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.

Appeal from the Superior Court of California, County of Monterey
Case No. M54889
The Honorable Robert A. O'Farrell, Judge

On Review from the Court of Appeal of the State of California
Sixth Appellate District
Case No. H028021

REPLY BRIEF ON THE MERITS

Deborah A. Sivas (Cal. Bar No. 135446)
Robb W. Kapla (Cal. Bar No. 238896)
Kimiko Narita (Cal. Bar Student No. 24096)
Allen Gleckner (Cal. Bar Student No. 24095)
Environmental Law Clinic
MILLS LEGAL CLINIC OF STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 723-0325
Facsimile: (650) 723-4426

Attorneys for Petitioner for Review
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Facsimile: (650) 723-4426

Attorneys for Petitioner for Review
VOICES OF THE WETLANDS

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INTRODUCTION

At issue in this case is a National Pollutant Discharge Elimination System ("NPDES") permit issued by the Central Coast Regional Water Quality Control Board ("Regional Board") on October 27, 2000, pursuant to the federal Clean Water Act. That permit made two basic determinations of relevance here. First, it concluded that the costs of installing an environmentally superior cooling water system for new generating units at the Moss Landing Power Plant were "wholly disproportionate" to the benefits of doing so – so-called "Finding 48" on which Respondents dwell. Second, it determined that compliance with the "best technology available" (or "BTA") requirement of Clean Water Act section 316(b) could be achieved only if the facility operator established a mitigation fund to offset project damages – memorialized in "Finding 51" of the NPDES permit.

Petitioner timely challenged the legality of these permit findings in accordance with the procedures specified by state law, first through administrative appeal to the State Water Resources Control Board ("State Board"), then through a petition for writ of mandate to the Monterey County Superior Court, and finally through an appeal to the Sixth Appellate District Court of Appeals. The propriety of these permit findings is now properly before this Court. A decision here will have implications not only

for the Moss Landing facility, but also for the "repowering" of 18 similarly situated coastal power plants awaiting new NPDES permits, for the interpretation and implementation of California's recently adopted "Use of Coastal and Estuarine Waters for Power Plant Cooling" policy[1] and for the handling of "remand" proceedings in countless administrative writ cases across the state.

Respondents build their legal arguments on a lattice of "facts" that simply do not exist. First, they advance a tortured theory that this case could not be brought in the superior court, despite the express directive of California Water Code section 13330(b), because the Moss Landing NPDES permit decision that Petitioner challenges "was, or could have been, determined in a proceeding before" the California Energy Commission under the Warren-Alquist Act. In reality, however, the permit decision was not determined in a proceeding before the Energy Commission, nor could it have been. As nobody disputes, the Regional Board had exclusive authority to issue the NPDES permit, and it did so in its own separate proceeding. Petitioner is aggrieved by the Regional Board's issuance of that permit, not

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[1] See http://www.swrcb.ca.gov/water_issues/programs/npdes/docs/cwa316may2010/otcpolicy_final050410.pdf (last visited 5/27/10) (setting deadlines for the phase-out of once-through cooling systems at all coastal plants, including Moss Landing).

by any action or determination of the Energy Commission. Accordingly, the Warren-Alquist Act has no bearing on the claims asserted in this lawsuit.

Second, and squarely at odds with their strenuous trial court arguments, Respondents claim that the Moss Landing NPDES permit did not rely on mitigation funding to achieve compliance with section 316(b). But the permit itself, which is the best – and only dispositive – record evidence on this question, plainly demonstrates otherwise. Permit Finding 51 expressly states that compliance with section 316(b) will be achieved through funding of an environmental enhancement program. Respondents' arguments entirely ignores this conclusive permit language.

Finally, Respondents insist that there was no flaw in the judicial review process here because the trial court "set aside" the defective NPDES permit findings and the Regional Board "reopened and reconsidered" these findings during the post-trial remand, paving the way for subsequent admission of this post-permit evidence. But the facts of the case speak for themselves and tell a very different story. They show that (1) the trial court adjudicated the merits of this matter and found that the weight of the evidence did not support the permit's section 316(b) compliance determination, triggering the statutory requirement for a final judgment and

writ of mandate; (2) the trial court refused to enter judgment, issue a writ, or "set aside" the offending determination, instead entering an interlocutory "order of remand"; (3) the Regional Board neither reopened nor amended the NPDES permit during the remand, which in turn allowed the agency's legal counsel to selectively exclude Petitioner's timely and relevant submissions concerning the permit findings; and (4) the trial court subsequently reversed its merits ruling based on the post-decisional, post-trial evidence submitted by Respondents. Each step in this process was flawed and, collectively, they made a mockery of the judicial review process. Thus, the Court should exclude the post-decisional information on which the trial court relied and look only to the documents contained in the original administrative record. Those documents show that the Regional Board did not independently evaluate alternative cooling water systems or properly support its "wholly disproportionate" finding, as the trial court originally held.

Although Respondents try to frame this case as a messy factual dispute not worthy of the Court's careful review, no such dispute exists. The only facts relevant to the legality of the NPDES permit are those indisputable facts contained in the administrative record documents for the permit decision, the most important of which is the permit itself. These

record documents demonstrate that (1) the trial court correctly found that there was insufficient analysis of and support for the Regional Board's "wholly disproportionate" finding, and (2) the permit unlawfully relied on an environmental enhancement fund to achieve compliance with section 316(b) of the Clean Water Act, in violation of federal law. Riverkeeper, Inc. v. EPA ("Riverkeeper I"), 358 F.3d 174 (2d Cir. 2004), and Riverkeeper, Inc. v. EPA ("Riverkeeper II"), 475 F.3d 83 (2d Cir. 2007), rev'd sub nom on other grounds, Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009). Petitioner fully briefed and properly preserved these claims throughout the long and winding road of judicial review. This Court should now decide them in Petitioner's favor.

