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 REPLY BRIEF

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I

INTRODUCTION

At a time when the Federal Government is drastically reducing environmental protections afforded under federal law, it is now more critical than ever that California protect its statewide environmental regulatory regime as set forth under the California Environmental Quality Act ("CEQA"). The positions set forth by the State Lands Commission ("Commission") and Pacific Gas & Electric ("PG&E") in their joint opposition brief (jointly, "Respondents"), which were largely adopted by the trial court, would gut the core purpose of CEQA of providing environmental protection to the people of California.

Since 1965, when the leases at issue were initially approved by the Commission, Diablo Canyon Power Plant ("Diablo"), despite being a *nuclear power generating facility*, has never undergone any environmental review. If the Commission and trial court's ruling stands, it will never be subject to environmental review, and the logical fallacy that a nuclear power generating facility is exempt from CEQA will be the law of California, contrary to the purpose and intent of CEQA.

This Court should protect the core purpose of CEQA by following California Supreme Court precedent in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086 (*"Berkeley Hillside"*). The key

issue in this case is whether the two leases enabling the core operations of Diablo - including intake pumps that indiscriminately ingest 2.5 billion gallons of sea water a day, annually killing billions of fish and other marine life, and then redepositing this water back into the ocean 18.5 degrees warmer, destroying even more marine life - are completely exempt from CEQA review.

There are **four** substantive reasons why the Diablo seven-year leases are not exempt from environmental review:

One, an exemption can *never* be created for projects that "may have a significant effect on the environment," and a nuclear power generation facility *by its de facto operation* has a significant effect on the environment. The Secretary of Resources fully understood the law, and cases interpreting that law clearly state that *only projects that will not have a significant effect on the environment may be included within an exemption*. Therefore, the Secretary of Resources never intended to include nuclear power generation operations within an exemption, nor had, and does not have, the authority to exempt nuclear power generation facilities. PG&E's attempt to shoehorn a nuclear power plant within the exemption has led the trial court to error. An exemption does not apply, and this Appellate Court can stop here, sending the matter back to the Commission with an instruction that nuclear power generation facilities cannot come within the existing facilities exemption, and an initial study must be prepared.

Two, California Supreme Court precedent in *Berkeley Hillside* requires that an agency such as the State Lands Commission must make specific findings if it wishes to apply an exemption. This point was observed by the trial court, when it noted that "[i]t is not clear from the Commission's Notice of Exemption whether it found no unusual circumstances existed, or whether it concluded that even if unusual circumstances existed there was no reasonable possibility of a significant environmental effect." Such findings were not made in this case, and at a minimum the decision by the Commission in applying an exemption should be voided with instructions to the Commission that it make the required findings.

Three, even if the Diablo nuclear power generation plant is deemed to fall within an exemption (and it cannot), there is an *exception* to the exemption that would render the exemption inapplicable. Well established law, including *Berkeley Hillside,* makes an exception applicable in this case if there are "unusual circumstances," and *the trial court specifically held that there are "unusual circumstances in this case!"*

The trial court had it right, stacks of evidence were presented to the Commission establishing unusual circumstances: **1)** Expert analysis and peer-reviewed studies, superior to anything provided by PG&E, provided statistically-significant data, strongly indicating that living downwind from a nuclear power plant directly raises cancer and infant mortality rates;

2) Studies establishing a web of fault lines, including two that may intersect to create a quake surpassing the plant's 7.5 Richter Scale capacity limit; **3)** Evidence that cumulative reactor embrittlement presents a serious risk.; **4)** Evidence that the precise ground Diablo sits on has been historically impacted by tsunami, and there is a subduction fault parallel to the shoreline that is comparable to Fukushima; **5)** Evidence that Diablo's massive size and once-through-cooling operational scope, including a desalinization plant built in 1985 without any EIR assessment under CEQA, results in the pumping of billions of gallons of sea water killing billions of fish and creating a growing 46-mile dead zone; **6)** An accumulating radioactive waste dump of thousands of spent fuel rods (including plutonium), stored on site with no plans for relocation; and **7)** Evidence that PG&E has accumulated substantial deferred maintenance at Diablo, just as in the case of the San Bruno community devastated by faulty gas pipeline explosions, which PG&E tried to cover up and was later convicted of five felonies.

The evidence presented to the Commission was so strong that it did not just constitute a showing that these unusual circumstances "**may**" have a significant effect on the environment – the evidentiary presentations at the hearings showed that there **"will"** be a significant effect on the environment due to one or more of these unusual circumstances. PG&E and the Commission do not want to admit that these circumstances (particularly

when considered for their combined effect, as they must be) **will** have a significant effect on the environment.

To avoid losing, and to stifle any real analysis of the severe environmental impacts at issue here, they "crimp" the "baseline" to prevent inclusion of new information within the traditional "baseline" used to identify unusual circumstances. PG&E has concocted an alternative "baseline" analysis positing that as long as the plant continues to operate in the same manner, regardless of adverse impacts, then a "baseline" is established, and other contrary evidence can be ignored. Babies dying? New earthquake faults? Does not matter, plant will be operated the same way during the proposed lease period. The integrity of the plant's reactor pressure vessel is becoming dangerously threatened by embrittlement? Does not matter, same rationale applies. When this bogus approach was initially presented, Lieutenant Governor Gavin Newsom and the Commission rightfully did not buy into it, and at a public hearing on December 18, 2015, Gavin Newsom said:

> "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."[1]

[1] SLC Meeting Transcript, December 18, 2015, pp. 161-162 [AR 000263-264]. The word "at" is not in the transcript, but is added for clarity.

Mr. Newsom went on to agree with William White who, speaking on behalf of Friends of Earth only minutes before, said that an exemption *did not apply* because the Diablo leases are comparable to offshore oil rigs, where the Commission *always requires CEQA application*, and refuses to apply the existing facilities exemption. With respect to the precedent for offshore oil rigs, Newsom agreed and said the following:

> "It is not without precedent as it was mentioned on the CEQA question with these oil leases *that what* appears to be a benign question of extending an existing lease triggers CEQA consideration. Why one would consider the same here I don't know. I do think we should consider the same."[2]

Unfortunately, both the Lt. Governor and Mr. White flip-flopped and now say that Diablo is not like the offshore rigs and an existing facilities exemption does apply. Despite the flip that Friends of the Earth and Lt. Governor Newsom have made on the application of an exemption in order to make a political deal, their original interpretation of the law that an exemption is not applicable was right then, remains correct today, and should decide this case. Mr. White, representing Friends of the Earth, stood before the Commission and said the following to convince the Commissioners that an exemption *does not* apply:

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[2] SLC Meeting Transcript, December 18, 2015, pp. 162-163 [AR 000264-000265.] The words in italics, "that what" are not in the transcript, but they are clearly in the video for the hearing on December 15, 2015 at 3:37:55.

