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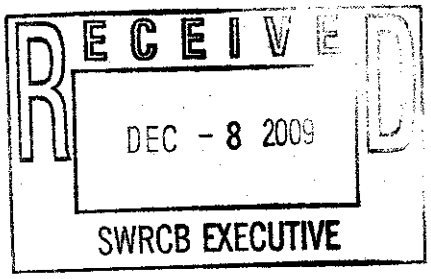

VIA E-MAIL & U.S. MAIL

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
commentletters@waterboards.ca.gov

RE: Comment on the Board's Revised OTC Policy

Dear Ms. Townsend,

On December 1, 2009, the State Water Resources Control Board (Board) held a workshop to receive comments on and consider a materially revised version of the Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling (Revised Policy).[1] At the workshop, the Board announced that it would accept written comments on the Revised Policy until December 8, 2009. Southern California Edison (SCE) raises the following points for the Board's consideration and review.[2]

I. SCE SUPPORTS ADOPTING THE CEQA DEFINITION OF "FEASIBLE"

SCE supports defining the term "feasible" in the same manner in which the California Environmental Quality Act (CEQA) defines the term. *See* Pub. Res. Code § 21061.1 ("'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors."); *see also* CEQA Guidelines (Cal. Code Regs. tit. 14) § 15364 (reiterating this definition and adding "legal" to the list of factors). In this fashion, the Board would incorporate the substantial precedent set forth by California courts as to how to determine when economic feasibility has been established. Furthermore, this is the approach taken by the Sixth Appellate District in *Voices of the Wetlands v. State Water Res. Control Bd.*, 157 Cal. App. 4th 1268, 1324-25 (2007), *depub. by* 74 Cal.Rptr.3d 453 (Mar. 19, 2008) (now on appeal to the California Supreme Court).

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[1] On November 30, 2009, the California Council for Environmental and Economic Balance ("CCEEB") submitted a letter objecting to the improper notice and inadequate comment period provided by the Board for the Revised Policy, and arguing that the Board is legally obligated to hold the comment period open for 45 days before considering and adopting the Revised Policy. SCE joins in CCEEB's November 30, 2009 letter.

[2] Exhibit A to this letter is a memorandum explaining the legal basis for SCE's proposed revisions.

Accordingly, SCE proposes the addition of the following definition of "feasible" to the Revised Policy:

> *Feasible* – Means capable of being accomplished in a successful manner within a reasonable period, taking into account economic, environmental, legal, social and technological factors.

II. SCE SUPPORTS THE BOARD'S IMPLEMENTATION OF A CONSISTENT, STATEWIDE EVALUATION OF COSTS AND FEASIBILITY FOR THE NUCLEAR FACILITIES PROVIDED THAT THE POLICY EXPRESSLY DESCRIBES THE SCOPE OF THE BOARD'S EVALUATION

At the December 1, 2009 workshop, the Board's staff circulated a summary of the revisions to the Policy. The staff explained that the original provision allowing applicants to demonstrate that the costs to comply with Tracks 1 or 2 would be wholly disproportionate to the environmental benefits to be gained (the "wholly disproportionate" demonstration) was removed because it "would place a burden on the Regional Water Boards, and State Water Board staff, in determining guidelines for its implementation." *Summary of Revisions of the Proposed OTC Policy* at 1. To the extent that Board members and staff stated at the workshop that the intent of the provision was not to eliminate the "wholly disproportionate" demonstration, the purpose of the revisions may have been to shift its implementation to the "special studies" contemplated for the nuclear facilities and perhaps the more efficient fossil OTC units. Under this rationale, the Board may have been attempting to shift the substance of the "wholly disproportionate" demonstration process set forth in Section 4 of the June 30, 2009 version of the Policy into the costs and feasibility analysis added to Section 3(D)(7) of the November 23, 2009 Revised Policy, ostensibly to reduce the burden on Regional and State Board members and staff in implementation.

SCE appreciates the Board's interest in minimizing administrative burdens in implementation of the Policy. Absent provision for a "wholly disproportionate" demonstration, or a comparably rigorous and substantive consideration and comparison of costs and benefits, however, the Revised Policy is inconsistent with the provisions of Section 316(b) of the Clean Water Act. The "wholly disproportionate" demonstration cannot be eliminated without an express description of how costs and feasibility will be considered and balanced. SCE also appreciates that the Board may prefer to establish a consistent, statewide approach to the implementation of the Policy. SCE supports a statewide approach provided that the revisions proposed below are reflected in the Policy to ensure that costs and feasibility are adequately evaluated.

Accordingly, SCE proposes the following revisions (in underlined text) to Section 3(D)(7) of the Revised Policy to describe how the Board would substantively consider costs and feasibility in the special studies. As part of these revisions, SCE proposes several new defined terms, which are articulated below.

> (7) The State Water Board shall consider the results of the special studies, including costs and feasibility, in evaluating the need to modify this Policy.

