In the Supreme Court of the State of California

VOICES OF THE WETLANDS, Petitioner, vs. 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.	)	No. S160211

After Decision Of The Court of Appeal,
Sixth Appellate District, No. H028021

Monterey Superior Court, No. M54889
Honorable Robert A. O'Farrell

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION.

The issues on which review is sought are not likely to recur in the same context in the future, and review of the court of appeal's scholarly opinion is not necessary "to secure uniformity of decision or to settle an important question of law." Cal. R. Ct. 8.500(b)(1); *People v. Davis*, 147 Cal. 346 (1905). Review should not be granted.

With respect to the first question presented in the Petition (involving the interpretation of the federal Clean Water Act and its implementing regulations and policies), Petitioner is asking this Court to intervene unnecessarily in a developing area of federal and state regulation. Such intervention is more likely to create a conflict of authority than to resolve one. The *Riverkeeper* decisions of the Second Circuit are not applicable to the permit in this case, and they do not conflict with the decision below on whether and/or how cost and mitigation factor into the Clean Water Act's best technology available ("BTA") standard. The Second Circuit did not reject the "wholly disproportionate" cost test utilized in this permit proceeding and approved by the First Circuit. Rather, it rejected an attempt by the U.S. Environmental Protection Agency ("EPA"), in now-withdrawn regulations, to create a new and different "cost-benefit" test that would have allowed a lesser standard. Further, the opinion below does not conflict with the Second Circuit's holding that mitigation does not qualify as a technology for purposes of the BTA analysis. The court of appeal properly affirmed the trial court's factual finding that mitigation was not treated as an alternate technology for BTA purposes.

Moreover, the BTA issues as presented in this case are not likely to recur. The instant case arises from the issuance of a permit that has already expired. The renewal application will likely be governed by new regulations and policies to be issued by the California Water Resources Control Board ("State Board") and the EPA. Those regulations will differ

from the regulations that were before the Second Circuit in the *Riverkeeper* cases, and they will also differ from the regulations and policies under which the challenged permit was issued in 2000. Thus, a decision by this Court on the Clean Water Act issues could have historical significance only.

With respect to the second question presented in the Petition, the court of appeal correctly construed Code of Civil Procedure Section 1094.5. Section 1094.5(f) specifies a superior court's options in entering final judgment in an administrative mandamus proceeding. It does not preclude the entry of an interlocutory order of remand. The court of appeal held that a limited interlocutory remand was proper in this case for several reasons. The permit was complex and the product of years of scientific study and interagency collaboration, and the trial court found fault with only one of the agency's fifty-eight findings. Moreover, the remand order was singularly appropriate in light of Public Resources Code Section 25531(c), which provides that a superior court may not "stop or delay the construction or operation of any thermal powerplant" on any ground applicable here. The superior court's interlocutory remand harmonized Section 1094.5 and Section 25531(c).

In upholding the interlocutory remand, the court of appeal did not bring itself into conflict with the decisions cited in the Petition, none of which addressed the unique context of this case implicating Section 25531(c). In those decisions, remand procedures were disapproved because they were ordered incident to entry of a final judgment (rather than pre-judgment, as here) or effectively prejudged the validity of a decision that was expected to be made on remand (which did not happen here). Nor is there any conflict between the decision below (insofar as it holds that an *agency* may consider new evidence on remand) and prior cases holding that

a *court* may not consider new evidence never considered by the agency in reviewing an agency decision.

II. ARGUMENT.

A. There Is No Conflict With Federal Cases.

1. Neither *Riverkeeper I* nor *Riverkeeper II* is applicable to the permit at issue in this case.

In attempting to create the appearance of a conflict with federal decisions construing the Clean Water Act, Petitioner significantly overstates the reach of the Second Circuit's *Riverkeeper* decisions. Even if those decisions were binding outside the Second Circuit, they would not be controlling in this case.

Riverkeeper, Inc. v. EPA, 358 F.3d 174 (2d Cir. 2004) ("*Riverkeeper I*"), involved challenges to Phase I regulations pertaining to *new* facilities issued by the EPA. The holding of the case is not controlling as to *existing* facilities (such as the Moss Landing Power Plant), even in the Second Circuit.