> "The gist of their argument [PG&E] is that this is an existing ongoing operation and there is no increase in the intensity of the operation. So therefore, it comes within the existing facilities exemption under CEQA. But that exemption contains an exception for unusual circumstances. *I think in this case to say there are unusual circumstances is an understatement.* This is the only remaining nuclear power plant operating in California. The original lease was approved by this Commission almost a half century ago before CEQA was even enacted. There's been no CEQA review for the project. There's new information that's come up in any event since that time. Four new seismic faults that were not known at the time the lease was originally approved … *So if these aren't unusual circumstances, I think nothing is.*"
>
> Mr. White went on: "The argument PG&E makes that, well, even if there are unusual circumstances, there can't be an impact because there is an existing plant. *That's just not the law.* There can be existing impacts even when existing facilities continue to operate."
>
> And on: "This has been the State Lands policy. For example, with oil facilities that have been operating for a century, you have required CEQA review because, for example, the risk of future impact, an oil spill, for example, or here the risk of a seismic event or tsunami or flooding event, these are future impacts. They are not part of the existing base line. Every year this plant continues to operate, that risk goes up. That is an impact under CEQA that is significant. *So therefore,* [the Commission] *cannot rely on this categorical exemption.*[3]

He was right about the law. The law is clear and cannot be cast aside for a political deal. To decide otherwise would eviscerate the

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[3] SLC Meeting Transcript, December 18, 2015, pp. 158-159 [AR 000260-000261.] This was a proper statement of law. The possibility of a massive radiation event can be a significant effect, just as the possibility of an oil spill can be a significant effect. *Citizens for East Shore Parks v. California State Lands Commission*, (2011) 202 Cal.App.4th 549, 555 (The Land's Commission, [the same Commission as in this case] concluded future oil spills constituted a potentially significant environmental impact, requiring analysis in an environmental impact report (EIR).

hearing process that the people of California, through political will executed by the actions of their representatives, have fought so hard to create. If the trial court's ruling that ongoing, unchanged operations is enough to negate new evidence of adverse impacts, then why should citizens and organizations bother to present such evidence at hearings? PG&E, or others with projects, just walk in and say, "we're operating the same way," "business as usual" and "this new evidence is irrelevant." This reasoning is contrary to law and will make bad law if allowed to stand. There are unusual circumstances, and even if an exemption applied, which it does not, there would be an exception to the exemption precluding its application.

Four, similar to its failure to make findings for the application of an exemption, the Commission abused its discretion when it failed to make the factual findings required under the Public Trust Doctrine, and therefore violated that doctrine. Once the Commission decided to make a political deal, it thought that the only finding it needed to make was that the ongoing operations at Diablo would remain the same. This unfounded, limited focus also violates the factual findings requirement of the Public Trust Doctrine.

Given that an exemption does not apply for at least three reasons, and the Public Trust Doctrine has also not been followed, this Court should reverse the trial court's holding that an exemption applies and

remand the matter back to the Commission to prepare an *initial study* and decide whether to issue a Negative Declaration, or prepare an Environmental Impact Report. *Save Our Carmel River v. Monterey Peninsula Water District* 141 Cal.App.4th 677, 687 ("If no exemption applies, the agency proceeds to the second tier and conducts an initial study in order to determine if the project may have a significant effect on the environment." *Citing* Guidelines, § 15063, subd. (a) in Public Resources Code).[4]

[4] PG&E states that Petitioner is demanding an EIR (Resp. Brief at 30 "WBA demands the preparation of an EIR for the Lease Extension.") This is untrue. The Petitioner is not demanding an EIR be prepared. The case should be remanded back to the Commission to prepare an initial study, and the Commission has the discretion to issue a Negative Declaration or an EIR. *John R. Lawson Rock & Oil, Inc. v. State Air Resources Board*, 2018 WL 636063 p. 10 ("Thus, courts can order an EIR only where, under the circumstances of that case, the agency lacks discretion to proceed in a different fashion.

II

FACTUAL REBUTTAL

These two leases at issue, initially approved nearly 50 years ago in 1969 prior to the enactment of CEQA, are about to expire. The first lease for the water intake structures and breakwaters expires on August 27, 2018 – **this year -** and the second lease expires on May 31, 2019.

Extensive hearings were held with respect to the lease extensions. Many individuals and groups, including the Petitioner in this case, prepared serious and thoughtful input for consideration in the hearing process.[5] During this time, PG&E suggested that it was entitled to an exemption from CEQA as long as Diablo did not make any operational changes.

Despite this flawed rationale, a political deal was struck on June 21, 2016, one week before the Commission applied the exemption, and any real analysis of the evidence presented was lost. In their Statement of Facts, PG&E presented the impression to this Court that the Commission made a thoughtful determination that "unusual circumstances" did not exist. This did not happen. The Commission and its staff *never* prepared a thoughtful analysis of "unusual circumstances." They just published a

[5] All of the AR cites in this Reply Brief are to the certified Administrative Record. Petitioners agree that the trial court joint appendix documents do not limit the administrative record documents that may be cited on appeal.

boilerplate paragraph as part of their report concluding that an exemption applied.[6]

The only unusual circumstance the staff addressed was intersecting earthquake faults. For this discussion, all they did was line out (you can see the lines in the report) what they had written before and insert claims by PG&E that these intersecting faults were not a problem. (AR 000028-000031). Cumulative embrittlement, cancer increases, storage of high-level radioactive waste on site, size and location of the plant (which had previously been a big concern to staff) are left unaddressed.

The staff report contains one single boiler-plate paragraph that merely states the standard they are supposed to apply to determine if there are unusual circumstances; it makes no findings. (AR 000032). Finally, the staff report concludes in a single sentence that an exemption for existing facilities applies: "The subject issuance of a new lease is exempt from the requirements of CEQA as a categorically exempt project." (AR 000037.)

Given the improper procedures used to determine whether an exemption applied, and if so, whether there was an exception, along with a legally and factually unsupported conclusion that an exemption does apply, the Petitioner filed suit for a Writ of Mandate in Los Angeles

[6] SLC Staff Report, June 28, 2016, Calendar Item 96 [AR 000025-000045].

Superior Court. Superior Court Judge Mary Strobel held a hearing on the merits on July 11, 2017. PG&E and the Commission claim in their Statement of Facts that Judge Strobel denied the Petitioner's claims in their entirety, but this is untrue. Yes, the trial court did deny the writ of mandate, but in so doing the court also agreed that there are "unusual circumstances" in this case.

Despite finding "unusual circumstances," the trial court accepted the unique "baseline" argument of PG&E that as long as the leasing "involves negligible or no expansion of existing use," then "business as usual" prevents a fair argument that there is a reasonable possibility of a significant effect due to these unusual circumstances. Petitioner then filed this appeal.

III

RESPONDENTS MISSTATE AND MISAPPLY THE APPROPRIATE STANDARD OF REVIEW

The issues presented to this Court involve questions of law and fact. Respondents attempt to apply the traditional substantial evidence standard to *all* the questions presented for review to this Court. (Respondents' Brief pp. 22-24.) *Nowhere in their Opposition Brief do they acknowledge that there are issues of law when there certainly are.* For example, with respect to Petitioner's argument regarding the application of the exemption in the first instance, the proper standard of

review is *de novo,* with no deference to the agency's decision required. (*Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 817) ("To the extent this argument turns only on an interpretation of the language of the Guidelines or the scope of a particular CEQA exemption, this presents a question of law subject to de novo review by this court").

PG&E and the Commission also refuse to admit in their Opposition Brief that *they have the burden of proof* to show that Diablo comes within the existing facilities exemption. (*Save Our Carmel River* 141 Cal.App.4th at 705.) ("The agency invoking the categorical exemption has the burden of demonstrating that substantial evidence supports its factual finding that the project fell within the exemption.") (*Citizens for Environmental Responsibility v. State ex. Rel. 14th Agricultural Assn.* (2015) 242 Cal.App.4th 555, 568) ("The lead agency has the burden to demonstrate that a project falls within a categorical exemption and the agency's determination must be supported by substantial evidence.") Once the agency establishes that the project is exempt, the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions listed in Guidelines section 15300.2. (*California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 186.)

Finally, the final standard is for an initial study which must be prepared on remand. Public Resources Code § 21151 creates a low threshold requirement for the preparation of an initial study which reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted.

ARGUMENT

I THE DIABLO NUCLEAR POWER GENERATION PLANT IS NOT WITHIN THE EXEMPTION FOR EXISTING FACILITIES

A. **The Secretary of Resources Never Intended Nuclear Power Generation Facilities to Come Within the "Existing Facilities" Exemption**.

This case is about whether an exemption from CEQA exists for the Diablo Canyon Nuclear Plant. In effect, an exemption cuts off *any* type of environmental review before it starts. (*Association for Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 726) ("where a project is categorically exempt, it is not subject to CEQA requirements and may be implemented without any CEQA compliance whatsoever.") That is what PG&E is after, "no compliance with CEQA whatsoever." PG&E is loath to do *any* environmental analysis, particularly when it comes to health concerns and evidence showing an increase in cancer and infant mortality rates near the plant. PG&E wants to completely sweep this evidence under the table by making sure it does not receive any type of serious environmental review.

