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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES – STANLEY MOSK DIVISION

The World Business Academy, a tax-exempt 501(c)(3) public charity, and the Immaculate Heart Community, a tax-exempt 501(c)(3) public charity,

Petitioners/Plaintiffs,

v.

California State Lands Commission, an agency of the State of California,

Respondent/Respondents,

Pacific Gas & Electric Company,
Real Party in Interest

Does 1-10
Real Parties in Interest

Respondents.

Case No.: BS163811

PETITIONERS' REPLY BRIEF

Complaint Filed: August 2, 2016
Trial Date: July 11, 2017
Department 82

Hon. Mary H. Strobel presiding

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Codes, Statutes and Regulations

INTRODUCTION

When the California Environmental Quality Act ("CEQA")[1] was enacted, it embodied into law a requirement for an open, transparent process by which science would guide governmental decisionmakers in reviewing projects that may result in significant harm to the environment. The public is included in this process through the preparation of an Environmental Impact Report ("EIR"). In this case, the State Lands Commission ("SLC") and Pacific Gas & Electric Company ("PG&E"), which has recently been convicted of six felonies stemming from a blatant disregard for public health and safety, and is presently on probation for a five-year period, ask this Court to disregard CEQA and exempt them from the transparent, scientific analysis required by the law. They do so even though *no EIR has ever been prepared for Diablo.*

A 2014 scientific report and 2016 published peer-reviewed study record an increase in infant mortality and cancer around the Diablo plant, yet the Joint Opposition Trial Brief, filed herein by Respondent, SLC, and Real Party in Interest, PG&E on June 24 (hereafter "Opp. Brief"), asks this Court to turn a blind eye to the requirements of CEQA despite this frightening threat to public health within the vicinity of the plant. Furthermore, studies by the U.S. Nuclear Regulatory Commission ("NRC") show that Diablo is the third most "embrittled" nuclear plant in America, and by 2033 will be a danger to operate. The NRC studies further admit that new information (*i.e.* the type that could be uncovered in an EIR) may show a shorter time-frame in which the plant becomes dangerous to operate. Meanwhile, the SLC and PG&E ask this Court to look away from this concern for *eight years* by granting an exemption from the applicability of CEQA for PG&E's requested Lease Extension.[2]

This health evidence, along with Diablo becoming "embrittled" so that it is more dangerous to operate every day, and the killing of billions of fish and other marine organisms over the eight-year period of the Lease Extension, all,[3] boil down to a simple truth: an eight-year Lease

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[1] California Resources Code, Section 21000 *et seq.*

[2] The Opp. Brief calls it a "Lease Replacement," a clever but inaccurate description, throughout their brief. But there is no avoiding that what they seek is a "Lease Extension", not a Replacement. PG&E wants *eight years* of operation, with all the environmental and health effects that go with it, without scientific review, and the SLC has timidly gone along.

Extension will unquestionably have a significant adverse effect on the environment. Therefore, CEQA applies to the Lease Extension project, and the SLC must prepare an EIR before it can formally approve any such Lease Extension.

Notwithstanding this simple truth, the Opp. Brief argues for an exemption to circumvent CEQA. Moreover, the SLC joins this argument for an exemption, even though Lt. Gov. Gavin Newsom, one of the Commission's members, opined at an SLC public hearing in December 18, 2015 that such an exemption would not apply in this case and likened it to CEQA being applied to offshore oil derricks.[4] The original conclusion that the exemption does not apply was correct, and there are three main reasons why an exemption does not apply. First, the Secretary of Resources ("Secretary") never intended that the generation activities of a nuclear power plant would fall within the "existing structures" exemption. The Secretary understood that this power was limited to creating exemptions for groups of things "that would not have a significant effect on the environment." As the administrative history shows, the Secretary only intended the existing facilities exemption[5] to apply to existing facilities for the *transfer* of power, like transmission lines and towers, not a massive nuclear power *generation* plant, which unquestionably has significant on-going adverse environmental impacts when operating.

