In the Supreme Court of the State of California

No. S160211

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.

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

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

PETITIONER'S OPPOSITION TO DYNEGY'S MOTION TO DISMISS REVIEW

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INTRODUCTION

The Court should deny Dynegy's belated and meritless motion to dismiss. The motion mischaracterizes Petitioner's legal claims and repeats arguments already advanced in Dynegy's opposition to the original petition for review. Moreover, Dynegy is simply incorrect in suggesting that the legal issues raised by this case lack statewide significance and are unlikely to recur in the future. If the appellate decision stands, it is virtually certain that state agencies and courts will look to it for guidance on both substantive and procedural issues. Indeed, the State Water Resources Control Board ("State Board") has done exactly that in its ongoing effort to develop a statewide once-through cooling policy. See State Board, "Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling, Draft Substitute Environmental Document," 9-10 (July 2009) (discussing the impact of Voices of the Wetlands on development of statewide once-through cooling guidance).[1] Thus, the need for the Court to address the issues raised by this case is as great as – or greater than – ever.

ARGUMENT

The petition for review filed by Voices of the Wetlands ("Voices") raises two distinct sets of issues, one concerning substantive interpretations of the Clean Water Act that conflict with federal law and are critical to ongoing state policy development and the

[1] Available at http://www.swrcb.ca.gov/water_issues/programs/npdes/docs/cwa316/draft_sed.pdf.

other concerning core administrative law principles that were profoundly undermined by the lower court's ruling. This Court granted review, over the strenuous objections of Dynegy, knowing that the U.S. Supreme Court might provide further guidance on one of the substantive issues. That guidance came in the form of the Supreme Court's April 2009 decision in Entergy Corp. v. Riverkeeper, Inc., __ U.S. __, 129 S.Ct. 1498 (2009). As Voices explained at length in the opening brief, the Entergy decision clarified the scope of one substantive issue, but did not address how that guidance may apply to Respondents' analysis in this case and did not in any way touch the other Clean Water Act question raised by the petition for review. Nor, of course, did Entergy have any impact on the fundamental state administrative law issues on which this matter ultimately turned. Dynegy's arguments dismissing these issues as "unworthy" of review already have been largely considered and rejected by the Court.

I. The U.S. Supreme Court's Decision in Entergy Does Not Resolve the Clean Water Act Issues Raised by this Case.

Dynegy claims that the Entergy decision "resolved" the first issue presented in Voices' petition for rehearing. It did not. As the petition explained, the lower court's decision in this case created a significant conflict with the federal courts' interpretation of Clean Water Act section 316(b) and interjected substantial uncertainty into California's ongoing attempt to develop statewide guidance for once-through cooling systems. Voices' Petition for Review at 2-3. Those facts remain as true today as they were when the Court granted review in March 2008.

Specifically, the lower court upheld Respondent Regional Water Quality Control Board's ("Regional Board") reliance on after-the-fact environmental enhancement funding to satisfy the "best technology available" requirements of section 316(b), in direct contradiction to settled federal law in Riverkeeper v. Environmental Protection Agency, 358 F.3d 174, 189 (2d Cir. 2004), and Riverkeeper v. Environmental Protection Agency, 437 F.3d 83, 109-110 (2d Cir. 2007). See Voices' Petition for Review at 19-23. Dynegy argued in response to the petition for review, as it does again here, that the lower court "did not disagree with" the federal court's holding in the Riverkeeper cases and that the mitigation issue does not warrant this Court's review. Dynegy's Answer to Petition for Review at 9. These arguments simply are not correct. As Voices's explained in its opening brief on the merits, the appellate court upheld the express finding in Dynegy's permit that environmental enhancement funding could and would be used to satisfy section 316(b). Opening Brief on the Merits at 46-51. That holding directly contravenes settled federal law in the Riverkeeper cases.[2] The Supreme Court did not address this mitigation issue in Entergy, leaving the Second Circuit's Riverkeeper holding intact. 129 S.Ct. at 1510. There is thus no reason for this Court to revisit its original grant of review.