SUPPLEMENTAL STATEMENT OF FACTS

Because Respondents raise a threshold subject matter jurisdiction argument in their answering briefs,[2] some additional clarification of the record is warranted. As explained previously, the addition of new

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[2] Petitioner was under no obligation to advance Respondents' evolving litigation theory on subject matter jurisdiction – framed here, for the first time, as a "conflict of law" issue. Both the trial and appellate courts correctly rejected earlier versions of this theory, concluding that jurisdiction over Petitioner's claims properly rested in the superior court pursuant to California Water Code section 13330(b). Petitioner did not seek review on this issue and, in its opening brief, identified section 13330(b) as the basis for the trial court's jurisdiction. Opening Brief at 18. Nothing more was required.

generating units at the Moss Landing facility required two distinct agency approvals: (1) a site license issued by the California Energy Commission under the Warren-Alquist Act, and (2) a NPDES permit issued by the Regional Board pursuant to the federal Clean Water Act, as implemented through the Porter-Cologne Act. Although these distinct approval processes proceeded in parallel for efficiency reasons, they involved two separate, independent decisions by two different agencies, the first culminating in the Energy Commission's Certification Decision and Order on October 25, 2000 (AR 304094), and the second culminating in the Regional Board's adoption of the NPDES permit on October 27, 2000 (AR 305747). As directed by law, Petitioner timely appealed the NPDES permit decision to the State Board on November 24, 2000 (State AR 000001-10), which denied that appeal seven months later, on June 21, 2001 (State AR 000192-197). Petitioner then timely filed a petition for writ of mandate in the superior court pursuant to California Water Code section 13330(b).

Buried amid Respondents' various legal theories is one central and incontrovertible fact: The Moss Landing NPDES permit is the only decision challenged in Petitioner's lawsuit and, accordingly, is the proper focus of this Court's review. That permit addresses compliance with section 316(b) of the Clean Water Act in a series of "findings" enumerated

48 through 51. AR 305756-305761. These findings collectively embody the Regional Board's interpretation of section 316(b) and its application of that interpretation to the Moss Landing facility. They are, therefore, the key administrative record evidence on which this case turns.

In its petition for writ of mandate challenging the NPDES permit, Petitioner asserted three specific legal deficiencies in the permit decision. First, Respondents failed to adequately consider, analyze or make specific findings regarding the feasibility of alternative cooling water systems. Second, the "wholly disproportionate" finding in the permit was both illegal and unsupported by the record. Third, the use of an environmental enhancement program to achieve compliance with the BTA requirement of section 316(b) was both illegal and unsupported by the record. Pet. App. 22-24. Petitioner briefed and argued each of these claims at trial and preserved each of them on appeal. Petitioner's Supplemental Appendix ("Pet. Supp. App.") 1-85, 97-172, Resp. App. 1-106.

Following trial on all issues, the lower court addressed only a subset of Petitioner's claims, focusing on permit Finding 48:

> Finding number 48 is not supported by the weight of the evidence. As outlined above, there is no evidence in the record of a comprehensive, definitive consideration of cooling water alternatives by the Regional Board to apply Best Technology Available to the Moss Landing Power Plant. The evidence is at best meager, and at worst, speculative and

based on historical conjecture.

Pet. Supp. App. 90. The trial court reached this conclusion by reviewing each step of the agency review process and finding no evidence in the record that the Regional Board independently evaluated alternative cooling systems. Id. 87-90. Exercising its "independent judgment" review authority, the trial court ordered the Regional Board to conduct a "thorough and comprehensive analysis of Best Technology Available." Id. 91. Rather than issue the writ of mandate sought by Petitioner, however, the trial court ultimately entered an Order of Remand drafted by Respondents, directing further analysis "with respect to Finding 48." Pet. Supp. App. 93. The other BTA-related findings in the NPDES permit, including Finding 51, were not expressly addressed in either the merits ruling or the remand order.

Without reopening or amending the permit, the Regional Board on remand invited, accepted, and considered new post-decisional information to support permit Finding 48. That new information was later admitted into evidence by the trial court. The trial court's final judgment, the appellate court's affirmance of that judgment, and Respondents' arguments here all rely on the post-decisional evidence from the May 2003, remand hearing to conclude that the Regional Board (1) conducted adequate independent evaluation of alternative cooling technologies and (2) properly supported its

"wholly disproportionate" finding in the record. Thus, the question of what administrative record was properly before the court remains a live issue, and an important one.

ARGUMENT

Three questions are now before this Court. First, did the superior court have original jurisdiction over a petition for writ of mandate seeking review of the Regional Board's NPDES permit? Second, did the Regional Board unlawfully determine that compliance with Clean Water Act section 316(b) would be achieved through an environmental enhancement fund? And third, does the administrative record, properly construed, reveal that the Regional Board failed to meaningfully evaluate alternative cooling systems or improperly determined that their costs were "wholly disproportionate" to their benefits? The answer to each of these questions is "yes."

I. THE SUPERIOR COURT HAD SUBJECT MATTER JURISDICTION OVER PETITIONER'S CLAIMS.

Respondents' subject matter jurisdiction argument turns on the fundamental misapprehension that this case raises a conflict between two unrelated statutes. It does not. Petitioner here sought judicial review of the Moss Landing NPDES permit decision under the Porter-Cologne Water Quality Act and the federal Clean Water Act. Respondents do not dispute

that only the Regional Board can and did issue the NPDES permit. State Brief at 23; Dynegy Brief at 25. Nor do they dispute that California Water Code section 13330(b) provides for judicial review of such permit decisions in the superior court. State Brief at 11. Yet they seek to override the plain language of the law on a muddled theory that the Energy Commission's concurrence with the Regional Board determination creates a "conflict" which dislodges the superior court's jurisdiction over NPDES permit decisions. That argument has no basis in the language of the Warren-Alquist Act, no grounding in the facts, and no valid policy justification. In fact, Respondents' proffered "pathway" would create an irreconcilable conflict between the two laws, throwing future NPDES permitting decisions into chaos and jeopardizing California's federally-approved NPDES program. The Court should reject Respondents' attempt to manufacture a statutory conflict where none exists and affirm the lower courts' correct resolution of this issue.