Second, even if the Secretary somehow intended to include existing nuclear power generation facilities within the group of projects that "do not have a significant effect on the environment,"[6] he/she lacked the authority to do so. A categorical exemption only applies when the project will *not* have a significant effect; therefore, the Secretary can only include it in a category of projects that also *do not have a significant effect*. A nuclear power plant, because it

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[4] The Opp. Brief states at pg. 6, fn. 4 "Petitioners take out of context Commissioner Newsome's (sic) comments at the December 18 hearing. The Commissioner did not state 'there is no exemption from CEQA for DCPP.' Rather, he stated that 'extending an existing lease triggers CEQA consideration.' Exactly! That is what this case is about "extending an existing lease triggers CEQA consideration." And he was right to compare it to the offshore oil derrick leases triggering CEQA. Here is what he said:

> "It is not without precedent as it was mentioned on the CEQA question with these oil leases 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." AR 000264-000265

[5] Cal. Admin. Code, Title 14, Chap. 3, Section 15301(b).

[6] Cal. Admin. Code, Title 14, Chap. 3, Section 15300.

will always have a significant effect, could only be statutorily exempt, never categorically exempt as the Opp. Brief asks this Court to decide here. To rule as the SLC and PG&E ask, the Court would have to flatly disregard the intent of the Legislature that the Secretary *cannot* categorically exempt projects that *will* have a significant effect on the environment.

Third, even if a categorical exemption did apply, which it cannot, there would be an *exception to the exemption* because more children dying, more people getting cancer, a greater chance of a radiation leak from Diablo's embrittled reactors (with the possibility of trade winds blowing that radiation down to Santa Barbara and the greater Los Angeles area), marine life dying, water temperatures rising, ocean salinity increasing, earthquakes from a fault discovered 1,000 feet away from reactors located in a historic tsunami zone, terrorist threats (including cyber-attacks) to nuclear plants, growing containment problems with nuclear waste on site, increasing numbers of violations at Diablo found by the NRC, separately and in combination, constitute *unusual circumstances*. These multiple unusual circumstances create an exception to the exemption for existing facilities, even if it were to apply.

Faced with these disturbing truths, SLC and PG&E engage in an elaborate and deceptive attempt to create a "baseline." According to them, the Court can just ignore all these unusual circumstances because they are part of a 'baseline' that was created when the original SLC leases were signed in 1969 and 1970. However, this "baseline" argument is a hoax. People and marine life had not started dying when the original SLC leases were approved because the plant was not even in operation until 1985, and some fault lines were not known to exist then. The desalinization plant went into operation even later. The SLC and PG&E are asking the Court to close its eyes entirely to the *actual*, significant adverse public health and environmental effects that *will take place* over the next eight years -- all without the scientific guidance of an environmental review under CEQA.

Having failed to make a plausible case on the law, the Opp. Brief then asks this Court to join them and support their placing a political deal over the clear requirements of the law, which is entirely contrary to the letter of CEQA and the spirit of our judicial system. The Opp. Brief spends a considerable portion of its argument emphasizing the "Joint Proposal" for the retirement of

Diablo. However, the existence of the "Joint Proposal" does not provide cover for the inapplicability of an exemption. CEQA is a process statute. If anything, the Joint Proposal reflects an attempt to circumvent the required process. CEQA was designed so that governmental decisions about whether or not to approve a given project would be based on science, not political expediency.

Finally, as this Court is well aware, CEQA is *not* a law that dictates whether public agencies should, or should not, ultimately approve a given project.[7] Rather, CEQA *is* a law mandating scientific analysis and public disclosure. Given the unquestionable significant adverse effects the Lease Extension *will* inflict on the environment for eight years, along with a plethora of unusual circumstances, CEQA requires that an EIR must be prepared before a decision is made on PG&E's requested Lease Extension, and Petitioners ask this Court to so order.

I. THE SECRETARY OF RESOURCES DID NOT INTEND TO INCLUDE A NUCLEAR POWER GENERATION PLANT WITHIN THE EXISTING STRUCTURES EXEMPTION

The California Supreme Court, in *Berkeley Hillside Preservation Council v. City of Berkeley* (2015) 60 Cal. 4th 1086, 343 P.3d 834, restated what the Legislature made clear in its limited delegation of authority to the Secretary to establish categorical exemptions from CEQA applicability: The Secretary can only create exemptions to CEQA for projects "which have been determined not to have a significant effect on the environment." *Id.* at 1101.

