Mills Legal Clinic
Stanford Law School

Environmental Law Clinic

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 725-8571
Fax 650 723-4426

April 13, 2010

Via Electronic Mail

Jeanine Townsend, Clerk of the Board
Charlie Hoppin, Chair and Board Members
California State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, California 95814
E-mail: commentletters@waterboards.ca.gov

Comments on Draft Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling and Final Substitute Environmental Document (March 22, 2010)

Dear Ms. Townsend, Chair Hoppin and Board Members:

Please accept the following comments on the State Water Resources Control Board's ("State Board") March 22, 2010, Draft Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling ("Policy") and Draft Substitute Environmental Document for the Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling ("SED"). We incorporate by reference all of the prior written and oral comments submitted by the Stanford Environmental Law Clinic since 2005, when the State Board commenced its consideration of a new Policy, and we request that those prior comments be included in the administrative record for any final decision on the Policy.[1] Additionally, although we submit these comments to meet the April 13, 2010, deadline set in the State Board's March 24, 2010, Notice of Adoption Meeting, we do not waive our right to submit and have the Board fully consider and respond to additional comments up to 15 days before the noticed Adoption Meeting on May 4, 2010. 23 C.C.R. § 3779(b).

As a initial matter, we note our extreme disappointment with the radical changes made to the proposed Policy since the last draft issued on November 23, 2009. As you know, staff's effort to develop a statewide policy began in September 2005 as a way to enhance protection of California's invaluable coastal resources, consistent with the state's strong resource protection laws, through adoption of a uniform approach that all regional boards would follow. Over the next four years, the draft Policy evolved to accommodate both ecological and energy reliability concerns and was moving toward an approach that satisfied the minimum requirements of the Clean Water Act, as well as the key environmental protection policies embodied in state law. That careful and deliberate

[1] These include oral testimony at the September 26, 2005 and December 7, 2005, workshops, as well as written comments dated May 20, 2008 and September 30, 2009.

process was thoroughly undermined by the abrupt change-of-course proposed in the latest draft. Perhaps most illustrative of this fact is elimination of the word "uniform" in the Policy recitals and its replacement with substantive provisions that carve out huge regulatory exemptions for individual power plants. These exemptions not only are bad policy for California's coastal communities, they are in several cases plainly inconsistent with section 316(b) of the Clean Water Act and vulnerable to successful legal challenge.

For all of the reasons set forth below, and for the reasons explained in the comments filed by California Coastkeeper Alliance et al., we urge the State Board in the strongest possible terms to reject the unlawful provisions inserted into the latest revision of the draft Policy and redirect staff to come back to the Board with something much closer to the November 2009 version of the document. The current draft Policy unlawfully exempts certain facilities from section 316(b), unlawfully delegates Clean Water Act regulatory authority over other facilities to other state actors, improperly implements the concept of compliance schedules, illegally relies on mitigation measures in lieu of timely technology upgrades, and wholly disregards the Board's public trust stewardship obligations. Failing to cure these legal defects is likely to lead to years of litigation. If the State Board is unwilling to adopt a statewide policy that is truly uniform, protective, and consistent with its myriad state and federal statutory obligations, Board members would better serve California by simply leaving implementation of section 316(b) to individual regional boards.

I. The State Board's Stewardship Duties Extend Well Beyond Its Obligations under the Federal Clean Water Act.

Before addressing specific provisions of the latest draft Policy that are inconsistent with existing federal law and sound public policy, we briefly reiterate the basic state law framework that should drive the adoption of any forward-looking coastal power plant cooling water regulation. The Board ignores the state's overarching legal framework at its peril – and at the peril of our coastal ecosystems and the vast communities that depend upon them.

California has long been a leader among states in environmental protection. Over the last three decades, and particularly in the last several years, the California Legislature and Governor have enacted a series of laws and initiatives that comprise a comprehensive, multi-pronged effort to protect and restore California's coastal resources. California's environmental standards are in many ways more stringent than federal requirements, and they provide the State Board with ample authority – and in some cases, the legal obligation – to set rigorous statewide guidelines for the rapid phase-out of outdated once-through cooling system technology.