A. The NPDES Permit Process Is Dictated by Federal Law and Embodied in the Porter-Cologne Act.

The Clean Water Act charges the U.S. Environmental Protection Agency ("EPA") with primary authority for the NPDES permit program. 33 U.S.C. § 1342(a). EPA may authorize states to implement the program within their borders, "but only upon EPA approval of the State's proposal to

administer its own program." EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 208 (1976). To obtain such approval, a state must submit to EPA "a full and complete description of the program it proposes to establish and administer under State law," along with a statement from the state attorney general that state laws "provide adequate authority to carry out the described program." 33 U.S.C. § 1342(b).

EPA regulations govern the content of state applications and the procedure for their approval. 40 C.F.R. Part 123. Among other things, the application must include "[a] description . . . of the organization and structure of the State agency or agencies which will have responsibility for administering the program" and "[a] description of applicable State procedures, including permitting procedures and any State administrative or judicial review procedures." 40 C.F.R. § 123.22(b), (c). If more than one agency will be responsible for administration of the program, the respective responsibilities of the agencies must be delineated, along with procedures for coordination and communication with EPA. Id. Any state seeking to administer the NPDES program "shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process." 40 C.F.R. § 123.30.

The state attorney general statement required for approval must describe the "specific statutes, administrative regulations, and, where appropriate, judicial decisions which demonstrate adequate authority." 40 C.F.R. § 123.23(a). EPA and the director of the state program also must enter into a memorandum of agreement memorializing federal and state responsibilities and ensuring that EPA retains its ultimate "statutory oversight responsibility" for the program. 40 C.F.R. § 123.24(a). EPA retains authority, for instance, to object to some or all permits, 33 U.S.C. § 1342(d); 40 C.F.R. § 123.44, and to withdraw approval of a state permitting program if it finds that the program fails to meet applicable requirements. 33 U.S.C. § 1342(c)(3); 40 C.F.R. §§ 123.63-64.

Once EPA approves a state NPDES program, the state must "keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority" 40 C.F.R. § 123.62(a), and must obtain EPA approval for any changes. To secure a program revision, a state must submit the proposed changes and supporting documentation for EPA's review and consent. 40 C.F.R. § 123.62(b)(1). Of particular significance here:

> States with approved programs must notify EPA whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, and must identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until approved by the Administrator.

40 C.F.R. § 123.62(c).

California received approval to implement its current NPDES program in 1989, many years after the Warren-Alquist Act was enacted. 54 Fed. Reg. 40,664 (Oct. 3, 1989) (noting State and Regional Board authority to administer NPDES program in California). The state's approved NPDES program is embodied in the Porter-Cologne Act. Cal. Water Code § 13370(b). Specifically, "[t]he state board is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act and . . . [is] authorized to exercise any powers delegated to the state by" the Clean Water Act. Id. § 13160; see also "NPDES Memorandum of Agreement between the U.S. Environmental Protection Agency and the California State Water Resources Control Board" at 1.[3] Together, the Regional and State Boards administer all parts of the NPDES permitting program. Id. §§ 13001, 13377.

Public participation and the ability to seek review and enforcement of NPDES permits is a critical component of approved state programs. See, e.g., Citizens for a Better Env't v. EPA, 596 F.2d 720, 724 (7th Cir 1979). To satisfy this requirement, the Porter-Cologne Act provides for public

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[3] See http://www.swrcb.ca.gov/water_issues/programs/npdes/docs/aquatic/moa.pdf (last visited 5/27/10).

notice and comment on permit applications, Cal. Water Code § 13384, appeal of Regional Board permit decisions to the State Board, id. § 13320, and judicial review of final permit decisions in the superior courts:

> 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.

Id. § 13330(b). Although California's NPDES program was last reviewed and approved by EPA fifteen years after passage of the Warren-Alquist Act, the Porter-Cologne Act makes no mention of the Energy Commission and contains no special permitting or judicial review provisions for power plants.

B. The Warren-Alquist Act Establishes Power Plant Siting Procedures that Override Certain State and Local Approvals, but Not the NPDES Program.

The Warren-Alquist Act of 1974, passed in the wake of the 1973 oil embargo, is designed to consolidate and streamline the siting of thermal power plants. Cal. Pub. Res. Code § 25543(a) (noting legislative intent to "improve the process of siting and licensing" for new power plants). To achieve these ends, the statute provides the Energy Commission with "exclusive power to certify all sites and related facilities in the state" and precludes construction or modification of a power plant without that

certification. Id. § 25550. The siting process begins with an applicant's submission of a notice of intention to file an application for site certification, defined as "an attempt primarily to determine the suitability of the proposed sites to accommodate the facilities." Id. § 25502. The notice must identify three alternative sites for the facility, including at least one that is not located on the coast, and must describe the relative advantages and disadvantages of each proposed site. Id. §§ 25503, 25504. This alternatives review process focuses on the "appropriateness" of various locations, id. § 25511, evaluating conformity with "any long-range land use plans or guidelines adopted by the state or by any local or regional planning agency . . ." Id. § 25514(a)(2). In this way, the Energy Commission screens potential sites for energy development before the application is even submitted.

In short, the Warren-Alquist Act is intended to streamline the process for identifying, evaluating, and approving the location of new or expanded power plants. It does so by displacing the traditional land use and siting authority of other agencies and local jurisdictions,[4] but only to the

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[4] For example, the Energy Commission site certification process supplants the normal siting jurisdiction of the California Coastal Commission and the San Francisco Bay Conservation and Development Commission. Cal. Res. Code §§ 25507-08, 25526. To ensure compliance with their governing statutes, the Act includes special review, consultation and compensation

extent permitted by federal law:

> 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.

