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BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of California Coastkeeper of Action and Failure to Act by the Central Coast Regional Water Quality Control Board for the Adoption of Order No. R3-2026-0001.	**PETITION FOR REVIEW OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD ORDER NO. R3-2026-0001**

Pursuant to Section 13320 of the California Water Code and Section 2050 of Title 23 of the California Code of Regulations, California Coastkeeper and The Otter Project hereby petition the State Water Resources Control Board ("State Water Board") to review the February 26, 2026 adoption by the California Regional Water Quality Control Board for the Central Coast Region ("Regional Water Board") of Order No. R3-2026-0001 ("Diablo Canyon NPDES Permit"), which sets out the conditions for Pacific Gas and Electric's ("PG&E") Diablo Canyon Nuclear Powerplant ("Diablo Canyon") for Waste Discharge Requirements ("WDRs") that include cooling water, treated process water, desalination brine, stormwater, and treated domestic wastewater discharged into Diablo Cove.

1. NAME, ADDRESS, TELEPHONE AND EMAIL ADDRESS OF THE PETITIONERS:

California Coastkeeper, dba California Coastkeeper Alliance & The Otter Project

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Sacramento, CA 95814

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Attention: Sean Bothwell, Executive Director

2. **PETITIONERS**

Petitioner California Coastkeeper, doing business as California Coastkeeper Alliance ("CCKA") is a statewide voice for our waters. CCKA is a non-profit public benefit corporation headquartered in Sacramento, California. Founded in 1999, CCKA is a network of California Waterkeeper organizations working to protect and enhance clean and abundant waters throughout the state, for the benefit of Californians and California ecosystems. Collectively, CCKA's member organizations are dedicated to the preservation, protection, and defense of the environment, and the natural resources of California watersheds and surface waters. CCKA's member organizations work to protect the health of their local water bodies and communities throughout California, as indicated by the geographic descriptors of each Waterkeeper organizational name (*e.g.*, Santa Barbara Channelkeeper). CCKA defends and expands on local matters by advocating before decision-makers on issues and programs with statewide impact and significance. To further their goals, CCKA and CCKA's member groups actively seek Federal and State agency implementation of Federal and State environmental laws and policies, and where necessary, directly initiate administrative challenges and enforcement actions on behalf of themselves and their individual members in State and Federal courts.

Petitioner The Otter Project is a program of CCKA and has been safeguarding the threatened Southern Sea Otter (*Enhydra lutris nereis*) along the Central Coast for over two decades. TOP protects watersheds and coastal oceans, including Central Coast watersheds and coastal oceans, to promote the rapid recovery of the threatened Southern Sea Otter.

3. THE SPECIFIC ACTION OR INACTION OF THE CENTRAL COAST WATER BOARD WHICH THE PETITIONERS REQUEST THE STATE WATER BOARD TO REVIEW

The Petitioners request that the State Water Board review the Regional Water Board's adoption of Order No. R3-2026-0001, which sets out the conditions for PG&E's Diablo Canyon for WDRs and its associated attachments and documents (collectively referred to as the "Diablo Canyon NPDES Permit").

Under Water Code § 13320 and 23 CCR § 2052, the State Water Board must determine whether the Regional Water Board proceeded in the manner required by law, whether its findings are supported by substantial evidence, and whether it abused its discretion. An abuse of discretion occurs where the agency relies on factors not intended by law, fails to consider an important aspect of the problem, or offers an explanation that runs counter to the evidence in the record.

The Regional Water Board's decision must be set aside because it failed to make required findings under the WATER QUALITY CONTROL POLICY ON THE USE OF COASTAL AND ESTUARINE WATERS FOR POWER PLANT COOLING ("OTC Policy") and Clean Water Act § 316(b). An agency cannot rely on assumptions or future contingencies in place of required determinations supported by substantial evidence.

Petitioners request that the State Water Board find the Regional Water Board abused its discretion and failed to proceed in the manner required by law and applicable policy with respect to the following actions and inactions in adopting the NPDES Permit for Diablo Canyon.

1. Section 6.3.6.1. Once-Through Cooling ("OTC") Water Requirements, in that it permits Diablo Canyon to operate without implementing Best-Technology Available ("BTA").
2. Section 6.3.6.1.3. Additional CWA 316(b) Rule Requirements, in that it permits Diablo Canyon to continue harm to endangered and threatened species without the requirement of BTA.
3. Fact Sheet 3.3.8. OTC Policy, for stating that Order No. R3-2026-0001 was compliant with CWA 316(b).

4. Response to Comments for ORDER R3-2026-0001, NPDES PERMIT CA0003751 and ORDER 34024WQ31, in that it inaccurately describes the facts, the law, and acknowledges that decommissioning at the end Diablo's lifespan constitutes BTA.

This petition does not attempt to provide an exhaustive list of all actions or omissions in which the Regional Water Board failed to proceed in the manner required by law or applicable policy. In particular, the Regional Water Board's actions and omissions related to the Clean Water Act Section 401 Certification and the associated antidegradation analysis raise serious concerns regarding compliance with governing legal standards. However, for purposes of this petition, Petitioners limit their request for review to the Regional Board's implementation of the OTC Policy and its failure to require BTA.

4. THE DATE ON WHICH THE CENTRAL COAST WATER BOARD ACTED OR REFUSED TO ACT

The Regional Water Board adopted Order No. R3-2026-0001 on February 26, 2026.

5. A STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT IS INAPPROPRIATE OR IMPROPER

A full and complete statement of the reasons why the Regional Water Board's actions were inappropriate or improper is provided in the accompanying Statement of Points and Authorities.

6. THE MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED

The Petitioners are filing this Petition on behalf of their members that are injured by the subject to the terms and conditions of Order No. R3-2026-0001 ("Diablo Canyon NPDES Permit"). Petitioners' members are aggrieved by the actions or inactions of the Regional Water Board because they use and enjoy the Central Coast coastline and marine habitat and will be impacted by the marine life impacts arising from the Regional Water Board's actions and inactions that are the subjects of this Petition. The Petitioners are additionally aggrieved by the invalid

application of the law in regard to the U.S. Constitution's Supremacy Clause, the federal Clean Water Act and the OTC Policy arising from the Regional Water Board's actions and inactions that are the subjects of this Petition.

7. THE SPECIFIC ACTION REQUESTED BY THE PETITIONERS

The State Water Board must vacate and remand the Diablo Canyon NPDES Permit because the Permit violates federal law, state administrative law and is unsupported by substantial evidence. Absent a lawful, record-supported finding that BTA is infeasible, or that decommissioning is adequate BTA, the Water Boards lack discretion to authorize continued OTC operation. The Petitioners request that the State Water Board review the record, NPDES Permit and this Petition, and that the State Water Board issue an order or orders accomplishing the following:

A. Vacate Order No. R3-2026-0001 (Diablo Canyon NPDES Permit) and remand the Permit back to the Regional Water Board to be reissued consistent with the findings of B below and which incorporate the outcome(s) of the State Water Board's actions C-E below.

B. Issue an Order with findings that conclude:

   i. BTA has never been determined to be infeasible for Diablo Canyon;

   ii. No site-specific alternative BTA has been determined for Diablo Canyon;

   iii. Senate Bill 846, PRC §25548(e), is invalid and has no bearing on the Water Boards' decision and permitting over BTA for Diablo Canyon; and

   iv. Decommissioning at some future, speculative date shall not be BTA.

C. Issue an Order requiring the State Water Board's Nuclear Review Committee to revise and update the BTA and alternatives analysis for Diablo Canyon with a specific emphasis to analyze the "parking lot solution" raised by independent experts[1].

D. Issue an Order directing the State Water Board to hold a public workshop, and provide a written comment period, on the Nuclear Review Committee's revised BTA/Alternatives

[1] https://foe.org/wp-content/uploads/2017/legacy/2013_Comments_Bechtel_Diablo_Canyon.pdf

feasibility analysis for Diablo Canyon.

E. Issue an order directing the State Water Board to conduct and evaluate OTC Policy §§ 3.D.7–3.D.9 and issue a formal decision supported by findings that bridge the substantial evidence in the administrative record and its conclusions.[2]

8. A STATEMENT THAT THE PETITION WAS SENT TO THE CENTRAL COAST REGIONAL WATER BOARD AND THE DISCHARGER

A true and correct copy of this Petition was mailed by First Class mail to the Regional Water Board and a courtesy copy of this Petition was sent electronically to the Regional Water Board. The address to which Petitioners mailed and sent an electronic copy of the Petition to the Regional Water Board is:

Ryan E. Lodge, Executive. Officer
Central Coast Regional Water Quality Control Board
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401-7906
Ryan.Lodge@waterboards.ca.gov

Further, a courtesy copy of this Petition was sent electronically to attorneys for the Central Coast Water Board at: Sophie.Froelich@Waterboards.ca.gov and Stephanie.Yu@waterboards.ca.gov.

A true and correct copy of this Petition was mailed by First Class mail to PG&E at:

Pacific Gas and Electric Company
300 Lakeside Drive
Oakland, CA 94612

A courtesy copy of this Petition was sent electronically to PG&E's Senior Director of Regulatory, Environmental and Repurposing Tom Jones at tom.jones@pge.com.

[2] The provisions of the OTC Policy (§§ 3.D.7–3.D.9) are non-discretionary, as evidenced by the use of "shall" requiring the State Water Board to conduct an evaluation and issue a formal decision supported by findings, yet the Board never did so.

9. A STATEMENT THAT THE ISSUES RAIESD IN THE PETITION WERE PRESENTED TO THE REGIONAL BOARD BEFORE THE REGIONAL BOARD ACTED, OR AN EXPLANATION OF WHY THE PETITION COULD NOT RAISE THOSE OBJECTIONS BEFORE THE REGIONAL BOARD.

Petitioners presented the issues raised in this Petition to the Regional Water Board at the November 12, 2025, Board Workshop, in our public comments timely submitted on December 8, 2025 (attached below), and during the February 26, 2026, Regional Board hearing to adopt the Diablo Canyon NPDES Permit.

STATEMENTS OF POINTS AND AUTHORITIES

I. INTRODUCTION

Does anyone really believe that Congress intended for a powerplant to operate its entire life without complying with Clean Water Act section 316(b)'s Best Technology Available standard, only to achieve "compliance" years later upon decommissioning at some future, speculative date?

For more than fifty years, the Clean Water Act has required power plants to minimize harm to aquatic life caused by cooling water intake structures. Section 316(b) of the Act mandates that the "location, design, construction, and capacity" of cooling water intake structures reflect the Best Technology Available ("BTA") for minimizing adverse environmental impact. Congress adopted this provision in 1972 to require power plants to install technology that prevents the mass killing of fish, larvae, and other marine organisms caused by once through cooling ("OTC") systems. Courts interpreting Section 316(b) have repeatedly held that the statute is technology-forcing: facilities must implement technology that reduces harm in the first instance, and after-the-fact mitigation or restoration cannot substitute for the installation of BTA.

The Diablo Canyon has operated for decades using OTC in a manner that highlights the very impacts Clean Water Act §316(b) was designed to prevent. Despite beginning operations in 1985—well after §316(b) was enacted—the facility withdraws approximately 2.5 billion gallons of seawater daily, exceeding the water use of major cities such as New York City and Los Angeles. This massive intake and discharge system affects roughly 46 miles of coastline and a 93-square-mile marine area, entraining an estimated 1.5 billion marine organisms annually and impacting critical habitat for protected species such as the Southern sea otter and Leatherback sea turtle. The plant also discharges heated effluent—on the scale of major river flows like the Sacramento River—resulting in significant cumulative ecological harm. The magnitude of these impacts underscores the necessity of requiring BTA to minimize environmental damage.

California adopted the OTC Policy in 2010 to implement §316(b) and require existing coastal power plants to install technology that would reduce seawater intake by approximately 93

percent. Diablo Canyon was scheduled to comply with this standard by 2024. The State Water Board was reviewing the feasibility of BTA and lesser alternatives for Diablo Canyon, but the State Water Board suspended its analysis in 2016 after PG&E proposed to retire the plant.

From 2016 through 2022, PG&E represented that it was actively planning for the decommissioning of Diablo Canyon. The company undertook extensive preparatory work, including staffing decommissioning teams, developing detailed engineering and environmental plans, coordinating with regulators, and engaging third-party consultants to evaluate dismantling and site restoration strategies. Public statements and filings during this period emphasized a timeline targeting a full shutdown by 2025, creating the impression that the facility was moving steadily toward achieving Section 316(b) BTA compliance envisioned through decommissioning.

In 2022, the Legislature enacted Senate Bill 846 extending Diablo Canyon's operations to 2030 while allowing the facility to continue paying mitigation fees rather than installing technology to minimize environmental harm. Since the enactment of Senate Bill 846 in 2022, however, these decommissioning activities have been effectively suspended. PG&E has drastically scaled back planning, postponed engineering and environmental assessments, and repeatedly acknowledged that decisions about shutdown timing are now "accordion-like," expandable or contractible at the company's discretion. The operational life of Diablo Canyon has been extended to 2030 under SB 846, with no enforceable milestones, meaning that the promise of decommissioning as a pathway to BTA compliance is no longer imminent or assured. As a result, the facility continues to operate at full capacity, perpetuating the extensive entrainment and thermal impacts on the California coastline and federally protected marine species.

On February 28, 2026, the Regional Water Board adopted a renewed NPDES permit for Diablo Canyon that allows the continued operation of this OTC system without requiring BTA. Rather than enforcing the Clean Water Act's technology requirement, the permit relies on restoration payments and the possibility that the plant may someday be decommissioned. This decision unlawfully substitutes mitigation and speculative future shutdown for the statutory requirement to install technology that minimizes environmental harm. By doing so, the Regional Board abused its

discretion, acted contrary to the Clean Water Act and controlling federal precedent, and authorized ongoing environmental damage that federal law was enacted to prevent

We submit this petition because the Regional Board abused its discretion by allowing Diablo Canyon to continue operating without requiring compliance with BTA, instead relying on speculative future decommissioning to satisfy both the OTC Policy and the Clean Water Act. Despite decades of operation, the record demonstrates that no formal determination has ever been made that BTA is infeasible for the facility (and if infeasible, what alternative technologies would be feasible). Substantial evidence—including studies conducted through the State Water Board's Nuclear Review Committee process—confirms that technologies such as closed-cycle cooling are viable. By permitting continued reliance on interim mitigation rather than requiring technology-based reductions in intake impacts, the Regional Water Board has allowed Diablo Canyon to avoid its longstanding legal obligations under Clean Water Act § 316(b).

Rather than requiring BTA during ongoing operations, the Regional Water Board has equated compliance with a projected future shutdown date, asserting that decommissioning by 2030 will achieve the necessary intake reductions. However, the record shows that this retirement timeline is highly uncertain, contradicted by PG&E's own statements, ongoing federal relicensing efforts, and the absence of concrete steps toward decommissioning. Treating an indefinite and speculative future event as present compliance improperly substitutes conjecture for enforceable regulatory requirements, allowing continued environmental harm while deferring implementation of required technology. This approach is inconsistent with the technology-forcing mandate of the Clean Water Act, which requires minimization of entrainment and impingement during operation—not at some uncertain point in the future.

Compounding this error, both the State and Regional Water Boards acted arbitrarily and capriciously by extending Diablo Canyon's compliance schedule using the same analytical framework used in the adoption of the 2020 OTC Policy Amendment adopted, without conducting any new analysis to account for materially changed circumstances. The rational for approving the 2020 OTC Policy compliance schedule extension was expressly predicated on a fixed and near-term

retirement schedule, which served as the basis for deferring BTA compliance. By contrast, the 2023 OTC Policy Amendments extended operations by years based solely on legislative changes, without reassessing environmental impacts, BTA feasibility, or the continued validity of prior assumptions. This failure to re-evaluate the underlying factual basis for prior decisions renders the Boards' actions unsupported by substantial evidence and inconsistent with both administrative law principles and the Clean Water Act's requirements.

Finally, Senate Bill 846, which purports to authorize Diablo Canyon's operations through 2030, is independently invalid because it is preempted by federal law. By directing the State Water Board to treat BTA as infeasible for Diablo Canyon and to rely instead on an interim mitigation fee in lieu of technology-based compliance, SB 846 conflicts with the Clean Water Act's technology-forcing mandate under Section 316(b) and impermissibly constrains the Board's federally delegated authority under the NPDES program. The statute effectively substitutes after-the-fact mitigation for required intake controls, undermining Congress's objective to minimize entrainment and impingement during facility operations. Continued operation without BTA results in ongoing and cumulative harm, which the Clean Water Act was specifically designed to prevent through technology-forcing requirements. Because the 2026 NPDES permit relies on SB 846 to justify continued OTC without requiring BTA, the resulting conflict with federal law is concrete and immediate, rendering the statute preempted under the Supremacy Clause and incapable of lawfully guiding the Water Boards' permitting decisions.

II. BACKGROUND

A. Overview of Clean Water Act Section 316(b).

For more than five decades, Section 316(b) of the Clean Water Act has imposed a clear, technology-forcing mandate on facilities that withdraw large volumes of water for cooling, including power plants such as Diablo Canyon. Enacted as part of the original 1972 Clean Water Act, Section 316(b), codified at 33 U.S.C. § 1326(b), requires that "the location, design, construction, and capacity of cooling water intake structures reflect the BTA for minimizing adverse

environmental impact." This directive is not discretionary—it establishes a substantive obligation to reduce harm to aquatic life caused by entrainment and impingement at intake structures. From its inception, Congress intended Section 316(b) to operate as a technology-forcing provision, ensuring that regulated facilities implement the most effective available measures to minimize environmental damage during ongoing operations.

In the years following enactment, the U.S. Environmental Protection Agency implemented Section 316(b) through regulations requiring permitting authorities to determine BTA on a case-by-case basis using Best Professional Judgment. Under the NPDES program, states such as California were delegated authority to administer the federal permitting program, but only on the condition that they apply and enforce federal standards, including Section 316(b). This framework preserves state implementation flexibility while maintaining a federal floor: permitting authorities must require BTA unless they make a reasoned, evidence-based determination that such technology is infeasible. At no point does the statute authorize categorical exemptions or allow facilities to avoid compliance based solely on operational convenience or future plans to cease operations.

EPA's subsequent regulatory efforts further confirm the central role of technology in Section 316(b). In 2004, EPA promulgated rules for existing facilities that, in part, allowed operators to rely on restoration measures—such as habitat improvements or fish stocking—as an alternative to installing BTA. However, EPA's rules were challenged by environmental organizations and ultimately rejected by federal courts. In *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 189 (2d Cir. 2004), and *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 189 (2d Cir. 2007), the Second Circuit held that after-the-fact mitigation cannot substitute for the statutory requirement to minimize impacts at the intake itself. The court explained that "restoration measures … do not minimize those impacts in the first place," and therefore are inconsistent with Section 316(b)'s mandate that regulation focus on the "location, design, construction, and capacity of cooling water intake structures." 475 F.3d at 189.

These decisions established a critical and enduring principle: compliance with Section 316(b) must be achieved through the installation and operation of technology that directly reduces entrainment and impingement, not through monetary payments, mitigation projects, or promises of

future environmental benefits. Courts have consistently reaffirmed that the Clean Water Act does not permit agencies or regulated entities to defer or avoid technology-based requirements by substituting alternative approaches that fail to minimize impacts during operation. *See, e.g., Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 189 (2d Cir. 2007) (holding that "restoration measures … do not minimize those impacts in the first place" and therefore cannot substitute for § 316(b)'s technology-based mandate); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223–24 (2009) (confirming that § 316(b) requires standards directed at minimizing adverse environmental impact through controls on intake structures). This precedent reinforces Congress's intent that Section 316(b) operate as a forward-looking, preventative mandate—one that requires real, enforceable reductions in environmental harm through the use of best available technology.

