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 County of Los Angeles Superior Court No. BS163811

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

APPELLANT'S PETITION FOR REHEARING

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Cases

Statutes

Other Authorities

I. INTRODUCTION

This Petition rests on two grounds for rehearing and a procedural consideration. As for the grounds, the opinion contains omissions and misstatements of fact as well as mistakes of law. Procedurally, there was difficulty with the Administrative Record in this case. Somehow the record crashed the Court's system and then hard copies were not provided as quickly as it would have served the Court. It is appreciated that the Court went forward with the record that it had, however, given the significant legal precedent in this published opinion, which is likely to be heavily cited, and the genuine dangers to the health and safety to Californians from the new seven-year leases at the Diablo Canyon Nuclear Power Plant ("Diablo"), it would be fruitful for this Court to ask the Respondents to file an Answer and give them more time than the typical eight days given the length of this Petition.

This brief will proceed through the opinion, identifying instances where the Court erred and proposing specific language to replace flawed language in the opinion. In short, the errors in the published opinion are two-fold. First, the opinion relies upon an appellate court ruling, *North Coast Rivers Alliance v. Westlands Water District* (2014) 227 Cal.App. 4th 832, a decision that preceded the California Supreme Court's comprehensive landmark decision in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal. 4th 1086, to negate and narrow the specific

direction of the Court in *Berkeley Hillside* for cases under the California Environmental Quality Act (CEQA).

Berkeley Hillside was only decided three years ago, and it is clear from the lengthy opinion and thoughtful exchange of the members of the Court that they wanted to set up a framework for analyzing unusual circumstances that was true to the main purpose of CEQA which is to allow and encourage the public to identify problems that could have a significant effect on the environment so that decision makers can address those problems. The Court's reading of *North Coast* marginalizes public participation because if a problem is identified, the proponent of the project, in this case PG&E, can just respond that its business operations have not changed so the problem does not need to be addressed. If this is the law, which *Berkeley Hillside* does not intend, then why would the public even bother to identify problems? It will not.

Second, the omission and misstatement of pertinent facts allows PG&E to turn a blind eye to cumulative evidence of harmful health effects, faulty welds at the core of the Unit 1 reactor that are becoming more embrittled and susceptible to failure each day of operation (already identified by the Nuclear Regulatory Commission as one of the most dangerously embrittled plants in the USA), and worsening harm to marine life all of which will worsen over the coming years. These worsening

changes require that an Initial Study be completed pursuant to CEQA to determine whether a Negative Declaration or an EIR must be prepared.

At a time when Federal environmental protections are being systematically stripped for all US citizens, Californians are placed in true danger if CEQA is not applied in this case, leaving affected citizens without a California State remedy to insure that adequate safety measures are being maintained at Diablo. Case in point: PG&E recently did not diligently perform timely inspections of welds to pipes in the City of San Bruno, and as a result, an entire community suffered a massive explosion and fire when a faulty weld ruptured. Now, after obtaining a 10-year waiver in 2015 from the Nuclear Regulatory Commission (NRC) from having to inspect welds it admits are flawed and lie at the core of the nuclear reactor, PG&E is being given a complete exemption from CEQA, leaving the public with no recourse to require PG&E to address the situation and leaving open the possibility of a repeat of the San Bruno catastrophe, but on a much larger and more permanent scale.

An Initial Study under CEQA will not allow PG&E to ignore the flawed welds, documented increases in cancer and infant mortality, and an expanding 47-mile marine "dead zone," and a rapidly evolving understanding of the deadly seismic implications for continued operation of the Diablo plant that are all part of the unusual circumstances at Diablo Canyon. Allowing PG&E to turn a blind eye to these cumulatively

increasing dangers is not in accord with *Berkeley Hillside* or the intent of CEQA. Consideration of the full record, followed by modification of the opinion, can correct these errors.

Given the gravity of the situation, this Court is asked to grant a rehearing and have the matter fully and fairly considered before issuing an opinion for publication.

II. ERRORS IN THE OPINION

A. The Leases Do Not Maintain a Status Quo

A fundamental error of fact occurs at the beginning of the opinion at page 3. The opinion opines that the lease at issue "maintained the status quo at the plant." (Opn. Pg. 3) This is an inaccurate statement of fact. The new leases do not maintain the status quo. It is true that the new leases do not change most of the *operations* at Diablo, but they do authorize the use of an expanding desalinization plant and the on-shore dumping of the deadly brine adjacent to the plant creating the "dead zone" referenced above. The desalinization plant is never even addressed in the opinion of the Court.

