

Case No. S160211

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

VOICES OF THE WETLANDS,

Petitioner,

v.

**CALIFORNIA STATE 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.

On Review from the Court of Appeal of the
State of California
Sixth Appellate District, Case No. H028021
Appeal from the Superior Court of California, County of
Monterey, Case No. M54889
The Honorable Robert A. O'Farrell, Judge

**ANSWERING BRIEF ON THE MERITS OF RESPONDENT
CALIFORNIA REGIONAL WATER QUALITY CONTROL
BOARD, CENTRAL COAST**

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INTRODUCTION

Elkhorn Slough is indeed an ecological gem. (Administrative Record (AR) 300863.) Respondent Regional Water Quality Control Board, Central Coast Region (Regional Water Board), the California Energy Commission (Energy Commission), and Real Parties in Interest Duke Energy, et al. (Duke Energy)¹ worked together for two years before the agencies issued their respective permits allowing Duke Energy to modify the Moss Landing Power Plant (Plant), which is adjacent to the Slough, to assure that it remains so.

The Elkhorn Slough continues to support a robust population of birds, fish, marine mammals, and all the organisms that feed them, almost sixty years after the Plant began operating the cooling water system at issue in this case. (AR 300859-0920.) The local Elkhorn Slough Foundation studied the Slough and made recommendations on improving its productivity in the Elkhorn Slough Conservation Plan dated July 2, 1999. (AR 300859-0920.) The plan listed the most significant threats to the critical resources within the Slough, and notably absent is the Plant: (1) sedimentation and contamination of marshes, largely due to uncontrolled runoff from steep cultivated fields; (2) destruction and fragmentation of maritime chaparral habitat associated with residential development; (3) severe depletion of groundwater resources and accompanying seawater intrusion due to excessive pumping of wells for irrigation; and (4) loss of marsh habitat by tidal erosion and conversion as a consequences of human manipulation (primarily the opening of the slough at the entrance to Moss Landing Harbor in 1947). (AR 300863-0864; 300878.)

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¹ The Moss Landing Power Plant is now owned by Dynegy Moss Landing, LLC.

After nearly a decade of litigation, two lower courts have upheld the conclusions of the Regional Water Board and the Energy Commission that an upgrade to the Plant could go forward in compliance with state and federal law – without endangering the Slough. Our positions are that: (1) the courts below had no jurisdiction to review the determinations made by the agencies because Voices failed to comply with the Warren Alquist Act (Pub. Resources Code, § 25531), (2) in any case, the agencies complied with the law, and (3) the trial court did not err when it remanded the case to one of the agencies for further consideration of one factual issue.

ISSUES PRESENTED

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

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² This issue is quoted directly from Voices’s Petition for Review. However, as explained below, the issue has now been resolved against Voices in *Entergy Corp. v. Riverkeeper, Inc.* (2009) ___ U.S. ___, 129 S.Ct. 1498, and, in its opening brief, Voices improperly attempts to change the issue.

3. 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 Assn. v. Superior Court* (1995) 9 Cal.4th 559, 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?

STATEMENT

I. THE MOSS LANDING POWER PLANT

The Moss Landing Power Plant has been operating since 1952 at its current site. After purchasing the plant from Pacific Gas & Electric Co. in May 1999, Duke Energy began plans to modernize the plant facilities by replacing older units with high efficiency units and upgrading the remaining two units. The modification plans also included changes to the plant's cooling system, including the water intake system. One purpose of these modifications was to reduce the plant's effects on Elkhorn Slough by reducing the size and number of organisms trapped by the plant's water intake system, used for cooling. (AR 300049, 302882.)

II. AGENCY REVIEW

Duke Energy filed an application for certification of planned modifications to the plant with the Energy Commission in May 1999. (AR 300002.) Shortly thereafter, the Regional Water Board's Executive Officer sent a letter to Duke Energy outlining the requirements for the issuance of a National Pollutant Discharge Elimination System (NPDES) permit for the planned modernization. (AR 304505-0509.) The letter emphasized that the Regional Water Board would work in parallel with the Energy Commission in developing the permits:

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The Regional Water Board's approval process will be carried out in parallel with the California Energy Commission's evaluation of Duke Energy's Application for Certification (AFC), consistent with the Memorandum of Understanding between the two agencies. . . .

Specifically, the Memorandum of Understanding between the staff of the California Energy Commission and the staffs of the State and Regional Water Quality Control Boards lays out an integrated approach concerning the issuance of the draft NPDES permit and the AFC approval process. It is our intent that the Regional Board's assessment of the Duke facility will be completed to allow for such an integrated review process as it relates to the preparation of the draft NPDES permit. . . .

(AR 304505.)

A. The Technical Working Group's Study of Environmental Effects of the Proposed Upgrade

The Regional Water Board and California Energy Commission organized a Technical Working Group of marine scientists, Energy Commission staff members, Duke Energy staff members, and other state agency members to evaluate the environmental effects of the modernization plans, with an emphasis on the effects of the modified facility's proposed new cooling system on the aquatic environment. (AR 304506.) The members of the Technical Working Group possessed considerable expertise with the marine environment and the effects of power plants on that environment. (AR 305187, 305782-5795, 305796-5804, 305805-5808.) The potential effects of the proposed once-through cooling system included the capture or "impingement" of organisms at the water intake screens, the "entrainment" of tiny organisms that slip through the screen and are killed, and the release of heated water into Monterey Bay. (AR 303868.)

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To accomplish this task, the Technical Working Group worked for over a year conducting studies in the Elkhorn Slough, and collecting data from the Slough and surrounding waters to determine what kind of organisms were in the water and which species were likely to be affected by the proposed new generating units, including the proposed cooling system.

After reviewing the study results, the Technical Working Group concluded that the environmental effects from the outflow of warm water (thermal effects) and the effects of inflow impingement were not significant. (AR 306122.) The group concluded, however, that entrainment impacts could be significant under a worst-case scenario, that is, when the plant operated at maximum capacity. (AR 306122.)

B. The California Energy Commission Proceedings

Duke Energy filed its Application for Certification (AFC) with the Energy Commission in May 1999. (AR 300001-0858.) After reviewing the application, the Energy Commission requested supplemental information from Duke Energy with regard to several environmental issues, including biological resources and water quality. (AR 300291.) Duke Energy submitted these supplemental data to the Energy Commission on July 30, 1999. (AR 300921-1085.)

The Energy Commission held a public informational hearing and site visit on September 7, 1999, provided many opportunities for public written comment, including three days of public evidentiary hearings on June 7, 15 and 20, 2000, a committee conference on the specific issues relating to the cooling system on July 17, 2000, and three more days of hearings on a proposed decision on September 21, October 23, and October 25, 2000. (AR 303191, 301943, 301106-1107, 306808.)

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The Energy Commission entered Order 00-1025-24 approving Duke Energy's AFC with Conditions of Certification and authorizing construction. (AR 304096-4098.) Those conditions included compliance with all provisions of the NPDES permit. (AR 304341.) The Energy Commission: (1) determined that the cooling water intake system satisfied the best technology available (BTA) requirements of the Clean Water Act; and (2) through its Conditions of Certification, ordered Duke Energy to comply with the NPDES permit requirements.

The Energy Commission approved the certification during a publicly-noticed hearing on October 25, 2000. (AR 304107.) The certification order was issued on November 3, 2000. (AR 304096-0098.)

C. The Regional Water Board Proceedings

The Regional Water Board received Duke Energy's NPDES permit application in January 2000. (AR 301520-1521.) A draft NPDES permit was circulated on June 26, 2000. (AR 304766-4794.) The draft permit included several modifications to the proposed facility operations. These included elimination of discharge into the Elkhorn Slough, stringent water temperature limitations for the discharge into Monterey Bay, and further modifications to the existing intake structure, such as modifications to the screens at the intake so that larger organisms would not be trapped, and moving the intake from the Slough to the harbor area outside the Slough. (AR 304766-4794.)

The Regional Water Board held a hearing on the proposed permit on September 15, 2000. (AR 305044-5072.) The Regional Water Board continued the matter and directed staff to provide more information regarding a proposed habitat enhancement plan and the feasibility of moving the intake structure offshore. (AR 305560.)

Accordingly, a Supplemental Staff Report was prepared for the October 27, 2000, hearing. (AR 305560-5563.) That Report concluded

that moving the intake structure offshore presented its own environmental concerns, and thus was not a reasonable solution to reducing the environmental impacts of the proposed cooling system. The staff also recommended several changes to the habitat enhancement plan to strengthen it. (AR 305663-5665.) The Regional Water Board approved the NPDES permit at the October 27, 2000, after receiving further public input. (AR 305748.) In one of 58 findings, the Board specifically found that the costs of a closed-cycle cooling system – an alternative to the once-through cooling system – were wholly disproportionate to its environmental benefits. (AR 305756.)