No party in this case has asserted, nor can any scientifically valid or rational case be made, that Diablo "does not have a significant effect on the environment." This is clear to the Secretary, or anyone else, considering the adverse environmental impact of nuclear power plant *generation.* A close reading of the applicable exemption from the State CEQA Guidelines, at (CAC, Title 14) §15301(b) shows this to be true. §15301(b) reads: "Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or

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[7] Indeed, CEQA law is unambiguous in allowing a public agency to approve projects with identified unmitigated adverse environmental impacts so long as that agency includes as part of its project approval a "Statement of Overriding Considerations" explaining that either there is no feasible way to lessen or avoid the project's identified adverse environmental impacts, or that the specifically identified benefits of the project outweigh the policy of reducing or avoiding the project's significant adverse environmental impacts. *See*, State CEQA Guidelines (at California Code of Regulations, Title 14), Section 15043.

other public utility services." The Opp. Brief tries to stretch the language of §15301(b) beyond the intent of the Secretary or common sense. It claims "...the exemption expressly lists electric power generating facilities as a covered class of exempt existing facilities." (Opp. Brief at pg. 12, ll. 9-10); and then later claims again "Section 15301(b) directly calls out existing electricity *generating* facilities as existing facilities to which the exemption applies." (Opp. Brief at pg. 13-14, ll. 27-2) (emphasis added).

However, this is entirely wrong. 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. 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.

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, attached as Exhibit "A" to the Petitioners' Supplemental Request for Judicial Notice ("Supp. Jud. Notice"). 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) 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* of electricity, not the *generation* of it. This makes perfect sense given that the distribution of electricity through

lines does not have a significant adverse effect on the environment, while the *generation* of electricity at a nuclear plant like Diablo certainly does.

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 "CATEGORICAL EXEMPTIONS FROM THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (emphasis original) dated March 29, 1973, and attached hereto as Exhibit "B", Supp. Jud. Notice).

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, Exhibit "C", to the Supp. Jud. Notice.). This is when the words "convey and distribute" were replaced with "provide." The Secretary sent out a letter (the proposed amendments, Exhibit "C", to the Supp. Jud. Notice) 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 (see, Exhibit "D", to the Supp. Jud. Notice), they looked specifically at the amendment changing "convey and distribute" to "provide" and said "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*, as SLC and PG&E attempt to use it in this case.

The same understanding is evident in the numerous written statements by individuals and small organizations; not one of them spoke out against this minor word change. James Cotter, a

Consulting Ecologist, for example, made a thorough review of every proposed Amendment. When he came to the switch from "convey and distribute" to "provide" he said "Good. Eliminates 2 words." (See written comments of James F. Cotter, October 15, 1973 attached as Exhibit "E" to Supp. Jud. Notice). This is accurate. There was no change in intent or attempt to deviate to include within the coverage of the exemption facilities like a nuclear power plant.

Finally, when the proposed amendments were getting close to a vote, the Secretary of Resources sent a "Cabinet Memo" to Governor Reagan discussing the continuing "unresolved differences" with the Attorney General and environmental groups regarding the proposed amendments. A list was provided of controversial amendments: "existing structures" was not on the list, because it was understood by all that it did not include large projects like a nuclear power plant that would have a significant adverse effect. (See Cabinet Memo, Exhibit "F", to the Supp. Jud. Notice).

Realizing their weakness on the law, as in other instances when the facts or law cut against them, the SLC and PG&E ask this Court to turn a blind eye and to deny jurisdiction so that this Court will not reach the issue of the Secretary's intent. This too is unavailing. The Administrative Record is replete with statements from both experts and concerned citizens that an exemption does not apply.[8] The application of the jurisdictional standard that the SLC and

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[8] *See,* comments submitted from William White, Shute Mihaly & Weinberger LLC, on behalf of Friends of the Earth, letter dated November 19, 2015 ("That Diablo Canyon is an existing facility does not exempt the lease from CEQA review.") [AR 001501-001538]; Biodiversity First!, letter dated June 27, 2016 ("The Joint Proposal acknowledges the question of environmental review and expressly anticipates that the SLC might prepare an EIR"); [AR 001886-001889], John Geesman, Dickson Geesman LLP, letter dated June 27, 2016, on behalf of Alliance for Nuclear Responsibility ("It is beyond dispute that these significant effects on the physical environment will occur if the reactors operate for the proposed new lease term.") [AR 002277-002282].

