IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FOUR

WORLD BUSINESS ACADEMY Petitioner and Appellant, v. CALIFORNIA STATE LANDS COMMISSION, Defendant and Respondent, PACIFIC GAS & ELECTRIC COMPANY, Real Party in Interest and Respondent.	Court of Appeal No. B284300 (Superior Court No. BS163811)

Appeal from an Order
of the Superior Court, County of Los Angeles
Hon. Mary H. Strobel

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PARTIES

The undersigned, counsel of record for Petitioner and Appellant, World Business Academy, certifies that the following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, Rule 8.20(e)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, Rule 8.209(c)(2)):

1. World Business Academy.

Dated: October 23, 2017

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I. INTRODUCTION AND SUMMARY OF APPEAL

The World Business Academy seeks environmental review of Pacific Gas & Electric's ("PG&E") proposal to replace state public trust land leases encompassing a portion of the water cooling facilities for Diablo Canyon Nuclear Power Plant ("Diablo"), which utilize a once-through cooling system using offshore seawater as a coolant. This leased land is a prerequisite for Diablo's continued operation.[1]

On August 28, 1969, prior to the enactment of California's Environmental Quality Act ("CEQA"), the State Lands Commission ("Commission") authorized a 49-year lease (expiring August 27, 2018) to PG&E for a portion of the cooling facilities located on state land (Lease No. 4307.1 or "Unit 1") and another 49-year lease on May 28, 1970, for the other portion of the cooling facilities on state land that expires on May 31, 2019 (Lease No. PRC 4449.1 or "Unit 2").

On June 28, 2016, the Commission approved replacement of the leases expiring on November 24, 2024 (Unit 1) and August 26,

[1] Facts in this introduction are cited to the record *post*.

2025 (Unit 2) without performing an Environmental Impact Report ("EIR") required under CEQA. In doing so, the Commission determined that the project was categorically exempt under the Class 1 exemption for existing facilities, without diligently determining whether an "exception to the exemption" would apply.

In so doing, the Commission failed to follow the procedural requirements of the two-prong test set forth in the Supreme Court's decision in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1092, that the Commission determine first whether "unusual circumstances" exist, and second, "whether there is a fair argument of a reasonable possibility of a significant effect on the environment due to those unusual circumstances."

In *Berkeley Hillside*, the Court specifically held that the CEQA statute and its implementing regulations, the CEQA Guidelines, "prescribe review procedures a public agency must follow before approving or carrying out certain projects." *Berkeley Hillside*, 60 Cal.App.4th at 1091-92. Despite this directive from the Court, the Commission issued a one paragraph conclusory statement with no analysis of whether there are "undue circumstances" or "whether there is a fair argument of a

reasonable possibility of a significant effect on the environment due to those unusual circumstances."

Instead, the Commission concluded that it did not have to follow this two-prong analysis because PG&E had not changed its existing operations, which they erroneously believe was sufficient to displace the *Berkeley Hillside* analysis.

The trial court erred by following the Commission's misapplication of law with respect to the holding in *North Coast Rivers Alliance, et. al. v. Wetlands Water District, et. al.* (2014) 227 Cal.App.4th 832, when it concluded that all the environmental damage stemming from the continued operation of the plant must be ignored because it is part of the existing "baseline" of historical operations. While the trial court reversed the Commission's finding and correctly held that unusual circumstances exist, the trial court incorrectly determined that thirty plus years of continuous operations invalidates Appellant's compelling expert evidence that 1) continued operation of the plant could result in a Fukushima type disaster, 2) a nuclear meltdown, 3) increased cancer and infant death rates, 4) catastrophic loss of marine life, 5) risks from cyber and terrorist attacks, and 6) accumulation and leakage of radioactive

waste.

All this evidence was submitted in detail to both the Commission and the trial court, and all of it was virtually ignored. The Commission and trial court's conclusions are directly contrary to CEQA's purpose of "[providing] long-term protection to the environment" and the California Supreme Court's holdings and decision in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1092. There is no question under the statute that further action was necessary pursuant to CEQA.

The Commission and the trial court's error in the first place was to apply the existing facilities exemption at all. Relying on administrative history and common sense, Appellants argued that the Secretary of Natural Resources ("Secretary") never intended nor possessed the authority to exempt a facility generating nuclear power because there is no question that it has a significant effect on the environment. As noted in *Berkeley Hillside*, *supra*, by statute, the Legislature directed the Secretary to establish "a list of classes of projects that have been determined not to have a significant effect on the environment and that shall be exempt' from CEQA." *Id*. The cooling facilities

at issue (or the desalinization plant or even the plant itself), have never undergone an environmental review and could not possibly fall within an exempt class because they operate as part of a nuclear power plant, which clearly has a significant effect on the environment. Truths such as these are self-evident.

As such, this Court is respectfully requested to reverse the trial court's judgment in the public interest and to remand this case for issuance of a peremptory writ holding that an exemption does not apply. Thereafter, the Commission must proceed with an Initial Study to decide whether to issue a negative declaration or prepare an environmental impact report. Alternatively, this Court may remand the matter to the trial court with instructions that the Commission apply the second-prong of *Berkeley Hillside* and determine whether there is a fair argument regarding a reasonable possibility of a significant effect on the environment due to the unusual circumstances as held to exist by the trial court.

II. STATEMENT OF FACTS

Two state land leases enabling operation of the cooling water discharge channel, water intake structure, breakwaters, a desalinization plant and associated infrastructure at the Diablo

Canyon Nuclear Plant (Diablo) are at the heart of this case. These leases are a prerequisite for the continued operation of Diablo, and without them, Diablo cannot function. The last remaining nuclear plant in California, Diablo is located along the Central Coast shoreline upwind from San Luis Obispo and adjacent communities, in direct proximity to several major earthquake faults.

As these two existing leases were scheduled to expire, respectively, on August 27, 2018, and May 31, 2019, Pacific Gas & Electric Company ("PG&E") sought new 7-year lease extensions until November 24, 2024 (Unit 1) and August 26, 2025 (Unit 2).[2]

The issue before the Commission was whether PG&E, whose initial leases were granted more than a decade prior to the enactment of the California Environmental Quality Act ("CEQA"),[3] was entitled to an exemption from CEQA environmental impact reporting requirements in relation to the Commission's issuance of the new leases. Remarkably, an Environmental Impact Report has never been prepared for

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[2] See, Vol. 4, Joint Appendix (hereafter "JA"), pp. 706-707.

[3] California Health and Safety Code, Section 21000, *et seq*.

Diablo, despite numerous changing circumstances calling its environmental security into question. At a hearing on December 18, 2015, on open record, Lieutenant Governor Gavin Newsom stated his opinion that there is **no** exemption from CEQA for Diablo, likening Diablo to offshore oil derricks that are subject to CEQA reporting requirements when their leases are renewed. His initial legal assessment was correct under prevailing law.

The February 9, 2016 staff report, prepared before any political deal emerged, contains evidence showing that the exemption did not apply. (See February 9 Staff Report, 4 JA 661-666). Despite this assessment, on June 21, 2016, just one week prior to the Commission's scheduled final hearing on the lease application, PG&E announced a proposal under which it would agree to retire the Diablo plant in 2025, if certain non-profit groups agreed to forego challenges to its application for renewal of the state land leases. In essence, PG&E requested an exemption from CEQA in exchange for an agreement to close Diablo in 2025, the expiration date of its license to operate under the federal Nuclear Regulatory Commission ("NRC").

Thereafter, on June 28, 2016, the Commission completely reversed course from its previously stated inclination to apply

CEQA and officially approved Calendar Item 96, granting Diablo a new lease until 2025 without any environmental review, on grounds that the project was exempt from CEQA as an "existing" facility.[4] The Commission made no explanation on why the exemption applied in direct contradiction to its prior staff report.

In its drastically revised report, Commission staff prepared incomplete and cursory findings. For example, the findings did not even mention, much less address, evidence in the record that cancer rates and infant mortality are increasing in relation to proximity and downwind location to the Plant. The report's summary findings merely concluded that an exemption as an existing structure applied, negating application of CEQA, with only a single boilerplate paragraph as an explanation for this decision. In contrast to the Commission, which provided no summary or analysis of its "substantial evidence," Petitioners and others submitted a broad range of substantial supporting evidence to the Commission.

The Commission approved the exemption, despite the fact that numerous attendees commenting at the June 28, 2016 meeting clearly demonstrated that the purported exemption did

[4] See, 4 JA 687, 785-787; 5 JA 1128.

not apply to cases, such as this one, where there is a reasonable possibility that the activity will have a significant adverse effect on the environment due to unusual circumstances.[5]

Appellant World Business Academy thereafter sought a Writ of Mandate to require the Commission to make a finding, as it was inclined to do earlier, that CEQA does apply and must be followed.

III. STATEMENT OF THE CASE.

Following the timely filing of this mandamus action, the record was prepared, and the case was briefed and argued. While there are disputes regarding evidence admitted by the trial court, there are no disputes about the content of the record which was jointly filed. The Honorable Mary H. Strobel denied the petition on July 11, 2017. (12 JA 288-2922 and 13 JA 2923-2941) Appellant timely filed this appeal on August 8, 2017. (13 JA 3000-3002)

IV. ISSUES.

1) Did the State Lands Commission fail to proceed in the

[5] See, 4 JA 981, 988, 990, 995, 1005-1006, 1011, 1017, 1033-1034, 1059; 6 JA 1321; 6 JA 1406-10; 8 JA 1769, 8 JA 1772-74. Also see, CEQA Guidelines Section 15300(c), which states: "[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment."

manner required by law when it approved the lease replacements for the cooling facilities associated with Diablo Canyon Nuclear Power Plant without following the two-prong test set forth in Berkeley Hillside and failing to conduct adequate CEQA review?

