decision on this issue and rejecting the use of a cost-benefit analysis to determine Clean Water Act section 316(b) compliance.

B. The Lower Court Committed Clear Reversible Error on an Important Issue of Law When It Upheld the Regional Board's Reliance on an Enhancement Program to Mitigate Adverse Environmental Impacts.

As explained above, the NPDES permit issued by the Regional Board in this case unequivocally relied upon the so-called environmental enhancement program to achieve compliance with section 316(b)'s requirement that cooling water systems employ BTA "for minimizing adverse environmental impact." 33 U.S.C. § 1326(b). In the permit document that is the focus of this litigation, the Regional Board expressly acknowledged that (1) the Moss Landing facility could not achieve section 316(b) compliance with the proposed technological modifications because they do not address significant entrainment impacts, (2) a habitat enhancement program was required "so that" the facility could comply with section 316(b), and (3) both the proposed technological modifications "and

complete funding” of the enhancement program together “constitute compliance” with section 316(b). AR 305757-61 (Attachment at 1-6). The appellate court here recognized that under “persuasive” federal decisional law, in the form of Riverkeeper I and Riverkeeper II, “mitigation does not qualify as a ‘technology’ for purposes of section 316(b).” Voices of the Wetlands, Slip op. at 89, 69 Cal. Rptr. 3d at 546. Nevertheless, the court suggested that unrelated state law might somehow alter this result and, even more troubling, went on to uphold the trial court’s conclusion that the enhancement program did not serve as a substitute for the best technology required by section 316(b). Id. Slip op. at 89-91, 69 Cal. Rptr. 3d at 547 (holding that the trial court’s conclusion “finds adequate support in the record”). Because this conclusion is both unsupported in the record and creates substantial uncertainty regarding the use of mitigation measures to achieve section 316(b) – when the federal courts have been unmistakably clear on this issue – review and reversal by this Court is appropriate.

The holdings in Riverkeeper I and Riverkeeper II are clear and not in dispute. The Second Circuit first explained in Riverkeeper I that restoration measures designed to compensate for ecosystem losses “correct for the adverse environmental impacts of impingement and entrainment; they do not minimize those impacts in the first place,” and therefore are “plainly

inconsistent with the statute’s text and Congress’s intent in passing the 1972 amendments” to the Clean Water Act. Riverkeeper I, 358 F.3d at 189. The court strongly reaffirmed this interpretation in Riverkeeper II:

Restoration measures are not part of the location, design, construction, or capacity of cooling water intake structures, . . . and a rule permitting compliance with the statute through restoration measures allows facilities to avoid adopting any cooling water intake structure technology at all, in contravention of the Act’s clear language as well as its technology-forcing principle. As we noted in Riverkeeper I, restoration measures substitute after-the-fact compensation for adverse environmental impacts that have already occurred for the minimization of those impacts in the first instance. . . . The Agency’s attempt to define the word “minimize” to include “compensati[on] . . . after the fact,” . . . is simply inconsistent with that word’s dictionary definition: “to reduce to the smallest possible extent,” Webster’s Third New Int’l Dictionary 1438 (1986). . . . Accordingly, the EPA impermissibly construed the statute by allowing compliance with section 316(b) via restoration measures.

Riverkeeper II, 475 F.3d at 110 (emphasis in original; citations omitted).

While purporting to adhere to this definitive federal court interpretation of federal law, the appellate court in this case evaded its result by ignoring the controlling language in the NPDES permit, where the Regional Board expressly relied on the enhancement program to make its Clean Water Act section 316(b) determination. The court opted, instead, to focus on a few Regional Board statements during the court-ordered remand hearing, where any further discussion of the enhancement program was explicitly excluded by the agency’s legal counsel and chairman. Voices of

the Wetlands, Slip op. at 90-91, 69 Cal. Rptr. 3d at 547.⁶ As discussed further below, the Regional Board did not reopen the permit or make any new or superseding permit findings during the remand process; and it explicitly did not accept, or even consider, new evidence about the efficacy or legality of the enhancement program. Thus, the Regional Board's actions and statements during the remand hearing are simply not relevant to the application of the Riverkeeper holdings on mitigation measures to the facts of this case. Because the lower court's finding on the enhancement program are not supported by "substantial, credible and competent evidence" in the trial court record, it constitutes clear reversible error. Evans v. Unemployment Ins. Appeals Bd., 39 Cal.3d 398, 407 (1985).

Although the appellate court framed the mitigation issue here as one of fact rather than law, its decision has significant implications for California's implementation of Clean Water Act section 316(b) and the recent Riverkeeper decisions. The question of whether after-the-fact mitigation can be used to achieve compliance with the section 316(b) technology standards is a critical one for the NPDES permit renewals and

⁶ The procedural aspects of the remand hearing, including the exclusion of any discussion about the efficacy or legality of the enhancement program, were the subject of additional disputes between the parties, as discussed at some length in the appellate court's decision, but are not at issue on this petition for review.

permit expansions that are pending, or shortly will be pending, for virtually every power plant along the California coast. For this additional reason, the Court should accept review of the Clean Water Act holding in this case and clarify this important area of law.

II. The Appellate Court's Affirmation of the Procedure Followed by the Trial Court Contravenes Settled Administrative Law and Creates a Significant Conflict Between California's Appellate Courts.

Following a full trial on the merits of Petitioner's claims, the trial court held that finding number 48 of the Moss Landing NPDES permit (related to section 316(b) compliance) was not supported by the weight of the evidence and ordered issuance of a writ of mandated. Voices of the Wetlands, Slip op. at 5, 29; 69 Cal. Rptr. 3d at 497, 510-11. At the urging of Respondents, however, the trial court ultimately declined to issue a writ of mandate, and instead ordered an interlocutory remand to the Regional Board for a "thorough and comprehensive analysis with respect to Finding No. 48." Id. Slip op. at 5-6, 29-30; 69 Cal. Rptr. 3d at 497, 510-11.

Perhaps the trial court intended that the Regional Board would actually reconsider finding number 48 in light of any new information received on remand, but because the court did not so direct the agency, no reconsideration ever occurred. The Regional Board merely accepted new information regarding alternative cooling technologies and at the end of the

remand hearing concluded, via resolution, that there was sufficient evidence to support its existing permit decision. See Voices of the Wetlands, Slip op. at 55-64, 69 Cal. Rptr. 3d at 526-31 (discussing remand hearing). The trial court then admitted this post-decisional information into evidence to uphold the very same permit findings it had previously rejected. The Sixth Appellate District’s affirmation of this approach directly contradicts the plain language of CCP section 1094.5 and muddies a previously clear line of judicial precedent.

A. California Courts Have Repeatedly and Consistently Held that CCP Section 1094.5 Precludes the Kind of Inerlocutory Remand Permitted by the Sixth Appellate District in this Case.

CCP section 1094.5 directs that “[t]he court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ.” Cal. Code Civ. Proc. § 1094.5(f) (emphasis added). Following adjudication of a writ petition, the statutory language thus provides reviewing courts with only two options: either deny the writ or order the respondent to set aside the unlawful agency decision. Although courts certainly may remand an unsupported or otherwise unlawful administrative decision to the agency, they must first “set aside” that decision – or the relevant part thereof – so that the agency will be compelled to reconsider it. Where, as here, “there is no ambiguity in the language of the statute, ‘then

the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.” Smith v. Rae-Venter Law Group, 29 Cal.4th 345, 358 (2002) (quoting Lennane v. Franchise Tax Bd., 9 Cal.4th 263, 268 (1994)). The plain language of CCP section 1094.5 does not authorize the option chosen by the trial court in this case – remand to the agency for acceptance of new post-decisional evidence in the absence of a writ setting aside the unlawful agency decision or finding.

The California courts have consistently rejected the use of such post-trial interlocutory remands in CCP section 1094.5 writ proceedings as “grievously erroneous” because they foster precisely the kind of “post hoc rationalization” that occurred here. Resource Defense Fund v. Local Agency Formation Commission, 191 Cal. App. 3d 886, 899-900 (1987) (holding that section 1094.5 only “authorizes remand when the writ is granted”). See also Sierra Club v. Contra Costa County, 10 Cal. App. 4th 1212, 1220-21 (1992) (noting that “Code of Civil Procedure section 1094.5 does not permit remand before the writ issues, but instead specifies that the writ shall issue and the reviewing court may then remand.”).

An exception to the general rule against interlocutory remand under CCP section 1094.5 is authorized in only two very narrow circumstances: (1) where the trial court finds that the evidence was improperly excluded at

the agency hearing, and (2) where the trial finds that the evidence could not have been produced at the time of the agency hearing with the exercise of reasonable diligence. Cal. Code Civ. Proc. § 1094.5(e). Here too, the courts have consistently limited these exceptions to situations where the appropriate statutory showing is made – a showing that was never made or even attempted in this case. As the Second Appellate District has explained:

in administrative mandamus cases . . . the writ is . . . made available to “inquir[e] into the validity of [a] final administrative decision,” rendered on the basis of ‘evidence taken’ (Code Civ.Proc., § 1094.5, subd. (a)), that is, evidence in the administrative record. Subdivision (e) opens a narrow, discretionary window for additional evidence, newly discovered after the hearing (or improperly excluded at it). Routine allowance thereunder of conflicting scientific opinions created after the decision would pose for quasi-judicial decisions at least as great a threat of repeated rounds of litigation, and uncertain, attenuated finality, as it would for quasi-legislative actions.

Fort Mojave Tribe v. Cal. Dept. of Health, 38 Cal. App. 4th 1574 (1995)

(citing Western States Petroleum, 9 Cal.4th at 578.) As the same court subsequently acknowledged, “[i]f we did not regard [CCP subsection 1094.5(e)] as providing a specific limitation on the power of a court to remand an administrative matter for a new hearing, then the more general provisions of subdivision (f) of section 1094.5 would effectively render subdivision (e) superfluous.” Ashford v. Culver City Unified School Dist., 130 Cal. App. 4th 344, 351 (2005) (noting that “well-settled principles of

legislative construction require us to recognize that a specific provision will generally govern a general provision”).

The Sixth Appellate District suggests that “there is an apparent split of authority on the question” of whether CCP section 1094.5 permits a post-trial interlocutory remand without issuance of a writ, but the court does not cite to any authority that contravenes Resource Defense Fund, Sierra Club, Ashford, and Fort Mojave. Voices of the Wetlands, Slip op. at 37, 69 Cal. Rptr. 3d at 515. In fact, the only cases allowing interlocutory remand to which the court cites are those involving procedural failures by the administrative agency, such as failure to hold a proper hearing or properly memorialize the agency proceedings, and those where the court expressly relied on the exemption in CCP section 1094.5(e). Id. Slip op. at 34-35, 69 Cal. Rptr. 3d at 514-15.⁷ Thus, while there previously was no split of authority on the availability of post-trial interlocutory remand under CCP section 1094.5 – with all cases having addressed the issue roundly

⁷ See, e.g., Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit Dist., 185 Cal. App. 3d 996, 1003 (1986) (pre-trial interlocutory remand pursuant to CCP section 1094.5(e) for clarification of agency findings); Keeler v. Superior Court, 46 Cal.2d 596, 600 (1956) (pre-trial interlocutory remand of non-CCP section 1094.5 case for the requisite agency findings on which the court could then adjudicate the case); Aluisi v. County of Fresno, 150 Cal. App. 2d 823, 828 (1958) (pre-trial interlocutory remand because transcripts of administrative proceedings were incomplete due to a technical error).

condemning and rejecting this approach – the Sixth Appellate District’s decision to the contrary in Voices of the Wetlands has itself created a split of authority.

Moreover, even if the trial court could properly direct a post-trial interlocutory remand without setting aside the unlawful agency determination, the case law in this state is clear: Documents that were not considered by the agency as it made its decision are not properly part of the administrative record and cannot be used to support the agency decision on judicial review. See Western States Petroleum, 9 Cal. 4th at 574 (1995) (“It is well settled that extra-record evidence is generally not admissible in . . . mandamus actions”); Porterville Citizens for Responsible Hillside Development v. City of Porterville, 157 Cal. App. 4th 885, 897-98 (2007); Cadiz Land Company v. Rail Cycle, 83 Cal. App. 4th 74, 120 (2000); Toyota of Visalia v. New Motor Vehicle Board, 188 Cal. App. 3d 872, 881 (1987). As the First Appellate District recently affirmed, “[e]xtra-record evidence may be considered in quasi-judicial administrative mandamus proceedings only if the evidence was unavailable at the time of the hearing ‘in the exercise of reasonable diligence’ or if improperly excluded from the record.” Eureka Citizens for Responsible Government v. City of Eureka, 147 Cal. App. 4th 357, 367 (2007) (emphasis added). Because the Regional

Board made no showing in this case – nor could it – that either exception applied, the trial court could not properly consider the post-decisional information submitted to it following the remand hearing. Id.

The fundamental problem in this case is that because the trial did not set aside the unsupported and unlawful section 316(b) determination, and the Regional Board elected not to reopen or reconsider that determination during the remand hearing, the original October 2000 permit decision and findings stand unaltered and the court cannot properly look to evidence produced during the much later May 2003 remand hearing to support that prior determination. In its petition for rehearing to the appellate court, Voices pointed out the court’s apparent confusion, as evidenced in its original opinion that “the trial court ordered the agency to set aside a discrete and segregable part of its decision, finding number 48,” Voices of the Wetlands, Slip op. at 41, when, in fact, no part of the decision was ever set aside by the court or reopened by the Regional Board. In response, the appellate court merely amended its opinion to read “the trial court effectively order the agency to set aside a discrete and segregable part of its decision, finding number 48.” Ordering Modifying Opinion and Denying Rehearing (adding underlined text). However, the record simply does not support the conclusion that finding number 48 was “effectively” set aside

by the trial court or revisited by the Regional Board; during the remand hearing, the Regional Board merely affirmed that, in its view, the prior section 316(b) determination was adequately supported by the evidence.

B. The Appellate Court's Decision Confuses the Case Law and Undercuts the Fundamental Purpose of the Writ Statute.

The Sixth Appellate District's decision contravenes settled case law, creating significant new confusion as to the availability of post-trial interlocutory review and the contours of the rules regarding admission of extra-record evidence when courts review administrative agency decisions. Indeed, if followed by other courts, Voices of the Wetlands would effect a fundamental shift in state law and policy respecting administrative mandamus actions. The writ of mandate process allows the public to hold government decisionmakers accountable by requiring that agencies proceed in the manner prescribed by law, that their decisions be supported by findings, and that the findings be supported by substantial evidence. CCP § 1094.5(b). The opinion in Voices of the Wetlands undermines this important check on administrative agency power by depriving citizen watchdogs of an ability to ever reach finality on their meritorious claims and encouraging agency respondents to seek interlocutory remand after an adverse decision on the merits for the purpose of packing the record with

new evidence and with the kind of post hoc rationalizations that the courts have “soundly condemned.” Resources Defense Fund, 191 Cal. App. 3d at 900.⁸

Because the holding in Voices of the Wetlands on this issue departs sharply from existing administrative law precedent and potentially undercuts important state policy, this Court should grant review and reverse the appellate court’s opinion with respect to the proper interpretation of California’s writ statute.

CONCLUSION

For the foregoing reasons, Voice of the Wetlands respectfully requests the Court grant this petition for review on both the federal Clean Water Act issue and the California administrative law issue.

Dated: January 23, 2008

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC

By: 
Deborah A. Sivas

⁸ Of course, in the face of a challenge to its decision, an agency may voluntarily withdraw or remand the decision and subsequently reopen it for further consideration before the matter ever reaches adjudication in the courts. But once a court hears the merits and determines that the agency’s decision is unsupported by the evidence (and, therefore, constitutes a prejudicial abuse of discretion), the agency cannot simply submit more evidence to justify its prior decision without actually reopening and reconsidering that decision in light of the new evidence.

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c), I certify that the text of this brief consists of 7,176 words, not including tables, certifications, or attachments, as counted the WordPerfect 12 word processing program used to generate it.

Dated: January 23, 2008


Deborah A. Sivas

ATTACHMENT

cumulative impact because the thermal plume impacts are limited to the applicable segment of Monterey Bay and the entrainment impacts are mostly in Moss Landing Harbor and Elkhorn Slough. Additionally, as described below, entrainment impacts will be mitigated.

43. Because the thermal discharge of the modernized power plant will assure protection and propagation of a BIC, an alternative effluent limitation for the thermal discharge from the modernized power plant is approved as specified in Part B: EFFLUENT LIMITATIONS in this Order, below. These alternative effluent limitations are effective upon approval by the State Water Resources Control Board.

ENTRAINMENT

44. Section 316(b) of the Clean Water Act (33 U.S.C. section 1326(b)) requires that the location, design, construction, and capacity of cooling water intake structures reflect Best Technology Available (hereafter BTA) for minimizing adverse environmental impacts.
45. Former owner PG&E submitted a final report in November 1983, and supplemental reports in November 1986 and January 1988, to demonstrate compliance with Clean Water Act Section 316(b). The reports determined that impacts could be minimized through operation and maintenance procedures. Based on these reports the Regional Board determined that the existing intake system operation complied with the BTA requirements of section 316(b). Reported conclusions were re-evaluated as part of the review process for this permit and it was determined that there is no basis for reconsidering the Board's existing determination of compliance regarding the existing intake system operation.
46. By letter dated July 21, 1999, the Board requested that the Discharger conduct certain studies and make submittals to the Board relating to Section 316(b) requirements for the cooling water intake system operation for the two new generating units (Units 1 & 2) modernized project. In response to this

request, the Discharger submitted the following documents and studies to the Board: Final Moss Landing Power Plant Modernization Project Cooling Water Intake and Discharge Study Plans dated November 18, 1999; Quarterly Reports Summarizing Entrainment Data beginning August 31, 1999; 316(b) Demonstration Reports for the MLPP including the most recent 316(b) Demonstration Report for the MLPP dated April 28, 2000. The Technical Working Group that was established by the Board to review the design and implementation of the 316(b) studies reviewed each of these reports.

47. The intake structures are located in the Moss Landing Harbor. Eight fish larval species made up 95 percent of the larvae entrained in twelve months of weekly site surveys. Unidentified larval goby accounted for about 50 percent of the entrained larvae. Of those eight fish larval species, three (approximately 5 percent) have commercial or recreational value. Pacific herring and white croaker support human food fisheries and pacific staghorn sculpin support a bait fishery. The direct impacts to sport and commercial fish populations due to entrainment are negligible. However, the cooling water intake does cause a loss of larval forms of fish organisms production for entrained slough/harbor species. This loss of production will continue for the life of the power plant. It is impossible to precisely quantify the resulting impact of the losses on the overall slough/harbor ecosystem and the long-term effects on species populations. Thus, mitigation of this impact is based on scientifically supported estimates.
48. The Discharger must use BTA to minimize adverse environmental impacts caused by the cooling water intake system. If the cost of implementing any alternative for achieving BTA is wholly disproportionate to the environmental benefits to be achieved, the Board may consider alternative methods to mitigate these adverse environmental impacts. In this case the costs of alternatives to minimize entrainment impacts are wholly disproportionate to the environmental benefits. However, Duke Energy will upgrade the

existing intake structure for the new units to minimize the impacts due to impingement of larger fish on the traveling screens, and will fund a mitigation package to directly enhance and protect habitat resources in the Elkhorn Slough watershed as explained below.

49. Minimization of adverse impacts of the intake system to Elkhorn Slough watershed can be accomplished in two ways: 1) modification of the existing intake system to reduce entrainment and impingement; and 2) environmental enhancement projects that result in permanent preservation or direct enhancement of Elkhorn Slough watershed resources. With respect to intake structure modifications, Duke Energy will upgrade the intake system for the new units. New angled traveling screen technology using finer mesh will be installed to reduce approach velocities and better maintain the intake free of debris that might otherwise entangle fish and shellfish. The new intake screens will operate with a continuous slow rotation. The new combined-cycle project will eliminate having a 350-foot tunnel in front of the intake screens and will greatly reduce entrapment of organisms. Each of these factors will directly reduce impingement effects. Additionally, the facility's new power generation technology enables a 34 percent reduction in that intake's permitted intake flow (depending on power demand) compared to the old retired units, a direct reduction in potential entrainment effects of the same percentage. Duke Energy will minimize the volume of cooling water used by shutting down circulation pumps whenever possible during low power demand. However, these modifications alone are not sufficient to minimize adverse environmental effects of the intake system and to achieve compliance with the BTA requirements of section 316(b) because the modifications do not address entrainment impacts.

50. Environmental Enhancement Program

In addition to the intake modifications mentioned above, the Board, California Energy Commission, and Duke Energy have developed an acquisition and aquatic habitat enhancement program called the Elkhorn Slough Enhancement Program. The enhancement program, in addition to the modifications to the intake system described above, will minimize adverse environmental effects of the intake system on the Elkhorn Slough watershed resources so that Duke Energy can comply with Clean Water Act section 316(b). Adverse environmental effects will be minimized by increasing health and biological productivity of aquatic habitat in the Elkhorn Slough watershed. Duke Energy will deposit a total of \$7,000,000 (seven million dollars), into a dedicated account as specified by the Executive Officer and California Energy Commission. The \$7,000,000 will be paid in full within 120 days after the start of construction for the new power generation units (anticipated at the end of December 2000). The dedicated account will be invested in a manner approved by the Executive Officer.

The funds will be used as follows:

- a. The dedicated fund will be used by Elkhorn Slough Foundation to only fund projects "for permanent preservation and enhancement" of habitat within the Elkhorn Slough watershed so that health and biological productivity of aquatic habitat will be increased.
- b. The goal of the Elkhorn Slough Enhancement Project is to mitigate significant effects of larvae entrainment by the cooling water intake system by using the most direct means to increase the biological health and productivity of the Elkhorn Slough watershed aquatic habitat through acquisition, permanent preservation, and restoration of habitat including wetland and upland areas in the Elkhorn Slough watershed and can include other improvements and enhancements to increase the health and productivity of the slough's aquatic habitat.

For habitat acquired, protected, or restored, measures will be identified to monitor the long-term maintenance of such habitat.

The Elkhorn Slough Enhancement Project will be implemented by the Elkhorn Slough Foundation subject to oversight by the Regional Board and Energy Commission. The Elkhorn Slough Foundation will implement the project in accordance with the plan and Memorandum of Agreement, described below.

c. The objectives to achieve the project goal are:

- Implement an aggressive conservation acquisition program for the Elkhorn Slough that includes acquiring fee interests, conservation easements or management agreements on lands that either directly impinge on the slough or that contribute damaging inputs to the slough. Damaging inputs can refer to debris or sediment coming from eroding uplands in the slough, nutrients or chemicals running off into the slough or other components that tend to degrade the productivity, species diversity or the long-term health of the slough ecosystem.
 - ◆ The priority for transactions is to:
 - Purchase fee interest or easements on wetland areas that are in need of restoration or enhancement.
 - Restore degraded wetlands and former wetlands that have been diked or impacted by other uses.
 - Purchase fee interest or easements on lands immediately adjoining the slough that are currently impacting aquatic resources in negative ways to reduce or eliminate the damaging practices.
 - Develop vegetated buffers between waterways and upland areas that are contributing runoff to the slough.
- Purchase fee interest or easements on the best remaining wetlands that are currently unprotected or in jeopardy.
- ◆ Priority for lands with damaging impacts to slough will be based on analyses by the NRCS and other local partners. Those lands that contribute the greatest negative input: sediment, chemicals, nutrients, debris, will be targeted first.
- As previously described, restore wetlands in the slough. The priority for this objective is to restore those areas, particularly degraded wetlands, that will contribute to the improvement of water quality entering the system by trapping sediments, filtering and transforming nutrients, and increasing wetland habitats for aquatic species.
- Establish from a portion of the \$7 million (approximately \$2 million) a fund to be invested to provide a permanent endowment to accomplish short-term and long-term stewardship (management and maintenance) of the selected mitigation projects in perpetuity.
- The Elkhorn Slough Foundation may implement these projects in cooperation and coordination with other conservation organizations and agencies and may use funds in the dedicated account to secure matching grants for the benefit of the Elkhorn Slough watershed. This objective is included to clarify that leveraging of the dedicated account is permitted to obtain additional benefits for the Elkhorn Slough watershed without additional expenditures from the dedicated account.
- The location of the Enhancement Project will be in the Elkhorn Slough watershed. Those lands that directly impinge on the health and productivity of the slough aquatic habitat and/or that have strategic importance for restoring and managing the slough's aquatic habitat over the long-run

will be targeted.