(a) The State Water Board's consideration of costs as part of the special studies shall include an economic analysis of whether the costs of complying with Track 1 and Track 2 are *wholly disproportionate** to the environmental benefits to be gained.

(b) The State Water Board's consideration of feasibility as part of the special studies shall include an evaluation of whether compliance with Track 1 and Track 2 is *feasible**.

(c) If the State Water Board determines that either the costs of compliance with Track 1 and Track 2 are *wholly disproportionate** to the environmental benefits to be gained, or that compliance with Track 1 and Track is not *feasible**, the State Water Board shall modify this Policy so the units covered by the special studies provision shall not be required to comply with either Track 1 or Track 2.

(i) If the State Water Board determines that a unit subject to the policy is not required to comply with either Track 1 or Track 2 in accordance with this section, the State Water Board shall modify this Policy to require an evaluation of whether *alternative protective technologies** are available for such a unit.

(A) Specific *alternative protective technologies** shall not be considered available if the State Water Board determines that the *alternative protective technologies** are either not *feasible** or result in costs that are *wholly disproportionate** to the environmental benefits to be gained.

(B) Any difference in impacts to marine life resulting from applying *alternative protective technologies**, if any, instead of complying with Track 1 and Track 2 shall be fully mitigated.

SCE proposes the addition of the following definitions to Section 5 of the Revised Policy:

Wholly disproportionate – Refers to situations where the costs of compliance unreasonably exceed the environmental benefits to be gained by compliance. Absent substantial evidence to the contrary on a case-by-case basis, costs are presumed to unreasonably exceed environmental benefits if the ratio of costs to benefits is greater than 5-to-1.

Alternative protective technologies – Refers to available protective technologies for compliance with the Policy when the State Water Board determines that Track 1 and Track 2 do not apply. Alternative protective technologies that may be available include: a fish-handling and return system; fine-mesh traveling screens; a redesigned intake structure with fine mesh, handling and return system; fish barrier net; filter fabric barriers (i.e. Gunderboom) that reduce aquatic impacts at cooling water intake structures; the relocation of cooling water intake structures; velocity caps for cooling water intake structures; passive fine-mesh screens at the inlet of an offshore submerged intake structure (i.e. Wedgewire); and double-entry, single-exit cooling-water intake structures with fine mesh screens and a fish-handling and return system.

III. SCE SUPPORTS THE BOARD'S PHASED IMPLEMENTATION OF THE REVISED POLICY PURSUANT TO THE LONG-TERM PROCUREMENT PLANNING PROCESS, PROVIDED THAT THE REVISED POLICY RECOGNIZES THE JURISDICTION OF THE ENERGY AGENCIES OVER GRID RELIABILITY

Replacement electric infrastructure for existing once-through-cooled units must be developed and operational to ensure that the Revised Policy does not adversely affect electric system reliability. The Board recognizes this in Section 1.G of the Revised Policy, which states: "The intent of this Policy is to ensure that the beneficial uses of the State's coastal and estuarine waters are protected while also ensuring that the electrical power needs essential for the welfare of the citizens of the State are met. The State Water Board recognizes it is necessary to develop replacement infrastructure to maintain electric reliability in order to implement this Policy." Further, Section 1.I of the Revised Policy states in part: "The State Water Board recognizes the compliance dates in this Policy may require amendment based on, among other factors, the need to maintain reliability of the electric system as determined by the energy agencies included in the SACCWIS [Statewide Advisory Committee on Cooling Water Intake Structures], acting according to their individual or shared responsibilities." The Revised Policy also provides for the creation of the SACCWIS, which will include representatives from the CAISO, the California Energy Commission (CEC), and the California Public Utilities Commission (CPUC), among others. Revised Policy § 3(B).

However, the Board's intention to rely on the energy agencies' recommendations is not clearly expressed in the Revised Policy. SCE respects the Board's efforts in the Revised Policy to recognize the individual and shared responsibilities of the energy agencies (the CAISO, CEC, and CPUC) to maintain the reliability of the electrical system and to supply an avenue for those agencies to provide determinations to the Board when an adjustment to the final compliance schedule for the Revised Policy is necessary. SCE strongly believes that the Board should more explicitly recognize and rely upon the fact that the CAISO and energy agencies have both the jurisdiction and expertise to determine if the final compliance schedule must be amended to preserve electrical system reliability. Accordingly, SCE proposes the following changes (in underlined text) to the Revised Policy:

Section 2(B)(2): Based on the need for continued operation of an existing power plant to maintain the reliability of the electric system as annually determined by the CAISO, CEC or CPUC acting according to their individual or shared responsibilities, and communicated to the State Water Board as a formal action of the CAISO or state agency, the State Water Board shall hold a hearing to consider suspension of a compliance date applicable to an existing power plant pending full evaluation of amendments to final compliance dates contained in the policy. Upon receipt of notice of a formal action by the CAISO or state agency, and prior to any such hearing, and in reliance upon that determination, the State Water Board shall suspend and/or amend a final compliance date consistent with the notice of formal action by CAISO or state agency.