2) Did the State Lands Commission and the trial court err by concluding that a nuclear power generation plant is included within the exemption for "existing structures?"

V. SCOPE AND STANDARD OF REVIEW.

A. Appellate Review is *De Novo.*

In CEQA mandamus actions, "the trial and appellate courts occupy in essence identical positions with regard to the administrative record, exercising the appellate function of determining whether the record is free from legal error." *Bowman v. Petaluma* (1986) 185 Cal.App.3d 1065, 1076. The scope of this Court's review of the certified record encompasses a *de novo* determination of whether or not the State Lands Commission prejudicially abused its discretion in approving the replacement leases based on a categorical exemption from CEQA.

While there are disputes regarding evidence admitted by the trial court, there is no dispute about the contents of the record which was jointly filed. Abuse of discretion will therefore

be proven if the Court finds that the Commission did not proceed in the manner required by law. (Code of Civil Procedure § 1094.5; Pub. Resources Code § 21168.)

Public Resources Code section 21005 (a) provides that "noncompliance with the information disclosure provisions" of CEQA -- which includes whether or not an EIR is prepared -- results in a prejudicial abuse of discretion "regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." This holding as to irrelevance of ultimate outcome has been underscored in a number of cases, including *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946. Thus, an agency cannot find a project categorically exempt from CEQA even if it believes that no different outcome would result after environmental review.

B. Judicial Review of Categorical Exemptions.

The Court's consideration of whether the Commission properly exempted a project from CEQA is a two-step process. The first question is whether substantial evidence supports the State Lands Commission's determination that the project fits with a particular exempt class. If not, which Appellants contend that it does not in the first instance, the exemption fails. But if this Court determines that it does, then this Court must decide whether any applicable *exceptions* defeat the exemption.

We conclude that both prongs of section 21168.5's abuse of

discretion standard apply on review of an agency's decision with respect to the unusual circumstances exception. The determination as to whether there are "unusual circumstances" (Guidelines, § 15300.2, subd. (c)) is reviewed under section 21168.5's substantial evidence prong. However, an agency's finding as to whether unusual circumstances give rise to "a reasonable possibility that the activity will have a significant effect on the environment" (Guidelines, § 15300.2, subd. (c)) is reviewed to determine whether the agency, in applying the fair argument standard, "proceeded in [the] manner required by law." (§ 21168.5; Friends of "B" Street, supra, 106 Cal.App.3d at p. 1002, 165 Cal.Rptr. 514.)

When unusual circumstances are established, as the trial court concluded so in this case, "the Secretary's findings as to the typical environmental effects of projects in an exempt category no longer control. Because there has been no prior review of the effects of unusual circumstances, the policy considerations [we] discussed in *No Oil* apply. An agency must evaluate potential environmental effects under the fair argument standard, and judicial review is limited to determining whether the agency applied the standard "in [the] manner required by law."

Berkeley Hillside, supra, 60 Cal.4th at 1116. The Commission and the trial court in this instance failed to apply the "fair argument" standard to determine whether or not an *exception* to the exemption applies and instead applied a more rigorous traditional substantial evidence standard.

VI. ARGUMENT.

VII. THE STATE LANDS COMMISSION HAD A DUTY TO FOLLOW THE TWO PRONG TEST SET FORTH BY THE SUPREME COURT IN *BERKELEY HILLSIDE* AND FAILED TO DO SO.

This case turns on whether there is an exemption for Diablo from CEQA for its two seven-year lease extensions. There are genuine questions about whether a nuclear power plant was ever intended to fall within the exemption for existing structures, and, if it was, whether the Secretary of Resources had the authority to include a nuclear power plant within this exemption. It is Appellant's position that no exemption ever existed for a nuclear power plant because the Secretary of Resources never intended nuclear power plants to come within the "existing structures" exemption, and even if the Secretary did intend to include nuclear power generation facilities, then he lacked statutory authority to include them.

Ad arguendo, even if a nuclear power plant like Diablo comes within the exemption for existing structures, as is claimed by PG&E and was held by the trial court, the inquiry is not over. The next step is to consider whether there is an exception to that exemption. Specifically, *"A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."*[6]

The California Supreme Court, in *Berkeley Hillside Preservation v. City of Berkeley,* (2015) 60 Cal. 4th 1086 has provided a specific two-prong test for agencies like the State Lands Commission to follow in instances such as this where there is an issue whether there is an exception to the exemption for existing structures.

The trial court in this case set forth this two-prong test required by the *Berkeley Hillside* case which first requires a showing that there are "unusual circumstances," and secondly, "whether there is a fair argument of a reasonable possibility of a significant environmental effect due to those unusual

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[6] (CEQA Guidelines §15300.2(c).

circumstances." The trial court explained what must be done when there are "unusual circumstances," as the trial court found there were in this case:

> If unusual circumstances are found under this first alternative, "agencies… apply the fair argument standard in determining whether 'there is a reasonable possibility of a significant effect on the environment due to unusual circumstances.' "Under this standard, 'an agency is merely supposed to look to see if the record shows substantial evidence of a fair argument that there may be a significant effect. [Citations.] In other words, the agency is not to weigh the evidence to come to its own conclusion about whether there will be a significant effect. It is merely supposed to inquire, as a matter of law, whether the record reveals a fair argument…" (Judgment pgs. 25-27) (citing *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 819-820.

In this case, the State Lands Commission had a duty to apply the Berkeley Hillside two-pronged test as part of its exemption analysis. The statute and its implementing regulations, the CEQA Guidelines, "prescribe review procedures a public agency must follow before approving or carrying out certain projects." *Berkeley Hillside*, 60 Cal.App.4th at 1091-92. The Court in *Berkeley Hillside* made it clear that the two-prong analysis was a procedure "a public agency must follow." *Ibid*.

Despite this directive from the Court, the State Lands Commission completely failed to apply the two-prong analysis in

Berkeley Hillside. Even though the Commission was applying an exemption, and the Commission's report specifically acknowledged that the Commission needed "…to determine whether there is a reasonable possibility that the issuance of the proposed limited-term interim lease will have a significant effect on the environment due to unusual circumstances…," the Commission never went on to determine whether there are "undue circumstances" in this case, or if there is a "fair argument of a reasonable possibility of a significant effect on the environment due to those undue circumstances."

In short, the Commission totally ignored its duty under *Berkeley Hillside*, and issued a one paragraph summary that never even discussed *Berkeley Hillside*. The *Berkeley Hillside* case is never mentioned, and the Commission makes no finding as to whether there are "unusual circumstances" in this case or whether there is a "fair argument of a reasonable possibility of a significant effect due to those unusual circumstances."[7] Instead, after a single paragraph that never discusses the health issues, or many of the other issues raised at the public hearings which comprise "unusual

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[7] Staff Report for Calendar Item 96, the report on the Diablo leases, 1 JA 41.

circumstances," the report states and the Commission abruptly concluded without explanation, that "The subject issuance of a new lease is exempt from the requirements of CEQA as a categorically exempt project."[8] Interestingly, even though the Commission failed to assess the possibility of unusual circumstances, the trial court found they did exist as noted below.

Acting in the aforementioned manner, the Commission applied an exemption without making a factual evaluation as is required by law. The Commission has a duty to make a "factual evaluation" for each of the two prongs enunciated in *Berkeley Hillside. Save Our Big Trees v. City of Santa Cruz*, 241 Cal.App.4th 694, 705 (citing Muzzy *Ranch Co v. Solano County Airport Land Use Com.* (2007) (41 Cal.4th 372, 386)(" a categorical exemption can be relied on only if a factual evaluation of the agency's proposed activity reveals that it applies.") In the case at hand, the State Lands Commission utterly failed to make the required "factual evaluation."

It is understandable why the report and the Commission refused to make an unusual circumstances analysis. There is no

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[8] Staff Report for Calendar Item 96, the report on the Diablo leases, 1 JA 46.

doubt that there are unusual circumstances in this case. The trial court recognized that the Commission failed to decide whether there are unusual circumstances, and held the Commission did not have substantial evidence to conclude there were no "unusual circumstances." The trial court then specifically found that there *are* unusual circumstances in this case. (Court's final order 12 JA 2911-12, 2919).

The trial court was correct in its determination that there are "unusual circumstances," and at that juncture should have sent the case back for the Commission to determine "whether there is a reasonable possibility of a significant environmental effect due to those unusual circumstances." The Commission must make this factual analysis because the Commission *has the burden* of demonstrating that substantial evidence supports a factual finding that the project falls within the exemption, and that there is no fair argument of a reasonable possibility of a significant effect on the environment due to unusual circumstances. *Save Our Big Trees v. City of Santa Cruz*, 241 Cal.App.4th 694, 705.

