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SUPREME COURT
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JAN 24 2011

Frederick K. Ohlrich Clerk

Deputy

January 24, 2011

Mr. Frederick K. Ohlrich
Court Administrator and Clerk of the Supreme Court
Earl Warren Building
350 McAllister Street
San Francisco, California 94102

**Voices of the Wetlands v. State Water Resources Control Board,
Case No. S160211**

Dear Mr. Ohlrich:

This letter brief is submitted by Petitioner Voices of the Wetlands ("Voices") in response to the Court's January 12, 2011, solicitation for additional information concerning the above-referenced case. Voices provides answers to the best of its ability for each of the numbered questions in the order they are asked by the Court.

1. Has the expansion of the Moss Landing Power Plan (MLPP), as proposed in Duke Energy's 1998 submissions to the California Energy Resources Conservation and Development Commission (Energy Commission) and the California Regional Water Quality Control Board, Central Region (Regional Water Board), been completed and become operational?

<u>Response</u>: *To the best of Voices' knowledge, the expansion of the MLPP was completed in 2002 and is currently operational. That expansion concerned new units 1 and 2 of the facility. Existing units 6 and 7, which were constructed in the late 1960s, continue to operate using once-through cooling technology and were not part of the 2002 expansion.*

2. If so, when did this occur?

<u>Response</u>: *Construction and commencement of the new units occurred between 2000 and 2002, while this case was pending in the lower court. Petitioner did not seek to enjoin construction or operation of the expansion because it believed that such injunctive relief was not permitted under the Warren-Alquist Energy Act, Cal. Pub. Res. Code section 25531(c). During the initial phase of the litigation, a third party attempted to intervene in the case for the purpose of seeking an injunction against construction and operation. The superior court denied that motion to intervene and indicated that injunctive relief was not available.*

3. Is the MLPP currently drawing cooling water, if any, from Elkhorn Slough under authority of Waste Discharge Requirements Order No. 00-41, National Pollution Discharge

Elimination System Permit No. CA0006254, issued by the Regional Board on November 6, 2000 (November 2000 NPDES permit)?

<u>Response</u>: *To the best of Voices' knowledge, the MLPP is currently withdrawing up to 1.224 billion gallons of cooling water each day from the Elkhorn Slough estuary pursuant to the authorization set forth in the November 2000 NPDES permit. Pursuant to federal and state law, NPDES permits may be issued for fixed terms not exceeding five years.* 33 U.S.C. 1342(b)(1)(B); 40 C.F.R. 122.46(a); Cal. Water Code § 13378. *Although the November 2000 NPDES permit expired on its face in November 2005, in accordance with this legal authority, Voices believes that the MLPP continues to operate and withdraw cooling water pursuant to a so-called administrative extension of that permit under 40 C.F.R 122.6(a)(2), which allows a facility to continue operating beyond the expiration date under certain conditions. It is Voices understanding that the Central Coast Regional Board has declined to initiate renewal proceedings for the November 2000 NPDES permit until resolution of the issues raised by this lawsuit, which will affect how the agency evaluates Clean Water Act section 316(b), 33 U.S.C. § 1326(b), compliance for both new units 1 and 2 and existing units 6 and 7.*

4. If the MLPP is not relying on the above authority for permission to draw cooling water, if any, from Elkhorn Slough, upon what other or different authority, if any, does the MLPP currently rely for such permission?

<u>Response</u>: *To be best of Voices' knowledge, the MLPP is withdrawing cooling water from Elkhorn Slough pursuant to the November 2000 NPDES permit, as explained in response to question 3.*

5. What is the current status of the Energy Commission's Order No. 00-1025-24, issued on November 3, 2000, approving Duke Energy's application for certification of its power plant modification (November 2000 Energy Commission certification order)?

<u>Response</u>: *To the best of Voices' knowledge, the November 2000 Energy Commission certification order remains in effect. Unlike NPDES permits, which must be renewed every five years in large part to implement the Clean Water Act's technology forcing intent purpose, Energy Commission certification decisions are intended to be a one-time approval of facility's site license, much like the local land use approvals it supersedes. Once a construction project is completed pursuant to an Energy Commission site license and certification decision, no future Energy Commission approvals are necessary unless the operator proposes to alter the facility in some way. NPDES permits, by contrast, are renewable operating permits that must be reviewed and updated at least every five years to accommodate changing conditions and technologies. In this litigation, Voices does not challenge the November 2000 Energy Commission certification order. It only challenges the November 2000 NPDES permit.*

6. What is the current status of the November 2000 NPDES permit?

Response: *As explained in response to question 3, it is Voices' understanding that the 2000 NPDES permit continues in effect pursuant to an administrative extension and governs the operation of the MLPP's cooling water system.*

7. If the plan is operating under terms of the November 2000 Energy Commission certification order, and the November 2000 NPDES permit, is there a dispute whether the operation under one or both of these authorities is proper during the pendency of this litigation? If not, why not? If so, what is the dispute?

Response: *Voices does not dispute that the MLPP may operate under the November 2000 Energy Commission certification order because, as explained above, Voices did not challenge that order and the Energy Commission decision constitutes a one-time approval for the construction of the facility.*

*With respect to the November 2000 NPDES permit, Voices remains concerned about the unreasonably long administrative extension of the permit, which has now continued in effect beyond what would have been another five-year permit period, without reconsideration of the section 316(b) compliance issues, but there is no effective forum in which Voices may raise those concerns. During the more than ten years that the MLPP has continued to operate under the extended permit, the California State Water Resources Control Board has continued to evaluate section 316(b) compliance issues. The State Water Board recently adopted a new policy calling for the phase-out of once-through cooling at all coastal power plants on a schedule negotiated with a number of other state agencies, including the California Energy Commission.* See *http://www.swrcb.ca.gov/water_issues/programs/npdes/docs/cwa316/policy100110.pdf. But a number of merchant generators, including the operator of the MLPP, have challenged that policy in court.* See *Attachment. Moreover, the new state policy does not fully address the Clean Water Act issues raised by this case or the inconsistency between the lower court's holding and federal law as articulated in* Riverkeeper, Inc. v. U.S. Environmental Protection Agency, *475 F.3d 83 (2d Cir. 2007). Accordingly, this Court's review of the legally and factually erroneous holding below remains as critical as ever to the future interpretation and implementation of section 316(b) in California.*

8. If the MLPP's modernization project has been completed and become operational, and if the MLPP has been operating under the authority of the November 2000 Energy Commission certification order and the November 2000 NPDES permit, do these circumstances render any of the issues in the case moot?

Response: *No. With respect to the Clean Water Act issues raised by this case, California continues to struggle with the interpretation and implementation of section*

*316(b). The State Water Board staff and outside commenter have repeatedly looked to the lower court's holding in this case for guidance on how to interpret section 316(b), and the Central Coast Regional Board does not intend to initiate an NPDES permit renewal process until those interpretation issues are solved. Because the MLPP continues to withdraw cooling water under the authority of the November 2000 NPDES permit, Voices' Clean Water Act claims are not moot and their consideration and resolution will provide invaluable guidance for the State's implementation of its new coastal power plant cooling policy and for the trial court's interpretation of that policy in the pending legal challenge.*

*Additionally, the administrative law issues raised by this case are not moot. They directly affect the lower court's resolution of substantive issues under the Clean Water Act and create a conflict with this Court's prior precedent, as discussed at length in Voices' merits briefs.*

As indicated by Voices' responses above, no claim or issue in this case is moot. The NPDES permit challenged here continues, into the indefinite future, to govern cooling water withdrawals at the MLPP. The Court's review and resolution of those issues remains vital both to the operation of this particular power plant and to the State of California's implementation of its Clean Water Act authority consistent with federal law.

Sincerely yours,

Deborah A. Sivas
Counsel for Voices of the Wetlands

cc: Anita E. Ruud, Deputy Attorney General
(Counsel for Respondents State and Regional Water Boards)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

RRI ENERGY, INC.; MIRANT DELTA, LLC; DYNEGY MOSS LANDING, LLC; DYNEGY MORRO BAY, LLC; EL SEGUNDO POWER, LLC; CABRILLO POWER I LLC

Petitioners

v.

STATE WATER RESOURCES CONTROL BOARD, A CALIFORNIA STATE AGENCY, and DOES 1-20

Respondents

CASE NO.

VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Water Code §§ 13000 et seq.; 23 CCR §§ 647 et seq., 3270 et seq.; 40 CFR §§ 25.1 et seq., 122.1, et seq., 123.1 et seq.; Gov. Code §§ 11340 et seq.; 33 U.S.C. §§ 1251 et seq.; Pub. Res. Code §§ 21000 et seq.; 14 CCR §§ 15000 et seq.; Cal. Const. Art. 1, § 7; U.S. Const., 14th Amend., § 1; Code of Civ. Proc. §§ 1908, 1085 and 1094.5)

**INTRODUCTION**

1. Petitioners RRI ENERGY, INC. ("RRI"), MIRANT DELTA, LLC ("Mirant"), DYNEGY MOSS LANDING, LLC, DYNEGY MORRO BAY, LLC (collectively,"Dynegy"), EL SEGUNDO POWER, LLC, and CABRILLO POWER I LLC (collectively, "Petitioners") petition this court for a Writ of Mandate ("Petition") pursuant to Code of Civil Procedure sections 1085 and 1094.5, directed to Respondent STATE WATER RESOURCES CONTROL BOARD ("Board"). Petitioners challenge the Board's May 4, 2010 adoption of the Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling (the "Policy") and the related

certification of the final Substitute Environmental Document ("SED") for the Policy. The Policy applies to California thermal power plants that currently use a single pass cooling system also known as once-through cooling ("OTC"), including power plants owned and operated by Petitioners.

2. Power plants that generate electricity with condensing steam turbines must utilize some form of cooling system. One cooling method is OTC, which involves the withdrawal and use of marine or estuarine waters for cooling purposes.

3. The Board is responsible for adopting state-wide policy for water quality control (Water Code § 13140), and is the designated state water pollution control agency for all purposes stated in the Clean Water Act. (Water Code § 13160.) The Board implements a National Pollutant Discharge Elimination System ("NPDES") permit program in lieu of a U.S. Environmental Protection Agency ("EPA") administered program under the Clean Water Act (Water Code §§ 13370, et seq.; 40 CFR §§ 122.1, et seq., 123.1, et seq.) and oversees the Regional Water Quality Control Boards' ("Regional Boards") administration of the NPDES permit program. (Water Code §§ 13263, 13320.) The California Natural Resources Agency has approved the Board's water quality control planning process as a "certified regulatory program" pursuant to the California Environmental Quality Act ("CEQA"). (23 CCR § 3782.)

4. The Federal Water Pollution Control Act ("Clean Water Act")(33 U.S.C. §§ 1251, et seq.) provides that the location, design, construction, and capacity of cooling water intake structures should reflect the best technology available ("BTA") for minimizing adverse environmental impact, including impacts to aquatic organisms that may be harmed during the OTC process. (33 U.S.C. 1326(b).)("section 316(b)")

5. The Board has proposed the OTC Policy as a State Water Quality Control Policy pursuant to the Porter Cologne Water Quality Control Act (Water Code §§ 13000, et seq.)("Porter Cologne").

6. The Board prejudicially abused its discretion and exceeded its authority when it adopted the Policy and violated the Clean Water Act by adopting a policy to implement Clean

Water Act section 316(b) in a manner that is in conflict with section 316(b) and the laws and regulations interpreting the same.

7. In certifying the SED and adopting the Policy, the Board prejudicially abused its discretion and failed to proceed in a manner required by law in violation of the Clean Water Act, applicable federal regulations, Porter Cologne , the Board's own regulations, the Administrative Procedure Act ("APA"), CEQA and the CEQA Guidelines, the Due Process and Equal Protection Clauses of the California Constitution and the U.S. Constitution, and principles of judicial estoppel and collateral estoppel. (33 U.S.C. §§ 1251, et seq.; 40 CFR §§ 25.1, et seq., 122.1, et seq., 123.1, et seq.; Water Code §§ 13000, et seq.; 23 CCR §§ 647, et seq., 3270, et seq.; Gov. Code §§ 11340, et seq.; Pub. Resources Code §§ 21000, et seq.; 14 CCR §§ 15000, et seq.; Cal. Const. Art. 1, § 7; Code of Civ. Proc. § 1908; U.S. Const. 14th Amend., § 1.)