See, also, Hearing Transcript for Meeting of State of California Lands Commission dated February 9, 2016 [AR 000324-000446], particularly testimony of Ben Davis, Jr. ("I provided, at the beginning of the meeting, a copy of a Third District Court of Appeal opinion in a case that I was involved with. It's the only case in California involving the application of the California Environmental Quality Act to a nuclear power plant. And in that case, the court of appeal agreed with me that it was subject to CEQA.")

See, also, Hearing Transcript for Meeting of State of California Lands Commission dated June 28, 2016 [AR 000634-000939], Lee Andrea Caulfield ("I believe that an EIR is legally required, and that the public safety must take precedence over economic interests.") [AR 000850]. She is correct. An EIR is legally required because a large nuclear power plant was not intended to come within the existing structures exemption.

PG&E ask this Court to apply would have the negative consequence of adding another procedural hurdle inhibiting the public, in direct contrast to the participation that CEQA seeks and specifically *invites*.

In order to preserve the record for review under the theory propounded in the Opp. Brief, lawyers would have to be brought in to hearings, and then hearings would have to be lengthened to provide an opportunity for every nuance to be brought up. Such a convoluted process for addressing the details of whether a project is subject to CEQA review or not is not sound process, nor would it facilitate the required public review.

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.")[9]

The case cited by Respondents in support of their claim of no jurisdiction, *Browning-Ferris Indust. v. City Council* (1986) 181 Cal.App.3rd 552, is unhelpful to them. *Browning* addresses the question of what is the proper level of government review at which CEQA issues should be raised. Here, however, there is no question that the challenges to the exemption were

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[9] 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.

raised at the highest level. A March 2016 meeting between Academy representatives and SLC staff involved the highest level of SLC staff, namely, the Executive Director and the General Counsel (AR000810). (Also see, Declaration of Jerald D. Brown (hereafter "Brown Dec."), filed concurrently herewith, para. 2-4.)

In addition, the inapplicability of the exemption in this case was *directly* brought to the attention of the SLC on June 28, 2016, just before the SLC reached its decision. (AR000809, lines 8-15). As the court said in *Browning*, "The purpose of the rule of exhaustion of administrative remedies is to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial review." *Browning, supra,* 181 Cal.App.3rd at 859 The SLC unquestionably had such an opportunity to address and decide this question at the June 28 hearing, at which many people and organizations stood before it in person and stated that an exemption from CEQA did not apply in the case of PG&E's requested Lease Extension.

For the reasons stated, this Court should rule that the Secretary did not intend to include nuclear power generating plants within the existing structures exemption and, therefore, an exemption does not apply. This Court's analysis of the issues presented could logically end here.

II. EVEN IF THE SECRETARY INTENDED TO INCLUDE NUCLEAR POWER GENERATING PLANTS WITHIN THE EXISTING STRUCTURES EXEMPTION, THE INCLUSION OF PLANTS THAT WOULD UNQUESTIONABLY HAVE A SIGNIFICANT EFFECT ON THE ENVIRONMENT WOULD EXCEED HIS OR HER AUTHORITY, AND THE EXEMPTION WOULD NOT APPLY

Even if the Secretary somehow did intend to include nuclear power generation plants within an existing structures exemption, the Secretary lacked authority to create the exemption, and an application of the exemption in this case is void *ab initio*. Both the Legislature and the Supreme Court have been clear that the Secretary can only create categorical exceptions for projects "that have been determined not to have a significant effect on the environment." *Berkeley Hillside, supra,* 60 Cal.4th at 1101. Since it is physically impossible to operate a nuclear power generation plant that does not have a significant effect on the environment, it is also impossible for the Secretary to make a determination that a nuclear power generation plant will not have a significant effect on the environment. Therefore, if such a determination were made, it would be null and void

as an abuse of authority. The Court in *Berkeley Hillside* simply could not have been clearer: "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. As with the issue of intent, whether the Secretary had the authority to include nuclear power generation facilities within the existing structures exemption is a question of *law* for this Court. *Carmel River, supra,* 141 Cal.App.4th at 694.

When deciding the question of law before it regarding the authority of the Secretary, the Court should follow the guidance of the California Supreme Court in *Mountain Lion Foundation v. Fish and Game Commission*, (1997) 16 Cal.4th 105 that "CEQA is to be interpreted 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" *Id.*, at 112 (citing *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal. 3d 247, 259.)