In *Save Our Big Trees*, the city of Santa Cruz claimed an exemption from CEQA for the protection of heritage trees. The trial court denied the writ of mandate challenging the application

of the exemption. The Court of Appeal reversed, holding that the city of Santa Cruz had failed to meet its factual burden. The same is true in this case, except even more obviously, as the State Lands Commission did not even attempt to satisfy the two- prong of *Berkeley Hillside*, but rather made no factual evaluation at all whether "undue circumstances" or a "fair argument" exists.

The Commission's excuse for not applying *Berkeley Hillside* was that it applied a "baseline" argument that circumvented and blocked application of the two-prong analysis. The Commission assumed, and the trial court accepted, that so long as PG&E did not deviate from business as usual, and left existing operations unchanged, then a significant effect, or even the reasonable possibility of a significant effect, cannot exist.

According to the trial court's judgement, even with its finding that "unusual circumstances" existed, a "fair argument" cannot be made because as long as "business as usual" remains unchanged, there is not even a reasonable possibility that evidence of new earthquake faults, increasing cancer and infant mortality rates near the plant, accumulating "embrittlement" as determined by the Nuclear Regulatory Commission, and a host of other unusual circumstances, could have a significant effect on

the environment. The trial court, led astray by applying PG&E's so-called "baseline" theory, has erroneously eviscerated the *Berkeley Hillside* case it cited as the law of the State of California.

Even as the trial court applied the PG&E theory that continuous operation without material change is sufficient to negate the second prong of *Berkeley Hillside* and exempt the plant under CEQA, the trial court did express some discomfort and suggested that the appellate court might provide a better way to harmonize the two-step approach of *Berkeley Hillside* with a "baseline" analysis. At the hearing, Judge Strobel made the following observation:

> "I think that the biggest disconnect perhaps here is what is the baseline that we're looking at to determine whether there is a record that there could be significant impacts. Petitioners argued that I should harmonize cases on unusual circumstances with baseline. That's, in fact, what I did do. And we know the Court of Appeal has de novo review on that. So, if I did that wrong. I'm sure we'll find that out." (Reporter's Transcript ("RT") pp. 42:21-43:2)

What is most important for this appeal is that the Commission, as a matter of law, could not simply refuse as it did to make any analysis of "unusual circumstances" and "fair argument." There is no factual discussion of these two prongs in

the Commission report. The law needs to be upheld.

What happened here is that the law was pawned off for a political deal. At first, the Commission members did not even think that an exemption applied or that "continuing procedures" were enough to negate CEQA. As Lt. Governor Gavin Newsom, a Commission member, said at a public hearing:

> "The question is, is this the site that it should operate with all of the questions, the seismic instability, questions that seem to arise every few years. Another fault is discovered; another fault is discovered; another question mark about its safety and its potential capacity to survive an earthquake. They would say that, when these new things happen as long as they're operating the same way in baseline, you don't even consider them. And that's a mistake. That's a crimp in the baseline." (Public hearing, December 18, 2015, RT pp. 15-16)

Lt. Governor Newsom's interpretation of the law was right then, and it remains correct today. The PG&E baseline argument unfortunately accepted by the trial court puts too big "a crimp in the baseline." It is a "crimp" so tight that it forecloses on the Court's duty to follow the Supreme Court analysis in *Berkeley Hillside*.

Applying CEQA in this case does not prevent a political deal with PG&E to shut down Diablo in 2025, which is when its current license from the Nuclear Regulatory Commission will

expire on its face. All it means is that a political deal cannot be used to circumvent the review requirements of CEQA. PG&E already explained to the Court during oral argument that there will be an environmental review as part of the decommissioning process. (RT pp. 34:10-14) ("… the lease proposal provides for a mechanism to set forth the decommissioning procedure for Diablo. Decommissioning necessarily has to go through full CEQA analysis.")

A decision to apply CEQA in this case will simply require an acceleration of the environmental review process so policy makers can decide what precautionary steps can, or should be taken should such a process determine that women and children are dying from radioactive exposures, or accumulated embrittlement requires upgrades to plant structures in case there is an earthquake within the next seven years.

The most egregious outcome of this case as it stands right now is that PG&E has convinced the Court to circumvent CEQA review and apply a "cross your fingers" test for the next seven years. This approach clearly did not benefit the city and citizens of San Bruno when gas lines blew up an entire neighborhood, killing 14 people. In that extraordinary tragedy, PG&E was

convicted of five felonies for conducting business as usual, and then lying about it.

This Appellate Court should not encourage or adopt this "cross your fingers" test. The situation here is unlike San Bruno, where failure resulted in death and destruction of one community. In this case, the Diablo plant lies just north from Santa Barbara and Los Angeles, with strong trade winds blowing nearly every afternoon down along the coast to these cities. An earthquake or a plant accident, leading to an airborne radioactive release transmitted by these winds, would kill tens of thousands of people, and, should emergency systems fail due to embrittled plant infrastructure, the meltdown could be catastrophic and impossible to stop.

As everyone knows, California is susceptible to earthquakes and Diablo sits right next to several clearly documented faults where pressure under the Earth's crust builds until there is "slip" and a resulting earthquake. Diablo sits in a cluster of these faults, one of which runs approximately 1,000 feet from the reactor vessel. As these seismic pressures build naturally and inevitably, a major quake is not a question of "if," but "when."

When great calamities happen, people wonder "How could this happen?" and "Why didn't we see this coming and do something to prevent it?" The worst and most common truth, unfortunately, is that public institutions, such as corporations and/or government agencies, prevented vital information from surfacing that might have created proactive steps to avoid these catastrophic events. This is the beauty of CEQA, which allows the public to raise issues of public interest, and when there is significant new information or a significant change of circumstances, require a thorough scientific analysis to accurately assess the situation. In this manner, some catastrophes can be averted, and no one is left wondering how PG&E was able to avoid preparing an initial EIR, and then allowed to not prepare any subsequent EIRs if the plant conducted "business as usual."

This Court should issue an order instructing the Commission that merely making a finding of "business as usual" and then crossing fingers for seven years is insufficient. To this end, there are two possible outcomes available to this Court: one, remand the matter back to the Commission to make an analysis

of a "fair argument" based upon the trial court's finding of unusual circumstances in this case; and two, determine that there is a "fair argument of a reasonable possibility of a significant effect due to the unusual circumstances" the trial court found to exist in this case, and therefore order that CEQA procedures be followed, and an initial EIR completed. A review of the "unusual circumstances" in this case shows that it would be proper to determine that a "fair argument" exists and the Commission is required to prepare and initial study to decide whether to issue a negative declaration or prepare an EIR.

VIII. THERE IS A "FAIR ARGUMENT" OF A REASONABLE POSSIBILTY OF A SIGNIFICANT EFFECT ON THE ENVIRONMENT FROM THE UNUSUAL CIRCUMSTANCES IN THIS CASE AND AN INITIAL STUDY MUST BE PREPARED BY THE COMMISSION.

It is a legal question whether a "fair argument" can be made and neither the trial court nor this Court defers to the agency's determination. *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App. 4th 903, 930. (Judgment 32). In reviewing the lower court's ruling on a petition for traditional writ of mandate in a CEQA case, an appellate court is not bound by the trial court's determination of law. *Gentry v. City of Murrieta*, (1995) 36 Cal.App. 4th 1359, 1375-1376 ("on appeal, the appellate court's

task is the same as that of the trial court: that is, to review the agency's actions to determine whether the agency complied with procedures required by law." The appellate court reviews the administrative record independently; the trial court's conclusions are not binding on it. *San Joaquin Raptor Rescue Center v. County of Stanislaus* (1994) 27Cal.App4th 713, 722.

As we make the factual evaluation of a "fair argument" based upon specific unusual circumstances, and also the possibility of a "fair argument" from a combination of these unusual circumstances, it is important to remember that the Commission has the "burden of demonstrating" that substantial evidence supports a factual finding of no "fair argument." *Muzzy Ranch Co v. Solano County Airport Land Use Com.* (2007)(41 Cal.4th 372, 386. Also, as the trial court pointed out in its Judgment, "the agency is not to weigh the evidence to come to its own conclusion about whether there will be a significant effect. It is merely supposed to inquire, as a matter of law, whether the record reveals a fair argument…" (Judgment pgs. 25-27) (citing *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 819-820.

With these principles in mind we turn to specific unusual

circumstances to see if a 'fair argument" can be made that there is a reasonable possibility of a significant environmental effect due to those unusual circumstances.

A. There is a "Fair Argument" Based on Significant New Information About Earthquake Faults.

It is indisputable that significant new advances have been made over the past 30 years with respect to the detection and analysis of earthquake faults. Since its construction, seismic studies have located Diablo within a web of fault lines and less than a mile from the Shoreline fault discovered in 2008. This new knowledge is certainly significant, and a map was presented to the Court during oral argument at trial showing the close proximity of the Shoreline fault to the Diablo plant. (RT pp. 12-13).