Cal. Pub. Res. Code § 25500 (emphasis added).

California's NPDES permitting program is established under federal law, codified in the Porter-Cologne Act, and approved by EPA as a comprehensive package. Because the EPA-approved program does not provide the Energy Commission with any Clean Water Act permitting or oversight authority, the Commission is not "permitted by federal law" to issue a site certification in lieu of a NPDES permit. Respondents concede that the Warren-Alquist Act does not displace or supersede the Regional and State Boards' NPDES permitting obligations. State Brief at 23; Dynegy Brief at 25.

Respondents insist, however, that the judicial review provision of the Warren-Alquist Act nonetheless applies to a NPDES permit challenge. That provision states:

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provisions. Id. §§ 25519(d)-(e), 25526(a)-(b), 25538.

> (a) The decisions of the [Energy] [C]ommission on any application for certification of a site and related facility are subject to judicial review by the Supreme Court of California.
> . . .
>
> (c) Subject to the right of judicial review of decisions of the 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 [Energy] [C]ommission, or to stop or delay the construction or operation of any thermal powerplant except to enforce compliance with the provisions of a decision of the commission.

Cal. Pub. Res. Code § 25531(a), (c). The statute thus provides a single judicial forum for review of "any matter which was, or could have been, determined" by the Energy Commission's certification decision, e.g., those other agency approvals that are superseded by the Warren-Alquist Act. For example, under the Coastal Act, new facilities in the coastal zone normally require a coastal development permit from the California Coastal Commission. Because the Energy Commission site certification functions "in lieu of" the Coastal Commission's normal siting authority, no separate coastal permit is available for judicial review. Instead, compliance with Coastal Act requirements is folded into the Energy Commission decision, which is reviewable in accordance with section 25531.

The same is not true here. Section 25531 only confers exclusive Supreme Court jurisdiction over a "matter" determined in the Energy

Commission proceeding. The "matter" challenged in this lawsuit is the NPDES permit issued by the Regional Board. That matter was not and could not have been determined by the Energy Commission because only the Regional and State Boards can issue and enforce these permits. The fact that the Energy Commission "summarized the proceedings, the evidence presented, and the rationale for [its] findings" or that Commission staff "collaborated" with the Regional Board, "concurred" with the findings of the NPDES, and "incorporated" the Regional Board outcome is of no relevance. State Brief at 17; Dynegy Brief at 25 (inaccurately paraphrasing AR 304341, which simply requires that the plant owner "comply with all provisions of the [NPDES] Permit."). The only fact of relevance here is that the challenged NPDES permit is not a matter that was or could have been determined by the Energy Commission.

Respondents' reading of section 25531 is illogical. Under their theory, only two outcomes are possible. Either (1) the NPDES permit cannot be challenged in any court or (2) the NPDES can be challenged, but only in this Court under section 25531. Respondents do not agree on the correct interpretation, but neither is legally sound. The State suggests that review of the Energy Commission concurring determination under section 25531 and "not direct review of the Water Board's determination" is the

only legitimate "pathway to review." State Brief at 26. But that result cannot possibly be correct. Federal law requires that approved state programs provide an opportunity for judicial review of the "final approval or denial of permits," not review of some other decision by some other state agency that has no jurisdiction or expertise under the Clean Water Act. 40 C.F.R. § 123.30. The Court's embrace of Respondents' reading would, therefore, violate federal law and jeopardize California's approved NPDES permit program. Id. § 123.63 (stating that withdrawal of an authorized program is appropriate where the program is changed through "[a]ction by a . . . court striking down or limiting State authorities").

Dynegy offers an alternative theory, suggesting that Petitioner can challenge the Regional Board's issuance of the NDPES permit, but only under section 25531. Dynegy Brief at 28 (arguing that EPA's delegation regulations "do not require that judicial review occur in any particular court"). But this argument cannot possibly be right, either. Section 25531(a) only provides for review of "decisions of the commission on any application for certification of a site." It does not provide jurisdiction over the Regional or State Boards or over NPDES permits.

Morever, Dynegy's approach does not avoid conflict with EPA's delegation regulations, which require an opportunity for state court judicial

review that is "sufficient to provide for, encourage, and assist public participation in the permitting process." 40 C.F.R. § 123.30. This standard is satisfied, for instance, when review is equivalent to that provided for federally-issued NPDES permits, which may be challenged for compliance with the Clean Water Act by any interested party. 33 U.S.C. § 1369(b). Judicial review under section 25531(b) is by way of petition, not of right, and is narrowly constrained to "a determination of whether the order or decision under review violates any right of the petitioner under the United States Constitution or the California Constitution," with all other findings of fact and conclusions of law shielded from review. Thus, even if section 25531(a) were judicially extended beyond its express terms to Regional Board decisions, the limited scope of review under section 25531(b) would not satisfy the requirements of federal law. And, of course, California would still need federal approval before a change in the judicial review provisions for the NPDES program become effective. 40 C.F.R. § 123.62.[5]

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[5] It is of no significance that the courts of appeal (briefly) had concurrent jurisdiction with this Court under section 25531 when the Moss Landing permit was issued. Under Respondents' theory, section 25531 is triggered by an Energy Commission "determination" and thus applies today just as it did in 2000. In any event, California never sought or obtained EPA approval for a change in the judicial review provision of its NPDES program. Nor, given the limited scope of judicial review under section 25531(b), is the state ever likely to obtain such approval.

In short, there is no real world scenario under which Respondents' highly theoretical argument makes sense. Any permutation of their theory places California's approved NDPES program in serious jeopardy, as the Regional Board Executive Officer recognized when he admonished that "[t]he Energy Commission may not take actions except to the extent permitted by federal law (P.R.C. § 25500.)," and noted that any impingement of the NPDES permitting process would risk withdrawal of EPA approval. AR 304951.

C. The Only Conflict Between the Porter-Cologne Act and the Warren-Alquist Act Is the One Created by Respondents' Argument.