The Phase II regulations at issue in *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007) ("*Riverkeeper II*"), *cert. pending* (Nos. 07-588, 07-589 and 07-597), deal with existing facilities, but they were promulgated by EPA well after the Moss Landing Power Plant's permit was issued, and thus are inapplicable by their terms. EPA published its *proposed* Phase II regulations for existing facilities on April 9, 2002, nearly eighteen months *after* the California Regional Water Quality Control Board ("Regional Board") issued the Moss Landing Power Plant's National Pollutant Discharge Elimination System ("NPDES") permit,[1] and the final Phase II

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[1] Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 67 Fed. Reg. 17121, 17122 (April 9, 2002).

regulations were not issued until July 2004.[2]

Even if the *Riverkeeper* cases were on point, which they are not, decisions of the Second Circuit are not controlling on federal courts outside that circuit (*In re Korean Air Lines Disaster*, 829 F. 2d 1171, 1176 (D.C. Cir. 1987)), much less on California courts (*People v. Crittenden*, 9 Cal. 4th 83, 120 n.3 (1994) ("we are not bound by decisions of the lower federal courts, even on federal questions"); *Tully v. World Sav. & Loan Ass'n*, 56 Cal. App. 4th 654, 663 (1997)). Moreover, three petitions for certiorari are pending in *Riverkeeper II* in the U.S. Supreme Court. Of relevance to the issues on which review is sought here, each of those petitions questions *Riverkeeper II*'s holding on cost-benefit analysis, two of them question its holding on mitigation/restoration, and one of them questions its holding that EPA can impose new regulations on existing facilities.[3]

2. The BTA cost test holdings of *Riverkeeper I* and *Riverkeeper II* are not in conflict with the decision below.

Riverkeeper I did not reject any best technology available ("BTA") cost test, and the cost-benefit analysis that was contained in the Phase II regulations, and rejected in *Riverkeeper II*, is *not* the same as the "wholly disproportionate" test that was applied by the Regional Board in this permit proceeding. Therefore, the *Riverkeeper* holdings and the decision below do

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[2] Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 41576 (July 9, 2004).

[3] On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, *Entergy Corp. v. EPA*, No. 07-588 (U.S. Nov. 2, 2007); On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, *PSEG Fossil LLC. v. Riverkeeper*, No. 07-589 (U.S. Nov. 2, 2007); On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, *Utility Water Act Group v. Riverkeeper*, No. 07-598 (U.S. Nov. 2, 2007).

not conflict on the issue of how cost factors into the Clean Water Act's BTA standard.

In the absence of governing regulations, the Clean Water Act allows permit writers to exercise their "best professional judgment" ("BPJ") in establishing technology-based permit requirements to ensure compliance with the Act. 40 C.F.R. § 125.3; 33 U.S.C. § 1342(a)(1)(B). Prior to the promulgation of the Phase II regulations, which for the first time established nationwide standards applicable to all existing cooling water intake structures with flows in excess of fifty million gallons per day, permit writers routinely made case-by-case BTA determinations on the basis of "best professional judgment." This practice was followed over a period of thirty-plus years, and applied to hundreds of power plants around the country. Following the remand of the Phase II regulations in *Riverkeeper II,* EPA suspended the bulk of the regulations and directed permit writers to resume the use of "best professional judgment" to make BTA determinations for existing facilities.[4]

The "wholly disproportionate" test has been an essential component of BTA determinations for over thirty years and reflects the fact that a technology cannot reasonably be said to be "available" if the cost of

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[4] "EPA is suspending § 122.21(r)(1)(ii) and (5), and Part 125 Subpart J with the exception of § 125.90(b)....[T]he Second Circuit's decision remanded key provisions of the Phase II requirements, including the determination of BTA and the performance standard ranges. This suspension responds to the Second Circuit's decision, while the Agency considers how to address the remanded issues....Notably, EPA by this action is not suspending 40 CFR 125.90(b). This retains the requirement that permitting authorities develop BPJ controls for existing facility cooling water intake structures that reflect the best technology available for minimizing adverse environmental impact." Suspension of Regulations Establishing Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 72 Fed. Reg. 37107, 37108 (July 9, 2007).

implementing it is "wholly disproportionate" to the benefits to be gained from it. 475 F.3d at 99. In other words, the technology is not economically feasible in the first instance. *Id.* at 100. As the court of appeal noted, the "wholly disproportionate" test has been confirmed as an appropriate reading of the Section 316(b) requirements in the exercise of best professional judgment in both regulatory documents and in federal cases. Op. at 92.[5] For example, in *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 311 (1st Cir. 1979) (cited in Op. at 84, 85, 92), the First Circuit affirmed the use of the "wholly disproportionate" standard and stated that "[t]he legislative history clearly makes cost an acceptable consideration in determining whether the intake design 'reflects(s) the best technology available.'"