The map, which was part of the administrative record, (AR 008218), further exposed the danger from the Shoreline fault intersecting with the Hosgri fault, potentially generating a 7.7 quake that would exceed Diablo's maximum seismic capacity of 7.5 even if no embrittlement existed. There is also an ongoing controversy over whether Diablo is in current compliance with its licensed seismic design basis, the so-called Double Design

Earthquake ("DDE"). As the NRC has acknowledged since 2012, "using the DDE as the basis of comparison will most likely result in the Shoreline fault and the Hosgri fault earthquake being reported as having greater ground motion than the plant's Safe Shutdown Earthquake."[9]

The trial court's treatment of the danger from the combined effect of the two faults, and other seismic issues, was to consider the controversy, but conclude that despite the potentially significant consequences, since plant operations had continued unchanged, the issue can be ignored as part of their theoretical "baseline," and a "fair argument" could not be shown regarding a reasonable possibility of a significant adverse effect on the environment from this serious vulnerability. Clearly, that alone is reversible error.

By looking at the continuation of the existing procedures at the plant rather than the significance of the new information about the intersection of earthquake faults, the trial court erred. The Commission's June 28th Staff Report considered the controversy of the potential linkage of faults to create an

[9] See, Letter to Edward D. Halpin from Joseph M. Sebrosky, NRC Senior Project Manager for Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, October 12, 2012, 10 JA 2539-2544.

earthquake the plant could not withstand taking the side of PG&E.

However, contrary conclusions are reached in the Independent Peer Review Panel Report No. 7:

> "The Shoreline fault is essentially a continuous feature from its intersection with the Hosgri fault . . . With respect to seismic hazard, this investigation has shown that effectively, there is a direct connection between the two fault zones, with the intersection located at a graben that is structurally controlled by the Hosgri and Point Buchon fault zones."[10]

Given conflicting opinions, it is important to again consider the standard for a "fair argument." The administrative record does not need to include proof of being right about the linkage of the faults: "the agency is not to weigh the evidence to come to its own conclusion about whether there will be a significant effect. It is merely supposed to inquire, as a matter of law, whether the record reveals a fair argument…" (Court's Final Order, 12 JA 2912-14).

The record here raises a genuine dispute about whether the Shoreline and Hosgri faults connect, and whether they are capable of jointly rupturing, there can be no dispute that the

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[10] IPRP Report No. 7, "Comments on PG&E's Central Coastal California Seismic Imaging Project Report part 1: offshore seismic studies intended to reduce the uncertainty in seismic hazard at Diablo Canyon Power Plant," November 21, 2014, pp. 14, 19-20, 8 JA 1851-1857.

Diablo plant sits atop the seismically most dangerous location in the United States for a nuclear power plant. This is sufficient for a "fair argument." In a situation like this with such potentially catastrophic consequences for numerous communities that could suffer from radioactive fallout following an earthquake, science presented as part of a CEQA review is intended to be the guide, not a cursory, one-sided staff review.[11]

B. There is a "Fair Argument" Based on Significant Changed Circumstances Due to Embrittlement.

In 2013 the NRC identified Diablo Canyon's Unit 1 reactor as the third-most embrittled reactor in the United States.[12] The type of reactors used at Diablo have, over time, experienced significant generic, industry-wide problems. These generic problems include steam generator corrosion, which ultimately led to the unplanned closure of Diablos' sister plant, San Onofre in 2013. As with steam generator corrosion at San Onofre, which led to a massive radiation leak threatening surrounding

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[11] In *Citizens for East Shore Parks v. California State Lands Commission*, (2011) 202 Cal.App.4th 549, 555 136 Cal.Rptr.3d 162, 168, the State Lands Commission conceded that the great potential risk of oil spills precluded the application of an exemption for existing structures to oil facilities. Exactly the same analysis applies here, even more so, as the risk of radioactive "spills" is more egregious and long lasting.

[12] Geesman Letter, 1 JA 59.

communities, reactor vessel embrittlement is an on-going problem at Diablo.

An increase in embrittlement is a decrease in safety. When a plant like Diablo is exposed to a stress-inducing event such as an earthquake, embrittlement increases the likelihood that, in such an emergency, the reactor vessel, which contains the nuclear fuel rods, will rupture causing a catastrophic failure and major radiation release. Furthermore, reactor embrittlement threatens the integrity of the entire reactor pressure vessel, which can result in a core meltdown and massive releases of radiation, such as occurred at Chernobyl in 1986 and Fukushima in 2011.

The trial court in this case came close to recognizing that embrittlement is not something that can be ignored by a finding of "business as usual." The trial court discussed the case *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2002) 131 Cal.App.4th 1170, 1196, where the court held that even when baseline is applied, the court can still consider the increases and intensity of the significant effects. ("…nothing in the baseline concept excuses a lead agency from considering the potential environmental impacts of increases in the intensity or rate of use that may result from a project.)" *Id*. at 919

The trial court recognized that a worsening condition at the Diablo plant due to embrittlement could reflect an increase in intensity. The trial court stated in its ruling "… while the operations are not expanding, one might hypothesize that the age of a nuclear reactor might make it less efficient or less safe when compared to baseline conditions." (Court's Final Order, 13 JA 2927) citing *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2002) 131 Cal.App.4th 1170, 1196-97.

Here the trial court came close to getting it right. The worsening condition of a deteriorating plant cannot be swept under the rug with the "business as usual" claim. Unfortunately, the trial court then erred by concluding that the evidence of embrittlement was not sufficient because there was no expert testimony. This cannot be the factual requirement for a "fair argument," particularly in light of the NRC's own determinations on the subject. Often important issues are raised that need expertise, but the people raising them lack funds for an expert. This is precisely why showing a "fair argument" does not have to prove a matter, but merely raise a reasonable possibility of a significant effect. Here the Nuclear Regulatory Commission's own finding that Diablo is the third most

embrittled plant in the United States, is sufficient to certainly warrant expert testimony, and that is precisely what the EIR process is designed to do.

C. There Is a "Fair Argument" Based on Significant New Information About Cancer and Infant Mortality Around the Diablo Plant.

1. Increasing Rates of Cancer.

Some of the most striking new information over the past 30 years is the documented increase in the rates of cancer and infant mortality. Even though the Commission staff had meetings with the staff from the World Business Academy, and the administrative record contains considerable information about increasing cancer rates and increasing rates of infant mortality including the proffer of peer reviewed epidemiological studies, the Commission staff refused to even mention increasing cancer rates and increases in infant mortality in the report, much less address this new information.

The trial court made a cursory review of the health risks, and the conflicting reports on health issues, and concluded that "petitioners cite to no evidence that the lease replacement, which does not modify the operations of DCPP, will result in an increase in health risks from the baseline conditions." (Court's Final Order,

13 JA 2930). In other words, the trial court concluded that even if the operations of Diablo were causing increases in cancer and infant mortality, as long as those ongoing operations were not changing, then the baseline prevented consideration of information regarding increases of cancer that occurred over time due to continuous exposure to Strontium-90, which accumulates in human teeth and bone over its 29-year half-life. This was reversible error.

The need for environmental review often becomes even greater when there is controversy. Science is needed to resolve the controversy, and issues should not be swept under the rug because it is considered "business as usual." The controversy over the health issues is a good example. On the one hand, Petitioners have submitted a scientific report and on the other, PG&E offers an unscientific report with no peer review, unsupported by data, and written anonymously by San Louis Obispo County staff.[13]

The County report is nothing more than a slipshod attempt to refute, with loose rhetoric, the serious health concerns provided

[13] The San Luis Obispo County Public Health Department's "Response to a Report on Health Concerns to Residences of San Luis Obispo County and Santa Barbara Counties due to Continued Operation of Diablo Canyon Nuclear Power Plant," 7 JA 1720-1733.

in detail to the Commission regarding significant increases in cancer and infant mortality rates. There are several reasons why PG&E's disingenuous reliance on this county report is unpersuasive. First, this Report is not a "scientific peer review" study, as claimed (3 JA 550). The Report contains no references to articles, books, and other scientific publications to support its claims; nor has it been published in a peer-reviewed scientific journal. At best, it is nothing more than "an opinion" lacking in supportive evidence or peer review; at worst, it is a biased attempt to protect PG&E as the County's largest employer.

By way of contrast, the 2014 Mangano Study, which the County report purports to refute, contains 19 references, most of them from journal articles, including 10 journal articles that found high childhood cancer rates near nuclear plants (11 JA 2648-49). The 2014 Mangano scientific study relied upon by Appellant is titled "Report on Health Status of Residents in San Luis Obispo and Santa Barbara Counties Living Near the Diablo Canyon Reactors Located in Avila Beach, California" (1 JA 78-113). It was carried out by Joseph Mangano, MPH, MBA, an epidemiologist and author or coauthor of three books and 32 peer-reviewed medical journal articles and letters to the editor on the topic of the

health hazards of radiation contamination. Mr. Mangano's research has been covered by the *New York Times, USA Today*, CNN, NPR, and Fox News.

2. Increasing Rates of Infant Mortality.

In addition to documenting increasing rates of various types of cancer in San Luis Obispo County, the 2014 Study (1 JA 78-113) also found that "after Diablo Canyon began operating, infant mortality in San Luis Obispo County rose significantly," based on California Public Health Department and U.S. Centers for Disease Control (CDC) data. This conclusion compares the 1989-91 period (approximately five years after the reactors began operating) with 2004-10 data, the last period for which infant mortality data was available when the 2014 Study was being prepared. (1 JA 103).