As the foregoing discussion demonstrates, there is no conflict of law created by the proper filing of this case in the superior court. At the time of the permitting process, all parties recognized that the Regional Board and the Energy Commission were proceeding on parallel tracks to implement their respective statutory authority and that any other course would jeopardize approval of California's NPDES program. See, e.g., AR 304338, 304947, 304951. By statute, these parallel processes terminate in different judicial review pathways. Any challenge to a Regional Board NPDES permit decision must first be administratively appealed to the State Board and then ultimately brought in the superior court under Water Code

section 13330. This path is precisely the one that Petitioner followed here. Any challenge to an Energy Commission site certification, on the other hand, must be brought under the extremely limited review provisions of Public Resources Code section 25531. Other agency approvals that are superseded by the Energy Commission's "in lieu" process fall within section 25531. Permit approvals that are not "permitted by federal law" to be decided by the Energy Commission do not fall within section 25531. Because there is no conflict here, there is no need to "harmonize" anything.

The only conflict is the one raised by Respondents' creative statutory interpretation. Section 25531 requires the filing of a challenge in the Supreme Court within 30 days after the final certification decision. Figueroa v. Cal. Energy Resources Conservation and Development Comm'n, 110 Cal. App. 4th 1118 (2003). The Porter-Cologne Act requires that a NPDES permit challenge first be exhausted through an administrative appeal to the State Board, which then has up to 270 days to decide the appeal. Cal. Water Code § 13320(a); 23 Cal. Code Regs. §§ 2050-2050.5. A potential challenger cannot, as a practical matter, satisfy both requirements. Respondents' legal interpretation thereby creates an irreconcilable legal conflict, sewing confusion in the permit process and impairing the public participation principles that lie at the heart of the Clean

Water Act. In assessing Respondents' fanciful theory, the Court should carefully consider "the consequences that flow from a particular interpretation." Dep't of Water and Power v. Energy Res. Conservation and Dev. Comm'n, 2 Cal. App. 4th 206, 220-21 (1991) (interpreting section 25550).

California's NPDES program is fixed by statute. Any change in its judicial review or other provisions requires prior EPA review and consent. Had the Legislature wanted to carve out an exception for judicial review of power plant NPDES permits, it could have pursued that course when California amended its NPDES program and obtained EPA approval in 1989 or when it amended the Warren-Alquist judicial review provisions in 2001 or at any other time. Because it has not done so, the Court should presume that the Legislature intended the Porter-Cologne Act and the Warren-Alquist Act to continue functioning separately in accordance with their respective terms. Orange County Air Pollution Control Dist. v. Public Util. Comm'n, 4 Cal.3d 945, 954, n.8 (affirming that "courts assume that in enacting a statute the Legislature was aware of existing, related laws and intended to maintain a consistent body of statutes.").[6]

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[6] Respondents essentially argue that the Warren-Alquist Act effected an implied amendment of the Porter-Cologne Act. There is, however, a strong presumption against implied repeal or amendment, especially where the

II. THE REGIONAL BOARD'S USE OF ENVIRONMENTAL ENHANCEMENT TO ACHIEVE COMPLIANCE WITH SECTION 316(b) WAS UNLAWFUL.

Respondents no longer seriously dispute that this Court should look to the Riverkeeper cases to interpret section 316(b).[7] Those cases held that compliance with section 316(b) "via restoration measures" and the use of mitigation "as a means of complying with the statute" are not permitted. Riverkeeper II, 475 F.3d at 110. The Court need look no further than the four corners of the permit itself to see that the Regional Board did precisely what the law forbids.

Although Respondents focus on permit Finding 48, analysis of section 316(b) compliance spans four findings, culminating in Finding 51. These four findings encompass the entirety of the BTA compliance determination and they demonstrate in the clearest terms that the Regional Board relied on an environmental enhancement fund to achieve compliance

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statutes have a long understood history. Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 49 Cal.3d 408, 419-20 (1989) (holding that presumption is overcome only (1) when the two statutes are "irreconcilable, clearly repugnant, and so inconsistent that . . . there is no possibility of concurrent operation," and (2) there is "undebatable evidence" of legislative intent to supersede).

[7] Dynegy seeks to preserve this issue in a footnote suggesting that the Riverkeeper interpretation does not govern here. Dynegy Brief at 45, n.11. That reservation demonstrates precisely why the Court should reject Dynegy's pending motion to dismiss as improvidently granted and address this issue conclusively.

with section 316(b) for the Moss Landing facility.

First, Finding 48 explains that under section 316(b), the plant must use BTA to "minimize adverse environmental impacts caused by the cooling water intake system." AR 305756. It then recites its interpretation of the law: "If the cost of implementing any alternative for achieving BTA is wholly disproportionate to the environmental benefits to be achieved, the Board may consider alternative methods to mitigate these adverse environmental impacts." Id. Finally, Finding 48 concludes that, in this case, the costs of alternative technologies are "wholly disproportionate" to their benefit; it goes on to explain, however, that the applicant will instead upgrade the existing intake structure to address impingement impacts and fund a mitigation package to address entrainment impacts. AR 305756-57.

Finding 49 reiterates that "[m]inimization of adverse impacts of the intake system to Elkhorn Slough watershed can be accomplished in two ways," through technology modifications and through "environmental enhancement projects." AR 305757. After describing the system modifications necessary to minimize impingement impacts, this finding concludes that such "modifications alone are not sufficient to minimize adverse environmental effects of the intake system and to achieve compliance with the BTA requirements of section 316(b) because the

modifications do not address entrainment impacts." Id. That is, Finding 49 determines that technology improvements will not suffice to support of a finding that adverse environmental are minimized under section 316(b).