Section 3(B): The SACCWIS shall be impaneled no later than [three months after the effective date of this Policy], by the Executive Director of the State Water Board, to advise the State Water Board on the implementation of this Policy to ensure that the implementation schedule takes into account local area and grid reliability. SACCWIS shall include representatives from the CEC, CPUC, CAISO, CCC, SLC, ARB, and State Water Board. The SACCWIS shall be composed of two representatives each from the CEC, CPUC, CAISO, and State Water Board, and one representative each from the CCC, SLC, and ARB.

IV. CONCLUSION

SCE respectfully offers the proposals described above to tailor the Revised Policy to meet the needs of the Board, the regulated community, responsible state agencies, the environmental community, and the people of California.

Very truly yours,

Michael M. Hertel

Michael M. Hertel, PhD
Director, Corporate Environmental Policy

Attachment

cc: Charlie Hoppin
Frances Spivy-Weber
Arthur Baggett, Jr.
Tam Doduc
Walt Pettit
Dorothy Rice
Jonathan Bishop
Michael Lauffer

Susan Kennedy
Dan Pellissier
Linda Adams
Cindy Tuck
Mike Chrisman
Karen Douglas
Michael Jaske
Yakout Mansour
Dennis Peters
Michael Peevey
Robert Strauss
Susan Lapsley

Exhibit A

I. THE BOARD'S ELIMINATION OF THE "WHOLLY DISPROPORTIONATE" DEMONSTRATION IS UNLAWFUL.

A. The "Wholly Disproportionate" Demonstration is a Long-Standing Fixture of Clean Water Act Section 316(b) Application.

The original version of the Policy, which was studied as the "project" for purposes of the Draft Substitute Environmental Document (SED), included a provision allowing certain power plants to request that the Board analyze whether the costs to comply with the Policy were wholly disproportionate to the environmental benefits to be gained from compliance (the "wholly disproportionate" demonstration). The Board's inclusion of the "wholly disproportionate" demonstration comported with the U.S. Environmental Protection Agency's (EPA) long-standing interpretation of Clean Water Act Section 316(b) and appellate decisions before the U.S. Supreme Court and California's Sixth Appellate District. As early as 1977, the EPA Administrator wrote, "I do not believe that it is reasonable to interpret Section 316(b) as requiring use of technology whose cost is *wholly disproportionate* to the environmental benefit to be gained." *Pub. Service Co. of NH, et al. Seabrook Station, Units 1 and 2* ("*Seabrook*"), Case No. 76-7, 1977 WL 22370 (June 10, 1977 Decision EPA Admin.) (emphasis added).

In a 1977 opinion, the EPA General Counsel further explained that under Section 316(b), the agency "has the ultimate burden of persuasion and economic considerations are appropriate." *In re Central Hudson Gas and Elec. Corp.* ("*Central Hudson*"), Op. EPA Gen. Counsel 63 (Jul. 29, 1977), at 8. This consideration was expressed through a showing that "the cost of the technology is not 'wholly disproportionate' to the environmental gains to be derived from the application of the technology." *Id.* The General Counsel illustrated this point by noting that "it would be more difficult for the Agency to show, for example, that the imposition of a $25 million technology under Section 316(b) is not 'wholly disproportionate' to the magnitude of the adverse environmental impact if the discharger has shown under Section 316(a) that the overall impact of a less stringent thermal effluent limitation does not interfere with the protection and propagation of the balanced indigenous population." *Id.*

In the SED, the Board recognized this precedent by citing the *Central Hudson* opinion, the U.S. Supreme Court's *Entergy* decision,[1] and a California appellate decision in *Voices of the Wetlands v. State Water Res. Control Bd.* (now on appeal before the California Supreme Court).[2] SED at 8-9. In the *Voices of the Wetlands* case, the Central Coast Regional Board used the "wholly disproportionate" demonstration to evaluate the best technology available ("BTA") for the Moss Landing Power Plant's cooling system under Section 316(b). The Central Coast Regional Board found that:

> The Discharger must use BTA to minimize adverse environmental impacts caused by the cooling water intake system. If the cost of

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[1] *Entergy Corp. v. Riverkeeper Inc.*, 129 S. Ct. 1498 (2009).

[2] 157 Cal. App. 4th 1268, 1324-25 (2007), *depub. by* 74 Cal.Rptr.3d 453 (Mar. 19, 2008). The appellant's opening brief in the *Voices of the Wetlands* appeal to the California Supreme Court is due on December 8, 2009.

> implementing any alternative for achieving BTA is wholly disproportionate to the environmental benefits to be achieved, the Board may consider alternative methods to mitigate these adverse environmental impacts. In this case, the costs of alternatives to minimize entrainment impacts are wholly disproportionate to the environmental benefits. However, Duke Energy will upgrade the existing intake structure for the new units to minimize the impacts due to impingement of larger fish on the traveling screens, and will fund a mitigation package to directly enhance and protect habitat resources in the Elkhorn Slough watershed as explained below.