Admittedly most operations will continue the same. Yes, Diablo continues to daily draw 2.5 billion gallons of water killing billions of fish, octopus and other sea creatures, superheating the water by 18°, and then circulating it back out to sea mixed with a continuous torrent of brine from the previously unauthorized desalinization plant to create a dead zone due

to contamination and temperature variation. Yes, Diablo continues daily to inject radioactive isotope contaminants into the air and water near the plant so there is an undeniable statistical increase in cancer and infant mortality in the ZIP Codes near the plant. Yes, Diablo continues daily to bombard the faulty welds at the core of the Unit 1 reactor with radiation (even PG&E admits that it used too much copper for the welds in Unit 1, and therefore removed the copper from the welds in Unit 2 without replacing the welds in Unit 1). Yes, PG&E continues to stockpile tubes of nuclear waste containing plutonium and other radioactive isotopes on site atop of four active earthquake faults, one of which is only two thousand feet away from the tubes. Admittedly, this is all business as usual for PG&E at Diablo, but it is only a maintenance of operations, not maintenance of the status quo.

Even with operations remaining unchanged over the next seven years, the physical effect is not static, and the "status quo" is cumulatively *worsening*. The 47-mile marine dead zone is expanding, increasing numbers of people are dying from cancer, and infant mortality is continually rising in ZIP Codes near the plant (in stark contrast to declining infant mortality across California). The faulty welds in the Unit 1 core reactor are exposed to the same amount of radiation each day, but the cumulative effect of exposure over time is causing the welds to become more "embrittled" and *weaker* so they are more susceptible to failure from even a moderate earthquake, or following an earthquake, when safety

protocols are implemented that require injecting high-pressure cold water into the core of the reactor. In short, although each day operations remain the same, the cumulative physical effects from those constant operations are *worsening*. This is not a maintenance of the status quo.

In addition to ignoring worsening conditions, the claim of maintenance of the status quo is inaccurate because it does not account for changing circumstances which demonstrate a reasonable possibility of a significant effect. An article in the New York Times on the day of this filing, June 28, 2018 proves this point. The headline is *A Seismic Change in Predicting How Earthquakes Will Shake Tall Buildings* (Written by Thomas Fuller). The article reports that Norman Abrahamson, a seismologist at the University of California, Berkeley, told hundreds of engineers gathered for a conference "We now know how far-off our ground motion models have been." Tests show that "In some areas of Los Angeles County like Century City, Culver City, Long Beach or Santa Monica, the new projections *nearly double* (emphasis supplied) the previous estimates." The engineers further explain that "Greater shaking could also bring out the vulnerabilities in older buildings already known to have defects."

This new information further points out a reasonable possibility of a significant environmental effect at Diablo. Diablo has a "known vulnerability" that is the welds at the core of Unit 1 are faulty and embrittled. This new information on ground shaking must be taken into

effect and an Initial Study will allow that to happen. Of course this new information was not before the Commission when it made its decision, but there was plenty of other new information, the linkage of faults, increasing embrittlement, all of which is discussed below. The important point is that relying on *North Coast* for a rule that assumes continuing operations is enough is not only contrary to *Berkeley Hillside*, but is unworkable because it fails to consider new information by only looking to see if operations have stayed the same.

This Court should not opine the status quo is being maintained when it is not. The wording of the opinion should be re-written to state the following: "The Commission concluded that the leases maintained operations at the same rate at the plant and, therefore, the plant was entitled to the "existing facilities" categorical exemption to CEQA." This is factually correct, and leaves out the erroneous assumption that the status quo is being maintained.

B. Lieutenant Governor Newsom Stated That Diablo Is Like the Off-Shore Oil Rigs and Should Be Treated the Same No Exemption

The next error is an omission of fact that occurs at page 5 in the "Background" section. The opinion discusses at length the remarks of Lt. Governor Gavin Newsom, a member of the State Lands Commission. It represents that, "Newsom queried the extent of CEQA review that might be required in this case." (Opn pg. 5) What is omitted, is that the Lt.