The same is true with respect to embrittlement and other safety-related nuclear plant equipment concerns that could require expensive upgrades or repairs. A comprehensive environmental review may identify deferred maintenance repairs that would be too costly to justify to shareholders. To avoid this dilemma, PG&E tries to shut down *any* environmental analysis through the application of an exemption, and would rather cross its fingers and roll the dice for the next seven years hoping that the plant deterioration does not lead to a radiation leak or that safety measures fail during an earthquake due to plant deterioration. That is the same type of thinking that led to the explosion of PG&E's faulty gas lines in San Bruno.

To gain an exemption, PG&E attempts to shoehorn the Diablo nuclear power generation plant into the "existing facilities" exemption. The problem for PG&E is that one of the main tenets of the CEQA process is that an exemption only can be created for projects that the Secretary of Resources specifically determines "will not have a significant effect on the environment." No matter how hard PG&E tries, a nuclear power generation plant could never meet this requirement, and as such the Secretary of Resources never intended, nor could have created, an exemption precluding environmental review for a nuclear power plant.

PG&E and the Commission also realize that their shoehorning effort is likely to fail if it is analyzed as a matter of *law*. Therefore, they take pains in their brief to characterize the Commission's decision concerning an exemption as discretionary. This is wrong. Whether Diablo falls within the scope of the exemption for existing facilities is a question of *law* for this Court to decide. (*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."); (*Walters v. City of Redondo Beach*, (2016) 1 Cal.App.5th 809, 817) (Scope of CEQA exemption is a question of law subject to de novo review).

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.")[7]

[7] 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*,115 Cal.App.3d 827, 842,

It is also clear that *the Commission has the burden of proof* to show by substantial evidence that the exemption applies. (*Save Our Carmel River* 141 Cal.App.4th at 705.) ("The agency invoking the categorical exemption has the burden of demonstrating that substantial evidence supports its factual finding that the project fell within the exemption.") (Citing *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372, 386). To the extent the Commission makes factual findings in order to make a decision about an exemption, those findings are reviewed under a substantial evidence test, (*Id.*) however, the Commission continues to have the burden to prove that the exemption applies. (*Id.*)

The Commission did not come close to meeting its burden because it simply accepted as correct a seven-page single-spaced letter from PG&E's lawyer misstating the law of *Berkeley Hillside* and erroneously stating that as long as the operations for Diablo continued the same, then the Commission did not need to make other findings and could simply conclude that the exemption applied.

[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 letter (AR 002133-AR 002142) from Daniel A. Goldberg, counsel for PG&E, to Ms Jennifer Lucchesi, the Executive Officer for the Commission, is dated June 21, 2016, the same day the political deal was made, and one week before the Commission hearing on June 28, 2016, when the Commission found that the exemption applied. The letter is the blueprint for the erroneous application of baseline by the Commission which was later accepted by the trial court.

Among other things, the letter claims "Accordingly, the duration of potential impacts that may occur from continued operations, including those from a nuclear accident arising from a seismic event or from once-through cooling, are no greater than what always has been understood would occur when NRC licenses were first issued to DCPP (Diablo)." By this reasoning, it does not matter that there has been considerable new information about earthquake faults in the past 40 years that were unknown at the time of the licenses, such as a fault that is only 1,000 feet away from the reactors. All this information can be ignored, including information about cancer, embrittlement, a growing marine dead zone, and other new information that are now part of the unusual circumstances affecting the leased property.

Once PG&E's inaccuracies are set aside, it is clear that the exemption was never intended to include nuclear power generation facilities, nor could it even if the Secretary of Resources had that

intention. 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:

> 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.)

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 facilities."

PG&E's entire claim of "no change" as defined in the exemption guidelines is flawed. Just because PG&E has not "changed" the 2.5 billion gallons of water it sucks through its pipes daily does not mean that this process is not having a cumulative significant effect on the environment. It is, and the dead zone is expanding as an additional 1.5 billion early stage fish are killed annually. The significant effect from changing marine life also includes an explosion of jellyfish that has on more than one occasion forced PG&E to shut down the plant due to clogged intake pipes. Just because PG&E is not changing its operations

in relation to the environment does not mean that the environment is not changing.

This is one of the reasons why the CEQA process is so invaluable and exemptions are narrowly construed. Continuing to pile up plutonium-laden spent fuel rods on site may not be a change in operations, but the massive accumulation of hi-level radioactive waste certainly makes for a better terrorist target and may have cumulative dangers requiring environmental analysis. The same is true of reactor embrittlement. It does not matter that PG&E turns on the switches the same way each day, the important change concerns cumulative reactor pressure vessel deterioration to the point where it will not withstand even a moderate earthquake which could cause the reactor to be flooded with emergency core cooling water, potentially shattering the reactor containment system.

The desalinization plant built after the enactment of CEQA is another example of change, both in the creation and expansion of something new with a significant effect, and in the changes it is causing to marine life through its operation - changing water salinity and altering intricate sea balances in a way that is killing off entire species. An EIR was never prepared for the desalinization plant, and now PG&E claims that no review is required as long as plant operations remain unchanged, regardless of whether such operations actually change the environment. In so doing, PG&E is misconstruing the reference to change in the

guidelines. “Change,” as described in the guidelines, is not intended to create a kind of blanket ignorance and complete disregard of changes actually occurring in the environment. (Resp. Brief at 34)

Despite what PG&E wants them to do, Commission staff cannot be complicit in a political mission to implement a deal by attributing to the Secretary what would be both an illegal act and a dereliction of responsibility. This Court can and should therefore conclude that the Secretary never intended for nuclear power plants to be classified under the "existing facilities" exemption, and hold that the leases are not exempt as a matter of *law* because they do not come within the “existing facilities” exemption.

B. The Plain Meaning and Legislative History of the Guidelines Reflect That Nuclear Power Generation Facilities Such As Diablo Are Not Within the Existing Facilities Exemption

The administrative history of §15301(b) the State Resources Code reflects that nuclear power generation facilities were never intended to come within the existing facilities exemption. The Secretary was thinking of transmission towers carrying power lines and similar structures that do not have a significant effect on the environment. This is why §15301(b) was careful to refer to existing facilities “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.

Looking back to the evolution of §15301 eliminates any ambiguity as to the plain meaning of the regulations, and their intent not to include nuclear power generation facilities. The plain meaning of the predecessor regulation shows that the word "provide" was limited to the conveyance and distribution of power e.g. transmission lines and not the *generation* of it.

As originally written, Article 8, Categorical Exemptions, §15101(b) (which later became §15301(b) that the Opp. Brief cites at pg. 11-12, ll. 25-2, and relies upon) reads 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 other wording remains unchanged between the two Sections, and the intent of the Secretary of Resources is the same: to apply the exemption to facilities that provide for the *distribution, not generation,* of electricity. This interpretation makes perfect sense given that the distribution of electricity over transmission lines does not have a significant adverse

effect on the environment, while the *generation* of electricity at a nuclear plant like Diablo certainly does.

PG&E tries to put a different spin on the meaning of the word "provide." According to PG&E, using the word provide "alters a narrower specific category to a broader category." In other words, according to PG&E, the intent behind the guidelines was to expand a guideline originally applied to transmission lines (and other forms of distribution and conveyance) to include nuclear power generation facilities. (Resp. Brief at 37.) First, there is nothing in writing indicating this intent on the part of the Secretary. Second, this reading of "provide" is directly contrary to the law holding that "exemption categories are not to be expanded or broadened beyond the reasonable scope of the statutory language." (*Save Our Carmel River* 141 Cal.App.4th at 697.)