D. The Trial Court Proceedings

On July 26, 2001, Voices filed a petition for writ of mandate in the superior court, challenging the NPDES permit issued by the Regional Water Board, but not the Energy Commission certification. The Water Boards³ and Duke Energy demurred to the petition on the ground that the superior court lacked jurisdiction under the Warren-Alquist State Energy Resources Conservation and Development Act (Warren-Alquist), Public Resources Code section 25531, subdivision (c). The Energy Commission supported the demurrers as amicus curiae. The trial court overruled the demurrers.

After a hearing on the merits, the trial court ruled that that the Regional Water Board had not adequately studied the alternatives to the once-through cooling system, contrary to Clean Water Act section 316(b), 33 U.S.C. § 1326(b), and ordered the Board to reconsider one of the 58 findings – Finding 48.

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³ The State Water Resources Control Board was dismissed from this action by the trial court.

The trial court's order had two basic parts. The first ordered the Regional Water Board to conduct a thorough and comprehensive analysis of the available alternatives to the approved cooling water system applicable to Moss Landing Power Plant. (Remand Administrative Record (RAR)⁴ 000007.) Because the plant was operational and the modifications were nearly complete at the time of the hearing,⁵ the second part stated that “[n]othing in this decision compels an interruption in the ongoing plant operation during the Regional Board’s review of this matter.” (*Id.*) The trial court did not issue a final judgment or writ of mandate at that time, but retained continuing jurisdiction.

Upon remand, the Regional Water Board held an evidentiary hearing on the issues specified in the superior court’s order, with Voices as a full participant, and including public comment. (RAR 000894-1206.) At the hearing Voices objected to the remand hearing, objected to the introduction of new evidence, and requested the Board open up the entire permit for review, not just Finding 48 specified in the trial court’s order. (RAR 001167-1168.)

The Board members discussed the various alternatives to once-through cooling, including the closed-cycle cooling alternatives, such as cooling towers with recirculating fresh or salt water, natural draft cooling towers, or air-cooled condensers. The Board found that closed-cycle cooling alternatives were not appropriate at the site, in part because each had significant adverse environmental impacts, including increased air pollution from the huge salt plumes on local farms located downwind of the plant from the salt water alternative, increased demand on an already over-

⁴ The Remand Administrative Record comprises “Moss Landing Power Plant Administrative Record”, Volumes 1 through 13. The Bates stamped pages do not bear the “RAR” identification.

⁵ Voices never sought an injunction to stop the plant modifications.

taxed freshwater supply, and reduced energy efficiency of the units. (RAR 001193-1197.) The Board also found that the much more expensive air-cooled condensers (also known as dry cooling) might provide environmental benefits, but the cost was not justified, considering the extensive data showing the robust marine habitat even after fifty years of plant operations. (RAR 001193-1201.) The Board concluded that these considerations supported its initial conclusion that the costs of the once-through cooling alternatives were wholly disproportionate to the benefits. (*Ibid.*) The NPDES permit was upheld by a four to one vote of the Board. (RAR 001203-1206.)

Voices petitioned for review of the Regional Water Board's decision to the State Water Resources Control Board. The State Water Board dismissed the petition on the grounds that it failed to "raise substantial issues that are appropriate for review." (SAR 000001.)⁶

Upon stipulation amongst the parties, the Board's permit decision went back to the trial court in the original proceeding. After a hearing the trial court rejected Voices's arguments regarding the evidence to support the Board's BTA finding, rejected its arguments regarding the remand procedures and rejected its challenge to the habitat enhancement plan, which Voices had raised before the Regional Water Board at the remand hearing. The trial court entered judgment denying the petition on August 17, 2004.

Voices appealed, as did the Regional Water Board and Duke Energy. The Court of Appeal upheld the trial court's decision in its entirety, and Voices's petition for review by this Court followed.

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⁶ SAR refers to the Supplemental Administrative Record submitted by Voices.

STANDARD OF REVIEW

The issues presented to this Court require differing standards of review. The threshold jurisdictional question of whether Public Resources Code, section 25331, subdivision (b), deprived the trial court of jurisdiction of this case is a question of law, which is reviewed *de novo*. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.)

If the superior court did have jurisdiction, then in its review of the NPDES permit, the trial court properly applied the standard of review in Water Code section 13330, which requires the court to exercise its independent judgment. “In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.” (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817; see also *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1484.) On appeal, the standard of review is the substantial evidence test. (*Fukuda v. City of Angels, supra*, 20 Cal.4th at p. 824.) Each reviewing court must afford the agency’s decision a presumption of correctness. (*Id.* at pp. 817-819.) “The trial court’s legal determinations receive a *de novo* review with consideration being given to the agency’s interpretation of its own statutes and regulations.” (*City of Rancho Cucamonga v. Regional Water Quality Control Bd., supra*, 135 Cal.App.4th at p. 1384, citing *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 879 and *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482.)

Finally, with regard to Voices’s challenge to the authority of the trial court to order a remand hearing on a single factual finding that it found to have lacked sufficient evidence rather than issuing a writ declaring the

permit void and remanding for recommencement of the entire proceedings before the Regional Water Board, this issue is a question of law which is reviewed *de novo*.

ARGUMENT

I. THE SUPERIOR COURT LACKED JURISDICTION OVER THIS ACTION

The Court need not reach the substantive issues, because Voices cannot overcome the predicate issue that the superior court lacked jurisdiction to consider Voices's writ petition.

Jurisdiction here depends on the interplay between the judicial review provisions of the Porter-Cologne Water Quality Control Act (Porter-Cologne) (Wat. Code, § 13300 et seq.) and the Warren-Alquist Act (Pub. Resources Code, § 25000 et seq.). Generally, under the Porter-Cologne Act, the superior court reviews decisions by the Water Boards:

Any party aggrieved by a final decision or order of a regional board for which the state board denies review may obtain review of the decision or order of the regional board in the Superior Court by filing in the court a petition for writ of mandate not later than 30 days from the date on which the state board denies review.

(Wat. Code, § 13330, subd. (b).) However, the Energy Commission's exclusive jurisdiction over the certification of all sites and facilities relating to power plants extends to judicial review. (See Pub. Resources Code, §§ 25500, 25531.)

A. The Purpose Behind the Warren-Alquist Act's "One-Stop" Licensing for Power Plants and the Attendant Expedited Judicial Review Remove Jurisdiction from the Superior Court

Enacted in 1974, the Warren-Alquist Act created the Energy Commission, in part "to establish and consolidate the state's responsibility for energy resources . . . and for regulating electrical generating and related

transmission facilities.” (Pub. Resources Code, § 25006; see generally *id.* § 25500.) Through the Warren-Alquist Act, the Legislature sought to avoid “regulatory fragmentation and uncertainty” in the field of electricity generation in California. (*Public Util. Com. v. Energy Res. Conserv. & Devel. Com.* (1984) 150 Cal.App.3d 437, 453.)

The Warren-Alquist Act gives the Energy Commission exclusive jurisdiction over the certification of new power plants that generate at least 50 megawatts, and modifications of existing power plants that add at least 50 megawatts of generating capacity. (See Pub. Resources Code, §§ 25110, 25119, 25123, 25500.) Three key provisions in the Warren-Alquist Act establish a comprehensive, “one-stop” “certification” (licensing, permitting) process for power plants.

First, the Legislature consolidated most permits at the Energy Commission:

The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.

(Pub. Resources Code, § 25500.) Second, the Legislature also gave the Energy Commission the authority to override otherwise applicable laws in specified circumstances. (*Id.*, § 25525.) Thus the Legislature clearly indicated its intent to centralize the permit process.

The Legislature also understood, of course, that federal law could prevent full implementation of the “one stop” concept, but it nevertheless stated that the one stop concept should be fully applied “to the extent

permitted by federal law.” For example, as in the instant case, the federal NPDES program implemented by the State and Regional Water Boards applies to power plants that discharge pollutants into navigable waters. (See generally *Environmental Protection Agency v. California ex rel. State Water Resources Control Board* (1976) 426 U.S. 200, 206-208; see also Wat. Code, §§ 13370-13389.)

The third way in which the Warren-Alquist Act consolidates power plant licensing is through its extraordinary judicial review provision, which, as this Court has noted, is designed to “expedite the state’s ultimate authorization of electric generating plants” in order “to ensure a reliable supply of energy” (*County of Sonoma v. State Energy Resources Conservation and Development Commission* (1985) 40 Cal.3d 361, 370-371.) That Act provides for judicial review only by this Court:

(a) The decisions of the commission on any application for certification of a site and related facility are subject to judicial review by the Supreme Court of California.

[¶]

(c) Subject to the right of judicial review of decisions of the commission, no court in this state has jurisdiction to hear or determine any case or controversy concerning any matter which was, or could have been, determined in a proceeding before the commission, or to stop or delay the construction or operation of any thermal powerplant except to enforce compliance with the provisions of a decision of the commission.⁷

⁷ The quoted version of subdivision (a) became effective on May 22, 2001. Previously, subdivision (a) provided for judicial review “in the same manner as the decisions of the Public Utilities Commission on the application for a Certificate of Public Convenience and Necessity for the same site and related facility.” From 1996 until May 2001, such review was
(continued...)

(Pub. Resources Code, § 25531, subds. (a) & (c).)