8. If left to stand, the Policy will require Petitioners to comply with requirements that are legally invalid, technically and economically infeasible, and wholly disproportionate to any demonstrated environmental benefits to be derived from the Policy. The Policy also will have unjustified and significant consequences for energy production in California, both in terms of the ability to meet demand for power in many areas of the State, and the costs of power generation and transmission.

9. A writ of mandate and preliminary and permanent injunctions are necessary to remedy the Board's failure to conduct proper review, to require that the Board comply with all applicable laws, and to prevent irreparable injury to Petitioners from the application of the Policy as adopted by the Board. Petitioners pray that the Board's adoption of the Policy and certification of the SED be set aside.

10. A grant of this petition would prevent unjust charges being passed onto ratepayers, and would enforce CEQA's substantive and procedural goals, thereby resulting in the "enforcement of an important right affecting the public interest." (Code of Civ. Proc. § 1021.5.)

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## PARTIES

11. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

12. Petitioner RRI is, and at all times herein mentioned was a Delaware Corporation. Petitioner RRI's wholly owned subsidiaries own and operate two electric generation facilities – Mandalay Station and Ormond Beach Station – that utilize OTC technology.

13. Petitioner Mirant is, and at all times herein mentioned was a limited liability company registered in Delaware. Petitioner Mirant owns and operates two power plants –Pittsburg Power Plant and Contra Costa Power Plant – that utilize OTC technology.

14. Petitioner Dynegy Moss Landing, LLC is, and at all times herein mentioned was, a limited liability company registered in Delaware. Petitioner Dynegy owns and operates the Moss Landing Power Plant, which utilizes OTC technology.

15. Petitioner Dynegy Morro Bay, LLC is, and at all times herein mentioned was, a limited liability company registered in Delaware. Petitioner Dynegy owns and operates the Morro Bay Power Plant, which utilizes OTC technology.

16. Petitioner El Segundo Power, LLC is, and at all times herein mentioned was, a limited liability company registered in Delaware. Petitioner El Segundo Power LLC owns and operates the El Segundo Generating Station, which utilizes OTC technology.

17. Petitioner Cabrillo Power I LLC is, and at all times herein mentioned, was, a limited liability company registered in Delaware. Petitioner Cabrillo Power I, LLC owns and operates Encina Power Station, which utilizes OTC technology.

18. The Respondent Board is a public agency of the State of California, duly created by the California Legislature pursuant to the provisions of Article 3, Chapter 2, Division 1, section 74, et seq., of the Water Code and consists of five members appointed by the Governor of the State of California. The Board is a state government department organized under the California Environmental Protection Agency.

19. Petitioners are unaware of the true capacities of Does 1 through 20, and sue such respondents by fictitious names. Petitioners are informed and believe, and based on such

information and belief, allege that said respondents are in some manner responsible for the adoption of, imposition of, or administration of the Policy and related occurrences of which Petitioners complain of herein. Petitioners will amend this Petition to set forth the true names and capacities of the fictitiously named respondents when such information has been ascertained.

## JURISDICTION AND VENUE

20. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

21. This Court has jurisdiction over the matters alleged in this Petition pursuant to Code of Civil Procedure sections 526, 527, 1060, 1085, and 1094.5, and Public Resources Code sections 21168 and 21168.5.

22. Venue for this action properly lies in the Superior Court of the State of California in and for the County of Sacramento pursuant to California Code of Civil Procedure section 401(a). The Respondent Board is a California state agency with headquarters in Sacramento, and there is an Attorney General's office in the County of Sacramento, California.

## STANDARD OF REVIEW

23. In reviewing the Board's adoption of the policy and certification of the SED under CEQA, the Court should determine whether the agency has committed a prejudicial abuse of discretion. Pub. Resources Code section 21168.5. "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Id.) The court should "determine whether the act or decision is supported by substantial evidence in light of the whole record." Pub. Resource Code, section 21168. The standard of review for CEQA actions under Public Resources Code section 21168 and 21168.5 are "essentially the same." *Laurel Heights Improvement Assn v Regents of the University of California* (1988) 47 Cal.3d 376, 392. "An agency's use of an erroneous legal standard constitutes a failure to proceed in a manner required by law." (*East Peninsula Education*

*Council, Inc v Palos Verdes Peninsula Unified School Dist* (1989) 210 Cal.App.3d 155, 165.)

24. For all other causes of action, judicial review under California Code of Civil Procedure section 1085 requires the court to consider "whether the action taken was arbitrary, capricious, or entirely lacking in evidentiary support, or contrary to required legal procedures." (*Stauffer Chemical Co. v. Air Resources Control Board* (1982) 128 Cal.App.3d 789, 796.) Judicial review under California Code of Civil Procedure section 1094.5 requires the court to consider "whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code of Civ. Proc. § 1094.5(b).) Abuse of discretion is established if the court determines that "the findings are not supported by substantial evidence in the light of the whole record" or that "the findings are not supported by the weight of the evidence." (Code of Civ. Proc. § 1094.5(c).)

## STANDING

25. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

26. Petitioners have standing to assert the claims raised in this Petition. As owners and operators of facilities subject to the Policy, Petitioners have a direct and beneficial interest in the Board's full compliance with CEQA, Porter Cologne, the Clean Water Act, and all other applicable laws concerning the Board's adoption and implementation of the Policy.

27. Petitioners are threatened with irreparable injury if the Policy remains in effect because the Policy requires Petitioners to perform numerous measures and to undertake significant operational modifications and structural changes that impose a significant economic burden and may ultimately require the closure of Petitioners' Facilities (*infra* ¶

44).

## EXHAUSTION OF ADMINISTRATIVE REMEDIES

28. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein. Petitioners have exhausted administrative remedies to the full extent required by law. Petitioners have actively participated in the administrative process since the commencement of CEQA scoping meetings in 2006, and have consistently raised the legal deficiencies asserted in this Petition in both their written and oral comments submitted during the administrative process. Petitioners have submitted written and oral comments, participated in public workshops and hearings, and raised procedural and substantive objections to the Policy and the SED, including but not limited to the submission of timely comment letters to the Board and participation in hearings relating to the drafting, development and adoption of the Policy. Petitioners or other parties raised, at the administrative level, all factual and legal objections asserted in this Petition.

## STATUTE OF LIMITATIONS

29. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

30. On May 4, 2010, the Board certified the SED and adopted the Policy by Resolution 2010-0020.

31. On August 10, 2010, the Board transmitted a summary of regulatory provisions to the Office of Administrative Law ("OAL") along with other supporting documentation for approval pursuant to Government Code § 11353.

32. On September 27, 2010, OAL approved the regulatory action pursuant to Government Code § 11353, thereby incorporating the regulatory provisions of the Policy into Title 23 of the California Code of Regulations.

33. On October 1, 2010, the Board filed the SED Notice of Decision ("NOD") for the Policy with the Secretary of Resources pursuant to CEQA.

34. CEQA requires that a challenge to the approval or adoption of a project based on a

CEQA document prepared pursuant to a state agency's certified regulatory program be filed within thirty (30) days of the filing of the NOD with the Secretary of Resources. (Pub. Resources Code, § 21080.5(g).)

35. This Petition is filed not more than thirty (30) days after the Board filed the NOD and is therefore timely.

**NOTICE OF CEQA SUIT AND NOTICE TO THE ATTORNEY GENERAL**

36. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

37. Petitioners have complied with the requirements of Public Resources Code § 21167.5 by serving by facsimile and United States mail written notice of this action to the Board on October 26, 2010. (See Exhibit A: Notice to Board.)

38. Petitioners also have complied with the requirements of Public Resources Code § 21167.7 and Code of Civil Procedure § 338 by notifying the Attorney General of California of the commencement of this action onOctober 26, 2010. (See Exhibit B: Notice to California Attorney General.)

**IRREPARABLE HARM**

39. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

40. Petitioners have no plain, speedy, or adequate remedy in the course of ordinary law unless this court grants the requested injunctive relief and writ of mandate to require Respondent to set aside certification of the SED and approval of this Policy. In the absence of such remedies, Respondent's Policy will remain in effect in violation of state and federal law, and Petitioners will be irreparably harmed because Petitioners will be required to perform numerous measures and to undertake significant operational modifications and structural changes that impose a significant economic burden and ultimately require the closure of Petitioners' Facilities. No money damages or legal remedy could adequately compensate Petitioners for that harm. Petitioners are likely to succeed on the merits at trial, and Petitioners will suffer greater interim harm if the Policy

remains in effect than the Respondents would suffer if the Court grants a preliminary injunction.

## FACTUAL, LEGAL, AND PROCEDURAL BACKGROUND

41. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

### A. Once-Through Cooling

42. Three general types of cooling systems commonly are used at California power plants, including OTC systems, closed-cycle cooling systems, and dry cooling systems.

43. Nineteen electrical power plants in California, including two nuclear fueled plants, use marine or estuarine waters as a source of cooling water in OTC.

44. OTC systems withdraw water from adjacent waterbodies through an intake structure located on the shoreline or off-shore. The systems pump the water through the tubes of a surface steam condenser where it cools the turbines before it is returned to the same or other nearby waterbody.

45. Close-cycle cooling is similar to OTC in that steam is condensed in water-cooled tube condensers. The closed-cycle cooling system is different than OTC as water used for cooling is not returned to the environment. Rather, it is conveyed to a cooling component, typically a tower, and then re-circulated to the condenser once cool. Closed-cycle cooling systems withdraw less water than OTC, but these systems are substantially more expensive, require the installation of large cooling towers, are less efficient due to higher operating power requirements and higher energy consumption, and tend to cause other adverse environmental impacts.

46. Dry cooling systems use mechanical, forced draft air-cooled condensers. Dry cooling systems use substantially less water than OTC and closed-cycle systems for plant cooling, but generally also have additional environmental impacts, are less efficient, and require even larger cooling towers.

### B. Petitioners' Power Producing Facilities Subject to the Policy

47. Petitioners own and operate eight power plants that utilize OTC and are subject to the

Board's Policy at issue in this Petition, including Mandalay Station ("Mandalay"), Ormond Beach Station ("Ormond"), Pittsburg Power Plant ("Pittsburg"), Contra Costa Power Plant ("Contra Costa"), Moss Landing Power Plant ("Moss Landing"), Morro Bay Power Plant ("Morro Bay"), El Segundo Generating Station ("El Segundo"), and Encina Power Station ("Encina") (collectively, "Petitioners' Facilities").

48. Combined, Petitioners' Facilities can contribute up to approximately 8,700 megawatts of electricity to the grid, and play a critical role with respect to the availability and reliability of the electric power supply in California and particular geographic areas of the State.

49. The Mandalay, Ormond, Pittsburg, Contra Costa, and Morro Bay facilities, and Moss Landing Units 6 & 7, currently operate as peaking facilities with low capacity utilization rates. "Peaking" facilities operate in a load-following capacity that requires availability to meet high demands during certain periods of the day or year as directed by procurement contracts or California Independent System Operator ("CAISO") policy. "Low capacity utilization rate" means the facility has a low ratio between the average annual net generation of energy and the total net capability of the facility to generate energy. These facilities have low capacity utilization rates because they are currently only operated when needed to meet high demands, or are operated at only partial output so as to provide critical load following and back-up services to the electric grid.

50. Petitioners' Facilities deliver power to critical points in California's electricity grid. California's grid is an interconnected system of high voltage transmission lines delivering power from power plants to distribution systems owned by utilities. In certain areas of the State, known as "Local Reliability Areas," power is difficult to import due to limits over key transmission lines. The CAISO is responsible for assessing and maintaining reliability for the majority of the State. Petitioners' Facilities located in Local Reliability Areas provide critical power and are often required to operate by CAISO to ensure grid reliability when other elements of the local electricity grid are unavailable.

51. Petitioners' Facilities provide both peaking power and reliability services and also play an important role in supporting renewable energy. Renewable energy sources, such as

wind and solar power, are "intermittent" sources of energy and production varies widely during the day and during certain times of year. Petitioners' Facilities are necessary to back-up and balance renewable power production to meet demand.

52. Cost-benefit studies submitted by National Economic Research Associates ("NERA studies") show that the costs of eliminating OTC at Ormond Beach and Mandalay exceed the benefits by a factor of 533. Other Petitioners' Facilities would likely achieve a similar cost-benefit ratio and cost of eliminating OTC has already been found to be wholly disproportionate at Moss Landing.

**D. The Board's OTC Policy**

53. The Board Policy at issue applies to California's thermal power plants utilizing OTC systems.

54. The stated purpose of the Policy is to uniformly establish closed-cycle cooling as the BTA for cooling water intake structures at existing power plants in California that utilize coastal and estuarine water for cooling purposes, pursuant to section 316(b) of the Clean Water Act.