A. The Public Trust Doctrine

Chief among these overarching state obligations is the oldest one of all – the public trust doctrine. Now enshrined in statute and the California Constitution as well as the common law, the public trust doctrine imposes a solemn duty on state agencies, including the State Board, to hold coastal lands in trust for the people of California. *See* Cal. Const., art. X, sec. 3; *Atwood v. Hammond*, 4 Cal.2d 31, 40 (1935); and *City of Long Beach v. Mansell*, 3 Cal.3d 462, 485 (1970). The state can abdicate this public trust responsibility only in the rarest of circumstances, when the land is found to be useless for public trust purposes. *Mansell*, 3 Cal.3d at 485-86. Even then, an act of the Legislature is required to release the land from the public trust burden. *Id.*

The California Supreme Court has recognized the protection of ecological integrity as a core contemporary public trust value:

> [O]ne of the most important public uses of the tidelands – a use encompassed within the tidelands trust – is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.

Marks v. Whitney, 6 Cal.3d 251, 259-60 (1971). *See also National Audubon Society v. Superior Court*, 33 Cal.3d 419, 435 (1983). Indeed, the Court has long held that California holds title to fish in state waters "in trust for the people of the state," *People v. Monterey Fish Prods. Co.*, 195 Cal. 548, 563 (1925), and it has repeatedly recognized the paramount ecological and recreational importance of coastal wetlands. *State v. Sup. Ct. of Placer County*, 29 Cal. 3d 240, 245-46 (1981).

Like other state agencies, the State Board has an affirmative and continuing duty to protect and enhance the public trust resources under its supervision. *Audubon*, 33 Cal. 3d at 437 ("The state has a duty to exercise continued supervision over the trust, and cannot abdicate its trust any more than it can abdicate its police powers."); *id.* at 446 ("The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."). In making decisions, therefore, it must avoid "unnecessary and unjustified harm to trust interest," and it has an obligation to "preserve, so far as consistent with the public interest, the uses protected by the trust." *Id.* at 446-47.

Permissible uses of public trust resources should "encompass changing public needs . . . . [without being] burdened with an outmoded classification favoring one mode of utilization over another." 6 Cal. 3d 251, 259-60 (1971). State agencies unlawfully abuse

the public trust if they make concessions to individuals for the perpetual and exclusive use of portions of state waters without reference to the needs of other inhabitants. *City of San Diego v. Cuyamaca Water Company*, 209 Cal. 105, 118 (1930). Accordingly, a policy or regulation that privileges an outmoded cooling technology to the detriment of ecological health – as is the case with the new draft Policy – patently violates the State Board's public trust obligations.

B. The Porter-Cologne Act

The State Board's statutory duties under the Porter-Cologne Water Quality Control Act reinforce and bolster this public trust obligation. For example, the statute provides the "highest priority" to improving or eliminating adverse affects to "the coastal marine environment," including specifically "wetlands, estuaries, and other biologically sensitive sites." Cal. Water Code § 13142.5. Indeed, the Porter-Cologne Act evidences a special legislative concern with the impact of cooling water systems on "coastal wetlands [and] areas of special biological importance, including marine reserves and kelp beds" and with the state's need to maintain "overall ecological balance" in these areas. *Id.*

To operationalize this abiding concern, the statute mandates that "[f]or each new or expanded coastal powerplant or other industrial installation using seawater for cooling, heating, or industrial processing, the best available site, design, technology, *and* mitigation measures feasible shall be used to minimize the intake and mortality of all forms of marine life." Cal. Water Code § 13142.5(b) (emphasis added). Thus, in developing a policy to regulate expanded and repowered coastal thermal plants, the State Board must require use of the best feasible cooling water technology for minimizing intake and marine impacts. As the studies of coastal plant cooling systems completed by various California agencies and consultants over the last few years amply demonstrate, alternatives to once-through cooling are technologically available (and have been for decades) and generally are physically, economically, and otherwise feasible for most coastal power plants in California. Thus, the adoption of a statewide directive that delays or defers the phase-out of once-through cooling and effectively "grandfathers" certain once-through cooling systems for the next several decades – as does the significantly revised draft Policy – is wholly inconsistent with the Legislature's intent and direction.