As explained below, because the issues raised by Voices, are a “matter which was, or could have been, determined in a proceeding before the commission,” (*id.*), there is a conflict between the Porter-Cologne Act and the Warren-Alquist Act regarding judicial review. The two acts must be harmonized if possible. (See *Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310.) If they cannot be harmonized, then “later enactments supersede earlier ones,” and “more specific provisions take precedence over more general ones.” (*Ibid.*)

B. Conformity of the NPDES Permit with Applicable State and Federal Law Was a Matter that Was, or Could Have Been, Decided by the Energy Commission

1. The Energy Commission not only Could Have Determined the NPDES Permit’s Conformity with the Applicable State and Federal Law, It Was Required to Do So

The coordinated scheme of administrative and judicial review established by the Warren-Alquist Act encompasses compliance with environmental laws such as the BTA requirement of section 316(b) of the Clean Water Act, and both enables and requires the Energy Commission to make determinations as to the matters raised by Voices’s writ petition to the superior court. The Warren-Alquist Act requires, for example, that the Energy Commission’s certification decision include specific provisions

(...continued)

available by writ in either the Court of Appeal or the Supreme Court. (See *Santa Teresa Citizen Action Group v. Energy Res. Conserv. & Dev. Com.* (2003) 105 Cal. App. 4th 1441, 1451 [citing former Pub. Util. Code, § 1756].) Thus, when the Energy Commission certified the Plant modernization project in November 2000, Voices could have sought review of that decision in the Court of Appeal or the Supreme Court. It did neither.

relating to the manner in which a proposed facility is to be designed, sited, and operated “in order to protect environmental quality and assure public health and safety.” (Pub. Resources Code, § 25523, subd. (a).) In so doing, the Energy Commission must determine that the proposed facility conforms “with public safety standards and the applicable air and water quality standards, and with other applicable local, regional, state, and federal standards, ordinances, or laws.” (Pub. Resources Code, § 25523, subd. (d)(1).) Nothing in the Act or applicable case law suggests that the “water quality standards” and “federal standards . . . or laws” specified in this subdivision do not include section 316(b) of the Clean Water Act, or that the specification of “state . . . standards . . . or laws” does not include relevant provisions of the Porter-Cologne Act, including its NPDES permitting provisions (Wat. Code, §§ 13370-13389).

Furthermore, the Energy Commission must ensure that its record contains evidence sufficient to support all these statutorily-required determinations. For example, the Energy Commission’s staff must present the results of its “environmental assessments” in a report. (Cal. Code Regs., tit. 14, § 1742.5, subd. (c).) Moreover:

The staff shall monitor the assessment of environmental factors by interested agencies and shall assist and supplement the agencies’ assessment *to ensure a complete consideration of significant environmental issues in the proceeding.*

(*Id.*, subd. (d), emphasis added.) Whether the cooling system for a power plant uses the best technology available to protect water quality, in compliance with section 316(b) of the Clean Water Act, undoubtedly is a “significant environmental issue.”

The provisions discussed above all give the Energy Commission authority to make determinations on the matters raised in Voices’s original writ petition to the superior court. Any more restrictive reading of the Warren-Alquist Act would undermine its primary purpose, and thus is not

permissible. (See *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 666 [“in interpreting statutes, our goal is to ascertain the Legislature's intent so as to give effect to the law's purpose” (citation and quotation omitted)]; *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003 [court “must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences” (citation and internal quotation omitted)].) That primary purpose, as explained above, is to expedite consideration of the siting and certification of thermal power plants by, among other things, consolidating that consideration and review in one administrative body.

2. The Permit's Conformity to Applicable State and Federal Law Was, in Fact, Determined by the Energy Commission

That the Energy Commission could have made determinations regarding the conformity of the NPDES permit to applicable state and federal law (as established in the first instance by the Regional Water Board), and whether it satisfied the Clean Water Act's BTA requirement, is sufficient to bring those issues within the purview of Public Resources Code section 25531, subdivision (c), and thus preclude the superior court's consideration of the matters. A review of the record, however, also reveals that the Energy Commission in fact did make a determination on the very matter that Voices challenged in the superior court.

For example, the Energy Commission's Presiding Member's Proposed Decision included an independent analysis of the BTA requirement for the cooling water intake structure, referencing the draft NPDES permit (cited as Exhibit 77 to the decision) as ensuring that the modernization project would meet water quality standards, including the BTA requirements of section

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316(b) of the Clean Water Act. (AR 304246-4247, 304264-4266, 304330, 304338.)

Similarly, the Energy Commission entered Order 00-1025-24 approving Duke Energy's AFC and authorizing construction. (AR 304096-4098.) That Order adopted a decision that summarized the proceedings, the evidence presented, and the rationale for the findings and Conditions of Certification, including a determination that the Conditions of Certification would "ensure that the project will be designed, sited, and operated *in conformity with applicable local, regional, state, and federal laws, ordinances, regulations, and standards, including applicable public health and safety standards, and air and water quality standards.*" (AR 304096, emphasis added.) Those Conditions included compliance with all provisions of the NPDES permit. (AR 304341.) The Energy Commission's "staff concurred that the proposed design represents the best technology available." (AR 304329-4330.)

In sum, the Energy Commission: (1) determined that the cooling water intake system satisfied the BTA requirements of the Clean Water Act; and (2) through its Conditions of Certification, ordered Duke Energy to comply with the NPDES permit requirements. These are the same matters that Voices later raised in its challenge in the superior court, which therefore are matters that section 25531 expressly precluded the superior court from deciding.

C. The Review Provision of the Warren-Alquist Act Controls in this Case

On their face, the conflicting judicial review provisions of the Porter-Cologne Act and the Warren-Alquist Act both apply to the Board's NPDES decision and the Commission's certification. The Porter-Cologne Act provides for review of decisions of the Water Board in the superior court. Such review includes challenges to the Water Board's determination of the

validity of NPDES permits it issues, including, specifically, their compliance with the Clean Water Act's best available technology requirement. Under the Warren-Alquist Act, however, such determinations may, and must, also be made by the Energy Commission, in cases where the NPDES permit is necessary for the operation of a power plant within the Energy Commission's certification authority.⁸ And, under the Warren-Alquist Act, the superior court lacks jurisdiction to "determine any case or controversy concerning any matter which was, or could have been, determined in a proceeding before the commission." (Pub. Resources Code, § 25531, subd. (c).)

The acts may be harmonized, however, by viewing the Warren-Alquist Act as an exception to the more general judicial review provisions of the Porter-Cologne Act. The Porter-Cologne Act speaks to judicial review, generally, of Water Board decisions. The Warren-Alquist Act speaks, specifically, to matters that were or could have been determined in the course of Energy Commission proceedings pertaining to power plants within the Commission's jurisdiction. In such a circumstance, it is the Warren-Alquist Act that controls. "It is well settled ... that a general provision is controlled by one that is special, the latter being treated as an exception to the former. . . ." (*Rose v. State of California* (1942) 19 Cal.2d 713, 723-724, 123 P.2d 505.)." (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577; see also *Rumsey, supra*,
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⁸ Under current California law, as approved by U.S. EPA, while the Energy Commission is not authorized to issue a NPDES permit, it is authorized to make determinations that a power plant within its jurisdiction will comply with applicable state and federal law, including Clean Water Act section 316(b) and conditions of certification that require continued compliance with that NPDES permit.

24 Cal.4th at p. 310; *Medical Bd. of California v. Superior Court* (2001) 88 Cal.App.4th 1001, 1004-1006.)

To the extent the two statutes are deemed irreconcilable, however, it is the more recently enacted statute, Public Resources Code section 25531 (enacted in 1974, Stats. 1974, ch. 276, § 2, p. 532), that controls over the earlier enacted one, Water Code section 13330 (enacted in 1969, Stats. 1969, ch. 482, § 18, p. 1069). (See, e.g., *California Correctional Peace Officers Assn. v. Department of Corrections* (1999) 72 Cal. App. 4th 1331, 1340 & fn. 9.) Nothing in the Warren-Alquist Act or its legislative history suggests that the Legislature intended that there be any exceptions to the clear commands of section 25531 on the exclusivity of judicial review. Therefore, there is no reason not to apply the rule that where statutes are in conflict, the later-enacted prevails.

These conclusions comport with the overall objective of statutory interpretation, discerning the intent of the Legislature, so that 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* (1987) 43 Cal. 3d 1002, 1008; see also *People v. Coronado* (1995) 12 Cal.4th 145, 151.) As detailed in section I.A. above, the objective of Warren-Alquist is to prevent delays in the provision of electrical power, while the evil to be remedied was regulatory fragmentation and uncertainty in the field of electrical generation. Allowing for judicial review under the Porter-Cologne Act provisions would impermissibly trump these clear legislative purposes.

