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**:**

INTRODUCTION

As provided by the State Water Resources Control Board's (WRCB's) Notice of Document Availability, Opportunity for Public Comment, and Public Hearing (Jan. 4, 2023) (hereinafter "Notice"), San Luis Obispo Mothers for Peace, Environmental Working Group, and Friends of the Earth (collectively "Commenters") hereby comment on the Draft Amendment to the Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling (hereinafter "Draft Policy Amendment") and the Draft Staff Report submitted in support of the Draft Policy Amendment).[1]

These comments focus on the proposed changes to the deadlines for compliance by the Pacific Gas and Electric Co. (PG&E) with Section 316(b) of the federal Clean Water Act (CWA) for the Diablo Canyon nuclear power plant ("Diablo Canyon"). Section 316 of the CWA requires that "the location, design, construction and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impacts."[2]

As stated in the 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.[3]

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[1] The WRCB has posted the Notice at https://www.waterboards.ca.gov/public_notices/comments/water_quality_enforcement/notice_wqenforcement_021023.pdf. The Draft Policy Amendment and the Draft Staff Report are posted at https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/policy.html.

[2] 33 U.S.C. § 1326. *See also* 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).

[3] Notice at 1, 3; Draft Policy Amendment at 18; Draft Staff Report at 12.

The Draft Policy Amendment would extend by five to six years the current compliance dates of November 2, 2024 for Unit 1 and August 28, 2025 for Unit 2.[4]

Commenters respectfully submit that the proposed change to the deadlines for complying with Section 316(b) are unlawful because the WRCB has not complied with its own legal processes for establishing or changing CWA compliance deadlines, as set forth in the 2010 Policy.

Moreover, contrary to the WRCB's assertion, a recently passed State law, S.B. 846, purportedly setting a new compliance deadline for Diablo Canyon, has no lawful effect on the 2024 and 2025 deadlines established in the 2010 Policy and 2021 Policy Amendment. The U.S. Environmental Protection Agency (EPA) has delegated the authority to WRCB to carry out the requirements of the CWA.[5] The EPA gave no such authority to the California Legislature. Therefore, statutory compliance deadlines may only be altered by the WRCB under the authority delegated to it by the CWA and the Memorandum of Agreement between the State and the U.S. Environmental Protection Agency (EPA), for implementation of the CWA.

Accordingly, the WRCB must not interpret S.B. 846 as extending Diablo Canyon's compliance deadline with the OTC Policy because to do so would run afoul of WRCB's delegated authority by the USEPA; the existing compliance deadlines of November 2, 2024 (Unit 1) and August 28, 2025 (Unit 2) for PG&E to come into compliance with CWA Section 316(b) must be maintained. And because the WRCB has determined that cooling towers constitute the "best technology available" (BTA) for achieving compliance with Section 316(b), PG&E must be required to install cooling towers by those dates.[6]

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[4] Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling at 15 (May 4, 2010) (hereinafter "2010 Policy"). The WRCB originally established a compliance deadline of December 31, 2024 for both Units 1 and 2. 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) ("2021 Policy Amendment") (https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/otc_policy_2021/final_amdmt.pdf).

[5] *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.)

[6] *See* 2010 Policy at 4. *See also* Final Substitute Environmental Document at 58-66. The WRCB must disregard the finding contained in § 5 of S.B. 846 that cooling towers are not "feasible," because the California Legislature has no delegated statutory or regulatory authority to make such a finding, nor is there any substantial evidence supporting such a finding.

LEGAL AND FACTUAL BACKGROUND

The WRCB's authority to issue and amend its 2010 Water Quality Control Policy arises from the CWA, passed by Congress in 1972 to regulate discharges of pollutants into the waters of the United States. The CWA is administered by the EPA through the issuance of National Pollutant Discharge Elimination System (NPDES) permits.[7] Under Section 402(b) of the CWA, EPA has delegated NPDES permitting authority to the California WRCB through the 1989 MOA.[8] As summarized in the 2010 Final Substitute Environmental Document:

> In 1972, the California Legislature amended Porter-Cologne to provide the state the necessary authority to implement an NPDES permit program in lieu of a USEPA-administered program under the CWA. To ensure consistency with CWA requirements, Porter-Cologne requires that the Water Boards issue and administer NPDES permits such that all applicable CWA requirements are met. The State Water Board is designated as the state water pollution control agency under the CWA and is authorized to exercise any powers accordingly delegated to the State.[9]

NPDES permits issued by the WRCB "must comply with all minimum federal clean water requirements" and "are issued under an EPA-approved state water quality control program."[10] In administering this EPA-approved program, the WRCB and all other State agencies must acknowledge and apply "the supremacy of federal law."[11]

In 2010, in an exercise of its delegated authority under the CWA, the WRCB established a Statewide Water Quality Control Policy.[12] Based on an exhaustive environmental study as documented in the Final Substitute Environmental Document, the WRCB concluded that for

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[7] 33 U.S.C. § 1251, *et seq.* The CWA amended and significantly expanded the 1948 Federal Water Pollution Control Act.