Additionally, although the U.S. Supreme Court has now clarified that the Environmental Protection Agency may consider some form of cost-benefit analysis in

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[2] The lower court also improperly left open the question of whether California state law could trump federal law on this issue. It cannot. Opening Brief of the Merits at 45 n.20 (citing appellate decision).

determining what constitutes "best technology available" under section 316(b), there remains a live and important legal question as to whether a state permitting agency may use the kind of unbounded reasonableness approach employed here. As Voices explained in its opening merits brief, the Regional Board purported to apply a so-called "wholly disproportionate" test in balancing costs against benefits for alternative cooling systems at the Moss Landing facility. Opening Brief on the Merits at 17-18. As with much else in this case, however, the words used by the Regional Board do not reflect the reality. The agency did not articulate any standard, formula, guidance, or other direction for what constitutes "wholly disproportionate" costs of compliance. Instead, it applied an indiscernible "reasonableness" approach to the economic evaluation process. As a result, the Moss Landing permit-writer concluded that readily available, widely used, environmentally superior closed-cycle cooling systems might not constitute the "best technology available" even where the costs of compliance do not exceed the benefits. Id. at 55-58. Given the undisputed technology-forcing intent of section 316(b), the Regional Board's approach in this case is inconsistent, as a matter of law, with the language and intent of the Clean Water Act and with the federal courts' interpretation of that statute. Id. If that approach remains unquestioned by the courts, there is little doubt that other Regional Boards up and down the coast will adopt and apply it – and citizen groups will likely continue to challenge it – as the State issues new permits for the imminent replacement of the aging power plant fleet.

II. Dynegy's Request to Dismiss the Critically Important Administrative Law Issue at the Heart of this Case Is Wholly Specious.

Dynegy also contends that this Court should not bother with reviewing two fundamental administrative law conflicts created by the lower court's decision – (1) whether a court may lawfully refuse to issue final judgment and a writ of mandate following trial on the merits and (2) whether a court may lawfully admit and consider post-decisional evidence in finding that an agency decision is supported by substantial evidence in the record. Applicable law and long-standing judicial precedent answer "no" to both questions, while the appellate court below answered "yes" to both. These facial conflicts, which have significant implications for all administrative law, well beyond the Clean Water Act or environmental law more generally, are precisely the kinds of issues this Court should review. An unsolicited amicus brief filed by unrelated parties in support of Voices' petition for review attests to this fact.

As Voices painstakingly demonstrated in its opening merits brief, the appellate court's decision here directly and starkly contravenes the plain language of California's writ statute, several published appellate decisions, and this Court's own settled jurisprudence. Opening Brief on the Merits at 30-40. No amount of clever phrasing by Dynegy can change that reality.[6] Accordingly, Dynegy's request to bypass the Court's

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[6] In a single paragraph that purports to incorporate "all the reasons set forth in its Answer to Petition for Review," Dynegy suggests that this case involves an agency's consideration of new evidence, not a court's admission of post-decision evidence. Motion to Dismiss at 4. That suggestion entirely mischaracterizes Petitioner's claims, as

full review of these critical issues should be rejected.

CONCLUSION

Months after Entergy was decided, months after this Court established a briefing schedule, and months after Petitioner filed its opening brief, Dynegy brings a belated, conclusory motion to dismiss that contains little more than a reprise of its opposition to the original petition for review. The Entergy decision that provides the excuse for Dynegy's motion does not in any way address the Regional Board's improper use of after-the-fact mitigation funding to comply with section 316(b) or resolve the legal questions raised by the "wholly disproportionate" test used in this case. If anything, the need for review of these legal issues is even more pressing now than it was when the Court granted review. And the Entergy decision has no bearing on the vital California administrative law issues that shaped the unorthodox and ultimately unjust trajectory of this case. Accordingly, Petitioner Voices respectfully requests that the Court deny Dynegy's motion to dismiss and proceed to a full adjudication of the merits.

Dated: March 22, 2010

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: _____
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Counsel for VOICES OF THE WETLANDS

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even a cursory review of the petition for review and opening brief reveals.

PROOF OF SERVICE

LYNDA F. JOHNSTON declares:

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

On March 22, 2010, I served the foregoing **PETITIONER'S OPPOSITION TO DYNEGY'S MOTION TO DISMISS REVIEW** on all persons named below by placing true and correct copies thereof in a sealed envelope, with postage fully prepaid, in the United States Mail at Palo Alto, California, addressed as follows:

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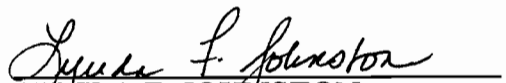
I declare under penalty of perjury (under the laws of the State of California) that the foregoing is true and correct, and that this declaration was executed March 22, 2010 at Stanford, California.



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