55. Clean Water Act section 316(b) requires that cooling water intake structures reflect the best technology available to minimize adverse environmental impact. Impacts from OTC include "impingement" and "entrainment." Impingement occurs when larger aquatic organisms are trapped against a facility's intake screen and can result in injury or death to the organism. Entrainment occurs when smaller aquatic organisms are drawn into a plant's cooling system and can also result in injury or death to the organism. Impingement and entrainment impacts can be correlated to the water intake velocity and volume. Therefore, efforts to establish BTA, and to minimize adverse environmental impact, seek to reduce water intake velocity and volume, sometimes combined with structural changes to the water intake structure.

56. Previous to the adoption of the Policy, consistent with written guidance issued by the EPA and with judicial precedent, the Regional Boards have been interpreting section 316(b) on a case-by-case basis using best professional judgment at the time they issue

NPDES permits to individual facilities. In fact, the OTC system at Moss Landing was recently determined to be BTA at Moss Landing. The Board and the Central Coast Regional Board continue to defend the determination of BTA in the Moss Landing case in ongoing litigation before the California Supreme Court. (*Voices of the Wetlands v State Water Resources Control Board* (2007) 157 Cal.App.4th1268 ("*Voices of the Wetlands*") on appeal to the California Supreme Court, Supreme Court Case No. S160211.)

57. The Board's Policy also comes after, and contradicts, thirty-years of interpretation of the meaning of Clean Water Act section 316(b) and attempted rulemaking by the EPA to establish BTA nation-wide.

58. BTA is not defined in the Clean Water Act, nor does section 316(b) specify what factors should be considered in establishing BTA. Unlike previous site-specific determinations of BTA by the Regional Boards and unlike the EPA's interpretation of section 316(b), in adopting the Policy, the Board did not compare the cost of compliance to expected benefits or consider whether the cost of compliance was wholly disproportionate to the benefits. Rather, the Board considered whether costs of compliance could be reasonably borne by the industry as a whole. In addition, the Board's methodology for determining whether costs could be reasonably borne by the industry was flawed and established in an arbitrary and capricious manner.

59. The Board ultimately established BTA as the water intake flow velocity and volume that is achieved by power plants utilizing closed-cycle wet cooling. This standard is very difficult to meet without installing closed-cycle cooling systems at the OTC facilities.

The May 4, 2010 Policy

60. The final Policy, as adopted by the Board on May 4, 2010, contains two potential compliance tracks for existing power plants, referred to as "Track 1" and "Track 2" in the Policy. Existing power plants must comply with either Track 1 or Track 2 as soon as possible, but not later than final compliance schedule dates contained in the Policy for each particular facility.

61. Track 1 requires the owner or operator of an existing power plant to install closed-cycle or dry-cycle cooling technology, or to reduce water intake flow rate to a level commensurate with that which can be attained by a closed-cycle wet cooling system, which the Policy determines to be a minimum of 93 percent reduction in intake flow rate compared to the unit's design intake flow rate, with a through-screen intake flow velocity that does not exceed 0.5 foot per second.

62. Track 2 requires the owner or operator of an existing power plant to demonstrate that compliance with Track 1 is "not feasible" before the facility may pursue compliance under Track 2. "Not feasible" is defined in the Policy as not capable of being accomplished because of space constraints or inability to obtain necessary permits. Under the Policy, cost is not a factor in determining whether Track 1 compliance is not feasible.

63. Track 2 compliance for impingement requires measured reductions in impingement mortality to at least 90 percent of the reduction in impingement mortality required under Track 1, or for plants relying solely on reductions in intake velocity, monthly verification of through-screen intake velocity that does not exceed 0.5 foot per second. Track 2 compliance for entrainment requires measured reductions in entrainment to at least 90 percent of the reduction in entrainment required under Track 1, or for plants relying solely on reductions in flow, 93 percent reduction in flow as compared to the average actual flow (not design flow) for the corresponding months from 2000 to 2005.

64. Existing power plants with "combined cycle units," or units within a power plant which combined generate electricity through a two-stage process involving combustion and steam, may credit prior reductions in impingement and entrainment from the replacement of steam turbine power-generating units toward meeting Track 2 requirements. Prior reductions are measured as the difference between the maximum permitted discharge for the entire plant, prior to cooling unit replacement, and the maximum permitted discharge for the entire plant after the replacement.

65. The Policy applies a materially different and preferential standard to nuclear facilities as

compared to other power facilities under the Policy. Specifically, for nuclear facilities, the Policy requires the Board to consider whether nuclear facilities' cost of compliance is wholly out of proportion to expected costs or compliance is unreasonable based on feasibility of attaining compliance with Track 1 and the environmental impacts of that compliance. Such wholly disproportionate compliance cost analysis is not available to other facilities under the Policy despite the fact that, for example, the NERA studies demonstrate that the cost-benefit result for Ormond Beach and Mandalay is more disproportionate than for the nuclear facilities and cost of eliminating OTC at Moss Landing has already been found to be wholly disproportionate. The two nuclear facilities covered by the Policy are responsible for approximately 40 percent of the impingement and the entrainment caused by all facilities subject to the Policy.

66. If left to stand, the Policy will require Petitioners to implement numerous measures by October 1, 2011, including the installation of large organism exclusion devices on off-shore intakes and cessation of intake flows when not directly engaging in power generating activities or conducting critical system maintenance. By October 1, 2015, until final compliance, Petitioners will be required to implement various measures to address impingement and entrainment at Petitioners' Facilities.

67. If left to stand, the Policy will require each owner or operator (except the nuclear facilities) to submit an implementation plan by April 1, 2011 to the Board. The implementation plan is to identify the selected compliance alternative and describe the design, construction, or operational measures that will be undertaken to implement the alternative. The implementation plan is to propose a schedule for implementing these measures that is as short as possible.

68. Pursuant to the compliance schedule, all of Petitioners' Facilities must comply with Track 1 or Track 2 by December 31, 2015 (Morro Bay, El Segundo), December 31, 2017 (Encina, Contra Costa, Pittsburg, Moss Landing), and December 31, 2020 (Mandalay, Ormond Beach), requiring significant operational changes and/or the installation of cooling towers at great cost. Implementation of the Policy could lead to closure of

Petitioners' Facilities because compliance with Track 1 and Track 2 requirements is technically and/or economically infeasible.

69. The Policy requires the Board to undertake actions on all NPDES permits for the power plants subject to the Policy, including actions to issue, modify, reissue, revoke, and terminate NPDES permits. The Policy provides that the Board will reissue or modify NPDES permits issued to owners or operators after a hearing in the affected region to ensure that the permits conform to the provisions of this Policy.

Public Comment and Policy Adoption Process

70. The Board failed to comply with numerous procedural requirements and disregarded public comments in adopting the Policy, resulting in procedural and substantive deficiencies in the Policy and the SED. The Board failed to provide sufficient notice and held public comment periods that were shorter than required by Porter Cologne and the Board's regulations in December 2009 and prior to the May 4, 2010 adoption meeting. For the adoption meeting, the Board's notice did not provide environmental review as a topic of the hearing, restricted oral comments and did not accurately describe the action the Board intended to take. Finally, the Board continually disregarded written comments from the Petitioners and other parties dated September 30, 2009, December 8, 2009, and April 13, 2010 and oral comments made at public hearings on September 16, 2009, December 1, 2009, and May 4, 2010 raising legal deficiencies and errors in the SED. The Board did not provide a reasoned explanation for not adopting the suggested revisions.

Policy Adoption Meeting

71. The Board allowed limited oral comments at the May 4, 2010 adoption meeting and then closed the public comment portion of the meeting.

72. After closing the public comment portion of the meeting, the Board considered seventeen changes to the March 22 draft Policy. These modifications were substantive and material, and include:

a. Making the Board, rather than the Regional Boards, responsible for issuing

NPDES permits to facilities regulated by the Policy;

b. Inserting a new requirement that facilities establish that compliance with Track 1 is "not feasible" in order to be eligible for compliance under Track 2;

c. Changing the entrainment reduction standard in Track 2 from "design flow" criteria to "average actual flow" rates for the corresponding months from 2000-2005.

d. Deleting the credit for prior entrainment reductions at combined cycle power generating units for which the California Energy Commission ("CEC") and/or a Regional Board had already imposed mandatory mitigation requirements.

73. Many of the May 4, 2010 modifications resulted in material and substantive conflicts with prior Staff reports and analyses contained in Board responses to comments on the Policy and the SED. For example, the May 4, 2010 revisions deviate significantly from Board analyses supporting the March 22 draft Policy, *viz.*:

a. The "infeasibility" requirement for Track 2.

i. A requirement that the owner or operator show that compliance with Track 1 is "not feasible" to be eligible for compliance under Track 2 was removed from the March 22 draft Policy: "Staff believes the determination of infeasibility will be problematic and subjective, likely resulting in inconsistencies from Region to Region, and at the very least would burden the Regional Water Boards with an unnecessary additional workload." (Final SED, p. 65.)

ii. The infeasibility test was referenced in Responses to Comments on the Policy as well. The Board's Staff stated that it removed the infeasibility requirement as a comparable alternative to allowing a cost-benefit and wholly disproportionate analyses, as a means to make Track 2 available to all facilities, and as evidence that the Policy would not require the shutdown or forced repowering of any existing power plant. (Final SED, Appendix G, Responses to Comments 51.02, 61.19, 31.05, 31.06, 31.27,

31.01, 31.57, 57.02.) Re-insertion of the infeasibility requirement conflicts with these analyses and justifications.

b. Changing the measurement for entrainment flow under Track 2 from design flow to average actual flow for the corresponding months from 2000-2005.

iii. In Response to Comments, Staff justified rejecting alternative requirements for low capacity utilization rate units because Track 2 measured reduction in entrainment based on design flow, allowing these units to meet Track 2. (Final SED, Appendix G, Responses to Comments 61.20, 31.13.)

iv. Staff concluded that averaging flow rates would be too restrictive and reductions measured from design flow was fair, comparable to Track 1, and reasonably provided entrainment reduction credit to facilities that ran less. (Final SED, Appendix G, Responses to Comments 11.64, 31.11, 31.33, 46.02.)

74. At the May 4, 2010 adoption meeting the Board took individual "straw" votes on each of the seventeen proposed changes, and then adopted the Policy, as amended, without allowing additional public comment on the significant and material modifications.

**E. Impact of the Board's Policy on Petitioners**

75. The Policy imposes compliance costs on the Petitioners that are disproportionate to any demonstrated environmental benefits.

76. The Policy requires compliance by means that even the Board's own analysis has shown is infeasible at some OTC plants. For example, some of the compliance requirements conflict with local ordinances, conflict with other existing environmental laws, will face local opposition, or will be prohibited because of the lack of sufficient air emission reduction credits to offset the increased air emissions of closed-cycle cooling.

77. The costs of compliance with the Policy are wholly disproportionate to the benefits to be derived, may lead to the forced closure of OTC facilities, and will increase cost to the public and ratepayers.

## FIRST CAUSE OF ACTION
**Violations of the Federal Water Pollution Control Act ("Clean Water Act")**
**(33 U.S.C. §§ 1251, et seq.)**

78. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

79. Clean Water Act section 316(b) requires the location, design, construction, and capacity of cooling water intake structures to reflect the BTA for minimizing adverse environmental impact. (33 U.S.C. § 1326(b).)

80. The Policy violates and misapplies Clean Water Act section 316(b) by, without limitation: (1) failing to apply a cost-benefit analysis or "wholly disproportionate" test; (2) requiring a particular cooling technology (closed-cycle wet cooling) that goes beyond the regulation of intake structures; (3) requiring the implementation of BTA that are not feasible and thus not "available"; and (4) seeking to eliminate OTC and power plants that utilize that technology instead of focusing on minimization of adverse environmental impacts associated with cooling water intake structures.

81. The SED concludes that a cost-benefit analysis is not required when establishing BTA under section 316(b). This conclusion conflicts with applicable legal precedent and relies on a misinterpretation of the law.