B. Overview of the Diablo Canyon Nuclear Facility's Marine Life Impacts.

Diablo Canyon has operated for decades without compliant of the Clean Water Act's BTA mandate under Section 316(b), despite becoming operational in 1985—thirteen years after that requirement became law. Although construction began in 1968, the facility has been subject to Section 316(b) for its entire operational life. Yet it continues to rely on OTC, withdrawing approximately 2.5 to 2.63 billion gallons of seawater per day. *See* California State Water Resources Control Board, *Final Once-Through Cooling Policy* Fact Sheet at 3 (2010) (identifying Diablo Canyon's cooling water intake flow at approximately 2.5 billion gallons per day); California Regional Water Quality Control Board, Central Coast Region, *NPDES Permit No. CA0003751, Fact Sheet* at 2–3 (2015) (stating intake flows of approximately 2.63 billion gallons per day). This extraordinary volume underscores the scale of Diablo Canyon's ecological footprint: the facility withdraws more water daily than many major cities, exceeding twice the daily water supply of New York City and several times that of Los Angeles.[3] The magnitude of this intake alone demonstrates why Congress required facilities of this type to implement BTA to minimize environmental harm.

The impacts of these operations are immense and ongoing. Diablo Canyon's OTC system

[3] See New York City Water Supply System, *Wikipedia* (Mar. 20, 2026), https://en.wikipedia.org/wiki/New_York_City_water_supply_system; Los Angeles Dep't of Water & Power, *Water System Overview*, https://www.ladwp.com/who-we-are/water-system?utm.

affects approximately 46 miles of California coastline and a 93-square-mile marine area, entraining and killing an estimated 1.5 billion marine organisms annually, including fish, invertebrates, and plankton that form the foundation of the coastal food web. (See Tenera Environmental, Final Report: Diablo Canyon Power Plant Entrainment Characterization Study at ES-3, ES-6 (2009); State Water Resources Control Board, Final Statement of Decision for the Once-Through Cooling Policy at 34–36 (2010); see also Central Coast Regional Water Quality Control Board, Order No. 90-09 (NPDES No. CA0003751) (as amended) (governing discharges from Diablo Canyon). These losses have occurred continuously and largely unabated for over four decades. The facility's intake structures operate in biologically rich and sensitive nearshore waters, where even marginal per-gallon impacts scale into massive cumulative harm due to the sheer volume of water processed. The result is a persistent and significant reduction in marine productivity and ecosystem health along California's central coast.

The facility is also the largest waste discharger in California, releasing an amount comparable to the average flow of the Sacramento River and nearly eight times the discharge of the Hyperion Water Reclamation Plant, the state's largest wastewater treatment facility. *See* California State Water Resources Control Board, *Final Once-Through Cooling Policy* Fact Sheet at 3 (2010) (identifying Diablo Canyon's intake and discharge flows at approximately 2.5 billion gallons per day); U.S. Geological Survey, *Sacramento River Streamflow Data* (reporting average flows on the order of tens of thousands of cubic feet per second, comparable in magnitude to Diablo Canyon's cooling water withdrawals); Los Angeles Bureau of Sanitation, *Hyperion Water Reclamation Plant* (reporting average flows of approximately 260–300 million gallons per day). This continuous discharge of heated water alters local ocean temperatures, contributes to thermal stress, and further degrades marine habitat. Because billions of gallons of ocean water—and the organisms within it—are withdrawn and discharged daily, even small deviations in ecological conditions result in significant, system-wide impacts.

These effects are particularly acute because Diablo Canyon operates in an ecologically sensitive and protected region. Its operations directly affect the Point Buchon State Marine Reserve

and surrounding marine protected areas and occur adjacent to the Chumash Heritage National Marine Sanctuary. *See* California Department of Fish and Wildlife, *Marine Protected Areas: Point Buchon State Marine Reserve* (describing the reserve's location immediately offshore of Diablo Canyon); National Oceanic and Atmospheric Administration, *Chumash Heritage National Marine Sanctuary Designation Documents* (2024) (describing the sanctuary's proximity to Diablo Canyon and overlapping coastal waters). The surrounding waters provide critical habitat for numerous threatened and endangered species, including the Southern Sea Otter, Black Abalone, Leatherback Sea Turtle, and Green Sea Turtle. *See, e.g.,* National Marine Fisheries Service, *Endangered Species Act Status Reviews and Recovery Plans* (identifying these species in California coastal waters); U.S. Fish and Wildlife Service, *Southern Sea Otter Recovery Plan* (2003, as updated) (identifying the central California coast as critical habitat); California State Water Resources Control Board, *Final Statement of Decision for the Once-Through Cooling Policy* at 34–36 (2010) (documenting impacts of entrainment, impingement, and thermal discharge on marine life). The facility's continued entrainment, habitat disruption, and thermal discharge place these species at risk and undermine the very protections these designations are intended to provide. *See* id.; Tenera Environmental, *Final Report: Diablo Canyon Power Plant Entrainment Characterization Study* at ES-3–ES-6 (2009) (quantifying entrainment impacts on marine organisms). Taken together, the scale, duration, and location of Diablo Canyon's impacts make clear that it is among the most environmentally damaging facilities on the California coast and exemplifies the precise type of harm that Section 316(b) was enacted to prevent.

C. Overview of California's Once-Through Cooling Policy and the Nuclear Review Committee.

In 2010, the State Water Board adopted the OTC Policy to establish uniform, statewide requirements for implementing Section 316(b) of the Clean Water Act at existing coastal and estuarine power plants. The OTC Policy reflects the statute's technology-forcing mandate by requiring facilities to reduce intake flow by approximately 93 percent or to achieve equivalent environmental protection through BTA. Recognizing grid reliability concerns, the Policy

established a staggered compliance schedule extending beyond 2015 for certain facilities and authorized limited, interim mitigation measures for plants that continued OTC operations during the transition period. In 2015, the State Water Board implemented an interim mitigation fee program intended to incentivize early compliance and partially offset ongoing harm; however, the fee was never designed to fully mitigate the extensive ecological impacts caused by OTC systems or to substitute for BTA.

Under the OTC Policy, Diablo Canyon was initially required to achieve compliance by 2024—more than five decades after Section 316(b) became law and fourteen years after adoption of the Policy. To evaluate compliance options for nuclear facilities, the State Water Board convened a special Nuclear Review Committee, which conducted its evaluation between 2011 and 2014. This multi-agency and stakeholder body was tasked with assessing the feasibility, alternatives, and costs of implementing BTA at Diablo Canyon and similar facilities. As part of this process, PG&E funded an independent third-party analysis by Bechtel Power Corporation, which evaluated potential alternatives to OTC, including closed-cycle cooling technologies.

Bechtel's analysis for the Nuclear Review Committee evaluated a range of closed-cycle cooling alternatives at Diablo Canyon, including wet cooling towers, fine mesh screens, and wedge wire screens. According to cost projections presented at Committee meetings, the closed-cycle cooling options that would fully meet the OTC Policy ranged from roughly $7.5 billion to over $14 billion for wet cooling tower systems at ideal locations, reflecting significant engineering, permitting, and space constraints identified by Bechtel.[4] These estimates assumed extensive site work and did not account for real-world cost reductions that could accompany competitive bidding or siting within the existing plant footprint.[5]

Late into Bechtel's analysis, but not after, external independent reviewers of the Nuclear Review Committee concluded that closed-cycle cooling was technically feasible and could ensure compliance with the state's OTC Policy, and that Bechtel's cost estimates were influenced by assumptions of "optimal" siting that unnecessarily increased projected costs, such as excavating

[4] https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/rcnfpp/docs/subbechcom_091214.pdf

[5] https://efiling.energy.ca.gov/GetDocument.aspx?DocumentContent

large amounts of material to prepare a mountainside site.[6] Other technical perspectives noted that alternative locations on the existing plant property, such as in parking areas, could materially reduce costs compared to the most expensive Bechtel scenarios.[7]

These late-stage developments highlighted that multiple feasible BTA alternatives existed and warranted further evaluation. On November 18, 2014, the State Water Board held a public informational workshop to present the results of the special studies, including the Bechtel report and related stakeholder comments. Media reports contemporaneously described the session as a hearing focused on reviewing the cooling options—such as closed-cycle towers and screen technologies—and the range of associated cost estimates, with environmental advocates citing far lower projected costs (e.g., in the $1.5 billion to $4.5 billion range) than Bechtel's top figures. Although Bechtel and stakeholders presented alternatives at the workshop and public comment was received on a variety of design and siting considerations, no formal State Water Board determination regarding BTA feasibility or adoption of alternative compliance requirements for Diablo Canyon was made at that meeting, and there is no evidence that the State Water Board subsequently adopted a binding infeasibility finding based on these analyses.

Before the State Water Board could complete its evaluation and make a formal BTA determination, the regulatory process was effectively halted. In June 2016, Natural Resources Defense Council and PG&E reached a joint agreement to pursue the eventual decommissioning of Diablo Canyon. (Diablo Canyon Decommissioning Agreement, June 2016, available in 2020 OTC Policy Staff Report, pp. 23–25.) Based on this agreement—and the assumption that the facility would retire by 2024–2025—the State Water Board suspended further analysis of BTA alternatives and accepted decommissioning as a pathway to compliance with Section 316(b). (2020 OTC Policy Staff Report, pp. 23–25; State Water Board Resolution No. 2020-0029, p. 1.) Critically, however, the Board never made a formal finding that BTA was infeasible for Diablo Canyon, nor did it amend the OTC Policy to exempt the facility from its requirements. (*Id.*) As a result, while the Policy framework remained intact, the decision to rely on anticipated retirement effectively deferred

[6] https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/rcnfpp/docs/subbechcom_111314.pdf
[7] https://foe.org/news/2013-11-indpdt-experts-reveal-that-pgebechtel-report-misleads-water-board

implementation of technology-based controls without resolving the underlying statutory obligation to minimize adverse environmental impacts during ongoing operations.

On September 1, 2020, the State Water Board issued an amendment to the OTC Policy which extended the compliance schedule for Diablo Canyon in response to a request from PG&E to align the facility's then-existing operating license expiration dates issued by the U.S. Nuclear Regulatory Commission. (Once-Through Cooling Policy, As Last Amended on September 1, 2020 (September 1, 2020) [as of March 25, 2026].[8]) The 2020 amendment revised Diablo Canyon's compliance schedule to August 2024 for Unit 1 and August 2025 for Unit 2 – a total of 6 months of additional operational time. This deferral was premised entirely on the legal commitments that operations would cease by 2025, and therefore did not establish a permanent or technology-based compliance pathway under § 316(b).

In 2023, the State Water Board again amended the OTC Policy, this time solely to conform to SB 846, which authorized the continued operation of the Diablo Canyon beyond its previously scheduled retirement dates. The amendment did not impose any new or additional best technology available requirements, nor did it revisit or substantively reevaluate whether closed-cycle cooling or equivalent measures were feasible or required under § 316(b) of the Clean Water Act. Instead, the Board's action functioned to maintain the existing compliance framework established in 2020 while updating the operative deadlines to reflect the Legislature's decision to extend the plant's operational life.

Following the enactment of SB 846, the State Water Board adopted Resolution No. 2024-0014 to revise and increase OTC mitigation fees. The resolution updated the OTC Policy interim mitigation payment calculations — including entrainment and impingement cost factors specific to Diablo Canyon — to ensure that annual payments continue to appropriately compensate for interim impacts to marine life based on current mitigation costs, consistent with the Legislature's intent that mitigation remain sufficient during extended operations.[9]

[8] https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/otc_policy_2020/final_amendment.pdf

[9] See Cal. Pub. Res. Code § 25548(e) (2022) (SB 846) (directing the State Water Board to continue imposing an interim mitigation fee on Diablo Canyon and allowing annual increases to reflect reasonable costs); Cal. State Water Res. Control Bd., *Notice of Public*

D. Senate Bill 846 (2022).

In 2022, the California Legislature enacted Senate Bill 846 ("SB 846") through an eleventh-hour budget trailer bill process, fundamentally altering the regulatory framework governing Diablo Canyon's compliance with cooling water intake requirements. The legislation was advanced rapidly in the final days of the legislative session amid concerns regarding grid reliability and potential energy shortages and was closely associated with Governor Newsom's efforts to ensure continued power generation as he considered a presidential run.[10] The truncated legislative process limited substantive policy deliberation and bypassed the type of comprehensive environmental and technical review typically associated with major regulatory changes affecting coastal resources and Clean Water Act implementation.

SB 846 contains two provisions of central importance to Diablo Canyon's compliance obligations under Clean Water Act § 316(b) and California's OTC Policy. First, the statute includes express legislative findings and intent language asserting that it is not "practicable" for Diablo Canyon to achieve compliance with the OTC Policy's BTA requirements before October 31, 2030. The statute directs the State Water Board to continue imposing an interim mitigation fee—rather than requiring installation of technology—to address entrainment impacts from continued OTC operations. This directive effectively substitutes after-the-fact mitigation for the technology-forcing mandate embedded in Section 316(b) and the OTC Policy.

Second, SB 846 mandates, as a matter of law, that Diablo Canyon's final compliance date with the OTC Policy be extended to October 31, 2030, "[n]otwithstanding any provision to the contrary" in the OTC Policy itself. This statutory extension overrides the previously established compliance deadlines of 2024 and 2025 and removes agency discretion to require earlier compliance based on environmental or technological considerations.

Workshop and Staff Recommendations: Revision of Interim OTC Mitigation Payments (Mar. 12, 2024), https://www.waterboards.ca.gov/board_info/calendar/docs/2024/mar/notice_otcinterimmitigation_031224.pdf.

[10] Media outlets discussed Newsom as someone who might be on a "shadow campaign" or a potential candidate *if* the incumbent were absent, and noted his national profile and visibility as fueling speculation about future presidential ambitions (https://www.theguardian.com/us-news/2023/nov/12/california-gavin-newsom-biden-president-2024?utm); Newsom's name has appeared in lists of potential Democratic contenders *should a vacancy occur*, and analysts mentioned him as a potential replacement option if Biden's campaign faltered (https://whyy.org/articles/biden-drop-out-kamala-harris-pritzker-shapiro-beshear-whitmer/?utm).

In 2023, the State Water Board amended the OTC Policy to conform to SB 846, characterizing the change as an "administrative, non-regulatory" update intended solely to align the OTC Policy's compliance dates with the statute. The accompanying Staff Report emphasized that "[n]o regulatory effects will occur as a result of this change" and did not include any new environmental analysis, reassessment of entrainment and impingement impacts, or evaluation of whether BTA compliance remained feasible or required during the extended period of operation. Critically, neither SB 846 nor the 2023 amendment includes any formal determination by the State Water Board that BTA is technically infeasible for Diablo Canyon. Instead, the statute's directive and the Board's subsequent actions operate to defer or foreclose technology-based compliance without the reasoned, evidence-based findings required under the Clean Water Act and the OTC Policy framework.

As a result, SB 846 functions as a legislative mechanism that extends Diablo Canyon's operational life while simultaneously overriding the federally-mandated requirement to implement BTA with an interim mitigation regime. This approach departs from the technology-forcing structure of Section 316(b), which requires facilities to minimize adverse environmental impacts through the location, design, construction, and capacity of intake structures during operation—not through deferred compliance or compensatory payments. The statute's directive to rely on mitigation in lieu of BTA, coupled with the extension of compliance deadlines without accompanying analysis, creates a regulatory framework in which Diablo Canyon continues OTC operations without ever implementing the technologies required by law.

E. The 2026 NPDES Permit Adoption by the Central Coast Regional Water Board.

The Central Coast Regional Water Board's process for adopting the 2026 NPDES permit for the Diablo Canyon Nuclear Power Plant reflects a truncated and internally conflicted regulatory proceeding that ultimately relied on speculative assumptions rather than record-based determinations.

In November 2025, the Regional Board released the draft permit for public review, beginning a 30-day comment period and holding a public workshop on November 12 to present the permit and

gather stakeholder feedback. At that workshop, participants—including CCKA—raised significant concerns about the structure and timing of the permit's monitoring requirements, specifically the mandate that PG&E conduct an updated entrainment study six months before the permit's expiration. Board staff explained that the study was intended to inform the next permit renewal, requiring PG&E to "update the data and submit it with its application for renewal…six months before [the] expiration date." However, this timing is problematic because it occurs after Diablo Canyon is reportedly scheduled to cease operations, leaving the study largely disconnected from any meaningful compliance or operational decision-making during the current permit term.

The Regional Board formally considered and adopted the NPDES permit on February 26, 2026. The record during the adoption hearing reflects substantial uncertainty—and skepticism—regarding the assumption that Diablo Canyon would decommission by October 31, 2030. Board members repeatedly questioned both PG&E and staff about the status and credibility of decommissioning plans. In response, staff acknowledged that PG&E was not actively pursuing decommissioning and that planning efforts had effectively been placed on hold. PG&E confirmed this uncertainty, explaining that its operational posture remained flexible and contingent on state direction. Using an "accordion" analogy, PG&E described its ability to expand or contract the facility's operational timeline depending on future energy needs, underscoring that the 2030 retirement date was not fixed or binding. These statements were further reinforced by admissions that decommissioning activities had significantly diminished and that no concrete steps toward shutdown were underway.

Despite these acknowledged uncertainties, the Regional Water Board proceeded to adopt the permit. In doing so, Regional Water Board members expressed reservations about relying on a speculative decommissioning date as the basis for compliance with BTA requirements. However, the Regional Water Board ultimately concluded that it lacked authority to independently determine or impose BTA requirements for Diablo Canyon, deferring instead to the State Water Board's jurisdiction over the OTC Policy. Relying on this interpretation, the Regional Water Board reasoned that it was constrained by existing State Water Board policy and by Senate Bill 846, and therefore

had no practical alternative but to issue the permit as drafted.

Notwithstanding these stated constraints, the Regional Water Board's adoption of the permit, and underlying assumptions on the record, marked the first time that a Water Board explicitly equated future decommissioning—at an uncertain and potentially distant date—with compliance with BTA requirements under Clean Water Act Section 316(b) and the OTC Policy. By treating eventual cessation of operations as a substitute for the implementation of technology during ongoing operations, the Regional Water Board effectively transformed a speculative future event into the operative compliance mechanism. This determination was made despite the absence of any binding commitment to decommission by 2030, the lack of active shutdown planning, and the existence of substantial evidence indicating that operations could continue well beyond that date.

In sum, the Regional Board's permitting process reveals a decision-making framework driven not by a reasoned evaluation of technological feasibility or environmental impacts, but by perceived legal constraints and policy assumptions. The Regional Water Board acknowledged the uncertainty surrounding decommissioning, recognized the ongoing nature of environmental impacts, and yet proceeded to approve a permit that defers compliance indefinitely. By doing so, the Regional Water Board relied on speculation in place of substantial evidence, failed to resolve critical factual inconsistencies in the record, and adopted a compliance approach that departs from the technology-forcing requirements of the Clean Water Act and the established framework of the OTC Policy.

III. THE REGIONAL WATER BOARD ABUSED ITS DISCRETION BY RELYING ON SPECULATIVE DECOMMISSIONING INSTEAD OF REQUIRING BTA COMPLIANCE.

To comply with the Clean Water Act and the OTC Policy, the NPDES Permit for Diablo Canyon must require PG&E to meet the BTA standard, as the State Water Board has never issued a formal determination that BTA is technically infeasible for the facility. Despite decades of operation, Diablo Canyon has operated without full BTA implementation, relying instead on interim mitigation

measures rather than adopting the 93 percent intake reduction or equivalent technology required under the OTC Policy. Extensive studies, including those conducted by the Nuclear Review Committee and Bechtel Power Corporation, confirmed that closed-cycle cooling and other intake technologies are technically feasible, and the State Water Board never formally acted to adopt alternative compliance requirements. Moreover, the Regional Water Board's recent position that decommissioning at some speculative future date satisfies BTA is unsupported by the administrative record, contradicted by PG&E's statements and Nuclear Regulatory Commission's license renewal approvals, and inconsistent with the technology-forcing mandate of Clean Water Act Section 316(b). By deferring required technological implementation until an indefinite shutdown, the Board's approach undermines statutory intent, risks ongoing environmental harm, and produces precisely the kind of absurd result courts have repeatedly rejected.

A. Diablo Canyon's operations must be held to the BTA standard under the OTC Policy because the State Water Board never determined an alternative BTA for nuclear facilities.