The "cost-benefit" analysis that was rejected by *Riverkeeper II* contemplated a comparison between "an economically feasible level of reduction of impingement mortality and entrainment"[6] and the desirability of achieving those reductions in light of the costs. 475 F.3d at 100. This is not the "wholly disproportionate" test. The Second Circuit in the *Riverkeeper* cases did not address the "wholly disproportionate" test used

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[5] The court of appeal's opinion, attached to the Petition for Review, is cited as "Op." The Petition for Review is cited as "Pet." The following materials were submitted to the court of appeal as part of the record, and we understand that they have now been transmitted to this Court. The Administrative Record is cited as "AR." The Remand Administrative Record is cited as "RAR." Respondents' and Cross-Appellants' Appendix is cited as "Resp. Appx." Appellant's Appendix is cited as "App. Appx."

[6] "The flow of water into these plants traps (or 'impinges') large aquatic organisms against grills or screens, which cover the intake structures, and draws (or 'entrains') small aquatic organisms into the cooling mechanism." *Riverkeeper II*, 475 F.3d at 89.

by the Regional Board in this case, much less reject it.[7] Nor did the Second Circuit disagree with the prior decision of the First Circuit in the *Seacoast* case. In *Riverkeeper II,* the Second Circuit referred to the "wholly disproportionate" test in the context of its discussion of alternative grounds upon which a facility could seek a site-specific variance from the national performance standards (the so-called "cost-cost" and "cost-benefit" compliance alternatives), without any suggestion that the "wholly disproportionate" test was inappropriate under the Act. As the opinion below points out:

> Even *Riverkeeper II*, extensively discussed by appellant at oral argument, indirectly endorses the wholly disproportionate standard, albeit in dicta and in the context of the cost-cost variance analysis.... 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 [the EPA regulations for new facilities]."

Op. at 92. While the regulatory "cost-benefit" compliance alternative was rejected, the Second Circuit expressly permitted EPA to consider a "cost-cost" BTA regulation. 475 F.3d at 113, 115, 127.

In summary, the Second Circuit has not rejected the "wholly disproportionate" test utilized in this permit proceeding (and in hundreds of other permit proceedings conducted over a period of thirty-plus years). Rather, it rejected EPA's attempt, in the now-withdrawn Phase II regulations, to create a new and different "cost-benefit" test that would

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[7] To the contrary, *Riverkeeper I* upheld regulations for new facilities that provided that, if facility-specific data showed that the costs of compliance would be "wholly out of proportion" with costs considered by EPA when establishing the standards for the industry at large, a less costly alternative could be permitted. 358 F.3d at 192.

have allowed economically feasible reductions to be sidestepped on the grounds that the benefits were not worth the cost. The Second Circuit's rejection of that test is not inconsistent with the application of the "wholly disproportionate" standard in the present case, which in turn is consistent with the First Circuit's approval of that standard.

3. The BTA cost issue as presented in this case is not likely to recur.

The State Board is in the process of developing its own cooling water intake structure policy (although not for the purpose of implementing *Riverkeeper*, as Petitioner asserts at p. 3). At the federal level, EPA also plans to issue new BTA regulations for existing facilities.[8] Future power plant permits will be governed by the State Board's BTA policy and the new EPA regulations, not by the court of appeal's opinion in this case. Thus, the BTA cost issue determined in this permit proceeding is unlikely to arise in the same context in the future. Indeed, the BTA issue as framed by the present record will not recur even with respect to the Moss Landing Power Plant itself. The Plant's five-year permit was issued in October 2000 and expired in October 2005. AR 305747, 305770. The renewal application is pending and presumably will be decided under the new State Board policy.

Rather than asking this Court to resolve a "conflict" on the BTA cost issue, Petitioner is asking this Court to make law in a developing area of federal and state regulation, namely, the development of national performance standards for cooling water intake structures and the role that costs will play in the selection of these standards. Insofar as Petitioner

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[8] Suspension of Regulations Establishing Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 72 Fed. Reg. 37107 (July 9, 2007).

urges that review be granted precisely to provide guidance to the State Board in developing the new policy (Pet. at 3), it puts the cart before the horse. This Court should await the agency's rulemaking and defer to its technical and regulatory expertise, rather than attempt to anticipate the results of the agency's work.