82. The adoption of the Policy was arbitrary and capricious, contrary to law, and unsupported by the evidence. In particular, but without limitation:

a. The Policy imposes a BTA standard that is not "available" at most facilities that are subject to the Policy. For example, several OTC plants cannot feasibly install cooling towers due to space constraints, conflicts with local land use ordinances, and/or because air emission credits are not available to offset increased air emissions resulting from implementation of the Policy;

b. The Policy provides no meaningful alternative to closed-cycle cooling because Track 2 is not feasible or available. For example, Track 2 compliance is measured in a per-unit basis and flow reductions are measured against average

actual flows from 2000-2005, when many facilities were already operating at well below capacity. As a result, Track 2 requires flow reductions that are actually significantly greater than reductions associated with installation of closed-cycle cooling;

c. The Policy fails to include BTA for minimizing environmental impact and instead, aims to eliminate OTC altogether, except for the nuclear plants;

d. The SED and the Policy fail to analyze and take into account whether costs are wholly disproportionate to the environmental benefit to be gained;

e. The Policy fails to include a "standard" to determine if costs are wholly disproportionate to the environmental benefit to be gained;

f. The Policy fails to provide any analysis or a reasoned explanation for its selection of closed-cycle technology as the BTA, or how the BTA was determined for each of the power plants subject to the Policy;

g. The Policy's conclusions with respect to the use of a cost-benefit test in establishing BTA is inconsistent with the Central Coast Regional Board's determination in the Moss Landing case, while the Board and the Central Coast Regional Board continue to defend that determination in litigation involving Moss Landing. (*Voices of the Wetlands,* (2007) 157 Cal.App.4th1268; *Voices of the Wetlands*, Supreme Court Case No. S160211.) Moss Landing is subject to the Policy at issue herein.

h. The Policy's conclusions that the costs of the Policy are reasonably borne by industry is arbitrary and capricious and not supported by substantial evidence;

i. The seventeen adopted amendments included in the final Policy were arbitrary and capricious, and not supported by substantial evidence.

83. For the foregoing reasons, the Board failed to proceed in a manner required by law and abused its discretion in adopting a Policy in violation of and in conflict with Clean Water Act requirements to the injury and detriment of Petitioners.

## SECOND CAUSE OF ACTION

**Violations of the Porter Cologne Water Quality Control Act**
**(Water Code §§ 13000, et seq.)**

84. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

85. The Policy violates Porter Cologne because it conflicts with the Legislature's declared policy and procedural requirements of Porter Cologne.

**A. Violations of Porter Cologne Consistency Provision, Water Code section 13372**

86. To ensure consistency with Clean Water Act requirements, Porter Cologne requires that the State and Regional Boards issue and administer NPDES permits such that all applicable Clean Water Act requirements are met. As a consequence of the violations of Clean Water Act section 316(b), as identified above, the Policy violates Water Code section 13372. (Water Code § 13372.)

**B. Violations of Porter Cologne Policies, Water Code section 13000**

87. Porter Cologne requires that the Board adopt state-wide water quality control policy in accordance with the policies set forth in the first chapter of the Act. (Water Code § 13140.) One of those policies is the Legislature's finding that "activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest quality water which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Water Code § 13000.)

88. The Policy violates Water Code section 13000 by establishing Track 1 and Track 2 standard that are infeasible and, as a practical matter, impossible to meet at Petitioner's Facilities that are subject to the Policy other than by simply shutting down facilities.

89. The Policy violates Water Code section 13000 because it does not allow consideration of costs associated with compliance with the Policy.

90. The Policy violates Water Code section 13000 because it fails to allow consideration of site-specific variables, such as the local impingement and entrainment effects at the facilities using OTC to demonstrate the relative benefits and impacts of the Policy on

water quality and wildlife, or the feasibility and impacts of installing closed-cycle cooling systems or other technologies to address impingement and entrainment at a specific site. Porter Cologne requires consideration of a range of site-specific factors including, without limitation, environmental and aesthetic impacts of cooling towers, environmental impacts of the cessation of the use of marine and estuarine water at OTC facilities, and other site-specific adverse impacts associated with implementation of the Policy.

### C. Violations of Porter Cologne Procedures, Water Code section 13147

91. Porter Cologne requires the Board to conduct a public hearing prior to the adoption of state policy for water quality control, and to provide notice to regional boards and the affected region at least sixty days prior to the public hearing. (Water Code § 13147.) The Board violated this provision for both the December 1, 2009 workshop on the draft Policy and the May 4, 2010 adoption meeting, both of which were public hearings respecting the adoption of the Policy.

92. The Board provided an email notice of the December 1, 2009 workshop on November 19, 2009, providing only twelve days notice and not the sixty days notice required by Porter Cologne. In addition, the Board did not issue the revised draft Policy until November 23, 2009, and did not separately notice when the revised Policy was published for public review.

93. The Board issued a public notice on March 23, 2010 for the May 4, 2010 adoption meeting, and then revised and re-issued the notice on March 24, 2010. The notice was not sufficient under Porter Cologne because it provided, at most, only forty-two days notice as opposed to the sixty days required by statute. (Water Code § 13147.) The Board also failed to provide notice of the substantial and material modifications that it adopted during the May 4, 2010 adoption meeting.

94. The Board adopted the Policy in violation of Porter Cologne's substantive and procedural requirements. In doing so, the Board acted in an arbitrary and capricious manner, and contrary to required legal procedures to the injury and detriment of Petitioners.

## THIRD CAUSE OF ACTION

**Violations of Title 23 of the California Code of Regulations**
**(Title 23, Division 3, Chapter 1.5, §§ 647, et seq. and Chapter 27, §§ 3720, et seq.)**

95. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

**A. Violations of the Board's regulations governing meetings, adjudicatory hearings and rulemaking proceedings**

96. The Board's regulations provide that any person may submit comments in writing on any agenda item. (23 CCR § 647.3(a).) The Board violated this regulation because it did not open a written comment period on the Policy prior to the December 1, 2009 workshop.

97. The Board's regulations require that the Board's agenda include "a description of each item, including any proposed action to be taken." (23 CCR § 647.2(b).) The Board violated this provision by failing to describe the action that was taken at the May 4, 2010 adoption meeting in the agenda. The agenda notified the public that the Board was considering adopting the draft Policy dated March 22, 2010. Instead, at the May 4, 2010 meeting, the Board considered and ultimately adopted a significantly and materially different Policy, including seventeen substantive amendments to the draft Policy not noticed in the agenda and agenda materials.

98. The Board's regulations require that persons present at a Board meeting be given an opportunity to make relevant oral comments on any agenda item. (23 CCR § 647.3(b).) The Board violated this provision at the May 4, 2010 adoption meeting when it closed public comment prior to making seventeen significant and material substantive changes to the draft Policy, and when it voted to adopt the Policy as revised without allowing any public comment on the amendments.

99. The Board's regulations governing rulemaking proceedings provide that proceedings to adopt regulations, at a minimum, shall comply with all applicable requirements established by the Legislature in the APA, commencing with Government Code section 11340. (23 CCR § 649.1.) As set forth below, the Board did not comply with the minimum requirements in the APA in violation of this regulation.

100. The Board's regulations contain procedural requirements for adjudicatory hearings, including requirements regarding the identification and rights of parties, the introduction of evidence, the order of the proceeding, and the examination or cross-examination of witnesses. (23 CCR §§ 648, et seq.) The Board's regulations also make provisions of the APA applicable to adjudicatory proceedings before the Board. (23 CCR § 648.)

101. The SED and the Policy as adopted apply to nineteen expressly identified and named OTC facilities, and the Policy expressly assigns specific compliance dates to each of the facilities. In so doing, the Board acted in an adjudicatory capacity and did not comply with applicable procedural and substantive requirements for adjudicatory proceedings.

**B. Violations of the Board's regulations implementing the certified regulatory program**

102. The Board's regulations for implementing a certified regulatory program under CEQA require that any regulation, rule or standard proposed for Board adoption be accompanied by a report containing a brief description of the activity, reasonable alternatives, mitigation measures and an environmental checklist. (23 CCR § 3777.). The Board did not release a draft SED with the draft Policy dated June 30, 2009, but rather posted the draft SED late on July 15, 2009. In addition, the revised draft Policy dated November 23, 2009 was not accompanied by a revised SED. Further, the draft Final SED that accompanied the draft Policy dated March 22, 2010 did not contain a revised environmental impact analysis, and did not contain an analysis of alternatives or mitigation measures to support the Policy that was ultimately adopted by the Board on May 4, 2010.

103. The draft SED, draft Final SED and Final SED do not contain reasonable alternatives and mitigation measures sufficient to comply with CEQA, for the reasons described below.

104. Pursuant to 23 CCR § 3777, the Board cannot take action on a proposed activity until forty-five days after it provides a Notice of Filing contained in Appendix C to Article 6 of Chapter 27. The Board violated this provision by: (1) failing to issue a Notice of Filing for the July 15, 2009 draft SED; (2) failing to revise the draft SED to accompany each revision of the Policy; (3) failing to issue a Notice of Filing each time; and (4) failing to

provide forty-five days after a Notice of Filing prior to acting on the Policy.

105. The Board violated 23 CCR § 3777 by issuing a public notice of the adoption meeting and availability of the draft Final SED on March 23, 2009, only forty-two days prior to the adoption meeting on May 4, 2010, rather than required forty-five day advance notice period.

106. The Board's regulations require the Board to prepare written responses to comments containing significant environmental points raised during the evaluation process, if such comments are received at least fifteen days before the date the Board intends to take action on the proposed activity. (23 CCR § 3779(a).) If the Board receives written comments later than fifteen days before the adoption meeting, the Board should, to the extent feasible, prepare written responses. (23 CCR § 3777(b).) The Board violated these requirements by providing an opportunity for written comments only on the changes to the March 22, 2010 draft Policy, rather than including comments on the SED as one of the purposes of the public review period. The Board also acted in violation of its regulations by noticing a public comment period on the draft Policy that ended April 13, 2010, twenty-one days prior to the adoption meeting on May 4. The Board unlawfully restricted the comment period prior to the adoption meeting. The Board's regulations require the Board to accept and consider written comments if received prior to fifteen days before the adoption meeting.

107. The Board's regulations require the Board to respond to significant environmental points raised at the hearing. (23 CCR § 3779(b).) The Board violated this provision by not including environmental review as one of the purposes of the adoption meeting and by limiting participation at the May 4, 2010 adoption meeting to summaries and supplements to previously submitted written materials. The Board unlawfully denied participants the opportunity to raise significant environmental points regarding the seventeen proposed amendments to the Policy prior to adoption.

108. By failing to follow its own regulations, the Board acted contrary to required legal procedures and abused its discretion.

109. The Petitioners are harmed by these violations because their input in agency decision-making was restricted and because the Board did not provide the information to allow the public to understand the environmental consequences of its action.

**FOURTH CAUSE OF ACTION**
**Violations of Title 40 of the Code of Federal Regulations**
**(Title 40, Part 25, CFR §§ 25.1, et seq.)**

110. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

111. Federal regulations contain objectives for public participation in State rulemaking under the Clean Water Act that include ensuring the public has the opportunity to understand official programs and proposed actions, encouraging public involvement, and using all feasible means to create opportunities for public participation. (40 CFR § 25.3(c).) Federal regulations also state that providing information to the public is a necessary prerequisite to meaningful, active public involvement. (40 CFR § 25.4(b).) Public consultation must be preceded by timely distribution of information, sufficiently in advance of agency decision making to allow the agency to assimilate public views into agency action. (40 CFR § 25.4(d).)

112. The Board violated these requirements by issuing a significantly revised draft Policy just one week before the December 1, 2009 workshop on the Policy.

113. The Board also violated these requirements by significantly and materially revising the Policy during the May 4, 2010 adoption meeting without any public notice that the Board would consider and, ultimately, adopt the seventeen amendments at the May 4, 2010 adoption meeting and without allowing public comment on the amendments.

114. When the Board failed to adopt the Policy in accordance with the federal requirements for state rulemaking under the Clean Water Act, the Board did not allow the public to meaningfully participate or understand proposed agency action. Petitioners are harmed by these violations because they were not given adequate opportunities to participate in the formulation of the Policy or to raise objections relating to the same.

**FIFTH CAUSE OF ACTION**

**Violations of the California Administrative Procedure Act**
**(Gov. Code §§ 11340, et seq.)**

115. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

116. The APA contains procedural requirements that apply to state agencies' adoption of regulations and policies. The APA prohibits state agencies from issuing standards of general application or other rules, which are regulations as defined in the APA, unless the agency has adopted a regulation and filed such regulation with the Secretary of State in compliance with the APA. (Gov. Code § 11340.5(a).)