Next, Finding 50 describes the "Environmental Enhancement Program" developed by the agencies to mitigate entrainment impacts and explains that this proposed mitigation, in addition to the intake system technology modifications described in Finding 49, "will minimize adverse environmental effects of the intake system on the Elkhorn Slough watershed resources so that Duke Energy can comply with Clean Water Act section 316(b)." AR 305757 (emphasis added). In other words, the permit concludes that the facility will comply with section 316(b) only because "[a]dverse environmental effects will be minimized by increasing health and biological productivity of aquatic habitat in the Elkhorn Slough watershed" through an enhancement program. Id.

Finally and most important, Finding 51 summarizes the Board's section 316(b) determination: "[I]mplementation of the above described intake modifications, and complete funding of the environmental enhancement program, as described in the above finding, constitutes compliance with Clean Water Act section 316(b)." AR 305761 (emphasis added). Thus, while Finding 48 (on which Respondents' briefs focus)

embodies the Regional Board's intermediary finding that costs of compliance are "wholly disproportionate" to benefits, Finding 51 (which Respondents never address) embodies the Board's ultimate determination that compliance with section 316(b) will be achieved through the funding of an environmental enhancement program.

The plain language of the permit shows conclusively that the Regional Board relied on mitigation funding to achieve compliance with section 316(b). There is not a shred of evidence in the record – and none cited – for Respondents' alternative theory that the Regional Board first determined section 316(b) compliance and then separately imposed extra mitigation obligations. All of the record evidence demonstrates that the section 316(b) determination was inextricably bound up with mitigation alternatives, as first staff and then Board members weighed and balanced alternative BTA compliance options to minimize adverse effects. That approach was unlawful.

III. THE ADMINISTRATIVE RECORD DOES NOT SUPPORT THE REGIONAL BOARD'S DETERMINATION THAT COOLING SYSTEM ALTERNATIVES WERE ADEQUATELY CONSIDERED AND PROPERLY REJECTED.

Petitioner raised two other challenges to the Moss Landing NPDES permit decision that were partially merged in the trial court's original

decision. First, the Regional Board did not adequately consider alternatives to the applicant's preferred once-through cooling system, alternatives that would drastically reduce or eliminate adverse environmental impacts. This claim is based on the utter absence of meaningful Regional Board evaluation for cooling system alternatives. The trial court agreed with Petitioner, but then improperly allowed Respondents to remedy this error by supplementing the administrative record with post-decisional, post-trial evidence. If admission of this post-permit evidence was improper, as Petitioner contends, this Court should reinstate the trial court's original ruling.

Petitioner also argued at trial that the Regional Board's "wholly disproportionate" determination was improper.[8] The trial court did not expressly address this issue in its original ruling. After admitting new, post-decisional evidence, the court summarily held that this claim already had been denied, apparently by negative implication in the prior decision. Pet. App. at 6. Curiously, Respondents now rely almost entirely on later

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[8] Petitioner argued both that (1) the use of a cost-benefit test was improper as a matter of law, an issue that was later resolved by the U.S. Supreme Court in Entergy, and (2) even if cost-benefit analysis is permitted, the Regional Board's purported application of a so-called "wholly disproportionate" test was not supported by the evidence in the permit record. Only the second issue remains.

admitted evidence to support the trial court's ruling. State Brief at 32-35. But in any event, as Petitioner's opening brief demonstrates, the record does not support the Regional Board's determination that the costs of an alternative cooling system are "wholly disproportionate" to the benefits. Opening Brief at 55-61.[9]

A. After Reviewing the Administrative Record for the NPDES Permit, the Trial Court Correctly Concluded that the Regional Board Failed to Adequately Consider Alternative Cooling Systems.

As Petitioner's opening brief explains, the administrative record for the permit did not contain any meaningful analysis or independent evaluation of cooling system alternatives by the Regional Board. See Opening Br. at 13-18. At trial, Respondents argued otherwise, citing a laundry list of record citations as their evidence. Petitioner demonstrated that none of these record citations contain analysis; they merely parrot the facility operator's preferences and unsupported conclusions in its original

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[9] Respondents disingenuously accuse Petitioner of "serious misstatements" regarding the costs figures in the Seabrook and Brunswick decisions. The very law review article that Dynegy references explains that in Seabrook, EPA found an intake structure costing "in excess of $100 million, was not wholly disproportionate to the benefits obtained," but the incremental benefit of extending the intake for an additional cost of $20 million was not justified. RAR 005265. Similarly, although Petitioner mistakenly attributed the Brunswick figures to an EPA General Counsel Opinion rather than the permit itself, the cited numbers are contained Petitioner's Appendix at 96-104 and explained in the same article. RAR 005265-66.

permit application. Pet. Supp. App. 25-29, 64-78. Both the trial and appellate courts recognized that such conclusory statements do not constitute evidence of meaningful independent analysis by the Regional Board, as required by section 316(b).

Respondents repeat, nearly verbatim, those same unsuccessful arguments here, despite having failed to petition the Court for review on this issue. Dynegy Brief at 36-43 (culling six pages of citations from the administrative record for their assertion that alternative technologies "were comprehensively reviewed and analyzed during the administrative proceedings"). Petitioner's comprehensive, point-by-point response is set forth in its appellate briefs. Pet. Supp. App. 64-78; Resp. App. 32-59. This Court should reject Dynegy's attempt to relitigate this issue.[10]

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[10] At trial, the court properly applied the "independent judgment" standard of review in scrutinizing the Regional Board's findings. Cal. Water Code §§ 13320, 13330(d). Under this standard, the trial court is called upon to reweigh the evidence in the administrative record to determine whether the "preponderance of evidence" supports the agency's findings. Cal. Civ. Pro. Code § 1094.5(b); Marina Co. Water Dist. v. State Water Res. Control Bd., 163 Cal. App. 3d 132, 138 (1984); Chamberlain v. Ventura Co. Civil Serv. Comm'n, 69 Cal. App. 3d 362, 368 (1977). This standard ensures that certain disputes receive careful and judicious reevaluation by the courts, County of Alameda v. Bd. of Retirement of the Alameda Co. Employees' Retirement Ass'n, 46 Cal. 3d 902, 909 (1988), and requires the trial court to undertake an independent analysis of the facts and law and come to its own conclusion. Fukuda v. City of Angels, 20 Cal. 4th 805, 818 (1999). To affirm the BTA determination, therefore, "the superior court would have to agree with the Board, on the basis of the record." Marina Co. Water Dist.,