In this regard, it is important to recognize the converse: Nothing in the purposes underlying the Porter-Cologne Act is thwarted by interpretation of the two acts advanced here. The purpose of the Porter-Cologne Act is to protect water quality. (See Wat. Code, § 13000.) The

purpose of that Act's provisions creating the State's in-lieu-of program for NPDES permits (Wat. Code, §§ 13370-13389), is exactly that: "to authorize the state to implement the provisions of the Federal Water Pollution Control Act [Clean Water Act]." (Wat. Code, § 13370, subd. (d).) The path of judicial review mandated by the Warren-Alquist Act is consistent with the Porter Cologne Act's environmental purposes, and Voices never has argued to the contrary. Similarly, as detailed below, that path of judicial review satisfies all the requirements of the Clean Water Act and thus also is consistent with the specific purposes of Chapter 5.5 of the Water Code.

D. Neither the Court of Appeal's Reasoning, nor the Arguments Advanced Below by Voices Undermines the Conclusion that the Superior Court Lacked Jurisdiction

The Court of Appeal actually agreed with the basic argument outlined above: that if this were an issue exclusively of state law, and merely a determination of how to reconcile the Warren-Alquist Act with the Porter-Cologne Act, the correct conclusion would be that review of the substantive issues raised by Voices would be pursuant to the Warren-Alquist Act, via a challenge in the Court of Appeal or the Supreme Court to the Energy Commission's determinations, and that the Superior Court lacked jurisdiction. (*Voices of the Wetlands v. Cal. State Water Resources Control Bd. (Voices)* (2007) 157 Cal.App.4th 1298, 1301.)

The Court of Appeal decided, however, that this is not entirely an issue of state law, and that federal law requires that the Porter-Cologne Act's judicial review provision trump the conflicting provisions in the Warren-Alquist Act. (See *Voices, supra*, at p. 1303.) This conclusion was erroneous. Although federal law provides the context of this dispute insofar as the Clean Water Act authorizes the state to adopt and implement its own NDPES permitting system in lieu of a federal system of permits

issued by the Environmental Protection Agency (see 33 U.S.C. § 1342(b)), it does not dictate or even inform the resolution of the apparent conflict between Porter-Cologne and Warren-Alquist.

The Court of Appeal reasoned that because NPDES permits are issued by the Regional Water Board pursuant to authority granted to it under the Clean Water Act (33 U.S.C. § 1342(b)), federal law controls the outcome of the conflict between the Warren-Alquist Act and the Porter Cologne Act, concluding that the permit at issue here was a “federal approval,” and this made all the difference. (*Voices, supra* at pp. 1303-1304.) In doing so, the Court of Appeal offered only two reasons for its decision: (a) that the NPDES is a federal permit, and (b) that the Energy Commission must follow all applicable local, regional, state, and federal (such as the Clean Water Act) laws. (*Ibid.*) This reasoning cannot withstand scrutiny.

1. A Water Board-Issued NPDES Permit is a State Permit, not a Federal Approval

The Court of Appeal’s main premise, that the permit is a “federal approval,” does not settle anything. First, that conclusion was erroneous as a matter of law. NPDES permits issued by the Regional Water Boards are not federal permits that the Boards have been delegated authority to issue. They are state permits, issued pursuant to state law. . (*Shell Oil Company v. Train* (9th Cir. 1978) 585 F.2d 408, 410-412.)⁹ The Clean Water Act does not delegate administration of the federal NPDES program to states, but instead “suspends” the issuance of the federal permits altogether, allowing states to adopt their own, state-law programs in lieu of the federal

⁹ In contrast, certain air permits applicable to power plants are federal, even though issued by the states. (See, e.g., *City of Morgan Hill v. Bay Area Air Quality Management District* (2004) 118 Cal.App.4th 861, 871-873.)

system. (See 33 U.S.C. § 1342(c)(1).) State permit programs are “establish[ed] and administer[ed] under State law.” (33 U.S.C. § 1342(b).) Congress emphasized this distinction:

The conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the Federal program. It is not a delegation of Federal authority. This is a point which has been widely misunderstood with regard to the permit program under section 402 of the Act. That section . . . provides for State programs which function in lieu of the Federal program and does not involve a delegation of Federal authority.

(H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess., p. 104, reprinted in 1977 U.S. Code Cong. & Admin. News at p. 4479; see also *State of Cal. v. U.S. Dept. of Navy* (9th Cir. 1988) 845 F.2d 222, 225-226 [“state permit programs are not a delegation of Federal authority, but instead are state programs which function in lieu of the Federal program” [citation and quotation omitted].) As the District of Columbia Circuit Court of Appeals has explained: “States, under State law, . . . issue State discharge permits. These [are] State, not Federal actions . . .” (*District of Columbia v. Schramm* (D.C. Cir. 1980) 631 F.2d 854, 861 [quoting 118 Cong. Rec. 33761 (1972), reprinted in 1 Cong. Research Serv., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 262 (remarks of Rep. Wright)]; see also, e.g., *Chesapeake Bay Foundation, Inc. v. United States* (E.D. Va. 1978) 445 F.Supp. 1349, 1353; *Chesapeake Bay Foundation, Inc. v. Virginia State Water Control Bd.* (E.D. Va. 1978) 453 F.Supp. 122, 126; *American Paper Institute, Inc. v. U.S. E.P.A.* (7th Cir. 1989) 890 F.2d 869, 874.)

Because the permit at issue here is a state permit, the Court of Appeal’s decision, which is based on the contrary conclusion, is in error.

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2. No Federal Law Prohibits the Path of Approval Dictated by State Law

In any event, the entire issue of whether the permit here is a “state permit” or a “federal permit” is a red herring. As explained above, to the extent that state law is controlling, it dictates that the issues Voices raises could not properly be heard by the superior court, as even the Court of Appeal agreed. The only question relating to federal law is not whether the permit is a state permit or a federal permit, but whether federal law allows the Energy Commission to determine whether a Regional Water Board-issued NPDES permit complies with applicable law and water quality standards, with subsequent judicial review as prescribed by the Warren-Alquist Act, Public Resources Code section 25531.

Neither the Court of Appeal nor Voices has identified any such federal constraint.

a. Federal law does not preclude the Energy Commission from making a determination that the Moss Landing Power Plant’s intake structure reflects the best technology available

It is correct, as the Court of Appeal noted, that the Regional Water Board, not the Energy Commission, issued the NPDES permit underlying this action. It also is correct that only the Regional Water Board, and not the Energy Commission, has authority to issue such permits. (Wat. Code, § 13377.) And, further, there is no dispute that the Regional Water Board itself determined that the NPDES permit was valid, pursuant to its authority under state and federal law. (See Wat. Code, §§ 13370-13389; 33 U.S.C. §§ 1342(b) & (c).)

But these truths do not alter or even call in to question the conclusion that the Energy Commission had authority to make the determination it did. The Energy Commission made an independent determination that the

permit complied with applicable law. Nothing in the Clean Water Act precludes the Energy Commission from doing so; nor does anything in the Porter-Cologne Act. In fact, as explained above, the Warren-Alquist Act required the Energy Commission to make that determination.

Voices argued below that this reading somehow implies that Warren-Alquist “preempts” the Porter-Cologne Act, and gives the Energy Commission “legal authority actually to implement or enforce the Clean Water Act.” (Voices Court of Appeal Reply Brief at p. 10, Regional Water Board Appendix at p. 021.) Voices contended: “given EPA’s delegation of the NPDES permit program exclusively to the Water Boards, the usurpation of that role by the Energy Commission would be directly contrary to federal law.” (*Id.* at p. 12; Reg. Wat. Bd. Appen at p. 023.) This argument is wrong for several reasons. As noted above, the characterization of the state-federal relationship as one of delegation is incorrect.

Further, the Regional Water Board, not the Energy Commission, actually issued the NPDES permit for the Moss Landing Power Plant. Regardless of the Energy Commission’s determination, the Regional Water Board will have authority to enforce the NPDES permit it issued under provisions of state law. (See, e.g., Wat. Code, § 13385.) But, this case and this question are not about enforcement or implementation. They are about the appropriate pathway for judicial review. Regardless of which path is chosen, the Regional Water Boards’ jurisdiction to enforce and implement the permit program remains intact.

b. Federal law does not require Water Code section 13330, subdivision (b), to be given priority over Public Resources Code section 25531, subdivision (c)

As to that pathway for review, the EPA regulations allowing approval of NPDES permitting authority for a state do not require that state judicial review occur in any particular court (e.g., trial court versus appellate court),

that any particular standard of review apply, or that any particular procedure be followed. The regulations require only that the state provide some form of judicial review and allow for “public participation in the permitting process.”

State NPDES programs must adhere to the requirements of federal law, which includes requirements on the type of judicial review that a state NPDES program must provide:

All States . . . shall provide an opportunity for judicial review in State Court . . . that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see Sec. 509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.)

(40 C.F.R. § 123.30 (2008).)

Only if Public Resources Code section 25531’s judicial review path is not “sufficient” under the foregoing federal regulation does federal law prevent its application here. In fact, section 25531 is sufficient. It does not “narrowly restrict the class of persons” who may seek judicial review, neither in any of the ways expressly set forth in the federal provision nor in any other way.