117. The APA prohibits "underground regulations." An underground regulation is any regulation adopted without compliance with applicable procedures in the APA. (1 CCR 250(a).) The adoption of state policy for water quality control is specifically subject to requirements contained in section 11353 of the APA requiring the Board's compliance with the procedural requirements of Porter Cologne together with any applicable requirements of the Clean Water Act. As described in this Petition, the Board did not adopt the Policy in accordance with these laws and therefore adopted an underground regulation in violation of the APA.

118. The APA provides that no state agency may adopt a regulation which has been changed from that which was originally made available to the public unless the change is nonsubstantial or solely grammatical in nature or sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. (Gov. Code § 11346.8.) The APA is the procedural minimum with which the Board must comply in the adoption of state water quality control policy.

119. The Policy adopted by the Board on May 4, 2010 was not made available to the public prior to adoption. Specifically, the Board made seventeen significant, material, and substantive amendments to the Policy during the May 4, 2010 adoption meeting, after public comment was closed. No notice of the amended Policy was circulated prior to the

adoption meeting that would have put the public on notice that the Board was considering any amendment to the Policy, let along numerous significant, material, and substantive amendments.

120. The APA provides minimum procedures that the Board must follow when conducting adjudicatory proceedings. (23 CCR § 648; Gov. Code §§ 11400, et seq.) Despite the fact that the Board acted in an adjudicatory capacity by adopting a Policy and applying it to nineteen specified facilities, it did not comply with applicable procedural and substantive requirements for adjudicatory proceedings.

121. In failing to comply with Government Code sections 11340.5, 11353, 11346.8, and 11400 et seq., the Board failed to act in a manner required by law and abused its discretion in adopting the Policy in violation of the requirements of the APA.

122. Petitioners are harmed by the Board's adoption of a Policy without opportunity to participate in agency decision-making.

**SIXTH CAUSE OF ACTION**
**Violations of the California Environmental Quality Act and CEQA Guidelines**
**(Pub. Resources Code, §§ 21000, et seq.; 14 CCR §§ 15000, et seq.)**

123. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

124. The Board violated CEQA by failing to conduct an adequate environmental review of the Policy. Among other things, the SED prepared for the Policy:

a. Fails to analyze a reasonable range of alternatives;
b. Fails to adequately explain why certain alternatives were rejected;
c. Fails to identify and analyze several reasonably foreseeable environmental impacts of various alternatives and alternative compliance methods;
d. Fails to identify any cumulative impacts of the Policy;
e. As a result of failure to identify environmental impacts of the Policy, the SED does not identify and does not include mitigation measures to minimize potentially adverse significant environmental impacts that will result from the Policy.

125. The Board conducts environmental review of state water quality policies prior to their adoption pursuant to a certified regulatory program. The Board's regulations implementing CEQA require a discussion of a reasonable range of alternatives to the proposed Policy, and identification and adoption of mitigation measures to minimize any significant adverse environmental impacts of the proposed Policy. (23 CCR § 3777.) The Board's SED analysis is subject to CEQA's broad policy goals and substantive standards. (*Cal Sportfishing Protection Alliance v. State Water Res Control Bd.* (2008) 160 Cal.App.4th 1625, 1643.) In adopting the Policy, the Board failed to comply with CEQA and the CEQA Guidelines, and the Board's own regulations implementing CEQA.

**A. Alternatives**

126. The SED was required to evaluate a reasonable range of alternatives, including those that could feasibly attain most of the basic objectives of the project. (14 CCR § 15126.6(f).) The range of potential alternatives to a proposed project should "include those that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects." (14 CCR § 15126.6(c).) CEQA defines feasible as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Resources Code § 21061.1.) The discussion of potential alternatives to a proposed project also should evaluate the comparative merits of the alternatives. (14 CCR § 15126.6(a).)

127. The SED and the Policy fail to analyze an appropriate range of alternatives to the Policy. The Board failed to analyze alternatives to the Policy that would feasibly accomplish the objectives and reduce impacts.

128. The SED fails to provide factual analysis or a reasoned explanation for rejecting certain alternatives, including but not limited to an alternative for low capacity utilization rate units. The reason given for rejecting a low capacity utilization alternative was the following statement: "Data show... that it is possible to operate less than 15% of the time and cause a greater impact than would be assumed if entrainment was uniform at all

times." (Final SED, p. 55.) The SED does not cite any data nor did the SED contain such data except data showing seasonal variation in larval fish concentrations and these data do not support the Board's conclusion.

129. CEQA requires that alternatives be feasible, including technological, economic and legal feasibility. The SED analyzed and the Board ultimately adopted a BTA alternative that will require installation of cooling towers at all nineteen OTC plants. The SED does not fully analyze the physical constraints and legal and economic conditions that make cooling towers infeasible and impossible, as a practical matter, at several sites, or impacts associated with compliance with Track 2 – which also is technically and economically infeasible at many sites. The fact that installation of cooling towers is infeasible at almost all of the gas-fired OTC facilities was acknowledged by the Board's staff at the September 16, 2009 and May 4, 2010 hearings. The Board's own consultant Tetra Tech concluded that installing cooling towers at Petitioner RRI's Ormond Beach, Petitioner El Segundo Power, LLC's El Segundo Generating Station, and one other OTC plant was infeasible. ("California's Coastal Power Plants: Alternative Cooling System Analysis" (February 2008) ("Tetra Tech report").) In addition, the Board failed to consider relevant factors that were raised in comments regarding whether cooling towers could feasibly be installed at Petitioners' others facilities.

130. The SED fails to provide a comparative analysis of the alternatives. For example, the discussion of the alternatives regarding establishing a statewide policy focuses on the ability of the alternatives to meet the objectives of consistency statewide and reducing the burden on Regional Boards, rather than the comparative ability of the alternatives to reduce or avoid environmental impacts as required by CEQA. (Final SED, p. 45-47.)

131. The SED inappropriately ignores the previous proceedings conducted by the CEC and the Central Coast Regional Board for the Moss Landing plant and by the CEC for the Morro Bay plant which examined alternatives to OTC. In Response to Comments by Petitioner Dynegy regarding the findings in these proceedings, staff stated:

> The Moss Landing and Morro Bay projects did not entail the

> initiation of OTC, but rather evaluated the continued use of OTC for the new projects. Under CEQA, the base condition for these projects would be OTC with its accompanying impacts. Since the projects would continue to use OTC, there would be no 'new' significant adverse environmental impacts 'pursuant to CEQA.' The purpose of the proposed Policy is to eliminate the environmental effects of OTC. A comparison to prior analyses for projects with far different criteria would be inappropriate.

(Final SED, p. G-18.) This statement misinterprets the appropriate baseline under CEQA. It also mis-states the objectives of the Policy. The objectives do not include "to eliminate the environmental effects of OTC." Rather, one objective of the Policy is to "[a]ddress the adverse impacts associated with uncontrolled OTC facilities by reducing impingement mortality and entrainment." (Final SED, p.15.) In this case, the Board rejected this site-specific environmental information regarding feasibility of alternatives without any reasoned basis.

132. While the Board identified reasonably foreseeable methods of compliance, the Board failed to identify any *alternative* means of compliance as required by CEQA. (Pub. Resources Code § 21159(a).) For example, without limitation, one reasonably foreseeable means of compliance suggested to the Board by Petitioner Dynegy in its September 30, 2009 comment letter was a Substratum Intake System which would replace a plant's current cooling water intake system with a network of wells drilled horizontally beneath sand beds on the ocean floor.

**B. Baseline and No Project Alternative**

133. CEQA establishes that the environmental baseline for CEQA review is typically the existing environmental setting at the time the notice of preparation of an environmental document is issued, against which agencies should assess the significance of project impacts. (14 CCR § 15125(a).)

134. CEQA requires analysis of a "no project alternative," which involves a comparison of the impacts of approving the project with the impacts of not approving the project. (14 CCR § 15126.6(e)(1).) The no project alternative is a factually based forecast of the environmental impacts of preserving the status quo. (*Planning & Conservation League v*

*Dept. of Water Resources* (2008) 83 Cal.App.4th 892, 917-918.)

135. The SED relied on data from 2000-2005 to establish the environmental baseline. This period includes the 2001 California energy crisis when average capacity factors and flows were much higher than during the five year period that preceded the preparation of the SED. The data used to establish the environmental baseline are thus not representative of the existing environmental setting, and the environmental analysis in the SED that relies on that baseline is accordingly flawed. The Board did not provide adequate reasoning for this approach. Using data that is five years old to establish the current environmental baseline when it is not representative of current conditions is not an acceptable approach under CEQA, and is not justified.

136. The SED fails to provide meaningful consideration of the no project alternative. The Board defines the no project alternative as the "baseline" under each issue or alternative considered in section 3 of the SED. First, the SED does not accurately describe the environmental setting as the baseline. The environmental setting section of the SED only provides a brief discussion of impingement and entrainment impacts. It does not provide sufficient information to adequately support its assumption that all OTC plants contribute to the decline of aquatic populations. It also contains only a brief and inadequate discussion of existing air quality emissions from OTC plants. Many other known and potential environmental impacts are not addressed at all.

137. The SED also fails to recognize and discuss the environmental benefits of the continued operation of OTC plants as would occur under the "no project alternative." Consequently, the SED underestimates the environmental effects of the OTC Policy. Although the SED recognizes that the OTC power plants are essential to the overall reliability of the grid, the SED does not mention that the OTC plants are important for local reliability and as necessary peaking generation as California transitions to increased reliance on renewable energy. By failing to describe the environmental benefits of the OTC plants in the "no project" analysis, the SED underestimates the environmental impacts of the Policy which prevents an accurate comparison of the impacts of approving

the project and the impacts of not approving the project.

138. The SED inappropriately ignores the previous proceedings and environmental analyses conducted by the CEC and the Central Coast Regional Board for the Moss Landing plant and by the CEC for the Morro Bay plant which examined site-specific impacts of OTC. The no project alternative is similar between those proceedings and this Policy. Both no project alternatives involve the continuation of OTC. The Board inappropriately dismissed comments that it should consider the findings from those earlier proceedings, without any reasoned basis.

### C. Impacts

139. The SED fails to identify potential environmental impacts of identified alternative technologies. (Final SED, p. 104.)

140. The SED fails to identify many reasonably foreseeable environmental impacts of implementing the Policy by retrofitting existing OTC units with closed-cycle cooling technology and equipment. The SED fails to investigate and examine potentially significant impacts raised by Petitioners and other commenting parties, including but not limited to, the following areas:

a. Aesthetics: The SED states that staff found no significant aesthetic impacts of cooling towers because the nineteen OTC plants are already located in areas with industrial structures or in remote areas. (Final SED, p. 106.) However, the SED assumes mitigation will minimize potentially significant aesthetic impacts of facilities adjacent to popular recreational, residential and commercial areas without detailing what these mitigation measures would be or if they are feasible. For example, the SED does not discuss the potential conflict with local laws protecting scenic views or the economic feasibility of installing plume abated towers.

b. Agricultural and Forest Resources: The SED states that staff did not identify any significant adverse agricultural or forest impacts. The SED ignored potential impacts from saltwater drift on nearby agricultural land, including for example, a

downwind dairy adjacent to the Moss Landing facility. The SED assumes drift eliminators would be included on all cooling towers without analyzing the economic feasibility.

c. Air Quality: All nineteen OTC facilities are located in nonattainment areas for particulate matter ("PM"), including both PM10 and PM2.5. The SED identifies substantial increases in the quantity of emissions from the installation of cooling towers at the OTC plants, but fails to analyze the feasibility of obtaining PM emission reduction credits in nonattainment areas. The SED also did not assume maximum air quality impacts and ignored increases in toxic pollutants, among other omissions.

d. Cultural Resources: The SED identifies no impacts to cultural resources and therefore does not discuss potential impacts to cultural resources. (Final SED, p. 104.) However, many of the OTC facilities have sensitive cultural resources on or adjacent to the facility that would be impacted by construction.

e. Water supplies: Installation of closed cycle cooling would require increased use of scarce fresh water resources at the subject facilities, because closed-cycle cooling requires higher quality water than marine and estuarine waters for cooling purposes, or at least higher quality water as a portion of the cooling water supply. The SED assumes that facilities would use reclaimed water supplies without analyzing the feasibility and impacts associated with the development and use of these supplies (including local availability and infrastructure to deliver reclaimed water).

f. Greenhouse Gases: The SED fails to analyze potential impacts from increased greenhouse gas emissions, including but not limited to, failure to discuss increased emissions of methane. The SED does not discuss increased greenhouse gas emissions from retrofitting and replacement of lost generation with other fossil-fueled facilities. The SED inappropriately analyzes estimated average impacts from greenhouse emissions, rather than peak impacts during operation.

