Case No. S160211

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

VOICES OF THE WETLANDS,

Petitioner,

v.

CALIFORNIA WATER RESOURCES CONTROL BOARD; CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD – CENTRAL COAST REGION; DUKE ENERGY MOSS LANDING LLC; and DUKE ENERGY NORTH AMERICA, LLC,

Respondents.

Sixth Appellate District Case No. H028021
Monterey County Superior Court No. M54889
The Honorable Robert A. O'Farrell, Judge

ANSWER TO PETITION FOR REVIEW

EDMUND G. BROWN JR.
Attorney General of the State of California
JANET GAARD
Chief Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
MARY E. HACKENBRACHT
Senior Assistant Deputy Attorney General
JOHN DAVIDSON
Supervising Deputy Attorney General
ANITA E. RUUD
Deputy Attorney General
State Bar No. 72483
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5533
Fax: (415) 703-5480
Email: Anita.Ruud@doj.ca.gov
Attorneys for Respondents State Water Resources Control Board and California Regional Water Quality Control Board, Central Coast Region

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INTRODUCTION

This case is not appropriate for Supreme Court review; review is not necessary in this case to secure uniformity of decision or to settle an important question of law. (*People v. Davis* (1905) 147 Cal. 346; Cal. Rules of Court, rule 8.500.) This case does not determine the future of permits issued pursuant to Clean Water Act section 316(b) (33 U.S.C. § 1326(b)) in California, or anywhere. The Court of Appeal's decision only looks to the state of law seven years ago when the Central Coast Regional Water Quality Control Board ("Regional Water Board") reissued a National Pollution Discharge Elimination System ("NPDES") permit for the Moss Landing Power Plant. The Regional Water Board issued the permit pursuant to the Clean Water Act (33 U.S.C. §§

1251, et seq.) before the U.S. Environmental Protection Agency ("EPA" or "US EPA") issued its final regulations concerning cooling water intake structures for existing power plants. Petitioner claims that *Riverkeeper v. Environmental Protection Agency* ("*Riverkeeper II*") (2d Cir. 2007) 475 F.3d 38 (*cert. pending*[1]) invalidated the decision of the Regional Water Board's decision to renew an NPDES permit for the Moss Landing Power Plant, which allowed the use of a once-through cooling water intake structure. The cooling structure, which had been in use for decades, was upgraded as part of an overall plant upgrade addressed by the renewed NPDES permit. The Court of Appeal in this case, *Voices of the Wetlands v. California State Water Resources Control Board* (2007) 157 Cal. App.4th 1268 ("*Voices*"), correctly determined that *Riverkeeper II* did not, in fact, invalidate this NPDES permit issued in 2000. (*Id.* at 1352, 1356.)

Petitioner also claims that the Court of Appeal's decision with regard to its interpretation of Code of Civil Procedure section 1094.5 is contrary to *Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4th 559 ("*Western States Petroleum*"). This Court's decision in *Western States Petroleum* is inapplicable to a trial court's limited remand to an administrative agency. The application of Code of Civil Procedure section 1094.5 to this

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1. See, Petition of Energy Corporation, No. 07-588, 2007 WL 3270386; Petition of PSEG Fossil LLC et al., No. 07-589, 2007 WL 3270387; Petition of Utility Water Act Group, No. 07-597, 2007 WL 3274445.

particular case is narrow in scope and the trial court's remand was particularly appropriate to an operating power plant. The Court of Appeal correctly determined that the remand and its procedures were appropriate to the situation at hand and did not violate Petitioner's due process rights. (*Voices*, *supra*, at 1316, 1339.)

The Supreme Court establishes uniformity of decisions and settles important legal questions. This case implicates neither of these policies; Supreme Court review is unwarranted.

ARGUMENT

1. THERE IS NO CONFLICT WITH SETTLED FEDERAL LAW.

Petitioner contends that the decision below warrants review because it conflicts with *Riverkeeper II* and will therefore cause confusion about the applicable standard for once-through cooling systems for existing power plants. Petitioner is incorrect for several reasons. First, *Riverkeeper II* concerned a different issue. Second, *Riverkeeper II* is not settled. Third, even if *Riverkeeper II* was final and presented a direct conflict, there would be little value to settling the conflict because the law that will govern future power plant renewals, including the renewal of the Moss Landing Power Plant permit,[2/] is currently in flux.

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2. The NPDES permit issued in 2000 has expired, and the power plant is currently operating on an administrative extension of this 2000 permit.

A. *Riverkeeper II* is Not Contrary To the Regional Water Board Decision.

1. *Riverkeeper II* Did Not Consider The Best Professional Judgment Standard That Applies Here.