Duke Energy North America, Moss Landing Power Plant NPDES Permit No. CA0006254 (Oct. 27, 2000).

Furthermore, the Board's Office of Chief Counsel concluded in a 2003 legal opinion that "[f]or over 25 years EPA has applied the wholly disproportionate cost test to BTA determinations. A technology may not be considered BTA if the cost of a technology is wholly disproportionate to the environmental benefit to be gained." *See* Office of Chief Counsel, *Legal Analysis of Clean Water Act Section 316(B); Hearing on NPDES Permit For Diablo Canyon Power Plant, Pacific Gas & Electric Company (PG&E)* (June 9, 2003), at 4.

These decisions support the use of the "wholly disproportionate" demonstration as a means for performing the balancing analysis embodied in Section 316(b).

B. The Board's Revised Policy of November 23, 2009 Completely Removes the "Wholly Disproportionate" Demonstration.

On November 23, 2009, the Board issued the Revised Policy, in which the section authorizing the "wholly disproportionate" demonstration was removed entirely. The Board's written explanation for its decision to remove the "wholly disproportionate" demonstration stated that, based on public comment, "staff believes that [it] would place a burden on the Regional Water Boards, and the State Water Board staff, in determining guidelines for its implementation." Board Staff, *Summary of Revisions to the Proposed OTC Policy*, (Dec. 1, 2009).

At the December 1 workshop, Board members expressed concern that conducting a cost-benefit analysis or detailed economic analysis of the Policy would be an impossible task because the costs and benefits as of 2025 could not be accurately estimated so far in advance. The cost-benefit analysis attached to SCE's September 30, 2009 comment letter provides a concise road map for an agency seeking to conduct a robust economic analysis. It states that "[m]uch the information required to develop estimates of costs and benefits already exists as a result of the substantial efforts that have been made over the years. Indeed, as we showed in Chapters III and IV, it is possible to do rough cost-benefit analyses using information developed the Water Board

for other purposes."[3] Far from being impossible to prepare, a robust economic analysis is a key step in the regulatory process.

The EPA and Regional Boards have developed a pattern and practice for substantively balancing costs against benefits with the "wholly disproportionate" balancing test, which has been regularly applied across a variety of facilities for over 30 years.

C. The Board's Attempt to Eliminate the "Wholly Disproportionate" Demonstration Violates *Chevron* Step Two as an Unreasonable Interpretation of an Ambiguous Statute

In *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984), the U.S. Supreme Court provided a two-step process to direct judicial review of an agency's interpretation of a statute.

- Step 1: The court examines whether the statute is ambiguous. If the statute is plain on its face and not ambiguous, the agency must interpret the law as Congress expressed.

- Step 2: If the statute is ambiguous, the court defers to the agency's interpretation, provided it is a reasonable construction of the statute.

The Board has the benefit of U.S. Supreme Court precedent interpreting Section 316(b). In *Entergy*, the Court determined that Section 316(b) is ambiguous and analyzed the EPA's interpretation to determine if it was a reasonable construction of the statute. *Entergy*, 129 S. Ct. at 1499; *see also id.* at 1518 (Stevens, Souter, Ginsburg, JJ., dissenting). The Court then upheld the EPA's consideration of costs as a reasonable interpretation of Section 316(b). *Id.* at 1499.

As part of its review, the Court considered the role of the "wholly disproportionate" test as a long-standing agency practice to avoid unreasonable or irrational results. The majority opinion noted, "[a]s early as 1977, the agency determined that, while Section 316(b) does not require cost-benefit analysis, it is also *not reasonable* to interpret Section [316(b)] as requiring use of technology whose cost is wholly disproportionate to the environmental benefit to be gained." *Id.* at 1509 (emphasis added). The Court also reasoned that a balancing test *must* be incorporated into Section 316(b) to avoid absurd results: "[T]he statute's language is plainly not so constricted as to require EPA to require industry petitioners to spend billions to save one more fish or plankton." *Id.* (internal quotations and citations omitted). Similarly, in his concurring opinion, Justice Breyer noted, "every real choice requires a decisionmaker to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs. Moreover, *an absolute prohibition would bring about irrational results*." *Id.* at 1513 (emphasis added) (Breyer, J., concurring in part and dissenting in part).

Entergy leads to the inescapable conclusion that the BTA determination under Section 316(b) cannot be made without a substantive balancing of costs against benefits that protects against unreasonable or irrational results. Without this balancing, there would be no limit to

[3] NERA, Preliminary Costs and Benefits of California Draft Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling, at 44. The NERA report is attached to SCE's September 30, 2009 comment letter as Exhibit D.

what BTA could be required, potentially leading to absurd results referenced by the Supreme Court. *Id.* at 1509. Likewise, as Justice Breyer explained, "irrational results" would inevitably flow from a policy that did not include a protective weighing of advantages against disadvantages. A mere procedural step of considering costs is not enough. *Entergy* makes clear that Section 316(b) is not intended to cause irrational or unreasonable results. Thus, any Board policy that fails to protect against such results would fail step two of the *Chevron* test as an unreasonable interpretation of Section 316(b).