Despite being the most destructive facility along California's coastline, for decades Diablo Canyon's OTC system has operated without implementing the OTC Policy's BTA standard. Although the Policy requires compliance with a 93 % reduction in intake or equivalent protections – for all OTC facilities including the nuclear powerplants – Diablo Canyon has instead been subject to interim mitigation measures through payment of mitigation funds to third parties, rather than installation of BTA.

The OTC Policy establishes a Review Committee for Nuclear Fueled Power Plants to oversee special studies "to investigate ability, alternatives, and cost for … nuclear-fueled power plants" such as Diablo Canyon to use alternative technologies to meet the Policy's requirements. These studies are conducted by an independent third-party consultant selected by the Executive Director of the State Water Board and paid for by the affected nuclear facilities. The Committee includes representatives from the State Water Board, the California Coastal Commission, the California Energy Commission, the California Public Utilities Commission, appropriate Regional

Water Boards, utilities, and experts from the environmental community.

The Committee was tasked to provide a final report describing the results of the special studies and present that report to the State Water Board for consideration of whether to modify the OTC Policy with respect to nuclear plants. As part of this process, Bechtel Power Corporation was selected as the independent third-party consultant to evaluate alternatives to OTC at Diablo Canyon, including closed-cycle cooling towers and intake technologies. Bechtel's reports, presentations, and draft analyses were reviewed in open meetings of the Nuclear Review Committee beginning in 2011, and public comments were submitted by stakeholders including environmental groups and local governments.

A Subcommittee of the Review Committee — including representatives from state agencies and the Alliance for Nuclear Responsibility — issued comments in September 2014 concluding that "there is no basis for an exemption from the once-through-cooling (OTC) Policy for Diablo Canyon Power Plant" and that closed-cycle cooling was a viable technology to meet the OTC Policy requirements.

PG&E also submitted written comments on November 4, 2014, regarding the Bechtel Alternative Cooling Technologies Report prepared for the Nuclear Review Committee and the Board, outlining the intended criteria in the OTC Policy for determining alternative compliance requirements and urging the Board to adopt alternative requirements based on the Bechtel Report's findings.

On November 18, 2014, the State Water Board held an informational workshop titled OTC Policy Special Studies, during which staff and committee representatives presented background on the OTC Policy, the Nuclear Review Committee process, and the results of the special studies, including the Bechtel Report. The Board's noticed agenda materials for this workshop confirm that the session was structured to provide an *overview* of the results of the special studies rather than to reach a final decision on BTA feasibility or to adopt alternative compliance requirements for Diablo Canyon.

Public accounts of the November 18, 2014, State Water Board workshop similarly

characterize it as a hearing in which presentations were made — including by Bechtel — but no formal Board decision was rendered at that meeting regarding the feasibility of BTA or alternative requirements for Diablo Canyon. The Board's official agenda for the workshop described the item as providing *"an overview of the process and results of the special studies conducted for the Diablo Canyon Nuclear Power Plant,"* indicating it was informational in nature rather than a decision item.[11] The Board's official notice stated, "The State Water Board shall not take action at this time." (State Water Resources Control Board, "Notice of Opportunity to Comment" Tuesday, November 18, 2014 Board Workshop). Contemporaneous reporting similarly confirmed that the meeting was intended to present cooling options and that no final determination would be made at that time.[12] Independent accounts from environmental groups also describe Bechtel's presentation of alternative technologies and public comments, with no Board action taken on feasibility or compliance alternatives.[13] Finally, subsequent Director's Reports clarify that the presentation was informational and that policy alternatives for Diablo Canyon *"will be brought to the Board for consideration"* at a later date, confirming the absence of a formal infeasibility determination in 2014.[14]

Despite the extensive Nuclear Review Committee process, Bechtel analyses, and multiple rounds of public comment through 2014 and beyond, the administrative record does not contain a formal written determination by the State Water Board that BTA (e.g., installation of closed-cycle cooling) is technically infeasible or otherwise inappropriate for Diablo Canyon. Nor has the Board expressly modified the OTC Policy to exempt Diablo Canyon from meeting the BTA standard.

The provisions of the OTC Policy (§§ 3.D.7–3.D.9) are non-discretionary, as evidenced by the use of "shall" requiring the State Water Board to conduct an evaluation and issue a formal decision supported by findings, yet the Board never did so. The State Water Board failed to fulfill its non-discretionary duty under OTC Policy § 3.D.7, which unambiguously states that the Board "shall consider the results of the special studies, and shall evaluate the need to modify this Policy with respect to the nuclear-fueled power plants." In other words, the Policy imposes a mandatory

[11] https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/rcnfpp/?utm
[12] https://www.kcbx.org/energy/2014-11-17/state-water-board-to-consider-cooling-options-at-diablo-canyon?utm
[13] https://a4nr.org/?p=3336&utm
[14] https://happylibnet.com/doc/2104510/state-water-resources-control-board-february-17--2015-dir...?utm

obligation on the Board to actively assess whether modifications are warranted based on the factual record and to consider the specific factors enumerated in the Policy when reaching a decision. The Board never finalized this evaluation, never analyzed the special studies in a manner that could support any conclusions, and never issued a formal decision tied to those findings. By failing to perform this mandatory review, the Board ignored a clear self-imposed, regulatory directive, effectively abdicating its non-discretionary responsibility and acting in a manner that was arbitrary and capricious.

Therefore, under the Clean Water Act § 316(b) and the OTC Policy's technology-based mandate, any NPDES permit for Diablo Canyon must require achievement of BTA to minimize adverse environmental impacts. Federal case law interpreting Section 316(b) affirms that a facility must employ the BTA to reduce intake impacts unless the permitting authority makes a reasoned determination, supported by record evidence, that such technology is infeasible — a determination absent here. *See Entergy Corp. v. Riverkeeper, Inc.* (recognizing that Clean Water Act Section 316(b) requires the use of BTA to minimize adverse environmental impact); *Seacoast Anti-Pollution League v. Costle* (holding that Section 316(b) mandates application of the best available technology).

B. The Regional Water Board Abused Its Discretion by Treating Speculative Future Decommissioning as Best Technology Available.

The State and Regional Water Boards have taken the position that decommissioning Diablo Canyon at some future date — and the associated cessation of OTC water intake — constitutes compliance with both Clean Water Act Section 316(b) and the OTC Policy. Under this framework, the anticipated shutdown would achieve the approximate 93 percent intake reduction that the OTC Policy identifies as BTA, effectively substituting future *decommissioning* for technology implementation during operations.

In responses to public comments on Order R3-2026-0001, the 2026 NPDES permit for DCPP, Board staff stated:

- *"DCPP remains on track to comply with the OTC Policy by ceasing operations by October 31, 2030."* (Response to Comments 18.1)
- *"DCPP also remains on track to comply with the OTC Policy by ceasing operations by October 31, 2030, at which point it will be fully compliant with the OTC Policy."* (Response to Comments 19.2)

These statements represent the first time the Water Boards have explicitly equated decommissioning— at some future, unspecified date — with compliance with the OTC Policy's BTA requirements in a NPDES Permit.[15]

However, the assumption that Diablo Canyon will retire by October 31, 2030, is highly speculative and contradicted by substantial evidence in the administrative record. First, Senate Bill 846 provided a legal path to extend Diablo Canyon's operations to achieve OTC Policy compliance but did not prohibit further extensions, creating the potential for continued operation well beyond 2030. Second, PG&E has repeatedly confirmed plans to continue operations beyond 2030 through Nuclear Regulatory Commission ("NRC") license renewals, demonstrating that the anticipated shutdown is not imminent.[16] Next, the NRC completed a Safety Evaluation Report (June 2025) and a Final Supplemental Environmental Impact Statement for Diablo Canyon's license renewal. The Safety Evaluation Report concluded that the plant is "safe to operate for another 20 years," and the Environmental Impact Statement stated there is "no environmental reason … to prevent the plant from operating for another 20 years."[17] PG&E's license renewal application to the NRC, accepted in late 2023, is for an additional 20 years of operation, providing additional evidence that the 2030 retirement date is not grounded in the facility's actual operational plans.[18] Finally, at the February 2026 Diablo Canyon Independent Safety Committee public meeting, PG&E reported that with key state permits expected soon, the NRC could renew Diablo Canyon's license for another

[15] https://www.waterboards.ca.gov/centralcoast/board_info/agendas/2026/feb/item07_att01.pdf
[16] https://www.pge.com/en/newsroom/currents/future-of-energy/regional-water-board-approves-applications-for-diablo-canyon-s-e.html
[17] https://www.pge.com/en/newsroom/currents/safety/federal-commission-finds-diablo-canyon-power-plant-safe-to-opera.html
[18] https://investor.pgecorp.com/news-events/press-releases/press-release-details/2023/Nuclear-Regulatory-Commission-Accepts-PGEs-Diablo-Canyon-Power-Plant-License-Renewal-Application-Allows-Both-Units-to-Continue-Operating-Past-Current-Licenses/default.aspx

20 years beyond its currently scheduled decommissioning.[19]

The record from the Regional Board's adoption hearing of Diablo Canyon's NPDES permit reflects substantial evidence that decommissioning by 2030 is uncertain. The Regional Board released the draft permit on November 7, 2025, initiating a 30-day public comment period. Shortly thereafter, on November 12, 2025, Regional Board staff conducted a public workshop to explain the draft permit and receive stakeholder input. During that workshop, significant concerns were raised regarding the structure and timing of the permit's monitoring requirements, particularly the requirement that PG&E conduct an updated entrainment study six months prior to permit expiration. In response to questions from stakeholders, including CCKA, staff explained that the purpose of the study was to inform the next permit renewal application, stating that PG&E would be required to "update the data and submit it with its application for renewal of the permit…six months before [the] expiration date." This timing is notable because it places the required study after the date by which Diablo Canyon is purportedly scheduled to cease operations, rendering the study disconnected from any meaningful compliance or operational decision-making during the permit term.

The Regional Board formally considered and adopted the NPDES permit on February 28, 2026. During the adoption hearing, the record reflects substantial uncertainty—and skepticism—regarding the assumption that Diablo Canyon would decommission by October 31, 2030. At the beginning of the hearing, Board Members questioned PG&E's sincerity and commitment to decommissioning by 2030 by asking Staff what PG&E is doing to meet the 2030 deadline; Staff noted that, "my understanding is that PG&E is not actively taking any steps toward decommissioning at this time" (53:21), underscoring that no operational decisions toward shutdown have been initiated. PG&E further explained, "The reason we don't know yet is there is some discussion that nothing's been decided, but we operate, as long as the state needs us" (1:49:02), and acknowledged that while "Diablo Canyon will decommission one day" (1:51:20), the timing is flexible. PG&E also described the potential for extended operation under a renewed NRC license,

[19] https://www.kcbx.org/environment-and-energy/2026-02-18/pg-e-reports-on-diablo-canyons-future-to-an-independent-safety-committee?utm

stating, “In our current California configuration, that's great because that's a lot of margin beyond five years…they look at it in 20-year intervals. That would be through 2045 for unit two. However, we operate at the direction of the state…right now we're at five years, and if the state needs us for another 10 or 15, that 20-year licensing action gives the state the window of opportunity to do that” (1:52:47). During Board Member deliberations, several Board Members continued to question PG&E’s earnest attempts to decommission by 2030. Board Member Hoskins echoed these uncertainties, observing, “Listening to all of this and having read everything, a concern I have…is the date…given that there is quite a bit of uncertainty, it appears we heard, I think, from even PG&E about decommissioning dates [and] about potential extensions” (4:00:18). Taken together, these statements in the record demonstrate that the timing of Diablo Canyon’s decommissioning is not fixed and that 2030 is speculative, contingent on state direction.

The Regional Water Board’s reliance on decommissioning at some future, speculative date as BTA is legally flawed. Section 316(b) is a technology-forcing provision that requires facilities to implement BTA to minimize entrainment and impingement during operation, unless a formal, record-based infeasibility finding is made. Treating a speculative future shutdown — contingent on PG&E’s decisions and NRC licensing — as equivalent to BTA allows continued environmental harm for an indeterminate period, contrary to the statute’s purpose. *See Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 102–03 (2d Cir. 2007) (noting that § 316(b) of the Clean Water Act requires the use of the “best technology available” to minimize adverse environmental impact on aquatic life, and that this mandate is not satisfied by speculative future measures); *see also Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1375–76 (D.C. Cir. 1977) (explaining that the Act directs agencies to apply effective technology in the first instance to protect the chemical, physical, and biological integrity of waters, including aquatic organisms, rather than deferring protection). In short, the Regional Water Board’s position that decommissioning constitutes BTA assumes a retirement schedule that is not realistic, defers technology implementation indefinitely, and risks ongoing environmental harm, all in direct tension with the technology-forcing intent of § 316(b) and the operational requirements of the OTC Policy.

The Regional Water Board's determination that speculative future decommissioning satisfies BTA constitutes a clear abuse of discretion. The administrative record establishes that decommissioning by October 31, 2030, is highly uncertain, contradicted by substantial evidence including PG&E's statements that no steps toward shutdown have been initiated since adoption of SB 846, ongoing NRC relicensing allowing operation through 2045, and the Regional Board's own acknowledgment of uncertainty during the adoption hearing. By equating a potential, indefinite future retirement with compliance under the OTC Policy and Section 316(b), the Regional Water Board substituted conjecture for concrete, technology-based action, deferring implementation of BTA and allowing ongoing environmental harm. This approach directly contravenes the technology-forcing purpose of Section 316(b), which requires facilities to implement measures to minimize entrainment and impingement during operation, and is inconsistent with the evidence in the record. The Board's reliance on a speculative retirement date to satisfy BTA requirements is therefore legally unsupported, arbitrary, and in direct tension with both the statutory mandate and the operational realities of Diablo Canyon.

C. The Regional Board's Reliance on Speculative Decommissioning Violates Congressional Intent and Produces an Absurd Result.

The Regional Board's decision to treat speculative future decommissioning of Diablo Canyon as satisfying BTA is not only an abuse of discretion but also violates Congress' clear intent under Section 316(b). Congress explicitly requires that OTC facilities implement BTA at their intake structures to prevent harm to aquatic life at the outset rather than relying on restoration after damage occurs. Under 33 U.S.C. § 1326(b) (Clean Water Act § 316(b)), "any standard established pursuant to section 1311…or section 1316…and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact," including impingement of fish and shellfish and entrainment of eggs and larvae. *See Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 189–91 (2d Cir. 2007) (holding that EPA's regulatory restoration compliance option was "inconsistent with section 316(b)'s requirement … because this option has nothing to do with the location, design,

construction, or capacity of such structures," and that "restoration measures correct for the adverse environmental impacts … but they do not minimize those impacts in the first place"); *see also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 216–17 (2009) (noting that § 316(b) directs EPA to set standards reflecting BTA for minimizing adverse environmental impact at intake structures, including impingement and entrainment) (statutory language at 33 U.S.C. § 1326(b)). Allowing an OTC facility to defer BTA implementation until a potential, undefined shutdown subverts the statute's technology-forcing purpose and undermines its environmental objectives.

Courts have repeatedly rejected agency attempts to substitute future mitigation or other non-technology-based measures for required technology controls. See *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 188–89 (2d Cir. 2004) (rejecting reliance on restoration measures in lieu of BTA); *Cronin v. Browner*, 91 F.3d 1316, 1321 (9th Cir. 1996) (holding off-site mitigation cannot replace technology-based compliance); *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1378–79 (D.C. Cir. 1977) (agency may not avoid implementing required control technologies by promising future environmental benefits).

If BTA compliance could be satisfied simply by promising decommissioning at some distant, undetermined future date, any OTC facility could indefinitely defer implementation, effectively nullifying Section 316(b). Agencies may not avoid required statutory determinations or defer compliance indefinitely. See *NRDC v. EPA*, 859 F.2d 156, 180–81 (D.C. Cir. 1988) (EPA cannot defer technology determinations); *NRDC v. Train*, 545 F.2d 320, 333 (2d Cir. 1976) (rejecting agency delay in implementing mandatory Clean Water Act requirements).

Interpreting Section 316(b) to allow compliance through speculative decommissioning also produces an absurd result, which courts consistently reject. See *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (statutory interpretations that produce absurd results are impermissible); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 465 (1989) (rejecting outcomes Congress could not have intended); *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (agencies must adhere to statutory mandates and may not adopt interpretations that undermine Congressional purpose); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515

U.S. 687, 703 (1995) (statutory interpretation must be consistent with legislative objectives and avoid unreasonable consequences). Legislative history confirms that Congress intended § 316(b) to require actual technological measures to reduce environmental impacts, not promises of eventual shutdown. H.R. Rep. No. 95-830, at 76–77 (1977) (Section 316(b) is "technology-forcing and designed to protect aquatic life from the adverse impacts of cooling water intake").

Allowing compliance to hinge on a speculative future decommissioning date subverts both the statutory mandate and Congressional intent, producing precisely the kind of absurd outcome that courts have repeatedly rejected: deferred implementation, continued environmental harm, and nullification of the statutory technology-forcing requirement. Accordingly, the Regional Water Board's reliance on a speculative retirement date to satisfy BTA is legally impermissible, arbitrary, and incompatible with the plain meaning, legislative intent, and purpose of Section 316(b).

In conclusion, Diablo Canyon remains legally obligated to implement BTA under the OTC Policy, as the State Water Board has never made a formal determination that such technology is infeasible for nuclear facilities. The record confirms that, despite decades of operation, Diablo Canyon has not adopted the required intake reduction technologies, and extensive studies—including those by the Nuclear Review Committee and Bechtel Power Corporation—demonstrate that closed-cycle cooling and other alternatives are technically feasible. The Regional Water Board's reliance on speculative future decommissioning to satisfy BTA is unsupported by the record, contradicted by PG&E's statements and NRC license renewals, and directly undermines the technology-forcing mandate of Clean Water Act. By deferring compliance until an indefinite shutdown, the Regional Water Board's decision subverts Congress' intent, allows ongoing environmental harm, and produces the absurd result that courts have consistently rejected. The record thus compels the conclusion that the Regional Water Board's approach is arbitrary, legally impermissible, and inconsistent with both statutory requirements and the operational realities of Diablo Canyon.

IV. THE WATER BOARDS ACTED ARBITRARY AND CAPRICIOUS USING THE PRIOR 2020 OTC POLICY AMENDMENT ANALYTICAL FRAMEWORK TO CONTINUE ALLOWING DECOMMISSIONING AS BTA WITHOUT ANY NEW ANALYSIS ADDRESSING THE NEW CIRCUMSTANCES.

The record demonstrates that both the State Water Board and the Central Coast Regional Water Board acted arbitrarily and capriciously by extending Diablo Canyon's OTC compliance schedule to 2030 without conducting any new analysis to account for materially changed circumstances. In 2020, the State Water Board's approval of PG&E's requested compliance dates was expressly grounded in a fixed retirement schedule established by NRC license expirations and the California Public Utility Commission's ("CPUC") approval, with environmental impacts evaluated over a limited timeframe and retirement treated as the operative compliance pathway. By contrast, the 2023 amendment relied solely on legislative changes under SB 846, characterizing the extension as an "administrative, non-regulatory" adjustment, and omitted any reassessment of environmental impacts, feasibility of BTA, or implications of delayed retirement. Under established law, an agency must re-examine prior decisions when the factual premises underlying those decisions materially change; failure to do so constitutes action that is unsupported by substantial evidence and inconsistent with statutory and policy mandates. Here, by reusing the 2020 analytical framework without addressing the new operational and environmental realities, the Water Boards issued amendments and permits that lack a reasoned basis and improperly defer technology-based protections required under the OTC Policy and Clean Water Act Section 316(b).

A. The State Water Board Failed to Analyze BTA Compliance for Delayed Decommissioning Rendering the 2023 Amendments Unsupported by Substantial Evidence and Inconsistent with the Analytical Framework Applied in 2020.