4. The court of appeal did not disagree with *Riverkeeper II* on the issue of mitigation.

The court of appeal did not disagree with the Second Circuit's holding in *Riverkeeper II* that mitigation does not qualify as a "technology" for purposes of the BTA analysis. Rather, the court of appeal stated that it did not have to decide the legal issue because it could affirm the trial court's ruling based on the ruling's factual component alone (Op. at 89-90), affirming the trial court finding that the Regional Board did *not* treat mitigation as an alternate technology for BTA purposes (Op. at 90-91). Voices concedes this when it says "the appellate court framed the mitigation issue here as one of fact rather than law." Pet. at 22. The court of appeal recognized that, quite apart from the required BTA analysis, California law makes mitigation a legitimate factor to be considered with respect to residual environmental harm. Op. at 89-90. Thus, the Regional Board could impose a mitigation project separate from the BTA requirements. Whether the court of appeal and the trial court correctly evaluated the significance of the mitigation project in this particular permit proceeding (which Respondent submits they did) is not an issue that warrants this Court's review.

B. There Is No Conflict With Other Case Holdings On Interlocutory Remand.

1. The challenged finding was reopened and reconsidered.

Petitioner repeatedly asserts that the single permit finding that was remanded to the Regional Board was not in fact reopened or reconsidered, and that the Board merely admitted additional evidence in support of the finding. Pet. at 4, 11, 29-31. Petitioner does not tie this claim to its legal arguments about asserted conflicts in the case law concerning remand, and the assertion itself is a gross mischaracterization of the record.

The Trial Court's 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 Control Board to conduct a thorough and comprehensive analysis with respect to Finding No. 48 of said Order No. 00-041 ...

Resp. Appx. at 119-120. In compliance with the Remand Order, the Regional Board issued a Notice of Public Hearing ("Hearing Notice") that explained the purpose of the hearing as follows:

> The Regional Board is convening this hearing in order to provide an opportunity for all parties to present evidence and analysis regarding the BTA alternatives, their costs and their environmental benefits. The best way to provide a comprehensive and thorough analysis of these issues is to consider the wide range of evidence and arguments submitted on all sides as well as comments from the public.

RAR at 15. Consistent with the Remand Order, the Hearing Notice solicited testimony and evidence addressing the alternatives to once-through cooling:

a. Which of these alternatives are effective to reduce entrainment?

b. Are there reasons that any of these alternatives may not be feasible?

c. What are the costs of these alternatives to once-through cooling?

d. What are the environmental benefits of each alternative?

e. Is the cost of the alternatives wholly disproportionate to their environmental benefit?

RAR at 16.

At the Regional Board's hearing on remand, all parties, including Petitioner, had the opportunity to summarize their evidence and their argument, to cross-examine witnesses and to present closing statements. RAR at 898-899. The general public also had an opportunity to comment. *Id.* Petitioner participated in the hearing, cross-examining Regional Board staff and Respondent's witnesses and submitting testimony from Petitioner's expert and legal argument. RAR at 797-808, 986-1024, 1053-1078, 1145-1153 and 1167-1170.

At the conclusion of the hearing, four of the five Regional Board members voted to adhere to Finding No. 48, while the fifth member voted no. RAR at 1203-05. It is absurd to assert that Finding No. 48 was not reconsidered by the Regional Board.

2. <u>There is no conflicting case law on the propriety of interim remand in this situation.</u>

California Code of Civil Procedure Section 1094.5(f) provides in part: "The court shall *enter judgment* either commanding respondent to set aside the order or decision, or denying the writ" (emphasis added). On its face, this statute requires only that a court's final decision ("judgment")

either set aside the underlying administrative decision or deny the writ. Here, the superior court's judgment, filed August 17, 2004, did the latter. Nothing in Section 1094.5 prevents the superior court from entering an interlocutory order of remand, as it did on March 11, 2003, before entering judgment.

The court of appeal concluded that Section 1094.5 does not require entry of a final judgment as a necessary predicate to remand, and that the remand of a single finding in this case was proper.

> 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.