This common-sense approach has long been recognized by the EPA. In 1977, the EPA General Counsel determined that "any cooling water intake technology may be imposed under Section 316(b) ... *if* the cost of the technology is *not* 'wholly disproportionate' to the environmental gains to be derived from the application of the technology." *Central Hudson* (emphasis added). The General Counsel does not leave any discretion for the EPA to select a technology that fails the "wholly disproportionate" test. To do so would be irrational and inconsistent with Section 316(b).

Applying California law leads to the same common-sense conclusion, consistent with *Entergy* and the General Counsel opinion. The Board's primary advisor on legal issues, the Office of Chief Counsel, has determined that a "technology may *not* be considered BTA *if* the cost of a technology is wholly disproportionate to the environmental benefit to be gained." *See* Office of Chief Counsel, *Legal Analysis of Clean Water Act Section 316(B); Hearing on NPDES Permit For Diablo Canyon Power Plant, Pacific Gas & Electric Company (PG&E)*, June 9, 2003, at 4 (emphasis added). The Office of Chief Counsel's opinion leaves no legal discretion under Section 316(b) for a Regional Board to select BTA that fails the "wholly disproportionate" test. Again, to allow otherwise would be irrational and inconsistent with Section 316(b).

In summary, selecting BTA that fails the "wholly disproportionate" test would run counter to *Entergy*, the General Counsel opinion, and the Chief Counsel opinion because such an agency action would be irrational and inconsistent with Section 316(b). The underlying safeguard against irrational results is a necessary component of Section 316(b) that is beyond an agency's discretion to remove. For this reason, the Board is not free of this substantive requirement simply by eliminating language in the Revised Policy about the "wholly disproportionate" demonstration. As noted above, neither the EPA General Counsel nor the Chief Counsel's interpretation of Section 316(b) allowed for any agency discretion to select BTA that failed the "wholly disproportionate" test.

The Board's obligation under Section 316(b) is not satisfied by committing to future analysis and study. The changes to the Revised Policy fall short of the substantive requirements of the "wholly disproportionate" demonstration. Absent a substantive standard at least as rigorous as the "wholly disproportionate" demonstration for balancing costs against benefits, the Revised Policy is an unreasonable application of Section 316(b) that violates the second step of the *Chevron* test and therefore is unlawful.

In California, although an agency interpretation of a statute is "entitled to consideration and respect by the courts," the courts "independently judge the text of the statute . . . ." *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 7 (1998). As the California Supreme Court explained, "[b]ecause an interpretation is an agency's *legal opinion*, however

'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." *Id.* at 11 (citing *Bodinson Mfg. Co. v. Cal. E. Com.*, 17 Cal. 2d 325-26 (1941)) (emphasis in original). In sum, a court's deference to an agency interpretation "turns on a legally informed, commonsense assessment of [its] contextual merit. 'The weight of such a judgment in a particular case . . . will depend *upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.*'" *Id.* at 15-16 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (emphasis in original). The *Yamaha* standard of review applies to Water Board statutory interpretation of the Clean Water Act. *Building Industry Association of San Diego County v. SWRCB* ("*BIA*"), 124 Cal. App. 4th 866, 879 n.9 (2006).

Before showing any deference to the Board's Revised Policy, a reviewing court would look to the record, which at this point does not demonstrate a thorough consideration by the Board of the issues involved, especially considering the Board's break with over 30 years of EPA and Regional Board history. Instead, the Revised Policy released on November 23, 2009, was described as only a minor change, with no explanation or evidence to support the elimination of the "wholly disproportionate" demonstration. On this record, the Board's Revised Policy will likely be accorded little, if any, deference by a reviewing court.

Furthermore, in *BIA* the court also found that where EPA had already interpreted the same provision of the Clean Water Act at issue, the court was "*required* to give substantial deference" to EPA's "administrative interpretation." *Id.* (emphasis added). The *BIA* court also found compelling the conclusion reached by a federal court interpreting federal law, even though it was dicta. *Id.* at 886-87. Accordingly, it is likely that a reviewing court would give deference to EPA's long-standing interpretation of Section 316(b), and the Supreme Court's interpretation of the same in *Entergy*.

D. It is Arbitrary and Capricious for the Board to Proceed With A Section 316(b) Policy Without A Balancing Test Because of the Risk of Irrational Results, As Explained in *Entergy*.

