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

DYNEGY'S ANSWER BRIEF ON THE MERITS

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ISSUES ON WHICH REVIEW WAS GRANTED

From Dynegy's Answer to Petition for Review: "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?"

From the Petition for Review: "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"), 473 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?"

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INTRODUCTION.

Petitioner has set out and briefed issues on which review was not granted, while failing to discuss either the lead issue presented in its petition for review or the issue presented in Respondent's answer. In doing so, Petitioner has violated the clear requirements of Rule 8.520(b) and this Court's Order of September 9, 2009.

The first of the two issues presented in the petition for review was:

> 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"), 473 F.3d 83 (2d Cir. 2007), has expressly prohibited consideration of these factors?

This is an issue of federal law, and it was conclusively resolved against Petitioner, at least as to the permissibility of cost-benefit analysis, in *Entergy Corp. v. Riverkeeper, Inc.*, __ U.S. __, 129 S.Ct. 1498 (April 1, 2009). The United States Supreme Court reversed *Riverkeeper II* and rejected Petitioner's principal argument in the present case, holding that the U.S. Environmental Protection Agency ("EPA") had "permissibly relied on cost-benefit analysis in setting the national performance standards [under

the Clean Water Act] and in providing for cost-benefit variances from those standards ...." 129 S.Ct. at 1510.[1]

Confronted with *Entergy*, Petitioner attempts to rewrite the federal issue presented for review. While now conceding that the California Regional Water Quality Control Board ("Regional Board") could properly conduct a cost-benefit analysis with respect to the permit at issue, Petitioner asserts that the analysis actually conducted was "factually unsupported." OB, at 1. But that is not an issue on which review was sought, or granted. It is an evidentiary argument that was correctly rejected both by the trial court (applying the independent judgment standard to the Regional Board's decision) and by the court of appeal (applying the substantial evidence standard to the trial court's decision).

Relying on ambiguous statements plucked from a massive record, Petitioner also asserts that the Regional Board improperly "consider[ed] after-the-fact environmental enhancement activities as part of its compliance determination under the statute's technology-forcing requirements." OB, at 1. This mitigation argument does not involve any legal issue, much less one worthy of this Court's review. The court of appeal correctly affirmed the trial court's factual finding that mitigation

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[1] Concurrently with this answer brief on the merits, Respondent is filing a motion to dismiss review in light of the *Entergy* decision, which was issued by the U.S. Supreme Court after review was granted in this case.

was **not** treated as an alternate technology for purposes of the Clean Water Act. Petitioner is again asking this Court to review the factual record, reweigh the evidence and reverse a finding of fact.

With respect to the second issue presented in the petition (which has also been rewritten and now appears as the lead issue in the opening brief), the court of appeal correctly construed Code of Civil Procedure Section 1094.5. That statute 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.

None of the decisions cited in Petitioner's opening brief addressed the unique procedural context of this case or 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*, in reviewing an agency decision, may not consider new evidence never considered by the agency.

In the Order of September 9, 2009, this Court directed the parties "to brief all issues raised in the petition for review and the answer to the petition." Again disregarding this Order and Rule 8.520(b), Petitioner has not discussed the jurisdictional issue raised in the answer. Apparently, Petitioner intends to state its position on the jurisdictional issue for the first time in its reply, which is the final brief allowed under the Court's rules. This is improper.

Section 25531 of the Public Resources Code deprived the superior court of jurisdiction to hear a petition for administrative mandamus. The issue of compliance with the Clean Water Act, although determined in the first instance by the Regional Board, was encompassed within the California Energy Commission's decision to certify the modernization of the Moss Landing Power Plant. Therefore, the exclusive avenue for judicial review was a writ petition in the court of appeal or this Court. Petitioner's failure to file such a petition is an alternate ground for affirmance.

In light of the *Entergy* decision upholding cost-benefit analysis under the Clean Water Act and Petitioner's attempts to substitute new issues for those on which it sought and obtained review, Respondent is respectfully moving the Court to dismiss review. Should the Court proceed with review, Petitioner's arguments should be rejected for the reasons discussed below.

STATEMENT OF FACTS.

I. PRIOR OPERATIONS.

The Moss Landing Power Plant (the "MLPP") has been in operation for over fifty years. In 1948, Pacific Gas & Electric ("PG&E") began construction of five generating units having a total generating capacity of 613 megawatts ("MW"); those units were operational by 1952. AR, at 300075-76.[2] In 1963 PG&E began construction of Units 6 and 7, which had an additional capacity of 750 MW each. AR, at 300076. When generating at 100% capacity, Units 1 through 7 passed through their

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[2] Petitioner's opening brief is cited as "OB." 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." The Supplemental Administrative Record is cited as "SAR." Respondents' and Cross-Petitioners' Appendix is cited as "Resp. Appx." Petitioner's Appendix submitted with its opening brief (which adds a couple of documents to the appendix it submitted to the court of appeal) is cited as "Pet. Appx."

cooling systems approximately 1.4 billion gallons of seawater per day. AR, at 300279-80. Units 1 through 5 discharged the heated cooling water into the Elkhorn Slough, while Units 6 and 7 discharged through an ocean outfall 600 feet into Monterey Bay. AR, at 300310. These seven units were in continuous operation until PG&E ceased using Units 1 through 5 in January 1995. AR, at 300279. On July 1, 1998, PG&E sold the MLPP to Duke Energy.[3] AR, at 300076.

II. THE MLPP MODERNIZATION PROJECT.

On May 7, 1999, Respondent submitted to the California Energy Resources Conservation and Development Commission ("CEC" or "Energy Commission") a proposal to modernize the MLPP by replacing the retired Units 1 through 5 with two new 530 MW generating units. As described in its Application for Certification ("AFC"), Respondent evaluated many alternatives and factors before submitting this proposal, including alternative locations, generating technologies and cooling systems. AR, at 300077-80, 300133, 300145.

After public review, the Energy Commission ultimately approved Respondent's application, and Respondent constructed the project. Since

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[3] Duke Energy owned and operated the MLPP during the Energy Commission, Regional Board and trial court proceedings. There were subsequent transfers of ownership, and Dynegy Moss Landing, LLC is the current owner. The term "Respondent" used in the history of this matter refers to both Duke Energy and Dynegy.

2002 the modernized MLPP has been generating more electricity with fewer environmental impacts. The conventional steam boilers at Units 1 through 5 have been replaced by two state-of-the-art "combined-cycle" units that now produce 1060 MW as compared to 613 MW, while (1) using much less cooling water, (2) producing fewer air emissions, and (3) using significantly less fuel per MW produced than the conventional steam boilers they replaced. AR, at 300133-34, 300293, 304111. In addition, rather than discharging the cooling water into Elkhorn Slough (as did the old units), the new units discharge into Monterey Bay, through the Units 6 and 7 outfall, with less environmental impact. AR, at 300079-80, 300276.

Petitioner would have the Court believe that Respondent merely re-used the once-through cooling system, while ignoring all other alternatives, when it modernized the MLPP. It did not. Respondent's AFC and subsequent studies evaluated several alternative technologies for both air and water heat transfer systems. In comparison with a once-through seawater cooling system, the reviewing agencies found that the other methods did not significantly reduce the environmental impacts and were not economically feasible. *See infra*, at 39-43. Modernizing the existing once-through cooling system was determined, after extensive agency review, to be the best alternative. AR, at 303161-62.

Continuously traveling screens replaced the conventional stationary ones, and the upstream intake tunnel was shortened from 350 feet to

approximately 10 feet, thereby minimizing the potential for organisms to become trapped. AR, at 302882. In addition, the new screens are made of finer wire mesh and are inclined at approximately 55 degrees from horizontal, thus reducing the flow velocity—and impingement and entrainment potential—across the screen.[4] AR, at 302882, 302886. As a result of the inclined screen and the reduced volume of cooling water, maximum approach velocities decreased by nearly half, further reducing impacts. AR, at 302882-86.

These changes and enhancements have minimized the environmental effects of the intake structure by significantly reducing impingement and entrainment. AR, at 303161. It was this project which Respondent proposed to the Energy Commission and the Regional Board, and which those agencies approved.