At the time the permit for the power plant relating to this action was issued, section 25531, subdivision (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 at the time was in the Court of Appeal but is now exclusively this Court). (See *Santa*

Teresa Citizen Action Group v. Energy Res. Conserv. & Devel. Com. (2003) 105 Cal.App.4th 1441, 1451 fn. 6.) Section 1756, in turn, provided that judicial review could be sought by “any aggrieved party.” (Stats. 1998, ch. 886, § 10; Stats. 2000, ch. 953, § 1.) Moreover, section 25531 “allows an opportunity for judicial review that is the same as [federal judicial review].” Section 509 of the federal Clean Water Act provides that judicial review of EPA NPDES permits is in the federal Courts of Appeals. (33 U.S.C. § 1369(b)(1).) Such review is available to “any interested person . . . directly affected” (*id.*), which is essentially the same as the Warren-Alquist Act’s “aggrieved person.” This is also the same standing requirement that appears in Water Code section 13330, subdivision (b), which provides for a writ petition by “[a]ny party aggrieved by a final decision or order” of a Regional Water Board. Thus, there is no room to argue that Water Code section 13330 satisfies the federal standard but that section 25531 does not.

Voices also has suggested below that if review is of the Energy Commission’s determinations, not direct review of the Water Board’s determinations, then Warren-Alquist “does not provide any substantive standards against which the Supreme Court or any other court can evaluate the adequacy of the Clean Water Act permit.” (Voices Court of Appeal Answering Brief, p. 16, Reg. Wat. Bd. Appen. at p. 027.) This is irrelevant. As noted above, Warren-Alquist requires the Energy Commission to make determinations about the consistency of a proposed power plant with all applicable state, local, and federal laws, including the Clean Water Act and the Porter-Cologne Act. (Pub. Resources Code, § 25523, subd. (d)(1).) There is no reason why an appellate court could not apply those state and federal standards in a proceeding under section 25531, just as this Court is being asked to apply them in the present proceeding.

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For these reasons the trial court did not have jurisdiction to hear Voices's challenge to the NPDES permit.

II. THE WATER BOARD PROPERLY CONSIDERED THE COSTS AND BENEFITS OF ALTERNATIVE COOLING TECHNOLOGIES IN MAKING ITS SECTION 316(B) DETERMINATION

Section 316(b) of the Clean Water Act requires that the "location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impacts. (33 U.S.C. § 1326(b).) The issues here are: (1) whether costs can be considered in determining what counts as the "best" technology available, and (2) whether habitat enhancement, replacement, or restoration can be considered as part of the "technology" that section 316(b) requires.

The first question has been resolved by the United States Supreme Court. On April 1, 2009, the United States Supreme Court held that cost-benefit analysis can be used to determine compliance with section 316(b), and the Court approved the "wholly disproportionate" standard that the Regional Water Board applied. (*Entergy Corp. v. Riverkeeper, Inc.* (2009) ___ U.S. ___, 129 S.Ct. 1498, 1508-1510, AR 305756.) Voices does not even address the issue in its opening brief.

Instead, Voices now argues that: (a) the Regional Water Board's "wholly disproportionate test" impermissibly gives the Board "unfettered" discretion; and (b) the Board's cost-benefit analysis is not supported by the administrative record. (Voices Opening Brief (Voices Op. Brf.) at pp. 55-61.) This is improper. Voices failed to present these issues in its Petition for Review, and they are outside the scope of briefing ordered by this Court. (Compare Voices's Petition for Review at pp. 1, 12-19 [dated Jan. 3, 2008], with Order [filed Sept. 9, 2009] ["The parties are directed to brief all issues raised in the petition for review and the answer to the petition."].) These issues are not "fairly included in the petition or answer." (Cal. Rules

of Court, rule 8.516(a)(1) and (b)(1).) If the Court decides to reach these issues anyway, we address each one below.

A. The Water Board Properly Applied the Wholly Disproportionate Test and Exercised its Discretion in Performing its Section 316(b) Analysis

In *Entergy*, the U.S. Supreme Court approved the precise “wholly disproportionate” standard that the Regional Water Board applied. (See *Entergy*, 129 S.Ct. at pp. 1509-1510; AR 305756.) Voices contends that the Water Board’s determination that the costs of alternative technologies were wholly disproportionate to their benefits was “open-ended,” and “led to exactly the unfettered (and unreviewable) discretion that courts reject.” (Voices Op. Brf. at p. 57.) In effect they contend that the Board should have adopted specific criteria for the wholly disproportionate test. This argument, rejected by both the trial court and the Court of Appeal (*Voices, supra* at pp. 1354-1355) misconstrues the applicable law.

In the absence of uniform regulations or other national standards, NPDES permits are issued on a case-by-case basis, with the agency using its best professional judgment. (*Natural Resources Defense Council v. U.S. E.P.A.* (1988) 863 F.2d 1420, 1425 (*NRDC v. EPA*); 66 Federal Register. 65256 (Dec. 18, 2000), [Phase I final regulations]; 67 Fed. Reg. 17122-17123 (Apr. 9, 2003), [Phase II draft regulations]; 69 Fed. Reg. 41578 (July 9, 2004), [Phase II final regulations].) At the time of the Regional Water Board’s decision in this action, there were no regulations applicable to section 316(b) determination. (*Entergy, supra*, 129 S.Ct. at p. 1503-1504; see also *Voices, supra*, at pp. 1341-42.)¹⁰

¹⁰ Other than the cases existing at the time, legal guidance for the Regional Water Board was found in a 1977 EPA draft guidance document, U.S. Environmental Protection Agency, Office of Water Enforcement, Permit Division, Industrial Permits Branch, Washington, D.C., Draft
(continued...)

It is true that the Clean Water Act does not permit an agency to exercise “unfettered” discretion, even when acting on a case by case basis, and using its best professional judgment. Thus, for example, in *NRDC v. EPA*, *supra*, 863 F.2d at p. 1432, the Ninth Circuit held invalid a permitting scheme that allowed applicants to request a variance from existing regulations simply by providing some information to the agency, but specified no standard at all for determining when such applications should be granted. (*Ibid.*) The key to the Ninth Circuit’s holding in *NRDC v. EPA* was its finding that the rule at issue there specified “no discernable standard . . . and [failed to define] when requests . . . should be granted or denied.” (*Ibid.*) Applicants could request a variance by providing certain specified information, but nothing in the permitting scheme told the EPA when or when not to grant the application. (*Ibid.*)

In this case, in stark contrast, there was a discernable standard that defined when the Regional Water Board need not require implementation of alternative technologies: the Board could do so only if the cost of those technologies was wholly disproportionate to their benefits. Here, the Regional Water Board considered alternative cooling technologies and the unique environmental and other factors of the Moss Landing facility, and applied EPA’s longstanding “wholly disproportionate” standard.

Courts have held that this standard imposes real constraints on an agency, and on that basis have expressly distinguished cases in which an agency is constrained by the “wholly disproportionate” standard from the standardless rule rejected in *NRDC v. EPA*. (See *Riverkeeper I*, *supra*, 358 F.3d 174, 193-194, at p. 193 [“Unlike the variance provision remanded in

(...continued)

Guidance for Evaluating the Adverse Impact of Cooling Water Intake Structure of the Aquatic Environment Section 316(b), P.L. 92-500 (May 1, 1977) (1977 Draft Guidance). (RAR 002407-2522.)

Natural Res. Def. Council, Inc. v. U.S. EPA, 863 F.2d 1420 (9th Cir.1988), § 125.85 [variance for costs “wholly out of proportion” with the EPA cost estimates, or where compliance with the standard would result in “significant adverse impacts” on energy or the environment] does not leave alternative requirements to the Agency's ‘unfettered’ discretion. [Citation.]”.)

To the extent that Voices is arguing that the Regional Water Board was required to more precisely define this standard, this claim finds no support in applicable case law or the 1977 Draft Guidance (RAR 002407-2522) available at the time the board issued the permit.

Courts have held, in analogous circumstances where a “wholly disproportionate” standard applies, that, for example, “[t]he selection of the point of diminishing returns is a matter for agency determination.” (*Chemical Mfrs. Assn. v. U.S. E.P.A.* (5th Cir. 1989) 870 F.2d 177, 207 [quoting *American Petroleum Inst. v. E.P.A.* (10th Cir. 1976) 540 F.2d 1023, 1037-1038].) And, accordingly, courts repeatedly uphold agency determinations based on such standards without demanding more specificity. (See, e.g., *ibid.*; *Rybachek v. U.S. E.P.A.* (9th Cir. 1990) 904 F.2d 1276, 1289; *BP Exploration & Oil, Inc. (93-3310) v. E.P.A.* (6th Cir. 1995) 66 F.3d 784, 796.)