B. The Trial Court's Admission of Post-Decisional Evidence to Reverse its Prior Merits Ruling Was Improper.

It is black letter administrative law that judicial review of an agency decision is limited to the record of the agency's decisionmaking proceeding. See, e.g., Sierra Club v. Cal. Coastal Comm'n, 35 Cal. 4th 839, 863 (2005). In this case, the trial court found the record evidence for the October 27, 2000, NPDES permit "at best meager, and at worst, speculative and based on historical conjecture," Pet. Supp. App. 90, but then allowed the Regional Board to supplement the record with information adduced years after the permit was issued. This approach violated California Code of Civil Procedure section 1094.5 and applicable case law. See Opening Brief at 29-40. Respondents' various attempts to defend it are unsuccessful.

First, Respondents subtly mischaracterize this Court's holding in Sierra Club, claiming the Court "held that a court generally may not augment the record with evidence that was never before the administrative agency." Dynegy Brief at 57. In their view, this "holding" means that as long as supplemental evidence passes through an agency's hands at some point, even years after the challenged decision was made, a court may rely

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163 Cal. App. 3d at 138. The trial court's conclusions, however, are reviewed by this Court under the more deferential "substantial evidence" test. Fukuda, 20 Cal. 3d at 824.

upon it in upholding an earlier decision. Id. at 56-59. What this Court actually said in Sierra Club was: "The general rule in [section 1094.5] actions is that judicial review is conducted solely on the record of the proceeding before the administrative agency." 35 Cal. 4th at 863. Here, the "proceeding before the administrative agency" was approval of the October 2000 NPDES permit, and "the record of the proceeding" consists of those documents submitted to the trial court by Respondents at the commencement of the case. The agency's subsequent consideration of new information does not magically transform that information into part of the record for the earlier proceeding.[11]

Respondents also misstate the facts. They argue that admission of post-permit, post-trial evidence to bolster the permit decision was proper here because the "best technology available" finding in the NPDES permit "was reopened and reconsidered" on remand, Dynegy Brief at 50, after "the trial court ordered the agency to set aside one finding." State Brief at 41. Neither of these assertions is true. When Petitioner asked the court to set

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[11] The State fails to address Sierra Club in any fashion. Its reliance on Friends of the Old Trees v. Dep't of Forestry & Fire Prot., 52 Cal. App. 4th 1383 (1997), is baffling. State Brief at 43-44. There, the appellate court reaffirmed that even in traditional mandamus cases, supplemental evidence that was not part of the proceeding before the administrative agency is inadmissible. Friends at 1391 (citing Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559 (1995)).

aside the decision in accordance with section 1094.5, Respondents objected and the trial court declined to do so. See Opening Brief at 18-21. When Petitioner requested that Respondents "reopen the permit for new evidence and possible amendment" on remand, the Regional Board reject that request in favor of a hearing to determine whether to actually reopen the permit or just affirm it. See Opening Brief at 21-26; RAR 000023-24, 000032-33. At the conclusion of that hearing and after accepting new evidence from the project applicant and staff (but refusing to consider Petitioner's comments on the section 316(b) finding), the Regional Board decided not to reopen the permit; instead, it adopted a resolution affirming its prior conclusions. Id. 001203-04; SAR 0017.

This approach was not just harmless error, as Dynegy suggests. Had the Regional Board actually reopened the permit's section 316(b) determination, Board members would have been required to consider all relevant legal arguments and information, including the federal requirements adopted by that time for new facilities and proposed for existing facilities,[12] and information on the legality of mitigation funding

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[12] Between issuance of the NPDES permit in October 2000, and the remand hearing in May 2003, EPA finalized detailed regulations adopting closed-cycle cooling as the performance standard for new facilities, 66 Fed. Reg. 65,255 (Dec. 18, 2001), and proposed detailed regulations for adopting closed-cycle cooling as a performance standard for existing facilities. 67

under the Clean Water Act.[13] As it was, however, staff carefully screened and limited the information and arguments transmitted to the Board decisionmakers, leaving these key facets of the section 316(b) determination unevaluated. See Opening Brief at 24-26.

But even if the remand hearing could be construed as "reopening" the section 316(b) permit determination, the interlocutory remand process by which the trial court sought and admitted new evidence was improper and prejudicial. As Petitioner's opening brief explains, after trial on the merits of the writ, the court "shall enter judgment" either granting or denying the writ. Cal. Civ. Pro. Code §§ 1094.5(f), 1095. This requirement comports with the general directive that courts "must" enter final judgment determining the parties' rights immediately upon making a merits decision.

Fed. Reg. 17,122 (April 9, 2002). As part of these regulatory packages, EPA conducted extensive economic and technological evaluations and developed detailed provisions for satisfying performance standards. None of this information was before the Regional Board during the original permit hearing. Had the Regional Board actually reopened the section 316(b) finding during the remand, it would have been compelled to consider and evaluate these important regulatory developments.

[13] For instance, although federal law prohibits use of mitigation funding to achieve section 316(b) compliance, Board decisionmakers at the remand hearing quite clearly did not understand this fact; they mistakenly believed that the environmental enhancement program could be used to "minimize" adverse impacts under the Clean Water Act. Opening Brief at 50-51. Had Petitioner been allowed to explain this argument at the remand hearing, instead of being silenced by legal counsel, the outcome of the remand may well have been different.