The SED also fails to evaluate greenhouse gas emissions on a system wide basis. The SED does not discuss the loss of carbon sequestration opportunities at OTC plants such as Moss Landing.

g. Land Use: The SED identifies no impacts to land uses and therefore does not discuss potential land use impacts. (Final SED, p. 104.) The SED fails to analyze known conflicts between local land use policies and the installation of closed-cycle cooling systems, including those impacts recently identified in the proceedings for the modernization projects at Moss Landing and Morro Bay.

h. Noise: The SED fails to analyze reasonably foreseeable noise impacts, including but not limited to noise impacts of closed-cycle cooling, and fails to consider feasibility of mitigation measures such as sound barriers.

i. Traffic: The SED fails to analyze impacts to traffic, including but not limited to impacts from cooling tower plumes on local traffic safety.

j. Utilities and Service Systems: The SED identifies no impacts for utilities and service systems, and therefore does not discuss potential impacts to utilities and service systems. (Final SED, p. 104.) This conclusion is based on unsubstantiated and erroneous assumptions regarding the costs of the Policy to ratepayers, the costs of replacement of OTC plants, and the cost and timeframe of installing new transmission infrastructure and upgrades to deliver replacement power.

141. Economic Analysis: The Board must evaluate economic factors, including compliance costs in adopting the Policy. (Pub. Resources Code § 21159(c).) CEQA also provides that economic and social considerations are a factor in determining whether a physical change has a significant effect on the environment. (14 CCR § 15064.) The SED evaluates the cost of the Policy based on collective generating capacity, assuming 100% operation instead of actual operation. The SED evaluates the cost of the Policy based on a "reasonably borne by industry" approach that actually investigates whether the cost can be borne by consumers, not whether it can be borne by industry. In doing so, it fails to recognize that the costs must be paid from generator profits in a competitive wholesale

market, not from a regulated cost of service paradigm. In fact, the cost of cooling towers is greater than the profit margin of most of the gas-fired steam plants utilizing OTC.

142. The SED fails to identify any cumulative impacts and fails to disclose whether any impacts were considered but rejected as not cumulatively considerable. (Final SED, p. 120.) The SED contains a single conclusory statement that implementation of the Policy will not result in cumulative impacts. The SED does not identify any other projects or impacts that were considered as potentially creating cumulative impacts. The Policy will require retrofitting OTC facilities and the installation of large cooling towers up and down the California coast, and will force the closure of most existing plants leading to a need for replacement infrastructure and energy transmission. These are reasonably foreseeable consequences of implementing the Policy that will have incremental impacts, including but not limited to impacts on air quality, aesthetics, fresh water resources, socioeconomics and greenhouse gases.

**D. Mitigation**

143. CEQA requires an analysis of reasonably foreseeable mitigation measures. (Pub. Resources Code § 21159(a)(2).) The SED must include mitigation measures that substantially lessen or avoid the otherwise significant adverse environmental impacts of proposed projects. (Pub. Resources Code § 21002.) Here, the SED did not identify any potentially significant impacts of the Policy and therefore did not identify sufficient mitigation measures.

**E. Programmatic Environmental Analysis**

144. CEQA requires an environmental document to evaluate the whole of an action and to avoid piece-meal analysis of project impacts. (14 CCR § 15378(a).) CEQA allows programmatic environmental documents, with project-specific environmental analysis to follow. CEQA requires programmatic environmental analysis for regulations adopting a performance standard, and requires analysis of the reasonably foreseeable methods of compliance, including reasonably foreseeable environmental impacts, mitigation measures and alternative means of compliance with the rule or regulation. (Pub.

Resources Code § 21159(a).) The analysis is to "take into account a reasonable range of environmental, economic, and technical factors, population and geographic areas, and specific sites." (Pub. Resources Code § 21159(c).)

145. The Board determined that a programmatic environmental document was appropriate, but the SED does not contain an adequate programmatic analysis. For example, but without limitation, the SED fails to analyze numerous reasonably foreseeable environmental impacts, fails to consider alternative means of compliance, and fails to take into account a reasonable range of environmental, economic, and technical factors, population and geographic areas, and specific sites as required by CEQA.

146. A more detailed site-specific analysis was appropriate in this case. The SED assumes that project-specific analysis will occur when individual facilities implement their respective compliance methods to comply with the Policy. However, in this case there are site-specific factors that limit the range of potential compliance methods at each site. These limitations as well as potential site-specific environmental impacts are well known and were identified to the Board during the preparation of the SED, and should have been evaluated before Policy adoption.

147. The Policy adopts a stringent standard with limited compliance alternatives, specific compliance deadlines, applicable to nineteen identified pre-existing facilities without regard to critical site-specific differences. A site-specific analysis is necessary to evaluate the whole of the action, and to disclose the full environmental impacts of the Policy.

148. The Board abused its discretion by deferring site-specific impact analysis to a later date. Subsequent project-specific environmental analysis pursuant to CEQA will not occur for facilities that cannot comply with the Policy and are required to close. The closure of the facilities does not trigger a discretionary approval that would require CEQA analysis, and therefore the true environmental impacts of the Policy have not been fully disclosed and analyzed.

**F. Environmental Checklist**

149. The Board's regulations implementing CEQA require an environmental checklist in the SED. (23 CCR § 3777.) The environmental checklist included with the SED contains numerous factual errors, including but not limited to, identification of no impacts where there are, in fact, potentially significant impacts. In addition, the SED fails to discuss several important resource areas, including cultural resources, land use, and utilities and service systems, which renders the checklist and SED inadequate. (Final SED, p. 104.)

**G. Response to Public Comments**

150. The Board is required to respond to public comments on the SED. (Pub. Resources Code §§ 21091(d), 21104; 23 CCR § 3779.) The Board failed to respond to public comments and failed to provide a good faith, reasoned analysis in response to comments on the SED.

151. The Board failed to undertake the studies recommended by commenting parties and agencies.

152. The SED fails to consider, and therefore the Board did not respond to public comments regarding the seventeen material and substantive amendments to the Policy at the May 4 adoption meeting.

**H. Recirculation**

153. If a lead agency adds significant new information to an environmental document after the commencement of public review but before certification, CEQA requires a new notice and recirculation of the revised document or the revised portions. (Pub. Resources Code § 21092.1; 14 CCR § 15088.5.) The Board did not issue a new notice or recirculate the SED in violation of CEQA, notwithstanding comments from Petitioners and other parties requesting revision of the SED. Recirculation was appropriate because the draft SED was legally deficient and substantial revisions to the Policy (November 23, 2009 draft and March 22, 2009 draft) raised new potentially significant environmental impacts or increased the severity of environmental impacts.

154. After significantly revising the Policy during the May 4, 2010 adoption meeting, the Board also was required to recirculate a revised SED for public comment prior to final

adoption of the Policy. The Board's failure to do so violated the notice and recirculation requirements of CEQA

155. The Board omitted information required by CEQA critical to an adequate evaluation of the environmental impacts of the Policy. The Board's determinations were not supported by substantial evidence. By certifying the SED and adopting the Policy without adequate environmental review, the Board abused its discretion. The Petitioners and the public are harmed by agency action that does not comply with CEQA and that does not disclose the environmental consequences of the action.

## SEVENTH CAUSE OF ACTION
### Violations of Due Process Clause of California and U.S. Constitutions
### (Cal. Const. Art. 1, § 7; U.S. Const. 14th Amend., § 1)

156. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

157. A person may not be deprived of life, liberty, or property without due process of law. (Cal. Const. Art. 1, § 7; U.S. Const. 14th Amend., § 1.)

158. The California Constitution protects an individual's liberty interest to be free from arbitrary adjudicative procedures. (*Ryan v. California Interscholastic Federation – San Diego Section* (2001) 94 Cal.App.4th 1048, 1061.) An agency that has deprived an individual of a statutorily conferred benefit violates this protection. (*Id.*) State action prohibited under the due process clause can be legislative or adjudicative. (*Adams v. Department of Motor Vehicles* (1974) 11 Cal.3d 146, 152.)

159. The Board violated Petitioners' procedural and substantive due process rights. A proceeding before an administrative officer or board lacks due process if it fails to meet the basic requirements of notice and opportunity for hearing. (*Rosenbilt v. Superior Court* (1991) 231 Cal.App.3d 1434, 1444; *People v. Lockheed Shipbuilding & Const. Co.* (1973) 35 Cal.App.3d 776, 785.) Substantive due process violations occur when an agency's exercise of its police powers are unreasonable or arbitrary.

160. The use of OTC was recently determined to be the environmentally preferred to other cooling technologies at Moss Landing and Morro Bay by the CEC. The CEC must

approve every application to construct or modify a thermal powerplant and conduct a CEQA-equivalent review pursuant to a certified regulatory program under CEQA. (Pub. Resources Code § 25519.)

161. Petitioner Dynegy Moss Landing, LLC was a party to several administrative hearings and is a party to ongoing litigation regarding the certification process for Moss Landing and issuance of its NPDES permit. In the Moss Landing proceedings, the CEC and Central Coast Regional Board jointly convened a working group to review the project's environmental impacts and evaluate potential alternative cooling systems. The Moss Landing facility is subject to final administrative decisions by the CEC and the Central Coast Regional Board determining that alternatives to OTC were not economically feasible and did not reduce significant environmental impacts, and that the existing OTC system, with certain modifications (see ¶ 159), is BTA for this facility. (CEC Final Decision, 99-AFC-4 (October 25, 2000); California Regional Water Quality Control Board Central Coast Region, Staff Report, Duke Energy Moss Landing Power Plant, Units 1 and 2, Review of Finding No. 48, NPDES Permit Order No. 00-041 (April 10, 2003); California Regional Water Quality Control Board Central Coast Region, Decision (May 15, 2003) confirmed by Regional Board Resolution No. R3-2003-0104 on June 18, 2003.) The Board rejected a petition to review the Regional Board's decision in the Moss Landing case. The NPDES permit for Moss Landing remains in full force and effect in accordance with the rules applicable to administrative extension of NPDES permits. (40 CFR § 122.6.) Further, the permit operates as a "shield" against the imposition of any new requirements during its term. (40 CFR § 122.5.) These sections of the federal NPDES permit program are applicable in California.

162. The Board and the Regional Board continue to defend the Central Coast Regional Board's determination of BTA using a wholly disproportionate test in ongoing litigation before the California Supreme Court. (*Voices of the Wetlands*, Supreme Court Case No. S160211.)

163. The agencies required Moss Landing to install technology at its intake structure including

new screens and a shortened intake tunnel and, separate from and in addition to BTA, required funding of a $7 million environmental enhancement project aimed at improving habitat quality and area for the species most at risk for entrainment.

164. Petitioner Dynegy Morro Bay, LLC was a party to administrative proceedings before the CEC for the Morro Bay facility, which resulted in a decision that concluded that OTC was environmentally preferable to other cooling technologies, and that other cooling technologies were not feasible. (CEC Final Decision, 00-AFC-12, August 2, 2004.) CEC regulations provide that a decision is "approved, issued, final and otherwise effective" on the day it is docketed unless the decision states otherwise. (20 CCR § 1720.4.) The CEC's decision in the Morro Bay case has not been docketed.

165. The Policy as adopted by the Board on May 4, 2010, conflicts with prior adjudicative findings applicable to Moss Landing and Morro Bay that the facilities' respective OTC systems constitute BTA, and that OTC is environmentally superior to closed-cycle cooling. In the case of Moss Landing, the Policy thus violates regulations applicable to administrative extensions and modifications of NPDES permits. In addition, the Policy imposes unreasonable and arbitrary additional burdens on these facilities including but not limited to:

a. The facilities must comply with Track 1 by reducing intake flow rate to a level commensurate with that which can be attained by closed-cycle wet cooling, unless it is demonstrated to the Board's satisfaction that compliance with Track 1 is not feasible, in which case Track 2 compliance is required. (Final Policy, ¶ 2.A.(1), (2).)

b. Under Track 2, the Policy requires a demonstration that prior studies accurately reflect current impacts and allows the State Water Board to determine that new entrainment studies are necessary to establish the baseline against which reductions measured by monitoring under Track 2 can be achieved. (Final Policy, ¶ 4.B.(1).)

c. Although the Policy allows projects that are required by state or federal permits to

count towards compensation for interim impingement and entrainment impacts, the Policy requires the owner or operator to demonstrate this "to the State Water Board's satisfaction." (Final Policy, ¶ 2.C.(3)(a).)

d. The Policy allows an owner or operator of a plant with combined cycle power generating units installed prior to October 1, 2010 to count prior reductions in impingement and entrainment towards meeting Track 2 requirements, but such reductions are calculated as the difference between the maximum permitted discharge for the entire plant identified in the NPDES permit that authorized the steam turbine power-generating units, and the maximum permitted discharge for the entire plant as identified in the plant's NPDES permit authorizing the combined cycle power generating units. (Final Policy, ¶ 2.A.(2)(d).)

e. The Board will now modify the Moss Landing and Morro Bay NPDES permits to comply with the Policy. (Final Policy, ¶ 3.C.)