The Regional Water Board issued the permit before the US EPA issued regulations for existing power plants with cooling water intake structures (the "Phase II regulations").[3/] Moss Landing Power Plant uses an existing cooling water intake structure that was not expanded as part of the plant upgrade. Moss Landing Power Plant is therefore an "existing facility" for purposes of Clean Water Act Section 316(b). (40 C.F.R. § 125.83.) In the absence of EPA regulations establishing technology-based standards, the Regional Water Boards must apply a Clean Water Act permitting standard known as "best professional judgment." (33 U.S.C.A. § 1342(a)(1)(B); 40 C.F.R. § 125.3.) The best professional judgment standard requires permitting authorities to use their best professional judgment in developing technology-based permit requirements. EPA has suspended its Phase II regulations, and best professional judgment continues to be the permitting standard. (40 C.F.R. § 125.90(b); 72 Fed. Reg. 37107 (July 9, 2007).)

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3. The Second Circuit upheld EPA's Section 316(b) regulations for new facilities (the "Phase I" regulations) in *Riverkeeper, Inc. v. U.S. EPA* (2d Cir. 2004) 358 F.3d 174 (*"Riverkeeper I"*). The only Phase I provision that *Riverkeeper I* struck down was a compliance alternative allowing the use of restoration (mitigation) measures in lieu of operational or technology measures.

As required by EPA regulations, the Regional Water Board applied its best professional judgment in establishing requirements for the Moss Landing Power Plant under section 316(b) of the Clean Water Act. The best professional judgment standard appropriately allows the agency issuing an NPDES permit to consider whether the costs of implementing a cooling water intake technology at a facility are "wholly disproportionate" to the benefits achieved from the technology. (*Seacoast Anti-Pollution League v. Costle* (1st Cir. 1979) 597 F.2d 306, 311 (*"Seacoast"*).) Unlike *Seacoast, Riverkeeper II* did not consider how permitting authorities should make best professional judgment-based permitting decisions, or the extent to which cost considerations may be part of that determination. The Regional Water Board's decision is consistent with the only federal authority to consider site-specific permits.

2. The Regional Water Board's Cost Considerations Were Not Disallowed by the *Riverkeeper* Cases.

Contrary to Petitioner's argument, the Court of Appeal's decision does not allow the use of the same cost-benefit analysis that *Riverkeeper II* prohibited. "Cost benefit analysis ... compares the costs and benefits of various ends, and chooses the end with the best net benefits." (*Riverkeeper II*, 475 F.3d at 98.) *Riverkeeper II* rejected a cost-benefit test that allowed a lower standard of performance where the benefits of an available technology are merely "significantly greater than" the benefits. (*Id.* at 114-115.) That is not the

standard the Regional Water Board applied. Rather, under the wholly disproportionate standard recognized by *Seacoast*, the Regional Water Board rejected a cooling water alternative only if (among other considerations) its costs were wholly disproportionate to its benefits and not merely a net increase over (or even significantly more than) the benefits.

The Phase I regulations allow a site specific variance. This variance allows for site-specific requirements different than the national performance standard, based on the environmental impacts and energy costs (i.e., reductions in generating capacity or energy efficiency) that cooling water alternatives will have at a particular facility. *Riverkeeper I* upheld this variance. (*Riverkeeper I,* 358 F.3d at 193-194, citing 40 C.F.R. § 125.85(a)(2).) *Riverkeeper II* reiterated that these considerations were appropriate for setting performance standards for existing facilities. (*Riverkeeper II,* 475 F.3d at 105.) In considering whether cooling alternatives were "available," the Regional Water Board considered the adverse environmental impacts of cooling water alternatives on air and water quality,[4/] the reduced generating capacity that some of the alternatives would have, and their efficacy for the Moss Landing site.

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4. Elkhorn Slough is the body of water which most concerns the Petitioner. Before deciding to issue the permit, the Regional Water Board staff and others provided extensive evidence regarding the project's impact on Elkhorn Slough. The administrative record supports the conclusion that the historical fact of the power plant taking water from Elkhorn Slough has not depleted its biological richness or value (AR 300859-920; 306491).

(See, e.g., AR 300141-143, 301057-064, 303704, 305560-563; RAR 000030-000048).[5/] In addition to Duke Energy's testimony, the Regional Water Board considered the testimony of Petitioner's expert and the opinions of an independent group of scientists, Regional Water Board staff and the California Energy Commission.

