ALA D. HARRIS
ney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-5533
Facsimile: (415) 703-5480
E-Mail: anita.ruud@doj.ca.gov

February 3, 2011

Frederick K. Ohlrich, Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

RE: No. S160211 - *Voices of the Wetlands v. California State Regional Water Board*
Reply Responses to Questions from Court dated January 12, 2011

Dear Mr. Ohlrich:

The Respondent California Regional Water Quality Control Board, Central Coast Region hereby replies to the letter brief filed by Petitioner Voices of the Wetlands. While Respondent disagrees with or finds irrelevant many of the statements made by Petitioner in its January 24 letter, we will focus this response on only those points that are germane to the Court's questions, specifically questions 2, 3, 7 and 8.

Counsel for Respondent Dynegy Moss Landing, LLC (Dynegy) has authorized me to inform the Court that it joins in these responses.

In responding to this Court's second question, Petitioner appears to concede one of the legal issues in dispute: whether section 25531, subdivision (c) of the California Public Resources Code (part of the Warren-Alquist Act) prohibits a court from enjoining the operation of a power plant in a case challenging a NPDES permit. Petitioner has consistently argued that section 25531, subdivision (c) does not apply to NPDES permits.

In its Reply of Petitioner for Review, Petitioner stated as follows:

> Finally, relying on Public Resources Code section 25531(c), Respondents imply that the trial court could not issue a writ because it lacked jurisdiction to do anything that would stop or delay operation of the facility. . . . However, as the appellate court properly found after a lengthy analysis, section 25531 does not apply to the Regional Board's issuance of a federal NPDES permit. Slip Op. at 17-29. Respondents offer no legitimate reason for the Court to revisit this novel theory, which has never been raised or

> addressed in any other case and is clearly contrary to the State's delegated NPDES permit program. . . . Because Respondents' argument would render the courts powerless to set aside unlawfully issued NPDES permits and thereby jeopardize delegation of the [sic] California's Clean Water Act authority, this Court should not give it further consideration or credence.

(Reply of Petitioner for Review (February 25, 2008), pp. 17-18 (citations omitted); see also Petitioner's Reply Brief on the Merits (June 1, 2010), p. 37, fn. 17, referencing its previous discussion of Section 25531 (at pages 14-23).) In the Court of Appeal, Petitioner made the same point, stating that section 25531 "simply does not apply to NPDES permits. For instance, if a Regional Board issued a NPDES permit that authorized a power plant to discharge toxic water pollutants in excess of federal standards, a superior court would certainly have authority to enjoin the effectiveness of that permit, regardless of its indirect impacts on the operation of the facility." (Appellant's Reply and Answering Brief on Cross-Appeal (September 7, 2005), pp. 55-56, fn. 16, referencing the previous discussion of section 25531 at pages 3-21.) Petitioner's response to question 2 is inconsistent with the position it previously has taken on this issue.

With respect to Petitioner's answer to question number 3 regarding the amount of water drawn from the Elkhorn Slough estuary, the facts are fully set out in the Regional Board's appellate briefs on the matter and the permit itself. (See Answering Brief on the Merits of Respondent California Regional Water Quality Control Board, Central Coast (Mar. 8, 2010) at pp. 6-7; AR 305749, [Finding no. 11, "Cooling water flow for the upgraded power plant will range from a low of 180 MGD to a maximum of 1224 MGD at peak power demand"]; AR 305756 [Finding no. 47, "The intake structures are located in the Moss Landing Harbor"].)

In reply to Petitioner's responses to question numbers 7 and 8, the Regional Board notes that the propriety of the administrative extension of the 2000 NPDES Permit is not at issue in this case, which only involves a challenge to the permit as issued by the Regional Water Board in 2000. Further this case does not involve the State Water Resources Control Board's new Once-Through Cooling Policy, which requires intake flow reductions commensurate with closed-cooling systems in accordance with a staged implementation schedule for affected generators statewide. The Policy also requires generators to mitigate any entrainment or impingement from existing once-through cooling systems during the interim compliance period while they complete necessary compliance measures. The case before this Court does not address the question of what interim requirements the state may impose on energy generators *before* those generators achieve final compliance with section 316(b).

As to Petitioner's reference to *Riverkeeper*, the mitigation issue in this case is a factual one, not a legal one. The trial court found that mitigation was not used to satisfy the requirements of section 316(b), and the Court of Appeal upheld that finding. Neither court held that mitigation can be used to satisfy the requirements of section 316(b) as a matter of law. Thus, contrary to what is suggested by Petitioner, there is no conflict between the lower court rulings in this case and those aspects of *Riverkeeper, Inc. v. United States Environmental Protection Agency* (2d Cir. 2007) 475 F.3d 83 that the United States Supreme Court did not overturn. (*See, Entergy Corp. v. Riverkeeper, Inc.* (2009) ___ U.S. ___, 129 S.Ct. 1498.)

As discussed in our January 24, 2011, letter to the Court, this case would be of limited utility as precedent for future NPDES permit actions or for the administration of the Once-Through Cooling Policy.

Sincerely,

ANITA E. RUUD
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

AER:

SF2008400435

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Voices of the Wetlands v. Regional Water Board, et al.**
Case No.: **S160211**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 3, 2011, I served the attached **LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Deborah A. Sivas
Stanford Law School
Environmental Law Clinic
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

Sarah G. Flanagan
Pillsbury Winthrop Shaw Pittman LLP cisco
Post Office Box 7880
San Francisco, CA 94120-7880

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 3, 2011 at San Francisco, California.

Carmelita Gonzales
Declarant

Signature

SF2008400435
20402404.doc