Subsequently, at a March 14, 2016, meeting with Commission staff, Academy representatives presented a power point slide showing that, for the latest five years for which CDC data was currently available (2010-2014), infant mortality rates in SLO County were now "31.6% higher than the state rate/100,000" (6 JA 1363). In a follow-up email of March 31, 2016, to Commission staff member Cy Oggins, the Petitioner replied to Oggins' request for additional information by sending him an email that spells out

exactly how these increased rates of infant mortality had been calculated (3 JA 608-609). Later, during the June 28, 2016, Commission hearing, Academy President Rinaldo S. Brutoco again reminded the Commission about the recent 2016 information showing an increase in infant mortality and implored the Commission to evaluate these findings as part of an EIR (5 JA 1019-20).

Evidence collected in 2016, and presented to staff before the decision was made by the Commission, found that "A comparison of official annual infant mortality data for ZIP coded areas near Diablo Canyon nuclear plant adjacent to the seas with those inland for the 25 years from 1989 to 2012 showed a remarkable and statistically significant 28% overall increase in infant mortality rates in the coast strip group relative to the inland control group."

It is noteworthy that the State of California made the compilation of this significant information possible because California is the only state that maintains epidemiology data by zip codes, thereby making it possible to compare zip codes of equal distance from Diablo under the plume with zip codes adjacent to them outside the plume. This zip code data is the critical piece required in order for researchers to reach the study's alarming

conclusions. It would be a travesty if, after State efforts to keep precise data, the findings that result from analysis of do not meet the "fair argument" prong. This type of information is precisely what a "fair argument" is intended to bring forward.

The trial court, again at the urging of PG&E, also ignored new significant health information documented in a separate peer-reviewed journal article, showing significant *declines* in cancer rates and infant deaths after the 1989 shutdown of the Rancho Seco nuclear power plant in Sacramento County. This data can be found in both the 2014 Study (11 JA 2646-47), and in slides 25 through 28 of Petitioner Academy's PowerPoint presentation, titled "Presentation to State Lands Commission on Public Health Issues and Proposed Diablo Canyon CEQA Review," which was given to the Commission staff in person in Sacramento on March 14, 2016 (6 JA 1360-1363).

Given the scientific evidence properly presented to the Commission, and now to this Court, the health issues, and the public controversy surrounding them constitute a "fair argument" and support a finding that an exception to the exemption exists.

D. There is a "Fair Argument" Based on Significant New Information and Significant Changed Circumstance Regarding Marine Life Near Diablo.

The Commission's own policy on the Once-Through Cooling systems located at Diablo, observes that "once through cooling significantly harms the environment by killing large numbers of fish and other wildlife, larvae and eggs" and "also significantly adversely affects marine, bay and estuarine environments by raising the temperature of receiving waters, and by killing and displacing wildlife and plant life . . . " [14, 15,,16, 17, 18, 19]

Every day, Diablo's cooling system takes in 2.5 billion gallons of seawater, the equivalent of 3,788 Olympic-size swimming pools. An estimated 1.5 billion fish eggs, marine larvae and marine animals a year are swept along for the ride,

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[14] Resolution by the California State Lands Commission regarding Once-Through Cooling in California Power [8 JA 1835-37].

[15] Miller, Peter, Senior Scientist, Natural Resources Defense Council (NRDC), Transcript, Meeting, State Lands Commission, NRDC, June 28, 2016, p. 65 [5 JA 943].

[16] Christie, Andrew, Director, Santa Lucia Chapter, Sierra Club, Transcript, Meeting, State Lands Commission, Sierra Club, June 28, 2016, pp. 128-130 [5 JA 1004-06].

[17] Brown, Marty, Mothers for Peace, Transcript, Meeting, State Lands Commission, Mothers for Peace, June 28, 2016, pp. 151-152 [5 JA 1027-28].

[18] Jencks, Michael, attorney, Biodiversity First, Transcript, Meeting, State Lands Commission, Biodiversity, June 28, 2016, pp. 167-169 [5 JA 1043-45].

[19] "Resolution by the California State Lands Commission regarding Once-Through Cooling in California Power Plants, SLC, April 17, 2006, pp. 1-3 [AR 8 JA 1835-37].

and in the process churned, cooked and killed. Indeed, Diablo currently represents 85% of all damage to our coastal environment from coastal power plants. To date, over 45 billion fish eggs and marine larvae have died during Diablo's 32-year operational lifetime. Another seven years of operating Diablo will increase the number of marine organisms killed by the plant to nearly 60 billion deaths, clearly an "unusual circumstance"[20] as the trial court correctly found.

Furthermore, Diablo is located less than a mile from the Point Buchon Marine Protected Area ("MPA"). The MPA is known for its biological diversity and is home to more than 700 species of invertebrates, as well as l20 fish species, marine plants, seabirds, and marine mammals. Over time, Diablo has seriously diminished California's marine populations as well as reduced the oceanic food supply. The cumulative, potentially exponential, impacts from seven more years of plant operations supports a "fair argument" of a significant effect supporting a comprehensive environmental review under CEQA.[21] These are

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[20] TENERA Environmental, Report Supplement: Length-Specific Probabilities of Screen Entrainment of Larval Fishes Based on Head Capsule Measurements (In DFPP Site-Specific Estimates, October 29, 2013, pp 1-22 plus appendixes [8 JA 1778-1834].

[21] PG&E, Application for Land Lease, Amended Application, Attachment D, Project Description, January 20, 2015, pp. 2-1 to 2-18 [6 JA 1190-1209].

not minor impacts. According to the Alliance for Nuclear Responsibility's ("A4NR") Attorney, John Geesman:

> "By simple arithmetic, the extended period of time of the new lease will enable a 21% increase in the creation of nuclear fuel (aka radioactive waste) and a 21% increase in damage to marine organisms."[22]

The new PG&E lease would also affect the habitat of at least 6 endangered species.[23] Since there was never an environmental review under CEQA, either at the original licensing of Diablo or at the Commission's previous issuance of land leases, there has never been a formal regulatory consideration of Diablo's impact on tidelands as an endangered species habitat. The existence of this endangered species habitat in the immediate vicinity of Diablo is yet another instance of a "fair argument" of a reasonable possibility of significant effect due to "unusual circumstances."

There is also cause for concern regarding adverse environmental impacts resulting from operation of Diablo's desalination plant which, like the nuclear plant, has never before

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[22] Geesman, John L., Attorney of Alliance for Nuclear Responsibility, Letter to The Honorable Betty T. Yee, State Controller and Chair, SLC, June 27, 2016, pp. 1-2 [1 JA 59-64].

[23] Christie, Andrew, Director, Santa Lucia Chapter, Sierra Club, Transcript, Meeting, State Lands Commission, Sierra Club, June 28, 2016, pp. 128-130 [5 JA 1004-06].

been assessed within the context of an EIR under CEQA.[24] The desalination plant was installed as part of the 1985 license to operate Diablo[25] without specific review by any State authority, and discharges toxic chemicals and brine into the cove, which is designated as an endangered species habitat. The desalination facility was not mentioned in the original leases, and its existence is an example of yet another significant changed circumstance that will have a significant effect on the environment that was overlooked by the trial court because it was part of a theoretical "baseline" of continuing operations.

The cumulative impacts from the non-reproduction of 1.5 billion fish and invertebrates a year adds up to tens of billions of lost marine life over the past 30 years. Moreover, cumulative effects from water overheating, ocean acidification, radiation, and heavy metals being discharged into the cove were never part of any baseline study of Diablo's potential adverse impacts.

Taken together, all of the foregoing cumulative adverse impacts on marine life that will result from continued operation under the Diablo lease for the next seven years constitute a "fair

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[24] Seeley, Linda, Mothers for Peace, Transcript, Meeting, State Lands Commission, Mothers for Peace, June 28, 2016, pp. 147-148 [5 JA 1023-24].

[25] "Diablo desal project moving forward," *Santa Maria Times*, March 23, 2016, pp. 1-3 [6 JA 1367-69].

argument" that creates an exception: CEQA applies.

E. There is a "Fair Argument" based upon Significant Changed Circumstances with Respect to the Size of the Diablo Plant.

The trial court concluded that the significant size of the Diablo plant constituted an unusual circumstance. (Court's Final Order 12 JA 2912) This was indisputable given that Diablo is located on 900 acres west of Avila Beach, California. The power generation portion of the plant is 12 acres with two nuclear reactors. There are also large water intake structures and numerous other facilities spanning both on and off shore. In accordance with *Berkeley Hillside*, this massive size constitutes an "unusual circumstance" and supports a "fair argument" that creates an exception to the exemption.

F. There is a "Fair Argument" Based on Significant New Information Regarding Tsunamis.

Even though the staff and Commission failed to consider (or simply ignored) evidence of tsunami risks, these risks raise a "fair argument" based on significant new information following the Fukushima disaster. We now know that the Fukushima disaster was caused by a tsunami generated by an earthquake from a subduction fault that ran parallel to the shore. A similar

type of subduction fault line runs parallel to Diablo as well and, with further study it has been determined that tsunamis have hit that precise portion of the California coast in centuries past. This risk was not even contemplated when Diablo began operations.

In the case of Diablo, the water intake structures are located within the area subject to PG&E's leases, and the vulnerability of these intake structures to a tsunami (they could be overwhelmed and sustain a catastrophic failure), coupled with rising ocean levels,[26] could lead to and exacerbate other dangerous circumstances. The risk of tsunamis constitutes further evidence of a "fair argument" that supports and exception to the exemption and the application of CEQA.