The court, in *Carmel River*, while overturning the improper application of an exemption, explained the rules. "These rules ensure that in all but the clearest cases of categorical exemptions, a project will be subject to some level of environmental review." (*Id.*) That is all Petitioner is trying to accomplish in this case: some level of environmental review. The plain meaning of the word "provide" should not be stretched to prevent this from happening. To do so would require the Secretary to ignore the mandate that he or she only include projects that will not have a significant effect on the environment.

Second, nothing in the legislative history reflects the scale and degree of resistance that would be expected to occur when nuclear power plants were suddenly exempted from CEQA. 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. It was clear to all that the exemption applied to facilities of distribution and conveyance, such as transmission lines that distribute electricity.

The reliance of PG&E and the Commission on the case of *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, being included within the rulemaking file is misplaced. (Resp. at 38). The presence of a reference to *Bloom* in the file strengthens an interpretation that "convey and distribute" and "provide" are limited in their breadth. First, the trial court in *Bloom* held that there were **no** "unusual circumstances." (*Bloom*, 26 Cal.App4th at 1316). In addition, the magnitude of the facts in *Bloom* are much less than the facts in Diablo. *Bloom* involved an incinerator burning waste, a limited environmental effect, nothing near the magnitude of a nuclear power generation plant. The court noted neighborhood included truck bodies and lumberyards, things that do not reflect an intent to alter a narrower specific category to a broader category including nuclear power generation facilities. (*Id.*)

Perhaps what is most egregious about the interpretation of the word "provide" by PG&E is that if the Secretary made an intentional decision to include Diablo, then the decision is void because the Secretary lacked authority to create the exemption, and an application of the exemption in this case is void *ab initio*. The Court, in *Berkeley Hillside,* was clear with respect to the limited authority given to create exemptions: "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." (*Id.* at 1107.) The reading of "provide" by PG&E is inconsistent with the *law.*

II. THE COMMISSION FAILED TO FOLLOW LEGALLY REQUIRED PROCEDURES FOR DECIDING WHETHER AN EXEMPTION APPLIES SO THE FINDING OF AN EXEMPTION IS INVALID

In *Berkeley Hillside,* the Court stated the following with respect to the steps an agency such as the State Lands Commission must take to determine whether an exemption applies:

> "Thus, an agency may not apply a categorical exemption without considering evidence in its files of potentially significant effects, regardless of whether that evidence comes from its own investigation, the proponent's submissions, a project opponent, or some other source."

(*Berkeley Hillside* at 1103.)

The Court, in *Berkeley Hillside*, was quite clear that the Commission is required to "weigh the evidence," not ignore it as the Commission did here. (*Berkeley Hillside* at 1115-1116.) Furthermore, the Court also required in *Berkeley Hillside* that a finding of fact must be made.

> Therefore, an agency must weigh the evidence of environmental effects along with all the other evidence relevant to the unusual circumstances determination and make a finding of fact.

(*Berkeley Hillside* at 1115-1116.)

While these findings of fact need not be extensive and may include a brief statement of reasons written, *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 816, *something* is required in writing so that it is possible to have judicial review and here *nothing* was done. After the political deal was made on June 21, 2016, one week before the Commission hearing date on June 28, 2016, all staff did was "revise" their report, i.e. flip-flop and physically line out what they had written before to insert claims by PG&E that intersecting earthquake faults were not a problem. (AR 000028-000031). In so doing, the Commission staff did not even mention the serious health issues, embrittlement, toxic waste dangers, or the effects of the desalination plant, much less make any findings on these issues. (AR 000025-AR00045.)

For example, a highly respected expert on nuclear issues and embrittlement, S. David Freeman told the Commission that 30 years of

radiation and heat had "embrittled" the plant and that it needed "annealing" – that is, "making it solid again," (AR 16450), and yet there is no response or finding by the staff whatsoever.

The Commission totally ignored its duty under *Berkeley Hillside*, and issued a one paragraph summary that never even discussed *Berkeley Hillside.* PG&E and the Commission claim in their Brief that "the Commission did make an express finding that the unusual circumstances exception did apply," (citing AR 000001, 000032, 000038; Resp. Brief at 40), *but that was just a one sentence conclusion.* (AR 000037.) Complicit in the political deal, the Commission ignored all legal requirements and made no findings.

The June 21, 2016 letter from PG&E's lawyer (AR 002133-AR 002142) blatantly misstated the law, but still convinced the Commission staff ready and willing to be convinced as part of the political deal. The letter, and the staff report a week later, concluded that as long as PG&E's operations remained the same, the key findings concerning coastal ecosystem destruction, health impacts and reactor embrittlement could be ignored. This resulted in a legally inadequate factual evaluation and insufficient findings.

The Commission also 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." Acting as it did, the Commission applied an exemption without making the factual findings required by law. This was error. *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.")

Given that the Commission failed to make the required factual findings, its decision that the exemption applies is invalid. At the very least, this Court should send the matter back to the Commission for it to make the required findings.

III EVEN IF DIABLO IS WITHIN AN EXEMPTION CLASS, WHICH IT IS NOT, AND THE COMMISSION MADE THE REQUIRED FINDINGS FOR AN EXEMPTION, WHICH IT DID NOT, AN EXCEPTION TO THE EXEMPTION WOULD APPLY

Even if an existing facilities exemption were to apply, and the required findings were made, there is an "exception to the exemption" when there are "unusual circumstances," and there is a significant effect upon the environment due to those unusual circumstances. (*Berkeley Hillside* at 1117.) There are a myriad of unusual circumstances in this case that require Diablo's exception from the exemption.

A. The Trial Court Correctly Held That Unusual Circumstances Exist In This Case

The trial court held that unusual circumstances exist in this case. (12 JA p. 2919) ("indulging all reasonable inferences in support of the Commission, the court concludes that there is no substantial evidence to support the finding that no unusual circumstances exist. There is substantial evidence of unusual circumstances...") PG&E and the Commission accuse the Petitioners of "jumping" past the first requirement of showing undue circumstances, (Resp. Brief at 42) and proceeding directly to the second prong which is whether there is a fair argument of a reasonable possibility of a significant effect due to those unusual circumstances.

Petitioners did not jump anywhere. To the contrary, it was the trial court that held that there are unusual circumstances in this case. There is an abundance of evidence demonstrating unusual circumstances and the trial court was correct. Therefore, it makes sense for Petitioner's Opening Brief, and for this Court, to spend more time looking at that second prong of whether there is a "fair argument" of a reasonable possibility that the unusual circumstances in this case may have a significant effect on the environment.

It is PG&E that wants to "jump," but not ahead. PG&E wants to jump backwards by appealing the trial court's finding of unusual

circumstances, because it realizes that the fair argument standard for the second prong is low, and easily met in this case. (Resp. Brief at 44, claiming "the trial court failed" by finding unusual circumstances). PG&E did not appeal from the trial court's holding, and this Court should uphold the trial court's holding with respect to a finding of unusual circumstances.

B. An Application of "Baseline" Includes All Existing Conditions and Not Only Whether PG&E is Continuing Operations in a Business as Usual Manner at Diablo

Before proceeding to individual examples of unusual circumstances, it is valuable to consider the "baseline" from which these circumstances are compared. The Respondent's primary defense in this case hangs on the question as to what "baseline" applies. PG&E was successful convincing the Commission and trial court to apply a flawed baseline analysis that has resulted in reversible error by the trial court. Petitioner agrees that the "baseline" for deciding whether there are unusual circumstances is to look at the "existing conditions" at the time the lease extensions are given. (*Citizens for East Shore Parks v. California State Lands Commission* (2011) 202 Cal.App.4th 549, 559.) ("Accordingly, the normal rule is that the baseline must reflect physical conditions existing at the time environmental analysis begins.")

PG&E's assessment of the existing conditions is flawed however, because it focuses on whether PG&E is making any changes in the way it

operates Diablo. It argues that, if no changes are made in plant operations, then new evidence concerning earthquake faults, rising cancer rates, rising infant mortalities, increased marine life destruction and an expanding dead zone, cumulative reactor embrittlement and deterioration, potential devastation from tsunamis, and the cumulative impact from on-site storage of thousands of spent fuel rods containing highly-radioactive plutonium *can be totally ignored.* As long as PG&E continues to operate the plant in the same manner, supposedly there can *never* be a significant effect on the environment.