C. The California Coastal Act

California's bedrock coastal protection statute, the California Coastal Act, is to the same effect. It sets a broad and stringent mandate for protecting marine resources along the coast of California. The Coastal Act begins with the unequivocal recognition that "the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem" and that "the

permanent protection of the state's natural and scenic resources is a *paramount concern* to present and future residents of the state and nation." Cal. Pub. Res. Code § 30001 (emphasis added). It further declares that to protect "wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction." *Id.* While the Coastal Commission is the agency with primary enforcement authority under the statute, "[a]ll public agencies . . . shall comply with the provisions of [the Coastal Act]." Cal. Pub. Res. Code § 30003.

> Of particular relevance here is the Coastal Act's strict admonition that:
>
> Marine resources shall be maintained, enhanced, and, where feasible, restored. . . . Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.
>
> The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms . . . shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment . . .

Cal. Pub. Res. Code § 30230-31. Again, the studies of once-through cooling systems conducted by the state over the last few years demonstrate that continued use of that outmoded technology at California's coastal power plant fleet is having significant adverse impacts on marine ecosystems. The State Board's failure to protect these marine resources from the continued destruction caused by entrainment – particularly where alternative technologies are available, feasible, and being used throughout the nation – in the draft Policy is plainly unlawful under the Coastal Act.

D. Other Marine Protection Statutes

Likewise, the proposed Policy flies in the face of more recently enacted California legislation designed to increase the protection of marine resources from inappropriate uses. For instance, in 1999, California passed the Marine Life Protection Act ("MLPA"), which mandated the creation of a network of marine protected areas throughout the state. The MLPA emphasizes the state's broad concern with the conservation of California's coastal resources, aiming "[t]o protect the natural diversity and abundance of marine life, and the structure, function, and integrity of marine ecosystems" and "[t]o help sustain, conserve, and protect marine life populations, including those of economic value, and rebuild those

that are depleted." Cal. Fish & Game Code § 2853. The governor's office followed this with the Marine Life Protection Act Initiative, which has created a public-private partnership across the state to achieve the goals of the MLPA.

In 2000, California adopted the Marine Managed Areas Improvement Act with an express purpose "to ensure the long-term ecological viability and biological productivity of marine and estuarine ecosystems and to preserve cultural resources in the coastal sea." Cal. Pub. Res. Code § 36620. And in 2004, the Legislature enacted and the Governor signed into law the California Ocean Protection Act ("COPA"), which mandated the creation of the Ocean Protection Council to address the problems facing California's coast in a comprehensive way. COPA recognizes that California's marine resources are held in trust by the state for the people of California and declares that the "governance of ocean resources should be guided by principles of sustainability, ecosystem health, precaution, recognition of the interconnectedness between land and ocean, decisions informed by good science and improved understanding of coastal and ocean ecosystems, and public participation in decisionmaking" because "California's coastal and ocean resources are critical to the state's environmental and economic security, and integral to the state's high quality of life and culture." Cal. Pub. Res. Code § 35505(a), (c). Under COPA, it is state policy to "incorporate ecosystems perspectives into the management of coastal and ocean resources, using sound science, with a priority of protecting, conserving, and restoring coastal and ocean ecosystems, rather than managing on a single species or single resource basis." *Id.* § 35510(b)(3).

Given this broad, proactive, comprehensive effort by California to put an end to the degradation of the state's coastal resources, it makes no sense whatsoever for the State Board to adopt a new policy that does just the opposite. What started out as an effort to enhance and accelerate coastal resource protection has turned into a draft Policy that will leave our marine ecosystems less protected than ever. The Policy will displace regular, five-year section 316(b) compliance determinations for individual facilities with blanket technology exemptions at some plants, protracted compliance schedules that can be delayed indefinitely without public input at others, and the possibility that facilities may substitute after-the-fact mitigation for readily available and feasible alternative technology. Allowing coastal power plants to continue using outdated technology, when less harmful technologies are feasible, and giving them a competitive advantage over inland plants by allowing them to use billions of gallons of public seawater each day without compensation, is an abuse of the State Board's stewardship obligations under the public trust doctrine and various statutory mandates.