The *Riverkeeper I* and *II* cases involved EPA's adoption of national performance standards for power plants. There is no inherent conflict between the federal cases and this case, which does not involve national, or even statewide, rulemaking. In *Riverkeeper II,* the Second Circuit held that EPA may only consider what costs the national power generating industry can reasonably bear when EPA sets national performance standards; EPA may then apply a cost-effectiveness analysis to minimally lower that national performance standard. The Court of Appeal did not address how these limitations apply to *site-specific* permits issued in the absence of EPA regulations or national performance standards.

B. *Riverkeeper II* Is Not Final.

Three petitions for review of *Riverkeeper II* are currently pending before the U.S. Supreme Court. (Petition of Energy Corporation, No. 07-588, 2007 WL 3270386; Petition of PSEG Fossil LLC et al., No. 07-589, 2007 WL

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5. "AR" refers to the administrative record in this case, which was also used as the clerk's transcript on appeal. "RAR" refers to the remand administrative record.

3270387; Petition of Utility Water Act Group, No. 07-597, 2007 WL 3274445.) All three of these petitions seek review of the Second Circuit's decision that Section 316(b) does not allow cost-benefit analyses, and one (Case No. 07-597) asks the Supreme Court to consider whether Section 316(b) applies to existing facilities at all. Even as federal law on the issue is not final, the law continues to evolve in California as well.

C. The Law Regarding Cooling Water Intake Structures for Existing Power Plants Continues To Develop.

In 2005, the State Water Resources Control Board[6] ("State Water Board") began the process of developing a statewide policy to implement federal Clean Water Act section 316(b) regulations and analogous state law on cooling water intake structures.[7] Statewide policy must be at least as stringent as federal law, but may impose more stringent requirements. (33 U.S.C.A. § 1370; see also, 33 U.S.C.A. § 1313(e)(3)(A).) Regional Water Board

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6. The State Water Board sets statewide policy and oversees California's nine regional water quality control boards. (Wat. Code, §§ 13100-13193, 13320.)

7. Petitioner suggests that this Court should take up this issue because there is "widespread regulatory interest" in cooling water regulation. (Pet. at p. 18, fn. 5.) As the Court of Appeal explained, only the Regional Water Boards can issue NPDES permits. (*Voices*, *supra*, at 1290, 1302-1304.) Similarly, only the State Water Board can set statewide policy in California under the Clean Water Act. (See, e.g., Wat. Code, §§ 13140, 13147, 13170.) This case involves Section 316(b) of the Clean Water Act. Nothing in the *Riverkeeper* cases or this case even remotely implicates regulatory standards applied by other agencies under other statutory schemes.

permitting decisions made after issuance of the statewide policy must comply with applicable federal law as well as any more stringent requirements of the statewide policy. (Wat. Code, §§ 13146, 13240, 13263.)

When it adopts statewide policy, the State Water Board must conduct a public hearing (Gov. Code, § 11123; Wat. Code, § 13147; see also, 40 C.F.R. Part 25) and provide written responses to public comments (Gov. Code, § 11353; Cal. Code Regs., tit. 23, § 3779.) After the State Water Board adopts a policy and the California Office of Administrative Law reviews it (see Gov. Code, § 11353), US EPA must review and approve any new water quality standards, including technology-based standards under Section 316(b), or they will not take effect under the Clean Water Act. (40 C.F.R. §§ 130.3, 131.21.)

Nothing in *Riverkeeper II* compels any particular result in either the statewide policy or in site-specific permits based upon the best professional judgment standard. The Court of Appeal reviewed a single decision of a single Regional Water Board. The court correctly noted that it was required to "'afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.' (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817)." (*Voices, supra*, at 1317-1318.) As the court noted, the Regional Water Board has considerable discretion in applying the best professional judgment

standard. (*Id.* at 1354.) The Court of Appeal neither established a performance standard for cooling water intake structures nor mandated a standard for making best professional judgment-based determinations of "best technology available."

Petitioner is essentially asking this Court to speculate at what the outcome may be of a rulemaking process which is in its early stages, and rule on its legality now. Given the uncertain state of the law, a decision by this Court now is unlikely to make future litigation unnecessary. We therefore disagree that the development of a statewide policy provides a reason for this Court to take up the case now, and respectfully suggest that the regulatory certainty that Petitioner seeks should come from the agency with the expertise and legislative charge to develop state policy for water quality control.

D. Whether The Regional Water Board Used Mitigation To Satisfy 316(b) Is A Question Of Fact That Does Not Warrant Supreme Court Review.