Does this mean that PG&E would be free to ignore falling asbestos particles from a ceiling simply because the plant continued to operate the same, even though we now know asbestos fibers are lethal? If an offshore oil rig continues to pump away at the same rate but is causing spills, is it exempt? Obviously, that reasoning is flawed, as is PG&E's attempt in this case to nullify new information accumulated over the past 40 years.

The case most heavily relied upon by PG&E to support its novel, flawed baseline argument is, *North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832. *North Coast* does not, however, support their flawed baseline theory for three reasons. One, the facts in *North Coast* are different: there had been extensive environmental review, including the preparation of an Environmental Impact Statement,

which is the federal equivalent to an Environmental Impact Report, just years before the leases, and more environmental review was under way when the leases were done. (*North Coast Rivers* 227 Cal.App.4th at 847) (assessment under the National Environmental Policy Act of 1969 (NEPA) had already been done). In this case, PG&E has *never* prepared an Environmental Impact Report for Diablo or its desalinization plant.

Two, the leases in *North Coast* were for two years and at Diablo the leases are for seven years. Seven years is a long time to ignore that people are dying from health issues and that the plant is deteriorating, and to cross fingers hoping that there will not be an earthquake, even a moderate one, that could cause a reactor meltdown and radioactive release that may be unstoppable. It is worth observing that precisely such an ongoing radioactive contamination of the ocean from the Fukushima catastrophe of 2011 remains unstoppable today.

Three, the gravity of the environmental harm is much greater in Diablo than in *North Coast.* In *North Coast* it is true that the lives of thousands of fish were at risk; with Diablo billions of fish are being killed and according to the hearing testimony of Friends of the Earth, *9 billion more* will be killed over the course of the seven-year leases. (AR 000259) Plus, unlike in *North Coast*, at Diablo there is a genuine risk that a lack of environmental review could lead to unsafe circumstances and inadequate preparation for an earthquake, accident or terrorist event

that could result in a radioactive plume descending not only upon San Luis Obispo, but traveling with the trade winds all the way down to Santa Barbara and Los Angeles killing tens of thousands of people initially, and causing tens of thousands of cancer deaths over time. [AR 017709]

PG&E cites CEQA Guidelines §15125, subd. (a) for the definition of a "significant effect on the environment" as "a substantial, or potentially substantial, adverse *change* in any of the physical conditions in the area of project…" (Italics to the word change are added by PG&E). One of the most troubling aspects of the PG&E flawed baseline approach is that when considering the existing conditions, it only looks at the "change" in operations, not at the "change" for the environment. Baseline is simply not this crimped. In *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2002) 131 Cal.App.4th 1170, 1196, the court held that even when baseline is applied, the court can still consider the increases and intensity of 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)

PG&E may follow the same procedures in pumping 2.5 billion gallons of water daily from the ocean, or releasing a relatively small amount of radiation into the local community on a regular basis, but although this may not be a "change" in operations, it effects a "change"

in the environment as massive volumes of superheated water are dumped back out into the ocean, and increasing numbers of adults and children are dying from radioactive accumulation. [AR 017699-017734 and AR 001777-001810]

It is clear to all that in the past 40 years there has been significant new information obtained since that time and significant changes in circumstances. Lt. Governor Gavin Newsom recognized this at the December 18, 2015 hearing when he considered the original date of the leases and said, "There was no CEQA consideration back then. We didn't know a lot back then compared to what we know today." (AR 000264) Again, prior to the political deal, he had it right. Information about embrittlement alone has accelerated dramatically in that time.

It is not just new information that is ignored using this flawed baseline, it is also ignoring fundamental core concepts of physics such as entropy. Embrittlement and other evidence of weakening are occurring at Diablo as part of a natural process of deterioration and Diablo is 40 years old, sitting in a caustic sea environment on one of the windiest and roughest parts of the California coastline. In addition, 2.5 billion gallons of *saltwater* are pumped through the plant each day. Yet with PG&E's flawed baseline, the fact that increasing threats of significant environmental effects from plant deterioration can be ignored, as long as all procedures are followed in the same manner each day.

The key then, whether it is the trial court or this Court looking at a "baseline," is that after looking at the original baseline existing on the date of project approval, over 40 years ago, the Court then looks to see whether there is significant new information or significant changed circumstances that have come to light since that time. If so, they too must be considered.

PG&E and the Commission make much of the passage from *North Coast* stating, "Where a project involves ongoing operations or a continuation of the past activity the establish levels of the particular use in the physical impacts thereof are considered part of the existing environmental baseline." (*North Coast*, 227 Cal.App.4th at 87.) (Resp. Brief at 49.) PG&E goes on to claim that Petitioner cannot disregard the "baseline" as a core principle of CEQA. (*Id.*) Petitioner does not deny baseline as a core principle - baseline serves as a valuable purpose.

Where, as in *North Coast*, there has been extensive environmental review and an additional environmental review is underway, there can be reason to avoid redundancy. But that is not the case here. PG&E has never prepared an environmental impact report, nor has it prepared a genuine, peer-reviewed study to determine if people near the plant are suffering from increased rates of cancer and if infants are dying with greater regularity. The application of a flawed baseline in this instance only thwarts any environmental review; it does not prevent redundancy.

No cases are following *North Coast* for the crimped baseline principle that PG&E seeks to apply here. PG&E and the Commission point to cases for mining operations *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App. 4th 645; or airport operations *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, and traffic conditions, *Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238 (Resp. Brief at 51), but these only stand for the proposition that ongoing activities are *one aspect* of existing conditions. Yes, Diablo does continue to draw in 2.5 billion gallons a day and this is part of the existing conditions. Where PG&E's reasoning fails is that it assumes that this one aspect of existing conditions means that the Commission does not need to look at other conditions such as the dead zone that pumping is creating. It is too draconian to say that "business as usual" is sufficient and is the conclusive existing condition. Other courts have not applied *North Coast* in the manner that PG&E suggests, and this Court should not either.

There are also strong practical reasons for rejecting the flawed baseline theory, if upheld by this Court, it would gut the regulatory process for environmental review across the state of California. If PG&E succeeds, there will no longer be reason for organizations such as the Petitioner and many others to even bother, at considerable expense, to present evidence that hearings. All PG&E, the Commission, or some other agency will need to do is to look to see whether there has been a change in operations. This

approach clearly benefits "business as usual" as any new significant information presented at hearings would not be considered.

In California, from its inception, the idea behind CEQA has been that with genuine input, policy makers can make better decisions. It is true that at times the input can be unhelpful, but there are also countless instances where public input has been beneficial, and this proven process should not be eviscerated with a new test that somehow establishes continuing operations as the *only* relevant benchmark.

With these considerations in mind, and without the application of a flawed baseline theory, we now turn to the unusual circumstances in this case.

C. As there are Four Circumstances in this Case that WILL Have a Significant Effect on the Environment, a Finding of Unusual Circumstances Has Been Made

Turning now to individual examples of unusual circumstances, both the majority and the concurrence in *Berkeley Hillside* are in agreement that when a project otherwise covered by a categorical exemption **will** have a significant environmental effect, it necessarily follows that the project presents unusual circumstances. (*Berkeley Hillside* at 1105-1106; *Walters v. City of Redondo Beach*, (2016) 1 Cal.App.5th 809, 817.) ("Evidence that the project *will* have a significant effect does tend to prove some circumstances the project is unusual") (*emphasis original, citing Berkeley Hillside* at 1105); *Citizens for*

Environmental Responsibility v. State ex. Rel. 14th Agricultural Assn. (2015) 242 Cal.App.4th 555, 576. ("Evidence that a project will have a significant environmental effect, if convincing, necessarily also establishes a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.") (C*iting Berkeley Hillside, supra,*60 Cal.4th at p. 1105.)