(It is generally not advisable to identify specific parcels of property for acquisition before contact has been made with landowners. The acquisition process is contingent on willing sellers or landowners willing to grant or sell easements on their property. Therefore, the general criteria for acquisition are outlined. It would be premature and counterproductive to identify specific parcels, but all acquisitions would meet the goals outlined here and the due diligence standards for conservation real estate transactions.)

d. The Plan will be implemented through the following procedures:

- The Regional Board and Energy Commission (permitting agencies) will prescribe final project requirements to assure funds are spent appropriately. As a part of this process a series of *Advisory Team* meetings will be held to obtain advice from representatives of the California Coastal Commission, California Department of Fish and Game, Monterey Bay National Marine Sanctuary, Elkhorn Slough National Estuarine Research Reserve, Monterey County, Elkhorn Slough Foundation, and Environmental organizations designated by the Regional Board and Energy Commission (the *Advisory Team*). Within 60 days of Project certification by the Energy Commission, one or more *Advisory Team* meetings will be held to identify categories of projects that could be funded with Elkhorn Slough Enhancement Project funds, and for each category of project, identify specific goals, objectives, performance standards, fund management protocols, and stewardship activities that may be needed to maintain goals and objectives over time. The Regional Board and Energy Commission will produce and circulate a written Elkhorn Slough Enhancement Project plan for review and comment by the *Advisory Team* and other interested stakeholders. The Regional Board

and Energy Commission shall hold meeting(s) and complete the written plan in a timely manner to ensure prompt mitigation efforts. The Regional Board will approve or disapprove the plan at a public meeting after public comment. It is expected that the first *Advisory Team* meeting will be in November.

- The Elkhorn Slough Foundation will apply all due diligence, as outlined in the Land Trust Alliance Standards and Practices, to the evaluation, negotiation and purchase of fee or easement interests in targeted properties. All transactions are predicated on the following:
 - Transaction meet all due diligence standards:
 - Clear title;
 - Phase I environmental review;
 - Phase II environmental review if necessary; and
 - Fair market-appraisals
- Fee Acquisition of appropriate properties – for those lands and waters that can be protected only by permanent ownership, we propose to acquire fee interest. Some of these lands may be annexed to the Elkhorn Slough National Estuarine Research Reserve, some to The Nature Conservancy Preserve, and some permanently managed by the Elkhorn Slough Foundation.
- Purchase of Conservation Easements – easements can protect the fundamental natural resources of many of the areas of concern. Where possible, easements are the preferred tool, as they tend to reduce long-term management costs for the conserving entity.
- Restoration activities will follow existing plans: The Moro Cojo Slough Wetlands Management and Enhancement Plan, the Elkhorn Slough Wetland Plan, and the Elkhorn Slough National Estuarine Research Reserve Vegetation Management Plan provide guidance for restoration

activities in the slough that will improve water quality.

- Elkhorn Slough Foundation and the permitting agencies will enter into a Memorandum of Agreement (MOA) governing the process for the Foundation to submit specific project proposals to the permitting agencies for approval. The MOA will require the permitting agency staff to review the proposed project for conformity to the Elkhorn Slough Enhancement Project plan and to approve the project as consistent with the plan and approve the level of funding for the project. Before such approvals the permitting agencies will consult with the *Advisory Team*.

The MOA will also provide for project monitoring and invoice approval by the permitting agencies. The MOA will require The Foundation to provide progress and final reports for specific projects. If the Enhancement Program fund is in the custody of the Elkhorn Slough Foundation, the MOA shall provide that no funds may be released without written approval of the Regional Board and the Energy Commission and shall provide for fiscal reports and auditing.

- Elkhorn Slough Foundation, will provide an annual report including description of projects implemented, a schedule and description of future projects, and if the Foundation has custody of the Enhancement Program fund, a summary of financial account activity.
- To maximize the benefits of the environmental enhancement program, the Regional Board and Energy Commission will approve projects for funding and implementation as soon as possible after funds are deposited in the dedicated account and the Elkhorn Slough Enhancement Plan is approved by the Regional Board and the Energy Commission.
- Over the course of approximately five years,

the projects funded by the mitigation money are expected to be complete except for any necessary stewardship activities.

- e. The following guidance will be followed for monitoring mitigation by the Elkhorn Slough Enhancement Program :

- Performance standards

Measures that gauge progress toward the goals of the plan will include:

Numbers of acres acquired and protected;
 Numbers of acres restored;
 Numbers of acres of vegetated buffers created; and
 Estimated quantities of Sediment prevented from entering the system due to acquisition and restoration of targeted lands.

Reduction of chemical and nutrient inputs to slough based on calculations provided by NRCS and partner agencies.

- Integrating monitoring with CEC compliance program

The Elkhorn Slough National Estuarine Research Reserve, Elkhorn Slough Foundation, National Oceanic and Atmospheric Administration, Department of Fish and Game, and the Monterey County Water Resources Agency cooperatively monitor 24 stations throughout the Elkhorn Slough and lower Salinas River system. This program, established in 1988, monitors nitrate, phosphate, ammonia, temperature, salinity, turbidity, pH, dissolved oxygen, and conductivity on a monthly basis. It is the longest running surface water quality monitoring program in the central Monterey Bay area. This data collection program will run in parallel with the acquisition and restoration associated with the mitigation and may provide a measure of nutrient reduction associated with implementation of the plan.

The Reserve and Foundation fly regular series of aerial surveys collecting photographs for tracking land use changes and vegetative cover in the slough watershed. This will continue through the period of acquisition and restoration and be used, in combination with GIS to provide another measure of performance.

To maximize the benefits of the environmental enhancement program, projects will be approved for funding as soon as possible and will be implemented as soon as possible after funds are deposited in the dedicated account. This provision is included because the program emphasizes land acquisition. Demand for coastal land and prices for that land are constantly increasing. Delay may result in lost opportunity to acquire a certain parcel or an increased price for that parcel. Additionally, every year a source of erosion or toxic run-off to the slough continues to discharge the more difficult ecosystem enhancement will be. Time has a direct connection to environmental benefit.

51. Based upon the above findings, implementation of the above described intake modifications, and complete funding of the environmental enhancement program, as described in the above finding, constitutes compliance with Clean Water Act section 316(b) by implementing BTA that minimizes adverse environmental effects on the environment due to operation of the modernized MLPP cooling water intake system.

California Environmental Quality Act

52. Waste discharge requirements for this discharge are exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 21100, et seq.) in accordance with section 13389 of the California Water Code.

Discharging is a Privilege

53. A permit and the privilege to discharge waste

into waters of the State is conditional upon the discharge complying with provisions of Division 7 of the California Water Code and of the Clean Water Act (as amended or as supplemented by implementing guidelines and regulations) and with any more stringent effluent limitations necessary to implement water quality control plans; to protect beneficial uses, and to prevent nuisance. This Order shall serve as a National Pollutant Discharge Elimination System Permit pursuant to Section 402 of the Clean Water Act. Compliance with this Order should assure conditions are met and mitigate any potential changes in water quality due to the project.

Changes to the Order

54. Order No. 00-041 includes findings for both the existing power plant and the proposed Units 1 & 2. The Order includes revised effluent limitations in accordance with the Thermal Plan and a variance under limited conditions from one of the Thermal Plan objectives according to Clean Water Act section 316(a). Order No. 00-041 includes provisions for cooling water intake system compliance with Clean Water Act section 316(b) based upon some improvements to the system and implementation of an environmental enhancement program.

Changes to the Monitoring and Reporting Program

55. The Discharger has indicated a willingness to participate in development of a regional monitoring program in the Monterey Bay National Marine Sanctuary. The receiving water monitoring may be revised based on program development. Duke Energy will conduct a comprehensive evaluation of the three dimensional thermal plume dispersion areas under actual operating conditions when the new power generation units come on-line. A thermal plume evaluation plan must be submitted to the Board for review six months prior to full commercial operation of the new power generation units. The Board's independent consultants will review the

Estimates of proportional entrainment (fractional losses) of fish larvae to the source water of the harbor and slough, and the percent volume of cooling water entrained (contains biological resources that will be entrained) relative to the volume of source water in the harbor and slough are considered as a percentage of the slough's productivity and used to estimate equivalent habitat productivity losses. Fractional losses from the Elkhorn Slough are equivalent to a loss of habitat (wetland habitat for instance). Determining reasonable and satisfactory mitigation amounts and costs for restoring wetland acres and other Elkhorn Slough enhancements is difficult, since there are a wide range of costs associated with these types of activities (see Table 5). Additionally, BTA alternatives will be considered, and balanced with environmental benefits and costs.

Impacts associated with the thermal discharge, impingement, and entrainment losses of marine and estuarine species due to the once-through cooling water system are considered to be significant. The new combined cycle power plant will suck through its cooling water intake system a minimum of six percent (6 percent to 28 percent with units 6&7 also operating) (see Table 2) of the water volume of the harbor and Elkhorn Slough on a daily, annual, and life-of-the-facility basis. Essentially all living material in this water volume will be lost. Additional losses of marine and estuarine biological resources will result from impingement and from thermal impacts due to the cooling water discharge influence. Impingement and thermal discharge losses are difficult to quantify, but will contribute to overall ecosystem losses. Impingement will add to the harbor and Elkhorn Slough ecosystem losses, and the thermal discharge will result in some effects to the near-shore, soft benthos, sandy beach, and jetty (rocky substrate) biological resources. The thermal discharge by itself is not considered to be a significant impact at this time. The true extent of the thermal effects of the new combined cycle power plant is unknown since the extent of the resulting thermal plume has not been determined adequately, and won't be until the new power plant operation begins. Monitoring of these thermally affected systems in order to determine effects with any level of confidence is considered difficult due to the many confounding factors. Therefore, the unquantified impacts that will result due to the thermal discharge, will be considered along with other cumulative effects and mitigated/compensated by an additional increment of Elkhorn Slough wetland replacement acres, or associated enhancements.

Table 2 below shows the replacement wetland acres required to replace harbor and Elkhorn Slough ecosystem (biological resources values) losses. There are approximately 4000 wetted acres of surface water in Elkhorn slough. The percent of water volume and associated productivity losses are considered to require an acre-for-acre of wetlands restored to replace the productivity lost due to the cooling water system. In this case six percent of Elkhorn Slough surface volume (4000 acres) equals 240 acres of wetland needed to be restored in order to replace the lost productivity.

BIOLOGICAL RESOURCES Table 2
Daily Cooling Water Intake Volume as a Percent of Harbor and Elkhorn Slough Water Volume and Equivalent Replacement Wetland Acres.

	% of Volume ¹	Equivalent Wetland Ac. ²
Combined Cycle Units 1&2	6%	240 Acres
Units 1&2 and Units 6&7	28%	1135 Acres

1. Volume of daily maximum cooling water intake and the volume of the Harbor and Elkhorn Slough were used.
2. Elkhorn Slough has approximately 4000 surface (wetted area) acres. It is estimated that it will take an acre-for-acre replacement of new wetland to mitigate/compensate for the biological productivity lost due to the intake water volume as a percentage of the wetted area of the Elkhorn Slough. An example is 6% volume multiplied by 4000 acres of surface water area in the Elkhorn Slough equals 240 acres of wetlands that need to be replaced/restored to make up for the loss of biological resources.

Entrainment due to the Moss Landing Power Plant project (new combined cycle units 1&2) cooling water system will carry essentially all pelagic organisms in the volume of water entrained through the power plant to their death. This is a similar way of assessing losses to the harbor and Elkhorn Slough ecosystem as discussed above. In the case of the new combined cycle power plant this results in the loss of an average of 13 percent (see Table 3) of the fish larvae (other pelagic eggs and larvae are also lost, such as crabs and clams) in the Harbor and Elkhorn Slough. If all units (units 1&2 and 6&7) are operating the percentage would be several times greater. These pelagic organisms are important living material that provide food (primary productivity) for many creatures in the harbor and slough ecosystems. The loss of this amount of productivity is significant. The Elkhorn Slough covers about 4000 acres of wetted surface, and the loss of 13 percent of the fish larvae will require an acre-for-acre replacement of wetland in order to replace the lost productivity of the harbor and Elkhorn Slough ecosystem. In this case 13 percent of the 4000 acres of wetted surface equals 520 acres of needed wetland acres restored. Table 3 below illustrates these figures.

BIOLOGICAL RESOURCES Table 3
Percentage of Fish Larvae Lost Due to the Cooling Water Intake System
and Replacement Wetland Acres

SOURCE WATER

	Large Volume	Small Volume
Unidentified Gobies	3%	11%
Bay Goby	4%	21%
Blackeye Goby	4%	7%
Longjaw Mudsucker	5%	9%
Combtooth Blenny	11%	18%
Pacific Herring	5%	13%
White Croaker	?	?
Pacific Staghorn Sculpin	4%	12%
Average % loss (small volume) (From 316 (b) report)		13%

13% of 4000 surface acres in Elkhorn Slough equals¹ **520 wetland replacement acres**

1. It is estimated that an acre-for-acre replacement/restoration percentage of wetland is needed to make up for each average percent of fish larvae (and other biological resources) removed from Elkhorn Slough ecosystem. This loss in productivity can be replaced by improving the quality and productivity of the Elkhorn Slough through wetland restoration type actions. Thirteen percent of 4000 acres equals 520 acres of replacement wetland acres.

The above two assessment methods are similar and rely on the same concept of the operation of the once through cooling system resulting in loss of productivity to the harbor and Elkhorn Slough ecosystems and that in order to replace those losses, the productivity of the Elkhorn Slough ecosystem needs to be improved, thereby enhancing the ability of Elkhorn Slough to replace the primary productivity lost due to the combined cycle power plant operation. This requires restoration of wetland acres and other enhancement of the Elkhorn Slough ecosystem. As mentioned above, this approach to mitigating/compensating for the biological resources losses has been agreed to as reasonable and acceptable methods for determining mitigation/compensation, by staff of the state agencies involved in permitting the Moss Landing Power Plant project. These agencies are the California Central Coast Regional Water Quality Control Board, California Department of Fish and Game, California Coastal Commission, and the California Energy Commission.

A reasonable wetland replacement amount taken from the range of acres and costs displayed in Tables 2-6. will be considered along with BTA options that would eliminate or reduce biological resource impacts. A mitigation/compensation amount will be derived at a publically noticed workshop by the agencies and the project owner, prior to the Evidentiary Hearing. Those determinations will be presented at the Evidentiary Hearing.

Table 4 displays the range of losses and the restored wetland acres needed. Table 5 displays a range of wetland restoration costs and cost estimates. Table 6 displays the range of wetland restoration costs to be applied to Moss Landing Power Plant project. Table 7 lists other BTA options that would significantly reduce biological resources losses due to impingement, entrainment, and thermal discharge. In some cases these BTA options eliminate the cooling water system impacts (dry cooling) and in other cases the cooling water system impacts are significantly reduced (cooling towers) and would be balanced with reduced mitigation/compensation requirements. The feasibility of the various BTAs are weighed against the effectiveness to reduce cooling water system adverse impacts to biological resources and the costs of wetlands restoration and other Elkhorn Slough enhancements. A specific mitigation/compensation amount for Elkhorn Slough enhancement (wetland acres to be restored and other enhancements) is yet to be determined.

BIOLOGICAL RESOURCES Table 4
Range of replacement Wetland Acres

	% Loss	Restored Wetland Acres Needed
% volume of water (C C units)	6%	240 Acres
% volume of water (All units)	28%	1135 Acres
% fish larvae lost (small volume)	13%	520 Acres

COURT OF APPEAL

OPINION
(December 14, 2007)

and

ORDER MODIFYING OPINION
AND DENYING REHEARING
(January 10, 2008)

COPY

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

VOICES OF THE WETLANDS,

Plaintiff and Appellant,

v.

CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD, et al.

Defendants and Appellants.

DUKE ENERGY MOSS LANDING, LLC,
et al.

Real Parties in Interest and Appellants.

H028021
(Monterey County
Super. Ct. No. M54889)

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This litigation arose from administrative approvals of a project to modify the Moss Landing Power Plant, which is located in Monterey County. In connection with state energy commission certification proceedings for the project, the regional water board issued a federal water pollution permit. Appellant challenged the issuance of that permit. Following two judicial hearings punctuated by an administrative remand, the trial court dismissed appellant's administrative mandamus petition. This appeal and cross-appeal followed. The complex issues before us include procedural challenges to the trial court's jurisdiction and to its interim remand. The parties also dispute the sufficiency of the evidence supporting issuance of the water permit, both before and after remand, and the proper application of the governing statute. For reasons explained in this opinion, we affirm the trial court's final judgment denying appellant's petition for writ of mandate.

INTRODUCTION

The Parties: This action was initiated by Voices of the Wetlands, petitioner below and appellant and respondent on appeal. Appellant is a nonprofit association of individuals dedicated to preserving Elkhorn Slough. Respondents in the trial court were two state agencies (collectively, the Water Boards): the California State Water Resources Control Board (State Board) and the California Regional Water Quality Control Board, Central Coast Region (Regional Board). Real party in interest is Duke Energy Moss Landing, LLC, and Duke Energy North America, LLC (collectively, Duke). At all times relevant to this litigation, Duke owned and operated the Moss Landing Power Plant, which is located at the mouth of Elkhorn Slough. Both Duke and the Water Boards are respondents and cross-appellants on appeal (collectively, respondents).

The Challenged Administrative Decision: Appellant challenges a permit issued to Duke by the Regional Board, under the National Pollutant Discharge Elimination System (NPDES). The NPDES permit allows Duke to cool the Moss Landing Power Plant using water taken from Moss Landing Harbor and later discharged back into Monterey Bay. According to appellant, the issuance of the NPDES permit here violates federal law, because the Water Boards did not require Duke to use the best technology available to minimize adverse environmental effects, as required by federal law.¹ Citing several specific grounds, appellant attacks the Boards' approval of once-through cooling, claiming that it kills unacceptable numbers of aquatic larvae.

¹ The federal law at issue here is commonly known as the Clean Water Act (CWA), which is codified at 33 U.S.C. sections 1251-1387. In keeping with the general practice in federal courts, we “refer to statutory provisions by their section in the Clean Water Act and provide the parallel citation to the United States Code only on first reference or where necessary to avoid confusion.” (*Riverkeeper, Inc. v. U.S. E.P.A.* (2004) 358 F.3d 174, 181, fn. 2 (*Riverkeeper I*)). In addition, we refer to Clean Water Act statutory subdivisions in shorthand fashion. We thus refer to the provision that governs here – 33 U.S.C. § 1326, subdivision (b) – as section 316(b).

Judicial Proceedings: After the State Board declined to review the issuance of the NPDES permit, appellant brought judicial proceedings in the superior court. Respondents demurred, asserting that the court lacked jurisdiction to hear the matter because the controversy arose from certification proceedings conducted by the California State Energy Resources Conservation and Development Commission (Energy Commission) and judicial review of such proceedings may be had only in the California Supreme Court. After overruling respondents' demurrer, the court conducted a hearing, ordered a limited remand to the Regional Board, and later conducted a second hearing, ultimately denying appellant's writ petition. The ensuing judgment culminated in this appeal and cross-appeal.

BACKGROUND

This litigation arose from Duke's 1999 application to modernize its Moss Landing Power Plant. The plant, previously owned by Pacific Gas and Electric, has been in continuous operation since 1950. Duke proposed to replace five old units at the Moss Landing Power Plant with two new 530-megawatt, natural gas fired, combined cycle generating units.

As described in the Energy Commission's October 2000 decision, the Moss Landing Power Plant is located in a biologically sensitive area, just south of "the Elkhorn Slough National Estuarine Research Reserve, which adjoins the much larger ... Monterey Bay National Marine Sanctuary near Moss Landing Harbor about midway between the cities of Santa Cruz and Monterey." The Elkhorn Slough is "a biological gem" and "a biologically rich wetland system, providing habitat for hundreds of resident and migratory bird species." The slough is home to a "great diversity of rare plants and animals" and it also "serves as an important nursery and source of nutrients for Monterey Bay." And "Elkhorn Slough is one of the few relatively large coastal wetlands remaining in California."

As proposed, the two new generating units would use seawater from the harbor for once-through cooling, the same basic technology utilized by the old units. Under section 316(b) of the federal Clean Water Act, cooling water intake structures must reflect the best technology available (BTA) for minimizing adverse environmental impacts. When a plant draws water in, the environmental effects may include “impingement” and “entrainment.” As explained in the Energy Commission’s October 2000 decision: “Impingement occurs from suction when the cooling water intake system holds organisms against the traveling screens. Entrainment is where [smaller] aquatic organisms such as larvae and fish eggs are drawn [through the screens] into the [plant’s] cooling system.” When the cooling water is later discharged at a higher temperature, the water body receiving it may suffer harmful thermal effects. The Regional Board required Duke to address both impingement and entrainment intake effects, as well as the thermal discharge impact.

SYNOPSIS OF PROCEDURAL HISTORY

Starting in 1999, Duke sought administrative approval to modernize the Moss Landing Power Plant. Duke applied for the necessary certification from the Energy Commission. Duke also applied to the Regional Board for an NPDES permit for the modified facility. The two agencies’ evaluation processes were integrated. For one thing, as described in the Energy Commission’s decision, “the Commission and the RWQCB [Regional Board] formed a Technical Working Group (TWG) made up of representatives from various regulatory agencies, the scientific community, and Duke Energy. The TWG met regularly on a monthly basis beginning in March 1999, holding approximately 13 meetings. The TWG worked to design biological resource studies and then validate the results of these studies.”

In October 2000, the Energy Commission approved Duke’s application for certification, subject to various conditions including compliance with the requirements of

the NPDES permit. In November 2000, the Regional Board approved Duke's NPDES permit. As relevant here, the Regional Board required Duke to "upgrade the existing intake structure for the new units to minimize the impacts due to impingement of larger fish on the traveling screens..." In addition, "the Board, California Energy Commission, and Duke Energy ... developed an acquisition and aquatic habitat enhancement program" designed to "minimize adverse environmental effects of the intake system on the Elkhorn Slough watershed resources," which would be funded by a \$7 million payment from Duke.² Appellant took an administrative appeal of the permit approval to the State Board, which rejected appellant's petition for administrative review in June 2001.

In July 2001, appellant instituted this judicial action, petitioning the Monterey County Superior Court for a writ of administrative mandamus to set aside the Water Boards' issuance of the NPDES permit. Duke and the Water Boards demurred to the petition, in part on the ground that the superior court lacked subject matter jurisdiction. The Energy Commission filed a memorandum as amicus curiae, supporting respondents' arguments. After the court overruled their demurrers, respondents opposed the petition on the merits.

Following a hearing in September 2002, the court filed its intended decision. In it, the court rejected one of the Regional Board's NPDES permit findings, number 48, which concerned BTA for the cooling system. As the court put it: "Finding number 48 is not supported by the weight of the evidence." The court therefore ordered issuance of a writ of mandate "compelling the Regional Board to conduct a thorough and

² The NPDES permit refers to this proposal as both the "Environmental Enhancement Program" and the "Elkhorn Slough Enhancement Program." Over the course of the administrative and judicial proceedings, the proposal has been called by that first title, by the corresponding initials (EEP), and by other names, including: the mitigation plan; the habitat program; the habitat equivalency plan; and the habitat enhancement plan (or HEP). Its stated purpose is to increase "health and biological productivity of aquatic habitat in the Elkhorn Slough watershed." In this opinion, we generally refer to it as the mitigation plan.

comprehensive analysis of Best Technology Available applicable to the Moss Landing Power Plant.” A writ did not issue, however. Instead, in March 2003, the court entered an order of remand to the Regional Board. The court retained jurisdiction while the remand was pending.