Petitioner incorrectly characterizes the Regional Water Board decision as utilizing mitigation measures to meet technology requirements. Whether or not mitigation was considered as a cooling water intake structure technology is a question of fact, as the Court of Appeal stated (*Voices*, *supra*, at 1352) and Petitioner concedes (Petition at p. 22). Both lower courts found in the Regional Water Board's favor on this factual issue after reviewing an extraordinarily lengthy administrative record that included thousands of pages of written

evidence and three separate hearings. Even had the Court of Appeal been wrong in making this factual finding (and we do not agree that it was), nothing in the decision stands for the proposition that restoration or mitigation measures may be used in lieu of available technology to meet Section 316(b)'s best technology available standard, because the Court found that the Regional Water Board had *not* allowed such a substitution. The correctness of the factual findings can have no implications beyond this case, and the decision below does not conflict with the *Riverkeeper* cases on this point.

2. The Trial Court's Remand Order Does not Conflict With Existing Authority.

Petitioner claims that the court's decision to order a limited remand somehow turned the law of administrative mandamus on end. Both the remand order and the conduct of the remand hearing were appropriate responses to the facts before the trial court. Each are consistent with existing law.

A. The Limited Remand.

Of the fifty-eight lengthy findings in the Moss Landing Power Plant permit, the trial court determined that only part of one finding warranted reconsideration and further review by the Regional Water Board. Rather than issue a writ and judgment at that time, the trial court remanded the decision to the Regional Water Board. In that order, the trial court made clear that its decision was not to prevent the power plant from operating. (RAR 000007.) The plant was upgraded after the Regional Water Board issued the permit, and

had already been operating for a year and a half before the limited remand.

California law (Pub. Resources Code, § 25531, subd. (c)) prohibits a court from stopping or delaying the construction of a power plant. This was always a concern to the trial court; the court's intention not to shut down the power plant was explicit in the Intended Decision. (RAR 000007.) The trial court fashioned the remand order only after the parties could not agree on a form of order to implement the Intended Decision, and only after a noticed hearing. In light of this, the remand was particularly appropriate. The Court of Appeal agreed with this approach as being suited to this fact situation.

The Court of Appeal examined the authority of the trial court to order such a remand. The court phrased the question as: "whether the statute [section 1094.50] categorically forbids a limited interlocutory remand to the agency without the issuance of a writ . . . . We conclude that it does not." (*Voices*, *supra*, at 1310.). The court went on to observe that section 1094.5 does not explicitly mention the issuance of a writ; it requires the issuance of a judgment, and such a judgment was entered in this case, denying the writ after remand. (*Id.* at 1313.) There is existing authority permitting a limited remand and continuing court jurisdiction in an administrative mandamus proceeding. (*County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 85; *Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit Dist.* (1986) 185 Cal. App.3d 996, 1003; *Helene Curtis, Inc. v. Los Angeles County Assessment*

Appeals Bds. (2004) 121 Cal.App.4th 29.)

The Court of Appeal also looked at the trial court's inherent powers: "the court also has the inherent authority to return a matter to an administrative agency for further proceedings. 'Courts have inherent power, as well as power under section 187 of the Code of Civil Procedure, to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Counsel.' (*Tide Water Assoc. Oil Co. v. Superior Court* (1955) 43 Cal.2d 815, 825)." (*Voices, supra,* at 1315.)

As the Court of Appeal stated: "Limited remand is appropriate in this case, for several reasons: the administrative order as a whole was broad ranging and complex, covering far more than just technological alternatives for minimizing entrainment; the permit was the product of years of scientific study and interagency collaboration; and the trial court found fault with only one of the agency's 58 findings." (*Voices*, *supra*, at 1315). The facts of this case involving an operating power plant were particularly suited to the trial court's flexible approach in its remedies.

B. The Remand Hearing Procedures.

Petitioner claims that *Western States Petroleum v. Superior Court* (1995) 9 Cal.4th 559, directly conflicts with the holding in the *Voices* case. It does no such thing. *Western States Petroleum* stands for the proposition that

a court is limited to the administrative record in its review of the agency action, not that the agency cannot supplement its own record upon remand. (*Id.* at 576.) After the remand, the trial court reviewed the new evidence in the form of the supplemental administrative record, not as evidence outside the administrative record.

The trial court directed that the Regional Water Board review alternatives to the once-through cooling. (*Voices, supra*, at 1306, fn. 3) After consideration of the court's order and the regulations of the Regional Water Board, counsel decided on a narrowly focused public hearing to specifically address the trial court's finding. Petitioner actively participated in the public hearing, after first refusing to do so. (*Id.*, at 1336 fn. 11.) It presented evidence and legal argument to the Regional Water Board. (*Id.* at 1335-1339.)