Op. at 42.

Petitioner seeks to create the appearance of a conflict by quoting language from other decisions rather than by analyzing their holdings. The court of appeal, while noting "an apparent split of authority" on the question of the interim remand procedure, pointed out that the holdings of prior cases cited by Petitioner did not address the situation before it. Op. at 37, 43. The court of appeal concluded "that the statute permits such a procedure in a proper case" and that this was such a case. *Id.*

In *Resource Defense Fund v. Local Agency Formation Comm'n*, 191 Cal. App. 3d 886 (1987), the trial court, having concluded that certain findings by a city council were inadequate, entered an "interlocutory judgment" remanding the matter to the city "for promulgation of appropriate findings" within sixty days, "upon which event judgment was to be entered in favor of [the city]." *Id.* at 899-900. This procedure

"raise[d] serious questions of due process" by approving the city council's supplemental findings in advance and "provid[ing] no opportunity to test the adequacy of [those] findings." *Id.* at 900. In the present case, by contrast, the trial court did not prejudge the Regional Board's finding on remand and did reexamine that finding in the renewed mandamus proceeding. App. Appx. at 75-81, 89-91.

Similarly, in *Sierra Club v. Contra Costa County*, 10 Cal. App. 4th 1212 (1992), the appellate court held that a prejudgment remand was improper, because "[t]he result of [the remand] procedure has been effectively to insulate [the agency's supplemental] findings from any meaningful challenge." *Id.* at 1221. Specifically, the trial court had issued an order that the writ petition was "denied with the exception that the County should administratively make further findings on alternatives"; and when the County did so, the trial court promptly entered judgment in its favor, without examining the new findings. *Id.* at 1216-17, 1221.

The court of appeal recognized that interim remands may offend due process in certain circumstances. "That is not our case, however." Op. at 43. As discussed *supra* at 10-11, the superior court, in its Remand Order, directed the Regional Board "to conduct a thorough and comprehensive analysis with respect to Finding No. 48 of [the NPDES permit]." RAR at 11. The Regional Board scheduled a hearing and solicited testimony and evidence on the alternatives to once-through cooling. RAR at 15-16. The Board allowed all parties to submit evidence. RAR at 18-19. Petitioner itself cross-examined Regional Board staff and Respondent's witnesses and submitted new evidence through its expert witness. RAR at 797-808, 1053-1078. As the court of appeal recognized, Petitioner's due process rights were not infringed by the remand proceedings. Op. at 43.

The other two cases Petitioner relies upon to create a conflict are also off point inasmuch as they deal with a remand after entry of judgment (not before entry of judgment, as here). In *Ashford v. Culver Unified Sch. Dist.*, 130 Cal. App. 4th 344 (2005), the School District discharged Ashford for working at another job while claiming sick time. The trial court granted Ashford's petition for administrative mandamus, because the video evidence admitted by the District lacked a proper foundation. It entered judgment directing the District to set aside the termination and hold another hearing in order to lay a foundation for the video. Ashford appealed, arguing that the trial court could only remand for additional evidence under California Code of Civil Procedure Section 1094.5(e). The appellate court agreed. In *Ashford*, however, Section 1094.5(e) was directly applicable because judgment had been entered and the remand was ordered in connection with the judgment. Here, no judgment was entered in connection with the remand, so the trial court's remand was not constrained by Section 1094.5(e).

Similarly, in *Fort Mojave Indian Tribe v. California Dept. of Health Servs., et al.*, 38 Cal. App. 4th 1574 (1995), the remand was incident to entry of judgment. The trial court entered judgment granting a writ of mandate and directing the agency to reconsider the case in light of a new scientific report that was issued after the agency decision. The appellate court held that, even if a trial court's judgment could properly direct remand in light of evidence that did not come into existence until after the agency decision, it was error in that case because the new report was at best new analysis of data that had already been considered, rather than new data. *Id.* at 1592-1598.