In April 2003, appellant filed a writ petition in this court, which challenged the trial court’s decision to remand the matter to the Regional Board without first issuing a writ directing the agency to vacate the entire NPDES permit. We summarily denied appellant’s writ petition.

In May 2003, the Regional Board conducted a further public hearing. After considering additional evidence, the Regional Board concluded that the challenged finding was supported by the weight of the evidence. Appellant appealed administratively to the State Board, again without success.

The parties returned to the trial court. In June 2004, the court filed an intended decision upholding the Regional Board’s action on remand and denying appellant’s petition. The following month, the court issued a statement of decision, reaching the same result.

These appellate proceedings followed.

CONTENTIONS

In its appeal, appellant argues: (1) the administrative remand process was fatally flawed; (2) the Water Boards improperly relied on the availability of an environmental enhancement fund in making the challenged determinations; and (3) the Regional Board erred in making its determination of best technology available, because it failed to apply a discernible standard and it acted with unfettered discretion.

The Water Boards and Duke dispute appellant’s arguments. They also raise two additional claims by cross-appeal, both of which appellant refutes: (1) the trial court erred in overruling their demurrers to appellant’s petition, because a statute bars judicial

review in the superior court in proceedings involving power plant certification; and (2) the court erred in remanding the matter to the Regional Board, because ample evidence supported the original administrative approvals.

STATUTORY FRAMEWORK

We begin by summarizing the statutory framework that governs the issues before us. Because an NPDES permit is at issue here, federal and state water law applies. Because the project is a power plant, state law governing power plant approvals also comes into play. We briefly describe each pertinent body of law.

I. Federal Water Quality Law: The Clean Water Act

“The United States Environmental Protection Agency (EPA) regulates water quality in the nation’s navigable waters pursuant to several statutes, the most important of which is the Clean Water Act.” (2 Manaster & Selmi, *Cal. Environmental Law and Land Use Practice* (2004) Water Quality Regulators, § 30.40, p. 30-55, fn. omitted.) The Clean Water Act (CWA) is codified at 33 U.S.C. § 1251-1387; its official name is the Federal Water Pollution Control Act (FWPCA). (See, e.g., *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 620.)

A. Overview

Congress passed the Clean Water Act in its present form in 1972. (*Rapanos v. United States* (2006) ___ U.S. ___ [126 S.Ct. 2208, 2225-2227] (plur. opn.)) With that legislation, Congress “established a comprehensive water quality policy for the nation.” (*City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th at p. 626.)

“Before it was amended in 1972, the Federal Water Pollution Control Act employed ambient water quality standards specifying the acceptable levels of pollution in a State’s interstate navigable waters as the primary mechanism in its program for the control of water pollution.” (*Environmental Protection Agency v. State Water Resources*

Control Board (1976) 426 U.S. 200, 202, fns. omitted.) Under that system, it was “very difficult to develop and enforce standards to govern the conduct of individual polluters.” (*Id.* at pp. 202-203.) “In 1972, prompted by the conclusion of the Senate Committee on Public Works that ‘the Federal water pollution control program ... has been inadequate in every vital aspect,’ Congress enacted the Amendments” that make up the current law. (*Id.* at p. 203, fn. omitted.)

The 1972 federal legislation “introduced two major changes in the methods to set and enforce standards to abate and control water pollution. First, the Amendments are aimed at achieving maximum ‘effluent limitations’ on ‘point sources,’ as well as achieving acceptable water quality standards. A point source is ‘any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged.’ An ‘effluent limitation’ in turn is ‘any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources ... including schedules of compliance.’ ” (*Environmental Protection Agency v. State Water Resources Control Board, supra*, 426 U.S. at p. 204, fns. omitted, citing 33 U.S.C. §§ 1251, 1262.) “Second, the Amendments establish the National Pollutant Discharge Elimination System (NPDES) as a means of achieving and enforcing the effluent limitations. Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits.” (*Id.* at p. 205, fns. omitted, citing 33 U.S.C. §§ 1319, 1365.)

The goal of the 1972 act is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” (33 U.S.C.A. § 1251(a); see *Rapanos v. United States, supra*, 126 S.Ct. 2208.)

B. Operation

Congress entrusted the EPA with primary authority for implementing the Clean Water Act. (33 U.S.C.A. § 1251; see generally 2 Manaster & Selmi, Cal. Environmental Law, *supra*, § 30.40, p. 30-55.) The EPA's statutory authority includes responsibility for issuing NPDES permits. (33 U.S.C.A. § 1342(a).)

“Congress also provided that a State may issue NPDES permits ‘for discharges into navigable waters within its jurisdiction,’ but only upon EPA approval of the State’s proposal to administer its own program.” (*Environmental Protection Agency v. State Water Resources Control Board*, *supra*, 426 U.S. at p. 208; 33 U.S.C.A. § 1342(b).)

“Under the federal Clean Water Act, each state is free to enforce its own water quality laws so long as its effluent limitations are not ‘less stringent’ than those set out in the Clean Water Act. (33 U.S.C. § 1370.)” (*City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th at p. 620.) In such cases, the EPA suspends its issuance of NPDES permits in favor of the state’s approved program. (33 U.S.C.A. § 1342(b); *Environmental Protection Agency v. State Water Resources Control Board*, *supra*, 426 U.S. at p. 208, fn. 17.) But the EPA “retains authority to review operation of a State’s permit program.” (*Id.* at p. 208; see also, e.g., *National Association of Home Builders v. Defenders of Wildlife* (2007) ___ U.S. ___ [127 S.Ct. 2518, 2525; *ibid.*, fn. 1].)

II. State Water Law: the Porter-Cologne Act

“In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969.” (*City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th at p. 619.) The Porter-Cologne Act preceded the federal Clean Water Act by three years. (*Id.* at p. 625.) The state statute is codified in the Water Code, Division 7, at sections 13000-14076.

A. Overview

The goal of the Porter-Cologne Act “is ‘to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.’ ” (*City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th at p. 619, quoting Wat. Code, § 13000.) “The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Water Board and the Regional Water Boards comprise ‘the principal state agencies with primary responsibility for the coordination and control of water quality.’ ” (*Ibid.*, quoting Wat. Code, § 13001.)

In 1972, the California Legislature amended the “Porter-Cologne Act ‘to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act.’ ([Wat. Code] § 13372.)” (*City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th at p. 620.) “On May 14, 1973, the Acting EPA Administrator approved the State of California’s request to administer its own NPDES permit program and, effective that date, suspended EPA issuance of all permits for ‘all discharges in the State of California, other than those from agencies and instrumentalities of the Federal government.’ ” (*Environmental Protection Agency v. State Water Resources Control Board*, *supra*, 426 U.S. at p. 209.) “California was the first state in the nation to be authorized to issue National Pollutant Discharge Elimination System (NPDES) permits, which regulate the discharge of pollutants to surface waters.” (2 Manaster & Selmi, *Cal. Environmental Law*, *supra*, § 31.08, p. 31-13, fn. omitted.)

The state’s water agencies thus perform a “dual role” of “implementing state law relating to water quality and carrying out a delegated administrative responsibility over the more precise and far-reaching system of federal law.” (*WaterKeepers Northern*

California v. State Water Resources Control Bd. (2002) 102 Cal.App.4th 1448, 1451-1452.)

B. Operation

“In California, wastewater discharge requirements established by the Regional Water Boards are the equivalent of the NPDES permits required by federal law. ([Wat. Code] § 13374.)” (*City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th at p. 621.) But Water Code section 13374 requires “equivalency *only* for purposes of state compliance with the *minimum* requirements of the federal mandate. The federal law does not preclude the state from utilizing its broader authority to regulate [other] sources of pollution by means of its waste discharge permit system.” (*Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1431.)

In issuing federal NPDES permits under the Clean Water Act, the State Board “is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act [i.e., the Clean Water Act].” (Wat. Code, § 13160.) California implements its delegated permitting authority through its regional water boards. (See Wat. Code, § 13263; see also, *id.*, §§ 13260, 13376; see generally, 2 Manaster & Selmi, *Cal. Environmental Law*, *supra*, § 30.40, p. 30-55; 57 Ops.Atty.Gen. 19, 20 (1974).) The Regional Water Boards are also responsible for implementing state water law. “The actual administration of the Porter-Cologne Act rests on the power of the Regional Boards to prescribe waste discharge requirements for all persons discharging waste into inland surface waters, enclosed bays and estuaries within their jurisdiction. (Wat. Code, § 13263.)” (*WaterKeepers Northern California v. State Water Resources Control Bd.*, *supra*, 102 Cal.App.4th at p. 1452.) California’s “statewide program of water quality control ... provides for regional administration within the

framework of statewide coordination and policy.” (*Hampson v. Superior Court* (1977) 67 Cal.App.3d 472, 484.)

C. Review

“A party who is aggrieved by an order or decision of a regional board may seek administrative review of that order or decision by petition to the State Board. (Wat. Code, § 13320, subd. (a).)” (*Johnson v. State Water Resources Control Bd.* (2004) 123 Cal.App.4th 1107, 1112; see also, e.g., Cal. Code of Regs., tit. 23, § 2050; *Hampson v. Superior Court*, *supra*, 67 Cal.App.3d at p. 484.) Administrative review by the State Board is discretionary. (*Johnson v. State Water Resources Control Bd.*, at pp. 1112-1113; *People ex rel. Cal. Regional Wat. Quality Control Bd. v. Barry* (1987) 194 Cal.App.3d 158, 172.)

If the State Board grants review, its decision is subject to judicial review by means of a petition for writ of administrative mandamus filed in the superior court. (Wat. Code, § 13330, subd. (a).) If the State Board denies review, “the statutory scheme ... provides for direct judicial review” of the challenged Regional Water Board decision, likewise by superior court mandamus petition. (*Johnson v. State Water Resources Control Bd.*, *supra*, 123 Cal.App.4th at p. 1114; Wat. Code, § 13330, subd. (b).)

III. State Law Governing Power Plant Approvals: the Warren-Alquist Act

The California statutory scheme governing power plants is entitled the Warren-Alquist State Energy Resources Conservation and Development Act. (Pub. Resources Code, § 25000.) The provisions of the Warren-Alquist Act are contained in Division 15 of the Public Resources Code, at sections 25000 et seq.

A. Overview

The Warren-Alquist Act governs the siting of “thermal powerplants” as statutorily defined. The Act includes the following relevant definitions: “ ‘Site’ means any location

on which a facility is constructed or is proposed to be constructed.” (Pub. Res. Code, § 25119.) “ ‘Facility’ means any electric transmission line or thermal powerplant, or both electric transmission line and thermal powerplant, regulated according to the provisions of this division.” (*Id.*, § 25110.) “ ‘Thermal powerplant’ means any stationary or floating electrical generating facility using any source of thermal energy, with a generating capacity of 50 megawatts or more, and any facilities appurtenant thereto.” (*Id.*, § 25120.) “ ‘Modification of an existing facility’ means any alteration, replacement, or improvement of equipment that results in a 50-megawatt or more increase in the electric generating capacity of an existing thermal powerplant or an increase of 25 percent in the peak operating voltage or peak kilowatt capacity of an existing electric transmission line.” (*Id.*, § 25123.)

Pursuant to the Warren-Alquist Act, the California Energy Commission has “the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility. The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site....” (Pub. Res. Code, § 25500.)

Under this statutory scheme, the “Energy Commission is the ‘one stop shopping’ center for power plant licenses in California. It exercises the State’s ultimate authority in reviewing and mitigating the environmental impacts of these plants.” (5 Manaster & Selmi, *Cal. Environmental Law, supra*, Power Plant Siting, § 75A.01, p. 75A-4.) “As defined in the Warren-Alquist Act, the Commission’s jurisdiction over power plant siting is all encompassing.” (*Id.* at § 75A.03, p. 75A-6.)

B. Operation

The Warren-Alquist Act provides that “no construction of any facility or modification of any existing facility shall be commenced without first obtaining

certification for any such site and related facility by the commission, as prescribed in this division.” (Pub. Res. Code, § 25500 [referring to Division 15].)

Nominally, the first step in the administrative certification process is “a notice of intention to file an application for the certification of the site and related facility or facilities.” (Pub. Res. Code, § 25502.) “The purpose of the notice of intent is to determine whether the proposed site or sites are suitable to accommodate the proposed facility, and whether the proposals comply with Energy Commission standards and demand forecasts.” (58 Ops.Atty.Gen. 729, 731 (1975); *id.* at p. 742.) By statute, however, certain applicants are exempt from filing a notice of intention (NOI). (See Pub. Res. Code, § 25540.6.) “The NOI process has not been used for over 10 years.... At present, all projects actually being proposed in California are exempt from the NOI process.” (5 Manaster & Selmi, Cal. Environmental Law, *supra*, § 75A.04[1], p. 75A-10, fn. omitted.)

Regardless of whether a notice of intention is required, every applicant wishing to construct or modify a thermal power plant must file an Application for Certification (AFC) with the Energy Commission. (Pub. Res. Code, § 25519, subd. (a); 58 Ops.Atty.Gen. 729, 731 [1975]; 5 Manaster & Selmi, Cal. Environmental Law, *supra*, § 75A.04[2][a],[b], p. 75A-10 to 75A-11.) “Once the AFC is filed, it must be determined by the Commission to be ‘data adequate,’ i.e., complete, based on informational requirements in the Commission’s regulations.” (5 Manaster & Selmi, Cal. Environmental Law, *supra*, § 75A.04[2][c], pp. 75A-11 to 75A-12; Pub. Res. Code, § 25519, subd. (b); Cal. Code Regs., tit. 20, § 1709.) “After acceptance of the AFC as ‘data adequate,’ the Commission’s staff then issues a preliminary Staff Assessment (‘PSA’) of the project, and the parties may file comments on the PSA.” (5 Manaster & Selmi, Cal. Environmental Law, *supra*, § 75A.04[3][a], p. 75A-12, fn. omitted.) After staff workshops and the opportunity for public comment, the staff prepares a Final Staff Assessment (FSA). (*Ibid.*; Cal. Code of Regs., tit. 20, §§ 1742-1744.) By gubernatorial

executive order issued in February 2001, effective through December 2001, the FSA operates as the equivalent of an environmental impact report under the California Environmental Quality Act (CEQA). (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 867, 878; see also Pub. Res. Code, § 21080.5, subd. (a) [exemption from CEQA for certified regulatory programs].) “The order was intended to expedite the processing of applications for power plants by ensuring that the necessary environmental review of such proposals would be completed more quickly.” (*City of Morgan Hill v. Bay Area Air Quality Management Dist.*, at p. 878.)

In addition to assessment by its own staff, the Energy Commission is required to transmit a copy of the application for certification (AFC) to various interested agencies and to elicit their comments. The statute specifically includes “local governmental agencies having land use and related jurisdiction in the area of the proposed site and related facility.” (Pub. Res. Code, § 25519, subd. (f).) It also includes “each federal and state agency having jurisdiction or special interest in matters pertinent to the proposed site and related facilities and to the Attorney General.” (*Id.*, subd. (g).)

Once the staff assessment process is complete, an Energy Commission Siting Committee holds a series of public hearings. (Cal. Code of Regs., tit. 20, § 1748.) The committee then issues a proposed decision, called a Presiding Member’s Proposed Decision, which is distributed for public review and comment. (*Id.*, § 1749.) After revisions, if any, and consequent further public comment, if warranted, the proposed decision is submitted to the full Commission, which either approves the AFC with conditions or denies it. (*Id.*, §§ 1753-1755; see generally 5 Manaster & Selmi, Cal. Environmental Law, *supra*, § 75A.04 [5]-[8], pp. 75A-14 to 75A-16.)

The Energy Commission may not certify a proposed facility that does not conform with applicable federal, state, regional, or local laws, unless the commission makes special findings related to public convenience and necessity. (Pub. Res. Code, § 25525.)

C. Judicial Review

The Legislature has placed explicit limitations on judicial review of certification decisions of the Energy Commission, as set forth in Public Resources Code section 25531. The first limitation relates to the judicial forum, which is now the California Supreme Court alone. The Warren-Alquist Act thus provides: “The decisions of the commission on any application for certification of a site and related facility are subject to judicial review by the Supreme Court of California.” (Pub. Res. Code, § 25531, subd. (a).) Previously, appellate courts could also review such decisions, but the Supreme Court has been the exclusive forum for judicial review since May 2001. (Stats. 2001-2002, 1st Ex.Sess., c. 12 (S.B.28), § 8, eff. May 22, 2001.) In that regard, the statute now mirrors an even earlier predecessor provision, which entrusted exclusive jurisdiction of Energy Commission power plant siting decisions to the Supreme Court. (*County of Sonoma v. State Energy Resources Conservation etc. Com.* (1985) 40 Cal.3d 361, 365-366 [“the operative effect of section 25531 is to give this court exclusive jurisdiction over Energy Commission decisions that comprise a necessary ingredient of the certificate issued by the PUC”].)

The Legislature’s intent in limiting judicial review in this fashion was to expedite the “final operative effect” of Energy Commission decisions. (*County of Sonoma v. State Energy Resources Conservation etc. Com.*, *supra*, 40 Cal.3d at p. 368.) In doing so, the Legislature “sought to expedite the state’s ultimate authorization of electric generating plants....” (*Id.* at p. 370.)

In addition to limiting the forum for review, Public Resources Code section 25531 expansively defines the subject matter within the Supreme Court’s exclusive jurisdiction. It thus provides: “Subject to the right of judicial review of the decisions of the commission [by the Supreme Court], no court in this state has jurisdiction to hear or determine any case or controversy concerning any matter which was, or could have been,

determined in a proceeding before the commission, or to stop or delay the construction or operation of any thermal powerplant except to enforce compliance with the provisions of a decision of the commission.” (Pub. Res. Code, § 25531, subd. (c).)

With that statutory backdrop in mind, we turn to the parties’ specific contentions, addressing them in the chronological order in which they arose below, and discussing the factual record as necessary. We begin with the question of the superior court’s jurisdiction, raised below by respondents’ demurrers to the petition and presented here by their cross-appeals.

ANALYSIS

I. Jurisdiction

The first issue before us is whether the superior court had subject matter jurisdiction to entertain appellant’s petition for administrative mandamus. That question turns on which statute governs judicial review in this case, Porter-Cologne or Warren-Alquist.

A. *The Statutes*

1. *The Porter-Cologne Act*

As explained above, under the authority of the Porter-Cologne Act, the state’s regional water boards implement the federal Clean Water Act, including its NPDES permit system. (Wat. Code § 13372; *City of Burbank v. State Water Resources Control Bd.*, *supra*, 35 Cal.4th at p. 620.)

Under the Act’s judicial review provisions, jurisdiction is in the superior court. (Wat. Code, § 13330, subd. (b).) Porter-Cologne thus provides: “Any party aggrieved by a final decision or order of a regional board for which the state board denies review may obtain review of the decision or order of the regional board in the superior court by filing

in the court a petition for writ of mandate not later than 30 days from the date on which the state board denies review.” (*Ibid.*)

2. *Warren-Alquist Act*

The Warren-Alquist Act governs the approval of thermal power plants, a function entrusted exclusively to the Energy Commission. (Pub. Res. Code, § 25500.)

In terms of judicial review, challenges to Energy Commission siting decisions may be heard in only one judicial forum, the California Supreme Court. (Pub. Res. Code, § 25531, subd. (a).) No other state court “has jurisdiction to hear or determine any case or controversy concerning any matter which was, or could have been, determined in a proceeding before the commission, or to stop or delay the construction or operation of any thermal powerplant except to enforce compliance with the provisions of a decision of the commission.” (*Id.*, subd. (c).)

B. Contentions

Appellant defends the trial court’s decision to apply the judicial review provisions of the Porter-Cologne Act to this dispute. It argues: “The decision at issue in this litigation is not an Energy Commission decision under the Warren-Alquist Act. It is a challenge to a National Pollutant Discharge Elimination System (‘NPDES’) permit issued by the [Regional Water Board], and subsequently upheld by the [State Board], pursuant to the state’s federally delegated Clean Water Act program.” According to appellant, “only the Water Boards are empowered to implement the delegated NPDES program in California.” Appellant finds no statutory authority in the Warren-Alquist Act or elsewhere to “displace the Water Boards’ exclusive jurisdiction” for this program. Additionally, appellant cites adverse policy implications that would arise from a contrary construction.

Respondents disagree. As they see it, when NPDES permits are issued in connection with power plant approvals, the Warren-Alquist Act coordinates

administrative environmental review through the Energy Commission. By logical extension, judicial review is available only pursuant to the Warren-Alquist Act. In respondents' view, the disputed issue of best technology available was a "matter which was, or could have been, determined" in the Energy Commission proceeding under the statute. (Pub. Res. Code, § 25331, subd. (c).) For that reason, respondents assert, the superior court lacked subject matter jurisdiction.

As all parties recognize, the issue is one of statutory interpretation. We therefore begin our analysis by summarizing the pertinent canons of statutory construction.

C. Statutory Construction: General Principles

When charged with interpreting legislative acts, "our task is to determine afresh the intent of the Legislature by construing in context the language of the statute. In determining such intent, we begin with the language of the statute itself." (*Smith v. Rave-Venter Law Group* (2002) 29 Cal.4th 345, 358, internal quotation marks and citations omitted.) In "giving due consideration" to statutory context, "we examine the legislative purpose in enacting the ... provision." (*Id.* at pp. 358-359, citations omitted.)

Furthermore, as our high court has repeatedly emphasized, "every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect." (*Moore v. Panish* (1982) 32 Cal.3d 535, 541.) "Where as here two codes are to be construed, they 'must be regarded as blending into each other and forming a single statute.' [Citation.] Accordingly, they 'must be read together and so construed as to give effect, when possible, to all the provisions thereof.'" (*Tripp v. Swoap* (1976) 17 Cal.3d 671, 679, overruled on another ground in *Frink v. Prod* (1982) 31 Cal.3d 166, 180.)

D. Analysis

With those principles in mind, we independently review the question of statutory construction presented here. (See, e.g., *Yamaha Corp. of America v. State Bd. of*

Equalization (1998) 19 Cal.4th 1, 7.) In order to resolve the parties' dispute about which body of state statutory law governs judicial review of the issuance of the NPDES permit – Warren-Alquist or Porter-Cologne – we must consider the agencies' respective responsibilities concerning the challenged administrative determination. We begin with the Energy Commission's role.