Governor did not just remark about what might be required by CEQA, he specifically stated at the public hearing on December 18, 2015, that he did not think that an exemption applied for Diablo. He made this statement immediately following testimony given that the off-shore oil rigs are not exempt from CEQA, even though they are "existing structures," and that this had been the practice for decades. Then the Lt. Governor stated that Diablo should be treated the same as the off-shore rigs. (AR 000264-000265)

This is a key fact because later, after a political deal with PG&E was made, apparently with an understanding that PG&E would be granted an exemption if it agreed to shut down the plant in seven years, the Lt. Governor reversed his position and said that an exemption did apply. It is particularly appropriate that this information be included in the background facts as this remark from the Lt. Governor was discussed at length during oral argument.

Counsel for the State Lands Commission accused the Appellant of misstating the Lt. Governor's remark. Appellant's counsel had the specific quote in hand and read it into the record - showing that there was no misstatement, and that the Lt. Governor did express that he thought that Diablo should be treated similarly to the oil rigs, which were not exempt. Back-room political "deals" should not be allowed to determine such a

critical set of issues as is presented by this case, but rather the application of actual facts and legal precedent should control.

The opinion should include supplemental language so that it reads "Lt. Governor Newsom queried the extent of CEQA review that might be required in this case and offered his opinion on December 18, 2015 that Diablo was similar to an offshore oil rig and should be treated the same under CEQA."

C. If There Is No Exemption, The Next Step Under CEQA Is an Initial Study to Determine Whether to Issue a Negative Declaration, Not the Preparation of an EIR

At page 15, the error committed is one of inaccurate description of CEQA procedure. It is properly stated that when a project is exempt from CEQA "no further environmental review is required." This is accurate. The next sentence, however, leaves out an important part of CEQA procedure. It states that when a project is not exempt, it moves forward to the preparation of an EIR. (Opn. Pg. 15)

While the project may ultimately proceed to an EIR, a step is missing because first the project moves forward for an Initial Study which decides whether there will be a Negative Declaration or an EIR. This extra step is important in this case: Appellant is not asking for an EIR, but for the CEQA process to be followed. If an exemption does not apply for Diablo that does not mean that there necessarily must be an EIR prepared. All that is required is that some environmental review be performed, unlike

an exemption where no environmental review is done. If the cumulative environmental effects on health, marine life, embrittlement, and waste are really not changing, but remain static just as continued operations, then PG&E can present this evidence and argue that a negative declaration should be issued rather than requiring an EIR.

This is the difference between a small amount of review and no review. PG&E is asking this Court to allow it to turn a completely blind eye and does not even want to perform the minimal amount of environmental review needed to issue a Negative Declaration. Perhaps this is because PG&E realizes that anyone looking at those welds will conclude they need repair, and if anyone does take a hard look at the ZIP code health information, they will clearly understand that more infants are dying close to the plant than in the other ZIP codes of SLO County, and if anyone investigates adjacent state marine protected areas, they will find an expanding dead zone while the Diablo pumps are being clogged with jellyfish to the point where the plant has had to shut down on occasion.

In oral argument, counsel for PG&E quietly told the Court "they just want to shut down Diablo." This is patently untrue. It is not the goal of the World Business Academy through this litigation to "shut down Diablo." The goal of this litigation has always been to preserve the CEQA process, and the findings needed to obtain a Negative Declaration are much lower than those for an EIR. PG&E can continue to operate beyond the date of

the lease expirations as long as the Initial Study is being prepared. What is important is that some environmental review be performed as required under CEQA.

The same is true for the political deal. There is nothing wrong with the deal per se, provided that a CEQA exemption is not offered as consideration in order to obtain the deal. The rule of law cannot be given away for deal making. It should be clear in the opinion that even if an exemption is not available, a negative declaration can be done that is short of an EIR. The wording should be changed so that it reads the following: "When there is an exemption, the project moves forward with the preparation of an Initial Study to decide whether a Negative Declaration or an EIR is required by CEQA."

D. If the Meaning of "Provide" is Interpreted Broadly, Then the Secretary of Resources Lacked the Authority to Create the Exemption

The next error is one of law, and begins on page 21. This error pertains to whether the Secretary of Resources has the authority to create an exemption for a nuclear power generation facility. First, there is the issue regarding the meaning of the word "provide," which was briefed and argued at the hearing. In its affirmation of the trial court's decision, this Court decided that the word "provide" does include nuclear power generation facilities. Appellant disagrees, but is not attempting to reargue this point to this Court.