The Board's removal of the "wholly disproportionate" demonstration is reviewable under the arbitrary and capricious standard under both California and federal law. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414-15 (1971) ("In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements."); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet*, 545 U.S. 967, 981 (2005) (unexplained inconsistency with prior agency interpretation of a statute is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."). While the reviewing court is not permitted to substitute its judgment for that of the agency, the court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . ." *Citizens to Preserve Overton Park*, 401 U.S. at 416. The court's review then must include the whole record, not just an agency's findings of fact.

Here the Board has not yet created a record that demonstrates consideration of the relevant issues and explains the basis for the Board's Revised Policy. Furthermore, the possibility that a court would see the Board's Revised Policy as an arbitrary and capricious action is higher because it creates an unexplained inconsistency with prior agency policy, and EPA interpretation of Section 316(b). *Nat'l Cable & Telecommunications Ass'n*, 545 U.S. at 981.

E. The Board's Explanation that the "Wholly Disproportionate" Demonstration Has Been Merely Restated In the Revised Policy Is Not Sufficient

At the December 1workshop, Board staff stated that the "wholly disproportionate" demonstration had not been eliminated, but rather, had been transferred to Section 3(D). This position is not supported by the text. Further, the Revised Policy does not provide the type of balancing test required by Section 316(b), as described above.

The original Policy set forth the "wholly disproportionate" demonstration balancing test, by which an owner or operator of an existing power plant could request that the Regional Board "consider the establishment of alternative, less stringent requirements, than those specified in Track 1 and Track 2, above, if the Regional Water Board determines that the costs to comply with Track 1 or Track 2 are wholly disproportionate to the environmental benefits to be gained . . . ." Policy § 4. Section 4 specified the type of evidence that the Regional Board would rely on to make this judgment, including costs of compliance, environmental benefits of compliance, environmental impacts from compliance, and the proposed alternative requirement, as well as any other relevant information. *Id.* §§ 4(A)(1) to (4); 4(B). The "wholly disproportionate" demonstration thereby provided the Regional Boards with a substantive mechanism for determining when compliance with the Policy would violate a reasonable interpretation of Section 316(b).

As revised, however, Section 3(D) now provides a timeline to prepare special studies to "investigate alternatives for the *nuclear-fueled power plants** to meet the requirements of this Policy . . . ", and simply requires the Board to "consider the results of the special studies, including costs and feasibility, in evaluating the need to modify this Policy with respect to the *nuclear-fueled power plants**." Revised Policy § 3(D)(1), (D)(7). Notably, this process does not require the Board to go through the kind of balancing test set forth in the deleted "wholly disproportionate" demonstration section. Instead, the Board is only required to "consider" the special studies, with no mention whatsoever of what standard the Board would use to determine whether the special studies identified a need to modify the Policy.

As described above, the elimination of the substantive "wholly disproportionate" demonstration cannot be replaced by the merely procedural Section 3(D) requirement to "consider" the results of the special studies. Maintaining the Revised Policy as currently framed is a *per se* unreasonable interpretation of Section 316(b) because it does not include a balancing test, as required by the United States Supreme Court, long-standing EPA policy, and the General Counsel to the Board's recent opinion.

F. The Board Has a Heightened Duty to Justify Major Changes in Policy That It Has Not Fulfilled.

The Board has a heightened duty to explain major changes in policy, such as the elimination of the "wholly disproportionate" demonstration. In *Entergy,* Justice Breyer questioned whether EPA's shift from using the "wholly disproportionate" test to a new "significantly greater than" standard constituted a major change in policy, and whether EPA's explanation justifying the same was adequate to support the agency's position. *Entergy*, 129 S. Ct. 1498, 1515 (2009) (Breyer, J., concurring in part and dissenting in part).

With respect to whether a change in policy is considered major, Justice Breyer stated that "[t]he words 'significantly greater' differ from the words the EPA has traditionally used to describe its standard, namely, 'wholly disproportionate.' Perhaps the EPA does not mean to make much of that difference. But if it means the new words to set forth a new and different test, the EPA must adequately explain why it has changed its standard." *Id.* (citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42-43 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"); *Nat'l Cable & Telecommunications Assn.*, 545 U.S. 981 ("[I]f the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating . . .'"); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 524 (1994) (Thomas, J., dissenting) ("[J]udges are properly suspect of sharp departures from past practice that are as unexplained as the [agency's] in this case")).