III. AGENCY REVIEW OF THE MLPP MODERNIZATION PROJECT.

The MLPP modernization project was subject to extensive agency review and public comment over nearly two years. The project had to receive certification from the Energy Commission and a National Pollutant

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[4] "Impingement" occurs when fish or other organisms become entangled in the screens of a cooling water intake structure. AR, at 303043. "Entrainment" occurs when floating organisms small enough to pass through the screen mesh (*e.g.*, fish larvae or eggs) are drawn into the cooling system. AR, at 302899, 304327.

Discharge Elimination System ("NPDES") permit from the Regional Board. California law (the Warren-Alquist Act, Cal. Pub. Res. Code § 25500 *et seq.*) and the Energy Commission's regulations (Cal. Code of Regs., tit. 20, § 1701 *et seq.*) mandate a coordinated, multi-agency, public review process for a power plant siting application. *See* AR, at 303728-29, 303732-33. In addition to the Energy Commission and Regional Board, numerous other agencies actively participated in this review of the MLPP modernization project. AR, at 303191.

A. The Technical Working Group's analysis of impacts on water resources and alternative technologies.

To assess the biological impacts of the modernization project, the Energy Commission and the Regional Board jointly convened a Technical Working Group ("TWG"). The TWG directed and supervised a broad review of the project's biological impacts and of potential alternative cooling systems. AR, at 302870, 304244. It collected and analyzed thousands of water samples from the area surrounding the MLPP. AR, at 301133, 301137. It also directed and supervised studies of possible effects on aquatic resources. AR, at 302876. This scientific work culminated in issuance of the final Moss Landing Power Plant Modernization Project 316(b) Resource Assessment ("316(b) Report") in April 2000. AR, at 302859-303187a.

The TWG studies found that, based on the maximum volume of water the modernized MLPP units could take in, there would be entrainment impacts on 13 percent of the larvae for 8 (out of approximately 97) species of fish (AR, at 304251)—not 13 percent of all larvae in the area, as Petitioner misleadingly suggests (OB, at 15). Moreover, even that maximum 13 percent would be at risk for only a few days in their life cycle. AR, at 306870-73. Most of the Slough's fish and wildlife would not be affected at all. *Id.*

The meaning and significance of the 13 percent figure was explained in detail by Dr. Peter Raimondi, a U.C. Santa Cruz professor of marine biology who served on the TWG:

> *There is no prediction that 13 percent of populations of all species in Elkhorn Slough will be lost....* What there is a prediction that as much as 13 percent of the larval population, the babies of species that have larval forms—not all species do. But of those species, as much as 13 percent of the larvae of those species may be lost due to the increased operations of the Moss Landing power plant.

AR, at 306865 (emphasis added).

> [Species that do not have larval forms] produce little juveniles that look just like adults, and they don't get sucked into the plant due to entrainment. *There are no losses through entrainment for those species. They constitute the vast majority of the biomass in the slough.*

AR, at 306868 (emphasis added). Moreover, the 13 percent figure was a "worst-case scenario," based on a number of conservative assumptions. As the Energy Commission explained in its Decision:

> Conservative assumptions used in the [TWG's] study include: 1) that the Project operates at 100 percent capacity all the time; 2) that no entrained organisms survive; and 3) that all intake waters come from Elkhorn Slough, with none coming from Monterey Bay.

AR, at 304277.

Respondent also agreed to fund a $7 million environmental enhancement project for habitat acquisition, restoration, and stewardship in the Elkhorn Slough. AR, at 305052. Taking into account the modifications to the intake system, the worst-case loss of 13 percent of larvae of 8 species, and the environmental enhancement project, the Energy Commission found that the MLPP modernization project would cause no unmitigated adverse environmental impacts and would comply with all applicable laws. AR, at 304286.

B. The Energy Commission review process.

At the outset of its process, Energy Commission staff notified those governmental agencies likely to have an interest in the project that an application had been filed. AR, at 304104-05. In June and July of 1999, the Energy Commission requested supplemental information concerning air quality, biological resources, water quality, visual resources, and land use. AR, at 300921. Respondent submitted supplemental data on July 30, 1999. AR, at 300921-301085. On August 11, 1999, the Energy Commission determined that Respondent's AFC was complete and instructed its staff to commence the review process. AR, at 304105-07.

In accordance with usual practice, a committee of two commissioners (the "Committee") was appointed to conduct the MLPP licensing process. *See* Cal. Code of Regs., tit. 20, § 1709(e). This process includes holding conferences and evidentiary hearings, as well as providing a recommendation to the full Commission. *Id.* §§ 1741-1755. The Committee, and ultimately the Commission, serve as fact-finder and decisionmaker. AR, at 304103.

The Commission staff performed an independent analysis of the proposed project, focusing on any environmental impacts and the necessity for mitigation measures. Based on this analysis, the staff prepared a Preliminary Staff Assessment. AR, at 303191, 301943. The staff also held a series of noticed public workshops, over an eleven-month period, to discuss project details. AR, at 304105-07.

After considering all comments received (including those of other agencies), the staff issued Parts 1, 2, and 3 of its Final Staff Assessment ("FSA") on May 15, May 30, and June 20, 2000, respectively. AR, at 304106. Revisions and errata were subsequently made to various sections of the FSA, including the Biological Resources section. AR, at 304690-716. The Committee conducted formal evidentiary hearings in June 2000, and held a Committee conference on July 17, 2000, to receive additional comments related to mitigation for impacts to marine resources. AR, at 304106-07.

The Committee published the Presiding Member's Proposed Decision ("PMPD" or "Proposed Decision") on August 29, 2000, which commenced a 30-day period for public comment. AR, at 304107; *see* Cal. Code of Regs., tit. 20, §§ 1749-1753. The Committee held a public conference in Moss Landing to receive oral and written comments on the PMPD. AR, at 304107. On October 13, 2000, the Committee issued its Errata to the PMPD and Response to Comments ("PMPD Errata"). *Id.* Ten days later the Committee held another conference to hear comments from the public and other agencies on the PMPD Errata. AR, at 306808.

On October 25, 2000, the full Energy Commission approved the project by adopting the PMPD, PMPD Errata, and final Committee Amendments. AR, at 304107. After considering the proposed facility site, generating technology and cooling alternatives, the Energy Commission concluded that the project complied with all applicable laws, including Section 316(b) of the Clean Water Act, and that "[n]either analysis [by Respondent or the CEC Staff] revealed an alternative which is superior to the proposed Project." AR, at 304121-25. The MLPP modernization project was certified by CEC Order dated October 25, 2000. AR, at 304096-98.

Although members of Petitioner participated in the Energy Commission's certification process, they failed to seek judicial review of the Commission's decision.

C. The Regional Board review process.

In January 2000, Respondent applied to the Regional Board for an NPDES permit for the MLPP modernization project. AR, at 301520-21. On June 26, 2000, the Regional Board staff, after working closely with CEC staff (AR, at 304338), issued a draft NPDES permit. AR, at 304766-94. The draft permit found that the proposed cooling system complied with BTA. *Id.*

In August 2000, the Regional Board staff prepared a Staff Report with its recommendations concerning the draft NPDES permit. AR, at 305044-72. Applying then-applicable regulatory guidelines (*see infra*, at 32-34), the staff concluded that the costs of retrofitting the existing facility with closed-cycle cooling alternatives (such as cooling towers with recirculating water, natural draft cooling towers, or air-cooled condensers) was wholly disproportionate to their environmental benefits and unreasonable relative to the impacts of the modernized MLPP. AR, at 305051. On September 15, 2000, the Regional Board postponed a vote on the NPDES permit so that its staff could provide additional information regarding (1) the environmental enhancement program and (2) the alternative of moving the intake to a different location. AR, at 305560-62.

The Regional Board staff prepared a Supplemental Staff Report, containing the additional information the Board had requested, for the Board's October 27, 2000 meeting. AR, at 305560-63. The Supplemental

Staff Report concluded that relocating the intake structure would not reduce the loss of aquatic organisms. AR, at 305561. The Supplemental Staff Report also recommended that the environmental enhancement program be strengthened in various respects. It included a new draft of the NPDES permit, revised to incorporate these recommendations. AR, at 305631-65.