Agencies must re-evaluate decisions when the underlying factual premise changes. In 2020 the State Water Board evaluated and approved Diablo Canyon's OTC Policy compliance schedule request to conform with PG&E's NRC license expiration dates for each unit. According to the 2020 amendment the State Water Board received a letter from PG&E requesting amendment of the OTC

Policy compliance dates for Diablo Canyon… "to conform with the expiration dates of the current Nuclear Regulatory Commission licenses… and PG&E's plan to permanently retire the units as approved by the CPUC in 2018." (2020 OTC Policy Staff Report, p. 23.) The State Water Board approved PG&E's request and justified it by stating that "[g]iven PG&E's decision to retire Diablo Canyon, the Parties agree that compliance issues under Track 1 and Track 2 of the State Water Board's OTC Policy will have been resolved once the plants cease power generation."

In 2023, the State Water Board amended the OTC Policy to extend Diablo Canyon's compliance deadlines solely to align with the Legislature's enactment of Senate Bill 846, which authorized continued operation of the facility beyond its previously approved 2024–2025 retirement dates. The State Water Board characterized this amendment as an "administrative, non-regulatory" change that updated the policy's compliance schedule to reflect the new statutory framework, rather than as a substantive reconsideration of OTC Policy requirements. (2023 OTC Policy Staff Report, p. 3.) The amendment thus extended Diablo Canyon's OTC compliance timeline to 2030 without conducting new environmental analysis, reassessing impacts to marine life, or re-evaluating whether continued operation over the extended period necessitates compliance with BTA.

The administrative record demonstrates that the State Water Board's 2023 amendment extending Diablo Canyon operations to 2030 was not supported by any analysis or reconsideration of whether delayed retirement requires compliance with BTA, in stark contrast to the analytical record underlying the 2020 amendment.

In 2020, the State Water Board expressly grounded its amendment in a fixed and near-term retirement schedule, which served as the factual and analytical basis for allowing continued OTC without BTA compliance. The staff report explains that PG&E had "formally withdrew its applications to renew the NRC licenses," and that Unit 1 and Unit 2 would cease operations by November 2, 2024 and August 26, 2025, respectively. (2020 OTC Policy Staff Report, p. 23.) The report further emphasizes that the CPUC had approved this retirement schedule, thereby "establishing retirement as the chosen compliance option." (Id.) Based on this legally-binding commitment, the State Water Board evaluated environmental impacts over a limited, defined

timeframe, concluding that impacts from continued operation through 2025 would remain bounded and consistent with prior analyses conducted when the OTC Policy was adopted in 2010. (Id. at pp. 23–24.) The staff report specifically notes that, following Unit 1's retirement, intake and entrainment impacts would be reduced, and that overall impacts during the extension period would be "at or below baseline impacts" previously analyzed. (Id. at pp. 24–25.) The State Water Board formally adopted these findings in Resolution No. 2020-0029, which approves and incorporates the staff report as the basis for the amendment. (State Water Board Resolution No. 2020-0029, p. 1.)

Thus, the 2020 amendment's allowance of continued OTC operation was expressly predicated on a short remaining operational life and a corresponding, limited scope of environmental impacts. The administrative record demonstrates that retirement in 2024–2025—not infeasibility of BTA—functioned as the operative compliance pathway. The 2020 OTC Policy Amendment administrative record demonstrates that the State Water Board did not act in a conclusory manner, but instead relied on specific factual findings regarding PG&E's committed retirement of Diablo Canyon and the practical implications of that commitment in determining that a limited compliance extension was appropriate. (Staff Report at pp. 23–25.)

By contrast, the 2023 amendment extending Diablo Canyon's operations to 2030 contains no comparable analysis. The 2023 staff report characterizes the amendment as an "administrative, non-regulatory change" that merely updates compliance dates to reflect legislative direction. (2023 OTC Policy Staff Report, p. 3.) It further states that "[n]o regulatory effects will occur as a result of this change." (*Id.*) Consistent with this framing, the State Water Board did not conduct any new environmental review, did not reassess the impacts of an additional five years of OTC operation, and did not evaluate whether the extended operational period alters the prior conclusion that retirement obviated the need for BTA compliance.

Critically, the 2023 record is devoid of any analysis addressing whether a delayed retirement date—extending operations approximately five years beyond the timeframe analyzed in 2020—undermines the factual predicate for foregoing BTA. The Board did not revisit the feasibility of BTA, did not apply the OTC Policy's required factors for evaluating compliance alternatives, and

did not make any findings that continued reliance on future retirement remains protective of marine life in light of the extended timeline.

Accordingly, while the 2020 amendment was supported by a detailed factual record tying continued OTC operation to imminent retirement and limited impacts, the 2023 amendment extended that operation to 2030 without any re-evaluation of those foundational assumptions. The administrative record thus demonstrates that the State Water Board failed to analyze whether delayed decommissioning requires renewed consideration of BTA compliance, rendering the 2023 amendment unsupported by substantial evidence and inconsistent with the analytical framework applied in 2020.

B. An Agency Action is Arbitrary, Capricious, and Not in Accordance with the Law When an Agency's Prior Decision is Premised on Specific Factual Conditions and Those Conditions Materially Change.

An agency acts arbitrarily and capriciously when it relies on prior determinations whose factual predicates no longer hold, because such reliance severs the required rational connection between the evidence and the agency's decision and reflects a failure to consider relevant, changed circumstances. Federal and California courts require that agency action be supported by a rational connection between the facts found and the decision made, and that the agency consider all relevant factors in light of the current administrative record. An agency therefore may not rely on prior analyses or determinations where the factual premises underlying those decisions have materially changed, without reevaluating those facts and providing a reasoned explanation supported by substantial evidence. (*See, e.g., Western States Petroleum Assn.; American Board of Cosmetic Surgery; Golden Drugs Co.; Communities for a Better Environment.*)

In *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, the U.S. Supreme Court held that an agency acts arbitrarily and capriciously when it "entirely fail[s] to consider an important aspect of the problem" or relies on reasoning that no longer reflects the relevant facts. 463 U.S. 29, 43 (1983). This principle applies with particular force where an agency's prior determination rested on specific factual assumptions that are later altered. Similarly,

in *FCC v. Fox Television Stations, Inc.,* the Court explained that when an agency changes position, it must provide a "reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy." 556 U.S. 502, 515–16 (2009). The agency must therefore grapple with the factual predicate of its earlier decision and explain why that predicate no longer controls.

The Court reaffirmed this requirement in *Department of Homeland Security v. Regents of the University of California*, holding that an agency's action is unlawful where it fails to consider "the important aspects of the problem" or ignores reliance on prior factual determinations. 591 U.S. ___, 140 S. Ct. 1891, 1913 (2020). An agency cannot simply proceed as if the underlying circumstances remain unchanged when, in fact, they have materially shifted.

California courts consistently hold that agency action must be grounded in the current administrative record and existing factual circumstances, and must demonstrate a reasoned connection between the evidence and the decision reached. In *Western States Petroleum Assn. v. Superior Court*, the California Supreme Court made clear that agencies are required to undertake further analysis where "new information" or changed circumstances undermine the factual premises of prior determinations. 9 Cal. 4th 559, 573–74 (1995). Similarly, in *Communities for a Better Environment v. South Coast Air Quality Management District*, the Court emphasized that agencies must confront and evaluate the actual environmental consequences of their actions, rather than rely on outdated, incomplete, or unsupported assumptions. 48 Cal. 4th 310, 328–29 (2010). Consistent with these principles, courts have repeatedly invalidated agency actions that fail to consider relevant factors, rely on stale factual predicates, or lack a rational connection between the facts found and the decision made. See, e.g., *American Board of Cosmetic Surgery v. Medical Board of California*, 162 Cal. App. 4th 534, 545 (2008); *Golden Drugs Co. v. Maxwell-Jolly*, 179 Cal. App. 4th 1453, 1466 (2009). Taken together, this authority establishes that an agency may not lawfully rely on prior analyses or decisions where the underlying factual predicates have materially changed, without reevaluating the evidence and providing a reasoned explanation supported by substantial evidence in the current record.

These authorities establish a consistent rule: when an agency's prior decision is premised on specific factual conditions—such as a defined timeline, operational scope, or environmental baseline—and those conditions materially change, the agency must re-evaluate its decision and provide a reasoned analysis addressing the new circumstances. Failure to do so renders the agency action arbitrary, capricious, and not in accordance with law. Agencies cannot rely on prior analysis or decisions as justification for current action when the factual premise of those previous decisions have materially changed.

C. The Water Boards Acted Arbitrarily and Capriciously by Applying the 2020 Analytical Framework to a New, Speculative Decommissioning Date Without Conducting Fresh Analysis or Reconsidering Changed Circumstances.

The record demonstrates that the State and Regional Water Boards acted arbitrarily and capriciously in extending Diablo Canyon's OTC compliance schedule to 2030 without any new analysis addressing the changed factual circumstances.

In 2020, the Board approved PG&E's compliance schedule based on fixed retirement dates and a limited environmental review that treated shutdown as the operative compliance pathway, whereas the 2023 amendment—extending operations to 2030 pursuant to SB 846—was adopted as an "administrative, non-regulatory" change without reassessing environmental impacts, reevaluating BTA feasibility, or addressing whether the altered operating horizon undermined the prior factual basis. Because the Board failed to re-examine the foundational assumptions underpinning its 2020 decision, the 2023 amendment is unsupported by substantial evidence and inconsistent with both the OTC Policy framework and basic administrative law principles.

The Regional Water Board's action is independently arbitrary and capricious because it rests entirely on the compliance schedule adopted by the State Water Board in 2023—an action that itself was unsupported by current facts and reasoned analysis. An agency may not bootstrap its decision onto a prior determination where the factual predicates underlying that determination have materially changed. See 5 U.S.C. § 706(2)(A) (agency actions may be set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" when the agency fails

to articulate rational connection between changed facts and its conclusions). Yet that is precisely what occurred here.

As discussed above, the State Water Board's 2023 OTC Policy Amendment failed to grapple with changed circumstances and is itself unsupported by substantial evidence. The Regional Board nevertheless incorporated that defective compliance schedule wholesale into its permit, without conducting any independent analysis of whether continued OTC operations through 2030 without achieving BTA comply with the OTC Policy and Section 316(b). By relying on an outdated and analytically unsupported State Board determination, the Regional Board failed to exercise its own judgment, failed to consider relevant factors, and failed to establish a rational connection between the evidence and decommissioning as BTA. An agency action that merely adopts a prior, flawed determination—without reevaluating the underlying facts or addressing intervening changes—cannot satisfy the requirements of reasoned decision-making and is arbitrary and capricious as a matter of law.

Accordingly, because the State Water Board's 2023 OTC Policy Amendment was itself improper, it cannot provide a lawful basis for the Regional Board's permit conditions, and the Regional Board's reliance on decommissioning as BTA renders its action invalid.

In conclusion, the State and Regional Water Boards acted arbitrarily and capriciously by extending Diablo Canyon's OTC compliance schedule to 2030 without conducting any new analysis to account for materially changed circumstances. The 2020 amendment was explicitly grounded in a fixed retirement schedule and limited environmental impacts, providing a reasoned basis for deferring BTA requirements. The 2023 amendment, by contrast, merely updated compliance dates to reflect SB 846, entirely ignoring the extended operational period, the continued impacts on marine life, and whether decommissioning at a future, speculative time is BTA. By reusing the 2020 analytical framework without reassessing these critical factors, the Boards failed to consider an important aspect of the problem, rendering the amendments and permits unsupported by substantial evidence, inconsistent with the OTC Policy, and contrary to the requirements of Clean Water Act § 316(b). The administrative record thus compels the conclusion that the Water Boards' actions were

legally impermissible, arbitrary, and capricious.

V. SENATE BILL 846 (PRC §25548(e)) REMOVES THE STATE AND REGIONAL WATER BOARDS' ABILITY TO REQUIRE WHAT FEDERAL LAW MANDATES AND IS INVALID AND PREEMPTED UNDER THE SUPREMACY CLAUSE.

SB 846 removes the State and Regional Water Boards' ability to require what federal law mandates. SB 846 (2022) is federally preempted because it directs the State Water Board, a federally delegated NPDES authority, to treat BTA as infeasible for Diablo Canyon and to rely solely on an interim mitigation fee, in direct conflict with the Clean Water Act's technology-forcing mandate under Section 316(b). SB 846 was enacted through an eleventh-hour "gut-and-amend" process that circumvented standard legislative vetting and imposed temporary mitigation in lieu of requiring BTA. By instructing the Board to defer technology-based compliance, SB 846 effectively usurps federally delegated authority and undermines federal objectives to minimize entrainment and impingement. Because the 2026 NPDES permit relies on SB 846 to justify continued OTC without BTA, plaintiffs suffer a concrete, immediate injury, rendering this challenge ripe and justiciable, and not barred by any statute of limitations. Ultimately, SB 846 creates a direct conflict with federal law because it prohibits what federal law requires—implementation of BTA—and mandates what federal law forbids—reliance on mitigation in lieu of technology.

A. Senate Bill 846 Represents an Eleventh-Hour Gut-and-Amend Measure Usurping the Water Boards' Federally-Delegated Clean Water Act Authority and Imposing Interim Mitigation In-lieu of Addressing BTA.

Senate Bill 846 began the 2021–22 legislative session as a bill introduced in January 2022 with unrelated subject matter, but on August 28, 2022—just three days before the end of the session—SB 846 was substantively gut-and-amended in the Assembly to become the Diablo Canyon powerplant extension bill and was then passed by both houses and enrolled on August 31, 2022.

Under California law, a bill or amendment must be made publicly available in its final form

and "in print" for at least 72 hours before a vote in each house," ensuring that legislators and the public generally have three days to review substantive changes before adoption, absent a declared emergency. SB 846 was enacted as a late-stage "gut-and-amend" legislative measure, effectively inserting entirely new provisions into an existing bill at the eleventh hour without the comprehensive legislative vetting typically associated with substantive environmental or regulatory reforms. Among its key provisions, SB 846 directs the State Water Board to continue imposing an interim mitigation fee for Diablo Canyon's ongoing ocean water intakes beyond the facility's previously established retirement dates. The bill explicitly states that it is the Legislature's intent, through the Board's authority under Resolution 2010-0020, to implement "an interim mitigation fee, such as an interim mitigation fee of ten dollars ($10) per million gallons for water, subject to an annual increase, that it deems appropriate in its discretion and that does not exceed all reasonable costs to, or incurred by, the state to address the entrainment impacts resulting from the continued ocean water intakes at the Diablo Canyon powerplant after the current expiration dates set forth in Section 25548.1." By enacting this provision, the Legislature effectively directed the State Water Board to treat installation of BTA as infeasible for Diablo Canyon, authorizing the Board to forgo technology-based compliance and instead rely solely on an interim mitigation fee to address entrainment impacts.

In effect, SB 846 functions as a legislative patch that allows Diablo Canyon to continue operating while deferring BTA implementation, relying instead on an interim mitigation fee to address entrainment impacts. This context underscores that the 2023 OTC Policy amendments—which aligned Diablo Canyon's compliance schedule with SB 846—did not constitute a reasoned re-evaluation of BTA requirements but rather implemented an administrative adjustment to accommodate a narrowly focused, last-minute statutory directive. By enacting the interim fee approach through a gut-and-amend process, the Legislature implicitly delegated discretion to the Water Boards to continue operation without rigorous assessment of technological alternatives, leaving a significant gap in environmental protections and rendering the Boards' reliance on after-the-fact restoration in-lieu of BTA particularly problematic.

B. State Law is Federally Preempted When It Restricts Federally Delegated Authority.

Under the Supremacy Clause of the United States Constitution, federal law preempts conflicting state law, and a state may not enact legislation that prevents a state agency from complying with or exceeding federal requirements where the agency administers federally delegated programs. U.S. Const., Art. VI, cl. 2. Preemption occurs when a state law either expressly conflicts with federal law or stands as an obstacle to the accomplishment of federal objectives.

The Clean Water Act establishes a comprehensive federal framework to protect waters of the United States, including the requirement that NPDES permits include BTA to minimize adverse environmental impacts from cooling water intake structures. 33 U.S.C. § 1326(b) (Section 316(b)). Under the Clean Water Act, the United States Environmental Protection Agency ("EPA") may authorize states to administer the NPDES program, delegating authority to issue and enforce permits consistent with federal law. 33 U.S.C. § 1342(b). However, Congress intended that such delegated authority be exercised in accordance with federal minimum standards, not to allow state law to reduce or circumvent federally mandated protections.

Accordingly, a state law is federally preempted if it directs a state agency to act in a manner that would prevent the agency from meeting or exceeding the requirements of the federal program. In other words, the state may not require or authorize the agency to issue permits, establish compliance schedules, or adopt policies that foreclose implementation of federally mandated technology or mitigation measures. Courts have repeatedly held that federal law preempts state rules that undermine federally delegated environmental authority, even where the state purports to act within its "discretion." See *Arkansas v. Oklahoma*, 503 U.S. 91, 108 (1992) (state cannot authorize activities that conflict with federally delegated water quality obligations); *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700, 713–14 (1994) (state cannot adopt standards that would defeat federal water quality objectives).

Applying these principles here, any California law such as SB 846, that directs the State Water Board to treat BTA as infeasible or to rely solely on an interim mitigation fee for Diablo Canyon, effectively constrains the Board from exercising its federally-delegated authority under

Section 316(b). By instructing the Board that "it is not practicable for the Diablo Canyon Power Plant to achieve final compliance with the [OTC Policy]", the law conflicts with the CWA's technology-forcing mandate, limits the agency's ability to impose measures necessary to minimize entrainment, and interferes with federal objectives of protecting aquatic life. Such a statutory scheme is therefore federally preempted because it restricts the agency from issuing permits or taking action consistent with federal law.

In sum, when a state law requires a federally-delegated agency to fall short of federally mandated protections, the law is invalid under the Supremacy Clause, and the agency must retain discretion to comply fully with federal requirements, including the technology-forcing provisions of CWA Section 316(b).

C. SB 846 is Federally Preempted Because It Requires the State Water Board to Use Interim Mitigation Instead of BTA in Violation of Congressional Intent and the *Riverkeeper* cases.

Federal courts have long held that Section 316(b) of the Clean Water Act ("CWA") requires the use of BTA to minimize adverse environmental impacts from cooling water intake structures, and that after-the-fact restoration measures cannot substitute for technology-based compliance. In *Riverkeeper, Inc. v. EPA*, 358 F.3d 174 (2d Cir. 2004) ("Riverkeeper I") and *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007) ("Riverkeeper II"), the Second Circuit struck down EPA rules allowing existing facilities to rely on restoration measures—such as restocking fish or habitat improvements—as a substitute for implementing BTA. The court emphasized that while such measures may mitigate impacts after the fact, they do not minimize entrainment or impingement at the intake itself, and thus violate the plain language and technology-forcing intent of Section 316(b). Restoration measures cannot lawfully replace the location, design, construction, or capacity improvements required under the statute.

California's Senate Bill 846 directly conflicts with these federal requirements. SB 846 unilaterally directed the State Water Board to extend Diablo Canyon's OTC compliance schedule through 2030, declared BTA not practicable for Diablo Canyon, and imposed only an interim

mitigation fee in-lieu of technology implementation. Specifically, the statute provides that the Board may impose "an interim mitigation fee … that it deems appropriate in its discretion … to address the entrainment impacts resulting from the continued ocean water intakes at the Diablo Canyon powerplant" (Water Code § 131.93.5(b)). By requiring the Board to rely solely on after-the-fact mitigation and forbidding implementation of BTA, SB 846 compels the State Water Board to act inconsistently with federally delegated authority under the CWA.

Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, a state law is invalid if it prevents a state agency from complying with or exceeding federally mandated requirements. Because the State Water Board is the federally authorized administrator of California's NPDES program, SB 846's direction to use mitigation instead of BTA prevents the Board from fulfilling its federally mandated duty under Section 316(b). By substituting interim mitigation for technology-based compliance, the law illegally requires the State and Regional Water Boards to issue an NPDES Permit that is not as stringent as required by the Clean Water Act and thus is expressly preempted.

In short, SB 846 not only usurps the State Water Board's federally delegated authority, it requires illegal after-the-fact restoration in violation of the *Riverkeeper* decisions. To the extent that SB 846 mandates that BTA is "not practicable" for Diablo Canyon and that interim mitigation is sufficient, SB 846 is preempted by federal law and cannot lawfully dictate how the Board implements Section 316(b). Reliance on SB 846 was particularly egregious because the State Water Board never carried out its non-discretionary duty under OTC Policy § 3.D.7 to evaluate the special studies, assess whether modifications were needed for nuclear-fueled power plants, and issue a findings-based decision.