G. There is a "Fair Argument" Based on Significant New Information Regarding Risks from Both Cyber and Physical Attacks.

Wherever nuclear fuels are produced, transported, and consumed, and wherever high-level nuclear wastes are accumulated there is a risk of a terror attack.[27] Terrorists could

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[26] Diablo Canyon Power Plant Units 1 and 2 Flood Hazard Reevaluation Report (March 2015), Enclosure 1, Table 3-17 and 3-18 [9 JA 2152-53].

[27] Congressional Research Service, Nuclear Power Plants: Vulnerability to Terrorist Attack, CRS Report for Congress RS21131 (Updated February 4, 2005), [2 JA 398-404].

also target nuclear power plants, digitally or physically, in an attempt to release radioactive contamination into adjacent communities.

The United States 9/11 Commission has said that nuclear power plants were potential targets originally considered for the September 11, 2001 attacks (in fact, the primary back up to attacking the World Trade Center was a nuclear plant near the New York metropolitan area).[28] If terrorist groups could sufficiently damage cooling and/or safety systems to cause a core meltdown at a nuclear power plant, and/or sufficiently damage spent fuel pools (with electronic sabotage or a "dive bombing" small plane), such an attack could lead to widespread radioactive contamination. This includes radioactive contamination due to spent fuel fires or leaks, which has already been the subject of a Generic Environmental Impact Statement prepared by the NRC.[29]

If a meltdown resulting in large scale releases of

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[28] The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States. National Commission on Terrorist Attacks (Cosimo, Inc). July 30, 2010. ISBN 978-1- 61640-219-8 [2 JA 405-444].

[29] U.S. Nuclear Regulatory Commission, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, Volume 1 and Volume 2, September 2014 [9 JA 2072]. "The GEIS contains several appendices that discuss specific topics of particular interest, including the two technical issues involved in the remand of *New York v. NRC*—spent fuel pool leaks and spent fuel pool fires" [9 JA 2072, para. 3].

radioactivity from the reactor core or the spent fuel waste pools occurred at Diablo Canyon, many nearby residents would suffer from acute radiation poisoning (short term) and cancer (long term). In 1982, the Sandia National Laboratories submitted estimates to Congress for each U.S. nuclear plant in the case of core meltdown. The Sandia figures are known as CRAC-2 (Calculation of Reactor Accident Consequences). Within 17.5 miles of Diablo Canyon, 22,000 acute radiation poisoning cases (10,000 fatal) would be expected; and within 35 miles, 12,000 cancer deaths would occur. Estimates would be dramatically larger today, since the San Luis Obispo County population has nearly doubled since 1980.[30] The risk of terrorism unfortunately constitutes a new circumstance supporting a "fair argument."

H. There is a "Fair Argument" Based on Significant New Information and Significant Changed Circumstances Regarding Radioactive Waste.

Nuclear facilities create large amounts of low- and high-level radioactive waste. High-level waste consists of spent

[30] Sandia National Laboratories, Calculation of Reactor Accident Consequences (CRAC-2) for U.S. Nuclear Power Plants, prepared for U.S. Congress, Subcommittee on Oversight and Investigations, Committee on Interior and Insular Affairs, cited in Report on Health Status of Residents in San Luis Obispo and Santa Barbara Counties Living Near the Diablo Canyon Reactors Located in Avila Beach, California, Academy, 3/14/14, p. 11 [13 JA 2626].

uranium fuel rods that can no longer be used for energy or reprocessed into another element that can yield power. For up to seven years, the high-level radioactive waste in the spent fuel rods at Diablo Canyon are stored in spent fuel pools,[31] which, unlike the reactor core, are not protected by a containment building, and are therefore more vulnerable to natural disasters, such as earthquakes[32] and tsunamis, as was the case at Fukushima. For this reason, the California Energy Commission stated in its 2013 Energy Policy Report that Diablo Canyon should "[t]ransfer spent fuel to dry casks as expeditiously as possible."[33]

By 2025, there will be approximately 4,300 spent fuel assemblies stored on site at Diablo Canyon.[34] Low-level waste consists largely of water and used equipment from the nuclear

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[31] Williams, Geisha, President, PG&E, Transcript, Meeting, State Lands Commission, PG&E, June 28, 2016, p 75 [5 JA 951].

[32] Independent Peer Review Panel, Report No. 6, Site shear wave velocity at Diablo Canyon: summary of available data and comments on analysis by PG&E for Diablo Canyon Power Plant, August 12, 2013, pp. 1-23 [8 JA 1838-87]; and Direct Testimony of Douglas H. Hamilton, Ph.D., Before the CPUC, Submitted by A4NR, February 10, 2012, pp. 1-54 [9 JA 2018-21]. Mr. Hamilton has more than 50 years of experience in engineering and seismic geology.

[33] See, CEC, 2013 Integrated Energy Policy Report, as adopted January 15, 2014, pp. 170-171, in A4NR's Opening Comments on ALJ's Proposed Decision, July 8, 2014, p. 6 [8 JA 863].

[34] Schumann, Klaus, San Luis Obispo Nuclear Waste Management Committee, Transcript, Meeting, State Lands Commission, June 28, 2016, pp. 180-181 [5 JA 1056-57].

facility in which power is being generated. Both types of waste are highly toxic and may have to be stored onsite indefinitely. Should waste not be stored adequately, radioactive substances could find their way into ground water, or contaminate other valuable resources or sites. In fact, the U.S. Nuclear Regulatory Commission "Effluent Database for Nuclear Power Plants" ranks Diablo Canyon *among the top five* U.S. power plants for releases of each the following carcinogenic, radioactive nuclear fission byproducts: airborne tritium, liquid fission and activation products, and liquid tritium.[35]

Here we can see how evidence of cancer combines with evidence of storage and containment of cancer causing radioactive waste to cause a potentially significant environmental effect supporting a "fair argument" that precludes exemption from the CEQA process.

I. There is a "Fair Argument" Based on Significant Changed Circumstances Making Diablo the Sole Operating Nuclear Plant in California.

Diablo is the state's only remaining nuclear power plant.

[35] Table 6, U.S. Nuclear Plants with Greatest Emissions, Selected Types of Radioactivity and Selected Years, in Curies, cited in Report on Health Status of Residents in San Luis Obispo and Santa Barbara Counties Living Near the Diablo Canyon Nuclear Reactors, March 3, 2014, p 14 [13 JA 2629].

The only other nuclear power plant that had been operating in California in recent years, located at San Onofre, was initially shut down due to a massive radiation "event" that occurred in January 2012; and that plant was permanently designated as "closed" in June 2013.

The June 24 Commission Staff Report refuses to even acknowledge the changed circumstances that Diablo is the state's only operating nuclear plant, and its sister San Onofre was closed due to a spontaneous life-endangering radiation release. In addition, Diablo's nuclear fuel source and proximity to fault lines distinguish it from all other power plants currently in service in California.[36]

J. There is a "Fair Argument" Based on Significant Changed Circumstances Due to Criminal Charges against PG&E Resulting from the San Bruno Explosion.

PG&E's recent federal prosecution on safety-related and agency obstruction felony counts is unprecedented for any utility holder of an NRC operating license. PG&E has been found guilty of operating certain of its facilities in a dangerous condition, with

[36] Staff report for Calendar Item No. 83 (Feb. 9, 2016), p. 3, para. 3 [1 JA 119].

careless disregard for public health and well-being.[37] This new information supports a "fair argument" of skepticism that PG&E will safely manage Diablo without the guidance provided by CEQA review.

K. Each of the Ten Examples of "Fair Argument" is Sufficient for an Exception to the Exemption, and Considered in Combination, they Create an Overwhelming "Fair Argument" supporting an exception to the exemption.

As this Court can see from the evidence, in the 10 separate instances supporting a "fair argument" showing of a reasonable possibility of significant effect on the environment from the "unusual circumstances" at Diablo, there is a compelling argument that an exception to the CEQA exemption applies to Diablo. Any of the ten would *independently* support the application of an exception to the "existing structures" exemption. Taking and applying the standard set forth in *Berkeley Hillside*, such a conclusion is without doubt.

IX. THE APPLICATION OF A "BASELINE" DOES NOT NEGATE THAT THERE IS A "FAIR ARGUMENT".

Faced with overwhelming evidence of a "fair argument" if

[37] United States of America v. Pacific Gas and Electric Company, USDC, Northern District of California, Case No. CR14-0175-TEH. *See also*, Pacific Gas & Electric Co., Current Report on Form 8-K dated August 9, 2016.

a proper factual evaluation is made, PG&E has concocted a "baseline" test for the trail court to apply that negates the required evaluation of a "fair argument" in accord with *Berkeley Hillside*.

As a starting point for this "baseline" analysis, given that *no Environmental Impact Report has ever been done for Diablo*, PG&E uses the time when Diablo was approved, over 30 years ago, as the beginning for this so-called "baseline." According to PG&E "All of the purported risks and potential impacts Petitioners allege have existed since DCPP began operation over 30 years ago." (3 JA 543-44).

As discussed above, in that 30-year record of new information and changed circumstances, according to the appalling reasoning of PG&E, as followed by the trial court, *none of this matters.*

In support of this baseline analysis, PG&E rests heavily upon the case of *North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, a case that preceded the Supreme Court's decision in *Berkeley Hillside*. No case since the decisions in *North Coast* or *Berkeley Hillside* has taken the position that somehow a "baseline" supplants the two-pronged

analysis of *Berkeley Hillside*. Nor is there any other reported example of an agency like the State Lands Commission concluding that a showing of continuing existing operations is sufficient to circumvent the legally required factual evaluation of a "fair argument" as required by *Berkeley Hillside*.

