

**CALIFORNIA LAW REQUIRES THE STATE WATER RESOURCES CONTROL BOARD TO BALANCE ENVIRONMENTAL BENEFITS AGAINST ECONOMIC FACTORS TO ENSURE THE REASONABLENESS OF THE POLICY**  
(September 29, 2009)

The U.S. Supreme Court, in *Entergy*,<sup>1</sup> held that economics and cost considerations can be taken into account by the U.S. Environmental Protection Agency when establishing best technology available (BTA) under Section 316(b) of the federal Clean Water Act. As a result, California law is not inconsistent with, or preempted by, federal law when it requires the State Water Resources Control Board (Board) to ensure the reasonableness of its policies under Section 316(b) by balancing environmental benefits with economic factors. As shown below, the California Porter-Cologne Act, California Environmental Quality Act, and the California Administrative Procedures Act require the Board to balance economic factors against potential environmental benefits to ensure the reasonableness of the proposed Draft Proposed Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling, June 30, 2009 (Policy).

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

The text of the Porter-Cologne Act embodies economic balancing principles. The first section of the Act states:

The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

Cal. Water Code § 13000 (emphasis added). The Board must conform to and implement this policy in every action they take. Cal. Water Code § 13001 (“The state board and regional boards in exercising any power granted in this division shall conform to and implement the policies of this chapter...”).

On top of the general requirement for balancing economics and costs whenever adopting a regulation, the Porter-Cologne Act specifically directs the consideration of economics when water quality objectives are established:

[W]ater quality objectives in water quality control plans... will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree

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<sup>1</sup> *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009).

without unreasonably affecting beneficial uses. Factors to be considered by a regional board<sup>2</sup> in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

...

(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

...

(d) Economic considerations.

Cal. Water Code § 13241(c), (d) (emphasis added). Read together, these two subsections indicate that the Porter-Cologne Act requires regulations to be reasonable and achievable, and that what is reasonable and achievable can be determined only in light of economic considerations.

The definitive legislative history of the Porter-Cologne Act is consistent with this mandate, indicating that a critical component of the legislation is striking a balance between protecting water quality and important economic interests:

The increasing demands on California's limited water resources make urgent the broad-scale planning and sound decision-making needed to protect or enhance the quality of all waters of the state. This urgency is superimposed upon important economic and scientific considerations.<sup>3</sup>

The Legislature resolved the potential tension between society's environmental and economic needs by requiring environmental consequences of water quality regulations to be balanced against the economic and non-economic costs of those regulations:

[B]alance environmental characteristics, past, present and future beneficial uses, and economic considerations (both the cost of providing treatment facilities and the economic value of development) in establishing plans to achieve the highest water

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<sup>2</sup> Although this provision refers to regional boards, it likely is binding on the Board when it acts in its capacity to implement rules and regulations.

<sup>3</sup> State Water Resources Control Board, *Final Report of the Study Panel of the California State Water Resources Control Board* ("Study Panel Report") at 1 (1969) (emphasis in original); State Water Resources Control Board, Order WQ 2001 - 15 at 12 (2001) ("The Final Report of the Study Panel to the California State Water Resources Control Board (March, 1969) is the definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act.").

quality which is reasonable.

*Id.* at 13. The substantive balancing of the economic and non-economic costs of the Policy requires more than a mere awareness of the costs. Balancing, by its nature, requires a weighing of the costs to implement the Policy (including economic and environmental costs) against the benefits to be achieved. As the agency tasked with ensuring reasonable water quality regulation, the Board must safeguard not only the environment, but also the public's economic interests:

The recommended language (section 13000, paragraph 2) recognizes that efforts made toward accomplishing the ideal of clean water must accelerate but that economic progress and development is essential, not, however, at the sacrifice of the environment.

The key to the proper balancing of these interests lies only partly in established statewide policy. The regional and state boards which, in their decisions in which policy is applied to specific cases, weigh the benefits and costs to society, are the ones who actually determine this balance. In performing this function, there is no substitute for sound judgment.

Study Panel Report at 7 (emphasis in original). In summary, the Porter-Cologne Act requires the Board to balance the costs of implementing the proposed Policy (including economic and environmental costs) against its potential environmental benefits to ensure the Policy's reasonableness.

## II. THE CALIFORNIA ENVIRONMENTAL QUALITY ACT REQUIRES AN ANALYSIS OF ECONOMIC FACTORS

CEQA also requires a consideration of costs when an agency establishes a performance standard. Pub. Res. Code § 21159. It is clear the Policy involves performance standards. The Substitute Environmental Document (SED)<sup>4</sup> for the Policy states: "The Policy contains technology-based performance standards to address adverse impacts from OTC systems" (emphasis added).<sup>5</sup> The SED's "Statement of Goals" section includes a goal to: "Establish technology-based performance standards that will implement CWA §316(b)" (emphasis added).<sup>6</sup>

Thus, the Board's analysis of the Policy must "take into account a reasonable range of environmental, economic, and technical factors, population and geographic areas, and specific sites." Cal. Pub. Res. Code § 21159(c) (emphasis added).

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<sup>4</sup> Draft Substitute Environmental Document, dated July 2009.

<sup>5</sup> *Id.* at 13.

<sup>6</sup> *Id.* at 14.

### III. THE CALIFORNIA ADMINISTRATIVE PROCEDURES ACT REQUIRES A CONSIDERATION OF REASONABLENESS

Under the California Administrative Procedures Act, “State agencies proposing to adopt, amend, or repeal any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements.” Gov’t Code § 11346.3(a) (emphasis added).<sup>7</sup> On its face, this statute requires the Board, at a minimum, to identify businesses that could be affected by the Policy, determine what costs they would be required to bear under the Policy, and to weigh whether those costs are reasonable.

### IV. CONCLUSION

In sum, multiple, overlapping authorities—including the Porter-Cologne Act, CEQA, and the California Administrative Procedures Act—require the Board to balance economics when considering the reasonableness of the Policy. Balancing economics requires more than a mere awareness of the potential costs of the Policy; at a minimum, it requires the Board to determine whether the Policy is reasonable when its economic costs are weighed against environmental and other factors.

The Policy fails the reasonableness standard established by California law. The two-page economic analysis provided in the SED does not adequately describe or evaluate the costs (both economic and non-economic) of the Policy or ensure its reasonableness. A sufficient balancing of costs and benefits is not provided. Our economic analysis (attached separately) provides evidence that the present value cost of the Policy would be about \$3.09 billion for only \$29 million in benefit – which raises serious questions about the Policy’s reasonableness. As a result, the Policy is unlawful at this point because a complete economic analysis has not been made available to the public that meets the requirements of California law.

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<sup>7</sup> The California Court of Appeal has confirmed that the requirements of the California Administrative Procedures Act apply to the RWQCBs. *State Water Res. Control Bd. v. Office of Admin. Law*, 12 Cal. App. 4th 697, 707 (1993) (“[A]ny new water quality control programs must comply with the APA.”).