PG&E and the Commission make the false claim that "the Petitioner does not even attempt to show by substantial evidence that the lease replacement will have a significant impact." (Resp. Brief at 43.) This claim is untrue. Petitioners have argued all along that some of the unusual circumstances **will** have a significant effect on the environment while others **may** have a significant effect on the environment. In an abundance of caution, Petitioner will now identify the specific usual circumstances that **will** have a significant effect, and those that **may** have a significant effect. Of course, those included in the "**will**" unusual circumstances category also fit into the "**may**" unusual circumstances category.

In this case, there are *four* specific circumstances that **will** have a significant effect on the environment and five specific circumstances that **may** have a significant impact. PG&E and the Commission try to belittle the unusual circumstances shown by the Petitioner with the claim that "WBA's claims largely resolved around the fact DCPP is the last operating nuclear generating facility in California." (Resp. Brief at 44). This is

another untruth. Yes, it is significant that Diablo is the last remaining nuclear power plant in California, and that its sister in San Onofre experienced rapid and extreme spontaneous steam generator tube shattering which spewed so much radioactivity so quickly that it had to be instantly shut down. But this is far from the only, or even "largely" the reason that the Petitioner has shown unusual circumstances.

There are a host of unusual circumstances to which we now turn, beginning with the four that demonstrate with substantial evidence that the unusual circumstances due to the seven-year leases **will** have a significant effect on the environment.

i. The Massive Size and Location of Diablo WILL Have a Significant Effect on the Environment

PG&E and the Commission concede that in *Berkeley Hillside* the Court said that the "size and location" is something that can be considered when deciding whether there are unusual circumstances. (Resp. Brief at 45-46). They had no choice as the law is clear. (*Walters v. City of Redondo Beach*, (2016) 1 Cal.App.5th 809, 821 ("*Berkeley Hillside* clarified that a party can show an unusual circumstance by demonstrating that the project has some characteristic or feature that distinguishes it from others in the exempt class, such as its size or location.")

This is not, however, what PG&E told the Commission on June 21, 2016, the day of the announcement of the political deal. In a letter from PG&E counsel, Daniel A. Goldberg, to Ms Jennifer Lucchesi, the Executive Officer for the Commission, Mr. Goldberg claimed that the location of Diablo in a seismically active area "is not directly relevant" as long as its operations were continuing as usual.

Perhaps realizing the weakness of this position, and the inaccurate counsel it gave the Commission, PG&E now concedes that location is relevant to other categorical exemptions, but claims it is not relevant to the exemption at issue in this case. They try to limit the discussion of size and location solely to the exemption pertaining to single-family homes, but there is no reason that a consideration of size and location does not apply to the existing facilities exemption as well.

The Commission cannot merely close its eyes to the cumulative effect on the environment by only looking at the Diablo operating procedures as encouraged to do by PG&E. The Commission must consider the future *reasonably foreseeable probable* killing of marine life as well. (*Save Our Carmel River*, 141 Cal.App.4th at 704.) ("The cumulative impact analysis requires the Board to consider changes in the environment resulting from the incremental impact of the project when added to other closely related past, present, and *reasonably foreseeable probable future projects*.") (Emphasis in original.)

It is reasonably foreseeable and probable that the next seven years of operations will have a significant effect on marine life.

> Diablo Canyon entrainment impacts an average source water coastline length of 74 km (46 miles) out to 3 km (2 miles) offshore, an area of roughly 93 square miles, for nine taxa of rocky reef fish…In that 93 square mile source water area, an average estimated proportional mortality of 10.8% was calculated for these rocky reef taxa.

(AR 016779)

Diablo is creating a coastline dead zone stretching out 46 miles and covering roughly 93 square miles. This massive entrainment does not just kill fish, it kills crustaceans (shrimps, lobsters, crabs) and cephalopods (octopus and squid). Size and location certainly do matter to these creatures, and massive killings in the future are part of a cumulative effect.

In accordance with *Berkeley Hillside*, this massive size and location effect on the environment constitutes an "unusual circumstance" that creates an exception to the exemption. (*Save Our Carmel River v. Monterey Peninsula Water District* 141 Cal.App.4th 677, 689.) (The court found that a categorical exception did not apply in part based upon the "location and cumulative impact" of the project.)[8]

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[8] The consideration of cumulative impact in the Guidelines, § 15300.2 subd. (b) is significant. It states: "All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place over time is significant." Here the continuing cumulative impact of drawing 2.5 billion gallons of sea water each day over

PG&E and the Commission try to argue that the size and location of projects in other cases was not an unusual circumstance, but a closer look at the cases they cite, such as *Bloom v. McGurk*, 26 Cal.app.4th at 1307, show that the size and location of those facilities were relatively small compared to the Diablo nuclear power plant. *Bloom,* for example, involved an incinerator burning waste with limited environmental effect compared to the magnitude of a nuclear power generation plant. The court compared the incinerator with nearby truck body manufacturing and lumberyards, again nothing remotely like a nuclear power generation facility.

The size and location of Diablo does constitute an unusual circumstance, with a significant cumulative effect, and it is one of several circumstances that **will** have a significant effect on the environment.

ii. Increases in Cancer and Infant Mortality for Residents Living Near Diablo WILL have a Significant Effect

Considerable evidence in the Administrative Record shows that the number of people with cancer has significantly increased since the plant started operations. In addition, there has been an increase in infant mortality. Evidence also shows that if Diablo continues to operate in a

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the course of the previous leases, and now the proposed seven-year lease extensions, is significant and prevents the application of an exemption.

"business as usual" fashion for seven more years, then the number of victims succumbing to cancer and the numbers of infants that die in the first year after birth will increase further. This is a dramatic toll that *will* have a significant effect. What could be more significant than the loss of newborn life?

PG&E has succeeded so far in avoiding a public discussion about the health issues around the plant. According to PG&E, using the flawed baseline theory discussed above, it does not matter if more people are dying from cancer or infant mortality is *increasing*, because there is no showing of a change in operations. (Resp. Brief at 66.) In other words, people may be dying now, but as long as we keep doing things the same way, it does not matter.

Given the scientific evidence properly presented to the Commission, and now to this Court, there is substantial evidence that there will be serious health issues over the next seven years that **will** have a significant effect on the environment.

iii. Killing Billions of Fish and Creating a 47 Mile Dead Zone for Marine Life Near Diablo for the Next Seven Years WILL Have a Significant Effect on the Environment

PG&E and the Commission argue in their response that the Petitioner must show that the leases "will change marine life impacts compared to the existing environmental baseline." (Resp. Brief at 69.)

This is patently obvious, as processing and depositing 2.5 billion gallons a day of superheated seawater back into the sea is creating a dead zone that is constantly expanding. Furthermore, Diablo's once-through-cooling system "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 . . . " [9, 10, 11, 12, 13, 14]

Diablo currently represents 85% of the damage to our coastal environment from all coastal power plants combined. To date, over 45 billion fish eggs and marine larvae have died over 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. This is a continuing "unusual circumstance" that will have a continuing significant effect on the environment.[15]

There is also cause for concern regarding adverse environmental impacts that result from the operation of Diablo's desalination plant which, like the nuclear plant, has never been assessed within the context of an EIR

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[9] (AR 002349)
[10] (AR 000735)
[11] (AR 000796-000798)
[12] (AR 000819-000820)
[13] (AR 000835-000837)
[14] (AR 002349-002351)
[15] (AR 002292-002348)

under CEQA.[16] The desalination plant was installed as part of the 1985 license to operate Diablo[17] without specific review by any State authority. It 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 another "unusual circumstance" that will have a continuing significant effect on the environment.

Taken together, the effects on marine life constitute an unusual circumstance that **will** have a significant effect on the environment.

iv. Storing Thousands of Spent Fuel Rods of High-Level Radioactive Waste With Plutonium on the Diablo Site WILL Have a Significant Effect on the Environment.