Furthermore, no decision has considered the question of interlocutory remand in the unique context of this case, which implicates Public Resources Code Section 25531(c). That statute provides that, "[s]ubject to the right of judicial review of decisions of the [Energy] [C]ommission, *no court in this state has jurisdiction ... to stop or delay the construction or operation of any thermal powerplant* except to enforce compliance with the provisions of a decision of the [C]ommission" (emphasis added). Because the petition for administrative mandamus here did not seek "to enforce compliance with" the Energy Commission's certification decision, the trial court had no power to stop or interrupt the operation of the Moss Landing Power Plant. The main practical difference between an interlocutory remand and a writ setting aside the NPDES permit is that the latter potentially would have entailed a complete or partial shutdown of the Moss Landing Power Plant, in direct violation of Section 25531(c).[9] The superior court was unwilling to interfere with the operation of the Moss Landing Power Plant, and rightly so. Thus, the court of appeal noted with approval the trial court's position that "[n]othing in this decision compels an interruption in the ongoing plant operation during the Regional [B]oard's review of this matter on remand." Op. at 28-29. An interlocutory remand was the appropriate procedure in light of Section 25531(c).[10]

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[9] Even if the Moss Landing Power Plant had been allowed to use its pre-modernization NPDES permit if its current permit had been vacated, its operations would have been curtailed to comply with those restrictions.

[10] This is true regardless whether Section 25531(c) requires that judicial review be sought in this Court, an issue we discuss in Part III below.

Finally, Petitioner attempts to dismiss the cases recognizing courts' inherent authority to remand matters to agencies for further proceedings without entry of judgment by asserting that such cases only involve "procedural failures by the administrative agency." Pet. at 27. The significance of that supposed distinction is not explained, and the assertion is not accurate in any event. For example, in *Rapid Transit Advocates, Inc. v. Southern California Rapid Transit Dist.*, 185 Cal. App. 3d 996, 999 (1986), "the court twice continued [an administrative mandamus proceeding] over [the petitioners'] objections, permitting [the agency] to clarify" its findings, and then "[u]pon resumption of the trial ... allowed [the agency] to enter into evidence several 'clarifications'" of its findings. The court of appeal upheld this procedure. *Accord*, *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 81 (1974) ("We do not question the power of a trial court to remand a matter to an administrative agency for clarification of ambiguous findings"); *Keeler v. Superior Court*, 46 Cal. 2d 596, 600-01 (1956) (courts have inherent power "to remand a cause in mandamus for further proceedings which are deemed necessary for a proper determination"); *Garcia v. California Employment Stabilization Comm'n*, 71 Cal. App. 2d 107, 110 (1945) (on original application for writ of mandate, court of appeal "remanded for further evidence").

3. There is no conflicting case law on the propriety of considering new evidence.

Petitioner argues that the decision below conflicts with cases holding that "[d]ocuments 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." Pet. at 28. As the court of appeal explained, however, these cases stand for "the unremarkable

proposition that a court may not consider 'extra-record' evidence that was not presented to the agency." Op. at 66. The issue in each of those cases cited by Petitioner – raised in the context of motions to augment the record, for judicial notice or to compel discovery in the trial court – was whether the *trial court*, sitting in mandamus, could consider *evidence outside the record that was never brought before the agency*. Not surprisingly, the cases hold that the trial court may consider such evidence only in exceptional circumstances.[11]

The overriding concern expressed in the cases cited by Petitioner is that the trial court not engage in independent factfinding rather than review of the agency's discretionary decision. In *Toyota of Visalia, Inc. v. New Motor Vehicle Bd.*, 188 Cal. App. 3d 872 (1987), where the trial court had issued a writ requiring the agency to reconsider its decision, the court of

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[11] The cases that Petitioner relied upon below do not address at all what evidence the trial court may consider if the agency admitted additional evidence on remand. *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 578 (1995) (trial court may admit extra-record evidence only if it existed before agency made decision and could not have been presented to agency with reasonable diligence); *Fort Mojave Indian Tribe v. California Dept. of Health Servs.*, *supra*, 38 Cal. App. 4th at 1592-1598) (even if trial court's remand in light of extra record evidence that did not come into existence until after the administrative decision was issued is not prohibited, it was error here since the evidence in question was at best new analysis of data already considered); and *Cadiz Land Co., Inc. v. Rail Cycle, L.P.*, 83 Cal. App. 4th 74, 116-123 (2000) (trial court properly denied discovery that sought to elicit extra-record evidence). The two additional cases relied upon by Petitioner in this Court are to the same effect. *Porterville Citizens for Responsible Hillside Dev. v. City of Porterville*, 157 Cal. App. 4th 885, 893-897 (2007) (extra-record evidence cannot be admitted by trial court merely to contradict the evidence on which the agency relied); and *Eureka Citizens for Responsible Government v. City of Eureka*, 147 Cal. App. 4th 357, 366-367 (2007) (extra-record evidence may be considered in trial court only if the evidence was unavailable at time of hearing or improperly excluded).