The SLC was given ample notice of the legal relevance of this exemption issue by the public, and the SLC could -- and should -- have addressed it seriously and substantively before reaching a decision on the PG&E Lease Extension.

III. WERE AN EXISTING STRUCTURE EXEMPTION TO APPLY, WHICH IT DOES NOT, UNUSUAL CIRCUMSTANCES CREATE AN EXCEPTION TO THE EXEMPTION

Even if an existing structure exemption were to apply, there is an exception to the exemption when there are "unusual circumstances." In operation, this exception serves as a fail-safe for the situation where a project that will have a significant effect on the environment is treated as falling within an exempt group, from which it should be disqualified. Here, even if Diablo was intended to fall within the "existing facilities" category, it would have to be removed because of unusual circumstances. Indeed, there are a myriad of unusual circumstances in this case that require Diablo's exception from the exemption.

The standard of review for assessing unusual circumstances is a two-step process. First the Court looks to see if the SLC had substantial evidence to decide that an existing structures exemption applied. Second, if the answer is yes, then the burden shifts to the party challenging the exemption to provide substantial evidence that there are unusual circumstances triggering an

exception to the exemption.

With respect to the first step, the SLC lacked substantial evidence to find that the existing structures exemption applied. The record reflects that the SLC was leaning against finding that the existing structures exemption applied, but then, for political reasons, went ahead and made the contrary decision anyway. This is not substantial evidence. The February 9, 2016 report by staff, prepared before the political deal emerged, actually contains evidence showing that the exemption did not apply. (See February 9 Staff Report, AR 000011-000016). Also, when the SLC did apply the exemption, it made no findings to explain why the exemption did apply. The explanation of this decision was a single paragraph, and that was just boilerplate. Unlike the SLC, which provided no summary or analysis of its "substantial evidence," the Petitioners and others submitted a broad range of substantial evidence thereby meeting their burden. A review of the record shows this to be true.

A. Increased Infant Mortality and Cancer Rates Caused by the Operation of the Diablo Plant are an Unusual Circumstance.

1. Increasing Rates of Cancer

Most people would think it is unusual when after a business comes to town and begins operating, more young children start dying and the number of people with cancer increases at significantly higher rates than before the plant started operations. That is what has happened within the vicinity of Diablo in San Luis Obispo County. On the one hand, Petitioners have submitted a scientific report and a published peer-reviewed study. On the other, the Opp. Brief offers an unscientific report with no peer review, unsupported by data, and written anonymously by county staff.[10]

The county report is nothing more than a slipshod attempt to refute, with loose rhetoric, the serious health concerns provided in detail to the SLC regarding significant increases in cancer and infant mortality rates, as described in Petitioners' Opening Brief (at p. 8, p. 17). There are several reasons why the Opp. Brief's reliance on this county report is unpersuasive. First, this Report is not

[10] 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," 2014 (AR 2226-2239).

a "scientific peer review" study, as claimed (Opp. Brief at 27). 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. 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 (AR 017731-017732).

The 2014 Mangano scientific study relied upon by Petitioners 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" (AR 017669-017734). 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.

Second, the county report was specifically crafted to serve as a critique of the 2014 Study[11] and not of the 2016 Study,[12] which also documented, using publicly available state and federal health data, significant increases in infant mortality. In stark contrast to the county report, the 2016 Study is a scientific study, published in the peer-reviewed *Jacobson Journal of Epidemiology and Preventive Medicine* on September 14, 2016.

Third, the Opp. Brief (at p. 27) cites the county report (AR 2229) to claim that "the scientific peer review determined that the author used 'improper methodology' and when the data was properly rerun, 'the results are shown to be inaccurate.'" The Opp. Brief merely parrots the county report's conclusion that "without adjusting for population variables, this statement is speculative and unsound" (*Id.*).

However, it is false to claim that the 2014 Study *did not* adjust for population variables. For example, in the 2014 Study, Tables 9, 10, and 11 (which refer to the incidence of cancer in San

[11] Petitioners' Opening Brief, at p. 7.
[12] Petitioners' Opening Brief, at p. 8.