Nuclear facilities have a large, unique environmental drawback in that their operation results in the creation of large amounts of low-level and high-level radioactive waste. High-level waste consists of spent 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[18] which, unlike the reactor core, are not protected by a containment building, and are therefore more vulnerable to

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[16] (AR 000815-000816)
[17] (AR 001832-001834)
[18] (AR 000743)

natural disasters such as earthquakes[19] and tsunamis, as was the case at Fukushima; and far more vulnerable to terrorist activities.

By 2025, there will be approximately 4,300 spent fuel assemblies stored on site at Diablo Canyon.[20] 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 report, "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.[21]

Here we can see how the "unusual circumstances" evidence of increasing cancer combines with the "unusual circumstances" of increasing storage and containment of cancer-causing radioactive waste to cause a potentially significant environmental effect which worsens over time, warranting an exception from the "existing facilities" CEQA exemption.

PG&E's response is that as long as it continues to stockpile plutonium-containing spent fuel rods in the same manner, there is no

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[19] (AR 003291-003313) (AR 003529-003582) Mr. Hamilton has more than 50 years of experience in engineering and seismic geology.

[20] (AR 000848-000849)

[21] Table 6, U.S. Nuclear Plants with Greatest Emissions, Selected Types of Radioactivity and Selected Years, in Curies (AR 017712)

significant effect. It's not unlike the claim that as long as someone continues to put the next card stacking a house of cards then that is all that matters regardless of how unstable it becomes. Supposedly the stack of plutonium-laden fuel rods could be huge and still continue to grow as long as all the spent fuel rods are being stacked the same way.

When this Court applies a proper baseline, and concludes that one of the four circumstances discussed above, or all of them, or a portion thereof, taken in combination, **will** have a significant effect on the environment, then unusual circumstances have been established and this Court need go no further: an exception eliminates the exemption when there are unusual circumstances that **will** have a significant effect on the environment.

D. There are Nine Circumstances in this Case that MAY have a Significant Effect on the Environment

As explained above, when a proper baseline is applied, there are four circumstances in this case that **will** have a significant effect on the environment and they support a finding of unusual circumstances. If, however, this Court were to not agree that these circumstances **will** have a significant effect, then the next step is to consider whether the four circumstances previously discussed, coupled with five others, **may** have a significant effect on the environment, thereby constituting unusual circumstances.

If this Court decides that any one of the nine **may** have a significant effect, or that all or a portion thereof combined **may** have a significant effect, then the Court should decide if there is a "fair argument" of a reasonable possibility of a significant effect on the environment due to those unusual circumstances.

i. Diablo, Being the Third Most Embrittled Nuclear Power Plant, MAY Have a Significant Effect on the Environment

In 2013, the NRC identified Diablo Canyon's Unit 1 reactor as the third-most embrittled reactor in the United States.[22] PG&E criticizes the use of the word "embrittlement" without a definition. (Resp. Brief at 64). A dictionary is a good start. According to Dictionary.com "embrittlement" is a noun meaning *"the act or process of becoming brittle, as steel from exposure to certain environments or heat treatment or because of the presence of impurities."* The act or process of becoming "brittle" is exactly what is happening at Diablo. That is why the NRC studied embrittlement and concluded that Diablo is "the 3rd most embrittled nuclear power plant in the United States.

This makes perfect sense given Diablo's history. Even though Diablo began operation in 1985, the atomic reactor for Unit 1 was purchased approximately *20 years earlier* and delivered to the Diablo Canyon Site in 1973. The Diablo Canyon reactor vessel was one of the

[22] Geesman Letter, p. 2 [AR 002278].

first ever manufactured for the nuclear power industry, by a company with no previous experience manufacturing a commercial reactor vessel. As it turned out, PG&E used the wrong material to weld the Diablo Canyon Unit 1 nuclear reactor pressure vessel. Because the nuclear industry was in its infancy, it was not yet known that the material used to weld the Diablo Canyon Unit 1 reactor vessel is highly susceptible to radiation damage. Reactor vessels damaged by radiation become embrittled and are susceptible to cracking and vessel failure. This phenomenon is known as embrittlement, which fits perfectly with the dictionary definition of embrittlement as something that becomes "brittle" from being exposed to certain environments, in this case radiation and heat. [AR 016448-016450]

The dangers of embrittlement were put squarely before the Commission during its hearing process. The Statement from S. David Freeman at AR 16450 specifically raised the danger of embrittlement:

> Diablo Canyon's reactors have been bombarded with radiation and intense heat for 30 years and now have an embrittlement problem - radiation has weakened the structure to the point that the NRC has flagged the problem at Diablo Canyon. A cure requires shutting the plant down and annealing it — that is, making it solid again. PG&E is ignoring the problem- again, problem denied, safety last.

Neither the staff report nor the Commission's findings addressed this embrittlement problem. As with cancer and infant mortality issues, they just ignored it. Of course, PG&E does not want to address embrittlement, or to perform the costly work of annealing it – that is, "making it solid again."

They would rather that this Court adopt a baseline theory that is unworkable and join in crossing fingers that not even a moderate earthquake puts the brittle plant to the test over the next *seven years*.

To turn a blind eye is foolish, especially after a San Bruno community recently blew up from similar neglect. An increase in embrittlement is a decrease in safety. For one, 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 leakage.

Such failure caused by embrittlement would result in numerous short-term fatalities, long-term cancers and prolonged contamination of the environment. In a possible scenario, a rupture of the embrittled reactor pressure vessel would release a plume of radiation that, given prevailing trade winds, could ultimately reach Los Angeles, resulting in a life-threatening catastrophe and the need to quickly evacuate the second largest city in the United States and all intervening population centers. Under these circumstances, seven years is a long time to be playing Radioactive Russian Roulette. The full ramifications of one of the most embrittled nuclear plants sitting next to multiple earthquake faults along its waterfront needs to be fully analyzed as an unusual circumstance through preparation of an initial study.

Given the gravity of risk in this case, it is important to recall that the overriding purpose of CEQA is "*preventing* environmental damage." (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 117) ("the overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to *preventing* environmental damage.") (*Emphasis added*). (*Save Our Carmel River v. Monterey Peninsula Water District* 141 Cal.App.4th 677, 687) Where there is evidence that Diablo has become embrittled, CEQA performs the important purpose of ensuring that there is serious review of existing conditions to *prevent* a radiation calamity.

The trial court in this case came close to recognizing that embrittlement is not something that can be ignored. The court stated in its ruling "although the argument is not fully developed by the petitioners, in theory the age or "brittleness" of the DCPP reactors might be viewed as similar to "increases in the intent or rate of use that may result from a project." *Citing* (*Lighthouse*, 1196-97.) Here the trial court came close to getting it right. Unfortunately, embrittlement is worsening through accumulation, and it may have a significant, deadly, effect.

ii. Earthquake Faults on the Diablo Lease Site MAY Have a Significant Effect

Consideration of earthquake faults highlights the flaw of the crimped baseline analysis. It is indisputable that significant new information over the past 30 years has been developed with respect to earthquake faults in general, and there are ones which we did not even know existed thirty years ago that affect Diablo. As William White of Friends of the Earth testified: "Four new seismic faults were not known at the time the lease was originally approved." (AR 000260).

The trial court's handling of this new information concerning the danger from the combined effect of these two faults was to consider the controversy, but to conclude that despite the controversy, they were part of the baseline since plant operations remained unchanged (i.e., the trial court applied the improper flawed baseline theory). The trial court erred by looking at the continuity of existing procedures at the plant, rather than the significance of new information about the intersection of earthquake faults.