166. The Board's process in adopting the Policy and applying it to Petitioners Dynegy Moss Landing and Dynegy Morro Bay did not incorporate or take into consideration the record and findings developed through lengthy and thorough administrative adjudicative proceedings. The Board failed to give a reasoned explanation for ignoring the previous site-specific findings. Moreover, the Board did not properly receive testimony or evidence from the prior hearings and associated findings. These omissions rendered the former processes futile acts and amounted to arbitrary adjudicative procedures, contrary to applicable NPDES regulations and in violation of Petitioners' due process rights.

167. The Board violated all of Petitioners' due process rights by not following procedures required when conducting adjudicatory hearings as described above. (23 CCR §§ 648, et seq.; Gov. Code §§ 11400, et seq.) The SED and the Policy as adopted apply to nineteen expressly identified and named OTC facilities, and the Policy expressly assigns specific compliance dates to each of the facilities. In so doing, the Board acted in an adjudicatory capacity and did not comply with applicable procedural and substantive requirements for adjudicatory proceedings in violation of Petitioners' due process rights.

168. In adopting the Policy, the Board violated the Due Process Clause of the California Constitution and U.S. Constitution (Cal. Const. Art. 1, § 7; U.S. Const. 14th Amend., § 1) by arbitrarily ignoring and overturning its own previous administrative determinations regarding specific facilities subject to the Policy without providing the owner an opportunity for a hearing.

**EIGHTH CAUSE OF ACTION**
**Violations of Doctrines of Judicial Estoppel and Collateral Estoppel**
**(Cal. Code Civ. Proc. § 1908)**

169. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

170. The doctrine of collateral estoppel gives preclusive effect to a former judgment in subsequent proceeding involving the same controversy. The doctrine is declared by the California Code of Civil Procedure: "the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties... litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding." (Code Civ. Proc. § 1908(a)(2).)

171. Collateral estoppel may be applied to decisions made by administrative agencies if the prior proceedings possess judicial character. Indicia of proceedings undertaken in a judicial capacity include a hearing before an impartial decision maker; testimony given under oath or affirmation; a party's ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make oral and written argument; the taking of a record of the proceeding; and a written statement of reasons for the decision. (*People v Sims* (1982) 32 Cal.3d 468, 479-480.)

172. Judicial estoppel precludes a defending party from taking inconsistent positions in successive proceedings or lawsuits. (*M. Perez Co. v. Base Camp Condominiums Assn. No One* (2003) 111 Cal.App.4th 456, 463.)

173. In administrative proceedings to certify the Moss Landing Power Plant and to issue a NPDES permit, the CEC and the Central Coast Regional Board determined that alternatives to OTC did not significantly reduce environmental impacts and were not

economically feasible, and that OTC is BTA at this facility. (CEC Final Decision, 99-AFC-4 (October 25, 2000); California Regional Water Quality Control Board Central Coast Region, *Staff* Report, Duke Energy Moss Landing Power Plan, Units 1 and 2, Review of Finding No. 48, NPDES Permit Order No. 00-041 (April 10, 2003); California Regional Water Quality Control Board Central Coast Region, Decision (May 15, 2003.) confirmed by Regional Board Resolution No. R3-2003-0104 on June 18, 2003.)

174. The Board rejected a petition for review of the Regional Board's decision in the Moss Landing case and the Court of Appeal of California, Sixth Appellate District affirmed the Regional Board's decision that OTC is BTA at this facility. (*Voices of the Wetlands* (2007) 157 Cal.App.4th1268.)

175. The Board and the Regional Board continue to defend the Regional Board's determination that evaluation of BTA properly includes economic feasibility and cost-benefit analysis in ongoing litigation before the California Supreme Court regarding the Moss Landing case. (*Voices of the Wetlands*, Supreme Court Case No. S160211.)

176. For the Morro Bay facility, after conducting a site-specific review pursuant to its CEQA-equivalent process, the CEC issued a certification decision concluding that OTC was environmentally preferable to other cooling technologies at Morro Bay and that other cooling alternatives were not feasible. (CEC Final Decision, 00-AFC-12, August 2, 2004.) CEC regulations provide that a decision is "approved, issued, final and otherwise effective" on the day it is docketed unless the decision states otherwise. (20 CCR § 1720.4.) The CEC's decision in the Morro Bay case has not been docketed.

177. The Policy fails to recognize the findings made in the previous administrative adjudications and imposes additional, burdensome requirements and mitigation measures on the Moss Landing and Morro Bay facilities that are unjustified and unreasonable as outlined above.

178. The Board violated principles of judicial estoppel by adopting the SED and Policy in which the Board takes an inconsistent position as compared to its position in the Moss Landing case. The Board violated collateral estoppel by failing to give preclusive effect

to prior determinations regarding these facilities.

**NINTH CAUSE OF ACTION**
**Violations of the Equal Protection Clause of the California and U.S. Constitutions**
**(Cal. Const. Art. I, § 7; U.S. Const. 14th Amend., § 1)**

179. The California Constitution and the U.S. Constitution provide that each person shall not be denied equal protection of the laws. (Cal. Const. Art. I, § 7; U.S. Const. 14th Amend., § 1.)

180. A law that arbitrarily discriminates violates the constitutional guarantee of equal protection. Disparate classifications are not unlawfully arbitrary if based on some difference between classes that reflects a substantial relation to a legitimate object to be accomplished. An administrative rule is subject to the same tests of validity as an act of the Legislature. (*Tahoe-Sierra Preservation Council v. State Water Resources Control Board* (1989) 210 Cal.App.3d 1421, 1439.)

181. The Policy allows the two nuclear facilities to meet alternate compliance requirements that take into account the costs of compliance. These alternative compliance requirements and cost considerations are not available to the other facilities subject to the Policy, including Petitioners' Facilities. Specifically, the nuclear facilities may utilize an alternative compliance track if the Board finds that the costs of compliance with Track 1 are wholly out of proportion to the costs identified in the Tetra Tech report, or if compliance with Track 1 is wholly unreasonable based on costs of compliance, ability to achieve compliance with Track 1, and potential environmental impacts of compliance with Track 1. The Policy does not permit the other non-nuclear facilities to make a showing that the cost of compliance is wholly disproportionate or wholly unreasonable, despite the fact that cost-benefit analysis shows that the costs are even more disproportionate to the benefits at Mandalay and Ormond Beach than at the nuclear units.

182. The stated basis for the distinction between nuclear facilities and the other facilities subject to the Policy has no relation to a legitimate object to be accomplished by the Policy. (Final SED, p. 14-15.)

183. One of the Policy's fundamental objectives is the reduction of impingement mortality and

entrainment. The nuclear facilities operate more hours in a year, withdraw more water for cooling purposes, and impinge and entrain far more marine life than the other facilities subject to the Policy. In fact, the nuclear facilities are responsible for approximately 40 percent of the entrainment and the impingement impacts caused by all of the OTC facilities, *combined.*

184. The Policy states that the justification for favorable disparate treatment of the nuclear facilities is because those facilities have lower greenhouse emissions than the other facilities subject to the Policy. However, the Policy does not include a goal of reducing greenhouse gas emissions. If it did, the Policy could not achieve, and would be in conflict with its own goal, because closed-cycle cooling will increase greenhouse gas emissions.

185. The Policy violates the Equal Protection Clause of the California Constitution and the U.S. Constitution (Cal. Const. Art. 1, § 7; U. S. Const. 14th Amend., § 1) in that it arbitrarily applies a preferential standard to nuclear facilities as compared to other OTC facilities.

**TENTH CAUSE OF ACTION**
**Declaratory Relief**
**(Cal. Code of Civ. Proc. § 1060)**

186. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

187. Petitioner "may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. (Code of Civ. Proc., § 1060.)

188. Declaratory relief is also appropriate when raising a question of law relating to the agency's compliance with procedural requirements. (*Vendanta Soc'y v California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 534*)*

189. The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

190. An action for declaratory relief may be brought against an administrative officer or

agency. (*Chas L Harney v Contractors' State License Bd.* (1952) 39 Cal.2d 561, 564.)

191. Petitioners challenge the Board's method of adopting the Policy, as well as the contents of the Policy, and seek a declaration of their rights and obligations under the Policy as alleged in the Petition.

**PRAYER FOR RELIEF**

192. Petitioners hereby reallege and incorporate the allegations contained in the preceding paragraphs, as if fully set forth herein.

193. Petitioners seek a writ of mandate, temporary and permanent injunctive relief, declaratory relief, costs, and attorneys' fees.

194. WHEREFORE, Petitioners pray for judgment as follows:

1. For a peremptory writ of mandate directing the Respondent to:
   a. Vacate and set aside approval of the Policy;
   b. Immediately suspend all activities in furtherance of the Policy;
   c. Conduct environmental review and otherwise comply with CEQA, the CEQA Guidelines, provisions of Title 23 of the California Code of Regulations implementing the Board's certified regulatory program and water quality control planning program, Porter Cologne, the federal Clean Water Act and applicable federal regulations, the Administrative Procedure Act, the California Constitution and U.S. Constitution, and principles of estoppel in any subsequent action taken to approve the Policy;
2. For a temporary restraining order and preliminary and permanent injunctive relief restraining the Board from taking any action to carry out the Policy, pending full compliance with CEQA, the CEQA Guidelines, provisions of Title 23 of the California Code of Regulations implementing the Board's certified regulatory program and water quality control planning program, Porter Cologne, the federal Clean Water Act and applicable federal regulations, the Administrative Procedure Act, the California Constitution and

1 U.S. Constitution, and principles of estoppel;

2 3. For a declaration that the Policy was unlawfully approved in violation of
3 CEQA, the CEQA Guidelines, provisions of Title 23 of the California Code of
4 Regulations implementing the Board's certified regulatory program and water
5 quality control planning program, Porter Cologne, the federal Clean Water
6 Act, the Administrative Procedure Act, the California Constitution and U.S.
7 Constitution, and principles of estoppel and/or other applicable laws and
8 regulations;

9 4. For costs of suit;

10 5. For attorneys' fees as authorized by Code of Civil Procedure section 1021.5
11 and other provisions of law; and

12 6. For such other and further relief as the court deems equitable and just.

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14 Dated: October 27, 2010 ELLISON, SCHNEIDER & HARRIS L.L.P.

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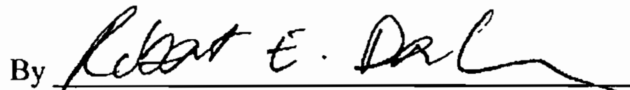
16 By 

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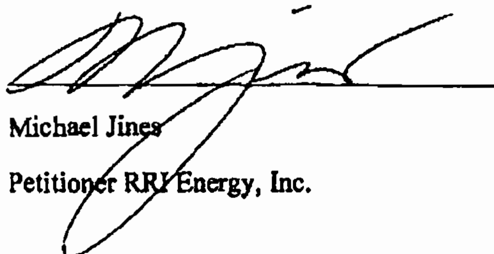
**VERIFICATION**

I, Michael Jines, am Executive Vice President and General Counsel for RRI Energy, Inc., and am a party to this action. I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and know the contents thereof. The matters stated in the Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief are true of my own knowledge, except as to matters stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this verification is executed on October 26, 2010, at Sacramento, California.



Michael Jines
Petitioner RRI Energy, Inc.

## VERIFICATION

I, John Chillemi, am President of Mirant Delta, LLC, and am a party to this action. I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and know the contents thereof. The matters stated in the Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief are true of my own knowledge, except as to matters stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this verification is executed on October 26, 2010, at Sacramento, California.