1. The Energy Commission's Role with Respect to the Challenged Determination

The relationship between the Energy Commission and the Regional Water Board is part of a bigger picture, which entails the Energy Commission's interaction with various governmental agencies that share overlapping interests in the construction or modification of power plants. As has been said: "One who would construct and operate a California power plant must first obtain an interconnected set of federal, state and regional agency approvals." (*City of Morgan Hill v. Bay Area Air Quality Management Dist.*, *supra*, 118 Cal.App.4th at p. 866; cf., *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 935 [timber harvest permit approvals are subject to a "regulatory scheme that encourages interagency teamwork" but does not strip "state agencies of their respective authority to protect resources"].)

a. Interaction with other agencies generally

As the Warren-Alquist Act recognizes, other governmental agencies may share an interest in the Energy Commission's power plant siting decision. For that reason, the Act requires the Energy Commission to inform those agencies of the application for certification. As to local governments, the Act thus provides: "Upon receipt of an application, the commission shall forward the application to local governmental agencies having land use and related jurisdiction in the area of the proposed site and related facility." (Pub. Res. Code, § 25519, subd. (f).) As to other entities, the Act requires the Energy Commission to "transmit a copy of the application to each federal and state agency having jurisdiction or special interest in matters pertinent to the proposed site and

related facilities and to the Attorney General.” (*Id.*, subd. (g).) By regulation, the Energy Commission also must send the AFC “to the California Department of Fish and Game, to the Air [P]ollution Control District in which the project is located, [and] to the Water Resources Control Board in which the project is located....” (Cal.Code Regs., tit. 20, § 1714, subd. (c).) The Act further provides for the timely submission of feedback: “Local and state agencies having jurisdiction or special interest in matters pertinent to the proposed site and related facilities shall provide their comments and recommendations on the project within 180 days of the date of filing of an application.” (Pub. Res. Code, § 25519, subd. (h); see also Cal.Code Regs., tit. 20, §§ 1714-1714.5.) The Act also requires the Energy Commission to notify interested federal agencies of its determinations: “Upon approval of an application, the commission shall forward to the United States Nuclear Regulatory Commission, the Environmental Protection Agency, and to other appropriate federal agencies, the results of its studies including the environmental impact report on the facility, the written decision on the facility contained in the application, and the commission’s determination of facility safety and reliability as provided in Section 25511.” (Pub. Res. Code, § 25537.)

b. Interaction with air pollution control districts

Because there are close parallels between water and air quality regulation, the Energy Commission’s relationship with air pollution control districts is of particular relevance to our analysis. Before describing that relationship, we begin with some statutory background on air quality regulation.

As with the control of water pollution within California, our state’s “air pollution regulatory program is based on provisions of both federal and California law.” (2 Manaster & Selmi, *Cal. Environmental Law*, *supra*, § 40.02, p. 40-6.) The applicable federal law is the Clean Air Act. (42 U.S.C. § 7401 et seq.) As amended in 1990, Title V of the federal Clean Air Act operates much like the federal Clean Water Act, in that it

“requires new, modified, and existing ‘major’ and ‘affected’ sources to obtain air pollution operating permits meeting uniform federal requirements.” (2 Manaster & Selmi, *Cal. Environmental Law*, *supra*, § 40.17, p. 40-30.) That amendment reflects a determination by Congress “to emulate the NPDES program in the [Clean Air] Act’s 1990 Amendments.” (*Ibid.*) “Congress intended that the [Clean Air Act] permit program be primarily administered and enforced by state and local government permitting authorities.” (*Id.* at p. 40-31, citing 42 U.S.C. §§ 7661(4), 7661a(b).)

In California, the Clean Air Act is implemented by local air pollution control districts, which issue permits for the prevention of significant deterioration, called PSD permits. (*City of Morgan Hill v. Bay Area Air Quality Management Dist.*, *supra*, 118 Cal.App.4th at p. 866.) The state statute thus provides: “Every district board may establish, by regulation, a permit system that requires ... that before any person builds, erects, alters, replaces, operates, or uses any article, machine, equipment, or other contrivance which may cause the issuance of air contaminants, the person obtain a permit to do so from the air pollution control officer of the district.” (Health & Saf. Code, § 42300, subd. (a).) The Environmental Protection Agency (EPA) has approved California’s clean air program and delegated permitting authority to the state; the district therefore has authority to issue PSD permits pursuant to the federal Clean Air Act. (*City of Morgan Hill v. Bay Area Air Quality Management Dist.*, at p. 871.) The resulting authorizations are federal permits. (*Ibid.*)

Like other state statutory schemes aimed at environmental protection, California’s clean air statute – together with its accompanying regulations – mandates cooperation between the local air pollution control district and the State Energy Commission. “The [Energy] Commission and the [Air Quality Management] District work together in their approval process. The Commission must obtain a determination of compliance from the District as part of its own air quality assessment during the certification process. The District officer reports this determination to the Commission. (Cal. Code Regs., tit. 20,

§ 1744.5, subd. (b); see Dist. Reg., rule 2-3-403.) A representative of the District appears at Commission hearings to present and explain that determination. (See Cal. Code Regs., tit. 20, §§ 1744.5, subd. (c), 1748.)” (*City of Morgan Hill v. Bay Area Air Quality Management Dist.*, *supra*, 118 Cal.App.4th at p. 879.)

c. Interagency coordination here

In this case, as the Energy Commission explained in its final Commission Decision: “During the siting process, Commission staff, as well as Duke Energy carried out extensive coordination with numerous local, state, and federal agencies. These included the Central Coast Regional Water Quality Control Board (RWQCB), the Coastal Commission, the California Independent System Operator (Cal ISO), Monterey Bay National Marine Sanctuary, United States Fish and Wildlife Service, California Department of Fish and Game, U.S. Army Corps of Engineers, Monterey Bay Unified Air Pollution Control District (MBUAPCD), Pacific Gas and Electric (PG&E), Monterey County, North County Fire Protection District, and Caltrans, as well as Intervenor California Unions for Reliable Energy (CURE), and interested local environmental groups and individual citizens in the community.”

2. The Regional Board’s Role with Respect to the Challenged Determination

As explained above, the State Board “is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act [i.e., the Clean Water Act].” (Wat. Code, § 13160.) California implements its delegated federal permitting authority through its regional water boards. (See Wat. Code, § 13263; see also, *id.*, §§ 13260, 13376; see generally, 2 Manaster & Selmi, Cal. Environmental Law, *supra*, § 30.40, p. 30-55; 57 Ops.Atty.Gen. 19, 20 (1974).)

In keeping with those statutory directives, the Regional Water Board was the agency that actually issued the challenged NPDES permit here.

3. *Harmonizing the Two Agencies' Roles*

When it comes to power plant siting, the Energy Commission possesses ultimate authority within the state. (*City of Morgan Hill v. Bay Area Air Quality Management Dist.*, *supra*, 118 Cal.App.4th at p. 879.) Subject only to its mandated cooperation with other agencies and compliance with applicable law, the Energy Commission's jurisdiction over power plant siting within California is "all encompassing." (5 Manaster & Selmi, *Cal. Environmental Law*, *supra*, Power Plant Siting, § 75A.03, p. 75A-6.)

"When an Energy Commission certificate is issued, it [will] supersede any conflicting local, regional or state statute, ordinance, or regulation." (58 Ops.Atty.Gen. 729, 731 [1975].) That being so, the Energy "Commission certificate constitutes the only *state, local or regional* approval necessary to construct and operate a power plant." (*City of Morgan Hill v. Bay Area Air Quality Management District*, 118 Cal.App.4th at p. 879.) All other such approvals thus are effectively subsumed within the Energy Commission certificate. (Pub. Res. Code, § 25500 [Energy Commission's certificate "shall be in lieu of" any such approval "required by any state, local or regional agency"].)

The same cannot be said, however, when a necessary *federal* permit is at stake. One pertinent example is a PSD permit, issued by local air pollution control districts under the federal Clean Air Act for the prevention of significant deterioration of air quality. (*City of Morgan Hill v. Bay Area Air Quality Management Dist.*, *supra*, 118 Cal.App.4th at p. 867, citing 42 U.S.C. §§ 7470- 7479 and 40 C.F.R. § 51.166 (2003).) A PSD permit "is a *federal* approval." (*City of Morgan Hill*, at p. 879.) As a federal approval, the PSD permit is not necessarily subsumed within the Energy Commission's certification in the way that state, local, and regional approvals are. (Pub. Res. Code, § 25500 [Energy Commission's certificate "shall be in lieu of" any federal requirement but only to "the extent permitted by federal law"].)

By parity of reasoning, the same analysis applies to federal NPDES permits, such as the one issued by the Regional Board in this case. As the Energy Commission itself observed in its final decision here: “While the Commission reviews the overall power plant project, the [Regional Board] regulates the Project’s intake and discharge systems via the National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to the federal Clean Water Act [citation].” A similar observation was made at the Regional Board’s September 2000 meeting by its counsel. Explaining the interaction between the Energy Commission and the Regional Board, counsel said: “This board is the only agency that is authorized to issue NPDES permits in this region, under federal law. So [the Energy Commission’s certification] must be consistent with the NPDES permit. It can have different things that are more stringent or different, as long as they don’t conflict.” In response to a board member’s question, counsel explained further that the Energy Commission’s proposed decision did not “act as a precedent or constraint” on the Regional Board’s decision. And in its staff report for the September 2000 meeting, Regional Board staff expressed a similar view when addressing a request by the Coastal Commission “that the Energy Commission preempt the NPDES permit....” In the stated view of the Regional Board’s staff, the requested preemption “is not legal because only the State and Regional Boards have authority to implement the NPDES program in California.”

In short, while the Energy Commission enjoys ultimate authority for power plant siting within California, the Regional Board is responsible for issuing any required federal NPDES permit. (Cf., *National Wildlife Federation v. Consumers Power Co.* (1987) 657 F.Supp. 989, 999, reversed in part on another point in *National Wildlife Federation v. Consumers Power Co.* (1988) 862 F.2d 580, 581 [although power plant “construction and operation ... are subject to the control of” the Federal Energy Regulatory Commission, that agency’s “regulatory powers over hydro-electric projects” do not “preempt any concurrent regulation under the CWA”].) Although the two

agencies' approvals are interconnected, the federal permit issued by the Regional Board is not automatically subsumed within the Energy Commission's certification.

4. Implications for Judicial Review

Under the Warren-Alquist Act, judicial review of the Energy Commission's powerplant certification may be had only by direct writ review in the California Supreme Court. (Pub. Res. Code, § 25531, subd. (a); *City of Morgan Hill v. Bay Area Air Quality Management Dist.*, *supra*, 118 Cal.App.4th at p. 868, fn. 8.) No other state court may hear or decide "any matter which was, or could have been, determined in a proceeding before the commission...." (Pub. Res. Code, § 25531, subd. (c).) Under the Porter-Cologne Act, by contrast, approval of the federal NPDES permit is subject to challenge by administrative mandamus in superior court. (Wat. Code, § 13330, subd. (b); cf., *City of Morgan Hill v. Bay Area Air Quality Management Dist.*, at p. 869 [PSD permit].)

As we now explain, the judicial review provisions of the Porter-Cologne Act govern this controversy. We reach that conclusion after analyzing the subject matter of the determination, addressing the forum choices, and considering legislative intent.

a. Subject matter

As just explained, the NPDES permit issued here constitutes a separate federal approval needed for this project. As the Energy Commission itself acknowledged, the Regional Board is the agency that "regulates the Project's intake and discharge systems" by means of the NPDES permit.

We recognize that the Energy Commission in fact incorporated the requirements imposed on Duke by the Regional Board. The Energy Commission thus imposed the following as a condition of certification: "The project owner shall submit the final, approved National Pollutant Discharge Elimination System Permit from the Central Coast Regional Water Quality Control Board governing the discharge of the project's

once through cooling water to the Energy Commission. The project owner shall comply with all provisions of the National Pollutant Discharge Elimination System Permit.”

But we are not persuaded that incorporation of the permit requirements somehow converts them into a “matter which was, or could have been, determined” by the Energy Commission. (Pub. Res. Code, § 25531, subd. (c).) As noted above, the Commission must follow the laws governing other affected agencies: it “may not certify a facility ... when it finds ... that the facility does not conform with any applicable state, local, or regional standards....” (Pub. Res. Code, § 25525.) And it “may not make a finding in conflict with applicable federal law or regulation.” (*Ibid.*) Consistent with that legal constraint, the Energy Commission made the following general finding in this case: “The Conditions of Certification contained in the accompanying text, if implemented by the Applicant, ensure that the project will be designed, sited, and operated in conformity with applicable local, regional, state, and federal laws, ordinances, regulations, and standards, including applicable public health and safety standards, and air and water quality standards.” Among the laws it identified as applicable was the federal Clean Water Act.

In this context, we conclude, the NPDES permit requirements do not represent a “matter which was, or could have been, determined” by the Commission. (Pub. Res. Code, § 25531, subd. (c).) To the contrary, the matter was “determined” by the Regional Board and that determination was adopted by the Energy Commission in the course of discharging its own legal obligation.

b. Forum choice

Warren-Alquist and Porter-Cologne each provide for a different judicial forum, depending on whether the challenged decision is a power plant certification.

As our high court instructs, we must read these provisions together, giving effect to both provisions if we can. (*Tripp v. Swoap, supra*, 17 Cal.3d at p. 679.) Honoring that

instruction, we conclude that both avenues for judicial review are open to an aggrieved party in a proper case.

The petitioner thus may seek writ review of a power plant certification in the California Supreme Court, while challenging an NPDES permit in superior court at the same or another time. (Cf., *City of Morgan Hill v. Bay Area Air Quality Management Dist.*, *supra*, 118 Cal.App.4th at p. 868, fn. 8 [Supreme Court review of Energy Commission certification]; *id.* at p. 869 [superior court review of PSD permit].) Review of a challenged decision thus may be had “by filing a petition for a writ of mandate in the superior court, *unless* the decision is one on an application for certification of a thermal power plant, in which case the petition must be filed in the Supreme Court.” (*Santa Teresa Citizen Action Group v. State Energy Resources Conservation & Development Com.* (2003) 105 Cal.App.4th 1441, 1446.)

As explained above, the administrative decision challenged in this case is not the power plant certification itself; rather it is the separate NPDES permit. Appellant’s challenge to that permit thus was properly heard in the superior court.

c. Legislative intent

By accepting the Legislature’s decision to grant access to the superior court for a challenge under Porter-Cologne, we do no violence to the limitation on judicial forum enacted as part of Warren-Alquist. As noted above, the legislative intent behind that limitation was to hasten the “final operative effect” of Energy Commission decisions. (*County of Sonoma v. State Energy Resources Conservation etc. Com.*, *supra*, 40 Cal.3d at p. 368.) In doing so, the Legislature “sought to expedite the state’s ultimate authorization of electric generating plants....” (*Id.* at p. 370.)

This is not a case in which the superior court acted “to stop or delay the construction or operation of any thermal powerplant,” however. (Pub. Res. Code, § 25531, subd. (c).) In its October 2002 intended decision, the court stated: “Nothing in

this decision compels an interruption in the ongoing plant operation during the Regional [B]oard's review of this matter" on remand.

E. Conclusion

For all of the foregoing reasons, we conclude that the judicial review provisions of the Porter-Cologne Act govern this controversy, and that the superior court thus had jurisdiction to hear and determine the parties' dispute concerning the NPDES permit.

Having concluded that the trial court had jurisdiction to hear this controversy, we next consider the propriety of its decision to remand the matter to the Regional Board.

II. Remand Order

As noted above, the court rejected one of the Regional Board's NPDES permit findings, number 48, which addressed best technology available (BTA) for the cooling system. As the court stated in its October 2002 intended decision: "Finding number 48 is not supported by the weight of the evidence." The court therefore ordered issuance of a writ of mandate "compelling the Regional Board to conduct a thorough and comprehensive analysis of Best Technology Available applicable to the Moss Landing Power Plant." Duke and the Water Boards objected to the intended decision, but the court adopted it as its statement of decision. The court directed appellant to "prepare an appropriate judgment, present it to opposing counsel for review, and submit it to this court for signature." But the parties could not agree on the form of judgment and the writ never issued. Instead, in March 2003, the court entered an order remanding the matter to the Regional Board for a hearing on the BTA issue.³ The court retained jurisdiction while the remand was pending.

³ The court's March 2003 remand order states: "THIS COURT HAVING DETERMINED that Finding No. 48 of Regional Water Quality Control Board Order No. 00-041 is not supported by the weight of the evidence in the record, [¶] IT IS ORDERED that Order No. 00-041 be, and it hereby is, remanded to the Regional Water Quality

The trial court's decision to remand the matter to the Regional Board is challenged by both sides. In the appeal, appellant contends that the remand procedure violates the statute governing administrative mandamus and thus was fatally flawed. In the cross-appeal, respondents argue that the court should not have remanded the matter, because ample evidence supported the original administrative approvals.

We consider each side's challenge to the remand in turn, ultimately rejecting both. Addressing appellant's challenge first, we conclude that the remand was procedurally proper, both as a matter of statutory authority and as an exercise of the trial court's inherent powers. Reaching respondents' contention next, we find substantial evidence to support the trial court's evidentiary determination.

A. Procedural Propriety of the Remand Order

According to appellant, remand was foreclosed by Code of Civil Procedure section 1094.5, which governs administrative mandamus actions. As appellant reads that statute, only two remedies were available to the trial court: (1) issuance of a writ commanding the Regional Board to set aside its entire order, or (2) a judgment denying the petition for writ of mandamus. (See Code Civ. Proc., § 1094.5, subd. (f).)

Respondents disagree. The Water Boards contend: "There is nothing in Code of Civil Procedure section 1094.5(f) prohibiting the action of the trial court to order the remand, then issue the judgment denying the writ" at a later time. They observe: "In this case a judgment was ultimately issued denying the writ, as required by the section." For its part, instead of focusing on the statute, Duke argues that the court had inherent authority to remand to the Regional Board.

Control Board to conduct a thorough and comprehensive analysis with respect to Finding No. 48 of said Order No. 00-041...."

Moreover, Duke asserts, appellant's claims have been rendered moot by the subsequent proceedings. Appellant disputes Duke's assertion of mootness. We consider that issue at the threshold.

1. Mootness

As Duke aptly observes: "A question may be deemed moot when, although it initially presented an existing controversy, the passage of time or the acts of the parties or a court decision have deprived the controversy of its life." (*Boccatto v. City of Hermosa Beach* (1984) 158 Cal.App.3d 804, 808.)

Here, however, we conclude that the parties' dispute over the procedural propriety of interlocutory remand retains vitality. Appellant's claims on this point relate to the manner in which the subsequent proceedings were conducted. Specifically, appellant contends, a writ should have issued setting aside the entire NPDES permit. Instead, more limited proceedings were conducted – over appellant's continuing objections. Thus, this is not a case where the appellant's own conduct rendered its challenge moot. (Cf., *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214 [City's appeal was moot where it complied with writ of mandate].) Nor is this a case in which actions by another party to the litigation deprived the controversy of life. (Cf., *Boccatto v. City of Hermosa Beach, supra*, 158 Cal.App.3d at p. 808 [plaintiff's challenge to parking permit fees was moot because defendant refunded the fees].) Finally, we cannot agree that appellant's unsatisfied demand for a different and fuller administrative process is rendered moot simply because the challenged proceedings were undertaken and completed. (Cf., *Terry v. Civil Service Commission* (1952) 108 Cal.App.2d 861, 871-872 [mandamus proceedings to enforce petitioners' right to take civil service examination were not rendered moot by their failure to pass it].) For that reason, we conclude, appellant's claims of procedural error are not moot.

In any event, even if appellant's claims were technically moot, we have inherent power to decide them, since the issues presented are important and of continuing interest. (*Burch v. George* (1994) 7 Cal.4th 246, 253, fn. 4; *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 746-747; *City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1121, fn. 5.) We therefore consider the substance of appellant's contentions.

2. *Authority to Remand under Code of Civil Procedure section 1094.5*

On the merits, our analysis of the question of the remand's procedural propriety begins with the governing statute. Our standard of review is de novo. (*Usher v. County of Monterey* (1998) 65 Cal.App.4th 210, 216.)

a. *The statute*

The pertinent statutory provision is Code of Civil Procedure section 1094.5, which governs administrative mandamus actions in superior court. Of particular relevance here is subdivision (f), which reads in pertinent part: "The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment...." (Code Civ. Proc., § 1094.5, subd. (f).)

According to appellant, the remand order issued here is an impermissible interlocutory judgment, which is not authorized by the statute.

b. *Case law*

In support of its argument, appellant relies on *Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886. In that case, the plaintiffs challenged a city's annexation action, petitioning for a writ of administrative mandamus. (*Id.* at pp. 890, 899.) The trial court found the city's environmental findings inadequate under the California Environmental Quality Act (CEQA). (*Id.* at p. 899.) It entered an

interlocutory judgment of remand, to allow the city to make the necessary findings; the order provided for “judgment to be entered after action by the city council or the expiration of 60 days.” (*Ibid.*) On appeal, the First District Court of Appeal concluded that “the interlocutory remand was improper.” (*Ibid.*) The appellate court cited two grounds. First, it explained: “We cannot agree that an interlocutory judgment is authorized by Code of Civil Procedure section 1094.5. That statute authorizes remand when the writ is granted: ‘Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court’s opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law....’ (Code Civ. Proc., § 1094.5, subd. (f).) In proper context, the questioned remand is not a prejudgment procedure.” (*Ibid.*, italics omitted.) “Moreover,” the court continued, “we think the use of an interlocutory remand raises serious questions of due process: it effectively precluded any possible challenge to the sufficiency of the evidence to support the new findings.” (*Id.* at p. 900.) In the court’s words: “The misguided attempt to salvage the defective proceedings provided no opportunity to test the adequacy of the new findings or otherwise challenge the existence of supporting evidence and compliance with the CEQA.” (*Ibid.*) “In this respect alone, we find the interlocutory judgment grievously erroneous.” (*Ibid.*)

Thereafter, the same court revisited *Resource Defense Fund*, in *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212. The court described both the statutory and due process components of its earlier decision, framing two similar arguments in its current case. (*Id.* at pp. 1220-1222.) First addressing the statutory basis of its earlier decision, the court noted its conclusion in *Resource Defense Fund* “that Code of Civil Procedure section 1094.5 does not permit remand before the writ issues, but instead specifies that the writ shall issue and the reviewing court may then remand.” (*Sierra Club*, at pp. 1220-1221.) A different statute was at issue in *Sierra Club*, a CEQA provision that “directs a court which finds a public agency has failed to act in compliance

with CEQA to issue a writ of mandate.” (*Id.* at p. 1218, fn. omitted, citing Pub. Res. Code, § 21168.9.) A different trial court procedure also was employed in *Sierra Club*: “the trial court did not proceed by way of interlocutory judgment and remand, but instead issued a tentative decision directing adoption of additional findings.” (*Id.* at p. 1221.) The court in *Sierra Club* implicitly concluded that the trial court’s failure to issue a writ before remanding to the agency did not comport with the express requirements of the governing CEQA provision. (*Id.* at p. 1221.) The court next focused on the due process element of the *Resource Defense Fund* case, observing: “The vice of prejudgment remand, as *Resource Defense Fund* points out, is that it ‘raises serious questions of due process....’ ” (*Ibid.*, quoting *Resource Defense Fund v. Local Agency Formation Com.*, *supra*, 191 Cal.App.3d at p. 900.) The procedure at issue in *Sierra Club* produced the same due process flaws identified in *Resource Defense Fund*. As the *Sierra Club* court explained: “The result of that procedure has been effectively to insulate those findings from any meaningful challenge.” (*Sierra Club*, at p. 900.) The court therefore concluded that the trial court “erred by not issuing the writ of mandate and remanding the EIR to the Board.” (*Id.* at p. 1222.)

As respondents point out, however, other authorities have endorsed the general use of administrative remand in a proper case.

In one category of cases, remand is permitted to correct procedural defects at the administrative level. Such a defect exists, for example, where there has been no fair hearing. In the words of our state’s high court, “it is established that the proper procedure upon the failure of an administrative board to give a hearing under appropriate circumstances, is to remand the case to the board for proper proceedings.” (*Steen v. City of Los Angeles* (1948) 31 Cal.2d 542, 546; see also, e.g., *English v. City of Long Beach* (1950) 35 Cal.2d 155, 159-160; *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1174.) A second example of using remand to correct a procedural defect is when the evidentiary record of the administrative hearing is inadequate. (See *Aluisi v. County*

of *Fresno* (1958) 159 Cal.App.2d 823, 828; but see *id.* at p. 826 [writ issued].)