A close look at *North Coast Rivers* shows why it has never been used in the manner that PG&E suggested, and the trial court erred in following in this case. The facts of *North Coast* are distinguishable and do not come close to extinguishing the requirements of *Berkeley Hillside*.

First of all, in *North Coast Rivers*, the court noted that prior to the two-year lease extension for water delivery that was at issue in that case, an assessment under the National Environmental Policy Act of 1969 (NEPA) had already been done. *North Coast Rivers* 227 Cal.App.4th at 847. Although NEPA and CEQA have their differences, they both require that genuine science and public input are core to decision making.

Furthermore, when looking at the facts of *North Coast* carefully, the reason for a series of two-year contract extensions was because of the "Bureau's failure to complete the required environmental documentation." *North Coast Rivers* 227

Cal.App.4th at 839. So, the situation in *North Coast* was that substantial environmental documentation had already been done, and the preparation of additional environmental documentation was underway. These facts are in stark contrast to the case at hand where there has been no environmental documentation done by way of an EIR, and there is no additional environmental documentation underway.

Given the magnitude of work required for an EIR, it is important that redundancy is avoided. In a case such as *North Coast,* where there has been substantial environmental documentation and more underway, there is a stronger argument that is a continuance of existing procedure is sufficient. But *North Coast* facts differ from the facts in this case, where there is no EIR and an abundance of serious unusual circumstances.

Another dissimilarity with *North Coast* is that a seven-year time period in the instant case, not two years as in North Coast, and there is clear evidence of substantial adverse changes over the existing span of 30-plus years. Health, embrittlement and marine issues have all become more evident and progressively *worse over that time*, and will continue to *worsen* and become more dangerous. This is unlike the facts in *North Coast* which were steady and did

not have the gravity of a reasonable possibility of significant effect on the environment that you have in this case. In *North Coast,* some fish stocks might suffer if there is not enough water. In the case at hand, children and adults are dying from radiation effects; billions of fish and sea life are being killed, thousands of spent fuel rods of high-level radioactive waste, including plutonium that is lethal for 200,000 years, are being stored on-site at Diablo, right next to several communities; and tens of thousands could die from an earthquake triggered by two intersecting faults, or even one fault where the safety mechanisms fail because of embrittlement. Different facts require different results, and *North Coast* is distinguishable.

Another case heavily relied upon by PG&E, which also preceded *Berkeley Hillside* and surely does not limit it, is *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307. North Coast considers *Bloom* as the seminal "baseline" case for if there is "business as usual," then that is enough. The problem is that *Bloom* does not go nearly as far as PG&E and the trial court in this case. First, the trial court in *Bloom* held that there were **no** "unusual circumstances." *Bloom*, 26 Cal.App4th at 1316. In this case, the trial court specifically held

that there **are** "unusual circumstances." (Court's Final Order, 12 JA 2911-12).

In addition, as in *North Coast*, the magnitude of the facts in *Bloom* is much less than the facts in Diablo. *Bloom* involved an incinerator burning waste, nothing near the magnitude of a nuclear power generation plant. The court noted the following in *Bloom*:

> "…there are apparently no homes in the immediate vicinity, and IES's operations are comparable to those of surrounding businesses. According to the record, '[i]mmediate neighboring land uses include truck body manufacture and repair, awning manufacture, lumberyard, container storage, warehousing, and a fire sprinkler manufacturer. Nearby uses include a petrochemical processing plant and glass making facility.'"

Considering a baseline of these similar operations, the court concluded that there were no unusual circumstances. Conversely, the case at hand involves a singularly unique nuclear power plant located adjacent to a pristine marine ecosystem, nothing remotely similar to truck repair and glass-making facilities. In addition, unlike in *Bloom*, *there are* residential developments in close proximity and residents are experiencing increased levels of cancer and infant mortality. It is an unnatural leap to extend *Bloom* to the facts in the case at hand.

Another case upon which PG&E and the trial court rely upon heavily, *Citizens for East Shore Parks v. State Lands Com.* (2011) 202 Cal.App. 4th 549, is not just distinguishable, but actually helps support the argument that the court cannot just make sure existing operations are "business as usual" and then ignore significant new information or changed circumstances and not make a "fair argument" analysis. The court in *Citizens for East Shore Parks* held that even when existing operations are being continued without change, future risks need to be considered when deciding the application of CEQA.

Citizens for East Shore Parks involved marine shipping terminals where tankers were coming and going in San Francisco Bay. The court noted that "The Lands Commission concluded future oil spills constituted a potentially significant environmental impact, requiring analysis in an environmental impact report (EIR)." *Id*. at 555. In other words, the baseline did not preclude consideration of future oil spills. Similarly, even when a baseline is applied in this case, it would not exclude the consideration of potential radioactive releases from earthquakes, human error, structural failure from gradual weakening, or a terrorist attack when deciding whether an EIR is required. When these future

risks are considered as part of a "fair argument" as they must be, the outcome, as was the case in *East Shore Parks*, is that an EIR will be required.

Once a proper factual evaluation of a "fair argument" is done, it is clear that an exception to the existing structures exemption applies and CEQA procedures must be followed.

X. THE SECRETARY OF RESOURCES DID NOT INTEND TO INCLUDE NUCLEAR POWER PLANTS WITHIN THE EXEMPTION FOR "EXISTING STRUCTURES" BECAUSE A NUCLEAR POWER PLANT INHERENTLY HAS A SIGNIFICANT EFFECT ON THE ENVIRONMENT, BUT IF THE SECRETARY DID INTEND TO INCLUDE NUCLEAR POWER PLANTS, THEN HE LACKED THE AUTHORITY TO DO SO.

A. The Secretary of Resources Did Not Intend to Include Nuclear Power Generation Plants Within the "Existing Structures" Exemption.

In *Berkeley Hillside Preservation Council v. City of Berkeley* (2015) 60 Cal. 4th 1086, 343 P.3d 834, the California Supreme Court crisply stated well-established law with respect to the power of the Secretary of Resources to create classes of exemptions to CEQA:

> The guidelines prepared and adopted pursuant to Section 21083 shall include a list of classes of projects which have been determined not to have a significant effect on the environment and which shall be exempt from the provision of CEQA. **In adopting the guidelines, the Secretary …shall make a finding**

> **that the list or classification of projects referred to in this section do not have a significant effect on the environment**. (citing §21084 of the Resources Code, as added by Stats. 1972, ch. 1154. §1 pp. 2271. 2273. 60 Cal. 4th at 1101. (Emphasis added.)

Given the explicit requirement that the Secretary "shall make a finding" that projects within an exemption "do not have a significant effect on the environment," the Secretary of Resources cannot have intended to include nuclear power plants within the exemption for "existing structures." Diablo takes in over 2,000,000,000 gallons of sea water each day (along with much of the sea life in it) and runs it through the plant, superheating it by 18 degrees and then injecting it back into the ocean. This is just one of many examples of a significant effect.

A close reading of the applicable exemption from the State CEQA Guidelines, at (CAC, Title 14) §15301(b) shows this lack of intent to be true. §15301(b) reads: "Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services."

The trial court, following the statutory interpretation of PG&E, stretched the language of §15301(b) beyond the intent of the Secretary or common sense. PG&E claimed in its briefing that "...the exemption expressly lists electric power generating

facilities as a covered class of exempt existing facilities." (Opp. Brief, 3 JA 535:9-10); and then later claimed again that "Section 15301(b) directly calls out existing electricity *generating* facilities as existing facilities to which the exemption applies." (Opp. Brief, 3 JA 536:27-537:2) (emphasis added).

However, PG&E was wrong and the trial court erred by accepting and applying this analysis. The administrative history of §15301(b) reflects that the Secretary was thinking of transmission towers carrying lines and similar structures that do not have a significant effect on the environment, not power *generating* facilities like the core reactors and water intakes at the nuclear plant. This is why §15301(b) was careful to refer to existing structures "used to *provide* electric power" (emphasis added), because existing transmission lines are the types of facilities that the Secretary could legitimately place into a categorical exemption, unlike a nuclear power generation plant which could not reasonably or logically fit into that category.

Surprisingly, the trial court looked at the word "provide" and concluded that it was the Secretary's intent to apply the exemption to the nuclear power plants despite the Legislatures clear specific limitation on the Secretary's authority and the

California Supreme Court's confirmation of the limitation on the Secretary's authority.

The trial court admitted the legislative history concerning the meaning of the word "provide," but then refused to consider that legislative history deciding instead that the meaning of the word "provide," as used is subject to a literal translation based upon its plain meaning. This was a mistake. It is clear from the discussion that the meaning of "provide" is sufficiently ambiguous that legislative history is helpful and should be considered.