Many of the cases Petitioner cites address when a reviewing court may consider extra-record evidence under Code of Civil Procedure section 1094.5, subdivision (e), where the administrative agency did not consider the evidence as part of its decision. All of the remand evidence in this case was submitted to the Regional Water Board and available to the State Water Board before it ever got to the trial court. The cases dealing with extra-record evidence are simply not relevant here.

There is no conflict with the cases cited by Petitioner, which are primarily concerned with the due process problems of such the limited remand

before judgment approach. The Court of Appeal directly addressed the due process issues. In *Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 900, cited by Petitioner, the court is concerned about the preclusion of any possible challenge to the sufficiency of the evidence to support new findings. However, in this case , as the Court of Appeal noted, "[Petitioner] had the opportunity both to participate in supplemental administrative hearing in 2003 and to contest the resulting findings at the continued judicial hearing in 2004.... In no way were the agency's procedures or findings insulated from review here." (*Voices*, *supra*, at 1316.) When one views the facts of this case and the inherent power of the trial court to order appropriate remedies, the procedures utilized in this case are suitable to its facts.

After the remand hearing before the Regional Water Board, at which Petitioner was given the opportunity to fully participate, the Regional Water Board issued new findings,[8] and a supplemental administrative record was prepared with the new deliberations of the Regional Water Board as required by the trial court's order.[9] This supplemental administrative record was then

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8. Petitioner characterizes the Regional Water Board actions as not adopting new findings after the remand hearing. (Pet. at p. 4.) This claim is incorrect as the record clearly indicates that after a twelve-hour remand hearing, a long deliberation and a split vote, the Regional Water Board explicitly adopted their deliberations as findings. (RAR 001203-1204.)

9. The trial court ordered the Regional Water Board to "conduct a thorough and complete analysis of Best Technology Available applicable to Moss Landing Power Plant." (*Voices*, *supra*, at 1287; RAR 000007.)

the subject of another hearing at the trial court level, with full briefing by all parties. At all times during these proceedings the Petitioner was able to fully challenge the Regional Water Board's and the trial court's decisions.

The trial court and the Court of Appeal were mindful of the specific facts of this case and its unique questions. The Court of Appeal's decision presents no conflict with existing law, and appropriately upheld a process designed to protect the rights of all interested parties.

CONCLUSION

The Water Board respondents respectfully request that the Petition be denied.

Dated: February 13, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

JANET GAARD
Chief Assistant Attorney General

GORDON BURNS
Deputy Solicitor General

MARY E. HACKENBRACHT
Senior Assistant Attorney General

JOHN DAVIDSON
Supervising Deputy Attorney General

ANITA E. RUUD
Deputy Attorney General

Attorneys for Respondents State Water Resources Control Board and California Regional Water Quality Control Board, Central Coast Region

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c), I certify that the attached ANSWER TO PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3864 words, not including tables, certifications, or attachments, as counted by WordPerfect word processing program used to generate it.

Dated: February 13, 2008

ANITA E. RUUD
Deputy Attorney General

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: ***Voices of the Wetlands v. California Water Resources Control Board, et al.***
California Supreme Court Case No.: S160211
Court of Appeal, Sixth Appellate District No. H028021
Monterey County Superior Court No. M54889

I, Corazon Marcelino, declare:

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

On February 13, 2008, I served the attached **ANSWER TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with the **FedEx Express overnight courier service**, addressed as follows:

Deborah A. Sivas, Esq.
Standford Law School
Environmental Law Clinic, Crown Quadrangle
559 Nathan Abbot Way
Stanford, CA 94305-8610
Counsel for Petitioner

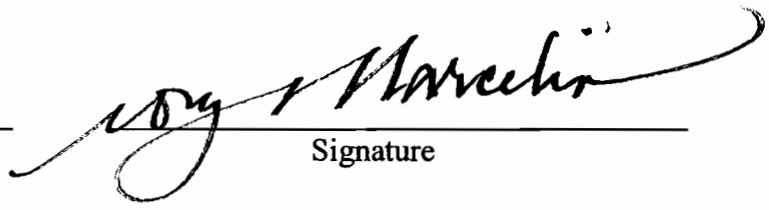
Sarah G. Flanagan, Esq.
Pillsbury Winthrop Shaw Pittman LLP–San Francisco
50 Fremont Street
San Francisco, CA 94105
Counsel for Real-Parties in Interest

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

Clerk of the Court, Civil Division
California Court of Appeal–
Sixth Appellate District
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113-17174

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 13, 2008, at San Francisco, California.

Corazon Marcelino
Declarant



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