Id. §§ 577, 632, 664. Here, the parties briefed and argued the writ at trial, which culminated in a decision on the merits that the evidence in the administrative record was insufficient to support the section 316(b) determination. At that point, Petitioner was entitled to entry of both a final judgment and a writ setting aside the offending permit provisions.[14]

Respondents ignore the governing statutory regime and focus their briefs, instead, on a string of inapposite cases. State Brief at 39-40, 45-46; Dynegy Brief at 58. All but one of these decisions ordered remand pursuant to a writ of mandate setting aside the defective action, precisely what Petitioner seeks here; none of them ordered a remand after adjudication of the merits.[15] And no case supports the notion that courts have "inherent power" to override the directives of the Code of Civil Procedure. State Brief at 41. See, e.g., Tide Water Associated Oil Co. v. Superior Court, 43

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[14] Respondents make the additional argument that nothing in section 1094.5(f) precludes a "limited" remand or requires that an "entire" decision be set aside. State Brief at 40. This argument is a red herring. Petitioner does not contend that every facet of the NPDES permit had to reopened. Rather, the trial court should have set aside the unsupported and unlawful section 316(b) compliance determination and directed the Regional Board to make a new section 316(b) determination.

[15] The facts of one case, Ng. v. State Personnel Board, 68 Cal App. 3d 600 (1968) are unclear, but the short summary of the proceedings below suggests that the trial court originally ordered the case back to the agency to consider the reporter's transcripts from plaintiff's employment dismissal hearing. This case obviously has no relevance here.

Cal. 2d 815, 825 (1955) (noting that court have inherent power to adopt suitable methods only "if the procedure is not specified by statute"); Keeler v. Superior Court, 46 Cal. 2d 596, 600-01 (1956) (same). Section 1094.5(e) statutorily defines the limited circumstances where interlocutory remand for supplemental evidence may be appropriate. E.g., Ashford v. Culver Unified School Dist., 130 Cal. App. 4th 344, 351 (2005); Sierra Club v. Contra Costa County, 10 Cal. App. 4th 1212, 1220-22 (1992); Res. Defense Fund v. Local Agency Formation Comm'n, 191 Cal. App. 3d 886, 899-900 (1987). Those special circumstances are not present here. Allowing the trial court to proceed as if they were renders section 1094.5(e) surplusage.

The trial court's conduct is at odds with both section 1094.5 and the overwhelming weight of judicial authority. In over 100 pages of briefing, Respondents do not cite a single case permitting a trial court to issue an "interlocutory" remand after adjudication of the merits instead of a writ of mandate setting aside the offending decision.[16] This Court should, therefore, reverse the decision below and hold that (1) Petitioner was entitled to a writ of mandate setting aside the section 316(b) compliance determination and (2) the trial court's admission of post-trial evidence was

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[16] As Petitioner's opening brief explains, the appellate court's decision in Rapid Transit Advocates, Inc. v. Southern Cal.Rapid Transit Dist., 185 Cal. App. 3d 996 (1986), is not to the contrary. Opening Br. at 34, n.15.

improper.[17]

That remedy is appropriate because the prior legal errors have a continuing effect on the facility's compliance with section 316(b). Although the NPDES permit at issue here formally expired in 2005, the Regional Board has deferred any consideration of a new permit and instead placed the existing permit on indefinite "administrative extension." If the improperly admitted evidence is excluded and the trial court's original ruling reinstated, the Regional Board must actually reopen the defective permit findings and provide a full and fair airing of the facts and the law. Otherwise, the defective section 316(b) analysis will become a judicially-sanctioned baseline against which future permit renewals are determined.

CONCLUSION

Petitioner respectfully requests that the Court reverse the ruling below, enter a writ of mandate setting aside the BTA permit findings, and reinstate the trial court's original ruling.

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[17] Respondents suggest that this case is different because it "implicates" section 25531(c) of the Warren-Alquist Act. As discussed above, that statute does not apply to Petitioner's claims. Moreover, Respondents' argument proves too much. A remand order to undertake further evaluation may "stop" or "delay" a project just as surely as a writ of mandate, unless the remand is contemplated as nothing more than a paper exercise to collect post-decision evidence or provide a post hoc rationalization for the decision.

Dated: May 28, 2010

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: _____
Deborah A. Sivas

Counsel for Petitioner VOICES OF THE WETLANDS

CERTIFICATE OF WORD COUNT

I certify that the text of this Petitioner's Reply Brief on the Merits is printed in 13-point Times New Roman font and contains 8,397 words, exclusive of tables, as calculated by the word processing program used to generate it.

Dated: May 28, 2010

Deborah A. Sivas

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 May 28, 2010, I served the foregoing REPLY BRIEF ON THE MERITS 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:

Anita E. Ruud, Deputy Attorney General
John Davidson, Supervising Deputy Attorney General
Edmund G. Brown, Jr., Attorney General
CALIFORNIA ATTORNEY GENERAL'S OFFICE
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-7004

Attorneys for Respondents CALIFORNIA STATE WATER RESOURCES CONTROL BOARD and CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD – CENTRAL COAST REGION

Sarah G. Flanagan, Attorney at Law
PILLSBURY WINTHROP SHAW PITTMAN L.L.P.
50 Fremont Street, P. O. Box 7880
San Francisco, California 94120-7880

Attorneys for Respondents DYNEGY MOSS LANDING LLC

Keith G. Wagner, Esq.
LIPPE GAFFNEY WAGNER LLP
9333 Sparks Way
Sacramento, California 95827-1040

Attorney for Amicus Curiae PLANNING AND CONSERVATION LEAGUE

Clerk, Civil Division
MONTEREY COUNTY SUPERIOR COURT
1200 Aguajito Road
Monterey, California 93940

Trial Court

Clerk, Civil Division
CALIFORNIA COURT OF APPEAL
Sixth Appellate District
333 West Santa Clara Street, Suite 1060
San Jose, California 95113-1717

Court of Appeal

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 May 28, 2010 at Stanford, California.

Lynda F. Johnston
LYNDA F. JOHNSTON