[8] *See* note 5 above. The MOA delegates EPA's authority to regulate water quality to the WRCB as "the State water pollution control agency for all purposes of the Clean Water Act." *Id.* at 1.

[9] *Id.* at 8 (citing Wat. Code, div. 7, ch. 5.5; Wat. Code, § 13377; California Code of Regulations (CCR), tit. 23, § 2235; CCR § 13160; CCR §§ 13,372, 13377; 40 C.F.R. Parts 122, 123, and 124).

[10] *Voices of the Wetlands v. State Water Resources Control Board,* (2011) 52 Cal. 4th 499 (citing the Porter-Cologne Water Quality Control Act (Porter-Cologne Act; Wat. Code, § 13000 et seq.); Wat. Code §§ 13372, 13377; 33 U.S.C.§ 1342(b); 40 C.F.R. §§ 123.21-123.25 (2011); 39 Fed. Reg. 26061 (Jul. 16, 1974); 54 Fed. Reg. 40664-40665 (Oct. 31, 1989)).

[11] *Id.,* 52 Cal. 4th at 521 ("Under the CWA, a federal statute, any facility that discharges wastewater into a navigable water source . . . must have an unexpired permit, conforming to federal water quality standards, in order to do so.").

[12] 2010 Statewide Water Quality Control Policy, (https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/cwa316may2010/otcpolicy_final050410.pdf.)

existing power plants including Diablo Canyon, closed cycle wet cooling systems (*i.e.*, cooling towers) constituted the Best Technology Available (BTA).[13]

Thus, Diablo Canyon was required to install cooling towers by December 31, 2024, unless it could demonstrate that cooling towers were infeasible or created a conflict with U.S. Nuclear Regulatory Commission (NRC) safety requirements.[14] The Policy also established a staggered compliance schedule for the 19 electric plants covered by the requirement, and set up a Statewide Advisory Committee on Cooling Water Intake Structures (SACCWIS) composed of representatives from the WRCB, the California Energy Commission (CEC), the California Public Utilities Commission (CPUC), the California Independent System Operator (CAISO) and other interested State agencies to "review implementation plans and schedules" for the purpose of ensuring that "the implementation schedule takes into account local area and grid reliability, including permitting constraints."[15] Finally, the Policy provided for suspension of compliance dates, but only after a determination by CAISO that continued operation "is necessary to maintain the reliability of the electric systems," and only after a public hearing on that determination.[16] Between 2010 and the deadlines for installing cooling towers, the affected companies (including PG&E) were ordered to contribute to a mitigation fund.[17]

In 2016, PG&E entered a settlement agreement with labor unions and environmental groups to close Units 1 and 2 on their operating license termination dates of November 2, 2024 (Unit 1) and August 28, 2025 (Unit 2).[18] The California Public Utilities Ccommission approved the settlement in 2018.[19] PG&E took no steps to install cooling towers, because PG&E officials considered the expense to be unnecessary given PG&E's 2016 agreement with labor unions and environmental groups to close the reactors on their NRC license termination dates.[20]

On September 2, 2022, California Legislature passed into law S.B. 846, directing the California Public Utilities Commission to execute several tasks and consider specific criteria

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[13] *Id.* at 4. *See also* Final Substitute Environmental Document at 58-66.

[14] *Id.* at 4, 8, 15.

[15] *Id.* at 2.

[16] *Id.* at 6.

[17] *Id.* at 7.

[18] *See* Joint Proposal by Pacific Gas and Electric Company, Friends of the Earth, Natural Resources Defense Council, *et al.* to Retire Diablo Canyon Nuclear Power Plant at Expiration of the current Operating Licenses and Replace it With a Portfolio of GHG Free Resources (filed before the CPUC June 20, 2016).

[19] California Public Utilities Commission Decision No. 18-01-022 (January 11, 2018), https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M205/K423/205423920.PDF. The CPUC decision was codified in Cal. Senate Bill 1090 (Monning), signed by then-Governor Jerry Brown on September 19, 2018.

[20] *See* https://www.pgecorp.com/corp_responsibility/reports/2021/pl04_water.html.

related to the potential extension of operations at Diablo Canyon, and providing an over $1billion loan to PG&E to support continued operation for at least five years past the previously-approved retirement dates of 2024 for Unit 1 reactor and 2025 for Unit 2 reactor.[21]

In Section 10 of S.B. 846, the state legislature added a new Section 13193.5 to the California Porter-Cologne Act:

> 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.

S.B. 846 includes a finding in Section 25548(b) that "[p]reserving the option of continued operations of the Diablo Canyon powerplant for an additional five years beyond 2025 may be 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."

DISCUSSION[22]

As held by the California Supreme Court in *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, the WRCB's actions must, above all, be consistent with federal law.[23] Here, federal law is established by Section 316 of the CWA; the MOA; and the WRCB's duly-promulgated policy for implementing Section 316, the 2010 Statewide Water Quality Control Policy. Where action by the State legislature is inconsistent with a federal law, here the CWA and its implementing state law and policy, it must be disregarded.