Natural Resources Defense Council v. Muszynski (2d Cir. 2001) 268 F.3d 91, 102-103, is instructive. In that case, the EPA had determined that a 10% “margin of safety” was adequate for the purposes of regulating phosphorus in drinking water. The plaintiffs argued that “margin of safety” was ill-defined, and “that no scientific or mathematical basis prescribed this percentage as opposed to any other.” (*Id.* at p. 102.) The Second Circuit rejected this argument, however, holding that a “best professional judgment” standard, requires courts to allow agencies to exercise their judgment, and does not require agencies to define a “rigorously precise

methodology.” (*Id.* at pp. 102-103; see also *City of Arcadia v. State Water Resources Control Bd.*, (2006) 135 Cal.App.4th 1392, 1412 [citing *Muszynski*]; (*Citizens Coal Council v. U.S. E.P.A.* (6th Cir. 2006) 447 F.3d 879, 890 [scientific determinations by a permitting agency are entitled to the highest degree of deference]; see also *So. Cal. Jockey Club v. Cal. etc. Racing Bd.* (1950) 36 Cal.2d 167, 177.)

Here, the Regional Water Board weighed a variety of factors, as detailed below, and ultimately determined that the costs of alternative technologies ranged from \$50-114 million, whereas the benefits were on the order of only \$7 million. The Board weighed these cost estimates, along with other factors. (RAR 001193-1201, *Voices, supra*, at 1321.) The Board ultimately concluded, on these bases, that the costs were wholly disproportionate to the benefits. (AR 305756.) This is exactly the sort of exercise of professional judgment that the cases cited above approve. Nothing in the Clean Water Act, or any other law, required the Water Board to first define “wholly disproportionate” as meaning that costs are at least ten times [or four times; or eighteen times] greater than the benefits before making a decision.

In an aside, *Voices* asserts that in two proceedings, the EPA “determined that expenditures of over \$100 million for cooling towers or deep sea were not wholly disproportionate to the environmental benefit of these technologies.” (*Voices Op. Brf.* at pp. 56-57.) On the contrary, a close reading of those two decisions, *In re Pub. Service Co. of New Hampshire, (Seabrook Station)*, 10 Environment Rptr. Cases (BNA) 1257, 1262 (EPA June 17, 1977) (RAR 005337-5630) and *In re Brunswick Steam Electric Plant*, 1976 WL 25235 (EPA Office of General Counsel Opinion No. 41, June 1, 1976) (Reg. Wat. Bd. Appen. at pp. 112-118) reveals that neither one made any determination that any specific cost – much less “over \$100 million” – was wholly disproportionate to the estimated benefit

in that case. The *Brunswick Steam* decision does not even apply the “wholly disproportionate” standard.

Voices’s assertion is also irrelevant. Even if EPA did conclude that \$100 million in costs was not wholly disproportionate to the benefits in specific circumstances presented in each of those proceedings, EPA did not purport to establish a numeric formula for applying the wholly disproportionate standard nationwide. Extrapolating such a rule from these two decisions would be antithetical to the whole notion of case-by-case determinations – even if the decisions included a detailed analysis of how to apply the wholly disproportionate standard.

B. The Water Board’s Determination that the Costs of Alternative Technologies were Wholly Disproportionate to Their Benefits was Supported by Substantial Evidence

Voices offers another argument that was rejected by both the trial court and the Court of Appeal: That the Water Board’s conclusion that the costs of alternative technologies are wholly disproportionate to their benefits is “unsupported by the administrative record.” (Voices Op. Brf. at p. 55; see also *id.* at pp. 58-61.) “The oft-repeated standard for evaluating such challenges is clear: ‘In reviewing the evidence on . . . appeal all conflicts must be resolved in favor of the [prevailing party], and all legitimate and reasonable inferences indulged in to uphold the [finding] if possible.’ [Citation.]” (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) The Board’s conclusions easily satisfy this standard.

Methodology. Although the details are complex, the basics of the method the Board used to estimate the benefits are fairly straightforward. To quantify the potential benefits that might be achieved with alternative technologies, the Board used a “habitat equivalency” analysis. (RAR 000046, one of three potential methods to determine the value of the larval

losses.) This approach requires an agency to (1) estimate the loss of species to the power plant operations from entrainment), (2) express that loss as a percentage of estimated total populations of the species in the affected water body (here, 13% from Elkhorn Slough), (3) assume that loss of this percentage of the species is equivalent to the loss of that percentage of their productive habitat, and (4) finally estimate what it would cost to replace that habitat. (RAR 000927-0930.) The theory behind this process is that the proportion of organisms lost through the cooling water intake structure is equivalent to the proportion of land necessary to support those organisms, and the environmental value (benefit) from saving those organisms is equivalent to the cost of buying enough land to support them. It is one environmental valuation methodology.¹¹

Voices describes this method as something the Board “concocted.” (Voices Op. Brf. at p. 59.) The method, however, is based on an approach recommended by the EPA itself at the time of the Board’s decision. (See RAR 002407-2470.) Voices primarily complains about the details of how Board implemented it, arguing that the Board underestimated species loss and underestimated land acquisition costs, specifically that (a) the 13% species loss number on which the analysis is based is too low, and (b) the Board’s estimate of what it might cost to purchase the equivalent amount of land is too low because the Board underestimated land acquisition costs. (Voices Op. Brf. at pp. 58-61.) Neither complaint has merit.

¹¹ The agency's habitat equivalency approach took the assumed percentage of larvae lost to entrainment (13%), and multiplied it by the surface area of the slough (3,000 acres), to arrive at an acreage equivalency (390 acres). The figure of 390 acres thus represents lost productivity due to entrainment. Calculations were then made to value those 390 acres based upon local land values. The staff report concluded: “Based on actual, local values, the cost of purchasing and/or restoring this habitat was calculated as \$1.2 million to \$9.7 million.” (*Voices, supra* at p. 1355; RAR 000048.)

Species Loss Estimate. As to the first asserted error,¹² Voices contends that the 13% larval loss estimate underestimated the total environmental effect of the entrainment, because that estimate is based on data about the loss of only a “handful” of all the species that inhabit Elkhorn Slough. (Voices Op. Brf. at p. 59.) To support this contention, Voices cites to a statement in an EPA document that opines that environmental assessments of the effects of power plant cooling systems that are limited to only a “subset” of all the potentially affected species are “potentially” likely to underestimate the effects. (*Id.* at p. 60.)

This extra-record evidence¹³ does not help Voices’s argument, because substantial evidence supports the agency’s approach. It is true that the Board’s studies were based on data from a subset of the species inhabiting Elkhorn Slough. (See, e.g., AR 306330; RAR 000990-1002; Voices Op. Brf. at p. 92.) However, the record reveals that surveying the effects on all species was impossible. One of the Board’s experts testified that it “just be to[o] difficult” obtain data on all species in the Slough, and so any estimate that included more than the sample species would be a “scientific wild ass guess.” (AR 306331.) A different expert testified “there is absolutely no way of figuring out the quantity of those [other species] that are being taken.” (AR 306332.) A wild guess of any sort is not substantial evidence. (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1144; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096.)

¹² We note that Voices did not raise this issue in the superior court or in its opening brief in the Court of Appeal, raising it for the first time in its appellate reply brief. (Reg. Water Bd. Appen. at pp. 103-104.) The issue is not addressed in the Court of Appeal’s decision.

¹³ This proposed rule was not in effect at the time of the Board’s decision at issue here.

The record, moreover, includes significant expert testimony explaining why using the subset selected was reasonable and representative. (See, e.g., AR 306333-306336; 306335; see also RAR 000102:2-7 [explaining specifically why surveying entrainment of crab species was too difficult]; RAR 000106:7-15 [explaining why surveying entrainment of clams was too difficult]; RAR 000105:7-25 [explaining why using only a subset of species was reasonable in light of the impossibility of obtaining data on all species].)

Land Cost Estimate. Voices's second evidentiary complaint is that the Board's estimate of the cost of acquiring habitat to replace the 13% loss was too low because the Board relied on per-acre cost estimates that were too low. (Voices Op. Brf. at pp. 60-61.) Specifically, Voices argues that all the evidence in the record pointed to per-acre costs of between \$60,000 and \$260,000, and there was, according to Voices, no substantial evidence to support the approximately \$18,000 per acre estimate the Board relied on. (*Ibid.*)

Again, substantial evidence supports the agency. The evidence in the record includes testimony before the Energy Commission, on June 20, 2000, at which the valuation for the acquisition of wetland ranged from \$12,000 to \$260,000 per acre. (AR 306125.) The upper end of this range was discarded as "luxury wetlands in Southern California," (AR 306124-1125), and there was testimony that a more moderate range of \$12,000 to \$25,000 per acre was more appropriate to the Elkhorn Slough area. (*Ibid.*) Dr. Raimondi testified at the remand hearing that some larger parcels could be acquired in the \$2000 to \$4000 range. (RAR 001028, 001174-1175.) And the Elkhorn Slough Foundation report lists per acre estimates for Elkhorn Slough acquisition projects as between \$3000 to \$5000 per acre. (AR 300891-0892; see also AR 306376 [testimony of Elkhorn Slough

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Foundation Executive Director Mark Silberstein regarding land acquisition costs in area].)

The Coastal Conservancy – a state agency whose functions include the purchase of environmentally valuable land in areas like Elkhorn Slough (see generally Pub. Resources Code §§ 31000-31410; see also *ibid.* §§ 31105 [authorizing Conservancy to purchase land]; 31054 [legislative statement of purpose]) – advised the Water Board to rely on information provided by the Elkhorn Slough Foundation: “We encourage you to avail yourself of [the Elkhorn Slough Foundation] as you consider appropriate compensation for the environmental effects of the power plant expansion.” (AR 305600; see also AR 305599 [recommending the “technical abilities and local knowledge of the Elkhorn Slough Foundation].)