appeal affirmed the judgment (with certain modifications) because the agency remained "free to exercise its discretion based upon the evidence properly admitted by the court, the administrative record and the appropriate guidelines." *Id.* at 885. In this case, by remanding the permit to the Regional Board for further analysis of BTA alternatives, the trial court properly deferred to the discretion and expertise of the agency and properly confined itself to the administrative record in reviewing the agency's finding. The court of appeal's opinion upholding this interim remand for new evidence on one of fifty-eight permit findings does not conflict with a single case holding cited by Petitioner.

Petitioner's suggestion that the opinion below will encourage agencies improperly to seek interlocutory remand "for the purpose of packing the record with new evidence and ... post hoc rationalizations" (Pet. at 30-31) is alarmist without reason. That is not what happened in this case. Moreover, the interlocutory remand in this case occurred in the unique context of Public Resources Code Section 25531(c), which provides that "no court in this state has jurisdiction ... to stop or delay the construction or operation of any thermal powerplant except to enforce compliance with the provisions of a decision of the [Energy] [C]ommission."

III. IF REVIEW OF ANY ISSUE RAISED BY PETITIONER IS GRANTED, JURISDICTION SHOULD ALSO BE REVIEWED.

For the foregoing reasons, Respondent does not believe that review should be granted. If, however, this Court grants review, Respondent requests, pursuant to Rule 8.500(a)(2) of the California Rules of Court, that the Court also review the threshold question of the superior court's jurisdiction to try this case: Does the judicial review provision of the

Warren-Alquist Act (Public Resources Code Section 25531) deprive the superior court of jurisdiction to hear a petition challenging an NPDES permit when that permit has been approved and incorporated by the California Energy Commission as part of its certification process?

The judicial review provision of the Warren-Alquist Act, Public Resources Code Section 25531, provides:

> (a) The decisions of the [Energy] [C]ommission on any application for certification of a site and related facility are subject to judicial review by the Supreme Court of California.
> ...
> (c) Subject to the right of judicial review of decisions of the [Energy] [C]ommission, 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 [Energy] [C]ommission, 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 [Energy] [C]ommission.

Petitioner sought superior court review of BTA issues that not only could have been, but actually were, determined by the Energy Commission.

Respondent demurred in the trial court on the basis of Section 25531(c), arguing that the statute prevents any court other than the Supreme Court (and formerly the court of appeal[12]) from hearing a petition "concerning any matter which was, or could have been, determined" in

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[12] The quoted version of Pub. Res. Code § 25531, subdivision (a) became effective on May 22, 2001. Previously, subdivision (a) provided for judicial review in the same manner as the decisions of the Public Utilities Commission. Thus, when the Energy Commission certified the Moss Landing Power Plant modernization project in November 2000, Petitioner could have sought review of that decision in the court of appeal or in the Supreme Court. *See Santa Teresa Citizen Action Group v. State Energy Res. Conserv. & Dev. Comm'n*, 105 Cal. App. 4th 1441, 1451 (2003) (citing former Pub. Utils. Code § 1756).

Energy Commission proceedings. The trial court overruled the demurrer on the ground that Public Resources Code Section 25531 should not be read to negate Section 13330(a) of the California Water Code, which provides that any Water Board order is subject to review in the superior court by a petition for writ of mandate. The court of appeal agreed, emphasizing the federal nature of the permit in question. Op. at 25-26. In the court of appeal's view, judicial review under Water Code Section 13330(a) did not do violence to the legislative purpose of the Warren-Alquist Act ("to hasten the 'final operative effect' of Energy Commission decisions") because "[t]his is not a case in which the superior court acted 'to stop or delay the construction or operation of any thermal powerplant,'" Op. at 28 (citing Pub. Res. Code, § 25531, subd. (c)).[13] The court of appeal held that the administrative decision being challenged was the permit issued by the Regional Board and that it was properly heard in the superior court. Op. at 28.