II. The Draft Policy Violates the Clean Water Act in Several Significant Ways.

A. The Exemption for Combined-Cycle Facilities Is Patently Illegal.

One of the most significant legal defects in the current Policy is its treatment of facilities that have installed combined cycle units over the last several years. Under proposed section 2.A(2)(d)(ii), these plants are deemed to be using "best technology available" as long as they meet a maximum intake flow velocity – a requirement that may address impingement impacts but does not mitigate entrainment impacts – and undertake some level of after-the-fact mitigation. In essence, this provision carves out from the requirements of section 316(b) a subset of facilities that have partially repowered with combined-cycle generating technologies and shields them from "best technology available" compliance for the next several decades over which they will operate.

This exemption is illegal in several respects. First, section 316(b) does not exempt facilities that use combined-cycle generating technologies, and the State Board does not have the discretion to create such an exemption. Although combined-cycle generating technology is somewhat more efficient at producing electricity than steam turbine technology – and for that reason will be the technology used by all future repowering of California coastal plants – it has no relation to the relevant section 316(b) question of what cooling system technology minimizes adverse impacts to marine life.

Indeed, combined-cycle generating technology does not appreciably reduce entrainment intake. For instance, in 2001, the Moss Landing facility installed two new combined-cycle generating units that utilize a once-through cooling system with a design intake flow capacity, according to the SED, of 361 million gallons per day. The five old steam turbine units they "replaced"[2] had a combined design flow capacity of 380 million gallons per day. Those facts speak for themselves and plainly indicate that the repowered generating technology does not minimize intake impact and would not come close to meeting the 93 percent reduction standard contained in the draft Policy. Other than creating a sweetheart deal for the owner of the Moss Landing facility, we are at an utter loss to understand why the State Board would want to shield such an environmentally destructive intake system from further scrutiny. Not only is such an exemption bad public policy, it unquestionably is illegal under the Clean Water Act and will become the subject of litigation.

---

[2] These older units had been decommissioned by the prior plant owner years before the new owner sought and obtained permission to install the more efficient new units. That is, the old units were no longer functional and the new units were, therefore, a significant expansion of the facility.

Moreover, proposed section 2.A(2)(d)(ii) allows these repowered units to satisfy their section 316(b) obligations through the use of after-the-fact mitigation, in clear violation of federal law. Although the SED recognizes that use of after-the-fact mitigation to satisfy section 316(b)'s technology requirement is "plainly in consistent with the statute and impermissible," SED at 7 (citing *Riverkeeper, Inc. v. U.S. EPA*, 475 F.3d 83 (2d Cir. 2007) (*Riverkeeper II*)), the draft Policy does exactly that, allowing so-called "interim" mitigation measures to permanently satisfy "best technology available."

Finally and incredibly, proposed section 2.A(2)(d)(I) of the Policy attempts to extend this illegal exemption to existing units that have not been repowered and to future units that have not even been built by counting after-the-fact mitigation for the installed combined-cycle units toward section 316(b) compliance. Because this exemption seems directly targeted at facilities like Moss Landing, where some new combined-cycle units have been constructed but older units also continue to operate, the Board should understand precisely what occurred during the regional board's permitting of the new units. Although the plant owner now contends otherwise, the NPDES permit speaks itself:

> [Finding] 49: Minimization of adverse impacts of the intake system to Elkhorn Slough watershed can be accomplished in two ways: 1) modification of the existing intake system to reduce entrainment and impingement; and 2) environmental enhancement projects that result in permanent preservation or direct enhancement of Elkhorn Slough watershed resources. . . . modifications [required by the permit] alone are not sufficient to minimize adverse environmental effects of the intake system and to achieve compliance with the BTA requirements of section 316(b) because the modifications do not address entrainment impacts.
>
> [Finding] 50: The enhancement program, in addition to the modifications to the intake system described above, will minimize adverse environmental effects of the intake system on the Elkhorn Slough watershed resources so that Duke Energy can comply with Clean Water Act section 316(b). Adverse environmental effects will be minimized by increasing health and biological productivity of aquatic habitat in the Elkhorn Slough watershed.
>
> [Finding] 51: Based upon the above findings, implementation of the above described modifications, and complete funding of the environmental enhancement program, as described in the above finding, constitutes compliance with Clean Water Act section 316(b) by implementing BTA that minimizes adverse environmental effects on the environment due to operation of the modernized MLPP cooling intake system.