Given substantial evidence in the record supporting the agency, any conflicting evidence that Voices identifies is insufficient to meet its burden. (See *Western States, supra*, 9 Cal.4th at p. 571 [existence of conflicting evidence does not render agency decision invalid].)

III. THE EVIDENCE IN THE RECORD SUPPORTS THE FINDINGS THAT THE ENVIRONMENTAL ENHANCEMENT PLAN WAS NOT AN INTEGRAL OR UNPERMITTED SUBSTITUTE FOR BEST TECHNOLOGY AVAILABLE

The Second Circuit has held that mitigation does not qualify as a “technology” for purposes of section 316(b). (*Riverkeeper II, supra*, 475 F.3d at p. 110.) Voices argues that the Regional Water Board impermissibly included the proposed habitat restoration plan in its assessment of the best available technology for the power plant modification at issue here. Contrary to Voices’s assertions, however, the Regional Water Board relied on the habitat restoration project as a method to estimate the value of eliminating entrainment for purposes of the wholly disproportionate analysis, not as a technological component of its BTA analysis.

The trial court made a factual finding, upheld by the Court of Appeal, that “the present record of the Regional Water 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 best technology available considerations, the Board’s determination does not rest on that plan as the basis for its best technology finding.” (Pet. App. at p. 80.)

The record, both from the original hearing standing alone, and the remand hearing, includes substantial evidence supporting these determinations, as the Court of Appeal found. (*Voices, supra*, at p. 1352.) At the remand hearing before the Regional Water Board, the Board was advised by counsel that best technology available “is defined as any kind of changes to the cooling water intake structure, including location, design, construction and capacity. And so it’s about the cooling water structure.” (RAR 000904.) Counsel also noted that the habitat enhancement program was “outside the scope of the language of [section] 316(b).” (*Ibid.*) The chair of the Regional Water Board was careful to limit the purposes for which admission of evidence on the mitigation plan could be used. (RAR 000912, 000931, 000932, 000934, 000940.) Board counsel Ms. Soloway and the Board chair Daniels specifically stated that the habitat enhancement was not part of the BTA discussion before the Regional Water Board. (RAR 000948.)¹⁴ Substantial evidence supports the trial court and Court of Appeal’s determinations that the BTA determination was legally sufficient. Nothing in section 316(b) constrained the board from requiring additional mitigation measures after making their BTA determination.

¹⁴ Ms. Soloway stated, the mitigation program can be considered “icing on the cake,” (RAR 000948) rather than an integral part of the BTA finding.

IV. THE REMAND TO THE REGIONAL WATER BOARD WAS CONSISTENT WITH LAW

Voices contends that the trial court lacked authority to remand to the Regional Water Board under section 1094.5 of the Code of Civil Procedure without first entering a judgment and vacating the Board's decision, and that even if remand was proper, the Board lacked authority to consider new evidence at the remand hearing.

A. The Limited Remand Prior to Entry of Judgment and Without Issuing a Writ Fit the Circumstances of the Action and was not Contrary to Law

At the conclusion of the proceedings described above, the trial court found a problem with one of 58 separate findings made by the Regional Water Board: It found the NPDES permit lacking in its discussion of BTA alternatives. (RAR 000003, 000006 [pp. 2 & 5 of Intended Decision, dated October 1, 2002].) In view of the limited nature of the defect it found in the Regional Water Board's initial decision, and in view of the fact that the Plant already was operational, the court used its equitable powers to issue an order of remand, rather than issuing a judgment and vacating the Board's decision. (See RAR 000001-000007.) In doing so, it noted: "Nothing in this decision compels an interruption in the ongoing plant operation during the Regional Water Board's review of this matter." (RAR 000007.)

Voices contends that the limited remand conflicts with Code of Civil Procedure section 1094.5, arguing that subdivision (f) requires a court to issue a judgment granting the writ petition (and therefore vacating the entire administrative decision) before remand. Subdivision (f), however, does not compel the conclusion Voices urges. The section provides, in relevant part: "The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ." As the

Court of Appeal's well-reasoned discussion of the issue demonstrates, the provision does not limit the superior court's authority over the conduct of its proceedings, including its authority to order a limited remand. (See *Voices, supra*, at pp. 1311-1316.)

More specifically, although this provision arguably limits the superior court's alternatives at the end of its proceedings to enter a final judgment either (a) ordering the respondent to set aside the challenged decision, or (b) denying the writ, nothing in section 1094.5, subdivision (f) precludes the court from issuing other orders, including remand orders, prior to entry of a final judgment. (See generally, *id.* at pp. 1311-1312 [reviewing cases involving interlocutory orders in mandamus proceedings].) "To hold otherwise would exalt form over substance." (*Voices, supra*, at p. 1313, citing, *Giannini Controls Corp. v. Superior Court* (1966) 240 Cal.App.2d 142, 151; see also, e.g., *Ng v. State Personnel Bd.* (1977) 68 Cal.App.3d 600, 604 [court's remand was an interlocutory order, not a final, appealable judgment]; *County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 85 [appellate court's earlier decision in mandamus proceeding "was an interim one which did not terminate the lawsuit"].)

Thus, for example, remand has been used, consistent with section 1094.5, to correct procedural defects at the administrative level, such as where there has been no fair hearing. (*Steen v. City of Los Angeles* (1948) 31 Cal.2d 542, 546; see also, e.g., *English v. City of Long Beach* (1950) 35 Cal.2d 155, 159-160; *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1174.) Remand also has been used to correct a procedural defect when the evidentiary record of the administrative hearing is inadequate. (See *Aluisi v. County of Fresno* (1958) 159 Cal.App.2d 823, 828; but see *id.* at p. 826 [writ issued].) "Moreover, courts have held that the trial court has the power to remand a matter to an administrative agency for clarification of ambiguous findings." (*Rapid Transit Advocates, Inc. v.*

Southern Cal. Rapid Transit Dist. (1986) 185 Cal.App.3d 996, 1003, citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 81, and *Keeler v. Superior Court* (1956) 46 Cal.2d 596, 600.)¹⁵

Voices also urges that the section 1094.5, subdivision (f)'s mandate that the court either "set aside the order or decision" or deny the writ required the superior court set aside the *entire* decision of the Regional Water Board before remanding to that agency, and argues that the only permissible judicial remedy was "a writ of mandate ordering respondents to set aside the NPDES permit." Once more, nothing in section 1094.5 requires this "all or nothing approach," precluding a limited remand for limited purposes prior to entry of a final judgment either setting aside the order or decision, or denying the writ. It is permissible for a court to direct "issuance of a limited writ of mandate" in an administrative mandamus proceeding. (*Helene Curtis, Inc. v. Los Angeles County Assessment Appeals Bds.* (2004) 121 Cal.App.4th 29, 33; *id.* at p. 42 [respondent tax agency was ordered only to hold a hearing on petitioner's application to reduce its assessed valuation]; cf., *Evans v. Department of Motor Vehicles* (1994) 21 Cal.App.4th 958, 976 [in proceedings under the Administrative Procedures Act, the agency itself may order an administrative reconsideration of only "part of the case" pursuant to Gov. Code, § 11521]; see also *Stoumen v. Reilly* (1951) 37 Cal.2d 713, 717 [where disciplinary proceedings against a liquor licensee were based on two counts, only one of which was supported by the evidence, "the matter should be remanded to the board" to reconsider the penalty alone"]; *Cooper v. State Bd. of Medical Examiners* (1950) 35 Cal.2d 242, 252; *Nelson v. Department of Corrections*

¹⁵ Such an approach is consistent with federal regulations governing the NPDES program, which provide that when a state reopens or modifies a permit, "only the conditions subject to modification are reopened." (See 40 C.F.R. § 122.62.)

(1952) 110 Cal.App.2d 331, 334 [where only two of six disciplinary charges against a civil service employee were supported by the evidence, limited remand was proper to reconsider just the penalty, rejecting the petitioner's contention "that respondent Personnel Board should be required to hold an entirely new hearing"].)

Here, the trial court ordered the agency to set aside one finding, and it ordered the Regional Water Board "to conduct a thorough and comprehensive analysis" with respect to that finding alone. (RAR 000007.) The effect of that order was "to remand the case to the board for proper proceedings" as to that single issue. (*Voices, supra*, at p. 1315.) Limited remand was appropriate in this case in that the administrative order as a whole was broad ranging and complex, covering far more than the BTA issue, 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.

Because section 1094.5, subdivision (f), does not bar a remand, a trial court has inherent authority to return a discrete matter to an administrative agency for further proceedings. "Courts have inherent power, as well as power under section 187 of the Code of Civil Procedure, to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council." (*Tide Water Assoc. Oil Co. v. Superior Court* (1955) 43 Cal.2d 815, 825.)