“Moreover, the Supreme Court has held that the trial court has the power to remand a matter to an administrative agency for clarification of ambiguous findings.” (*Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit Dist.* (1986) 185 Cal.App.3d 996, 1003, citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 81, and *Keeler v. Superior Court* (1956) 46 Cal.2d 596, 600; cf., *National Association of Home Builders v. Defenders of Wildlife, supra*, 127 S.Ct. at p. 2529 [“proper course would have been to remand to the agency for clarification of its reasons”].) And when “there are errors in the admission of evidence before an administrative agency, it is proper to remand to the agency for reconsideration.” (*Newman v. State Personnel Board* (1992) 10 Cal.App.4th 41, 49.) “Remand for reconsideration is also appropriate where the original hearing before the agency was conducted by an unauthorized hearing officer.” (*Ibid.*; see also, e.g., *Usher v. County of Monterey, supra*, 65 Cal.App.4th at p. 219.) But where “the administrative agency errs not in the conduct of the hearing but in the results reached, there is no basis for reconsideration.” (*Newman v. State Personnel Bd.*, at p. 49.)

Remand is allowed in a second category of cases, where relevant new evidence is to be considered. (Code Civ. Proc., § 1094.5, subd. (e).)⁴ In such cases, the statute “specifically authorizes remand proceedings.” (*Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit Dist., supra*, 185 Cal.App.3d at p. 1003.) “Code of Civil Procedure section 1094.5, subdivision (e), ... permits consideration of relevant evidence that either was improperly excluded by the administrative agency or could not with reasonable

⁴ Code of Civil Procedure section 1094.5, subdivision (e), provides: “Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent [agency], it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case.”

diligence be produced before it.” (*Helene Curtis, Inc. v. Los Angeles County Assessment Appeals Bds.* (2004) 121 Cal.App.4th 29, 37; *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, 350.) “Subdivision (e) opens a narrow, discretionary window for additional evidence, newly discovered after the hearing (or improperly excluded at it). Routine allowance thereunder of conflicting scientific opinions created after the decision would pose for quasi-judicial decisions ... a threat of repeated rounds of litigation, and uncertain, attenuated finality....” (*Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1595.) “Remand under Code of Civil Procedure section 1094.5, subdivision (e) for consideration of postdecision evidence generally has been limited to truly new evidence, of emergent facts.” (*Ibid.*; see generally, 2 Cal.Jur. (3d ed. 2007) Administrative Law, § 804, pp. 290-291.)

The cases thus recognize the propriety of remand where procedural defects have prevented a fair administrative hearing or where relevant new evidence has emerged. As our high court long ago observed in the context of administrative mandamus actions, “where determinative powers are vested in a local administrative agency and the court finds its decision lacks evidentiary basis, a hearing was denied or it was otherwise erroneous, it is proper procedure to remand the matter to the agency for further and proper proceedings rather than for the court to decide the matter on the merits.” (*Fascination, Inc. v. Hoover* (1952) 39 Cal.2d 260, 268.) “If a hearing has been denied or the evidence is insufficient to sustain the action of the board, and it is still possible for the board to hold a hearing or exercise its discretion, then the matter should be remanded to the board for further consideration rather than having a trial de novo in the superior court and requiring that court to exercise independent judgment on the facts which should be determined by the board.” (*La Prade v. Department of Water & Power* (1945) 27 Cal.2d 47, 53.)

c. Analysis

The question before us is whether the statute categorically forbids a limited interlocutory remand to the agency without issuance of a writ, as appellant contends. We conclude that it does not. Based on the language of Code of Civil Procedure section 1094.5, subdivision (f), and considering the foregoing authority, particularly the cases from the California Supreme Court, we reject appellant's interpretation of the statute. We acknowledge that there is an apparent split of authority on the question. As one commentator notes, "it is unclear whether the remand procedure ... may be used without entry of judgment or issuance of a writ." (2 Cal. Administrative Mandamus (2007) Trial and Judgment, § 14.28, p. 537, citation omitted; see also, *id.* § 14.29, p. 538.)

As we now explain, we conclude that the statute permits such a procedure in a proper case. We reach that conclusion after examining the statute's use of the word "judgment," the necessity for a writ, and the validity of a limited remand. As relevant to our analysis here, the statutory language reads: "The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ." (Code Civ. Proc., § 1094.5, subd. (f).)

Judgment: The statute requires the court to "enter judgment...." (Code Civ. Proc., § 1094.5, subd. (f).) Generally speaking, judgment means "the final determination of the rights of the parties in an action or proceeding." (Code Civ. Proc., § 577; *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697.) Likewise, by general statutory definition, a "judgment in a special proceeding is the final determination of the rights of the parties therein." (Code Civ. Proc., § 1064.) As our state's high court long ago recognized: "There can be but one 'final judgment' in an action, and that is the one which in effect ends the suit in the court in which it was instituted and finally determines the rights of the parties in relation to the matter in controversy." (*Stockton etc. Works v. Ins. Co* (1893) 98 Cal. 557, 577.) But the "label of the judgment as 'interlocutory' is not

determinative upon this question, since it is the substance and effect of a judgment that determines its finality.” (*In re L. A. County Pioneer Society* (1953) 40 Cal.2d 852, 857-858.) A judgment is not final where the “court expressly reserve[s] for future decision questions regarding the rights, duties, and liabilities of the parties.” (*Id.* at p. 858.) This is equally true in the context of special proceedings such as mandamus. Thus, for example, there is no final judgment where “the trial court’s denial of the alternative writ in administrative mandamus neither terminated the proceeding below nor finally determined the rights of the parties in the proceeding.” (*Gibson v. Savings & Loan Commissioner* (1970) 6 Cal.App.3d 269, 272; accord, *Covina-Azusa Fire Fighters Union v. City of Azusa* (1978) 81 Cal.App.3d 48, 56.)

Here, the statute plainly contemplates entry of a final judgment at the conclusion of the mandate proceeding. But we find nothing in the language of Code of Civil Procedure, section 1094.5, subdivision (f), that forecloses the use of an interlocutory order, either expressly or by necessary implication. (See *Ng v. State Personnel Bd.* (1977) 68 Cal.App.3d 600, 604 [court’s remand was an interlocutory order, not a final, appealable judgment]; *County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 85 [appellate court’s earlier decision in mandamus proceeding “was an interim one which did not terminate the lawsuit”]; *Endangered Habitats League, Inc. v. State Water Resources Control Bd.* (1997) 63 Cal.App.4th 227, 243 [same]; see also, e.g., *Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit Dist.*, *supra*, 185 Cal.App.3d at p. 1003 [trial court acted properly in continuing mandamus trial and remanding to agency for clarification of findings].)

We therefore conclude that the statute does not expressly require entry of a final judgment as a necessary predicate to remand, where further action both by the agency and by the court is contemplated.

Writ: Next, we consider the related question of whether the statute demands issuance of a peremptory writ prior to remand. Appellant argues that a writ is required at

this juncture, citing the statutory language commanding the court to “enter judgment” either denying the writ or ordering the agency “to set aside the order or decision....” (Code Civ. Proc., § 1094.5, subd. (f).) We cannot agree that the statutory language demands issuance of a writ as the sole means to compel agency action while the mandamus proceeding remains pending in court.

We begin by observing that Code of Civil Procedure section 1094.5, subdivision (f), does not explicitly mention the issuance of a writ; it calls for entry of a “judgment.” A writ is not a judgment. (*Endangered Habitats League, Inc. v. State Water Resources Control Bd.*, *supra*, 63 Cal.App.4th at p. 244.) By statutory definition, a writ is a species of order. “Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.” (Code Civ. Proc., § 1003.) “The word ‘writ’ signifies an order or precept in writing, issued in the name of the people, or of a court or judicial officer....” (Code Civ. Proc., § 17, subd. (6); cf., *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 176 [form by which peremptory writ issued from the court of appeal “combined elements of both an order and a writ”].) “A writ of mandate is a piece of paper. If its purpose is to declare the rights of parties, its existence suffices. ... If its purpose is to compel someone to *do* something, its existence does not suffice.” (*Endangered Habitats League, Inc. v. State Water Resources Control Bd.*, *supra*, 63 Cal.App.4th at p. 244 [compliance is secured via return].)

Certainly, the usual practice in mandamus proceedings is for the court to issue a writ to explain its decision and to order the agency to comply with it. (2 Cal. Administrative Mandamus, *supra*, Procedures After Trial, § 15.22, p. 568.) Under that familiar procedure, “the proper way to ensure compliance is to require a return on the writ, which commands a party to do something and report to the court that the act has been done.” (*Endangered Habitats League, Inc. v. State Water Resources Control Bd.*, *supra*, 63 Cal.App.4th at p. 244.)

Notwithstanding that accepted general practice, we cannot agree with appellant that issuance of a writ is the *only* authorized procedure for accomplishing the goal of agency compliance with judicial orders. Here, the trial court instead chose to issue an order for remand, to reserve jurisdiction, and to require the agency to inform it upon the completion of remand proceedings. We find nothing in the statute that forbids use of the alternate procedure chosen by the court, while the mandate proceeding is still pending and before entry of final judgment. While the peremptory writ offers one familiar, well-accepted way for the court to secure the agency's compliance, the statute does not demand its exclusive use for this purpose. To hold otherwise would exalt form over substance. (Cf., *Giannini Controls Corp. v. Superior Court* (1966) 240 Cal.App.2d 142, 151 [directing trial court to permit petitioners to file a "supplemental petition" in mandamus so that they would not be compelled to "relitigate the same question under a different case number"].)

Limited Remand: Finally, we consider the statute's mandate that the court either "set aside the order or decision" or deny the writ. (Code Civ. Proc., § 1094.5, subd. (f).) Appellant apparently reads that language as a requirement that the court set aside the *entire* decision of the Regional Board before remanding to that agency. Appellant thus argues that the only permissible judicial remedy was "a writ of mandate ordering respondents to set aside the NPDES permit." We disagree. We find nothing in the statutory language compelling the all-or-nothing approach espoused by appellant. To the contrary, it is permissible for a court to direct "issuance of a limited writ of mandate" in an administrative mandamus proceeding. (*Helene Curtis, Inc. v. Los Angeles County Assessment Appeals Bds.*, *supra*, 121 Cal.App.4th at p. 33; *id.* at p. 42 [respondent tax agency was ordered only to hold a hearing on petitioner's application to reduce its assessed valuation]; cf., *Evans v. Department of Motor Vehicles* (1994) 21 Cal.App.4th 958, 976 [in proceedings under the Administrative Procedures Act, the agency itself may order an administrative reconsideration of only "part of the case" pursuant to Gov. Code,

§ 11521].) Thus, for example, where disciplinary proceedings against a liquor licensee were based on two counts, only one of which was supported by the evidence, “the matter should be remanded to the board” to reconsider the penalty alone. (*Stoumen v. Reilly* (1951) 37 Cal.2d 713, 717; see also, e.g., *Cooper v. State Bd. of Medical Examiners* (1950) 35 Cal.2d 242, 252 [same].) Similarly, where only two of six disciplinary charges against a civil service employee were supported by the evidence, limited remand was proper to reconsider just the penalty. (*Nelson v. Department of Corrections* (1952) 110 Cal.App.2d 331, 334 [rejecting the petitioner’s contention “that respondent Personnel Board should be required to hold an entirely new hearing”].)

By analogy, in cases involving the California Environmental Quality Act, authority for limited remand is explicitly recognized. “Public Resources Code section 21168.9, subdivision (b), ... provides that the court’s order must include only those mandates that are necessary to achieve CEQA compliance.” (*City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 416, fn. omitted.) “That section provides alternative remedies which allow the trial court to tailor the remedy to fit the violation.” (*San Bernardino Valley Audubon Society v. Metropolitan Water Dist.* (2001) 89 Cal.App.4th 1097, 1102, fn. omitted.) “Public Resources Code section 21168.9 is a *specific application* of the *general rule* contained in Code of Civil Procedure section 1094.5, subdivision (f)...” (*Id.* at p. 1103, italics added.) It “was enacted in 1984 to give the trial courts some flexibility in tailoring a remedy to fit a specific CEQA violation.” (*Ibid.*; see also, e.g., *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1181.) The foregoing authority thus reflects the severable nature of some administrative decisions made in CEQA cases. (See generally, 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 860, pp. 1029-1030; *id.* (2007 supp.) pp. 78-79.)

Here, the trial court ordered the agency to set aside a discrete and segregable part of its decision, finding number 48, and it ordered the Regional Board “to conduct a

thorough and comprehensive analysis” with respect to that finding alone. The effect of that order was “to remand the case to the board for proper proceedings” as to that single issue. (*Steen v. City of Los Angeles, supra*, 31 Cal.2d at p. 546.)

In our view, under the circumstances presented here, the trial court was justified in taking that approach. Limited remand is appropriate in this case, for several reasons: the administrative order as a whole was broad ranging and complex, covering far more than just technology alternatives for minimizing entrainment; the permit was the product of years of scientific study and interagency collaboration; and the trial court found fault with only one of the agency’s 58 findings.⁵

In sum, we conclude, given the circumstances presented in this case, the court acted within the permissible confines of the statute in ordering a limited remand to the Regional Board without first commanding a writ to issue.

3. Inherent Authority to Remand

As just explained, we find nothing in Code of Civil Procedure section 1094.5 that forecloses the possibility of interim remand. Moreover, the court also has the inherent authority to return a matter to an administrative agency for further proceedings. “Courts have inherent power, as well as power under section 187 of the Code of Civil Procedure, to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council.” (*Tide Water Assoc. Oil Co. v. Superior Court* (1955) 43 Cal.2d 815,

⁵ In its entirety, the Regional Board order granting Duke the challenged NPDES permit comprises more than 25 pages. The subject matter of its 58 findings ranges from the Regional Basin Plan and the California Ocean Plan to thermal discharges, impingement, and entrainment. The compliance provisions set forth as “orders” in the permit include discharge prohibitions, effluent limitations, receiving water limitations, and other “standard” provisions; none of the permit’s orders specifically addresses entrainment.

825, fn. omitted [trial court did not err in trying cross-complaint with prohibition proceeding].)

As the California Supreme Court long ago recognized – albeit in a case where section 1094.5 was found inapplicable – “aside from statutory provisions, such a power to remand also exists under the inherent powers of the court.” (*Keeler v. Superior Court, supra*, 46 Cal.2d at p. 600.) “There is no question but that, consistent with proper regulations, a court has inherent power to control the course of litigation before it. [Citations.] This includes the power to remand a cause in mandamus for further proceedings which are deemed necessary for a proper determination.” (*Ibid.*) “The policy underlying such a rule is that the determination of the issues should first be made by the administrative agency.” (*Steen v. City of Los Angeles, supra*, 31 Cal.2d at p. 546.)

4. Due Process

We recognize that remand without issuance of a writ may offend due process in some circumstances. As has been aptly stated: “The vice of prejudgment remand ... is that it ‘raises serious questions of due process: it effectively preclude[s] any possible challenge to the sufficiency of the evidence to support the new findings.’ ” (*Sierra Club v. Contra Costa County, supra*, 10 Cal.App.4th at p. 1221, quoting *Resource Defense Fund v. Local Agency Formation Com., supra*, 191 Cal.App.3d at p. 900.)

That is not our case, however. Here, appellant had the opportunity both to participate in the supplemental administrative hearing in 2003 and to contest the resulting findings at the continued judicial hearing in 2004. “The essential requirements of due process are met when the administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made [citations] and the party is afforded an opportunity for review by the courts [citation].” (*De Cordoba v. Governing Board* (1977) 71 Cal.App.3d 155, 159.) “In the instant case petitioner was ... given a full administrative hearing and afforded an opportunity for judicial review. Thus

[its] constitutional right to due process was not violated.” (*Ibid.*) In no way were the agency’s procedures or findings insulated from review here. We therefore discern no due process problem arising from the prejudgment remand procedure used in this case.

5. Conclusion

Under the circumstances presented here, the court acted properly in remanding the matter to the Regional Board for additional hearings on finding number 48 only: the remand procedure comported with the requirements of Code of Civil Procedure section 1094.5; it was within the court’s inherent authority; and it did not offend due process.

B. Evidentiary Predicate for Remand

In their cross-appeal, respondents question the evidentiary predicate for remand. They assert that the court erred in remanding the matter to the Regional Board, because the original administrative determination was supported by substantial evidence. Appellant disagrees.

As before, our analysis begins with the statute.

1. Statutory Framework

In administrative mandamus proceedings, the judicial inquiry “shall extend to the questions whether the respondent [agency] has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” (Code Civ. Proc., § 1094.5, subd. (b).)

In this case, the first phase of the judicial proceeding concluded with administrative remand, based on the trial court’s determination – challenged here in respondents’ cross-appeal – that one critical agency finding was not supported by the weight of the evidence.

As a necessary threshold step in assessing the challenged determination, we first describe the governing standards of review.

2. *Standard of Review in the Trial Court: Independent Judgment*

In this case, the Porter-Cologne Act provides for independent trial court review of the evidence before the Regional Board as contained in the administrative record: “For the purposes of subdivision (c) of Section 1094.5 of the Code of Civil Procedure, the court shall exercise its independent judgment on the evidence....” (Wat. Code, § 13330, subd. (d).)

Independent trial court review is accomplished “by means of a limited trial de novo in which the trial court not only examines the record for errors of law but also exercises its independent judgment upon the *weight* of the evidence produced before the administrative agency together with any further evidence properly admitted by the court.” (*Merrill v. Department of Motor Vehicles* (1969) 71 Cal.2d 907, 914, fns. omitted.) However, “judicial trial de novo after an administrative hearing is not usually intended as a trial without appropriate consideration of the evidence upon which the administrative body based its action.” (*Dare v. Bd. of Medical Examiners* (1943) 21 Cal.2d 790, 801.) “In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.” (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817; see generally, 1 Cal. Administrative Mandamus, *supra*, Court’s Scope of Review Under CCP § 1094.5, § 6.163, pp. 294-295.)

3. *Standard of Review in the Appellate Court: Substantial Evidence*

Where an independent review standard applies below, as is the case here, we review the factual findings of the trial court, not those of the agency. (*Fukuda v. City of Angels, supra*, 20 Cal.4th at p. 824.) Thus, “where the trial court exercised its

independent judgment, we must determine ‘whether the findings and judgment of the trial court are supported by substantial, credible and competent evidence.’ [Citation.] All conflicts in the evidence must be resolved and all inferences drawn in favor of the judgment.” (*Cooper v. Kizer* (1991) 230 Cal.App.3d 1291, 1299, quoting *Evans v. Unemployment Ins. Appeals Bd.* (1985) 39 Cal.3d 398, 407; see also, e.g., *Lake v. Reed* (1997) 16 Cal.4th 448, 456.) In other words, where “the trial court is authorized to conduct a limited trial de novo ... the province of the appellate court is analogous to that assumed by it in an ordinary civil appeal....” (*Merrill v. Department of Motor Vehicles, supra*, 71 Cal.2d at p. 915; accord, *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 721.)

4. *The Evidence*

With that deferential review standard in mind, we now assess the trial court’s decision to remand the matter to the Regional Board “to conduct a thorough and comprehensive analysis of Best Technology Available,” a decision that was based on its determination that finding number 48 lacked evidentiary support in the administrative record. Our assessment of this point turns on these two questions: Is there is evidence of alternatives to once-through cooling in the administrative record? If so, is there evidence that the Regional Board considered such alternatives?

a. Background: alternatives for plant cooling

“Thermal electric generating facilities create heat in order to convert water into high-pressure steam that will drive turbines, thus generating electricity.” (Rábago, *What Comes Out Must Go In: Cooling Water Intakes and the Clean Water Act* (1992) 16 Harv. Envtl. L.Rev. 429, 438.) Power plants need a thermal transfer system to eliminate the excess heat that they produce. (*Ibid.*; see also, May & van Rossum, *The Quick and the Dead: Fish Entrapment, Entrapment, and the Implementation and Application of Section 316(b) of the Clean Water Act* (1995) 20 Vt. L.Rev. 373, 376.) Waste heat is eliminated

using air (dry cooling) or water (wet cooling). Wet cooling systems may be broadly categorized as either open cycle (once-through) or closed cycle.

Dry Cooling: Dry cooling systems employ air-cooled condensers, fans, and large cooling towers. They use virtually no water. (*Riverkeeper, Inc. v. United States Environmental Protection Agency* (2007) 475 F.3d 83, 91, fn. 3 (*Riverkeeper II*).

Once-Through Wet Cooling: “A once-through cooling system withdraws water from the source waterbody, runs it through the condenser system, and then discharges without recirculation. As the water circulates through the condenser system it is heated, and thus returns to the environment in a heated state. Once-through cooling systems require a continual supply of cooling water and are more common than closed-cycle systems.” (May & van Rossum, *supra*, 20 Vt. L.Rev. at p. 379; see also *Riverkeeper II*, *supra*, 475 F.3d at p. 91, fn. 3; Rábago, *supra*, 16 Harv. Envtl. L.Rev. at p. 430.) Once-through cooling was already in use at the Moss Landing Power Plant, and the Regional Water Board approved that alternative as the best technology available for the two new units at the plant.

Closed-Cycle Wet Cooling: “In contrast to once-through cooling systems, closed-cycle cooling systems recirculate and reuse cooling water. As with once-through cooling, cooling water in closed-cycle systems is passed through the condenser system where it is heated in the process of converting steam back to water. After passing through the condenser system, however, the cooling water is transported to cooling towers or to some other process to be cooled. Once cooled, the water is returned to the condenser system and used again in the cooling process. Although the cooling water used in a closed-cycle system is constantly being reused and recycled, some of the water is lost through evaporation and other processes. Therefore closed-cycle systems must recoup such losses by making additional withdrawals of cooling water from the source waterbody. The amount of make-up cooling water withdrawn from the source waterbody in a closed-cycle system is only 2% to 4% of the quantity of water used by a comparable once-

through system. Accordingly, the adverse environmental impact on aquatic ecosystems is far less from closed-cycle than from once-through systems.” (May & van Rossum, *supra*, 20 Vt. L.Rev. at pp. 379-380; see also *Riverkeeper II*, *supra*, 475 F.3d at p. 91, fn. 3; Rábago, *supra*, 16 Harv. Envtl. L.Rev. at p. 430.) Closed cycle wet cooling systems may employ either mechanical or natural draft cooling towers, using either fresh water or seawater.

Water Intake: Wet cooling systems – both once-through and closed cycle – depend on water intake from a source waterbody. Technology alternatives exist for water flow reductions, which in turn diminish impact on aquatic organisms. They include water pump flow reduction and seasonal flow reduction. Apart from technologies that limit intake flow, there are other technologies for minimizing biological impacts, such as screens and filters; physical and behavioral barriers; and fish collection, removal, and conveyance systems. (See generally, May & van Rossum, *supra*, 20 Vt. L.Rev. at pp. 455-459, 465.) Beyond design alternatives, intake location may be changed, either to an alternate onshore site or to an offshore location. (*Id.* at pp. 459-463.)

b. Discussion of alternatives in the administrative record

In their briefs on appeal, respondents cite to numerous documents in the administrative record that discuss alternatives for the plant’s cooling water intake system. The Water Boards first point to reports and analyses presented to the Energy Commission, including: Duke’s application for certification, made in May 1999; Duke’s responses to the Energy Commission’s request for supplemental data, dated July 1999; the Energy Commission staff’s preliminary, final, and amended analyses, which were submitted between February and June 2000; and the Energy Commission’s Presiding Member’s Proposed Decision, issued in August 2000. They also emphasize the existence of reports prepared or evaluated by the Technical Working Group (TWG), including

studies submitted by Duke as required by the Regional Board.⁶ Lastly, the Water Boards list various reports, comments, and presentations submitted to the Regional Water Board at its meetings in September and October 2000.

Only that last category of evidence concerns us here. Whatever information exists in the administrative record as a whole, the focus of judicial inquiry properly rests solely on the evidence before the Regional Board, which was the agency charged with approving or disapproving the NPDES permit. We consider that evidence now.

c. Evidence of alternatives presented to the Regional Board

Duke's NPDES permit application was considered by the Regional Board in public meetings held in September and October 2000. After a lengthy hearing on September 15, 2000, the matter was continued to allow further exploration of two issues: (1) an alternative offshore location for the cooling water intake, and (2) the proposed mitigation plan. The continued hearing took place on October 27, 2000. At the conclusion of that hearing, the Regional Board approved the permit.