It is thus abundantly clear that the "best technology available" finding in the Moss Landing NPDES permit was explicitly (and illegally) premised in large part on the provision of mitigation funding. That unlawful finding is the subject of litigation before the California Supreme Court. The State Board should not repeat the same mistake again.

In illegally lowering the compliance bar for facilities that have partially repowered, the draft Policy seems to conflate generating technology upgrades with cooling system upgrades. The two have virtually nothing to do with each other, and the former cannot be used to satisfy the requirements of section 316(b). As the Board is aware, the Clean Water Act is a technology-forcing statute intended to inexorably reduce impacts to aquatic resources over time. *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 155-56 (1985); *Natural Res. Def. Council, Inc. v. U.S. EPA*, 859 F.2d 156, 208-09 (D.C. Cir. 1988); *Natural Res. Def. Council, Inc. v. U.S. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1057 n.79 (D.C. Cir. 1978); *Riverkeeper II*, 475 F.3d at 107-8, *rev'd sub nom on limited grounds*, *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1515 (2009) (Breyer, J. concurrence noting "Congress' technology-forcing objectives"). This overarching Clean Water Act purpose is implemented primarily through the five-year permit renewal system whereby facility technology comes under repeated and continuous compliance scrutiny. Because the draft Policy proposes to circumvent this core feature of the law by permanently deeming relatively new combined-cycle units as "best technology," it violates the letter and intent of the Clean Water Act and will struck down by a court.

The two-tiered system established by section 2.A(2)(d) is not only illegal, but bad public policy. It effectively grants a huge competitive advantage to those plants that repowered shortly before, rather than after, adoption of the policy. There simply is no public policy justification for such a distinction. All aging coastal power plants along the California coast will have to either repower and close. Those that repower will do so with combined-cycle generating technology because it is more efficient, not because it reduces entrainment impacts. The draft Policy offers no rationale for exempting some facilities from more stringent intake system requirements but not others, when both will install virtually the same electric generating technology. When combined-cycle units were installed in 2001 at the Moss Landing facility, for example, the U.S. EPA's best technology studies had already been completed, and they very clearly demonstrated that closed-cycle cooling was available, feasible, and economically practicable. The owners of the Moss Landing plant simply chose not to utilize closed-cycle technology, proceeding at their own risk with an antiquated once-through cooling system. That the State Board would now see fit to retroactively reward such conduct – to the competitive disadvantage of other facilities – with a permanent "best technology" determination is unfathomable and certainly gives the appearance of an improper back room deal.

In short, the draft Policy's current approach tiers early and late adopters of combined-cycle technologies along a dimension completely irrelevant to water quality. The only relevant factor in determining compliance is whether they have adopted technology that minimizes effects on marine life. There is no legal or policy justification or environmental relevance to favoring those who happened to convert earlier to a different energy-generation technology for reasons having nothing to do with intake impacts.

B. The Draft Policy Illegally Delegates Clean Water Act Compliance Authority to Other Agencies and Non-Governmental Organizations.

The draft Policy also illegally delegates permit compliance authority to agencies and non-governmental organizations other than the State and Regional Water Boards, in clear violation of the Clean Water Act. In particular, it impermissibly grants agencies other than the Water Boards, most notably the non-governmental California Independent System Operator ("CAISO") but also to a lesser extent other state agencies, ultimate control over compliance with section 316(b) best technology requirements. For instance, the Policy provides that notification by CAISO, subject to the objections of the California Energy Commission and the California Public Utilities Commission, "will suspend final compliance dates." Draft Policy § 2.B(2)(a)-(b).[3] The Policy then directs that the State Board "shall implement the recommendations of CAISO" concerning amendment or suspension of compliance deadlines unless it finds there is "compelling evidence" not to do so and makes a finding of "overriding considerations." *Id.* § 2.B(2)(d). Requiring such deference does not comport with EPA's delegation of NPDES authority to California, which requires that the Water Boards alone be able to exercise full authority to make permitting decisions solely on the basis of the CWA-mandated analysis that cooling intake mechanisms use the "best technology available for minimizing adverse environmental impact." 40 C.F.R. § 123.1. Adopting this provision of the draft Policy renders California's NPDES program vulnerable to suspension or withdrawal by EPA.