Luis Obispo County vs. the State of California), cite the California Cancer Registry as the source of this cancer rate data and explicitly state that "Rates adjusted to 2000 U.S. standard population" (AR 017719-017721). Therefore, the 2014 Study finding that, "in the decades following the opening of Diablo Canyon in the mid-1980s, San Luis Obispo devolved from being a low-cancer county to a high cancer county"[13] remains a valid concern and is, in and of itself, an "unusual circumstance" that merits an EIR.

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 (AR 017699-017734) 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. (AR 017724).

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" (AR 001807 and Brown Dec., para. 5.) Along with the power point presentation, SLC staff was told that a new scientific study on infant mortality was underway and the author of that study, Dr. Busby, was mentioned by name. (See, Brown Dec., para 1, 7.) 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 (AR 001777-001778 and Brown Dec., para. 6).

Having informed the SLC about the Busby Study in March, during the June 28, 2016, Commission hearing, Academy President Rinaldo S. Brutoco then again reminded the Commission about the Busby Study, the "2016 Study" and invited the Commission to evaluate these findings as

[13] Petitioners' Opening Brief, at p. 7.

part of an EIR (AR 000811-000812). Mr. Brutoco further reported the preliminary findings of increased infant mortality at that June 28, 2016 hearing, and requested that the Commission determine through an EIR if the alarming Academy data was accurate. This 2016 Study, published in a peer review journal on September 14, 2016, 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."[14]

Despite this compelling evidence showing significant increases in cancer rates *and* infant mortality rates in the decades after Diablo Canyon began operating, the Opp. Brief does not discuss the Academy's presentation to the Commission staff or the 2016 Study. PG&E, in particular, does not want to talk about health issues, or even to acknowledge that there has been a discussion of these issues that is contained in the Administrative Record of the SLC's proceeding.[15]

Once again when faced with bad facts or bad law, the SLC and PG&E ask this Court to turn a blind eye and refuse to consider some relevant fact or legal requirement. So it is with Christopher Busby's 2016 scientific, peer-reviewed study showing that infant mortality has increased as a result of the operation of Diablo. The SLC and PG&E seek to "strike" the study after not considering it. In a situation such as this, the California Supreme Court has held that extra-record evidence such as Busby's report is admissible. *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 578 ("Extra-record evidence is admissible in administrative mandamus proceedings under Code Civ.Proc,. §1094.5 subd. (e))"

Admittedly, writ cases such as the one at hand are generally limited to the record, and the

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[14] Christopher Busby, "Is There Evidence of Adverse Health Effects near US Nuclear Installations? Infant Mortality in Coastal Communities near The Diablo Canyon Nuclear Power Stations in California, 1989-2012," *Jacobson Journal of Epidemiology and Preventive Medicine*, 09-14-2016, p. 1. As this 2016 Study was published after the Petitioner's lawsuit was filed, it is not in the Administrative Record. However, it is attached as Exhibit 2 to the Declaration of Christopher Busby, filed herewith ("Busby Dec.").

[15] PG&E acts to stifle discussion while presently running statewide television advertisements apologizing for their lack of safety, and promises to become more transparent and inclusive of the public.

exception is to be narrowly construed, as the Court explained in *Western States Petroleum*, to "rare instances in which (1) the evidence in question existed *before* the agency made its decision, and (2) it was not possible in the exercise of reasonable diligence to present this evidence to the agency *before* the decision was made so that it could be considered and included in the administrative record. *Id.*

Both of these criteria are met in this case. First, there was the meeting in Sacramento on March 14, 2016 between representatives of the Academy and the SLC staff, during which Mr. Busby, and his Study, were mentioned by name. Then, three months later, at the June 28 meeting at which the SLC approved the Lease Extension, Academy senior staff asked again that the study be considered and assured the Commission that it would soon be done. (AR 000811-000812) This is all evidence that existed and had been presented to SLC staff *before* the SLC made its decision on June 28, 2016.

Second, it was not possible in the exercise of reasonable diligence for Dr. Busby and the Academy to present this evidence to the SLC *before* the June 28 decision was made. Dr. Busby was working diligently to obtain adequate peer review, unlike the county report done for PG&E, Dr. Busby's report was scientific and being published in a scientific, peer-reviewed journal. (See Declaration of Dr. Busby, filed concurrently herewith, Exhibit B).