On October 27, 2000, after hearing additional expert testimony and public comment, the Regional Board approved the NPDES permit for the modernized MLPP, with the changes recommended in the Supplemental Staff Report. The Board concluded that the "modernization will produce additional electric power more efficiently *and reduce environmental impacts, including the existing permitted impacts on water resources.*" AR, at 305748 (emphasis added).

Petitioner filed a petition with the State Water Resources Control Board ("State Board") to appeal the Regional Board's approval of the NPDES permit for the project. AR, at 000011-15. By Order No. WQ 2001-10, dated June 21, 2001, the State Board rejected that petition. AR, at 000192-97.

LITIGATION HISTORY.

I. THE FIRST PETITION.

On July 26, 2001, Petitioner filed its first petition for writ of mandate, to set aside the NPDES permit for the MLPP modernization

project, in the Monterey Superior Court ("the First Petition"). Pet. Appx., at 1-25.

The Water Boards[5] and Respondent, supported by the Energy Commission as amicus, demurred on the ground that Public Resources Code Section 25531(c) precluded review in the superior court. Resp. Appx., at 1-74. The superior court overruled the demurrers (Resp. Appx., at 75), and Respondent's petition to the court of appeal for a writ of mandate on this issue (No. H024416) was summarily denied.

On October 1, 2002, following a hearing on the merits, the superior court issued an Intended Decision in which it concluded that:

> Finding number 48 [of the NPDES permit] is not supported by the weight of the evidence. As outlined above, there is no evidence in the record of a comprehensive, definitive consideration of cooling water alternatives by the Regional Board to apply Best Technology Available to the Moss Landing Power Plant.

Resp. Appx., at 103. The court directed the Regional Board "to conduct a thorough and comprehensive analysis of the Best Technology Available applicable to the Moss Landing Power Plant." Resp. Appx., at 104. At the same time, however, the court noted that "[n]othing in this decision compels an interruption in the ongoing plant operation during the Regional board's review of this matter." *Id.*

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[5] "The Water Boards" refers to the State Board and the Regional Board, both of which were named as respondents in the First Petition.

The Intended Decision was later designated a Statement of Decision. Resp. Appx., at 117. In subsequent discussions concerning the form of judgment, the parties disagreed as to whether the court was required to vacate the NPDES permit. Petitioner sought a final judgment and writ of mandate ordering the Regional Board to vacate the NPDES permit. Pet. Appx., at 55-62. Citing the court's ruling that plant operations should not be interrupted during the Regional Board's further review, Respondent and the Water Boards requested an order of "remand to the Regional Board for further analysis of the BTA issue." Pet. Appx., at 63-69.

Following a hearing on February 5, 2003, the superior court entered its Remand Order on March 11, 2003. Resp. Appx., at 119-120. The 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 ...

Id. Petitioner filed a petition for extraordinary relief with the court of appeal (No. H025844) seeking to set aside the Remand Order. That petition was summarily denied.

II. PROCEEDINGS ON REMAND.

Petitioner seriously mischaracterizes the remand proceedings. The BTA issue was fully reopened and reconsidered, and Petitioner's ability to participate fully was not "constrained" (OB, at 24) by anything other than its own gamesmanship.

A. The Notice of Public Hearing.

In compliance with the Remand Order, the Regional Board issued a Notice of Public Hearing ("Hearing Notice") on March 7, 2003 "to provide an opportunity for all parties to present evidence and analysis regarding the BTA alternatives, their costs and their environmental benefits." RAR, at 000015. 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 these alternatives wholly disproportionate to their environmental benefit?

RAR, at 000016.

The Hearing Notice designated Petitioner, Respondent, the Regional Board, and the Energy Commission as parties to the hearing. RAR, at 000017. The Hearing Notice directed the parties to submit direct

testimony, evidence, and argument to the Regional Board by April 14, 2003, and any rebuttal testimony and argument by April 28, 2003. RAR, at 000018-19.

B. Submissions to the Regional Board in advance of the hearing.

Regional Board staff, Respondent, and the Energy Commission each timely submitted direct evidence and testimony on April 14, 2003. RAR, at 000035-437, 000462-472, 000473-725. Petitioner, however, "respectfully decline[d] to submit any evidence at this time" in light of its pending writ petition in the court of appeal. RAR, at 000726-28.

Two weeks later, on April 28, 2003, Petitioner submitted "preliminary comments" in the form of a 13-page letter. SAR, at 0059-72. The letter restated Petitioner's objections to the taking of evidence on remand and argued that the Regional Board could not consider the costs of BTA alternatives or require mitigation in connection with the issuance of an NPDES permit.

The Regional Board declined to accept Petitioner's April 28 letter. RAR, at 000828-30. Pointing out that "the overwhelming majority of the letter addresses issues that were not raised by the other parties," the Board concluded that it was not properly submitted as rebuttal evidence but was direct evidence (due April 14) and, as such, untimely. RAR, at 000829. In addition, the Board noted that many of the topics addressed in the letter

(such as the legality of considering mitigation) were outside the scope of the Remand Order. RAR, at 000829.

The Regional Board did accept an April 28, 2003 memorandum from Dr. Haddad of U.C. Santa Cruz and two Ph.D. students, on condition that one of the authors appear for cross-examination. RAR, at 000797-808, 823-824. The Regional Board staff noted Dr. Haddad's statement that he had "prepared the memorandum at the request of Ms. Sivas, [Petitioner's] counsel," which was "puzzling because [Petitioner] has asserted the Board may not augment the administrative record." RAR, at 000823-24.

C. The Regional Board hearing and resolution.

The Regional Board's hearing on the remand was conducted, as scheduled, on May 15, 2003. RAR, at 000894. All parties, including Petitioner, had the opportunity to summarize their evidence and argument, to cross-examine witnesses, and to present closing statements. RAR, at 000898-99. The general public also had an opportunity to comment. RAR, at 000899. Petitioner participated in the hearing. In addition to pressing some of its legal arguments, Petitioner cross-examined Regional Board staff and Respondent's witnesses and submitted testimony from Dr. Haddad. RAR, at 000986-1024, 1053-78, 1146-53 and 1167-70.

At the conclusion of the hearing, four of the five Regional Board members who were present voted to approve a resolution finding that: "After a thorough and comprehensive analysis, Finding No. 48 in Waste

Discharge Requirements Order 00-041 is supported by the weight of the evidence." RAR, at 001203-05; SAR, at 0017.

On June 13, 2003, Petitioner appealed the Regional Board's May 15 action to the State Board. SAR, at 0037-90. On September 16, 2003, the State Board dismissed the appeal because it "fail[ed] to raise substantial issues that are appropriate for review." SAR, at 0001.

III. THE SECOND PETITION.

On October 15, 2003, Petitioner filed a second petition for writ of mandate in the superior court, raising its procedural concerns about the May 15 remand hearing and the alleged insufficiency of the evidence ("Second Petition"). Resp. Appx., at 121-135.

After briefing and oral argument, the superior court issued its Statement of Decision on July 21, 2004. Pet. Appx., at 75-81. The superior court rejected each of Petitioner's procedural objections to the remand proceedings and confirmed that it had earlier rejected Petitioner's arguments concerning the environmental enhancement project and the Regional Board's consideration of the economic feasibility of alternative technologies. The superior court found that:

> [T]he 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. Although the mitigation plan was at times discussed in conjunction with other BTA considerations, the Board's determination does not rest on that plan as the basis for its best technology finding.

Pet. Appx., at 80 (original emphasis).

Judgment denying the First Petition was entered on August 17, 2004. Pet. Appx., at 89-91. Thereafter, the parties entered into a stipulation for dismissal with prejudice of the Second Petition since "the issues raised in the Second Petition have been resolved against Petitioner through the Court's Judgment on the First Petition." Resp. Appx., at 156-158.