The WRCB Staff Report interprets S.B. 846 in a manner which results in inconsistencies with the CWA and the 2010 Policy in several key respects.

First, by claiming that 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" the WRCB staff is essentially claiming that the Legislature has usurped WRCB's regulatory authority and has, as such, *per se* extended the compliance dates legislatively. If this is indeed a correct reading of SB 846, which Commenters do not necessarily concede, then this

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[21] S.B. 846 Sections 5 and 9(c)(1)(a); California Public Utilities Commission Order Instituting Rulemaking (R.23-01-007), at pp..1, 2.

[22] Commenters incorporate by reference the California Coastkeeper Alliance's points and authorities on this matter.

[23] *Voices*, supra 52 Cal.4th 499, 509.

provision of SB 846 is *ultra vires* and must be disregarded. (*Estate of O'Dea* (1973) 29 Cal.App.3d 759,771-772 [If a legislative body passes an act which involves a matter upon which the legislature has not been given the power to legislate, the legislative act is necessarily ultra vires and the court in those instances would have not only the power but the duty to so declare].) The Clean Water Act does not permit the state legislature to contravene its terms, nor does the MOA between the federal government and the state. Under the MOA between the State and USEPA, as well as the corresponding provisions of the Porter-Cologne Act, only the WRCB can change the compliance schedule established in the 2010 Statewide Water Quality Control Policy pursuant to the required procedures and processes.

Further, Section 5 of SB 846 makes a bald claim that "it is not practicable for the Diablo Canyon Power Plant to achieve final compliance" with the OTC Policy before 2030. However, the OTC Policy contains specific procedures and requirements that WRCB must follow when appropriately determining BTA feasibility and compliance deadline extensions. The OTC Policy has federal authority, and thus these procedures are akin to federal regulations with the force of federal law, which the state cannot legislatively circumvent. For this reason, notwithstanding the legislature's claim to the contrary, unless WRCB completes its process of determining whether BTA is cost-prohibitive vis-à-vis its environmental benefits, and supports any such determination with substantial evidence, the Draft Policy Amendment may not lawfully be approved by WRCB.[24]

In addition, the State legislature cannot lawfully mandate the WRCB to "continue to impose an interim mitigation fee"[25] on Diablo Canyon until its retirement, in lieu of the procedures and requirements of the OTC Policy; SB 846 cannot lawfully order 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, because to do so would be ordering the Water Board to violate the federal court's holding in *Riverkeeper, Inc. et al. v. U.S. Environmental Protection Agency*, (2nd Cir, January 25, 2007) 475 F.3d 83. *("Riverkeeper II")*. Thus, because legislation may not be interpreted in a manner that would lead to absurd results (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003)[26], the WRCB must do more

[24] As California Coastkeeper Alliance notes in its comment letter, 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." To the extent that the WRCB staff's comments at the workshop regarding BTA infeasibility and minimal environmental impacts might be considered implied or express findings, these findings are not supported in law or substantial evidence.

[25] Section 5 of SB 846; Pub. Res. Code section 25548(e).

[26] Legislation should be construed, if reasonably possible, to preserve its constitutionality and thus avoid the constitutional issue inherent in a contrary construction (*Department of Corrections*

than simply impose a mitigation fee on PG&E. Instead, it must order PG&E to install cooling towers by 2024/2025, or demonstrate, supported by substantial evidence, why the environmental benefits of doing so do not outweigh the financial costs of installing them.

As stated by the WRCB Staff in the Final Substitute Environmental Document on its OTC Policy, "[t]his policy is needed to address an ongoing critical impact to the State's waters that remains unaddressed at the national level for existing facilities despite § 316(b)'s enactment more than 35 years ago." With the passage of an additional twelve years since 2010, it is now 47 years since enactment of CWA Section 316. And Diablo Canyon has been operating for many decades with an antiquated OTC system that causes massive adverse impacts to the marine environment. In fact, substantial evidence, which is contained in the record on the OTC Policy, demonstrates that Diablo Canyon's marine life impacts are significantly larger than all the remaining OTC power plants combined.

Commenters urge the WRCB to stay true to its word:

> Thus, in passing the 2021 amendment to the 2010 Statewide Water Quality Control Policy that conformed the compliance dates for the Diablo Canyon reactors to their [2024/2025] retirement dates, the WRCB committed that it remains "firmly committed"to "timely compliance" with the deadlines for modernizing cooling systems at electric plants.[27]

CONCLUSION

The WRCB should withdraw its proposal to revise the November 2, 2024 and August 28, 2025 deadlines as set forth in the 2021 amendment to the 2010 Statewide Water Quality Control Policy. Finally, the WRCB should clarify that it will require Diablo Canyon to operate in compliance with those deadlines or require that the reactors must cease to operate.

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v. Workers' Comp. Appeals Bd. (1979) 23 Cal. 3d 197, 207; *Conservatorship of Hofferber* (1980) 28 Cal. 3d 161, 175; *Rowe v. Superior Court* (1993) 15 Cal. App. 4th 1711, 1722.)

[27] WRCB Resolution 2020-0029 at 4.

Dated: March 17, 2023

Respectfully submitted,

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