Public Resources Code § 21151 reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted. If there is a disagreement among experts over the significance of an effect, the agency is to treat the effect as

significant. (*Sierra Club v. County of Sonoma*, (1992) 6 Cal. App. 4th 1307.)

iii. Fukushima-type Tsunami at Diablo MAY Have a Significant Effect

Even though the Commission and its staff failed to consider (or simply ignored) evidence of tsunami risks, the risks are real and could be devastating. Recent evidence, which was presented to the Commission, shows that on past occasions tsunamis have impacted the Diablo area.[23]

iv. Growing Threats of Terrorism Against Nuclear Plants MAY Have a Significant Effect

For obvious reasons, nuclear facilities and nuclear materials present appealing targets to terrorists. Wherever nuclear fuels are produced, transported, consumed and/or stored, there is a risk of a terror attack. Terrorists could also target nuclear power plants, digitally or physically, in an attempt to release radioactive contamination into surrounding communities.

Further, there is a more than a reasonable possibility that California's elongated and highly vulnerable electric grid can be brought down by sophisticated cyber and physical attacks. Because Diablo Canyon relies on grid power when disabled, these malicious digital assaults could trigger a

[23] (AR 005361-005362).

devastating nuclear meltdown. Such a scenario, unfortunately, is increasingly likely in an internationally conflicted world, and must be considered as another "unusual circumstance."

v. PG&E's Conviction of Five Felonies for Dishonest Project Management Create an Unusual Circumstance

PG&E's recent federal prosecution on safety-related and agency obstruction felony counts related to its natural gas business is unprecedented for any utility holder of an NRC operating license. At a minimum, given that PG&E has been has been found guilty of operating certain of its facilities in a dangerous condition, with careless disregard for public health and well-being,[24] an "unusual circumstance" exists such that CEQA review should be required in this case.

PG&E was cutting corners in San Bruno and now they are trying to repeat that process with Diablo. There is already substantial deferred maintenance at the Diablo plant.[25] Knowing that it will shut down Diablo in seven years, given its past practices and recent convictions is a genuine

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[24] *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.

[25] PG&E just does what it wants. The briefing in this case is a good example. There is a 14,000 word limit for briefs, and the Opposition Brief exceeds that by almost 4,000 words at 17,913. Even with these extra words it is clear an exemption does not apply, and Petitioner is not asking that they be stricken, but PG&E cannot be allowed to just do what it wants and cause a repeat on a grander scale of what happened in San Bruno.

concern that PG&E will not keep the Diablo plant in good repair. Its refusal to address embrittlement, or even recognize that it is happening, is a good example. Seven years is a long time to let things go unabated and this possibility, based on past actions, also constitutes an unusual circumstance that **may** have a significant effect on the environment.

E. There is a Fair Argument of a Reasonable Possibility of a Significant Effect on the Environment Due to the Unusual Circumstances in this Case

If after review of the nine circumstances that **may** have a significant effect, this Court concludes that individually or in totality they constitute unusual circumstances, then this Court should move on to consider whether there is a "fair argument" of a reasonable possibility of a significant effect on the environment due to these unusual circumstances. (*Berkeley Hillside* 60 Cal.4th at 1117)

The first step is to recognize that the standard for finding a "fair argument" is lower than the standard for finding unusual circumstances. PG&E and the Commission admit that the "fair argument" test is "less deferential" than the test for unusual circumstances. (Resp. Brief at 40) This is why they argue that the trial court was wrong making a finding of unusual circumstances. Once unusual circumstances are shown, as Justice Liu points out in his concurrence in *Berkeley Hillside*, there is not a single case where there are unusual circumstances, yet there is not a fair

argument that those circumstances may have a significant effect on the environment. (*Berkeley Hillside* at 1131-1132.)

While the standard for unusual circumstances is whether there is substantial evidence of unusual circumstances, once it has been determined that there are unusual circumstances, the fair argument standard is simply that – whether there is a "fair argument."

Plaintiffs do not need to prove that their evidence is correct or convincing to show a "fair argument." All they need to show is that there is a fair argument of a significant effect due to the individual and totality of the unusual circumstances. For instance, although the scientific evidence is very strong, and evidence was presented to the Commission and the administrative record of an increase in cancer and infant mortality rates in close proximity to the plant, petitioners do not have to prove that this is so even though no compelling evidence to the contrary was ever presented.

Whether there is a "fair argument" is a legal question. Neither the trial court nor this Court defers to the agency's determination regarding a "fair argument." (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App. 4th 903, 930.) Therefore, after looking at the totality of the undue circumstances, it is up to this Court to decide independently whether there is a "fair argument" of a reasonable possibility of a significant effect on the environment.

It is important, as this Court undertakes the task of determining whether a fair argument exists, that the concept of "reasonable possibility" is not lost within the analysis. The test is lengthy and somewhat unwieldy, but there's good reason for determining "reasonable possibility." Adding this standard makes it clear to all courts, including this one, that a fair argument does not have to be a winning argument; it just has to raise a "reasonable possibility" that one of the unusual circumstances presented could have a significant effect. Whether it is the health issue, the size of the project, the deterioration and embrittlement of the plant, the stream of discoveries regarding new earthquake faults, the accumulation of plutonium-containing spent fuel rods stored on-site, each of these independently raises a "reasonable possibility" of a significant effect.

Here, PG&E convinced the trial court to take a very narrow view of what is a "fair argument." The trial court got it right in finding that there were unusual circumstances, but then PG&E convinced the trial court to disregard large portions of the fair argument with the claim that as long as PG&E was proceeding with business as usual, there could be no significant effect, and therefore there could be no "fair argument" of a significant effect. As this Court can see, the attenuated logic of PG&E must fail because it emasculates the "fair argument" standard enunciated by the California Supreme Court in *Berkeley Hillside*. All of the

evidence presented for a finding of unusual circumstances also applies to a finding of "fair argument," and will not be repeated. Just as there are unusual circumstances, so too there is a "fair argument" and an exception to the exemption applies.

IV THE TRIAL COURT ERRED BY NOT PROPERLY APPLYING 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."[26] However, the cumulative environmental impacts from the continued operation of Diablo, as discussed above, 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.

Since no EIR has ever been conducted concerning any or all of the possible adverse environmental impacts from the operation of Diablo, there are likely cumulative health, environmental and other impacts associated with radioactive emissions from, and long-term storage of

[26] Revised SLC Staff Report, Calendar Item 96, p. 14, Recommendation No. 3 [AR 000038].

radioactive waste at, Diablo that have yet to be fully measured. Absent the completion of an EIR under CEQA, there can be no credible means of independently determining whether past or proposed measures concerning plant operations adequately protect the public interest as required by the Public Trust Doctrine.[27]

A. The Commission Applied a Crimped, Flawed Baseline to its Public Trust Analysis and, Therefore, Failed to Make the Factual Findings Required by the Public Trust Doctrine.

The staff for the Commission relied upon the letter from PG&E's lawyer dated June 21, 2016 which told them that the only finding they needed to make was that operations at Diablo were continuing as before. The application of this flawed "baseline" theory resulted in an insufficient "factual evaluation" necessary to render a decision on public trust. Given word limitations, Petitioner incorporates by reference its argument in Section II of this Brief regarding inadequate findings. The court in *Baykeeper v State Lands Commission* 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 an adequate CEQA "factual evaluation" in

[27] Perry, Robert, Director of Energy Research, World Business Academy, Transcript, Meeting, State Lands Commission, Biodiversity, June 28, 2016, pp. 140-141 [AR 000808-000809].

compliance in *Berkeley Hillside*, and this failure to make a factual evaluation also makes the public trust decision flawed and subject to remand.

Had a proper factual evaluation been completed under the public trust doctrine, the cumulative environmental impacts from continued operation of Diablo, as discussed above, and again incorporated by reference, 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 in relation to waterborne commerce, fisheries, recreation and most importantly, habitat preservation.

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 CEQA compliance procedures, including preparation of an initial study and a determination of whether further environmental review would require an

EIR, a mitigated negative declaration, or a negative declaration under CEQA, before Respondent extends, re-issues or issues any new or existing lease or leases to PG&E.

Dated: February 16, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed Appellant's Reply Brief is produced using 13-point Roman type including footnotes and contains approximately 13999 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: 2/16/2017

Signed: /s/ *J.Kirk Boyd*

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