IV. APPEAL.

Petitioner appealed from the August 17, 2004 judgment, and Respondent and the Water Boards cross-appealed. Resp. Appx., at 145-154. The cross-appeals raised the issues whether the superior court had jurisdiction to hear the First Petition and whether the Remand Order was correct in concluding that Finding No. 48 lacked evidentiary support.

The Sixth District Court of Appeal issued its opinion on December 14, 2007, and issued an Order Modifying Opinion and Denying Rehearing on January 10, 2008. The court of appeal affirmed the judgment, rejecting both sides' challenges to the trial court's reasoning.

ARGUMENT.

I. THE JUDICIAL REVIEW PROVISION OF THE WARREN-ALQUIST ACT, PUBLIC RESOURCES CODE SECTION 25531, BARRED A MANDAMUS PETITION IN THE SUPERIOR COURT.

In its answer to the petition, Respondent requested that the Court 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?" In the September 9, 2009 Order, this Court ordered briefing on that issue.

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.

Until May 22, 2001, Section 25531(a) provided for judicial review in the same manner as the decisions of the Public Utilities Commission. Thus, when the Energy Commission certified the MLPP 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).

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) from hearing a petition "concerning any matter which was, or could have been, determined" in Energy Commission proceedings. The trial court overruled the demurrer on the ground that Section 25531 should not be read to negate Section 13330(a) of the 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 (quoting Pub. Res. Code,

§ 25531, subd. (c)). However, the threshold question of jurisdiction should not rest on whether the superior court was in fact prudent in its exercise of jurisdiction or on whether it interfered with the operation of the MLPP (as Petitioner urged that it should have). Jurisdiction must be determined at the outset of a proceeding, not after the proceeding is concluded and not based on an evaluation of the superior court's actions.

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. As discussed above, the Energy Commission worked closely with the Regional Board and expressly considered the BTA issue with Petitioner's participation in the Energy Commission proceedings. AR, at 000011-15, 000204-26, 306738-44. The permit conditions adopted by the Regional Board, in collaboration with the Energy Commission, were approved and incorporated into the Energy Commission's decision certifying the MLPP modernization project. AR, at 304341. In short, Petitioner sought superior court review of issues that not only could have been, but actually were, determined by the Energy Commission.

Statutes relating to the same subject matter must be harmonized with each other, to the extent possible. *Dyna-Med, Inc. v. Fair Employment & Housing Comm'n*, 43 Cal. 3d 1379, 1387 (1987). The statutes here in question can readily 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 for those few Water Board decisions concerning a power plant subject to Energy Commission certification. Additionally, to the extent the two statutes are deemed inconsistent, it is the more recently enacted statute, Section 25531 (enacted in 1974), that controls over the earlier enacted one, Section 13330 (enacted in 1969). *See, e.g., California Correctional Peace Officers Ass'n v. Dep't of Corrections*, 72 Cal. App. 4th 1331, 1340 & n.9 (1999).[6]

In construing a statute, the court should consider "the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." *People v. Woodhead*, 43 Cal. 3d 1002, 1008 (1987). The objective of the Warren-Alquist Act was to prevent delays in the provision of electrical power, while the evil to

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[6] Section 25531 was most recently amended by S.B. 28, § 8, effective May 22, 2001, which did not change subdivision (c). *See supra,* at 24.

be remedied was regulatory fragmentation and uncertainty in the field of electrical generation. *Public Utils. Comm'n v. Energy Res. Conserv. & Devel. Comm'n*, 150 Cal. App. 3d 437, 448-453 (1984). Moreover, if the Legislature had intended only to restrict review of Energy Commission decisions as such to the Supreme Court (or previously to the court of appeal), and had not also intended to prevent collateral attacks on those decisions via judicial review of other agencies' decisions, it would have enacted subdivision (a) only. But the Legislature also enacted subdivision (c), which clearly forbids judicial review of any matter—including the Regional Board's application of Section 316(b)—that was or could have been determined by the Energy Commission.

Petitioner failed to discuss this issue in its opening brief, but its main argument below was that Section 25531 would effectively transfer the federally-delegated authority to issue NPDES permits from the Water Boards to the Energy Commission, in violation of the Clean Water Act. This is a straw man. There is no dispute that the authority to issue NPDES permits belongs to the Water Boards. But equally, there is no dispute that the permit conditions adopted by the Regional Board in this case, in collaboration with the Energy Commission, were incorporated in the Energy Commission's decision certifying the MLPP modernization project. The question, in these circumstances, is whether *judicial review* was properly sought in the Supreme Court pursuant to Section 25531, or in the

superior court pursuant to Water Code Section 13330. And that question depends on the proper construction of Section 25531 and the purpose of the Warren-Alquist Act. It is not affected, one way or the other, by federal law.

The EPA regulations governing delegation of NPDES permitting authority to the states do not require that judicial review occur in any particular court (*e.g.*, trial court versus appellate court), or that any particular standard of review apply, or that any particular procedure be followed. The EPA regulations require only that the state provide some form of judicial review that allows for "public participation." 40 C.F.R. § 123.30.

As noted above, when the permit was issued Section 25531(a) provided for review "in the same manner" in which decisions of the Public Utilities Commission were reviewed under Public Utilities Code Section 1756, which, in turn, provided that judicial review could be sought by "any aggrieved party." 1998 Cal. Stats. ch. 886, § 10; 2000 Cal. Stats. ch. 953, § 1. This is the same standing requirement that appears in Water Code Section 13330(b), which provides for a writ petition by "[a]ny party aggrieved by a final decision or order" of a Regional Board. Thus, there is no room to argue that Water Code Section 13330 satisfies the federal standard but that Section 25531 does not. Indeed, Section 25531, as it stood when Respondent's permit was issued, arguably was *more*

comparable than Water Code Section 13330 to the federal system, where judicial review is by an appellate court.[7]

If this Court agrees that the superior court lacked jurisdiction under Section 25531(c), the judgment denying the petition can be affirmed on that basis alone. But even if the superior court had jurisdiction, its denial of the petition was correct on the merits, as we demonstrate below.

II. THE ADMINISTRATIVE RECORD SUPPORTED THE CONCLUSION OF THE ENERGY COMMISSION AND THE WATER BOARD THAT THE NPDES PERMIT SATISFIED THE "BEST TECHNOLOGY AVAILABLE" STANDARD.

A. Even if the trial court correctly applied the independent judgment standard in reviewing the Water Boards' decisions, the trial court's own factual findings are subject to the substantial evidence standard on appeal.

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[7] While the EPA regulations do not require that states adopt the same judicial review procedures that are available in federal court, they do provide, as a safe harbor, that states will satisfy the "public participation" standard if their procedures allow the same "opportunity for judicial review" as Section 509 of the Clean Water Act. 40 C.F.R. § 123.30. Section 509 (33 U.S.C. § 1369(b)) provides for review "in the Circuit Court of Appeals of the United States for the Federal judicial district in which the [petitioner] resides or transacts business which is directly affected by [the challenged EPA] action...."

In reformulating the Clean Water Act issues on which it sought and obtained review, Petitioner has converted its arguments, for purposes of its brief, into a frontal attack on factual findings of the trial court. Accordingly, Respondent must identify the applicable standards of review.

If this Court concludes that Section 25531 does not apply and that the permit issuance is reviewable under Water Code Section 13330, then the standard of review applicable in the trial court is set forth in Section 13330(d):

> Except as otherwise provided herein, Section 1094.5 of the Code of Civil Procedure shall govern proceedings for which petitions are filed pursuant to this section. 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 in any case involving the judicial review of ... a decision or order of a regional board for which the state board denies review under Section 13320 ....

Code of Civil Procedure Section 1094.5(c), in turn, provides that where the trial court is authorized to exercise independent judgment, "abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence." In exercising its independent judgment, the trial court should defer to the expertise of the agencies. Independent judgment review

> does not mean that the preliminary work performed by the administrative board in sifting the evidence and in making its findings is wasted effort.... In weighing the evidence the courts can and should be assisted by the findings of the board. *The findings of the board come before the court with a strong presumption of their correctness, and the burden rests on the*

> *complaining party to convince the court that the board's decision is contrary to the weight of the evidence.*

Fukuda v. City of Angels, 20 Cal. 4th 805, 812 (1999) (citations omitted) (emphasis and ellipsis in original).