The 2026 Diablo Canyon NPDES permit, which relies on SB 846[20] to justify continued OTC operations without requiring BTA, is also inconsistent with federal law. By authorizing the facility to substitute an interim mitigation fee for technology-based compliance, the permit effectively implements the preempted provisions of SB 846, compelling the Regional Water Board to act in a

[20] Response to Comments, Central Coast Regional Water Quality Control Board (Diablo Canyon NPDES Permit), at __ (Feb. 13, 2026). "The Bechtel report presented to the State Water Board in 2014 supports the Legislature's finding in Public Resources Code section 25448, subdivision (b), that it is not practicable for Diablo Canyon to achieve final compliance with the OTC Policy before October 31, 2030. Compliance was not practicable when the report was presented in 2014 and there is no evidence to support a conclusion that it has become practicable in the intervening time."

manner that violates its federally delegated authority under Section 316(b) of the Clean Water Act. Because the Clean Water Act mandates that NPDES permits include BTA where feasible, any permit condition that forecloses implementation of BTA in favor of after-the-fact mitigation is legally impermissible. SB 846 conflicts with federal law and thus the Regional Board cannot rely on it as a basis for issuing Diablo Canyon's NPDES permit.

D. Challenges to SB 846 Are Not Barred by Statute of Limitations.

There is no statute of limitations in regard to challenging the legality of SB 846 and the State and Regional Water Board's reliance on the bill to adopt the Diablo Canyon NPDES Permit. During the written public comment period for the Diablo Canyon NPDES permit re-issuance, CCKA filed timely comments asserting that "SB 846 (2022) is federally preempted because the bill usurps the Central Coast Water Boards' federally delegated authority and instructs the Water Boards to issue this NPDES Permit that is noncompliant with federal law." In Response to Comments, the Central Coast Regional Water Board states that to the "extent that this comment is a collateral attack on SB 846 (2022), any such attack is barred by the statute of limitations…"[21] The Regional Water Board's assertion that challenging SB 846 is barred by the statute of limitations is legally inaccurate.

Under the Supremacy Clause of the U.S. Constitution, federal law "shall be the supreme Law of the Land … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." A state statute may be challenged as preempted whenever it (a) is in direct conflict with federal statute or regulation, (b) intrudes on a federally occupied field, or (c) otherwise frustrates federal objectives.

Federal preemption challenges are not subject to a single codified statute of limitations that begins when a state law is enacted. Rather, preemption claims become justiciable when a plaintiff suffers a concrete injury or faces an imminent threat of enforcement or adverse impact due to the state law. Courts focus on whether the dispute is *ripe* for adjudication and whether the plaintiff has *standing* to sue — not merely how many years have passed since the statute's enactment. A preemption challenge must be timely in the sense that (1) the plaintiff has suffered, or will

[21] https://www.waterboards.ca.gov/centralcoast/board_info/agendas/2026/feb/item07_att05.pdf

imminently suffer, a direct injury resulting from the state law; and (2) there is a real and concrete conflict between state and federal law, rather than a hypothetical or abstract dispute. Challenges brought years after enactment are nonetheless permitted so long as the plaintiff demonstrates that the law is affecting them in a concrete way and that the dispute presents a live case or controversy under Article III of the Constitution.

The adoption of the 2026 NPDES permit for Diablo Canyon makes a challenge to SB 846 ripe because the permit explicitly relies on SB 846 while not requiring Diablo to implement BTA under the OTC Policy. Instead of mandating full technology-based reductions in entrainment and impingement, the permit allows PG&E to continue OTC operations under SB 846's framework, with only after-the-fact restoration in-lieu of BTA. The permit's reliance on SB 846 directly affects regulated entities and the public by allowing ongoing environmental impacts that would otherwise be subject to BTA compliance. Because the permit conditions are now in effect, there is a concrete, immediate injury: marine life continues to be entrained and impinged, and the Clean Water Act § 316(b) technology-forcing requirements are not applied.

Courts consistently hold that challenges to state laws are ripe once the law is applied or enforcedly relied upon in a regulatory or permitting context, even if the law is otherwise recent. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967) (holding that a law is ripe for judicial review when it has a direct impact on regulated parties). Thus, SB 846 is ripe for preemption and constitutional review because the law actively shapes regulatory outcomes, not merely potential future conduct.

Even if the statute of limitations has expired, the Regional Board acted arbitrarily and capriciously by relying on SB 846 to justify Diablo Canyon's NPDES permit. An agency cannot lawfully base its actions on a statute or legal framework that is itself unlawful, outdated, or otherwise improper. By deferring to SB 846 without independently assessing the facility's current operations, environmental impacts, and compliance obligations, the Regional Board effectively grounded its permit on a flawed legal premise. Reliance on an improper statutory foundation, rather than reasoned, evidence-based decision-making, constitutes arbitrary and capricious action under

established administrative law. *See Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 42 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009).

In conclusion, Senate Bill 846 is federally preempted because it directs the State Water Board to forgo implementing BTA at Diablo Canyon and instead rely solely on an after-the-fact restoration fee in-lieu of BTA, in direct conflict with the Clean Water Act's technology-forcing requirements under Section 316(b). The law was enacted through an eleventh-hour legislative maneuver that bypassed meaningful review and imposed a temporary compliance scheme in lieu of requiring concrete technological measures. The 2026 NPDES permit's reliance on SB 846 to justify continued OTC without BTA creates a concrete, immediate injury, making the preemption challenge timely, ripe, and justiciable. Any assertion that such a challenge is barred by a statute of limitations is legally unsupported. Even assuming the statute of limitations applies, the Regional Board acted arbitrarily and capriciously by basing Diablo Canyon's permit on SB 846, a legal framework that was itself improper and could not lawfully justify the Board's action. Because SB 846 constrains the Water Board from exercising its federally delegated authority, requires the Water Boards to issue an NPDES that is not as stringent as Clean Water Act requirements, conflicts with federal law, and undermines Congress' objective to minimize entrainment and impingement, it cannot lawfully govern the Board's permitting decisions.

VI. CONCLUSION

For the foregoing reasons, the Regional Water Board has abused its discretion by permitting Diablo Canyon to operate without requiring compliance with BTA, instead relying on speculative future decommissioning to satisfy both the OTC Policy and the Clean Water Act. Continued operation without BTA results in ongoing and cumulative harm, which the Clean Water Act was specifically designed to prevent through technology-forcing requirements. The record demonstrates that no formal determination of BTA infeasibility has ever been made, and substantial evidence—including studies from the Nuclear Review Committee process—confirms that technologies such as closed-cycle cooling are viable. By allowing reliance on after-the-fact restoration rather than

enforcing technology-based reductions, the Water Boards have permitted Diablo Canyon to evade its legal obligations under Clean Water Act § 316(b).

The Boards' approach—treating an uncertain future shutdown as compliance—improperly substitutes conjecture for enforceable regulatory requirements, allowing continued environmental harm and deferring implementation of required technology. This method is inconsistent with the Clean Water Act's technology-forcing mandate, which requires minimization of entrainment and impingement during operation, not at some speculative future date.

Additionally, the Boards' repeated reliance on the 2020 analytical framework without reassessing materially changed circumstances constitutes arbitrary and capricious action. The 2023 amendments extended operations based solely on legislative changes, without evaluating environmental impacts, BTA feasibility, or the continued validity of prior assumptions, rendering these actions unsupported by substantial evidence and contrary to both administrative law principles and federal statutory requirements.

Finally, Senate Bill 846 is independently invalid because it is preempted by federal law. By directing the State Water Board to treat BTA as infeasible and to substitute an interim mitigation fee in place of technology-based compliance, SB 846 conflicts with the Clean Water Act's technology-forcing mandate and impermissibly limits the Board's federally delegated NPDES authority. Because the 2026 NPDES permit relies on SB 846 to justify continued OTC without requiring BTA, the conflict with federal law is concrete and immediate, rendering the statute preempted under the Supremacy Clause and incapable of lawfully guiding the Water Boards' permitting decisions.

Accordingly, the Boards' actions should be set aside, and Diablo Canyon must be required to implement BTA consistent with federal law.

CONCLUSION

Based on this Petition and the evidence in the record, Petitioners respectfully request that the State Water Board grant the remedies requested.

Respectfully submitted,

Dated: March 26, 2026

CALIFORNIA COASTKEEPER

By: Sean Bothwell

California Coastkeeper Alliance & The Otter Project

December 8, 2025

Chair Jane Gray and Board Members
c/o Ryan E. Lodge, Executive Officer
Central Coast Regional Water Quality Control Board
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401-7906

Sent via electronic submission to: RB3-npdes@waterboards.ca.gov

Re: Diablo Canyon Power Plant Tentative Permits

Dear Chair Gray and Members of the Board,

California Coastkeeper Alliance (CCKA) represents a network of California Waterkeeper organizations dedicated to fishable, swimmable, and drinkable waters for all Californians. CCKA has been the primary NGO stakeholder working on the Once-Through Cooling (OTC) Policy for the last 24 years. From 2001 - 2010, we worked with the State Water Board and other state agencies to address Clean Water Act Section 316(b) in California ultimately resulting in the OTC Policy. From 2010 – 2014, CCKA participated as the only NGO to regularly attend the State Water Board's Nuclear Review Committee meetings to ensure the Diablo Canyon Nuclear Facility (Diablo) achieved compliance with the OTC Policy and Section 316(b). From 2015 to present day, we watchdogged the OTC interim mitigation payments, including commenting in 2015 that the OTC interim mitigation was insufficient to fully mitigate for the impacts of OTC. In 2023, CCKA commented to the State Water Board that the compliance schedule extensions without requiring Best Technology Available (BTA) until the powerplants elect to decommission is an illegal loophole of 316(b) and the *Riverkeeper* cases (See Attachment One). Finally, CCKA submitted a letter this year to the Governor and the Legislature arguing that SB 846's (Dodd – 2022) direction to the Water Boards to continue permitting Diablo Canyon to operate OTC until 2030 without implementing BTA is federally preempted and noncompliant with federal law (See Attachment Two). We further commented that the 2025 unbacked trailer bill, which would have reappropriated Diablo's OTC interim marine life mortality mitigation to be used for land acquisition only perpetuated the illegality of the original SB 846 legislation. We provide the following comments regarding the Diablo Canyon Power Plant Tentative Permits asserting that the combination of actions taken by Governor Newsom, the California Legislature, the State Water Board and now the Central Coast Regional Water Quality Control Board is a violation of Clean Water Act Section 316(b), the *Riverkeeper* federal court decisions, and the state's own OTC Policy.

The federal Clean Water Act, Section 316(b), was enacted in 1972; mandating that power plants use the best technology available to minimize environmental impacts. The EPA's first regulations came out in 1976, later overturned, and eventually re-established in 2004 for existing power plants, but only after the EPA was sued in 1993 for failure to implement 316(b). Between 1976 and 2004, states were encouraged to set their own regulations to require the best technology available. California did so, starting in 2001 with formal public workshops starting in 2005.

On May 4, 2010, the State Water Board adopted the Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling (OTC Policy), establishing technology-based requirements to implement federal Clean Water Act section 316(b) provisions to reduce harmful effects on marine and estuarine life associated with cooling water intake structures.

The OTC Policy has several key provisions pertinent to this Permit. First, an owner or operator of all existing coastal power plants in California, including Diablo Canyon, must reduce intake flow rate at each

unit, at a minimum, to a level commensurate with that which can be attained by a closed-cycle wet cooling system, which was determined to be BTA by the State Water Board. A minimum 93 percent reduction in intake flow rate for each unit is required for Track 1 compliance, compared to the unit's design intake flow rate. This BTA standard applies to ALL California's coastal power plants, unless for safety reasons or technical infeasiblity as discussed below. Additionally, existing power plants shall comply with the BTA standard as soon as possible, but no later than, the dates shown in the compliance schedule found in Table 1, contained in Section 3.E of the OTC Policy.

The State Water Board also created an interim mitigation requirement for power plants that were not in compliance by 2015. Section 2.C(3) of the Policy requires owners or operators of existing power plants to implement measures to mitigate the interim impingement and entrainment impacts resulting from their cooling water intake structures. The interim mitigation period commenced on October 1, 2015, and continues up to and until owners or operators achieve final compliance with the OTC Policy, which they must do by dates established in the Compliance Schedule (Section 3.E).

Finally, the OTC Policy has special provisions for nuclear facilities. If the owner or operator of an existing nuclear-fueled power plant demonstrates that compliance with the requirements for existing power plants in Section 2.A would result in a conflict with any safety requirement established by the Commission, with appropriate documentation or other substantiation from the Commission, the State Water Board will make a site- specific determination of best technology available for minimizing adverse environmental impact that would not result in a conflict with the Commission's safety requirements. The State Water Board may also establish alternative, site- specific requirements in accordance with Section 3.D (8). Diablo Canyon participated in the Nuclear Review Committee to evaluate any conflicts with the safety requirements of the Commission, but those studies concluded in 2014 without any formal decision by the State Water Board.

The OTC Policy requires Diablo Canyon to implement the OTC Policy's BTA standard unless the facility can demonstrate a conflict with nuclear safety requirements or technical infeasibility crtieria. Diablo Canyon has not demonstrated a safety conflict. And the State Water Board has never made a formal decision that BTA is infeasible due to (i) safety concerns, (ii) because the costs are wholly out of proportion, (iii) engineering constraints, space constraints, permitting constraints, and public safety considerations; or (iv) because of potential environmental impacts. If the State Water Board had determined that BTA at Diablo was infeasible due to one of these four factors, the State Water Board would be required to establish alternative requirements no less stringent than justified by the wholly out of proportion (i) cost and (ii) factor(s) above. Keep in mind that PG&E made $ 2.48 billion in profit in 2024.[1] Additionally, the State Water Board would need to require full mitigation for the difference in impacts to marine life resulting from any alternative, less stringent requirements.

Our understanding is that the State and Regional Water Board believe that the decommissioning of Diablo Canyon is sufficient to comply with the OTC Policy because the shutdown – at some undetermined date - would achieve a 93 percent reduction in intake flow rate. However, the Water Boards are aware that Diablo Canyon has no intention of shutting down by 2030 and that additional compliance extensions will be necessary. Ultimately, the use of compliance schedule extensions until PG&E decides it wants to shutdown coupled with mitigation in-lieu of BTA runs counter to Congressional intent of Section 316(b) and the *Riverkeeper* cases. To allow Diablo Canyon to evade implementing cooling towers, the Water Boards must first determine that true BTA (not just shutting down sometime in the unknown future) is infeasible for the factors outlined in Section 3.D (8); second must establish alternative requirements no less stringent than justified by the wholly out of proportion analysis; and finally, must fully mitigate for the different between impacts resulting from the alternative less stringent requirements. Alternatively, the

[1] https://abc7news.com/post/pge-reports-profit-247b-2024-shattering-records-second-year-row/15904733/

State Water Board could start issuing enforcement actions with civil liability fines, above and beyond the interim mitigation fees, if Diablo continues to operate without implementing BTA. Anything else does not comport to the Clean Water Act's statutory plain meaning.

I. THE ENDLESS EXTENSIONS TO DIABLO CANYON'S OTC COMPLIANCE SCHEDULE - WITHOUT IMPLEMENTING BEST TECHNOLOGY AVAILABLE - RUN COUNTER TO CONGRESSIONAL INTENT AND THE PLAIN MEANING OF CLEAN WATER ACT SECTION 316(B).

a. *The Diablo Canyon Nuclear Facility is the most destructive impact to marine life along the California coast*.

Diablo Canyon is the most destructive OTC power plant in California. California OTC power plants discharge volumes range from 78 to 2670 MGD, with Diablo Canyon being the largest discharger in the state with a discharge of 2,670 MGD.[2] To put that into perspective, San Francisco's wastewater facility discharges only 43 MGD.[3] Diablo Canyon's continuous seawater withdrawal is estimated to kill roughly 1.5 billion fish in early life stages each year, with approximately 45 billion fish eggs and marine larvae have died over the lifetime of Diablo Canyon's operations. Diablo Canyon's marine life destruction can range from 46 miles of coastline and out to 2 miles offshore, an area of roughly 93 square miles, for nine taxa of rocky reef fish.[4]

Diablo's cooling water discharges at a warmer temperature can also cause additional harm to fish and other marine life in the area. Diablo's discharge has reported been up to 20 degrees Fahrenheit over natural background levels. This thermal pollution — plus the physical suction/impingement — has been linked to serious harm: loss of native habitat along the cove, declines or near-elimination of sensitive species (e.g. black and red abalone locally), disruption to kelp and other marine flora, and so-called "marine desert" zones near the discharge area. Moreover, Diablo Canyon's intake and discharge are located less than one mile from the Point Buchon State Marine Reserve and the adjacent Point Buchon State Marine Conservation Area, which together protect an ecologically diverse seascape and provide a home to more than 700 species of invertebrates, as well as 120 fish species, marine plants, seabirds, and marine mammals. This "MPA (marine protected area) cluster" is important in its own right, as well as being an important part of an ecologically connected network that runs along the coast of California. While Diablo Canyon's intake is not directly within the MPA cluster, the area of source water being drawn into the plant likely overlaps with the MPA boundaries and has the potential to withdraw marine life out of the protected area.

b. *PG&E must be required to do more than just pay mitigation in perpetuity until they decide to decommission Diablo Canyon.*

Despite being the most destructive facility along California's coastline, Diablo Canyon has not been required to comply with Clean Water Act Section 316(b) for over 40 years[5]; and has not been required to implement the state's BTA standard for the last 15 years and counting. If Diablo is permitted to continue intaking seawater without implementing BTA, an estimated 30 billion additional marine life deaths will occur.

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[2] Cal. State Water Res. Control Bd., *Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling*, Substitute Environmental Document, pg. 29 (May 4, 2010); available at https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/otc_sed2010.pdf.
[3] *Id*.
[4] *Id* at 31.
[5] Diablo Canyon became operational in 1985.

The OTC Policy requires Diablo Canyon to implement the BTA standard unless the facility can demonstrate a conflict with nuclear safety requirements or that BTA is infeasible for the factors outline in the OTC Policy**.** According to the 2010 OTC Policy, "State Water Board staff has concluded that impacts associated with OTC operation, including those from Diablo Canyon, *have not been sufficiently addressed such that they can be considered compliant with §316(b)'s technology-based mandate*." Since that conclusion in 2010, Diablo Canyon has done nothing to implement 316(b)'s technology-based mandate except pay for restoration in-lieu of implementing the Best Technology Available standard.

In 2004, the U.S. Court of Appeals for the Second Circuit issued its opinion in *Riverkeeper, Inc. v. EPA*, 358 F.3d 174 (2d. Cir. 2004) (Riverkeeper I), which addressed challenges to the EPA's rule governing cooling water intake structures at new — as opposed to existing — facilities. In 2007, the Second Circuit again decided *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007) (Riverkeeper II). That case reviewed the EPA's 316(b) Phase II Rule, which allowed existing facilities to meet BTA through the use of restoration measures such as restocking fish killed by a cooling water system and improving the habitat surrounding the intake structure. The EPA explained that the rule was created, "to provide additional flexibility to facilities in complying with the rule by eliminating or significantly offsetting the adverse environmental impact caused by the operation of a cooling water intake structure."[6]

The petitioners in *Riverkeeper II*, which included our organization, argued that the U.S. EPA exceeded its authority by allowing compliance with section 316(b) through restoration measures. The court reasoned that *Riverkeeper I* held that the statute's meaning is plain and that restoration measures cannot substitute for the "best technology available for minimizing adverse environmental impact" in cooling water intake structures.[7]

Riverkeeper I conclusively decided that the EPA erred in allowing permit restoration measures, which were not "based on a permissible construction of the statute,", and the case was remanded because the EPA's restoration rule "contradicts Congress's clearly expressed intent."[8] The court stated that "however beneficial to the environment, [restoration measures] have nothing to do with the location, the design, the construction, or the capacity of cooling water intake structures, because they are unrelated to the structures themselves.[9] "Restoration measures *correct* for the adverse environmental impacts of impingement and entrainment," the court noted, but "they do not *minimize* those impacts in the first place."[10]

The court ultimately agreed with us and the other petitioners again, in *Riverkeeper II*, that restoration measures are not part of the location, design, construction, or capacity of cooling water intake structures[11], and a *rule permitting compliance with the statute through restoration measures allows facilities to avoid adopting any cooling water intake structure technology at all, in contravention of the Act's clear language as well as its technology-forcing principle*.[12] Citing back to *Riverkeeper I*, the court stated that "restoration measures substitute after-the-fact compensation for adverse environmental impacts that have already occurred for the minimization of those impacts in the first instance."[13]

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[6] 69 Fed. Reg. 41,609; 40 C.F.R. § 125.94(c).
[7] *Riverkeeper II*, 475 F.3d at 108.
[8] *Riverkeeper I*, 358 F.3d at 181.
[9] *Id.* at 189.
[10] *Id.* (emphasis added).
[11] *Riverkeeper I*, 358 F.3d at 189.
[12] *Riverkeeper II*, 475 F.3d at 110.
[13] *Id*.

c. *The Water Boards' endless compliance extensions for Diablo Canyon without requiring true Best Technology Available is a farce*.