As explained above, the substantive "wholly disproportionate" demonstration was not merely relocated to the "special study" provision in Section 3(D), but was eliminated altogether in favor of the merely procedural requirement to "consider" the special studies. This constitutes a major change in the Policy, as both a matter of substance and appearance. Substantively, the deletion removed a balancing test consistent with over 30 years of EPA regulatory interpretation and appellate authority, as described in detail above. Facially, the elimination of the "wholly disproportionate" demonstration removed an entire fifth of the Policy. The elimination of 20 percent of the Policy created a new and different policy, regardless of the Board's belief as to whether the change was major.[4]

Justice Breyer explained in *Entergy* that for an agency's justification of the change in policy to be adequate, the agency has to confront the change in policy head-on, particularly when the policy is a long-standing one: "I am not convinced the EPA has successfully explained the basis for the change. It has referred to the fact that existing facilities have less flexibility than

[4] How the agency characterizes the change in policy is entitled to no deference because a reviewing court looks to the substance of the agency's textual change and the rationale behind the change. *Entergy*, 129 S. Ct. at 1515. Thus, the Board's characterization of the changes to the Revised Policy in its "Summary of Revisions to the Proposed OTC Policy" as falling into eight broad categories, including: (1) corrections to spelling, acronyms, and grammar; (2) adding background information; (3) improving readability; (4) adding definitions for improved clarity; (5) clarifying intent; (6) specifying implementation provisions in further detail; (7) rearranging portions of the Policy; and (8) correcting dates, clearly does not describe the change made by eliminating the "wholly disproportionate" demonstration. To the contrary, elimination of the "wholly disproportionate" demonstration is a major change that must be adequately explained.

new facilities with respect to installing new technologies, and it has pointed to special, energy-related impacts of regulation. But it has not explained why the traditional 'wholly disproportionate' standard cannot do the job now, when the EPA has used that standard (for existing facilities and otherwise) with apparent success in the past." *Entergy*, 129 S. Ct. at 1515 (Breyer, J., concurring in part and dissenting in part) (internal citations omitted).

By the same token, the Board's explanation that "staff believes that the ["wholly disproportionate" demonstration] would place a burden on the Regional Water Boards, and State Water Board staff, in determining guidelines for its implementation" is insufficient. No standard or methodology is offered to how Board staff reached the "belief" that the burden of the "wholly disproportionate" demonstration outweighed the critical benefits the law requires. Nor does the Board explain how the procedure set forth in Section 3(D) would resolve the supposed burden on the Regional Boards and State Water Board staff. In addition, the Board staff's conclusion is unsupported by any public comment, because the Revised Policy neither was noticed nor subject to public comment prior to the December 1 workshop.

Furthermore, the Board does not explain how the "wholly disproportionate" demonstration, recently used effectively by the Central Coast Regional Board in the Moss Landing Power Plant NPDES permitting process, placed an unreasonable burden on that Regional Board. In fact, the *Voices of the Wetlands* decision (currently on appeal to the California Supreme Court) examined in great detail the Central Coast Regional Board's process to undergo the "wholly disproportionate" demonstration, and upheld the analysis and fact-finding performed by the Board.

In summary, by eliminating the "wholly disproportionate" demonstration, the Board has made major substantive changes to the Policy without adequately explaining why it has done so. As such, the agency has acted in an arbitrary and capricious manner that cannot withstand judicial scrutiny.

II. THE REVISED POLICY TRIGGERS A NEW COMMENT PERIOD UNDER CEQA AND RECIRCULATION OF THE DRAFT SUBSTITUTE ENVIRONMENTAL DOCUMENT.

Under CEQA, recirculation is required where "significant new information" has been added to an EIR or an equivalent document (such as a SED), which has been made available for public review, but not yet certified. *See* Cal. Code Regs. tit. 14 ("CEQA Guidelines") § 15088.5(a). "[I]nformation" can "include changes in the project or environmental setting as well as additional data or other information." *Id.* (emphasis added). New information is "significant" when "the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement." *Id.*

Section 15088.5 requires notice and comment for the recirculated SED. *See* CEQA Guidelines § 15088.5(d) ("Recirculation of an EIR requires notice pursuant to Section 15087, and consultation pursuant to Section 15086."); CEQA Guidelines § 15088.5(f) (response to

comments required pursuant to CEQA Guidelines § 15088). Typically, the public comment period must be at least 45 days for projects of statewide importance.

The Revised Policy would trigger new significant environmental impacts that were not fully analyzed, disclosed or mitigated by the SED. The elimination of the "wholly disproportionate" demonstration represents a significant shift in the project analyzed in the SED. *See* SED, at 13. The removal of the "wholly disproportionate" demonstration will necessarily increase the likelihood that cooling towers will be required for the nuclear facilities and combined cycle units. Cooling towers at these locations will cause new significant environmental impacts.

Environ Corporation prepared technical comments on the SED (Environ Report) which were submitted with SCE's Sept. 30, 2009 comment letter.[5] The Environ Report demonstrates that significant environmental impacts are associated with adding cooling towers at the regulated facilities. The Environ Report provides strong evidence that the project changes will trigger new significant impacts, as demonstrated in the following synopsis:

- **Climate Change** – Cooling towers increase a power plant's greenhouse gas (GHG) emissions by decreasing the plant's efficiency. Increased GHG emissions may contribute to a significant cumulative climate change impact, which must be analyzed under CEQA. Environ Report at 10-11. Eliminating the "wholly disproportionate" determination would have very significant ramifications on the SED's climate change analysis because of the critical role the nuclear facilities play in providing reliable, low-carbon electricity to critical load areas. Taking either of the nuclear facilities offline, even temporarily for construction of cooling towers, would result in very large increases in GHG emissions. The long-term parasitic effect of the cooling towers would also result in increased GHG emissions. The SED must analyze these significant new sources of GHG emisisons and carefully evaluate whether the changes in the project are consistent with California's efforts to reduce GHG emissions. *Id.* at 12-13.