Even when the trial court is required to apply the independent judgment standard, the standard of review of the trial court's determination by the court of appeal or this Court is the substantial evidence test. *Fukuda*, 20 Cal. 4th at 824. Moreover,

> our standard of review must extend appropriate deference to the administrative agencies in this case, and their technical expertise. And while interpretation of a statute or regulation is ultimately a question of law, we must also defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision.

Communities for a Better Env't v. State Water Res. Control Bd., 109 Cal. App. 4th 1089, 1103-04 (2003) (citations omitted).

B. The Regional Board could properly consider cost in applying the "best technology available" standard of Section 316(b) of the Clean Water Act.

1. Overview of the NPDES permitting process.

The Clean Water Act generally prohibits discharges of pollutants that are not authorized by an NPDES permit. 33 U.S.C. §§ 1311, 1342. Such permits are issued by the EPA, unless a state has established a permit program that has been approved by EPA. *Id.* §§ 1342(a)-(c). In California,

NPDES permits are issued pursuant to an EPA-approved state program, which is administered by the State Board and the nine regional water quality control boards. *See* Cal. Water Code § 13370(c); 54 Fed. Reg. 40664 (Oct. 3, 1989).

Projects involving thermal power plants with a capacity of more than 50 MW also require certification by the Energy Commission pursuant to the Warren-Alquist Act. Cal. Pub. Res. Code §§ 25110, 25120, 25500. For such projects, the Energy Commission's certification process encompasses the environmental review mandated by the Clean Water Act, as discussed below.

The conditions for issuance of an NPDES permit include compliance with applicable technology-based effluent limitations established pursuant to Section 301 or Section 306 of the Clean Water Act (33 U.S.C. §§ 1311, 1316). 33 U.S.C. § 1342(a)(1). Standards for facilities with thermal discharges are specifically addressed in Section 316 (*id.* § 1326). Subsection 316(b)(*id.* § 1326(b)), which establishes the "BTA" requirement, provides:

> Any standard established pursuant to section 1311 of this title or section 1316 of this title 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.

2. The "Wholly Disproportionate" Cost-Benefit Standard.

For over two decades before the MLPP permit was issued, NPDES permitting agencies consistently considered cost in making BTA determinations for cooling water intake structures, using what came to be known as the "wholly disproportionate" test. That test was announced by EPA in deciding whether to require a utility to spend an additional $20 million to move a cooling water intake structure further offshore, based on the fundamental principle that technology-based standards have an economic component. *See In re Public Service Co. of New Hampshire, Seabrook Station,* 10 Env't Rep. Cases (BNA) 1257, 1261 (EPA June 17, 1977) ("*Seabrook* ") and *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 311-312 (1st Cir. 1979). Concluding that Section 316(b) could not reasonably be interpreted to require the use of technology whose cost was wholly disproportionate to the environmental benefit to be gained, EPA rejected the proposed modification. *Id.*[8]

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[8] Petitioner has made serious misstatements about *Seabrook* and another BTA case in trying to demonstrate that projected costs in those cases were in excess of some of the cost estimates in this case and yet failed to satisfy the "wholly disproportionate" standard. OB, at 55-56. Petitioner cites *Seabrook* as holding that a $100 million cost was not wholly disproportionate. That cost figure does not appear in the cited case. In fact, as stated above, $20 million was the projected cost discussed in the case—and it was subsequently determined to be "wholly disproportionate" to any environmental benefit. *Seacoast Anti-Pollution League*, 597 F.2d at 311-312. Petitioner also asserts that *In re Brunswick Steam Electric Plant* (1976 WL 25235 (EPA Office of

(continued...)

In applying this test, agencies have recognized that the cost of installing closed-cycle cooling systems at existing facilities can be "wholly disproportionate" to their environmental benefits. *See, e.g.,* *316 Determinations, John Sevier Steam Plant*, NPDES Permit No. TN0005436 (April 15, 1986) (Resp. Appx., at 87); *In The Matter Of Florida Power Corp.,* NPDES Permit No. FL0000159 (Sept. 1, 1988) (Resp. Appx., at 84); *PSE&G Salem Generating Station*, Response To Comments Document, NJPDES/DSW Draft Permit No. NJ0005622 (Resp. Appx., at 97-98). Likewise, federal courts consistently have upheld the consideration of costs in BTA determinations. *See Seacoast*, 597 F.2d at 311 (affirming use of the "wholly disproportionate" standard and stating that "[t]he legislative history clearly makes cost an acceptable consideration in determining whether the intake design 'reflect(s) the best technology available'"); *see also United States Steel Corp. v. Train*, 556 F.2d 822, 850 (7th Cir. 1977), *overruled on other grounds by City of West Chicago, Ill. v.*

(...continued)
General Counsel Opinion No. 41, June 1, 1976)) refused to find that a projected cost of $106 million was wholly disproportionate. That dollar number is not mentioned in the cited opinion, nor is the term "wholly disproportionate." (In fact, apparently EPA ultimately agreed not to require cooling towers estimated to cost more than $100 million but rather to require modifications to the once-through cooling system, just as was done at MLPP.) *See* May & Rossum, *The Quick And The Dead: Fish Entrainment, Entrapment, and the Implementation And Application of Section 316(b) of the Clean Water Act*, 20 VT. L. REV. 373, 408, 413 (1995).

U.S. Nuclear Regulatory Com'n, 701 F.2d 632 (7th Cir. 1983); *Hudson Riverkeeper Fund v. Orange & Rockland Utils., Inc.*, 835 F. Supp. 160, 166 (S.D.N.Y. 1993).

3. The *Entergy* decision.

In *Riverkeeper II*, the Second Circuit set aside EPA's 2004 "Phase II" regulations, which governed permit renewals for existing cooling water intake structures (as distinct from permits for new facilities), on the ground (among others) that Section 316(b) prohibited cost-benefit analysis in making BTA determinations for specific facilities. 475 F.3d at 97-105. Petitioner's leading argument in the petition for review in this case was that the court of appeal had upheld a cost-benefit analysis, and that this "apparent misunderstanding or misapplication of *Riverkeeper II* to allow for the use of a wholly disproportionate cost-benefit test... 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...." Pet., at 18.

In granting review, this Court took note that petitions for certiorari were pending in *Riverkeeper II*, and deferred further action until the United States Supreme Court acted on those petitions. Order filed March 19, 2008. This Court entered a similar order after certiorari was granted. Order filed January 14, 2009.

On April 1, 2009, the United States Supreme Court issued its opinion in *Entergy,* reversing *Riverkeeper II* and holding that Section 316(b) allows a cost-benefit analysis. 129 S.Ct. at 1510. *Entergy* thus eliminates the "state-federal conflict" claimed in the petition for review.

C. Substantial evidence supports the trial court's findings that the Regional Board properly considered the costs and benefits of alternative cooling technologies.

Petitioner now accepts, as it must in light of *Entergy*, that the Regional Board could properly conduct a cost-benefit analysis with respect to the permit at issue. Nevertheless, Petitioner disingenuously criticizes the Regional Board's application of the "wholly disproportionate" standard using the same arguments it previously advanced against any cost-benefit analysis. Rewriting its own "issue presented," Petitioner now asks this Court to re-examine the evidence submitted for the cost-benefit analysis and to reverse the trial court's findings with respect to the sufficiency of that evidence.

Contrary to Petitioner's suggestion (OB, at 15-17), alternative cooling system technologies were comprehensively reviewed and analyzed during the administrative proceedings. For example, the 316(b) Report discusses a broad range of technological alternatives, including:

- Offshore and onshore intake locations and configurations;
- A once-through cooling water system;

- Closed-cycle cooling systems (*i.e.*, mechanical and natural draft cooling towers);
- A closed-cycle air system (*i.e.*, air-cooled condensers);
- Behavioral barriers such as light, sound, bubble screens, and velocity caps;
- Fish diversion systems such as louvers and angled screens;
- Physical barriers such as drum screens, center-flow screens, and vertical traveling screens; and
- Operational and flow reduction alternatives.