As written, the draft Policy subjects individual facilities to Clean Water Act liability through citizen and EPA enforcement. In particular, the draft Policy requires individual NPDES permits to incorporate these compliance suspension provisions which would allow permit modification "without reopening the permits." Draft Policy § 3C(4). The federal courts have concluded that extension or suspension of compliance schedules without actual permit modification does not protect a permittee from citizen suits or federal enforcement. *Citizens for a Better Environment-California v. Union Oil Co. of California*, 861 F. Supp. 889, 900-01 (N.D. Cal. 1994). Allowing very significant permit revisions that could indefinitely suspend compliance dates is plainly unlawful under the Clean Water

[3] Similarly, notice from the Los Angeles Department of Water and Power compels the State Board to conduct a hearing on whether to suspend final compliance dates.

Act and renders the draft Policy, as well as individual facility permits, vulnerable to legal challenge.

III. The Draft Policy and SED Fail to Account for the Enormous Social and Economic Value of Our Vibrant Coastal Communities.

After nearly five years of development, the draft Policy constitutes a radical departure from the last, evolving version of the document, unsupported by either the analytic basis for that departure or adequate consideration of the environmental consequences. The unreasonably short time period between issuance of the revised Policy and the deadline for submission of comments precludes us from preparing a longer analysis of the environmental and socioeconomic impacts of the proposal and, as noted above, we reserve our right to submit additional comments on this issue pursuant to 23 C.C.R. § 3779(b). As a preliminary matter, however, we note that the draft Policy and SED fail to adequately evaluate the impact of this proposal – including potential long-term suspension of section 316(b) compliance dates – on the interests of coastal residents and other industries that have made California by far the country's biggest coastal treasure and economy.

According to a July 2005 report by the National Ocean Economics Program, California has the largest ocean economy in the United States, making up 19 percent of the national ocean economy as of the year 2000. The fastest growing coastal economic sector is tourism and recreation, making the protection and enhancement of coastal resources of paramount importance. Moreover, as of 2000, 77 percent of California's population lived in coastal counties, which represent just 25 percent of the land. Coastal county Gross State Product in 2000 accounted for approximately 86 percent of California's total Gross State Product. *California's Ocean Economy, Report to the Resources Agency, State of California*, The National Ocean Economics Program (July 2005). *See also Coastal and Ocean Economic Summaries of the Coastal States 2009*, The National Ocean Economics Program (June 2009); *State of the U.S. Oceans and Coastal Economies 2009*, The National Ocean Economics Program. The draft Policy potentially undermines these significant environmental and socioeconomic interests in the health of our coastal ecosystems by potentially enshrining a "business as usual" approach to destructive power plant cooling systems.

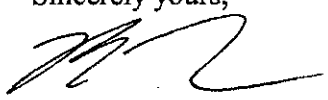
Indeed, the draft Policy violates the clear directive under the State Board's certified CEQA functional equivalent program that "[t]he board shall not approve a proposed activity if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the proposed activity may have on the environment." 23 C.C.R. § 3780. At the very least, the Board must more thoroughly evaluate the potential environmental, social, and economic impacts on our

precious public trust resources of disregarding this regulatory mandate.

* * * *

In closing, we urge the State Board to reject the strange new turn that the draft Policy has taken. As now proposed, the Policy will not increase regulatory certain or the orderly transition to a cleaner coastal energy economy. The Policy's impermissible special exemptions, unlawful compliance delay provisions, and illegal delegations of authority will prevent the Policy from serving as the uniform, coordinated, environmentally protective vehicle for section 316(b) implementation that staff originally envisioned. To the contrary, because the draft Policy is now so clearly unlawful under both federal and state law, litigation over its adoption and subsequent application is all but inevitable. And a petition to withdraw EPA approval of the state's NPDES program will surely follow. The best course is for the Board to reject the new proposal and instead return to more reasoned and careful deliberation of the November 2009 draft policy.

Sincerely yours,



Jacob Hale Russell, Clinic Student
Deborah A. Sivas, Clinic Director
Robb W. Kapla, Clinic Fellow