PG&E intends to operate for the next 20 years – and the State of California knows it. Senate Bill 846 (Dodd) was enacted in 2022 to extend Diablo Canyon's OTC operations to 2030. However, initial negotiations of SB 846 considered extending Diablo's OTC operations until 2045. Additionally, the legislative intent of the bill was to ensure 100% renewable and zero-carbon electricity *by 2045 without increasing carbon emissions elsewhere*.[14] Diablo Canyon is considered necessary to remain on-line until 2045 to not increase carbon emissions elsewhere.

Following the enactment of SB 846, on November 7, 2023, PG&E submitted a license renewal application to the Nuclear Review Committee (NRC) to extend the current operating licenses for Diablo.[15] PG&E's license renewal application to the NRC seeks an extension period of 20 years.[16] For Unit 1, this proposed relicensing would extend the operating life from November 2, 2024, to November 2, 2044. For Unit 2, the proposed action would extend the operating life from August 26, 2025, to August 26, 2045.[17]

The Coastal Commission is operating under the presumption that PG&E will be operating until for the next 20 years. PG&E's Coastal Commission's consistency certification reflects its proposal and application to the NRC for renewed operating licenses to allow an additional 20 years of operations. And throughout the Coastal Commission's staff report, the mitigation being proposed and analyzed is for 20 years of additional Diablo OTC operations.[18]

The Water Boards are also aware that Diablo Canyon's 5-year OTC compliance extension is a farce. The Central Coast Regional Board's draft NPDES permit for Diablo Canyon requires a new entrainment study to be completed 6 months prior to the expiration of the NPDES permit.[19] Coincidently, this is also 6 months prior to when Diablo Canyon is theoretically supposed to shutdown in order to achieve BTA compliance with the OTC Policy. Why would the Water Board require a new entrainment study 6 months before the plant presumably decommissions and stops OTC operations?

The Central Coast Regional Water Board held a public workshop on November 12, 2025.[20] During that workshop, CCKA asked the Regional Water Board why the draft NPDES was requiring PG&E to conduct a new entrainment study six months prior to before the facility decommissioning. The staff responded as follows:

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[14] Senate Bill 846 (Dodd), Section 454.53 of the Public Utilities Code is amended to read:
454.53. (a) It is the policy of the state that eligible renewable energy resources and zero-carbon resources supply 100 percent of all retail sales of electricity to California end-use customers and 100 percent of electricity procured to serve all state agencies by December 31, 2045. The achievement of this policy for California shall not increase carbon emissions elsewhere in the western grid and shall not allow resource shuffling.

[15] California Coastal Commission, Diablo Canyon Staff Report, (Oct. 17, 2025); available at https://documents.coastal.ca.gov/reports/2025/11/Th8a-Th9a/Th8a-Th9a-11-2025-report.pdf.

[16] CCC Staff Report. Pg. 28-29.

[17] *Id* at 30.

[18] See CCC Staff Report.

[19] Draft NPDES Permit: "6.3.6.1.1.1. At least six months prior to the expiration date of this Order, the Discharger shall complete and submit an updated impingement and entrainment study. The Discharger shall submit a proposed work plan to conduct the study w ithin nine months of the effective date of this Order. The updated study shall include a minimum of one year of new data collection and must address potential impacts to all threatened, endangered, and other protected species in the vicinity of the intake structure."

[20] See Central Coast Regional Water Quality Control Board, Notice, Diablo Canyon Power Plant Tentative Permits Available, (Nov. 7, 2025).

> "[W]hat we've required in the permit is that *PG&E update the data and submit it with its application for renewal of the permit. So that's six months before expiration date*."[21]

In other words, the Water Board is requiring PG&E to conduct a new entrainment study to help inform Diablo's next permit extension in 2030.

Nobody believes that Diablo Canyon will cease OTC operations by 2030. The legislative intent of SB 846 demonstrates that the state needs Diablo's zero-carbon electricity to continue until 2045. PG&E applied for a 20 year relicense to the NRC to operate until 2045. The Coastal Commission is calculating PG&E's necessary mitigation under the assumption that Diablo Canyon will be operating for the next 20 years. And the Central Coast Regional Board acknowledged that they anticipate PG&E will be submitting an "application for renewal" of this draft NPDES permit "six months before [its] expiration date"…or stated alternatively, the Water Boards' anticipate PG&E will apply for a renewed NPDES permit 6 months before the theoretical requirement for Diablo Canyon to decommission by 2030 to achieve BTA. The draft NPDES permit's requirement for Diablo Canyon to achieve BTA through decommissioning by the 2030 compliance date is an illegal fiction.

II. THE WATER BOARDS' POSITION THAT DECOMMISSIONING AT SOME UNKNOWN FUTURE DATE IS COMPLIANCE WITH THE BEST TECHNOLOGY AVAILABLE STANDARD IS AN ILLEGAL FICTION.

The State Water Board has extended compliance deadlines for several OTC facilities repeatedly. Initially, the OTC Policy's Compliance Schedule was a practical tool to phase-out the use of OTC and bring power plants into compliance with the Clean Water Act, all while ensuring grid reliability. However, the State's repeated compliance schedule extensions have resulted in power plants being allowed to evade Section 316(b) of the Clean Water Act and instead pay a restoration fee in-lieu of ever implementing the required Best Technology Available (BTA). The OTC Policy's interim mitigation measures were intended to encourage power plant operators to phase out OTC operations in a timely manner. Today, however, the interim mitigation measures have lost their temporary, incentivizing character and have instead effectively become a standing method for power plants to avoid implementing technology as envisioned by the Clean Water Act, and instead, choose to pay restoration fees as a permanent solution in lieu of actual compliance with the Clean Water Act and the OTC Policy. While interim mitigation may be acceptable, permanent mitigation as a form of compliance is not. This violates the Clean Water Act mandate to employ the best technology available for minimizing adverse environmental impacts. It further runs counter to the precedent set by the U.S. Court of Appeals for the Second Circuit in *Riverkeeper v. US EPA* (*Riverkeeper I and II*), which held that restoration measures were not an acceptable method of compliance given Congress's clear intent that cooling intake structures be regulated directly.[22] The Second Circuit reiterated, in *Riverkeeper II*, that it is also unacceptable for existing OTC facilities to comply with Section 316(b) through restoration measures in-lieu of implementing BTA.

Diablo Canyon never demonstrated – and the State Water Board never decided – that it was technically infeasible for PG&E to install BTA for Diablo. As the draft Permit's Fact Sheet explains, the OTC Policy allowed operators of nuclear power plants to fund special studies, conducted by independent third parties, to investigate alternatives to meet the requirements of the OTC Policy, including the costs of these alternatives. To satisfy this requirement, in 2014 Bechtel Power Corporation (acting as an independent third party) submitted a study entitled Alternative Cooling Technologies or Modifications to the Existing Once-Through Cooling System for Diablo Canyon Power Plant. However, prior to the State Water Board taking an action on Diablo's alternatives study, PG&E submitted a plan to decommission Diablo

[21] https://cal-span.org/meeting/rwqcb-cc_20251112/audio; at 1:03:33.
[22] *Riverkeeper v. US EPA*, (2nd Circuit, 2004) 358 F.3d 174, 190, 191.

Canyon.[23] In the proposal, PG&E planned to operate Diablo Canyon until the expiration of the NRC licenses for Units 1 and 2 on November 2, 2024, and August 26, 2025, respectively. According to the Regional Board's Staff Report, this "proposal implements Track 1 of the OTC Policy." In 2020, the State Water Board adopted OTC Policy revisions that accepted PG&E's decommissioning dates.

In 2022, Senate Bill 846 (SB 846) was passed into law, extending the operation of Diablo Canyon's two reactor units until October 31, 2029, and October 31, 2030. As discussed below, the enactment of Senate Bill 846 is federally preempted and violates the state's federally delegated authority under the Clean Water Act. However, in SB 846, the Legislature determined that the extended operation was necessary to "improve statewide energy system reliability and to reduce the emissions of greenhouse gases while additional renewable energy and zero carbon resources come online, until those new renewable energy and zero carbon resources are adequate to meet demand." In response to SB 846, the State Water Board again amended the OTC Policy, effective December 5, 2023. The 2023 OTC Policy amendment revised the compliance dates for Diablo Canyon Units 1 and 2 to October 31, 2030, in accordance with SB 846. However, as discussed above, the State of California does not believe Diablo Canyon will be decommissioned by 2030.

The OTC Policy requires all power plants – including the nuclear facilities – to implement the OTC Policy's BTA standard unless the facility can demonstrate a conflict with nuclear safety requirements or that BTA is infeasible under the criteria set forth in the OTC Policy. Diablo Canyon has not demonstrated a safety conflict or that BTA is infeasible for the factors outlined in Section 3.D (8) of the OTC Policy. And as the draft Fact Sheet admits, the State Water Board never made a formal decision that BTA is infeasible. Therefore, Diablo Canyon is still legally required to achieve BTA, which the OTC Policy sets as a 93% reduction in seawater intake.

Our understanding is that the State and Central Coast Regional Water Boar believe that the retirement of Diablo Canyon is sufficient to comply with the OTC Policy because the shutdown would achieve a 93 percent reduction in intake flow rate. However, the Water Boards are aware that Diablo Canyon has no intention of shutting down by 2030 and that additional compliance extensions will be necessary. Allowing PG&E to continue Diablo Canyon OTC operations indefinitely (and expectedly until 2045) without implementing BTA runs afoul of Congress' expressed intent and plain meaning of Clean Water Act section 316(b).

As stated above, the *Riverkeeper* cases clearly expressed that only requiring restoration measures in-lieu of BTA violates the plain meaning of the Clean Water Act. Specifically in the *Riverkeeper II* case, the Court stated that a "rule permitting compliance with the statute through restoration measures allows facilities to *avoid adopting any cooling water intake structure technology at all, in contravention of the Act's clear language as well as its technology-forcing principle*."[24] Congress clearly expressed its intent and the plain meaning of the Clean Water Act to intend that OTC power plants implement technology to minimize entrainment. Allowing an OTC facility to avoid BTA until deciding to shutdown undercuts the entire purpose of Clean Water Act Section 316(b). If Congress intended BTA to include decommissioning OTC operations at some distant, undetermined future date, then every power plant in the nation would simply state they are complying with BTA under Section 316(b) by eventually decommissioning in the future – ultimately undermining the entire purpose of 316(b).

A court would not agree with the Water Boards that decommissioning at a future, undetermined date is compliance with Section 316(b) because that interpretation would lead to an absurd result. Courts avoid statutory interpretations that lead to absurd, impossible, or nonsensical outcomes because they would

[23] Draft Fact Sheet pg. 75.
[24] *Riverkeeper II*, 475 F.3d at 110.

defeat the statute's purpose. This occurs when the interpretation of a statute produces results the legislature clearly could not have intended. Here, Congress clearly did not intend for power plants to simply say they will be decommissioned at some unknown future date and that is sufficient to achieve the technology-forcing statute of Section 316(b).

The U.S. EPA also intends for the Water Boards to require technologies to be implemented during the NPDES permit term and for subsequent permit applications to require additional technologies if needed to minimize marine life mortality. The U.S. EPA's Rule compels the permitting authority, during subsequent permit applications under Track I, to "review the performance of the [additional design and construction] technologies implemented [pursuant to § 125.84(b) (4)-(5), (c) (3)-(4)] and require additional or different design and construction technologies, if needed to minimize impingement mortality and entrainment of all life stages of fish and shellfish."[25]

Ultimately, the use of compliance schedule extensions until PG&E decides it wants to be decommissioned at an unknown later date is an absurd interpretation of Congress' Section 316(b) intent and the already decided *Riverkeeper* cases. The only way for Diablo Canyon to avoid constructing cooling towers, is the Water Board must first determine that constructing cooling towers is infeasible using the factors outlined in Section 3.D (8). As stated above and in the draft Fact Sheet, that process had started but was never completed due to PG&E's commitment to decommission by 2025, which is no longer plausible After determining that BTA is infeasible, the Water Board would then need to establish alternative requirements no less stringent than justified by the wholly out of proportion analysis – again, keeping in mind that PG&E just reported profits of $2.47 billion. There has been no Water Board analysis to-date on alternative requirements no less stringent than justified by the wholly out of proportion analysis. Last, the Water Board must require PG&E to fully mitigate for the difference between impacts resulting from the alternative less stringent requirements. Until this analysis and subsequent requirements are completed, the Water Board is allowing Diablo Canyon to continue OTC operations using only restoration measures in-lieu of achieving BTA.

Alternatively, the Water Board can decide that PG&E is out of compliance with Clean Water Act and the OTC Policy and put Diablo Canyon on a Time Schedule Order to install cooling towers by a date certain during the term of the renewed NPDES permit. The TSO should be explicit that if BTA is not achieved by a date certain (within the 5-year NPDES permit) then the Water Board shall start issuing civil liability fines, above and beyond the interim mitigation fees, until Diablo installs BTA or decommissions.

III. Senate Bill 846 is federally preempted because the bill usurps the Water Boards' federally delegated authority and instructs the Water Boards to issue this NPDES Permit that is noncompliant with federal law.

In 2022, the California Legislature enacted SB 846 (Dodd, 2022), which unilaterally directed state agencies to extend the operating life of the Diablo Canyon Nuclear OTC Facility, including extending the OTC Policy's compliance schedule for Diablo Canyon from 2024 to 2030 (New Water Code Section 131.93.5).[26] The Governor and the California State Legislature overstepped their authority with Senate Bill 846 by requiring the State Water Board to extend the compliance schedule for the Diablo Canyon

[25] 40 C.F.R. § 125.89(b) (1) (i).

[26] Senate Bill 846 (Dodd), Section 10, Section 13193.5 was added to the Water Code. **"**Notwithstanding any provision to the contrary in the State Water Resources Control Board's Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling, as referenced in Section 2922 of Title 23 of the California Code of Regulations, the final compliance dates for Diablo Canyon Units 1 and 2 shall be October 31, 2030. Nothing in this section prevents the state board from ordering the operator of the Diablo Canyon powerplant to conduct any other form of mitigation allowed under this chapter."

Nuclear Facility ("Diablo Canyon"), counter to the Clean Water Act, effectively allowing the powerplant to operate in noncompliance until its retirement. More distressing, Governor Newsom made findings that usurp the State Water Board's authority to determine whether it is feasible for Diablo Canyon to implement the BTA in accordance with the federal Clean Water Act.

Under section 402(b) of the Clean Water Act, the U.S. EPA's authority to issue National Pollutant Discharge Elimination System ("NPDES") permits may be delegated to a state permitting program approved by the U.S. EPA.[27] As part of this delegation, the U.S. EPA must approve the specific policies that the state regulatory body wishes to implement.[28] In California's case, the U.S. EPA has delegated permitting authority to the State Water Board and has approved the Water Board's OTC Policy.[29] Thus, the OTC Policy has the effective legal status of a federal regulation, and the State Water Resources Board is the sole state entity with the delegated federal authority to execute that policy.

A State legislature can direct a state agency with Clean Water Act delegated authority—but only within the boundaries of federal Clean Water Act requirements. As discussed above, the federal courts have ruled repeatedly that a permitting authority cannot allow an OTC facility to comply with Clean Water Act Section 316(b) simply by only requiring restoration measures in-lieu of BTA. SB 846 states:

> "it is the intent of the Legislature that the State Water Resources Control Board, through its authority pursuant to Resolution Number 2010-0020, continue to impose an interim mitigation fee, such as an interim mitigation fee of ten dollars ($10) per million gallons for water, subject to an annual increase, that it deems appropriate in its discretion and that does not exceed all reasonable costs to, or incurred by, the state to address the entrainment impacts resulting from the continued ocean water intakes at the Diablo Canyon powerplant after the current expiration dates set forth in Section 25548.1."

The *Riverkeeper* cases held that the statute's meaning is plain and that restoration measures cannot substitute for the "best technology available for minimizing adverse environmental impact" in cooling water intake structures. And yet that is exactly what the California Legislature and Governor Newsom forced the State Water Board to do when it enacted SB 846. If the legislature's instructions make the agency noncompliant with federal law, EPA can step in or revoke delegation.

A state legislature also cannot usurp the Water Boards' federally delegated authority to issue NPDES permits without independent review. A state legislature may direct a permitting agency to run the NPDES program, but it cannot adopt federal NPDES permits wholesale or compel the agency to do so without following state and federal procedures. Such a system would violate the Clean Water Act and jeopardize the state's delegated authority.

Senate Bill 846 compels the Water Boards' to adopt a NPDES permit without following state and federal procedures. As discussed above, SB 846 usurped the Water Boards' federal delegation by deciding on its own that BTA is infeasible for Diablo Canyon. SB 846 states that Diablo Canyon's 2014 Bechtel Study, which the State Water Board did not take an action upon, "conclusively establish that it is not practicable for the Diablo Canyon Power Plant to achieve final compliance with the 'Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling' before October 31, 2030."[30] The

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[27] 33 U.S.C. § 1342(b).
[28] *Ibid.*
[29] *See* NPDES Memorandum of Agreement Between The U.S. Environmental Protection Agency and The California State Water Resources Control Board (Sept. 22, 1989) (https://www.epa.gov/sites/default/files/201308/documents/ca-moa-npdes_0.pdf.).
[30] SB 846, Section 25548 (e).

decision of whether BTA is feasible under the Clean Water Act rests solely under the authority of the Water Boards' federal delegated authority – not the California Legislature.

The OTC Policy contains specific procedures and requirements that the Water Board must follow when appropriately determining BTA feasibility and compliance deadline extensions.[31] As previously stated, the Policy has federal authority, and thus these procedures are akin to federal regulations with the force of federal law. Regardless, the Governor and State Legislature felt they could circumvent the OTC Policy's procedures and independently determine compliance date extensions and BTA feasibility for Diablo Canyon. The considerations and analyses that the Water Board would have been required to make (and could have more readily made considering its particular expertise), were completely disregarded by the Governor and Legislature in violation of the Clean Water Act.

If a state tries to legislate "automatic adoption" of federal permits, EPA should deem the state noncompliant and can revoke delegation under 40 C.F.R. § 123.63. According to the regulation, the Administrator may withdraw program approval when a State program no longer complies with the requirements of this part, and the State fails to take corrective action. Such circumstances include the following:

> (1) Where the State's legal authority no longer meets the requirements of this part, including:
> (i) Failure of the State to promulgate or enact new authorities when necessary; or
> (ii) *Action by a State legislature* or court striking down or limiting State authorities.
> (2) Where the operation of the State program fails to comply with the requirements of this part, including:
> (i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;
> (ii) *Repeated issuance of permits which do not conform to the requirements* of this part.

The California Legislature and Governor Newsom, in enacting SB 846, has both limited the State Water Board's authority to follow its own OTC Policy; and has forced the Water Boards to issue permits which do not conform to the plain meaning of the Clean Water Act as ruled by the *Riverkeeper* cases in prohibiting the use of restoration in-lieu of BTA.