- **Air Quality** – Particulate matter emissions from cooling towers associated with the Policy will cause significant exceedences to air quality significance thresholds, which are established by the regional air districts. *Id.* at 4. Eliminating the "wholly disproportionate" determination likely would increase the scope and magnitude of the this impact. The SED must be revised and recirculated to evaluate whether particulate matter emissions from the nuclear facilities or combined-cycle units would exceed regional significance thresholds if cooling towers are required.

- **Utilities and System Reliability** – The nuclear facilities are central to the delivery of a reliable electricity supply in California. Taking either of the nuclear facilities offline, even temporarily for construction of cooling towers, could substantially impair grid reliability. *Id.* at 17-18. The parasitic load associated with adding cooling towers to the nuclear facilities would also threaten grid reliability. The SED needs to be revised and

[5] The ENVIRON Report is attached to SCE's September 30, 2009 comment letter as Exhibit F.

recirculated to address whether adding cooling towers to the nuclear facilities would significantly impair grid reliability.

- **Noise** – Noise from cooling towers would likely cause a significant environmental impact by exceeding local noise standards. *Id.* at 14-15. Eliminating the "wholly disproportionate" determination creates a potential for new significant noise impacts at the nuclear and combined-cycle plant locations. The SED must be revised and recirculated to address whether adding cooling towers at these locations would cause local noise standards to be exceeded.

- **Aesthetics** – Significant aesthetic impacts may be associated with siting cooling towers at sensitive coastal locations that cannot be mitigated without a specific evaluation of the actual sites, which was not provided by the SED. *Id.* at 2. Eliminating the "wholly disproportionate" determination creates a potential for new significant aesthetics impacts at the nuclear and combined-cycle locations. The SED must be revised and recirculated to prepare a site-specific analysis for these location to determine the scope of the potential impact.

- **Biological Resources** – Siting cooling towers in sensitive coastal habitats would cause a myriad of adverse biological impacts, including impacts to environmentally sensitive habitat. *Id.* at 15-17. Both nuclear facilities are surrounded by sensitive coastal habitat with little room to site cooling towers. The SED must account for the significant biological resources that would invariably result from using these coastal habitats for cooling tower purposes. The project changes will also trigger new significant increases in salt drift from the cooling towers, which must be analyzed in the SED.

III. THE PORTER-COLOGNE ACT REQUIRES ECONOMICS TO BE BALANCED WITH POTENTIAL ENVIRONMENTAL BENEFITS.

The Porter-Cologne Act requires the Board to consider economics when it establishes policies to enhance water quality objectives, and the objectives adopted must be reasonable and achievable. *See* Water Code §§ 13000, 13241 The Act's legislative history makes clear that economics must be balanced against environmental benefits:

> "The regional boards must *balance* environmental characteristics, past, present and future beneficial uses, and *economic considerations* (both the cost of providing treatment facilities and the economic value of development) in establishing plans to achieve the highest water quality which is *reasonable*."[6]

[6] State Water Resources Control Board, *Final Report of the Study Panel of the California State Water Resources Control Board* ("Study Panel Report") at 1 (1969) (emphasis added); State Water Resources Control Board, Order WQ 2001-15 at 12 (2001) ("The Final Report of the Study Panel to the California State Water Resources Control Board (March, 1969) is the definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act.").

Balancing, by its nature, requires a weighing of the costs to implement the proposed policy against the benefits to be achieved. The State Water Board must safeguard not only the environment, but also the public's economic interests:

> "The key to the *proper balancing* of these interests lies only partly in established statewide policy. The regional and state boards which, in their decisions in which policy is applied to specific cases, *weigh the benefits and costs* to society, are the ones who actually determine this *balance*."[7]

The Revised Policy materially undermines the Board's ability to perform its balancing requirements under the Porter-Cologne Act. The wholly disproportionate test represents exactly the type of balancing that is required. *See Entergy*, 129 S. Ct. at 1509 (discussing that the EPA has used the wholly disproportionate test to "weigh benefits against costs" for "over 30 years"). The Revised Policy takes away the Board's primary method for weighing benefits and costs without providing a new substantive standard that satisfies the Porter-Cologne Act.

The Board's obligation under the Porter-Cologne Act is not satisfied by committing to consider a future study of costs. The changes to the Revised Policy do not involve any substantive balancing or weighing of benefits and costs. Because it lacks a substantive balancing test that identifies definite and known standards by which the balancing will be measured, the Revised Policy is inconsistent with the Porter-Cologne Act.

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[7] *See* Study Panel Report, *supra*, at 7 (emphasis added).