AR, at 303124, 303137-41.

The 316(b) Report evaluated cooling system technologies on the basis of the following four site-specific criteria:

(1) the alternative technology is available and proven;

(2) implementing the technology will result in a reduction in the loss of aquatic organisms;

(3) implementing the technology is feasible at the Moss Landing Power Plant; and

(4) the total economic cost of the alternative technology is proportionate to the environmental benefits anticipated.

AR, at 303123. The criteria were applied progressively—that is, if the technology was found to be available and proven (first criterion), it was then subject to a biological evaluation (second criterion), and so on. *Id.*

After analyzing the range of potentially available technologies based on these four criteria, the 316(b) Report concluded that the existing once-through cooling system, as improved through the modernization project (including the installation of inclined traveling screens and reduction of the length of the intake tunnel), was the best technology available for the modernized MLPP. AR, at 303161.

The Energy Commission staff reviewed the 316(b) Report and, after receiving comments from other agencies and the public, prepared its FSA in which it discussed alternative technologies, including closed-cycle cooling water systems, alternative intake locations, behavioral and physical barriers, and fish diversion and conveyance systems. AR, at 303708-17. The Energy Commission's Proposed Decision also analyzed alternative cooling water systems. AR, at 303880-910, 303948-51. The Energy Commission's final Decision incorporated the discussion of cooling system alternatives in the Proposed Decision (AR, at 304255-64, 304327-30) and concluded that the proposed cooling system design represented the best technology available. AR, at 304247.

The Regional Board staff prepared its own Staff Report concerning Respondent's permit application (AR, at 305044-72), which concluded that the alternatives considered for minimizing entrainment effects would be much more expensive than the once-through cooling system and would cause other adverse environmental, aesthetic, and community impacts that

the proposed once-through cooling system did not. AR, at 305051. On that basis, the staff found that the costs of closed-cycle cooling alternatives (cooling towers with recirculating water, natural draft cooling towers, and air-cooled condensers) were wholly disproportionate to their environmental benefits and unreasonable relative to the entrainment impacts at Moss Landing. *Id.* The impingement effects were found not to be significant in the first instance. AR, at 306132, 306422.

In its Order approving the NPDES permit, the Regional Board found that the costs of alternatives to the modernized MLPP were wholly disproportionate to their environmental benefits. AR, at 305756.

The closed-cycle alternatives favored by Petitioner are discussed at numerous places in the record, and the evidence supports the Regional Board's finding that none of them represented BTA for the proposed project. Some of this evidence relates to non-water quality impacts of the alternative technologies, which are properly considered in Section 316(b) evaluations because they can reduce the overall environmental benefit achieved by a technology, which in turn would increase the relative disproportionality of its cost. The Regional Board properly determined that the varied environmental impacts of each alternative (air, noise, visual, land use, biology, etc.), as well as its economic cost and feasibility, rendered that alternative unsuitable:

1. Air-Cooled Condenser.

- Adverse visual impact caused by two cooling tower units, each approximately 80-90 feet high and occupying .75 acres. AR, at 300141, 303150-52, 303160, 303710, 304257, 305678.
- Increased noise. AR, at 300141, 301060, 303150, 303160, 305678.
- Large amount of exhaust heat. AR, at 305678.
- Loss of net energy output (40 to 60 MW) due to operating inefficiencies, resulting in revenue loss of $114 million over life of project. AR, at 300141, 303710, 304257, 304336, 305679.
- Increased capital costs of $30 million. AR, at 303150-52, 303710, 304257, 305051, 305679.

2. Mechanical Draft Cooling Tower (Freshwater).

- Not feasible because of inadequate supply of freshwater. AR, at 301058, 303145, 303710, 304256a.

3. Mechanical Draft Cooling Tower (Saltwater).

- Increased concentration of biocides, dispersants, and conditioning chemicals in blowdown, and increased temperature of discharge to Monterey Bay. AR,

at 301058, 303146, 303160, 303704, 303710, 304256a, 305676.

- Adverse air quality impact caused by "drift" rain, including salt water deposition impacts to agriculture, and increased PM10 emissions. AR, at 301059, 303148, 303160, 303710, 304257, 305677.
- Adverse visual impact caused by fog plume above cooling tower. AR, at 300142, 301059, 303146, 303160, 303710, 304257.
- Adverse visual impact caused by two cooling tower units, each approximately 400 feet high. AR, at 300142, 303145-48, 304256a, 305677.
- Increased noise. AR, at 300142, 301059, 303148, 303160, 303710, 304257.
- Loss of net energy output (9 to 38 MW) due to operating inefficiencies, resulting in revenue loss of $60 million over life of project. AR, at 301058, 303146, 303710, 304257, 304336 n.87, 305677.
- Increased capital costs of $12 million. AR, at 303146, 303704, 304257, 305051, 305677.

4. Natural Draft Cooling Tower.

- Increased concentration of biocides, dispersants and conditioning chemicals in blowdown, and increased temperature of discharge to Monterey Bay. AR, at 301059, 303150, 303160, 303704, 303710, 304256a, 305676.
- Adverse air quality impact caused by "drift" rain and increased PM10 emissions. AR, at 303150, 303160, 303710, 304257, 305677.
- Adverse visual impact caused by fog plume above cooling tower. AR, at 300142, 301059-60, 303710, 304257.
- Adverse visual impact caused by two cooling tower units, each approximately 370 feet high and 250 feet in diameter. AR, at 300142, 301059, 303148-50, 303160, 303170, 304336, 305677.
- Increased noise. AR, at 303150, 303160, 303710, 304257.
- Loss of net energy output (35 MW) due to operating inefficiencies, resulting in revenue loss of $51 million over life of project. AR, at 303150, 303160, 303704, 303710, 304336, 305677.

- Increased capital costs of $13 million. AR, at 303148-50, 303704, 304336, 305051, 305677.

In response to the superior court's Remand Order, the Regional Board reviewed the record of the 2000 NPDES permit approval and, based on updated research and information, expanded its cost/benefit analysis of the intake structure alternatives. RAR, at 000035-51. The Regional Board's staff relied on a number of scientific reports, including a 2003 EPA Technical Development Document setting forth cost methodologies for a number of model facilities. RAR, at 000221-66.

The staff analyzed the possible use of a closed cooling system for the MLPP, but again concluded that the environmental and economic costs were wholly disproportionate to the environmental benefit. The staff concluded that the cost of a closed cooling system would range from $47 million to $124 million and that such a system could itself have a variety of adverse environmental impacts. RAR, at 000044-48.

Petitioner argues that the Regional Board exercised an "unfettered" discretion in applying the "wholly disproportionate" standard, and that "its assessment was not guided by any defined criteria or parameters." OB, at 55, 57. This is an attack on the standard itself, rather than its application in this case. Even if Petitioner were allowed to pursue this argument for the first time in this Court, and without having sought review of it, its lack of merit is exemplified by Petitioner's reliance on federal cases that did *not*

consider that standard,[9] while ignoring those federal cases that did review the wholly disproportionate standard in BTA cases and upheld it. As discussed *supra* at 33, the wholly disproportionate standard had been applied by EPA and state environmental agencies, with federal courts reviewing and upholding the use of it in BTA cases, for more than two decades before the MLPP permit was issued. It is absurd to assert that the Regional Board had no guidance in this area.[10]

D. Whether or not *Riverkeeper I* and *II* are controlling or persuasive on the point, the trial court did not disagree with those cases on the issue of mitigation.

Primarily relying on *Riverkeeper I* and *Riverkeeper II*, Petitioner devotes five full pages to an argument that mitigation cannot serve as a

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9 *Riverkeeper I*, 358 F.3d at 193-94, and *Natural Resources Defense Council, Inc. v. EPA*, 863 F.2d 1420, 1432 (9th Cir. 1988).