Governor Newsom has codified restoration measures as the permanent and exclusive method of compliance for Diablo Canyon. Thus, the Governor and Legislature have overtly contravened federal law by passing a bill ordering the Water Board to disregard the Clean Water Act as interpreted by the *Riverkeeper* decisions, and instead, follow a contradictory state law that lacks the authority to evaluate or change the federal regulation of the state's OTC Policy.

By overstepping their authority in this way, the Governor and State Legislature have set a dangerous precedent of disregard for federal law. In making independent determinations of BTA feasibility and compliance schedule extensions for Diablo Canyon, the Governor and Legislature have unlawfully appropriated the Water Board's federal authority and directly contravened the Clean Water Act. Not only do the Governor and Legislature lack the authority to have taken these actions in the first place, but it is even more egregious to have usurped this authority without regard for the OTC Policy's procedures set in place specifically to guide these determinations.

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[31] The State Water Board will convene a Statewide Advisory Committee on Cooling Water Intake Structures (SACCWIS) with representatives from relevant state agencies and the California Independent System Operator to review plans and schedules submitted by dischargers and to ensure that the implementation schedule is realistic and will not jeopardize the reliability of the electric system. SACCWIS will present its recommendations to the State Water Board at least annually, and the State Water Board will amend the Policy as appropriate based on these recommendations. The schedule may also be temporarily suspended, if necessary for grid reliability purposes.

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The Diablo Canyon Nuclear Facility is the largest discharger in the state and the most destructive power plant along California's coast. The endless extensions to Diablo Canyon's OTC compliance schedule - without implementing Best Technology Available - run counter to Congressional intent when enacting Clean Water Act Section 316(b). The legal fallacy that Diablo Canyon will achieve BTA by decommissioning in 2030 is an illegal fiction. PG&E must be required to do more than just pay mitigation in perpetuity until they decide to decommission Diablo Canyon. Furthermore, the State of California overstepped its authority when enacting SB 846 (Dodd, 2022), by usurping the State Water Board's federally delegated authority and unilaterally deciding that Diablo Canyon's OTC compliance schedule should be extended and that BTA is infeasible. Additionally, the State of California illegally erred by allowing Diablo Canyon to pay for after-the-fact restoration as compliance with Clean Water Act Section 316(b) in-lieu of implementing the best technology available. That decision runs counter to U.S. Congressional intent, the statutory text of Clean Water Act Section 316(b), and the *Riverkeeper* federal appellate court decisions.

The Water Boards need to require PG&E to install BTA during the NPDES 5-year coverage, determine that BTA is infeasible for Diablo and find alternative requirements including fully mitigating the gap in protection, or begin enforcement proceedings with a TSO and associated civil penalties against PG&E for being out of compliance with Clean Water Act Section 316(b) and the OTC Policy.

Sincerely,

Sean Bothwell
Executive Director
California Coastkeeper Alliance

ATTACHMENT ONE
CCKA Letter to the State Water Board Regarding Diablo Canyon OTC Policy Extension

March 17, 2023

Chair Joaquin Esquivel and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

RE: Comment Letter – OTC Policy Amendment

Sent via electronic submission to: commentletters@waterboards.ca.gov

Dear Chair Esquivel and Members of the Board,

California Coastkeeper Alliance (CCKA) represents a network of California Waterkeeper organizations dedicated to fishable, swimmable, and drinkable waters for all Californians. We provide the following comments regarding the proposed amendment to the Once-Through Cooling (OTC) Policy extending the compliance schedule for the Alamitos, Huntington Beach, Ormond Beach, Scattergood, and the Diablo Canyon power plants.

On May 4, 2010, the State Water Board adopted the Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling ("OTC Policy"), establishing technology-based requirements to implement federal Clean Water Act section 316(b) provisions to reduce harmful effects on marine and estuarine life associated with cooling water intake structures. Section 2.C(3) of the Policy requires owners or operators of existing power plants to implement measures to mitigate the interim impingement and entrainment impacts resulting from their cooling water intake structures. The interim mitigation period commenced on October 1, 2015, and continues up to and until owners or operators achieve final compliance with the OTC Policy, which they must do by dates established in the Compliance Schedule (Section 3.E).

Compliance deadlines for several facilities have been extended repeatedly, and under the current proposed amendment to the OTC Policy, they stand to be extended again. Initially, the OTC Policy's Compliance Schedule was a practical tool to phase-out the use of OTC and bring power plants into compliance with the Clean Water Act, all while ensuring grid reliability. However, the State's repeated compliance schedule extensions have resulted in power plants being allowed to evade Section 316(b) of the Clean Water Act, and instead pay a restoration fee in-lieu of ever implementing the required Best Technology Available (BTA). The OTC Policy's interim mitigation measures were intended to encourage power plant operators to phase-out OTC operations in a timely manner. Today, however, the interim mitigation measures have lost their temporary, incentivizing character and have instead effectively become a standing method for power plants to evade the law and choose to pay restoration fees as a permanent solution in lieu of actual compliance with the Clean Water Act and the OTC Policy. This violates the Clean Water Act mandate to employ the best technology available for minimizing adverse environmental impacts. It further runs counter to the precedent set by the U.S. Court of Appeals for the Second Circuit in *Riverkeeper v. US EPA* ("*Riverkeeper I*"), which held that restoration measures were not an acceptable method of compliance given Congress's clear intent that cooling intake structures be regulated directly.[1] The Second Circuit reiterated, in *Riverkeeper II*, that it is also unacceptable for existing OTC facilities to comply with Section 316(b) through restoration measures in-lieu of implementing BTA.

Additionally, the Governor and the California State Legislature overstepped their authority with Senate

[1] *Riverkeeper v. US EPA*, (2nd Circuit, 2004) 358 F.3d 174, 190, 191.

Bill 846 by requiring the State Water Board to extend the compliance schedule for the Diablo Canyon Nuclear Facility ("Diablo Canyon"), counter to the Clean Water Act, effectively allowing the powerplant to operate in noncompliance until its retirement. More distressing, Governor Newsom made findings that usurp the State Water Board's authority to determine whether it is feasible for Diablo Canyon to implement the BTA in accordance with the federal Clean Water Act.

Finally, due to the establishment of Assembly Bill 205's Electricity Supply Strategic Reliability Reserve Program ("ESSRRP"), the Statewide Advisory Committee on Cooling Water Intake Structures ("SACCWIS") recommended the Water Boards enact the current proposed amendment to extend compliance dates for four facilities by at least three and up to five years. AB 205 thus creates a statutory basis to coerce the Water Board to continue issuing compliance extensions indefinitely, contrary to section 316(b) of the Clean Water Act, the OTC Policy, and the *Riverkeeper* decisions.

CCKA appreciates that Governor Newsom has put the State Water Board in a precarious position. Our recommendations are intended to help the state not be in this same position five years from now when additional compliance extensions are forced upon the State Board. It is time we stop kicking the proverbial "can down the road", and instead, the State Water Board should:

(1) Remove the SACCWIS and all other provisions allowing for future compliance extensions within the OTC Policy;
(2) Finalize the BTA determination for Diablo Canyon while considering a potential 2030 compliance extension *pursuant to the provisions of the OTC Policy*; and
(3) Start issuing enforcement actions with civil liability fines, above and beyond the interim mitigation fees, for OTC operators that continue to operate without implementing BTA.

I. REPEATED COMPLIANCE SCHEDULE EXTENSIONS ALLOW POWER PLANTS TO EVADE THE LAW AND VIOLATE THE HOLDING OF THE *RIVERKEEPER* CASES.

The State Water Board's ongoing compliance deadline extensions have created a pathway for power plants to evade the requirements of the Clean Water Act. Section 316(b) of the Clean Water Act requires that "location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact."[2]

On May 4, 2010, the State Water Board adopted a statewide policy (Policy) on the use of coastal and estuarine waters for power plant cooling under Resolution No. 2010-0020. The Policy establishes uniform, technology-based standards to implement federal Clean Water Act section 316(b), which requires that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact. The Policy applies to 19 existing power plants, including two nuclear plants. An owner or operator of an existing power plant must reduce the intake flow rate at each unit, at a minimum, to a level commensurate with that which can be attained by a closed-cycle wet cooling system (a minimum 93% reduction compared to the design intake flow rate). If the owner or operator can demonstrate that this is not feasible, the owner or operator may comply by reducing environmental impacts for the facility comparably through other means, using operational or structural controls, or both.

The State Water Board will convene a Statewide Advisory Committee on Cooling Water Intake Structures (SACCWIS) with representatives from relevant state agencies and the California Independent System Operator to review plans and schedules submitted by dischargers and to ensure that the implementation schedule is realistic and will not jeopardize the reliability of the electric system.

[2] *Supra* note 1.

SACCWIS will present its recommendations to the State Water Board at least annually, and the State Water Board will amend the Policy as appropriate based on these recommendations. The schedule may also be temporarily suspended, if necessary for grid reliability purposes.

In *Riverkeeper I,* the Second Circuit Court of Appeals opined on how strict Section 316(b)'s technology-based standard was intended to be by Congress.[3] The regulation subject to dispute in *Riverkeeper I* was the U.S. EPA's two-track permitting system for power plants that utilized OTC.[4] Under this regulation, new facilities intending to use once-through cooling were required to comply with one of two regulatory pathways: Track I, which set out intake capacity and velocity limits as well as "'additional design and construction technologies or operational measures' to minimize impingement mortality and entrainment"; and Track II, under which a facility could take any steps that reduced adverse environmental impact to a level comparable to that achieved by Track I.[5] A group of environmental protection organizations collectively referred to as "Environmental Petitioners" challenged Track II of the regulation, arguing that it unlawfully allowed compliance through restoration measures (including habitat restoration and fish restocking) which were "unrelated to the 'location, design, construction, and capacity of cooling water intake structures'" as the Clean Water Act required.[6] The Court agreed, and concluded that compliance via restoration measures "is plainly inconsistent with the statute's text and Congress's intent in passing the 1972 [Clean Water Act] amendments,"[7] and further holding that "the EPA exceeded its authority by allowing compliance with section 316(b) through restoration measures."[8] Several years later, the Riverkeeper II decision reaffirmed the Riverkeeper I decision that restoration measures cannot be used in-lieu of implementing the Best Technology Available. The *Riverkeeper* cases clearly sets forth that 316(b) of the Clean Water Act demands strict technology-based compliance and that attempts at compliance by any other means, including restoration measures, is unacceptable.

California's OTC Policy does not allow compliance by restoration fees on its face, but rather structures these payments as a temporary solution to the problem of inducing compliance while maintaining power grid reliability.[9] However in reality, the State Water Board's pattern and practice of repeated compliance date extensions has created a system where power plants can opt to pay restoration fees indefinitely until their retirement, in lieu of actual compliance via implementation of the BTA standard. Practically speaking, the State Water Board's interim mitigation measures result in in-lieu restoration when compliance schedules are extended indefinitely until the power plant determines to stop operating. Thus, this proposed amendment and the practices it upholds violate the Clean Water Act, California's own OTC Policy, and the clear precedent set by the *Riverkeeper* decisions.

Considering the above, CCKA requests the State Water Board end the ability to extend the OTC Policy's compliance schedule. By perpetuating endless compliance extensions without any evidence that operators are working towards BTA, the OTC Policy's interim mitigation is now in-lieu restoration. The need to stagger compliance for grid reliability concerns is over. Operators and the energy agencies have had 13 years to ensure grid reliability. At some point – this point – the State Water Board needs to do its Clean Water Act duty to minimize environmental impacts from OTC by requiring BTA. We request that the State Water Board make a clear statement that this is the last compliance extension. If further extensions are warranted to ensure grid reliability than OTC operators better start building cooling towers. We request the State Water Board remove the SACCWIS and all other provisions allowing for future

[3] *See Riverkeeper v. US EPA*, (2nd Circuit, 2004) 358 F.3d 174.
[4] *Id.* at 187.
[5] *Id.* at 182-183.
[6] *Id.* at 187, 189.
[7] *Id.* at 189.
[8] *Id.* at 191.
[9] Cal. Code Regs., tit. 23 § 2922.

compliance extensions within the OTC Policy.

II. GOVERNOR NEWSOM OVERSTEPPED HIS AUTHORITY IN SETTING NEW OTC POLICY COMPLIANCE SCHEDULE EXTENSIONS AND BTA FEASIBILITY FOR DIABLO CANYON.

a. Senate Bill 846 Would Allow the Diablo Canyon Nuclear Facility to Operate in Noncompliance Until Retirement in Violation of the Clean Water Act.

The OTC Policy required special studies for the nuclear-fueled power plants to address their unique issues and to evaluate appropriate requirements for those plants. The special studies were conducted by an independent third party overseen by a Review Committee. The Review Committee produced a report to the State Water Board on the ability of these plants to achieve compliance, the cost of compliance, and potential environmental impacts of compliance. However, the State Water Board never made a final decision as to the BTA for the Diablo Canyon Nuclear Facility (Diablo) due to a settlement between PG&E and some environmental organizations that would result in Diablo shutting down near its OTC compliance deadline.

Senate Bill 846, Section 10, illegally extends the final compliance date for Diablo Canyon to October 31, 2030.[10] As stated in the State Water Board's Notice, the Draft Policy Amendment would make:

> a change without regulatory effect to revise the compliance date for Diablo Canyon Nuclear Power Plant (Diablo Canyon) Units 1 and 2 to October 31, 2030 to comport with the extension provided by Senate Bill 846.[11]

By signing SB 846 into law, Governor Newsom violated the Clean Water Act, because the State Legislature had no federal statutory authority to alter the federally-delegated State Water Board's previously-established compliance deadlines of November 2, 2024 (Unit 1) and August 28, 2025 (Unit 2) for Diablo Canyon.[12] The WCRB imposed those 2024 and 2025 deadlines in order to ensure compliance with the requirement of Section 316 of the CWA, 33 U.S.C. § 1326.[13] Therefore, the deadlines may only be altered by the State Water Board under the authority delegated to it by the Clean Water Act.[14]

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[10] Sen. Bill No. 846 (2021-2022 Reg. Sess.) § 10.
[11] Notice at 1, 3; Draft Policy at 18; Staff Report at 12.
[12] The WRCB originally established a compliance deadline of December 31, 2024 for both Units 1 and 2. *See* Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling at 15 (May 4, 2010) (hereinafter "2010 Statewide Water Quality Control Policy") (https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/cwa316may2010/otcpolicy_final050410.pdf). In 2021, upon receiving notification by PG&E that it intended to retire the Diablo Canyon reactors on their operating license expiration dates of November 2, 2024 for Unit 1 and August 26, 2025 for Unit 2, the WRCB changed the previous compliance date to conform to the reactors' retirement dates. Final Amendment to the Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling (Oct. 19, 2021) (https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/otc_policy_2021/final_amdmt.pdf).
[13] *See* 2010 Statewide Water Quality Control Policy at 1; Final Substitute Environmental Document, Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling at 1-2 (May 4, 2010) ("2010 Final Substitute Environmental Document") (https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/otc_sed2010.pdf).
[14] *See* CWA Section 402, 33 U.S.C. § 1342. *See also* NPDES Memorandum of Agreement Between the U.S. Environmental Protection Agency and the California State Water Resources Control Board (Sept. 22, 1989) (https://www.epa.gov/sites/default/files/2013-08/documents/ca-moa-npdes_0.pdf.)

Senate Bill 846, Section 5, illegally makes a finding that "it is not practicable for the Diablo Canyon Power Plant to achieve final compliance" with the OTC Policy before 2030.[15] Considering that finding, SB 846 mandated that the State Water Board "continue to impose an interim mitigation fee" on Diablo Canyon until its retirement, in place of final compliance with the OTC Policy.[16] Thus, SB 846 has ordered the Water Board to impose interim mitigation fees on Diablo Canyon as its sole form of compliance with Clean Water Act Section 316(b) for the rest of its operational life, in disregard of the actual requirements of federal law.

As previously discussed, the *Riverkeeper* decisions held that restoration measures are not an acceptable form of compliance with section 316(b) of the Clean Water Act and the strict technology-based standard therein. But here, Governor Newsom has codified restoration measures as the permanent and exclusive method of compliance for Diablo Canyon. Thus, the Governor and Legislature have overtly contravened federal law by passing a bill ordering the Water Board to disregard the Clean Water Act as interpreted by the *Riverkeeper* decisions, and instead, follow a contradictory state law that lacks the authority to evaluate or change the federal regulation of the state's OTC Policy.

b. <u>The Governor and State Legislature Usurped the State Water Board's Authority in Determining BTA Feasibility and Compliance Schedule Extensions for Diablo Canyon Nuclear Facility.</u>

Under section 402(b) of the Clean Water Act, the U.S. EPA's authority to issue National Pollutant Discharge Elimination System ("NPDES") permits may be delegated to a state permitting program approved by the U.S. EPA.[17] As part of this delegation, the U.S. EPA must approve the specific policies that the state regulatory body wishes to implement.[18] In California's case, the U.S. EPA has delegated permitting authority to the State Water Board and has approved the Water Board's OTC Policy.[19] Thus, the OTC Policy has the effective legal status of a federal regulation, and the State Water Resources Board is the sole state entity with the delegated federal authority to execute that policy.

Therefore, when the Governor and State Legislature enacted SB 846 and determined that Diablo Canyon's compliance date would be extended and BTA would not be feasible for the Facility, they usurped the federal authority of the Water Board and contravened federal regulation. It is the Water Board, not the Governor or Legislature, which the Clean Water Act has granted the authority to take these actions on behalf of the federal government. It is also only the Water Board which has the expertise needed to conduct the analyses necessary to make these determinations. By overstepping their authority in this way, the Governor and State Legislature have set a dangerous precedent of disregard for federal law by state governments.

Furthermore, the OTC Policy contains specific procedures and requirements that the Water Board must follow when appropriately determining BTA feasibility and compliance deadline extensions. As previously stated, the Policy has federal authority, and thus these procedures are akin to federal regulations with the force of federal law. Regardless, the Governor and State Legislature felt they could circumvent the OTC Policy's procedures and independently determine compliance date extensions and BTA feasibility for Diablo Canyon. The considerations and analyses that the Water Board would have

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[15] Sen. Bill No. 846 (2021-2022 Reg. Sess.) § 5.
[16] *Ibid.*
[17] 33 U.S.C. § 1342(b).
[18] *Ibid.*
[19] *See* NPDES Memorandum of Agreement Between The U.S. Environmental Protection Agency and The California State Water Resources Control Board (Sept. 22, 1989) (https://www.epa.gov/sites/default/files/201308/documents/ca-moa-npdes_0.pdf.).

been required to make (and could have more readily made considering its particular expertise), were completely disregarded by the Governor and Legislature in violation of the Clean Water Act.

By overstepping their authority in this way, the Governor and State Legislature have set a dangerous precedent of disregard for federal law. In making independent determinations of BTA feasibility and compliance schedule extensions for Diablo Canyon, the Governor and Legislature have unlawfully appropriated the Water Board's federal authority and directly contravened the Clean Water Act. Not only do the Governor and Legislature lack the authority to have taken these actions in the first place, but it is even more egregious to have usurped this authority without regard for the OTC Policy's procedures set in place specifically to guide these determinations.

During the State Water Board's March 7th OTC Policy Board Workshop, State Water Board staff responded to CCKA's concerns over the lack of BTA for Diablo Canyon. During the workshop, staff responded to Board Member inquiries by stating that it would be infeasible for Diablo to achieve BTA by 2030 and that the 5 year extension would have minimal environmental impacts. First, there is no evidence in the administrative record that it would be infeasible for Diablo to install BTA by 2030. The Nuclear Review Committee determined that Diablo Canyon had several feasible BTA options – the greatest concern was largely over the cost to comply, but that was ultimately never decided by the State Water Board. Besides the lack of evidence on the record demonstrating BTA is infeasible for Diablo Canyon, including the lack of a final decision by the State Water Board, it is also important to appreciate that Diablo Canyon's marine life impacts are significantly larger than all the remaining OTC power plants combined. Given the immense amount of entrainment caused by the Diablo Canyon Nuclear Facility, the State Water Board should seriously keep-in-mind that a final 2030 operating lifetime is speculative and optimistic at best. SB 846 was originally proposed with a 2035 operating life, with the Governor forcing a 10 year compliance extension upon the State Water Board. The State Water Board should not be naïve to the likelihood that future extensions for Diablo will likely be proposed, and again, forced upon the Board to make. The State Water Board needs to set BTA, and compliance extensions need to end, in order to put PG&E (and Governor Newsom) on notice that if Diablo does not shut down by 2030, then cooling towers are expected to be built in order to comply with Clean Water Act, Section 316(b).