The administrative history for February 3, 1973, the date of the adoption for regulations of the California Resources Agency, signed by the Secretary of Resources, N.B. Livermore Jr., shows the intent of the exemption was to apply to the *conveyance and distribution* of electric power, not the *generation* of it by a large nuclear power plant. (See Order Adopting Regulations of the California Resources Agency, 12 JA 2660-2671). As originally written, Article 8, Categorical Exemptions, §15101(b) (which later became §15301(b) that the trial court interpreted read as follows:

§ 15101(b) Existing facilities of both investor, and publicly

owned utilities used to convey or distribute electric power, natural gas, sewage, etc:

The only difference between §15101(b) and its successor §15301(b) is that the words "convey or distribute" in §15101(b) have been condensed into the simple word "provide" in §15301(b). All the other wording is the same in the two Sections, and the intent of the Secretary of Resources is the same: to apply to facilities that provide for the *distribution*, not *generation* of electricity.

A reading of the 2,395 pages of administrative history that encompasses the regulations, including the categorical exemptions, shows that §15101(b) was not even controversial. As can be seen from a representative letter from the Department of Planning for the City and County of San Francisco commenting on the existing structures exemption, §15101(b), it was thought to apply to "Replacements of utility lines and equipment in existing locations…" (See Letter dated March 29, 1973, 12 JA 2673-2685).

After the guidelines containing exemptions were adopted in February 1973, the Secretary of Resources then proposed amendments to the guidelines on August 31, 1973. (See

Proposed Amendments to Guidelines for Environmental Impact Reports, 12 JA 2687-2705). This is when the words "convey and distribute" were replaced with "provide." The Secretary sent out a letter (*id*.) encouraging public comment and announcing that there would be two public hearings in Los Angeles and Sacramento where oral comments could be made, and written comments submitted.

There was broad public participation, yet no one, including major environmental groups, spoke against the change from "convey and distribute" to "provide." In their minds, and the mind of the Secretary, and based on the plain meaning of the words, it was clear to all that the exemption applied to transmission lines and the distribution of electricity. In the Comments of the Environmental Defense Center and the Sierra Club for example (12 JA 2707-2729), they looked specifically at the amendment changing "convey and distribute" to "provide" and replied, "No Comment." They did not need to comment, as it was clear to all that the amendment was not intended to be an exemption for nuclear power plants *per se*. PG&E creatively suggested and the trial court followed a unique, inaccurate interpretation in this case.

Whether the Secretary intended to include nuclear power generation facilities within the existing structures exemption is a question of *law* for this Court to be decided *de novo*. *Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 694 ("Where the issue turns only on an interpretation of the language of the Guidelines or the scope of a particular CEQA exemption, presents 'a question of law, subject to *de novo* review by this court.") Furthermore, categorical exemptions must be construed narrowly in order to afford the fullest possible environmental protection. *Carmel River, supra.* ("Since a determination that a project falls within a categorical exemption excuses any further compliance with CEQA whatsoever, we must construe the exemptions narrowly in order to afford the fullest possible environmental protection.")[38]

[38] Citing Azusa *Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1193; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 966, 91 Cal.Rptr.2d 66; *Dehne v. County of Santa Clara,* (1981) 115 Cal.App.3d 827, 842, 171 Cal.Rptr. 753.) "[E]xemption categories are not to be expanded or broadened beyond the reasonable scope of their statutory language." (*Dehne v. County of Santa Clara, supra,* at p. 842, 171 Cal.Rptr. 753; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125, 65 Cal.Rptr.2d 580, 939 P.2d 1280.) These rules ensure that in all but the clearest cases of categorical exemptions, a project will be subject to some level of environmental review.

This Court should use its power of review to examine the legislative history and conclude that the Secretary did not intend to include nuclear power generation facilities within the Existing Structures exemption. Once the Court concludes that the Secretary did not intend to include nuclear power generating plants to come within the existing structures exemption and, therefore, an exemption does not apply, this Court's analysis of the issues presented could logically end here: an exemption does not apply.

B. Even if the Secretary Intended Nuclear Plants to be Within the Exemption, such a Decision Would Be Invalid as an Abuse of Authority.

As discussed above, the Legislature was careful to limit the authority of the Secretary to create exemptions from CEQA.

As the Supreme Court put it bluntly in *Berkeley Hillside*: "No regulation is valid if its issuance exceeds the scope of the enabling statute. The secretary is empowered to exempt only those activities which do not have a significant effect on the environment." (citing Pub. Resources Code. §21084). *Berkeley Hillside,* at 1107, citing *Wildlife Alive v. Chickering* (1976) 18

Cal. 3d 190, 205-206, 132 Cal. Rptr. 377, 553 P. 2d 537.[39] Given this explicit limitation, the Secretary lacked the authority to include nuclear power generation facilities within the existing structures exemption regardless of intent.

The Supreme Court's statutory interpretation of the limitation on the authority of the Secretary fits perfectly with the intent of the author of the legislation, John Knox. At first, the Sierra Club objected to the Secretary of Resources being given "carte blanche" to create exemptions. However, the bill passed ultimately with no opposition from the Sierra Club, since the statutory language was clarified that the Secretary was required to make a finding of no significant effect on the environment in order to create an exemption.

Legislative history and common sense reflect that nuclear power generation facilities do not come within an exemption. This is another ground upon which this Court should reverse with instruction that the Commission apply CEQA and prepare and initial study.

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[39] The concurrence in *Berkeley* reinforces this majority holding "[W]here there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper." *Berkeley* at 1131, citing *Chickering, supra*, 18 Cal. 3rd at p. 206.

XI. THE TRIAL COURT DID NOT PROPERLY APPLY THE PUBLIC TRUST DOCTRINE.

The staff report that the Commission relied upon in reaching its June 28, 2016 decision on the Diablo lease stated that Commission staff "recommends authorizing the subject lease as it does not substantially interfere with public trust needs and values, is in the best interests of the State, and is otherwise consistent with the common law Public Trust Doctrine."[40] The error is this decision, however, is that, as discussed above, because an improper "baseline" was applied, the staff never performed the "factual evaluation" that was necessary to make a decision on public trust.

The court in *Baykeeper v State Lands Commission* (2015) 242 Cal.App4th 202, 242 specifically held that a CEQA analysis alone is not automatically sufficient to satisfy public trust obligations. "…the SLC did not implicitly consider its own obligations under the public trust doctrine as part of its CEQA review of this project.) *Id*. The same is true in the case at hand. The staff did not make a CEQA "factual evaluation" in compliance in *Berkeley Hillside*, and this failure to make a

[40] Revised SLC Staff Report, Calendar Item 96, p. 14, Recommendation No. 3, 4 JA 688.

factual evaluation also makes the public trust decision flawed and subject to remand.

Had a proper factual evaluation been done under the public trust doctrine, the cumulative environmental impacts from the continued operation of Diablo, as discussed above, would have been found to substantially interfere with both the express and implied responsibilities imposed on the Commission by the Public Trust Doctrine to protect the public interest related to waterborne commerce, fisheries, recreation and most importantly, habitat preservation.

In addition, since no EIR has ever been conducted concerning all of the possible adverse environmental impacts of the operation of Diablo, there are likely cumulative health, environmental and other impacts associated with radioactive emissions from, and long-term storage of radioactive waste at, Diablo that have yet to be fully measured as part of a Public Trust analysis.

Diablo's once-through cooling system takes in over 2.5 billion gallons (7,600 acre-feet) of water per day and heats it by

18 degrees F before discharging into the Pacific.[41] The geographic scope of the impact from Diablo is estimated to average 46 square miles.[42] Two Marine Protected Areas, established in 1999, are in proximity to the SLC-managed public lands. The taking of *any living marine resources within a protected area is forbidden.*[43] Diablo entrains (kills) approximately 1.5 billion larval fish and over 30 billion planktonic forms per year. [44] In 2003, the state Water Resources Control Board and the Department of Fish and Game prepared a cease and desist order for reactor discharges into the ocean cove, concluding: "The question presented is whether the degradation of the marine environment near Diablo is acceptable to the DFG. Based on review of law and policies …the answer is "No".[45] Failure to apply and follow the public trust doctrine is another reason way this case should be reversed and remanded

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[41] Diablo Canyon Power Plant License Renewal Application, Appendix E, Environmental Report, at 4.2-6, http://www.nrc.gov/reactors/operating/licensing/renewal/applications/diablo-canyon/dcpp-er.pdf)

[42] *Findings Regarding Clean Water Act Section 316(b), Diablo Canyon Nuclear Power Plant NPDES Permit Order,* Peter Raimondi, 2005.

[43] CA Code of Regulations, Title 14, §632, §§ (b) (48).

[44] Peter Raimondi, *et al.,* July 27, 2005

[45] *id.*

so that a proper public trust assessment can be made.

XII. CONCLUSION.

For all the foregoing reasons, Appellant asks this Court to do the following: (1) compel Respondent Commission to set aside its decision dated June 28, 2016 on Calendar Item No. 96 (to terminate Lease numbers 4307.1 and 4449.1, and to approve the new lease requested by PG&E); (2) require Respondent Commission to proceed with further CEQA compliance, including preparation of an initial study and a determination of whether further environmental review would require an EIR or a mitigated negative declaration under CEQA, before Respondent extends, re-issues or issues any new or existing lease or leases to PG&E; and (3) enjoining Real Party in Interest, PG&E, from any activity or operation under a new Diablo lease unless and until Respondent complies with all applicable California regulations and statutes, including CEQA, so as to

bring its approval of the project into full compliance with CEQA.

DATED: October 23, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 13,921 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: October 23, 2017

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