10 Petitioner asserts that its argument that "mischief [] can be wrought by unbounded discretionary exceptions" is proven because a staff member who was cross-examined at the remand hearing before the Regional Board could not identify "when the balance tipped" from wholly disproportionate to proportionate (OB, at 58). During the remand proceedings, Petitioner's counsel posited *hypotheticals* and asked the staff member to decide them. The staff member correctly stated that he could not necessarily decide one way or the other on the hypothetical gaps posited by Petitioner's counsel without more information. RAR, at 000986-91. Of course, the staff member was not the decision maker. The Regional Board members, who heard Petitioner's counsel's cross-examination of the staff member and questioned him themselves during the remand hearing, made the decision as to whether the costs were wholly disproportionate to the environmental benefit.

substitute for technology in the BTA analysis, and that this Court should defer to the Second Circuit on this point. OB, at 41-45.[11] But there is no occasion to decide those legal issues. The courts below did not hold that mitigation qualifies as a "technology" for purposes of the BTA analysis. Indeed, the court of appeal stated that it did not have to decide that legal issue because it could affirm the trial court's ruling based solely on its factual component—*i.e.*, the trial court's finding that the Regional Board did *not* treat mitigation as an alternate technology for BTA purposes. Op., at 89-91. 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—and did—impose a mitigation project separate from the BTA requirements.

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[11] Contrary to Petitioner's repeated statements, the holdings of the *Riverkeeper* decisions that survive *Entergy* are not controlling outside the Second Circuit. In any event, *Riverkeeper I* involved challenges to EPA's Phase I regulations pertaining to *new* facilities, and would not be controlling as to *existing* facilities (such as the MLPP) even in the Second Circuit. The EPA's Phase II regulations at issue in *Riverkeeper II* deal with existing facilities, but they were promulgated by EPA well after the MLPP permit was issued, and thus are inapplicable by their terms.

1. The environmental enhancement project was not treated as an alternate technology.

Rather than treating the environmental enhancement program as a substitute technology that satisfied BTA, the Regional Board used the costs of environmental enhancement, along with various other methods, to try to put a dollar value on environmental benefits for purposes of determining, under Section 316(b), whether the costs of alternative technologies were wholly disproportionate to those benefits. The Regional Board staff used the "habitat equivalency" approach to assign a dollar number (*i.e.*, how much it would cost to create additional habitat to offset the potential loss of marine life), in addition to looking at the question in terms of ecological benefit. RAR, at 000927-33.

As the court of appeal recognized, mitigation is a legitimate factor to be considered by the Regional Board with respect to residual environmental harm (Op., at 89-90). Thus there was nothing wrong with the Regional Board considering, along with the other evidence on the alternatives summarized above, a $7 million habitat enhancement project proposed as mitigation by Respondent and the fact that the total environmental loss in the worst case scenario could be more than offset by it. The Regional Board properly incorporated that mitigation project in the NPDES permit (Finding No. 50), separate from the BTA finding (Finding No. 48). AR, at 305748-81.

Petitioner relies on select comments made by Board members as evidence that the mitigation project was integral to the BTA finding, but the snippets offered by Petitioner are misleading as to the overall nature of the Board's decision. The statements of the Board members explaining their votes make clear that the Board did not rely on the environmental enhancement program to satisfy the BTA standard. Rather, the Regional Board members concluded, without regard to the mitigation program, that the costs of alternatives to once-through cooling were wholly disproportionate to their benefits.

Mr. Young: We have had 50 years of the plant being on line. … [There are] *lots of impacts to the slough, the entrainment being one of them and really not that significant*, at least from what I have seen. It's there, but it's happening to species that are short-lived, have high fecundity, producing lots of offspring, there aren't any recreationally or commercially important species involved....

Mr. Jeffries: The biggest concern that I have for the Elkhorn Slough is the erosion and the scouring. I think we are *losing more with that than we are with the entrainment.*

Mr. Bowker: [T]here's not a great deal—*there's a real question about how much damage the entrainment actually does*, entrainment of survivability of various species.

Mr. Daniels: I can see that there definitely are some things that are really impacting the slough and money applied to those is definitely going to fix them, *whereas money applied to changing entrainment effect may not have any observable effect on the slough....* Unfortunately, I think I have to agree that I can't justify in my own mind *the expense of doing*

> *something that it looks like might not have any effect at all[,] any benefit at all in the things that people really care about.*

SAR, at 0018-22 (emphasis added).

It is clear that the Board members, in affirming Finding No. 48, found that the costs attendant to alternative cooling technologies were wholly disproportionate to the entrainment impacts that those technologies might prevent. Evidence that the Board members *also* attached value and importance to the mitigation project, and that some of them may have viewed it as more beneficial than an economically infeasible cooling technology, does not establish that the BTA standard was misapplied.

2. The record establishes the adequacy of the environmental enhancement project.

Again raising an issue on which review was not granted, Petitioner argues that "[e]ven [i]f [m]itigation [l]egally [c]ould [s]atisfy [s]ection 316(b)," there is no evidence in the record that the $7 million in program funds will be sufficient to offset impacts and that the proposed uses of the funds will be effective. OB, at 52-54. This, of course, is legally irrelevant because the project was not considered as an alternate technology in the BTA analysis, and Respondent is not arguing that it should have been. In any event, Petitioner mischaracterizes the record.

There is substantial evidence in the record that the environmental enhancement program would *more than offset* any impacts from entrainment at the modernized plant. For example:

- "Dr. Raimondi ... stress[ed] the nexus between the entrainment impacts of the new generating units and mitigation measures which would increase slough productivity sufficiently to completely compensate for the losses due to entrainment. (6/20/00 RT 166)." AR, at 304268.

- "[W]ith the total mitigation involved ... we can reduce the entrainment ... project impacts ... to [a] less than significant level ...." AR, at 306130.

Indeed, the members of the TWG were unanimous in their opinion that the environmental enhancement program would fully offset any potential entrainment impacts of the new generating units. AR, at 304268-69.

As to the actual costs of acquiring interests, Dr. Raimondi stated:

> fresh water buffer [land or] fresh water brackish habitats could be purchased for about $3,000 to $5,000 an acre. You can get a thousand to 1400 acres of that for [] $5 million. And you would provide really good habitat of wetland types or buffer types that would have two really beneficial consequences.

AR, at 306892. Petitioner points to no evidence to the contrary because there is none. As the Regional Board observed: "There was no evidence in the record of the Energy Commission hearing and none presented at the Regional Board hearing proposing a superior method for estimating the appropriate amount of mitigation." AR, at 305267.

III. THE INTERLOCUTORY REMAND ORDER WAS PROPER AND DID NOT DEPRIVE PETITIONER, OR ANYONE ELSE, OF AN OPPORTUNITY TO BE HEARD.

A. 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 its original BTA finding. OB, at 36-39. The assertion is another serious mischaracterization of the record.

As noted above, the Regional Board's Hearing Notice explained that the hearing would "provide an opportunity for all parties to present evidence and analysis regarding the BTA alternatives, their costs and their environmental benefits." RAR, at 000015. The Hearing Notice solicited testimony and evidence addressing all aspects of the alternatives to once-through cooling. RAR, at 000016 (quoted *supra*, at 18).

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 000898-99. 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 000797-808,

986-1024, 1053-1078, 1145-1153 and 1167-1170. Petitioner's decisions not to submit any affirmative evidence (except the Haddad memorandum) and to repackage its legal arguments against the Remand Order as "rebuttal" evidence (*see supra*, at 19-20), were its own tactical judgments; they do not establish that the remand proceedings were in any way unfair.

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 001203-05. It is absurd to assert that Finding No. 48 was not reconsidered by the Regional Board.

B. Interim remand in this situation was proper.

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 prevented 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's attempts to dismiss the cases recognizing courts' inherent authority to remand matters to agencies for further proceedings without entry of judgment (OB, at 34-35) are unavailing. 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").

As the court of appeal pointed out, the cases cited by Petitioner did not address the situation before it. Op., at 37, 43. The court of appeal correctly concluded "that the statute permits such a procedure in a proper case" and that this was such a case. Op., at 37.