Considering subsections (a) and (b) above, CCKA requests the State Water Board – independent of Governor Newsom's illegal proclamation – finalize its BTA determination for Diablo Canyon, evaluate a potential 2030 compliance extension *pursuant to the provisions of the OTC Policy*, and eliminate the ability for future compliance extensions putting Governor Newsom on notice that extending the life of Diablo past 2030 will require the construction of cooling towers as BTA.

III. ASSEMBLY BILL 205 HAS CREATED A STATUTORY BASIS EFFECTIVELY REQUIRING INDEFINITE COMPLIANCE SCHEDULE EXTENSIONS.

Assembly Bill 205, Section 13 contains multiple findings by the State Legislature which express in sum that the combined effects of climate change, wildfire, drought, and other factors have jeopardized the reliability of California's electricity grid, such that policy changes are needed to ensure reliable and affordable energy.[20] Chapter 2 of Section 13 then lays out the framework for the Electricity Supply Strategic Reliability Reserve Program, which requires the Department of Water Resources and the State Energy Resources Conservation and Development Commission to undertake various contract actions to secure resources for summer energy reliability, including extending the operating life of generating facilities.[21]

[20] Assem. Bill No. 205 (2021-2022 Reg. Sess) § 13.
[21] *Ibid.*

In and of itself, AB 205 does not explicitly *require* SACCWIS or the Water Board to issue compliance schedule extensions under the OTC Policy. However, the ESSRRP is structured such that SACCWIS and the Water Board realistically *must* issue these extensions, even absent a direct command. The ESSRRP needs power plants to produce the energy for the reserve it created, and if these power plants implement BTA in compliance with the OTC Policy, they very likely will not have the production capacity required to generate energy for the reserve. Thus, in order to keep energy available for the ESSRRP as mandated by AB 205, SACCWIS and the Water Board necessarily must continue extending compliance deadlines and allowing these facilities to operate without regard to section 316(b) of the Clean Water Act. We are already seeing this effect play out before us in the extensions currently proposed.

Though AB 205 is not as explicit as SB 846 in its mandate of unlawful extensions, the real-world effects of the ESRRP show that the Bill in fact contravenes federal law in essentially the same way. The structure of the ESSRRP does not give SACCWIS or the Water Board any real choice but to issue repeated compliance schedule extensions under the OTC Policy, leaving restoration fees as the sole form of compliance for these facilities for the foreseeable future. The *Riverkeeper* decisions make clear that restoration measures are not an acceptable form of compliance with the technology-based standard set forth in section 316(b) of the Clean Water Act. In addition, as previously explained, only the Water Board has the delegated federal authority and expertise to issue compliance date extensions. Thus, the Governor and State Legislature have once again exceeded their legal authority in AB 205 by coercing the Water Board into ignoring federal law and issuing compliance schedule extensions in violation of the Clean Water Act.

Considering the above, CCKA requests the State Water Board begin treating the lack of OTC Policy compliance as an enforcement action and require civil penalties for non-compliance with the Clean Water Act. Compliance with Clean Water Act Section 316(b) and continued power operations are not mutually exclusive. The OTC Policy was designed to stagger BTA compliance while keeping the lights on. Continuing to operate in disregard of Section 316(b) until power generation is no longer necessary is not a compliance option within the OTC Policy and runs counter to the Congressional intent of Section 316(b). The time has come to put an end to compliance extensions, and instead start treating those still out of compliance with the 13-year old OTC Policy as violators of the Clean Water Act. Therefore, CCKA requests that in addition to requiring interim mitigation payments, the State Water Board needs to start issuing civil liability fines to those operators that are continuing to use OTC without implementing BTA.

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CCKA has been part of the development and implementation of the OTC Policy for the last two decades. The state was a national-leader and did a laudable job in creating the OTC Policy, but like so many environmental policies in California, the implementation of the Policy has been underwhelming at best. The State Water Board has deferred its Clean Water Act authority in the name of "grid reliability" for far too long. It is time the State Water Board lives up to its delegated Clean Water Act authority to reduce the harmful effects on marine and estuarine life associated with cooling water intake structures. We implore the State Water Board to take measures so that we do not find ourselves here again in another five years. The State Water Board should remove the ability to extend compliance schedules, set BTA for Diablo Canyon, and treat those still operating with OTC as non-compliant and start assessing civil liability penalties above and beyond the existing interim mitigation payments.

Sincerely,

Sean Bothwell
Executive Director
California Coastkeeper Alliance

ATTACHMENT TWO
CCKA LETTER TO THE LEGISLATURE REGARDING SB 846

September 4, 2025

Gavin Newsom
Governor
State of California

Robert Rivas
Speaker of the Assembly
State Capitol

Mike McGuire
President Pro-Tempore
State Capitol

Joaquin Esquivel
Chair
State Water Resources Control Board

RE: Diablo Canyon OTC Nuclear Facility Trailer Bill - OPPOSE

Dear Governor Newsom, Pro Tem McGuire, Speaker Rivas, and Chair Esquivel,

It has come to our attention that there is an unbacked trailer bill being proposed that would divert approximately $8 million annually, an estimated $78 million in total, away from marine life restoration as part of Diablo Canyon Nuclear Facility's intended compliance with the federal Clean Water Act Section 316(b). Instead, those federally-derived funds would be used for land conservation as part of a state legislative agreement in Senate Bill 846 (Dodd – 2022). Our organization has spent the last 20 years advocating for the phase-out of the destructive and antiquated practice of Once-Through Cooling (OTC). We were plaintiffs in successful litigation against the U.S. EPA's OTC Rule and a primary stakeholder in the development and implementation of California's OTC Policy. On behalf of the California Coastkeeper Alliance, we write in strong opposition to this trailer bill proposal and argue it and SB 846 exceeds the State of California's legal authority.

Background

In 2010, the State Water Board used its delegated federal authority under the Clean Water Act to adopt the Once-Through Cooling Policy to establish "uniform requirements for the implementation of §316(b)".[1] Clean Water Act §316(b) requires that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available (BTA) for minimizing adverse environmental impact.[2] Note that the federal statutory language does not mention mitigation funding for after-the-fact restoration projects.

The OTC Policy sets best technology available (BTA) on a statewide basis using Best Professional Judgment; it includes alternative means of compliance (for both fossil-fueled and nuclear-fueled power plants); an implementation schedule; and monitoring provisions to ensure that the goals of the proposed policy are being met.[3] The Policy allowed for a staggered compliance schedule due to grid reliability concerns, with Diablo Canyon originally set to comply by 2024 – 14 years after the Policy was adopted to comply with Clean Water Act Section 316(b).

[1] Cal. State Water Res. Control Bd., *Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling* (May 4, 2010), https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/cwa316may2010/otcpolicy_final050410.pdf.
[2] 33 U.S.C. § 1326
[3] Cal. State Water Res. Control Bd., *Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling* § II.A (May 4, 2010), https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/cwa316may2010/otcpolicy_final050410.pdf.

The Policy also allowed for a controversial – and arguably illegal – interim mitigation fee for any power plant that was still operating OTC after 2015. The NGO community decided to not challenge the interim mitigation because the Policy was strong overall, and the mitigation was only intended to be temporary until BTA was completed. What the NGO community did not realize at the time was that the combination of compliance schedule extensions - coupled with interim mitigation - would result in in-lieu restoration as a means of Section 316(b) BTA compliance for the remaining life of certain power plants – including Diablo Canyon.

Diablo Canyon is the most destructive OTC power plant in California. OTC power plants are generally the largest volume dischargers in the State due to their high use of once through cooling water.[4] Discharge volumes range from 78 to 2670 MGD, with Diablo Canyon being the largest discharger in the state with a discharge of 2,670 MGD.[5] To put that into perspective, San Francisco's Oceanside plant discharges only 43 MGD.[6] Diablo Canyon marine life impacts an average source water coastline length of 46 miles out to 2 miles offshore, an area of roughly 93 square miles, for nine taxa of rocky reef fish.[7]

Federal Courts Have Determined that Restoration Measures Used In-Lieu of Implementing BTA is Illegal Under Clean Water Act Section 316(b)

In 2004, the U.S. Court of Appeals for the Second Circuit issued its opinion in *Riverkeeper, Inc. v. EPA*, 358 F.3d 174 (2d. Cir. 2004) (Riverkeeper I), which addressed challenges to the EPA's rule governing cooling water intake structures at new — as opposed to existing — facilities. In 2007, the Second Circuit again decided *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007) (Riverkeeper II). That case reviewed the EPA's 316(b) Phase II Rule, which allowed existing facilities to meet BTA through the use of restoration measures such as restocking fish killed by a cooling water system and improving the habitat surrounding the intake structure. The EPA explained that the rule was created, "to provide additional flexibility to facilities in complying with the rule by eliminating or significantly offsetting the adverse environmental impact caused by the operation of a cooling water intake structure."[8]

The petitioners in *Riverkeeper II*, which included our organization, argued that the EPA exceeded its authority by allowing compliance with section 316(b) through restoration measures. The court reasoned that *Riverkeeper I* held that the statute's meaning is plain and that restoration measures cannot substitute for the "best technology available for minimizing adverse environmental impact" in cooling water intake structures.[9]

Riverkeeper I conclusively decided that the EPA erred in allowing permit restoration measures, which were not "based on a permissible construction of the statute,", and the case was remanded because the EPA's restoration rule "contradicts Congress's clearly expressed intent."[10] The court stated that "however beneficial to the environment, [restoration measures] have nothing to do with the location, the design, the construction, or the capacity of cooling water intake structures, because they are unrelated to the structures themselves.[11] "Restoration measures *correct* for the adverse environmental impacts of

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[4] Cal. State Water Res. Control Bd., *Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling*, Substitute Environmental Document, pg. 29 (May 4, 2010); available at https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/otc_sed2010.pdf.
[5] *Id*.
[6] *Id*.
[7] *Id* at 31.
[8] 69 Fed. Reg. 41,609; 40 C.F.R. § 125.94(c).
[9] *Riverkeeper II*, 475 F.3d at 108.
[10] *Riverkeeper I*, 358 F.3d at 181.
[11] *Id.* at 189.

impingement and entrainment," the court noted, but "they do not *minimize* those impacts in the first place."[12]

The court ultimately agreed with us and the other petitioners again, in *Riverkeeper II*, that restoration measures are not part of the location, design, construction, or capacity of cooling water intake structures[13], and a *rule permitting compliance with the statute through restoration measures allows facilities to avoid adopting any cooling water intake structure technology at all, in contravention of the Act's clear language as well as its technology-forcing principle*.[14] Citing back to *Riverkeeper I*, the court stated that "restoration measures substitute after-the-fact compensation for adverse environmental impacts that have already occurred for the minimization of those impacts in the first instance."[15]

Ultimately, the *Riverkeeper* cases decided – and were not overturned by the U.S. Supreme Court – that after-the-fact restoration as a means of compliance with Section 316(b) is illegal and cannot be used in-lieu of requiring the best technology available to minimize marine life impacts in the first place.

SB 846 (Dodd, 2022) Illegally Used Restoration Measures In-Lieu of Implementing BTA for Diablo Canyon`

Senate Bill 846 (Dodd, 2022) exposed the illegality of the state's Once-Through Cooling Policy. The OTC Policy's temporary interim mitigation measures were intended to encourage power plant operators to phase out OTC operations in a timely manner. Today, however, the interim mitigation measures have lost their temporary, incentivizing character and have instead become the method for power plants to evade BTA and Congressional intent for federal Clean Water Act Section 316(b). Instead, power plants such as Diablo Canyon are now allowed to pay restoration fees as a permanent solution in lieu of BTA. This violates the Clean Water Act mandate to employ BTA and runs counter to the *Riverkeeper* cases.[16]

In 2022, the California Legislature enacted SB 846 (Dodd, 2022), which unilaterally directed state agencies to extend the operating life of the Diablo Canyon Nuclear OTC Facility, including extending the OTC Policy's compliance schedule for Diablo Canyon from 2024 to 2030 (New Water Code Section 131.93.5).[17] The Legislature also usurped the State Water Board's federally derived authority under the Clean Water Act, and unilaterally determined that BTA for Diablo was not feasible, and interim mitigation should be used for the remaining years of operation.[18]

> *The estimated costs and timelines for design and construction of alternatives that would comply with the State Water Resources Control Board's Resolution Number 2010-0020, Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling, which were presented to the State Water Resources Control Board in accordance with Section 3.D of the Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling, conclusively establish that it is not practicable for the*

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[12] *Id.* (emphasis added).
[13] *Riverkeeper I*, 358 F.3d at 189.
[14] *Riverkeeper II*, 475 F.3d at 110.
[15] *Id*.
[16] *Riverkeeper I*, 358 F.3d at 191.
[17] Senate Bill 846 (Dodd), Section 10, Section 13193.5 was added to the Water Code. **"**Notwithstanding any provision to the contrary in the State Water Resources Control Board's Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling, as referenced in Section 2922 of Title 23 of the California Code of Regulations, the final compliance dates for Diablo Canyon Units 1 and 2 shall be October 31, 2030. Nothing in this section prevents the state board from ordering the operator of the Diablo Canyon powerplant to conduct any other form of mitigation allowed under this chapter."
[18] Senate Bill 846 (Dodd), Section 5, Section 25548 was added to the Water Code.

> *Diablo Canyon Power Plant to achieve final compliance with the "Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling" before October 31, 2030. Accordingly, it is the intent of the Legislature that the State Water Resources Control Board, through its authority pursuant to Resolution Number 2010-0020, continue to impose an interim mitigation fee, such as an interim mitigation fee of ten dollars ($10) per million gallons for water, subject to an annual increase, that it deems appropriate in its discretion and that does not exceed all reasonable costs to, or incurred by, the state to address the entrainment impacts resulting from the continued ocean water intakes at the Diablo Canyon powerplant after the current expiration dates set forth in Section 25548.1.*[19]

The Governor and the California State Legislature overstepped their state authority by enacting Senate Bill 846 and forcing the State Water Board to use its federally delegated authority to extend the OTC compliance schedule for Diablo Canyon. The Governor and California State Legislature also usurped the State Water Board's federally delegated authority to unilaterally determine that BTA is infeasible for Diablo Canyon; and instead, require illegal after-the-fact restoration through mitigation funding, counter to Congressional intent of Clean Water Act Section 316(b) and the federal appellate *Riverkeeper* decisions.

The Currently Proposed Trailer Bill Only Exacerbates the Illegality of SB 846

From our understanding, there is currently an unbacked trailer bill proposal that would take the increased Diablo Canyon OTC mitigation fee away from marine life restoration and instead use it for land acquisition – something with zero relevance to the purpose of the OTC mitigation or Clean Water Act Section 316(b). This trailer bill would only further the illegality of SB 846 by not only allowing Diablo Canyon to use in-lieu restoration as a means of compliance throughout the lifespan of the facility, but also by reappropriating that funding to something that is not even restoration of the impacts caused by the ongoing operation of OTC.

SB 846 was silent on where the funding for land conservation needs to come from. SB 846 states: "(a) Upon appropriation by the Legislature, the sum of ten million dollars ($10,000,000) shall be available in the 2023–24 fiscal year, and the sum of one hundred fifty million dollars ($150,000,000) shall be available in the 2024–25 fiscal year to support a Land Conservation and Economic Development Plan developed by the Natural Resources Agency."[20] There is no reason the funds should come from federally derived funding, nor does this Legislature have the authority to use the OTC mitigation funds however they desire. The OTC funds – already illegal as in-lieu restoration – were intended to mitigate the marine life mortality harm caused by ongoing OTC – not used for land conservation that does nothing to restore or mitigate marine life lost by Diablo Canyon.

Federal law preempts the ability for California to take funding derived from Clean Water Act Section 316(b) and use it for whatever purpose the state desires. As such, the Legislature should reconsider this unbacked trailer bill.

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[19] *Id*.
[20] Senate Bill 846 (Dodd), Section 13.

Diablo Canyon's OTC Mitigation Funds Are Federally Derived – Not State Water Code Derived

SB 846 is wrong in asserting that Diablo Canyon's OTC mitigation funding is derived from the Water Code. In the summary of SB 846, the bill states that:

> (5) Under the Porter-Cologne Water Quality Control Act, the State Water Resources Control board is required to adopt specified state policies with respect to water quality as it relates to the coastal marine environment, including a policy requiring new or expanded coastal powerplants and other industrial installations using seawater for cooling, heating, or industrial processing to use the best available site, design, technology, and mitigation measures feasible to minimize the intake and mortality of all forms of marine life. Pursuant to that policy, the state board has adopted a policy to phase out once-through cooling for powerplants and issued an order implementing this policy and establishing an interim mitigation fee to address the impacts caused by once-through cooling during the phase-out period.

This is blatantly wrong and conflicts with the statutory language of SB 846. First, Diablo Canyon is not a "new or expanded" coastal powerplant, so Water Code Section 13142.5(b) does not even apply to this circumstance.

Second, the State Water Board is explicitly clear – throughout all of its OTC Policy documentation – that the OTC Policy was established to implement the federal Clean Water Act Section 316(b). According to the State Water Board's website, "[t]he OTC Policy establishes uniform, technology-based standards to *implement federal Clean Water Act (CWA) Section 316(b)* and reduce the harmful effects associated with cooling water intake structures on marine and estuarine life."[21]

Lastly, the summary conflicts with the bill's own statutory text. Public Resource Code 25548 of SB 846 states that it is the "intent of the Legislature that the State Water Resources Control Board, *through its authority pursuant to Resolution Number 2010-0020*, continue to impose an interim mitigation fee…".[22] As discussed above, the State Water Board was clear within Resolution 2010-0020 that the OTC "Policy (see Attachment 1) establishes uniform requirements for the *implementation of §316(b)*, using best professional judgment in determining BTA for cooling water intake structures at existing coastal and estuarine power plants that must be implemented in NPDES permits."[23] The OTC mitigation funds for Diablo Canyon were federally derived – not state Water Code derived – and therefore it is beyond this state Legislature's authority to appropriate those funds for another purpose other than for the implementation of the Clean Water Act.

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The Diablo Canyon Nuclear Facility is the largest discharger in the state and the most destructive power plant along California's coast. The State of California overstepped its authority when enacting SB 846 (Dodd, 2022), by usurping the State Water Board's federally delegated authority and unilaterally deciding that Diablo Canyon's OTC compliance schedule should be extended and that BTA is infeasible. Additionally, the State of California illegally erred by allowing Diablo Canyon to pay for after-the-fact restoration as compliance with Clean Water Act Section 316(b) in-lieu of implementing the best

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[21] Cal. State Water Res. Control Bd., *Once-Through Cooling Policy*, https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/policy.html (last visited Sept. 3, 2025).
[22] Senate Bill 846 (Dodd), Section 5, Section 25548 was added to the Water Code.
[23] Cal. State Water Res. Control Bd., *Resolution No. 2010-0017, Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling* (May 4, 2010), https://www.waterboards.ca.gov/board_info/agendas/2010/may/050410_5res.pdf

technology available. That decision runs counter to U.S. Congressional intent, the statutory text of Clean Water Act Section 316(b), and the *Riverkeeper* federal appellate court decisions. Lastly, the Legislature's current consideration to reappropriate approximately $78 million in federally derived funding intended to restore marine life lost through ongoing Diablo OTC operations only exacerbates the illegality of SB 846. For those reasons, we strongly recommend the State of California reconsider their actions as it pertains to Diablo Canyon Nuclear Facility's Clean Water Act compliance with Section 316(b).

Sincerely,

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