Over the course of the two public meetings, the Regional Board was provided with many documents. The two agenda packets alone contain a total of nearly 300 pages. The Board also received testimony at both hearings. Of that extensive body of written and oral evidence, a relatively small portion dealt with cooling water alternatives. We summarize that portion of the evidence now.

Staff Report: A 24-page staff report was prepared for the September hearing, which refers to best technology available (BTA) alternatives in three places. The first

⁶ Duke prepared an assessment of technology alternatives, designed to address the requirements of section 316(b) of the Clean Water Act. The assessment was required by the Regional Board. Duke produced four drafts of this report between September 1999 and early April 2000. The final draft is dated April 28, 2000. It is officially entitled "Moss Landing Power Plant 316(b) Resource Assessment." We refer to it here as Duke's § 316(b) Report.

reference to BTA in the staff report is this statement: “The Discharger must use BTA to minimize adverse environmental impacts caused by the cooling water intake system. If the cost of implementing technological alternatives for achieving BTA is wholly disproportionate to the environmental benefits to be achieved, the Board may consider alternative methods to mitigate these adverse environmental impacts. In this case the cost of technical alternatives for eliminating entrainment impacts (such as cooling towers) is wholly disproportionate.” The next reference to BTA alternatives is Table 2, entitled “Best Technology Available Costs (New Units Only)”, with cost figures supplied by Duke. The third reference to BTA is staff’s discussion of alternatives in response to a comment by the Center for Marine Conservation. The comment states: “Power plant modifications that avoid impacts, such as cooling towers, should be chosen over mitigation.” Staff responds: “Cooling towers are the only alternative for definitely eliminating significant impacts due to entrainment. ... To our knowledge, there are no salt water cooling towers in place for a facility like the Moss Landing Power Plant. Cooling towers are massive structures, they present other impacts (construction, noise, aesthetic, fog, etc[.]) and they are relatively expensive (up to \$114 million in this case). The range of productivity loss, and our interpretation of that range, does not support pursuing technological alternatives to eliminate entrainment impacts.” Staff thus recommended granting the NPDES permit as drafted, allowing the use of once-through cooling, but requiring Duke to fund a \$7 million mitigation plan to address the adverse environmental effects of entrainment.

Energy Commission Documents: The transcript of the September hearing indicates that the Board received an excerpt of the Energy Commission’s Presiding Member’s Proposed Decision covering “those issues that are before the board today, which are the thermal[,] entrainment and impingement issues.” The agenda packet for the October meeting includes several other items from the Energy Commission: a two-page excerpt from its June 2000 Final Staff Assessment containing Table 7, which sets

staff are ascribed to the Environmental Protection Agency. The report also touches on some environmental issues resulting from the alternatives, such as the possibility of “salt drift on agriculture” if saltwater mechanical draft towers were used.

The staff report recommends that “the Regional Board determine that the weight of the evidence supports Finding No. 48 of the NPDES permit for MLPP, which states that the costs of alternative cooling technologies are wholly disproportionate to the benefit to be gained.”

Staff later submitted rebuttal, commenting on Duke’s testimony, particularly its alternatives analysis, and responding to public comments from the Elkhorn Slough Coalition and the California Coastal Commission.

3. Board Counsel’s Correspondence

Acting as the Regional Board’s legal advisor, Senior Staff Counsel Jennifer Soloway submitted a memorandum “to provide guidance to the Board on the purpose of this hearing and the applicable law.” Dated April 11, 2003, the memorandum: (1) describes the trial court’s order; (2) discusses the “legal guidance” available for applying the governing law, section 316(b) of the Clean Water Act, which requires the best technology available (BTA); (3) details the statutory factors for BTA analysis; (4) describes standards for determining whether a particular technology is available; and (5) offers advice on applying the “wholly disproportionate” test.

The record also contains another correspondence from Soloway, this one a letter dated May 9, 2003 and directed to Jeff Young, the Regional Board’s Vice Chair. Counsel’s letter states: “You have requested copies of opinions, decisions, and analyses pertaining to the wholly disproportionate cost analysis.” Counsel adverted to two court opinions already in the record and forwarded seven additional documents. She noted, however: “The following NPDES permit decisions and analyses include discussions of

section 316(b) as it applies to certain power plants. Because 316(b) is applied on a case-by-case basis, these documents are instructive but are not binding on the Board.”

4. Appellant's Responses and Submittals

In its first response to the hearing notice – a letter dated March 24, 2003 – appellant objected to the format of the scheduled hearing and requested a continuance. Roger Briggs, the Regional Board's executive director, forwarded the letter to the other parties, gave them a deadline to respond, and advised appellant to proceed according to the extant hearing notice unless advised to the contrary. Duke and the Energy Commission both responded; each asked the Regional Board to overrule appellant's objections and to deny the requested continuance. By letter of April 3, 2003, Briggs overruled appellant's objections and refused to postpone the hearing. That letter closed with a reminder that appellant's submission was due by April 14th, the previously established deadline for presenting direct evidence and argument in writing.

Appellant submitted a letter dated April 14, 2003, in which it: repeated its view that defects in the NPDES permit required its reopening; opined that those defects would “not be cured by the proposed new hearing process”; and stated its intent to “preserve[]and reassert[] these additional objections to the Permit.” Appellant further advised that it was “proceeding with a petition for writ of mandate to the Court of Appeal” and thus “respectfully declines to submit any testimony at this time.”

On April 28, 2003, appellant submitted further correspondence from its counsel. In its opening paragraph, the letter states that it is in response to the staff report and other submittals. The letter reiterates appellant's position that “the only proper course of action in this matter is to reopen the existing NPDES permit” but continues: “in order to fully preserve its rights and to assist the Board's future deliberations over this important public policy matter, Voices submits the following preliminary comments. When the Board properly notices a new draft permit, we will, of course, provide additional testimony and

comments.” In a discussion titled “Threshold Issues,” the letter asserts that the purpose of the hearing is not clear, that new evidence should not be taken, and that the Regional Board’s counsel mischaracterized the trial court’s decision. Under the heading “Additional Matters for Consideration in a New Permit Process,” appellant provides a detailed legal analysis setting forth its view of Clean Water Act section 316(b), particularly the role of costs and mitigation.

Appellant’s April 28th submittal was rejected for inclusion in the written record for the hearing. As stated in a May 14th letter by Bruce Daniels, Regional Board Chair, the decision was made on the grounds that appellant’s letter was untimely and beyond the scope of the hearing issues.⁹ Before explaining his determination, Daniels first observed that appellant’s April 28th correspondence “seems to have been submitted to address future deliberations of the Board that theoretically will occur if [appellant’s] request to vacate the existing NPDES permit is granted.” Daniels nevertheless acknowledged the possibility that appellant “intends to augment the administrative record and participate in the current hearing.” He continued: “in case that is their intent, the following discussion explains that because the letter was not submitted in accordance with the deadlines and requirements of the Notice, it will not be accepted into the administrative record and will not be distributed to the Board members in the course of the above-referenced hearing.” The letter from Daniels apparently did not reach appellant prior to the May 15th hearing.

Appellant arranged for another submission on April 28th, this one a memorandum authored by three individuals, including Dr. Brent Haddad of the University of

⁹ As to those points, Daniels’s letter states: “While the April 28 letter states in some parts that it is responding to submissions by Board staff and Duke Energy, the overwhelming majority of the letter addresses issues that were not raised by the other parties. Thus, the letter is not properly submitted as rebuttal argument or evidence. [¶] Additionally, most of the letter addresses issues outside the scope of the Order of Remand by the Superior Court of Monterey County. ... Because the purpose and scope of this hearing is to comply with the Order of Remand, the issues argued in the April 28 letter are outside the scope of the hearing and so are not relevant and may be excluded.”

California, Santa Cruz. It states: "We are submitting this memorandum to the Board in an effort to clarify the inadequacies" in the submissions by Duke and Regional Board staff. The Haddad memorandum continues: "Section 316(b) of the Clean Water Act states that cooling water intake structures must be of the best technology available (BTA), although courts have subsequently allowed exceptions for cases of wholly disproportionate costs and benefits. ... The costs and benefits used by Duke and the Board staff are not comprehensive nor do they meet the standards laid out in the law with regard to incremental costs and benefits."¹⁰ Following a detailed analysis, the

¹⁰ On the question of costs, the memorandum explains that "the 'wholly disproportionate test' is a test of incremental cost," which refers "to the added expenditure necessary for environmental protection above and beyond the costs of normal operation. For MLPP, some technology must be employed to cool the two new generating units. Therefore, the expenditure that MLPP would make to achieve this cooling is not a cost of environmental protection, but a cost of their operations. ... Therefore costs for the [wholly disproportionate] test should be the difference between the once-through cooling technology and the non-entraining alternatives." In the view of the memorandum's authors, analysis of incremental costs was lacking in this case. They state: "The Board was not directed to measure the incremental costs that MLPP would now face given that MLPP has already invested in once-through technology. Therefore, the costs have been drastically over-estimated."

On the issue of benefits, the memorandum advises: "Benefits for consideration must also be incremental. In this case, the benefits would be the increase in environmental quality above the case that would result with MLPP choosing technology to achieve their cooling needs only. Therefore, the target figure is the total benefit value of environmental protection minus the environmental protection that would be achieved otherwise." As with costs, the authors of the memorandum question the treatment of benefits, saying: "The benefit calculations provided by Duke are clearly lacking. They consider direct use and nonuse values exclusively.... While only small organisms are directly affected by impingement and entrainment (I&E), the indirect effects are potentially widespread and of great value." The authors complain that Duke assessed only direct "impacts on the fish directly entrained in the once-through cooling system" without considering associated "trophic-level effects" on other biota in the ecosystem. The authors of the memorandum offer a detailed, critical analysis of the habitat equivalency method of benefit valuation used by Regional Board staff as reflected in the mitigation plan. They opine: "Not only have the benefits been incorrectly calculated, but planned mitigation is technically infeasible."

memorandum concludes that “a strong case can be made on purely economic grounds that the assessment so far inadequately meets the ‘wholly disproportionate’ requirements of 316(b) of the Clean Water Act.” This memorandum was admitted into evidence at the hearing.

5. The Hearing

At the start of the May 15th remand hearing, Regional Board Chair Daniels reiterated the procedures for the hearing as described in the hearing notice. Daniels then announced that several documents had been received “after the deadlines in the notice.” He identified two late submittals that nevertheless had been admitted: a public comment from the Elkhorn Slough Coalition, and the Haddad memorandum. Daniels then stated: “The other late submittals are not admissible to the record for this hearing” but he did not specify what particular items were excluded. A Regional Board staff member later made an objection to Haddad’s memorandum as being outside the scope of the hearing, but that objection was overruled.

After Daniels made his opening comments, one board member (Shallcross) recused himself. Board counsel Soloway then explained her role, summarized the history of the proceedings, and described the nature and scope of the hearing. Soloway advised the Regional Board: “You are not required in any way to stick by the original decision the board made in 2000. The Court remanded this for you to look at this again.” In response to a board member’s question, a representative from the Regional Board’s staff indicated that there had been “major additions to the record.”

Following these preliminaries, the parties’ oral presentations began, starting with Regional Board staff. Within their respective time allocations, the parties were permitted to cross-examination each other’s witnesses, and board members’ questions were allowed as well. Before cross-examining Duke’s witnesses, appellant’s counsel again objected to the Board’s decision to accept new evidence. After presentation of the parties’ evidence,

the Board took public comments and then entertained the parties' closing statements before beginning its deliberations.

At the conclusion of the hearing, by majority vote on a formal motion, the Regional Board stated that it had undertaken "a thorough and comprehensive analysis" and concluded that Finding No. 48 of the NPDES permit for the Moss Landing Power Plant was "supported by the weight of the evidence." A formal resolution to the same effect followed.

B. Legal Issues

Before addressing appellant's specific claims of error, we begin with some general observations about the nature of the administrative proceeding at issue here and the proper scope of judicial review.

NPDES permit proceedings typically are subject to informal adjudication procedures under the Administrative Procedures Act. (*City of Rancho Cucamonga v. Regional Water Quality Control Bd.*, *supra*, 135 Cal.App.4th at pp. 1381, 1385, citing Gov. Code, §§ 11445.10 et seq., and Cal. Code of Regs., tit. 23, §§ 647-648.8.) "While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. Among these are the following: the evidence must be produced at the hearing by witnesses personally present, or by authenticated documents, maps or photographs; ordinarily, hearsay evidence standing alone can have no weight [citations], and this would apply to hearsay evidence concerning someone else's opinion; furthermore, cross-examination within reasonable limits must be allowed." (*Desert Turf Club v. Board of Supervisors* (1956) 141 Cal.App.2d 446, 455; accord, *Ashford v. Culver City Unified School Dist.*, *supra*, 130 Cal.App.4th at p. 349; Gov. Code, § 11513, subd. (c); see generally, 1 Witkin, Cal. Evidence (4th ed. 2000) Introduction, § 55, pp. 60-62; *id.* (2006 supp.) p. 18.)

On judicial review, the administrative proceedings enjoy a presumption of regularity, which generally extends to procedural matters, including evidentiary rulings. (*City of Rancho Cucamonga v. Regional Water Quality Control Board, supra*, 135 Cal.App.4th at p. 1384.) When the basic fairness of an administrative hearing is challenged, however, the appellate court independently reviews the claim as a question of law. (*Sinaiko v. Superior Court* (2004) 122 Cal.App.4th 1133, 1140; *id.* at p. 1141 [“wholesale disqualification of petitioner’s experts rendered the administrative proceedings unfair as a matter of law”].)

With that background, we turn to appellant’s claims of administrative error at the remand hearing.

1. The Decision to Take New Evidence

Appellant’s first complaint is that the Regional Board erred in accepting new evidence at the remand hearing. To the extent that this argument constitutes an attack on the trial court’s authority to remand, we have already resolved the question adversely to appellant. Beyond that, we find no merit in the argument.

Where further administrative proceedings are warranted, they may involve the admission of new evidence. (See, e.g., *Keeler v. Superior Court, supra*, 46 Cal.2d at p. 600 [upholding remand procedure “for the taking of further evidence”].) In one case, for example, a writ issued ordering the Department of Motor Vehicles both “to set aside its decision revoking [the petitioner’s] probation and suspending his license and to reinstate [his] license as it existed immediately prior to that suspension.” (*Carlton v. Department of Motor Vehicles* (1988) 203 Cal.App.3d 1428, 1435.) On appeal, the agency complained that the trial “court erred in not specifically remanding the matter to the DMV for a new hearing.” (*Id.* at p. 1434.) The appellate court stated: “Where an administrative decision is set aside for insufficiency of the evidence it is customary to remand the matter to the agency for a new hearing....” (*Ibid.*) With a new hearing, the

court agreed, it was “conceivable the DMV could produce competent evidence sufficient to establish” the petitioner’s responsibility for the underlying accident. (*Id.* at pp. 1434-1435.) As pertinent here, the court emphatically explained: “Nothing in the writ of mandate precludes it from doing so.” (*Id.* at p. 1435.) Other cases likewise recognize the agency’s discretion to consider new evidence on remand. (See, e.g., *Zink v. City of Sausalito* (1977) 70 Cal.App.3d 662, 666 [where “the trial court’s independent review of the evidence determines that some of the substantive findings ... are unsupported by the evidence, remand to the administrative body is the only means of permitting it to exercise its discretion”]; *Overton v. State Personnel Bd.* (1975) 46 Cal.App.3d 721, 725 [“evidentiary deficiency requires that ... the peremptory writ issue”]; *Garcia v. California Emp. Stab. Com.* (1945) 71 Cal.App.2d 107, 110 [due to “the insufficiency of the evidence in the record filed herein to support the findings of the board, it is necessary that this application be remanded for further evidence”]; cf., *Moyer v. State Board of Equalization* (1956) 140 Cal.App.2d 651, 654 [under Gov. Code, § 11521, agency’s reconsideration may be based on “all the pertinent facts of the record and such additional evidence and argument as may be permitted”].) As the foregoing authority demonstrates, on remand or reconsideration, an administrative agency may admit new evidence as necessary to a proper determination of the issues before it.

The cases cited by appellant do not dictate a contrary conclusion. They stand for the unremarkable proposition that a court may not consider “extra-record” evidence that was not presented to the agency. (See, e.g., *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576; *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 120; *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1390.) As California Supreme Court authority makes clear, the overriding purpose of “restricting review ... to the administrative record” is to ensure that the courts do not “engage in independent factfinding rather than engaging in a review of the agency’s discretionary decision.” (*Friends of the Old Trees v. Department of*

Forestry & Fire Protection, at p. 1391, discussing *Western States Petroleum Assn. v. Superior Court*, at p. 576.) Nothing in these cases prevents an agency from supplementing its own record on remand.

In sum, the agency acted properly in accepting additional evidence in response to the court's remand order.

For the same reasons, the trial court correctly considered this new evidence at the post-remand judicial hearing. Indeed, review of that evidence was not only proper, it was necessary given the court's prior determination that the agency's initial analysis was inadequate. As reflected in the trial court's post-remand statement of decision: "It was certainly this Court's expectation that the Board would more fully consider additional relevant evidence on the issue of the best technology available ('BTA'). To meaningfully comply with the remand, a more complete inquiry into BTA necessitated the receipt of further information." Having reviewed "over 6,000 pages" of new administrative evidence, the court determined "that the Board engaged in the kind of scrutiny and analysis that the issue required." The augmented administrative record thus helped guide the trial court in its "review of the agency's discretionary decision." (*Friends of the Old Trees v. Department of Forestry & Fire Protection*, *supra*, 52 Cal.App.4th at p. 1391.) By considering the additional evidence adduced at the remand hearing, the court adopted the proper analytic focus: reviewing the agency's expanded fact-finding rather than engaging in its own. (*Ibid.*)

We therefore reject appellant's assertion that "such an approach would lead to the very kind of post hoc agency rationalizations that the courts have soundly rejected, and it would make a mockery of the section 1094.5 administrative mandamus provision and decades of case law" as well as its dire prediction that "the fundamental building blocks of administrative law, which guard against arbitrary and capricious decisionmaking by our otherwise unaccountable public agencies," will thereby "lie in shambles." To the contrary, we conclude, the challenged procedure helped to ensure a more thorough and

meaningful administrative process, without sacrificing procedural protections or encouraging after-the-fact justification.

2. The Decision to Exclude Appellant's Written Submission

Appellant next challenges the exclusion of its counsel's April 28th letter, made on the grounds that it was untimely direct evidence and that it largely addressed matters beyond the scope of the remand order. Describing its April 28th letter as containing "detailed legal and policy arguments regarding the propriety of staff's chosen cost analysis and the legality of the habitat mitigation approach on which staff's analysis relied," appellant characterizes its submission as proper rebuttal argument and thus timely. Moreover, appellant insists, it was prejudiced by the exclusion of this document, notwithstanding the trial court's finding to the contrary.

The Administrative Procedures Act contemplates liberality in admitting evidence at adjudicative proceedings such as the one at issue here. (*City of Rancho Cucamonga v. Regional Water Quality Control Board, supra*, 135 Cal.App.4th at p. 1385.) In NPDES proceedings such as this, "wide latitude" is "allowed an administrative agency in the receipt of evidence...." (*U. S. Steel Corp. v. Train* (1977) 556 F.2d 822, 836-837.) Even so, unless exclusion of the evidence rendered the entire proceeding unfair – a claim that appellant does not advance – the Board chair's decision to reject appellant's submission comes clothed in a presumption of regularity. (*City of Rancho Cucamonga*, at p. 1384; *So. Cal. Jockey Club v. Cal. etc. Racing Bd.* (1950) 36 Cal.2d 167, 175 [trial court properly rebuffed the contention "that competent evidence offered by plaintiff was rejected" by the agency]; cf., *Sinaiko v. Superior Court, supra*, 122 Cal.App.4th at 1140 [trial court's exclusion of petitioner's experts violated due process].)

Appellant has the burden of demonstrating error. (*Fukuda v. City of Angels, supra*, 20 Cal.4th at p. 817.) As we now explain, appellant failed to carry that burden

here. We thus affirm the trial court's approval of the administrative decision to exclude appellant's submittal as untimely and outside the scope of the hearing.

a. Timeliness

The hearing notice established an April 14th deadline for direct testimony, evidence, and argument. The requirement for early submittal of direct written testimony is expressly permitted by regulations governing the Water Boards' adjudicative proceedings. As pertinent here, those regulations provide: "The hearing notice may require that direct testimony be submitted in writing prior to the hearing." (Cal. Code Regs., tit. 23, § 648.4(c).) That practice is in keeping with the Water Boards' policy "to discourage the introduction of surprise testimony and exhibits." (*Id.*, § 648.4(a).) The regulations also provide consequences for noncompliance: "Where any of the provisions of this section have not been complied with, the presiding officer may refuse to admit the proposed testimony or the proposed exhibit into evidence, and shall refuse to do so where there is a showing of prejudice to any party or the Board." (*Id.*, § 648.4(e).)

To the extent that appellant's April 28th submission represents direct testimony, it was untimely and subject to exclusion on that ground alone. (Cal. Code of Regs., tit. 23, § 648.4(c), (e).) Appellant characterizes the letter as rebuttal, however. And as longstanding California Supreme Court precedent teaches, "improper restrictions on the right to present evidence in rebuttal" may constitute "a deprivation of the constitutional guaranty of due process of law." (*Pence v. Industrial Acc. Com.* (1965) 63 Cal.2d 48, 50-51.)

As a close reading demonstrates, appellant's April 28th letter is susceptible of several different interpretations, a point recognized by Regional Board Chair Daniels. On the one hand, it can be fairly read as simply rejecting the remand process as illegitimate,

preserving objections, and addressing theoretical future deliberations.¹¹ Alternatively, as Daniels acknowledged, the letter could be interpreted as an attempt to “participate in the current hearing.”

Viewed as a proffer of evidence and argument for the May 15th remand proceeding, we agree that appellant’s April 28th letter was not rebuttal. To be sure, appellant takes Duke and the Regional Board staff to task for perceived analytic errors and evidentiary omissions. For the most part, however, it does so by setting up then knocking down straw men, without actually rebutting any direct evidence. Appellant employs this tactic with each of the three substantive topics it discusses.¹²

In its first argument, appellant decries staff’s recommendation as “entirely without legal or factual support.” Appellant offers its assessment of what staff’s “logic ... seems to be,” then promptly disparages it as a “tautological analysis” that is “entirely

¹¹ Several factors support this interpretation. For one thing, just two weeks earlier, appellant had expressly declined “to submit any testimony at this time.” For another thing, the April 28th letter opens by reiterating appellant’s position that “the only proper course of action in this matter is to reopen the existing NPDES permit” while nonetheless seeking “to fully preserve its rights and to assist the Board’s future deliberations” with the proffered “preliminary comments.” Moreover, most of the letter’s content appears under the heading “Additional Matters for Consideration in a New Permit Process,” a title that suggests appellant’s unwillingness to participate in the remand hearing then scheduled. Additionally, on the penultimate page of the letter, appellant renews its insistence on reopening the permit, stating: “In reconsidering all of these issues in a new permit process, Voices strongly encourages the Board to resist Staff’s ill-conceived and illegal approach....” Given the foregoing, it would be reasonable to conclude that appellant did not intend its April 28th correspondence as a substantive proffer for this proceeding.

¹² Those three topics, which appear under the heading “Additional Matters for Consideration in a New Permit Process,” are as follows: “1. The Clean Water Act Does Not Allow Cost Considerations to Drive the BTA Analysis.” “2. The Board Cannot Selectively Evaluate Costs and Benefits If It Chooses to Base its Decision on Economic Considerations.” “3. There Is No Evidence To Support The Conclusion that the Funding of Habitat Measures Will Fully (or even Substantially) Mitigate the Impacts of Once-Through Cooling.”

inconsistent with the plain language of the Clean Water Act and EPA's interpretation of the statute." Having given itself that opening, appellant devotes several pages to presenting its view of the proper interpretation of federal water law.