The cases on which *Voices* relies are not to the contrary. *Voices* cites *Resource Defense Fund v. Local Agency Formation Commission* (1987) 191 Cal.App.3d 886, and *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, for the proposition that the trial court does not have the authority to order a remand to the agency before judgment. Those decisions, however, are based on the court's view that in the specific

circumstances that obtained in each case, the remand proceedings and subsequent return to the superior court failed to provide all parties and the public with an adequate hearing concerning the remand issues, thus raising due process concerns. (See *Resource Defense Fund, supra* at p. 900; *Sierra Club, supra*, at p. 1221.)

Here, in contrast, Voices fully participated in the remand hearing as a party, subsequently argued its position at the hearing before the trial court, and further filed this appeal bringing forward the same challenges. There was no lack of opportunity for Voices to review and challenge the agency action during the remand and subsequent judicial proceedings in this case.

“The essential requirements of due process are met when the administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made [citations] and the party is afforded an opportunity for review by the courts [citation].” (*De Cordoba v. Governing Board* (1977) 71 Cal.App.3d 155, 159.) In this case Voices fully participated in the administrative hearing and was afforded an opportunity for judicial review. Thus its constitutional right to due process was not violated. (*Ibid.*)

Under the circumstances presented here, and for the reasons stated above, the trial court acted properly in remanding the matter to the Regional Water Board for additional hearings on Finding 48 only.

B. The Regional Water Board and the Trial Court Acted Properly In Allowing Additional Evidence in the Remand

Voices contends that the trial court’s acceptance and consideration of the evidence produced at the remand hearing was erroneous. Specifically, Voices argues that admission of this additional evidence: (1) was barred by Code of Civil Procedure section 1094.5; and (2) undermines the “integrity

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of the judicial process.” (Voices Op. Brf. at pp. 37-40.) Neither contention has merit.

As to section 1094.5, the overriding purpose of its rule “restricting review ... to the administrative record” is to ensure that the courts do not “engage in independent factfinding rather than engaging in a review of the agency’s discretionary decision.” (*Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1391.) Here, additional evidence was introduced at the Regional Water Board’s further proceedings, considered by the Board, which issued a supplemental decision, and only thereafter considered by the superior court in its review of that supplemental agency decision. In other words, the trial court simply reviewed additional evidence in the form of supplemental administrative record, not as evidence outside the administrative record, and correctly considered this additional evidence at the post-remand judicial hearing. It did not consider any additional evidence in the first instance, or engage in “independent factfinding;” it did exactly what the statutes and cases allow: it reviewed the “agency’s discretionary decision” which was based, in part, on that additional evidence. (*Ibid.*).

As to undermining the integrity of the judicial process, Voices’s arguments are equally off-mark. Voices argues, for example, that the admission of additional evidence amounted to impermissible post hoc rationalization. As the cases Voices cites make clear, an agency cannot simply offer a new reason or new findings to support what already is a settled and foregone conclusion. (See *Resources Defense Fund v. Local Agency Formation Com.*, *supra*, 191 Cal.App.3d at p. 900, [“the trial court entered an ‘interlocutory judgment’ remanding the matter to the city council for promulgation of appropriate findings and ordering judgment to be entered after action by the city council or the expiration of 60 days”]; *Bam, Inc. v. Bd. of Police Comrs.*, (1992) 7 Cal.App.4th. 1343, 1346.)

In this case, additional evidence was offered not simply to rubber-stamp the agency's previous decision, but offered in the course of the agency's full reconsideration of its conclusions on the issue that was remanded. And in this case, the trial court did not pre-ordain the outcome, but made an independent judgment of the agency's decision after remand.

Indeed, review of additional evidence was proper and necessary given the court's prior determination that the agency's initial analysis was inadequate. As reflected in the trial court's post-remand statement of decision: "It was certainly this Court's expectation that the Board would more fully consider additional relevant evidence on the issue of the best technology available ('BTA'). To meaningfully comply with the remand, a more complete inquiry into BTA necessitated the receipt of further information." (Petitioner's Appendix at p. 78.) Based upon the new evidence, the court determined "that the Board engaged in the kind of scrutiny and analysis that the issue required." (Pet. Appen. at p. 76.) The new evidence assisted the trial court in its review of the agency's discretionary decision. (*Friends of the Old Trees v. Department of Forestry & Fire Protection, supra*, 52 Cal.App.4th at p. 1391.)

In its Notice of Hearing for the remand, the Regional Water Board set out the formal hearing procedure before the Board. This included advance submittal of testimony, an opportunity for rebuttal written testimony, and an opportunity to present and cross-examine witnesses. (RAR 000013-0022.) In addition, any Regional Water Board hearing must include public comment on any item on its agenda. (Gov. Code, §11125.7; Cal. Code Regs., tit. 23, §647.3.) Even if the Regional Water Board had not permitted new evidence by the parties, it was required by law to allow public input. Therefore, by definition, there would have been new evidence in the record.

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In this case, the Court's order of remand specifically provided that the Regional Water Board "conduct a thorough and comprehensive analysis with respect to Finding No. 48 of said Order No. 00-041." (RAR 000011.) The Regional Water Board made the determination that a full hearing would be the best way to comply with the trial court's order, especially in light of the fact that new evidence in the form of public comment would be part of a new remand record. (RAR 000015.) In addition, Duke Energy had completed work on the upgrade of the Plant, and it was fully operational. It would have been perverse for the agency to ignore the actual data from the plant improvements to assess the questions before it on remand.

This course of proceedings is consistent with applicable law. The procedures allowed on remand are flexible. As stated in 2 Administrative Mandamus (Cont.Ed.Bar 3d ed. 2010) Trial and Judgment, § 14.35 Agency's Further Proceedings, p. 541, a remand's "further proceedings" can consist of simply reconvening the administrative hearing in order to give proper notice to interested parties, to hear testimony from a single witness, to consider a document, or to adopt proper and adequate findings."

The law allows the court to fashion appropriate remedies to the situation, including the introduction of additional evidence where an agency has been ordered to review its determinations. In *Carlton v. Department of Motor Vehicles* (1988) 203 Cal.App.3d 1428, 1435, the court stated: "Where an administrative decision is set aside for insufficiency of the evidence it is customary to remand the matter to the agency for a new hearing...." (*Ibid.*) With a new hearing, the court agreed, it was "conceivable the DMV could produce competent evidence sufficient to establish" the petitioner's responsibility for the underlying accident. (*Id.* at pp. 1434-1435.) Other cases recognize the agency's discretion to consider

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new evidence on remand. (See, e.g., *Zink v. City of Sausalito* (1977) 70 Cal.App.3d 662, 666 [where “the trial court’s independent review of the evidence determines that some of the substantive findings ... are unsupported by the evidence, remand to the administrative body is the only means of permitting it to exercise its discretion”]; *Garcia v. California Emp. Stab. Com.* (1945) 71 Cal.App.2d 107, 110 [due to “the insufficiency of the evidence in the record filed herein to support the findings of the board, it is necessary that this application be remanded for further evidence”].)

The Regional Water Board’s actions in reviewing additional evidence and the trial court’s support of that decision was well warranted by the unique facts of this case and is supported by law.

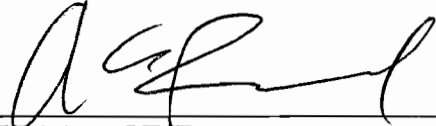
CONCLUSION

For the reasons stated above, Regional Water Board urges this Court to find that the trial court had no jurisdiction to consider Voices Petition for Writ of Mandate. The Regional Water Board also asks this Court to uphold the trial court’s order and judgment.

Dated: March 8, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWERING BRIEF ON THE MERITS OF RESPONDENT CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL COAST uses a 13 point Times New Roman font and contains 13,479 words.

March 8, 2010

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DECLARATION OF SERVICE BY U.S. MAIL and BY OVERNIGHT COURIER

Case Name: **VOICES OF THE WETLANDS v. CALIFORNIA STATE WATER RESOURCES**

Case No.: **S160211**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On March 8, 2010, I served the attached **ANSWERING BRIEF ON THE MERITS OF RESPONDENT CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL COAST** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

Clerk, Civil Division
Monterey County Superior Court
1200 Aguajito Road
Monterey, CA 93940

Trial Court

Clerk, Civil Division
California Court of Appeal
Sixth Appellate District
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113-1717

On March 8, 2010, I served the attached **ANSWERING BRIEF ON THE MERITS OF RESPONDENT CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL COAST** by placing a true copy thereof enclosed in a sealed envelope with the **U.S. Mail Express** addressed as follows:

Deborah A. Sivas, Robb W. Kapla, Kimiko Narita
Allen Gleckner, Michael S. Nunez
Environmental Law Clinic
Mills Legal Clinic at Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305-8610
Attorneys for Petitioner for Review VOICES OF THE METLANDS

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50 Fremont Street
P. O. Box 7880
San Francisco, CA 94120-7880
*Attorneys for Real Parties in Interest, Respondents, and Cross-Appellants Duke
Energy Moss Landing LLC and Duke Energy North America, LLC*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 8, 2010, at San Francisco, California.

Debin Wang
Declarant



Signature