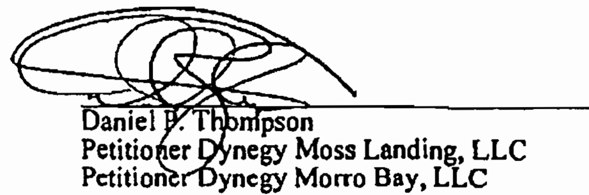
John Chillemi
Petitioner Mirant Delta, LLC

1 **VERIFICATION**

2

3 I, Daniel P. Thompson, am Vice President, Dynegy West Region Operations, and am a
4 party to this action. I have read the foregoing Verified Petition for Writ of Mandate and
5 Complaint for Declaratory and Injunctive Relief and know the contents thereof. The matters
6 stated in the Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive
7 Relief are true of my own knowledge, except as to matters stated on information and belief, and
8 as to those matters, I believe them to be true.

9 I declare under penalty of perjury of the laws of the State of California that the foregoing
10 is true and correct and that this verification is executed on October 26, 2010, at Sacramento,
11 California.

12 

13 Daniel P. Thompson
14 Petitioner Dynegy Moss Landing, LLC
Petitioner Dynegy Morro Bay, LLC

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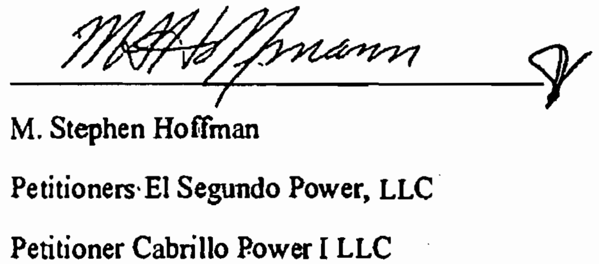
**VERIFICATION**

I, M. Stephen Hoffmann, am Senior Vice President of NRG Energy, Inc., and the President of El Segundo Power, LLC and Cabrillo Power I LLC, which are parties to this action. I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and know the contents thereof The matters stated in the Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief are true of my own knowledge, except as to matters stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this verification is executed on October 26, 2010, at Carlsbad, California.



M. Stephen Hoffman
Petitioners El Segundo Power, LLC
Petitioner Cabrillo Power I LLC

Exhibit Index

**Exhibit A to Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief:** Notice of Petition for Writ of Mandate Directed to State Water Resources Control Board Respecting Approval of the Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling and Corresponding Substitute Environmental Document.

**Exhibit B to Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief:** Notice to the Attorney General

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**EXHIBIT A**

NOTICE TO BOARD

ELLISON, SCHNEIDER & HARRIS L.L.P.

ATTORNEYS AT LAW

2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CALIFORNIA 95816
TELEPHONE (916) 447-2166
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ANNE J SCHNEIDER
1947 2010

CHRISTOPHER T ELLISON
JEFFERY D HARRIS
DOUGLAS K KERNER
ROBERT E DONLAN
ANDREW B BROWN
GREGGORY L WHEATLAND
CHRISTOPHER M SANDERS
LYNN M HAUG
PETER J KIEL

BRIAN S BIERING
SHANE E CONWAY
KATHRYN C COTTER
JEDEDIAH J GIBSON
CHASE B KAPPEL
SAMANTHA G POTTENGER

ELIZABETH P EWENS
OF COUNSEL


October 26, 2010

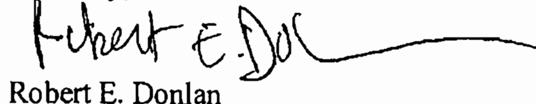
Charles R. Hoppin, Chairman
Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
Post Office Box 100
Sacramento, CA 95812-0100

**RE: Notice of Petition for Writ of Mandate Directed to State Water Resources Control Board Respecting Approval of the Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling and Corresponding Substitute Environmental Document.**

Dear Mr. Hoppin and Ms. Townsend:

Please take notice that, pursuant to the California Environmental Quality Act ("CEQA"), Public Resources Code section 21167.5, RRI Energy, Inc., Mirant Delta, LLC, Dynegy Moss Landing, LLC, Dynegy Morro Bay, LLC, El Segundo Power, LLC, and Cabrillo Power I, LLC, ("Petitioners") intend to file a petition for writ of mandate in Sacramento County Superior Court directed to the State Water Resources Control Board ("Board"), challenging the Board's approval of the Substitute Environmental Document ("SED") for the Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling ("Policy"). The Policy applies to existing California thermal power plants that utilize a single pass cooling system, also known as once-through cooling ("OTC"). The petition alleges violations of CEQA, the Porter-Cologne Water Quality Control Act, the federal Clean Water Act, the California Administrative Procedures Act, and corresponding regulations related to the foregoing, as well as violations of Petitioners' due process and equal protection rights pursuant to the State and Federal Constitutions. The petition will seek a petition for writ of mandate, preliminary and permanent injunctive relief, and declaratory relief.

Sincerely,



Robert E. Donlan

ELLISON, SCHNEIDER & HARRIS L.L.P.
Counsel for RRI Energy, Inc., Mirant Delta, LLC,
Dynegy Moss Landing, LLC, Dynegy Morro Bay, LLC,
El Segundo Power, LLC, Cabrillo Power I, LLC

## PROOF OF SERVICE

I declare that:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and am not a party to the within action. My business address is ELLISON, SCHNEIDER & HARRIS; 2600 Capitol Avenue, Suite 400; Sacramento, California 95816; telephone (916) 447-2166.

On October 26, 2010, I served the attached *Notice of Petition for Writ of Mandate Directed to State Water Resources Control Board Respecting Approval of the Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling and Corresponding Substitute Environmental Document* by putting a true copy thereof in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

Charles R. Hoppin, Chairman
Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
Post Office Box 100
Sacramento, CA 95812-0100

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 27, 2010, at Sacramento, California.

Ron O'Connor

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**EXHIBIT B**

NOTICE TO ATTORNEY GENERAL OF CALIFORNIA

ELLISON, SCHNEIDER & HARRIS L.L.P.

ANNE J SCHNEIDER
1947 2010

CHRISTOPHER T ELLISON
JEFFERY D HARRIS
DOUGLAS K KERNER
ROBERT E DONLAN
ANDREW B BROWN
GREGGORY L WHEATLAND
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SAMANTHA G POTTENGER

ELIZABETH P EWENS
OF COUNSEL

October 26, 2010

Hon Edmund G Brown Jr
Attorney General's Office
California Department of Justice
Attn Public Inquiry Unit
P O Box 944255
Sacramento, CA 94244-2550

**Re: Notice of Intent to Petition for Writ of Mandate, Public Resources Code section 21167.7 and Code of Civil Procedure section 388**

Dear Attorney General Edmund Brown:

Please take notice that on October 27th, 2010, pursuant to Public Resources Code section 21167.7 and Code of Civil Procedure section 388, RRI Energy, Inc , Mirant Delta, LLC, Dynegy Moss Landing, LLC, Dynegy Morro Bay, LLC, El Segundo Power, LLC, and Cabrillo Power I, LLC ("Petitioners") will file a petition for writ of mandate in Sacramento County Superior Court directed to the State Water Resources Control Board ("Board") The petition alleges that the Board violated the California Environmental Quality Act ("CEQA"), the Porter-Cologne Water Quality Control Act, the federal Clean Water Act, the California Administrative Procedures Act, and corresponding regulations related to the foregoing, as well as Petitioners' due process and equal protection rights under the State and Federal Constitutions, in connection with the Board's approval of the Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling ("Policy") and certification of the related Substitute Environmental Document ("SED") A copy of the petition is attached to this notice

Very truly yours,

Robert E. Donlan

ELLISON, SCHNEIDER & HARRIS L L P
Counsel for RRI Energy, Inc., Mirant Delta, LLC,
Dynegy Moss Landing, LLC, Dynegy Morro Bay, LLC,
El Segundo Power, LLC, Cabrillo Power I, LLC

Enclosure

ELLISON, SCHNEIDER & HARRIS L.L.P.
Robert E. Donlan (State Bar No. 186185)
Elizabeth P. Ewens (State Bar No. 213046)
Shane E. Conway (State Bar No. 258588)
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Attorneys for Petitioners

SUPERIOR COURT, STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

RRI ENERGY; MIRANT DELTA LLC; DYNEGY MOSS LANDING, LLC; DYNEGY MORRO BAY LLC; EL SEGUNDO POWER, LLC, CABRILLO POWER I, LLC

Petitioners

v.

STATE WATER RESOURCES CONTROL BOARD, A CALIFORNIA STATE AGENCY, and DOES 1-20

Respondents

NOTICE TO ATTORNEY GENERAL

(Water Code §§ 13000 et seq.; 23 CCR §§ 647 et seq., 3270 et seq.; 40 CFR §§ 25.1 et seq.; Gov. Code §§ 11340 et seq.; 33 U.S.C. §§ 1251 et seq.; Pub. Res. Code §§ 21000 et seq.; 14 CCR §§ 15000 et seq.; Cal. Const. Art. 1, § 7; U.S. Const., 14th Amend., § 1; Code of Civ. Proc. §§ 1908, 1085 and 1094.5)

To the Attorney General of the State of California:

PLEASE TAKE NOTICE that, pursuant to Public Resources Code section 21167.7, and Code of Civil Procedure section 388, on October 27th, 2010, RRI Energy, Inc., Mirant Delta, LLC, Dynegy Moss Landing, LLC, Dynegy Morro Bay, LLC, El Segundo Power, LLC, and Cabrillo Power I, LLC ("Petitioners") will file a petition for writ of mandate in Sacramento County Superior Court directed to the State Water Resources Control Board ("Board").

The Petition alleges that the Board abused its discretion and failed to proceed in a manner required by law when it certified the Substitute Environmental Document ("SED") and approved the Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling ("Policy"). The Policy applies to existing California thermal power plants that utilize a

single pass cooling system, also known as once-through cooling ("OTC"). The stated purpose of the Policy is to establish "best technology available" ("BTA") for cooling water intake structures at existing coastal and estuarine power plants, to be implemented in National Pollutant Discharge Elimination System ("NPDES") permits pursuant to the Board's authority to issue state water quality control policy under the Porter-Cologne Water Quality Control Act and delegated authority to implement a NPDES permit program in lieu of a U.S. EPA-administered program under the Clean Water Act.

The Petition alleges that in approving the Policy and certifying the SED, the Board violated the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000, et seq.), the Porter Cologne Water Quality Control Act (Water Code § 13000, et seq.), the federal Clean Water Act (33 U.S.C. § 1251, et seq.), the California Administrative Procedures Act (Gov. Code § 11340, et seq.), and the corresponding regulations related to the foregoing (California Code of Regulations, Title 23, Division 3, Chapter 1.5, § 647, et seq. and Chapter 27, § 3720, et seq.; Code of Federal Regulations, Title 40, Part 25, CFR § 25.1, et seq.), as well as violations to Petitioners' due process and equal protection rights under the Federal and State Constitutions (Cal. Const. Art. 1, § 7; U.S. Const. 14th Amend., § 1; Cal. Const. Art. I, § 7; U.S. Const. 14th Amend., § 1).

The Petition alleges that Board violated CEQA when it failed to consider a reasonable range of alternatives, failed to consider the feasibility of alternatives, conducted an inappropriate baseline analysis and "no project alternative," failed to properly analyze reasonably foreseeable impacts associated with the Policy, failed to conduct an economic analysis, failed to identify mitigation measures, prepared an improper environmental checklist, and failed to adequately respond to comments.

Petitioners seek a petition for writ of mandate, temporary and permanent injunctive relief, and declaratory relief.

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Petitioners seek a petition for writ of mandate, temporary and permanent injunctive relief, and declaratory relief

Dated October 26, 2010

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By [signature]

Robert E Donlan
Elizabeth P. Ewens
Shane Conway
2600 Capitol Avenue, Suite 400
Sacramento, California 95816
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Attorneys for Petitioners

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PROOF OF SERVICE

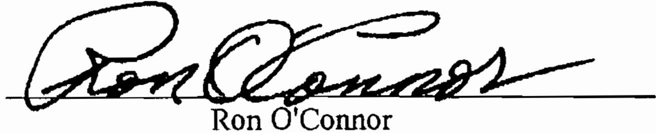
I declare that:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and am not a party to the within action. My business address is ELLISON, SCHNEIDER & HARRIS; 2600 Capitol Avenue, Suite 400; Sacramento, California 95816; telephone (916) 447-2166.

On October 26, 2010, I served the attached *Notice to Attorney General* by putting a true copy thereof in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

Hon. Edmund G. Brown Jr.
Attorney General's Office
California Department of Justice
Attn: Public Inquiry Unit
P.O. Box 944255
Sacramento, CA 94244-2550

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 27, 2010, at Sacramento, California.



Ron O'Connor