Appellant continues in this vein with its second point, which concerns the valuation of costs and benefits. In appellant's words, "the Board cannot selectively choose only certain 'benefits' to consider and weigh against the full costs of alternative technologies. That, however, is exactly what Staff proposes in this case." Again, though, appellant's arguments on this point are addressed to its view of what "the new Staff Report suggests" rather than what that report contains by way of rebuttable evidence. To the extent that appellant does refer specifically to evidence adduced on direct, its discussion is mainly limited to reasserting that Board cannot lawfully consider new evidence unless it reopens the permit. Appellant's other comments about "Staff's truncated approach to valuing benefits" are offered merely as a springboard for its own analysis of the issue, which should have been offered on direct.

Introducing its third and final main point, appellant states: "The heart of the problem with the existing permit is the Board's reliance on \$7 million in 'mitigation' funding in lieu of BTA." As to that issue, appellant offers legal arguments about the validity and application of the mitigation approach. These arguments do not specifically address any evidence submitted for the hearing, however. Nor do they attempt to counter the legal analysis provided by Board Counsel Soloway concerning mitigation.¹³ Instead, appellant advances these legal arguments as support for its own interpretation and

¹³ Appellant's April 28th letter refers to Soloway's legal analyses in only two places. At page 2, in its discussion of threshold issues, appellant contends that Soloway mischaracterized the court's decision as relating to a single sentence of finding number 48. At page 11, in addressing the mitigation issue, appellant states: "Counsel's Legal Analysis points the Board to EPA's discussion of restoration measures in the new Section 316(b) rules." Appellant then quotes and discusses those regulations, but without criticizing or challenging counsel's conclusions.

application of the statute. Appellant's legal arguments concerning mitigation thus are not rebuttal. Finally, to the extent that appellant addresses substantive aspects of the mitigation plan, its arguments are beyond the scope of the hearing issues, a point we now address.

b. Relevance

Stressing the importance of its proffered information on mitigation, appellant contends that its exclusion was both erroneous and prejudicial. Appellant cites "the apparent misunderstanding of Board decisionmakers about the use and availability of mitigation funding as a substitute for technology under section 316(b)," and opines that there is no way to determine whether "the improper exclusion of Appellant's submittal would have made a difference" in the outcome. But the mitigation plan – also known as the habitat or environmental enhancement program – was not at issue in the hearing, except insofar as its economic aspects relate to the question of whether the costs of alternative technologies were wholly disproportionate to their benefits. As Board counsel Soloway observed in her introductory remarks at the hearing: "The habitat enhancement program was not questioned by the Court. And in fact is outside the scope of the language of 316([b])." During the hearing, Board Chair Daniels likewise addressed the mitigation plan on several occasions, usually in the process of preventing testimony about its ecological aspects. Each time, he hewed to the distinction between the scientific and the economic aspects of the program. Thus, for example, Daniels said: "We do need to talk about costs because you can't talk about wholly disproportionate without talking about costs and benefits. I think where we step off the end is where we start talking about the habitat program which is outside the intake structure issue and is a completely different mechanism than to try to mitigate against those impacts. So we are not going to talk about the habitat program. You can talk about the costs, the benefits, the impacts of the current plan, and any of these proposed different intake regimen[*s*], but not the habitat

program.” At another point in the hearing, during testimony by Haddad about the availability of replacement wetlands, Daniels stated: “That’s an issue we are not dealing with here. If you want to talk about how it relates to valuation, that’s okay.”

In administrative proceedings, “the basic requirement of relevancy remains.” (1 Witkin, Cal. Evidence, *supra*, § 64, p. 69.) Both “oral and written evidence ... should be considered if relevant to the issues.” (*Allied Comp. Ins. Co. v. Ind. Acc. Com.* (1961) 57 Cal.2d 115, 120.) By the same token, of course, it is not error to exclude irrelevant evidence. (*Id.* at p. 121 [referee properly rejected “further medical evidence bearing on the extent of [the employee’s] disability and other evidence relating to her occupational classification” where the hearing was limited to “the accuracy of the rating expert’s conclusion”]; see also, e.g., *Ashford v. Culver City Unified School Dist.*, *supra*, 130 Cal.App.4th at p. 350 [videotapes that lacked “authenticating foundation ... were irrelevant”]; *Vielehr v. State Personnel Bd.* (1973) 32 Cal.App.3d 187, 195-196 [discussing relevance of proffered evidence].)

The relevance of appellant’s evidence depends on whether it addressed the limited issue before the Board. As explained above, the Board was *not* considering the scientific validity of the mitigation plan. Instead, the question before the Board was purely economic – whether the habitat equivalency valuation reflected in that plan accurately monetized the entrainment impact. As the Water Boards concede, this distinction between the biological and economic aspects of the mitigation plan sometimes proved slippery during the hearing. Nevertheless, the presiding officer consistently and effectively limited the evidence to the program’s economic aspects.

Appellant’s April 28th letter does mount a fleeting challenge on that one relevant issue, arguing that “there simply is no credible evidence to support the numbers on which Staff relies; indeed, the limited evidence of wetlands replacement costs in the record from other projects suggests that Staff missed the mark by an order of magnitude.” To that limited extent, the letter arguably was relevant. But appellant must show prejudice from

its exclusion as well as error. As our high court has long acknowledged, there is no basis for reversing an agency decision to exclude evidence if “ ‘the error complained of has not resulted in a miscarriage of justice.’ ” (*So. Cal. Jockey Club v. Cal. etc. Racing Bd.*, *supra*, 36 Cal.2d at p. 176; Cal. Const., art. VI, § 13.) No prejudice appears here. Appellant was able to offer far more extensive and effective evidence and analysis on this point through Haddad’s evidence. Thus, even assuming error in the exclusion of appellant’s April 28th letter, there is no prejudice.

C. Conclusion

To sum up, we reject both of appellant’s procedural challenges to the post-remand administrative hearing. First, we find no merit in appellant’s claim that the agency erred in considering new evidence in response to the court’s remand order. The additional evidence permitted a more thoroughgoing administrative process, as the court’s remand order contemplated. Furthermore, the augmented record assisted the court in its review of the agency’s decision. Second, the agency acted properly in excluding appellant’s submittal as untimely and beyond the scope of the issues. To the limited extent that the submittal constituted rebuttal on relevant aspects of the mitigation plan, appellant suffered no prejudice from its exclusion.

Having rebuffed both of appellant’s procedural challenges to the post-remand administrative hearing, we now turn to the judicial proceeding in which the Regional Board’s decision was affirmed.

IV. Post-Remand Judicial Proceedings

Appellant challenges the outcome of the post-remand court hearing, arguing in effect that the trial court misinterpreted and misapplied the governing statute, section 316(b) of the Clean Water Act. Respondents dispute those assertions. As a framework for our analysis of this issue, we begin by summarizing the general principles of statutory

construction that guide our task. Next, we discuss section 316(b) itself. Finally, we examine how that statute was applied in this case.

A. General Principles of Statutory Construction

The courts' task in interpreting federal legislative acts is to ascertain the intent of Congress. (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837, 843; accord, *National Association of Home Builders v. Defenders of Wildlife*, *supra*, 127 S.Ct. at p. 2534.) That task begins with the statutory language itself, which must be read in context. (*National Association of Home Builders*, at p. 2534; cf., *City of Burbank v. State Water Resources Control Board*, *supra*, 35 Cal.4th at p. 625.)

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress...." (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, *supra*, 647 U.S. at pp. 842-843; accord *National Association of Home Builders v. Defenders of Wildlife*, *supra*, 127 S.Ct. at p. 2534.) But where "a fundamental ambiguity ... is not resolved by the statutory text ... [¶] ... it is appropriate to look to the implementing agency's expert interpretation" of the provision at issue. (*National Association of Home Builders v. Defenders of Wildlife*, at p. 2534.)

Within those parameters, statutory interpretation presents a question of law, which we review *de novo*. (*Yamaha Corp. of America v. State Bd. of Equalization*, *supra*, 19 Cal.4th at p. 7.) Because a federal statute is at issue here, we look to federal law for guidance. "Although lower federal court decisions are not binding on this court, they may be persuasive, especially as regards the interpretation of federal law." (*Spellman v. Securities, Annuities & Ins. Services, Inc.* (1992) 8 Cal.App.4th 452, 459; see also, e.g., *People v. Bradley* (1969) 1 Cal.3d 80, 86; *Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 97-98.) Moreover, the Environmental Protection Agency's "administrative interpretation is relevant" here too, "in light of the State Board's

obligation to carry out the objectives of federal law” in issuing NPDES permits.

(*WaterKeepers Northern California v. State Water Resources Control Bd.*, *supra*, 102 Cal.App.4th at p. 1458.)

B. Construction of Section 316(b)

With those principles in mind, we now turn to a consideration of the governing statute, section 316(b) of the Clean Water Act (CWA).

1. The Statutory Language

The governing provision reads: “Any standard established pursuant to section 1311 of this title [CWA § 301] or section 1316 of this title [CWA § 306] and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.” (§ 316(b) [33 U.S.C.A. § 1326, subdivision (b)].)

The statutory text is brief but rich. In the opinion of one commentator, “by requiring that ‘location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact,’ Congress has imbued Section 316(b) with more operative terms than any twenty-word phrase in all environmental law.” (May & van Rossum, *supra*, 20 Vt. L.Rev. at p. 377, quoting § 316(b).)

2. Agency Interpretations

Over the decades since the enactment of section 316(b), the Environmental Protection Agency has generated a rather bewildering array of regulatory interpretations, reflected in its rulemaking and in many other documents.

a. Regulations

The EPA's attempts at rulemaking under section 316(b) have a long history. Because the regulations illuminate the agency's understanding of the section, we briefly summarize their development here.

Initial Regulations: The agency first promulgated regulations in 1976. (41 Fed. Reg. 17387 (Apr. 26, 1976.)) They were remanded on procedural grounds in *Appalachian Power Co. v. Train* (4th Cir. 1977) 566 F.2d. 451, 457. (*Riverkeeper I, supra*, 358 F.3d at p. 181.) Thereafter, the agency formally withdrew the regulations. (44 Fed. Reg. 32956 (Jun. 7, 1979.)) Pursuant to a 1991 consent decree, the EPA agreed to promulgate regulations in three phases by specified deadlines. (*Riverkeeper I*, at p. 181; *Riverkeeper II, supra*, 475 F.3d at p. 90.)

Phase I Rule (New Facilities): "Phase I concerns cooling water intake structures at new facilities." (*Riverkeeper I, supra*, 358 F.3d at p. 181, fn. 3.) The draft rule was published in August 2000. (65 Fed. Reg. 49060 (Aug. 10, 2000.)) The final rule was promulgated in December 2001. (66 Fed. Reg. 65256 (Dec. 18, 2001.)) One portion of the final rule permitted a facility to "comply with section 316(b) by undertaking so-called 'restoration measures'" (*Riverkeeper II, supra*, 475 F.3d at p. 92.)

The Phase I regulations were challenged in *Riverkeeper I, supra*, 358 F.3d 174, 196-197. On appeal, the court "upheld most aspects of the Phase I Rule, but remanded the provisions relating to the ... restoration option." (*Riverkeeper II, supra*, 475 F.3d at p. 92; see *Riverkeeper I, supra*, 358 F.3d at pp. 189, 191.)

Phase II Rule (Existing Large-Volume Power Plants): The Phase II rule "governs cooling water intake structures at large, existing power plants." (*Riverkeeper II, supra*, 475 F.3d at p. 92.) The draft rule was issued in April 2002. (67 Fed. Reg. 17122 (Apr. 9, 2002.)) The final rule was promulgated in July 2004. (69 Fed. Reg. 41576 (July 9, 2004.))

The Phase II regulations were challenged in *Riverkeeper II, supra*, 475 F.3d 83, 96-97. After extensively analyzing various elements of the regulations, the court remanded the matter to the agency on procedural and substantive grounds. (*Id.* at pp. 103, 115, 117.) The court reaffirmed that restoration measures are not permissible compliance alternatives under section 316(b). (*Id.* at p. 109.) It also addressed the role of costs in the BTA analysis. (*Id.* at p. 97.) As to that point, the court concluded that costs play a limited role in the determination of best technology available. (*Id.* at p. 99.)

Phase III Rule (Other Existing Facilities): “Phase III will regulate existing power plants not governed by Phase II, as well as other industrial facilities.” (*Riverkeeper II, supra*, 475 F.3d at p. 90.)

None of the regulations is binding here. The 1976 regulations were remanded then withdrawn. The Phase I regulations apply only to new facilities. (See *Riverkeeper II, supra*, 475 F.3d at pp. 117-118, 120 [discussing the definition of “new facility” under the Phase I and Phase II regulations].) The Phase II regulations were published in July 2004, long after the October 2000 permit approval at issue here. Therefore, as appellant acknowledged in its written briefs, the Phase II regulations “do not strictly govern” the NPDES permit challenged here. Nonetheless, as indicated above, they do shed light on the agency’s understanding of its statutory charge.

b. Other regulatory guidance

Beyond its rulemaking efforts, the Environmental Protection Agency has interpreted section 316(b) in other documents, including its “Draft Guidance for Evaluating the Adverse Impact of Cooling Water Intake Structures on the Aquatic Environment; Section 316(b) P.L. 92-500,” issued in May 1977 (hereafter, the 1977 Draft Guidance). In addition, the EPA’s general counsel has issued a number of written opinions in connection with specific NPDES permits (hereafter, General Counsel Opinions). Two are of particular interest here: General Counsel Opinion 41

(Environmental Protection Agency, Office of the General Counsel, Opinion 41, June 1, 1976) and General Counsel Opinion 63 (Environmental Protection Agency, Office of the General Counsel, Opinion 63, July 29, 1977). Further insight may be gleaned from the EPA's adjudication of particular NPDES permit applications, which one commentator describes as "a rather detailed administrative 'common law' developed as the Agency attempted to apply" the statute. (Rábago, *supra*, 16 Harv. Envtl. L.Rev. at p. 467.) The same commentator calls the EPA's "extant policy and regulatory statements ... a somewhat incoherent patchwork of information. Though each is helpful, none is enforceable." (*Id.* at p. 470.)

3. The Statute's Reach

To better understand Clean Water Act section 316(b), we first explore its parameters. We consider three issues related to the statute's reach: the relationship between intake and discharge; the provision's applicability to NPDES permits for existing facilities; and the basis for considering closed cycle alternatives to cooling water intake structures.

a. Relationship between intake and discharge

The first two subdivisions of section 316 address two points on the water use continuum, income and outgo. The intake of water for plant cooling is regulated by 316 (b), while discharge of the used, heated water is governed by 316(a). "Section 316(b) is concerned with the adverse environmental impact of the withdrawal of cooling water rather than the discharge of heated water." (General Counsel Opinion 41, p. 5, *supra*.) It is "the one section of the Act that focuses not on discharges, but on intakes." (Rábago, *supra*, 16 Harv. Envtl. L. Rev. at p. 437; see also, *Riverkeeper II*, *supra*, 475 F.3d at p. 124.) By contrast, section 316(a) is concerned with "whether the discharge exceeds a thermal limitation or whether the discharge interferes with the propagation of a balanced indigenous population of shellfish, fish, and wildlife." (General Counsel Opinion 41,

p. 5.) Section 316(a) “permits consideration of the quality of the receiving water for purposes of granting variances with respect to the rules concerning thermal pollution” of the water discharge. (*Riverkeeper II*, at p. 115, fn. 27.)

Despite these differences, there is a “relationship between the withdrawal of cooling water and thermal discharges.” (General Counsel Opinion 63, p. 9.) That relationship has an operational component: the amount of water that goes in is directly related to the amount that comes out. Therefore closed cycle systems, which take in minimal amounts of cooling water in the first instance, “in turn, discharge minimal thermal pollution directly into the water.” (Rábago, *supra*, 16 Harv. Envtl. L.Rev. at p. 482; see also, May & van Rossum, *supra*, 20 Vt. L.Rev. at pp. 379-380.) The intake/discharge relationship also has a legal component: “the statute requires that any standard established by the EPA to govern the discharge of pollutants from existing facilities must also regulate cooling water intake structures.” (*Riverkeeper II*, *supra*, 475 F.3d at pp. 122 -123.) Even so, section 316(b), the sole intake provision in the entire Clean Water Act, has been described as “something of an afterthought, having been added by the conference committee without substantive comment.” (*Riverkeeper I*, *supra*, 358 F.3d at p. 187, fn. 12.)

b. NPDES permits for existing plants

As explained in federal court decisions, section 316(b) applies to existing plants as they undertake the periodic NPDES permitting process. In *Riverkeeper II*, the court confirmed the statute’s application to existing plants, saying: “Nothing in section 316(b) indicates that because it applies to the ‘location, design, construction, and capacity’ of a facility’s cooling water intake structure, the section is therefore limited to new facilities and does not require existing facilities either to modify existing intake structures or to construct new intake structures in order to come into compliance with the EPA’s Rule.” (*Riverkeeper II*, *supra*, 475 F.3d at pp. 121-122, fn. omitted.) The court rejected the

argument “that the EPA has authority to approve cooling water intake structures only before construction and cannot regulate these structures through the NPDES permits....” (*Riverkeeper II, supra*, 475 F.3d at p. 121.) As the court acknowledged: “The textual basis for the EPA to regulate cooling water intake structures during the periodic permitting process applicable to the discharge of pollutants is not immediately apparent.” (*Id.* at p. 122.) “Despite this textual hiccup,” the court said, “the EPA’s decision to use the NPDES process to enforce section 316(b) is not unreasonable.” (*Ibid.*; see also, e.g., *U. S. Steel Corp. v. Train, supra*, 556 F.2d at p. 850.) In sum, *Riverkeeper II* concludes, “the EPA may regulate cooling water intake structures via the NPDES permit process. Otherwise, Congress’s intent to regulate the intake structures of existing facilities could not be effectuated.” (*Riverkeeper II*, at p. 123, fn. omitted.)

c. Consideration of alternative cooling technologies

As explained by the EPA’s general counsel, closed cycle systems may be considered in assessing best technology available, even though they are not technically subsumed within the statute, which governs only cooling water intake systems. “Cooling towers or other closed cycle cooling systems are not cooling water intake structures. It is clear that there is no independent basis under [section] 316(b) to require a cooling tower in a permit. However, under [section] 316(b) a permit may restrict the volume of flow or capacity of an intake structure.” (General Counsel Opinion 41, pp. 5-6.) “Such a reduction of allowable capacity may necessitate the use of a closed cycle or recirculating cooling system. Section 316(b) does not, however, allow for the imposition of closed cycle cooling systems per se.” (*Id.*, at p. 3; see, e.g., *May & van Rossum, supra*, 20 Vt. L. Rev. at pp. 470-471.)

With that understanding of the statute’s reach in mind, we now address its command to minimize adverse environmental impact through the use of the best technology available.

4. *Statutory Mandate to Minimize Adverse Environmental Impact*

Section 316(b) requires technology that minimizes adverse environmental impact.

The specific environmental impacts to be minimized are impingement and entrainment. In the EPA's view, they "are primary, harmful environmental effects that can be reduced through the use of specific technologies." (69 Fed. Reg. at p. 41600, *supra* [Phase II final regulations]; see *Riverkeeper II, supra*, 475 F.3d at p. 125.)

By regulatory interpretation: "Minimize means to reduce to the smallest amount, extent, or degree reasonably possible." (40 C.F.R. § 125.83 (2001) [Phase I final regulations]; see also, e.g., General Counsel Opinion 63, p. 9 [equating minimize with "reduce to the smallest possible amount or degree"].) The statute does not require the complete elimination of all impacts. As stated in the 1977 Draft Guidance: "Regulatory agencies should clearly recognize that some level of intake damage can be acceptable if that damage represents a minimization of environmental impact." (1977 Draft Guidance, p. 3.) More recently, in connection with its promulgation of the Phase II Rule, the EPA concluded "that the percent reduction of impingement mortality and entrainment is not completely within the control of a facility and therefore may not be precisely achieved by a facility." (*Riverkeeper II, supra*, 475 F.3d at p. 107.)

5. *Statutory Mandate to Employ Best Technology Available*

To satisfy the statutory mandate of minimizing environmental impact, a plant's cooling water intake system must reflect BTA – best technology available. We separately consider each of the three words in that critical operative phrase.

a. *Is it a technology?*

The statute is technology-oriented. (*Riverkeeper II, supra*, 475 F.3d at pp. 99, 114; *id.* at p. 108 [CWA reflects a "technology-forcing imperative"].) "BTA is an organic concept planted firmly in the CWA's technology-forcing preference, and evolves

along with developments in engineering.” (May & van Rossum, *supra*, 20 Vt. L.Rev. at p. 471.)

By way of example, design technologies may include “screening devices, use of fish handling and bypass systems, pumps, trash racks, and behavioral barriers” as well as “fish ladders, fish buckets, improved fish screens, protective coatings, intake depth adjustment, modified velocity caps, and sound deterrent devices.” (May & van Rossum, *supra*, 20 Vt. L. Rev. at p. 455.) Technologies for capacity reduction may include such things as seasonal flow reductions and upgraded screening. (*Id.* at p. 465.)

On the other hand, restoration measures are not a “technology” within the contemplation of the statute as construed in the *Riverkeeper* cases. (*Riverkeeper I*, *supra*, 358 F.3d at p. 189; *Riverkeeper II*, *supra*, 475 F.3d at pp. 108-110.) As the *Riverkeeper I* court explained, such measures “have nothing to do with the location, the design, the construction, or the capacity of cooling water intake structures, because they are unrelated to the structures themselves.” (*Riverkeeper I*, at p. 189.) “Restoration measures correct for the adverse environmental impacts of impingement and entrainment; they do not minimize those impacts in the first place.” (*Ibid.*; accord, *Riverkeeper II*, at p. 109.) Thus, under the express dictates of the statute, “restoration measures cannot substitute for the ‘best technology available for minimizing adverse environmental impact’ in cooling water structures.” (*Riverkeeper II*, at p. 108.) To the extent that the EPA’s regulations allowed restoration in lieu of technology, they were struck down. (*Riverkeeper I*, at p. 191 [remanding that aspect of the Phase I final regulations]; *Riverkeeper II*, at p. 110 [remanding that aspect of the Phase II final regulations].)

b. Is it available?

In assessing whether a technology is “available” within the meaning of the statute, several elements come into play, including feasibility and costs.

The feasibility of a given technology is a relevant factor in determining BTA. (*Riverkeeper I, supra*, 358 F.3d at p. 196 [“EPA was entitled to consider feasibility generally”].) An assessment of feasibility properly includes site-specific considerations. As the 1977 Draft Guidance explains: “The appropriate technology is best determined after a careful evaluation of the specific aspects at each site.” (1977 Draft Guidance, at p. 12.) There might be site-specific physical constraints, such as topography or the availability of fresh water. Additionally, there may be legal constraints on using a particular technology at a given site based on the application of other laws, such as those prohibiting nuisance. (See *Wat. Code*, § 13002, subds. (b), (c).)

In considering the availability of a technology, cost is also a factor.

Appellant observes that the statute contains no explicit authority for cost considerations, and it urges “as a general proposition” that “an agency implementing federal law may not consider costs unless the statute clearly authorizes cost considerations,” citing *Whitman v. American Trucking Associations* (2001) 531 U.S. 457, 467-468. *Whitman* is inapposite here. As Duke points out, *Whitman* involved health-based air quality standards under the Clean Air Act. Under that statute, those standards had to be set high enough “ ‘to protect public health’ ... ‘with an adequate margin of safety’ ” without regard to cost. (*Id.* at p. 465.) As the high court recognized, however, other provisions of the Clean Air Act do permit “economic costs to be taken into account.” (*Id.* at p. 467.) *Whitman* offers no basis for disregarding costs in considering the availability of a technology under section 316(b). In any event, as appellant explains in its reply brief, it “does not contend on this appeal that economic considerations can never be taken into account.”