Nevertheless, the SLC made its decision that the unusual circumstances exception to the existing facilities exemption did not apply *without even mentioning or considering the potential significance of Dr. Busby's Study.* In so doing, the SLC abused its discretion in violation of the standard set forth by the Court in *Western States Petroleum.*

In addition, in accordance with CCP §1094.5, this Court can review the Busby study as something that was submitted as part of the record below, which the Commission should have considered before reaching a decision on the requested Lease Extension.

> (e) Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the

evidence at the hearing on the writ without remanding the case.[16]

This language clearly authorizes the Court to remand this matter back to the SLC to fully consider the Busby 2016 Study and to hold a public hearing about the significance of the findings in that study prior to taking further action on PG&E's requested Lease Extension. *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 81 ("We do not question the power of a trial court to remand a matter to an administrative agency for clarification of ambiguous findings.")

In addition to ignoring the Busby study, PG&E and the SLC ignored the facts, 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 (AR 017729-017730), 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 (AR 001803-001807).

Given the scientific evidence properly presented to the Commission, and now to this Court, the health issues, and the public controversy surrounding them, constitute unusual circumstances.

B. The Brittleness of Diablo, Becoming More at Risk for a Radiation Event Each Day, and the Possibility that Prevailing Winds Would Carry Radiation Right Down on Santa Barbara and Los Angeles are an Unusual Circumstance.

Ever since the world's first full-scale, commercial nuclear power plant was commissioned in 1954 at Shippingport, PA, pressurized water reactors – the type of reactors found at San Onofre and Diablo – have, over time, experienced significant generic, industry-wide embrittlement problems. These generic problems include steam generator corrosion, which ultimately led to the unplanned closure of San Onofre in 2013, and reactor vessel embrittlement, which is an on-going problem at Diablo. The NRC has recently ranked Diablo as *the third most embrittled nuclear plant in the United States* (AR 002278).

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, which is reasonably foreseeable since the plant sits less than 1,000 feet from an active fault, embrittlement increases the likelihood that, in

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[16] CCP §1094.5 (e)and(f).

such an emergency the reactor vessel, which contains the nuclear fuel rods, will rupture causing a catastrophic failure and major radiation leakage.

In addition, while steam generator corrosion causes tube leaks that generate *temporary* radiation releases that result in reactor shutdowns and ultimately in steam generator replacement, 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 1989 and Fukushima in 2011. A failure caused by embrittlement would result in numerous long-term cancers and prolonged contamination of the environment. Due to the extreme seismic risk surrounding Diablo, and the fact that the two reactors are located in a historic tsunami zone, a Fukushima-like sequence of earthquake, tsunami and meltdown could occur at any time and the continuous, increasing embrittlement makes the situation even more dangerous over time.

In a possible scenario, a major rupture of the embrittled reactor pressure vessel would release a plume of radiation that, given the prevailing trade winds, could travel to Santa Barbara and reach Los Angeles, resulting in a life-threatening catastrophe for the second largest city in the United States. Under these circumstances, eight years is a long time, and the full ramifications of one of the most embrittled nuclear plants sitting next to earthquake faults along its waterfront needs to be fully analyzed as an unusual circumstance through preparation of an EIR.

C. Seven More Years of Annual 1.5 Billion Larval Fish and 30 Billion Planktonic Kills by Entrainment is an Unusual Circumstance.

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 20 degrees F before discharging into the Pacific.[17] The geographic scope of the impact from Diablo is estimated to average 46 square miles.[18] 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* [19] Diablo entrains (kills)

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[17] 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)

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

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

approximately 1.5 billion larval fish and over 30 billion planktonic forms per year. [20] 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".[21] The cumulative impacts of the ongoing decimation of marine life in and around Diablo Cove, and the 2006 admission of SLC of the pernicious effects on ocean habitat constitute additional unusual circumstances.

IV. A 1969 BASELINE CUT OFF FOR CONSIDERING SIGNIFICANT EFFECTS AS UNUSUAL CIRCUMSTANCES DOES NOT APPLY IN THIS CASE

Faced with strong evidence of increasing rates of cancer and infant mortality, a brittle plant becoming more dangerous every day, and widespread destruction of marine life, SLC and PG&E falsely argue that all these unusual circumstances are an "existing condition," and that even though an EIR has *never* been prepared for Diablo, somehow a "baseline" was created when the leases were signed way back in 1969 and 1970, when there was nothing built and no "existing facility" existed. According to the SLC and PG&E "All of the purported risks and potential impacts Petitioners allege have existed since DCPP began operation over 30 years ago." (Opp. Brief at p.2, ll. 20-21). This is impossible. Many of the health, embrittlement and marine issues have only become apparent in the past few years as the passage of time presents them. According to the argument of SLC and PG&E, it is as though significant adverse effects are frozen in time and the cumulative significant adverse effect of an eight-year lease extension cannot even be considered.