The authority to issue NPDES permits unquestionably belongs to the Water Boards. But the question posed by Section 25531 is not which *agency* has the authority to issue an NPDES permit. The question is what *court* has the authority to review that administrative decision. That question hinges on whether the "case or controversy concern[s] any matter which was, or could have been, determined in a proceeding before the [Energy] [C]ommission...." Here, it was. The record is clear that the permit conditions adopted by the Regional Board, in collaboration with the

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[13] The threshold question of jurisdiction should not rest on whether the superior court was prudent in its exercise of that jurisdiction or on whether it interfered with the operation of the Moss Landing Power Plant (as Petitioner urged that it should have). Jurisdiction must be determined at the outset of a proceeding, not after the proceeding is concluded and based on an evaluation of the superior court's actions.

Energy Commission, were approved and incorporated into the Energy Commission's decision certifying the Moss Landing modernization project. AR at 304341. Respondent believes that the two statutes can be harmonized, giving the greatest possible effect to each, by understanding Water Code Section 13330 as providing the general rule for judicial review of Water Board decisions and Public Resources Code Section 25531 as providing the exception, or special case, for those few Water Board decisions concerning a power plant subject to Energy Commission certification.

IV. CONCLUSION.

Review of the opinion below is not necessary "to secure uniformity of decision or to settle an important question of law" (Cal. R. Ct. 8.500(b)(1)), and it should not be granted. With respect to the BTA questions presented in the Petition, review by this Court is more likely to create a conflict of authority in a developing area of federal and state regulation than to resolve such a conflict. The *Riverkeeper* holdings are not applicable to the permit in this case, and those holdings and the decision below do not conflict on whether and/or how cost and mitigation factor into the BTA standard. Moreover, the BTA issues as presented in this case are not likely to recur. With respect to the remand question presented in the Petition, the court of appeal correctly construed Code of Civil Procedure Section 1094.5 as not precluding the entry of an interlocutory order of remand in this case. Such an order was singularly appropriate in light of Public Resources Code Section 25531(c). Insofar as it upholds the interlocutory remand, the decision below does not conflict with the

decisions cited in the Petition, none of which addressed the unique context of this case implicating Section 25531(c).

February 13, 2008.

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CERTIFICATE OF WORD COUNT

(California Rule of Court 8.504(d)(1)

The text of this brief consists of 6,338 words, not including tables of contents and authorities, or this certificate, as counted by Microsoft Word, the computer program used to prepare this brief.

Dated: February 13, 2008

Sarah G. Flanagan
Attorney for Real Party in Interest
And Respondent Dynegy Moss Landing, LLC

In the Supreme Court of the State of California

Docket No. No. S160211

PROOF OF SERVICE BY U.S. MAIL AND FEDERAL EXPRESS

I, Susan Macken, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop Shaw Pittman LLP in the City of San Francisco, California.

2. My business address is 50 Fremont Street, San Francisco, CA 94105-2228. My mailing address is P. O. Box 7880, San Francisco, CA 94120-7880.

3. I am familiar with Pillsbury Winthrop Shaw Pittman LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service; in the ordinary course of business, correspondence placed in interoffice mail is deposited with the United States Postal Service with first class postage thereon fully prepaid on the same day it is placed for collection and mailing.

4. On February 13, 2008, at 50 Fremont Street, San Francisco, California, I served a true copy of the attached document titled exactly **ANSWER TO PETITION FOR REVIEW** by placing it in an addressed, sealed envelope clearly labeled to identify the person being served at the address shown below and placed in interoffice mail for collection and deposit in the United States Postal Service on that date following ordinary business practices:

Anita E. Ruud, Esq.
Deputy Attorney General
Office of the Attorney General
California Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Clerk, Court of Appeal
of the State of California
Sixth Appellate District
333 West Santa Clara Street
San Jose, CA 95113

Clerk, Superior Court
County of Monterey
1200 Aguajito Road
Monterey, CA 93940

5. On February 13, 2008, in the city where I am employed, I served a true copy of the attached document titled exactly **ANSWER TO PETITION FOR REVIEW** by depositing it in a box or other facility regularly maintained by Federal Express, an express service carrier providing overnight delivery, or delivering it to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by Federal Express, with overnight delivery fees paid or provided for, clearly labeled to identify the person being served at the address shown below:

Deborah A. Sivas, Esq.
Environmental Law Clinic
Mills Legal Clinic at Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305-8620

I declare under penalty of perjury that the foregoing is true and correct. Executed February 13, 2008, at San Francisco, California.

Susan Macken