As appellant acknowledges, the Environmental Protection Agency itself has read economic considerations into the provision. (See, e.g., 69 Fed. Reg. at p. 41604, *supra* [Phase II final regulations].) The federal courts have concurred. (*Seacoast Anti-Pollution League v. Costle* (1979) 597 F.2d 306, 311 (*Seacoast*); *Riverkeeper I, supra*,

358 F.3d at p. 195; *Riverkeeper II, supra*, 475 F.3d at p. 99.) As the *Riverkeeper I* court acknowledged, “section 316(b) itself is silent as to what factors the EPA should consider.” (*Riverkeeper I, supra*, 358 F.3d at p. 195.) Nevertheless, that court concluded, “the EPA was permitted to consider cost and energy efficiency in determining the ‘best technology available.’ ” (*Ibid.*) However, as explained in *Riverkeeper II*, the agency can do so “only in a limited fashion and not as a primary consideration.” (*Riverkeeper II, supra*, 475 F.3d at p. 99.)¹⁴

Over the years, a standard for economic considerations has emerged, commonly referred to as the “wholly disproportionate” test. (See generally, *May & van Rossum, supra*, 20 Vt. L. Rev. at pp. 473-474.) Under that test, a technology need not be employed if its costs are wholly disproportionate to the environmental benefits to be gained. This standard is reflected in both regulatory and judicial decisions. (See, e.g., General Counsel Opinion 63, p. 9; *Seacoast, supra*, 597 F.2d at p. 311; *Riverkeeper II, supra*, 475 F.3d at p. 113, fn. 25.)

c. Is it the best?

To comply with section 316(b), the technology selected must be the “best” available. Although the statute’s objective is to minimize impingement and entrainment, other factors may also be considered, such as energy efficiency and non-water

¹⁴ More specifically, *Riverkeeper II* states, “the EPA may permissibly consider cost in [only] two ways: (1) to determine what technology can be ‘reasonably borne’ by the industry and (2) to engage in cost-effectiveness analysis in determining BTA.” (*Riverkeeper II, supra*, 475 F.3d at p. 99.) “Thus, the EPA must first determine what is the most effective technology that may reasonably be borne by the industry.” (*Ibid.*) “This technology constitutes the benchmark for performance. Once this determination has been made, the EPA may then consider other factors, including cost-effectiveness, to choose a less expensive technology that achieves essentially the same results as the benchmark.” (*Id.* at p. 100, fn. omitted.) By contrast, the *Riverkeeper II* court stressed, “cost-benefit analysis is not consistent with the requirement of § 316(b) that cooling water intake structures ‘reflect the best technology available for minimizing adverse environmental impact.’ ” (*Id.* at p. 114.)

environmental effects. (67 Fed. Reg. at pp. 17125-17126, *supra*.) As stated in *Riverkeeper II*, “the EPA could rely on factors other than impingement and entrainment in establishing BTA, such as negative environmental impacts or concerns about energy production and efficiency....” (*Riverkeeper II, supra*, 475 F.3d at p. 105; see also *Riverkeeper I, supra*, 358 F.3d at p. 196 [rejecting the argument that the EPA gave too much weight to “energy consumption and emissions” in the Phase I Rule].)

The determination of BTA is entrusted to the EPA or its delegate, in this case, the Regional Board. As we now explain, the agency must use its best professional judgment in making that determination.

6. Agency Standard for Applying Section 316(b): Best Professional Judgment

In the absence of uniform regulations or other national standards, NPDES permits are issued on a case-by-case basis, with the agency using its best professional judgment. (See, e.g., *Natural Resources Defense Council v. EPA* (1988) 863 F.2d 1420, 1425; 66 Fed. Reg. 65256, *supra* [Phase I final regulations]; 67 Fed. Reg. at pp. 17122-17123, *supra* [Phase II draft regulations]; 69 Fed. Reg. at p. 41578, *supra* [Phase II final regulations].)

Using its best professional judgment, the agency thus must determine whether the applicant is using the best technology available to minimize adverse impacts. Under the statute as interpreted, that determination has both environmental and economic dimensions.

a. Environmental considerations

“Adverse aquatic environmental impacts occur whenever there will be entrainment or impingement damage as a result of the operation of a specific cooling water intake structure. The critical question is the magnitude of any adverse impact.” (1977 Draft Guidance, p. 15.)

Various factors may be considered in determining an impact's magnitude.¹⁵

As the 1977 Draft Guidance explains: "The exact point at which adverse aquatic impact occurs at any given plant site or water body segment is highly speculative and can only be estimated on a case-by-case basis by considering the species involved, magnitude of the losses, years of intake operation remaining, ability to reduce losses, etc." (1977 Draft Guidance, at p. 11.) By way of example, that document offers one potential matrix, which factors in resource value and potential impact, then postulates: "An open system large volume intake in an area of high biological value does not represent best technology available to minimize adverse environmental impact and will generally result in disapproval. [¶] Exceptions to this may be demonstrated on a case-by-case basis where, despite high biological value and high cooling flow, involvement of the biota is low or survival of those involved is high, and subsequent reductions of populations is minimal." (*Id.*, at p. 12.)

b. Economic considerations

As explained above, the chosen technology must reduce impact "to the smallest amount, extent, or degree *reasonably* possible." (40 C.F.R. § 125.83, *supra* [Phase I final

¹⁵ According to the 1977 Draft Guidance, both long term and short term magnitude should be estimated, with reference to these factors:

"(1) Absolute damage (# of fish impinged or percentage of larvae entrained on a monthly or yearly basis);

"(2) Percentage damage (% of fish or larvae in existing populations which will be impinged or entrained, respectively);

"(3) Absolute and percentage damage to any endangered species;

"(4) Absolute and percentage damage to any critical aquatic organism;

"(5) Absolute and percentage damage to commercially valuable and/or sport fisheries yield; or

"(6) Whether the impact would endanger (jeopardize) the protection and propagation of a balanced population of shellfish and fish in and on the body of water from which the cooling water is withdrawn (long term impact)."

(1977 Draft Guidance, p. 15.)

regulations], italics added.) In terms of economic considerations, the EPA long ago stated that the application of BTA “should not impose an *impracticable and unbearable* economic burden on the operation of any plant subject to Section 316(b).” (41 Fed. Reg. at p. 17388, *supra* [EPA’s initial 1976 regulations], italics added.) More recently, the court in *Riverkeeper II* concluded that “the EPA may permissibly consider cost ... to determine what technology can be ‘*reasonably borne*’ by the industry” in formulating industry-wide rules. (*Riverkeeper II, supra*, 475 F.3d at p. 99, italics added.)

The foregoing environmental and economic factors help guide the agency in making its case-by-case determination of best technology available for the particular site. With that understanding of section 316(b) in mind, we now consider how it was applied in this case.

C. Application of Section 316(b)

Appellant advances two main arguments concerning the application of section 316(b) here. First, it contends, the respondents impermissibly relied on the mitigation plan in determining BTA. Second, it asserts, the Regional Board acted with “unfettered discretion” in concluding that the costs of alternative technologies were wholly disproportionate to their benefits.

The trial court found against appellant on both issues. We review the trial court’s decision, not that of the agency. (*Fukuda v. City of Angels, supra*, 20 Cal.4th at p. 824.) “The trial court’s legal determinations receive a de novo review with consideration being given to the agency’s interpretations of its own statutes and regulations.” (*City of Rancho Cucamonga v. Regional Water Quality Control Bd., supra*, 135 Cal.App.4th at p. 1384.) The court’s factual determinations are reviewed for substantial evidence. (*Ibid.*)

1. Mitigation

The court rejected appellant’s “claims concerning the propriety of the environmental mitigation project in the permit” on both legal and factual grounds. As a

legal matter, the court determined that it was not bound by the decision in *Riverkeeper I* rejecting the use of mitigation measures. (See *Riverkeeper I, supra*, 358 F.3d at p. 189.) As the trial court put it, that decision “is not controlling here. That case addresses new construction and not the modification of existing facilities such as the plant at issue here.” As a factual matter, the court stated, “the present record of the Board’s proceedings, viewed in its entirety, does not show that habitat restoration was offered as a *substitute* for selecting the best technology available.”

a. The court’s legal ruling

As explained above, under federal decisional law, mitigation does not qualify as a “technology” for purposes of section 316(b). (*Riverkeeper II, supra*, 475 F.3d at p. 110; *Riverkeeper I, supra*, 358 F.3d at p. 189.) In each of the two *Riverkeeper* cases, the court explicitly construed the statute itself, not merely the regulations at issue. (*Riverkeeper II*, at p. 110 [use of restoration measures contravenes “the Act’s clear language as well as its technology-forcing principle”]; *Riverkeeper I*, at p. 189 [restoration measures are “plainly inconsistent” with the statutory text].) In light of this persuasive federal decisional law, we may therefore assume that mitigation does not constitute a “technology” under section 316(b) of the Clean Water Act.

Nevertheless, we observe, California law makes mitigation a legitimate factor in certain circumstances. For example, a provision of state water law contained in the Porter-Cologne Act, which governs “each new or expanded coastal powerplant,” expressly recognizes the availability of “mitigation measures” as one way “to minimize the intake and mortality of all forms of marine life.” (Wat. Code, § 13142.5, subd. (b).)

And under the California Environmental Quality Act, an environmental impact report must include “a meaningful discussion of both alternatives and mitigation measures.” (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 731; see Pub. Resources Code, § 21102.) The same is true of the corresponding report

issued pursuant to an agency's certified regulatory program – it “must include alternatives to the proposed project and mitigation measures to minimize significant adverse environmental effects....” (*Mountain Lion Foundation v. Fish & Game Com.*, *supra*, 16 Cal.4th at p. 127, citing Pub. Resources Code, § 21080.5, subd. (d)(3)(A).) In this case, as the lead CEQA agency, the Energy Commission was required to consider mitigation, even if the Regional Board was not.

In any event, we need not decide here whether section 316(b) categorically forecloses the consideration of mitigation measures in lieu of technology. As we now explain, we may affirm the court's ruling based on its factual component alone.

b. The court's factual determination

As noted above, after considering the administrative record as a whole, the trial court concluded that the Regional Board did not use the mitigation plan as “a *substitute* for selecting the best technology available.”

That determination finds adequate support in the record. At the post-remand administrative hearing, only the monetary aspects of the mitigation plan were at issue. In her introductory remarks at that hearing, agency counsel reminded the Regional Board that BTA “is defined as any kind of changes to the cooling water intake structure, including location, design, construction and capacity. And so it's about the cooling water structure.” She further observed that the mitigation plan was “outside the scope” of section 316(b). During the hearing, the Board's chair strictly controlled the admission of evidence on the mitigation plan, admitting evidence about its economic aspects while rejecting information about its ecological features. He issued periodic reminders that the mitigation plan “is outside the intake structure issue and is a completely different mechanism” from intake technologies. And during deliberations, board members

generally limited their discussion of the mitigation plan to its valuation component. The board dealt separately with the alternative technologies for plant cooling.¹⁶

On this record, we find substantial evidence to support the trial court's factual determination that the Regional Board did not adopt the mitigation plan as an alternative technology for purposes of section 316(b), but instead considered it only for its relevance in monetizing environmental impacts and benefits.

2. "*Wholly Disproportionate*" Test

As with its mitigation arguments, the trial court cited both legal and factual grounds in rejecting appellant's attack on "the propriety of the wholly disproportionate test applied by the Board in the BTA analysis." Discussing the legal ground for its ruling, the court stated: "Consideration of the costs of various technologies in individual BTA determinations, using what has come to be known as the 'wholly disproportionate' test, is a reasonable reading of section 316(b)." As a factual matter, the court observed: "The Board made the determination that the cost of alternatives to once-through cooling would be wholly disproportionate to the benefits achieved. The record contains a basis

¹⁶ For example, during deliberations, Board Member Young summarized some of the alternatives and his analysis as to each. He said: "I have gone through in my mental checklist the cooling alternatives. And so I looked at the potential offshore intake and I don't think that's really too realistic. ... [¶] I have looked at freshwater cooling towers and I think that it's infeasible because there is just a lack of a freshwater resource for this area. ... [¶] Saltwater cooling, you know, it looks the most interesting to me because it has the lowest cost of the alternatives, but I'm concerned about the impact of the salt air plume continually going out and being dissipated and what unintended consequences that might have in terms of other land uses. [¶] We are left with dry cooling. And, you know, it's the Cadillac here. So it's the only alternative that would take care of the entrainment problem. And it's appealing to want to just gravitate towards that because it would solve so many problems from the water quality impact side of this, but what prevents me from making that choice is that I am not convinced that there is enough of an impact to the resource at this point that would justify that expenditure."

for that conclusion, and cost was only one of the factors considered by the Board in arriving at its conclusion.”

a. The court's legal ruling

In the legal component of its ruling, the court determined that “a reasonable reading” of the statute permits a consideration of whether the costs of a technology are wholly disproportionate to the benefits to be gained.

As explained above, regulatory documents and federal decisional law support a construction of section 316(b) that incorporates the wholly disproportionate standard. (See, e.g., General Counsel Opinion 63, p. 9; *Seacoast*, *supra*, 597 F.2d at p. 311.) Even *Riverkeeper II*, extensively discussed by appellant at oral argument, indirectly endorses the wholly disproportionate standard, albeit in dicta. (*Riverkeeper II*, *supra*, 475 F.3d at p. 113, fn. 25.) The *Riverkeeper II* court thus expressed its “discomfort with the ‘significantly greater than’ standard” contained in the remanded regulation, “given the historical applicability of a ‘wholly disproportionate to’ standard and the use of the latter standard in the Phase I Rule.” (*Ibid.*)

We see no reason to reexamine that interpretation here. As we understand it, appellant’s real quarrel is not with the wholly disproportionate standard per se, but rather with its application here, a point we now explore.

b. The court's factual determination

Based on the administrative record before it, the trial court affirmed the Regional Board’s determination that the cost of alternative technologies was wholly disproportionate to their benefit. In its bid for reversal, appellant asserts two claims against the agency in this regard: (1) that it employed an open-ended and impermissible “reasonableness” standard in assessing costs; and (2) that the record does not support the Board’s findings on this point. To determine whether the court erred in affirming the Regional Board’s decision here, we first consider the standard governing the agency. We

then examine the record for evidence supporting the court's approval of the agency's "wholly disproportionate" cost determination.

Agency's Discretion: As explained above, the agency exercises its best professional judgment in determining whether to issue an NPDES permit in a given case. (*Natural Resources Defense Council v. EPA, supra*, 863 F.2d at p. 1425.) That standard does not permit the agency to act with unfettered discretion, however. (*Ibid.*) An agency violates that boundary when, for example, it adopts a procedure that lacks implementation criteria. (*Id.* at p. 1432 [the EPA acted with unfettered discretion where it had no discernible standards for authorizing discharges of toxic pollutants above a previously established limit].)

In appellant's view, "the Board merely borrowed the phrase 'wholly disproportionate' and then turned what EPA has always viewed as an 'unbearable' or 'extraordinary' cost test into an entirely open-ended 'reasonableness' standard with neither content nor limits." Appellant complains that agency staff had no "particular definition or formula for how to apply its 'wholly disproportionate' test...." And it argues that "the lack of sideboards for [staff's] reasonableness determination created the kind of unfettered discretion that 'is contrary both to the letter and spirit of the Clean Water Act' and that has been expressly rejected by the courts."

In response to appellant's arguments, the Water Boards assert: "The very nature of best professional judgment dictates that the permitting agency use its best judgment to interpret a standard in the absence of regulatory guidance, and this necessarily requires the use of discretion." Furthermore, they observe, the Regional Board in this case "undertook a detailed legal and factual analysis of alternative cooling options and the benefits and drawbacks of each." They contend that the Board properly exercised its best professional judgment here.

Under a deferential standard such as "best professional judgment," the agency enjoys considerable discretion. (*Cf., So. Cal. Jockey Club v. Cal. etc. Racing Bd., supra*,

36 Cal.2d at p. 177.) In this case, we cannot agree that the lack of a rigid “wholly disproportionate” formula means that the Board acted without standards. To the contrary, in the absence of uniform regulations, the agency quite properly used its best professional judgment in deciding the complex issues presented by this permit application. It considered such factors as the magnitude of the impact, the degree to which it reasonably could be minimized, and the proportionality of the cost of doing so.

Under the circumstances presented here, the trial court did not err in approving the Board’s analysis. “Judicial review is considerably deferential when ‘the agency’s decision rests on an evaluation of complex scientific data within the agency’s technical expertise.’ ” (*Riverkeeper II, supra*, 475 F.3d at pp. 126-127.) We therefore reject appellant’s claim that the agency exercised unfettered discretion here.

Evidentiary Underpinnings: The trial court found that the administrative record supports the Board’s determination “that the cost of alternatives to once-through cooling would be wholly disproportionate to the benefits achieved.” We assess that judicial finding for substantial evidence. (*City of Rancho Cucamonga v. Regional Water Quality Control Bd., supra*, 135 Cal.App.4th at p. 1384.)

Disputing the trial court’s determination, appellant argues that the administrative record lacks evidentiary support for the Board’s finding. In pressing that argument, appellant asserts that the \$7 million mitigation fund “served as the key metric for Respondents’ valuation of benefits in applying their wholly disproportionate test” and that “there is not the slimmest reed of foundation” for that calculation. In particular, appellant takes issue with the per-acre cost determination for habitat equivalency.

Respondents disagree. As the Water Boards point out, the agency “had to determine some way to quantify the benefits.” The Regional Board chose “the habitat equivalency method, where the larval loss is converted to equivalent habitat acreage” and

the resulting acreage equivalency is then assigned a monetary value.¹⁷ Respondents defend the resulting valuation, particularly in light of the conservative assumptions that underpin the calculation.¹⁸

We agree with the trial court's implicit finding that substantial evidence supports the benefit calculation. At the May 2003 administrative hearing, during its cross-examination of Dr. Raimondi, appellant observed that at "390 acres of restored habitat and \$7 million" – the amount to be funded by Duke – "it comes out to be a little under \$18,000 per acre." When asked whether a study or other analysis in the record supported that figure, Raimondi replied: "Those values come directly from the Elkhorn Slough Report." Apparently, that reference is to information from the Elkhorn Slough Foundation, which was to administer the mitigation program. The Foundation's director, Mark Silberstein, had testified at the Regional Board's September 2000 hearing. That testimony was in the record for the May 2003 hearing. During his 2000 testimony, Silberstein identified actual costs that the Foundation had paid to acquire local easements and to restore habitat. For example, the Foundation had acquired an easement on an upland ranch for approximately \$5,000 per acre. It had purchased easements for "restorable wetland" at nearby Morro Cojo Slough at a cost of approximately \$3,000 per acre. And the Foundation had spent "probably 500 dollars an acre to restore" 400 acres in the National Estuarian Research Reserve.

¹⁷ In broad brush, the agency's habitat equivalency approach took the assumed percentage of larvae lost to entrainment (13%), and multiplied it by the surface area of the slough (3,000 acres), to arrive at an acreage equivalency (390 acres). The figure of 390 acres thus represents lost productivity due to entrainment. Calculations were then made to value those 390 acres. According to the staff report: "Based on actual, local values, the cost of purchasing and/or restoring this habitat was calculated as \$1.2 million to \$9.7 million." Duke was to pay \$7 million to fund the habitat program.

¹⁸ The assumptions include these: (1) that the plant runs at full capacity all the time; (2) that 13 percent of larvae are entrained; (3) that all entrained larvae die; and (4) that the loss of larvae results in a corresponding loss of adult fish.

In light of this evidence, we reject appellant's attack on the evidentiary foundation for the per-acre habitat cost determination. Appellant does not challenge any other element of the "wholly disproportionate" cost analysis. Therefore, as the trial court properly concluded, the Regional Board's determination must be affirmed.

C. Conclusion

We find no merit in appellant's contentions concerning the interpretation and application of section 316(b) of the Clean Water Act. Like the trial court, we reject appellant's claim of misplaced reliance on the mitigation plan as well as its challenge to how the "wholly disproportionate" test was applied. We therefore affirm the trial court's determinations.

SUMMARY OF CONCLUSIONS

I. The judicial review provisions of the Porter-Cologne Act govern this controversy. For that reason, the superior court had jurisdiction to hear and determine this dispute over the NPDES permit.

II. The trial court's March 2003 order for administrative remand was procedurally proper, and it was supported by sufficient evidence.

III. The May 2003 administrative hearing was conducted properly. The agency did not err, either in considering new evidence in response to the court's remand order or in excluding appellant's submittal.

IV. The trial court acted properly in affirming the agency's application of section 316(b) of the Clean Water Act to the NPDES permit at issue in this case.

DISPOSITION

We affirm the trial court's June 2004 judgment, which denied appellant's petition for writ of administrative mandamus. Defendants (the Water Boards) and real party (Duke) shall have costs on appeal.

McAdams, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Duffy, J.

Voices of the Wetlands v.
California State Water Resources et al.
H028021

Trial Court:

Monterey County Superior Court
Superior Court No. M54889

Trial Judge:

Honorable Robert A. O'Farrell

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Voices of the Wetlands v.
California State Water Resources Control Board et al.
H028021

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

VOICES OF THE WETLANDS,

Plaintiff and Appellant,

v.

CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD, et al.,

Defendants and Appellants.

DUKE ENERGY MOSS LANDING, LLC,
et al.,

Real Parties in Interest and
Appellants.

H028021

(Monterey County
Super. Ct. No. M54889)

ORDER MODIFYING OPINION
AND DENYING REHEARING

NO CHANGE IN THE JUDGMENT

[Faint stamp: FILED, JAN 11 2008, COURT OF APPEALS, SIXTH DISTRICT, MONTEREY COUNTY, CALIFORNIA]

It is ordered that the opinion filed herein on December 14, 2007, be modified as follows.

Page 2, line 2

Voices should be identified as “appellant and cross-respondent.”

Page 2, line 6

Should read “Real parties in interest are Duke ...”

Page 22, fifth line from the bottom

In the phrase “State Energy Commission,” the word state should not be capitalized.

Page 26, at the end of the first paragraph under heading “4”

The “cf” citation to *City of Morgan Hill* should be omitted.

Page 28, lines 5-7

The citation to *City of Morgan Hill* should be omitted.

Page 41, second line from the bottom

Add the word “effectively” between “trial court” and “ordered.”

Page 44, fifth line from the bottom

Remove second “.)” at end of citation.

Page 85, just above heading “c”

Add “cf” before citation to *Riverkeeper II*, fn. 25.

Page 92, under heading “a”

Expand the end of the sentence that starts “Even *Riverkeeper II*” to read “albeit in dicta and in the context of a cost-cost variance analysis.”

Page 96, under DISPOSITION:

At the start of the second sentence, change the word “Defendants” to “Respondents.”

There is no change in the judgment.

The petition for rehearing is denied.

Date: **JAN 10 2008**

McAdams, J.

Bamattre-Manoukian, Acting P.J.

Duffy, J.

PROOF OF SERVICE

LYNDA F. JOHNSTON declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On January 23, 2008, I served the foregoing **PETITION FOR REVIEW** on all persons named below by placing true and correct copies thereof

- in a sealed envelope, with postage fully prepaid, in the United States Mail at Palo Alto, California, addressed as follows:
- for facsimile transmission to each recipient identified below to the facsimile number appearing after such recipient's name and mailing address.
- for Federal Express next-day delivery service, addressed as follows:

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I declare under penalty of perjury (under the laws of the State of California) that the foregoing is true and correct, and that this declaration was executed January 23, 2008 at Stanford, California.


LYNDA F. JOHNSTON