The cases relied upon by Petitioner are inapposite. 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 findings on remand and did reexamine those findings.

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. *See id.* at 1216-17. Here, the superior court directed the Regional Board "to conduct a thorough and comprehensive analysis with respect to Finding No. 48 of [the NPDES permit]" (RAR, at 000011), and then itself reviewed the remand record and the Regional Board's action on Finding No. 48. Petitioner's due process rights were not infringed by the remand proceedings.

The other cases cited by Petitioner 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 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) applied because a final judgment had been entered, yet a remand was ordered in connection with that 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.*, 38 Cal. App. 4th 1574 (1995), the remand was incident to entry of judgment.

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 MLPP.[12] 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 MLPP, in direct violation of Section 25531(c).[13] The superior court was

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[12] This is true regardless of whether Section 25531(c) requires that judicial review be sought in this Court, an issue we discuss in Section I above.

[13] Even if the MLPP had been allowed to use its pre-modernization NPDES permit if its current permit had been vacated, its operations (continued...)

unwilling to interfere with the operation of the MLPP, 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).

C. The Regional Board could properly take new evidence on remand that could then be considered by the trial court.

The issue in each of the 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.*

For example, in *Pomona Valley Hospital Medical Center v. Superior Court,* 55 Cal. App. 4th 93, 101 (1997) (cited in OB, at 31, 37, and 38), a doctor filed an administrative mandamus action after he was suspended from a hospital's medical staff. The trial court granted the doctor's motion to depose the former president of the hospital's medical staff for the purpose of augmenting the administrative record. The deposition

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(...continued)
would have been curtailed to comply with those restrictions.

testimony, however, was never before the administrative agency. In our case, all of the evidence that the trial court considered was presented to and first considered by the Regional Board.

Petitioner relies on *Sierra Club v. Coastal Comm'n,* 35 Cal. 4th 839 (2005) (OB, at 37-38), which held that a court generally may not augment the record with evidence that was never before the administrative agency. That is not what happened in this case, where the Regional Board considered the evidence before it was submitted to the trial court.

Petitioner relies on *State v. Superior Court,* 12 Cal. 3d 237 (1974) for the proposition that the court is confined to the original record. OB, at 37. In that case the real party in interest sought to propound discovery interrogatories to augment the record before the trial court. Thus the Court said: "We agree that in reviewing the Commission's determination the trial court is confined to the record before the Commission unless [real party in interest] can show that it possesses evidence not presented to the Commission which it could not have produced in the exercise of reasonable diligence or unless relevant evidence was improperly excluded at the administrative hearing." *Id.* at 257. Again, in this case the challenged evidence was first considered by the Regional Board.

As the court of appeal noted when reviewing similar cases cited by Petitioner (OB, at 37-38[14]), they 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 overriding concern expressed in those cases 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 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

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[14] *Fort Mojave Indian Tribe,* 38 Cal. App. 4th at 1592-98 (trial court erred in remanding to consider evidence that did not come into existence until after the administrative decision was issued since the evidence in question was at best new analysis of data already considered); *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); *Eureka Citizens for Responsible Gov't. 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); *No Oil, Inc.*,13 Cal.3d at 81 (while a trial court can unquestionably remand a matter to an administrative agency for clarification of ambiguous findings, that doctrine did not apply because the agency initially failed to make any written determinations at all).

properly confined itself to the administrative record in reviewing the agency's finding.

Petitioner's suggestion that an interlocutory remand will encourage agencies to "selectively pack the record with new evidence to target the court's concerns" (OB, at 40) is obscure and inapposite. Petitioner itself submitted evidence and argument on remand, and one of the Regional Board members voted no after considering the remand record. 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." No case relied upon by Petitioner has considered the interlocutory remand issues in this context.

D. In any event, arguments with respect to remand are moot.

Even if Petitioner's procedural arguments were correct, which they are not, the only consequence would be that the superior court, instead of ordering an interlocutory remand, should have issued a writ of mandate setting aside the NPDES permit and requiring the Regional Board to conduct new hearings on the BTA issue. There is no reason to believe that administrative hearings conducted pursuant to such a writ would have had a different outcome than the hearings actually conducted by the Regional

Board pursuant to the Remand Order. Nor is there any reason to believe that judicial review of such administrative proceedings would have resulted in a different judgment than the actual post-remand review conducted by the superior court. No purpose would be served by this Court setting aside the NPDES permit and ordering the Regional Board and the superior court to conduct hearings they have already conducted and to make decisions they have already made. Petitioner's arguments with respect to remand are moot.

Even in the cases on which Petitioner relies, the courts' concerns were limited to ensuring that the petitioners had an adequate opportunity to challenge any supplemental findings made on remand. Thus, in *Resource Defense Fund*, the court observed: "had the [superior] court granted the writ of mandate compelling the city council to prepare new findings, plaintiffs would have been entitled to challenge *those* findings at that level and thereafter to litigate any claim of insufficiency of *those* findings." 191 Cal. App. 3d at 900 (emphasis added). Similarly, in *Sierra Club v. Contra Costa County*, the key deficiency in the remand procedure was that it "denied [the petitioners] an opportunity to challenge the adequacy of *the new findings which the Board adopted at the court's direction.*" 10 Cal. App. 4th at 1219 (emphasis added). Here, those concerns have been satisfied. Petitioner has had two opportunities to litigate the BTA issue

before both the Regional Board and the superior court—*i.e.*, both before and after the remand—and one opportunity to litigate all the other issues.

"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 life." *Boccato v. City of Hermosa Beach*, 158 Cal. App. 3d 804, 808 (1984); *accord Guardianship of Baby Boy M.*, 66 Cal. App. 3d 254, 276 (1977); *National Ass'n. of Wine Bottlers v. Paul*, 268 Cal. App. 2d 741, 746 (1969). Here, the parties' dispute over the propriety of an interlocutory remand (as opposed to a judgment vacating the NPDES permit) has been mooted by the Regional Board's conduct of hearings in compliance with the Remand Order and the superior court's review of the record developed in those hearings. Even if the original record were insufficient, Petitioner has merely identified a different procedural framework by which the superior court and the Regional Board could have addressed that problem. These procedural issues are now moot.

Although Petitioner avoids saying so directly, its basic position appears to be that, if the original NPDES permit did not pass muster in every possible respect, the superior court had no alternative but to vacate the permit, shut down the MLPP (or at least reduce its operations) and restart the administrative procedure from scratch. In Respondent's view, any writ that prevented or restricted the operation of the MLPP would have

directly violated Public Resources Code Section 25531(c), even if that statute did not deprive the superior court of all jurisdiction in the matter. *See supra*, at 23. But that issue too is moot, because no purpose would now be served by adjudicating whether the MLPP was properly allowed to operate during some interval in the past.

CONCLUSION.

For the foregoing reasons, we respectfully submit that, if the Court reviews the issues, the judgment should be affirmed insofar as it denies Petitioner's writ petition.

March 4, 2010.

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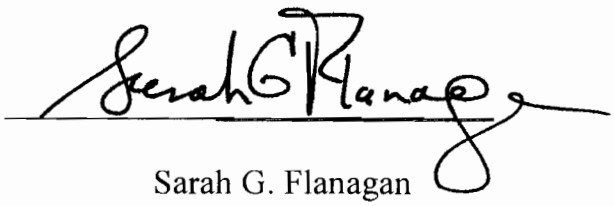
CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 13,781 words, not including the statement of issues on which review was granted, tables of contents and authorities, or this certificate, as counted by Microsoft Word, the computer program used to prepare this brief.

Dated: March 4, 2010



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. 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. On March 5, 2010, in San Francisco, I served a true copy of the attached document titled exactly DYNEGY'S ANSWER BRIEF ON THE MERITS 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 the express service carrier, with overnight delivery fees paid or provided for, clearly labeled to identify the persons being served at the addresses shown below:

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4. 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.

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Sixth Appellate District
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Clerk, Superior Court
County of Monterey
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Monterey, CA 93940

I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th day of March, 2010, at San Francisco, California.

Susan Macken

Susan Macken