Furthermore, the cases relied upon by SLC and PG&E are distinguishable. One case the Opp. Brief relies upon heavily, *Citizens for East Shore Parks v. State Lands Com.* (2011) 202 Cal.App. 4th 549 makes it quite clear that even with the application of a baseline, the court does not ignore the dangers of continuing operations when considering unusual circumstances. As the Court in *Citizens for East Shore Parks* recognized, "The Lands Commission concluded future oil spills constituted a potentially significant environmental impact, requiring analysis in an environmental

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

[21] *id.*

impact report (EIR)." *Id.* at 555. In other words, the so-called baseline did not preclude consideration of future oil spills. Even if a baseline was applied in this case, it would not exclude the consideration of potential radioactive releases as requiring analysis in an EIR.

Lighthouse Field Beach Rescue v. City of Santa Cruz (2002) 131 Cal.App.4th 1170, 1196, a case cited in the Opp. Brief, stands for the proposition 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 increases and intensity of the significant adverse effects of Diablo are extensive. They can and should be considered by this Court.

The facts of the cases cited in the Opp. Brief need to be considered carefully. The dangers presented in them are not nearly as great as the dangers in the case at hand, and so do not present the same kind of unusual circumstances. Another case heavily relied upon by SLC and PG&E, *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, is also unhelpful to them. *Bloom* involved an incinerator burning waste, nothing near the magnitude of a nuclear power generation plant. The court noted that "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. The case at hand, by contrast, 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 the people living in them are experiencing increased levels of cancer.

Again, when the facts are looked at closely in *North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, it too is distinguishable. In *Northcoast Rivers*, the court noted that prior to considering the two-year lease extension in that case, an assessment under the

National Environmental Policy Act of 1969 (NEPA) had already been done. *Northcoast Rivers, supra,* 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. The court further noted in *Northcoast* that it was considering a series of two-year leases, and that:

> "Even under the fair argument standard, the 2012 interim renewal contracts and the activity contemplated therein were not shown to have the potential to cause a *substantial adverse change* (emphasis original) from the environmental baseline at the time of the Water District' approval. *Id.* at 873.

Here there is clear evidence of a substantial adverse change as the health, embrittlement and marine issues have all become *worse*, and continue to *worsen*. The Opp. Brief callously ignores health data showing that people living downwind near Diablo have been experiencing, and will experience for the next eight years of the lease extension, on-going *increases* in cancer rates, including radiosensitive breast and thyroid cancers, and *raised* infant mortality rates if Diablo's nuclear reactors continue to operate and continuously emit Strontium-90 and other carcinogenic radioactive isotopes for another eight years under the Lease Extension. The same is true of embrittlement – every day the situation becomes worse and more dangerous, unlike the facts in *Northcoast* which were steady and of shorter duration, two years instead of *eight*. Grave unusual circumstances that are worsening and becoming more dangerous should not ignored because leases were signed in 1969 and 1970, long before these dangerous conditions arose. CEQA review must be conducted given the unusual circumstances in this case.

CONCLUSION

The Complaint filed by Petitioners on August 2, 2016 seeks one concrete result: that this Court find, based on one or several of the points made above, that the "existing facilities" exemption does not apply in this case. The Administrative Record of the proceedings below and the argument set forth herein and in Petitioner's Briefs amply support such a conclusion.

This Court should therefore issue the peremptory writ of mandate under Code of Civil Procedure §1094.5 as requested by Petitioners in their Verified Petition on file in this case.

Dated: May 22, 2017

Respectfully submitted,

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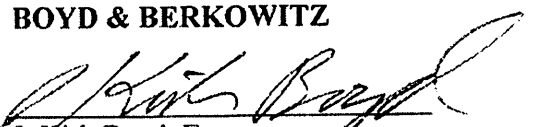
By: 

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