It is significant, however, that once the word "provide" is interpreted to include nuclear power generation facilities, then there is a genuine issue as to whether the Secretary has the authority to include a nuclear power generation facility within a categorical exemption and this is where the opinion errs. The catch is that once the word "provide" is interpreted to include a nuclear power generation facility, then the Secretary has exceeded the authority of the enabling statute.

The opinion at page 22 states that the class of projects in the existing structures exemption is "not nuclear power plants," but broader than that. According to the opinion "it includes existing structures of all types," including nuclear power plants. The flaw in this reasoning is that as soon as an exemption includes nuclear power generation facilities within the broader group, the exemption inherently exceeds the scope of the Secretary's authority in the enabling statue. (See Opinion page 22.)

The Supreme Court in *Berkeley Hillside* emphasized that the Secretary has limited authority to create exemptions stating, "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 oil rigs off the California coast, for example, are existing structures, yet they have *never* been included within the exemption. Lt. Governor Newsom was absolutely right about this point in his transcript statement. Why? Off-shore rigs leak

oil and other contaminants into the water injuring marine life, and they corrode over time to the point where structural elements could fail. So too Diablo, with its pumps drawing in 2.5 million gallons a day, killing fish and other marine life, along with the desalination plant that produces 1,000,000 gallons a day, dumping brine and other chemicals directly to the immediately adjacent waters into the sea, include similar structural harms and risks that constitute a significant effect precluding inclusion within the exempted class. Furthermore, failure of these facilities would require an immediate shutdown of the plant, which if not properly executed, would lead to potentially catastrophic consequences.

Courts have intentionally prevented exemptions from being expanded so they do not weaken CEQA. First, "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." (*Save Our Carmel River v. Monterey Peninsula Water Management District* (2006) 141 Cal.App.4th 667, 697.)

Second, categorical exemptions must be construed narrowly in order to afford the fullest possible environmental protection. (*Save Our 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.") Here, the Court's affirming

opinion does just the opposite. Rather than narrowly construing the exemption, the opinion expands the exemption beyond the scope of the enabling statute.

Chairperson Yee at a public hearing on February 9, 2016 noted that "[T]he Commission has responsibility for the prevention of oil spills at marine oil terminals and offshore oil platforms…"). (AR 000353) If the Commission's argument for an expansive exemption prevails in this case, it will limit the Commission's ability to apply CEQA to ensure there are no significant environmental effects from the operations of the offshore oil platforms. The Secretary lacks the authority to create an exemption for either Diablo or off-shore oil rigs.

Justice Liu, in his concurrence in *Berkeley Hillside* succinctly stated the legal limitations on the Secretary's authority. He wrote: *"I expect that after today's decision, as before, courts reviewing agency determinations under section 15300.2 (c) will be guided by that guideline's basic purpose, which echoes the statutory mandate: to ensure that projects with a reasonable possibility of a significant environmental effects are not exempted from CEQA review."* (Emphasis added).

In order to honor and follow *Berkeley Hillside*, and the precedent set concerning off-shore oil rigs, the opinion should be modified as follows: "The Respondents argue that the meaning of 'provide' includes nuclear power generation facilities. This Court accepts this reading of the

plain meaning of the word 'provide' and concludes that nuclear power generation facilities come within the existing structures exemption. However, given the Supreme Court's clear direction in *Berkeley Hillside* that 'No regulation is valid if its issuance exceeds the scope of the enabling statute,' and appellate decisions holding that exemptions must be narrowly construed so that 'in all but the clearest cases of categorical exemptions, a project will be subject to some level of environmental review' (*Save Our Carmel River* 141 Cal.App.4th at 697), the Secretary of Resources exceeded his authority through the inclusion of nuclear power generation facilities with the existing structures exemption."

E. The Opinion Improperly Inserts the Word "Certainly" into the *Berkeley Hillside* Unusual Circumstances Analysis

The next error made by the Court in its opinion is at page 27 and is also a mistake of law. This Court does not properly apply *Berkeley Hillside* and inserts a word into the *Berkeley Hillside* standard that does not exist. The opinion is initially correct in stating that when analyzing whether there is an exception to an exemption, the first step is to determine whether there are unusual circumstances. *Both the trial court and this Appellate court in its opinion find that there are unusual circumstances in this case!* Where the opinion errs is that after assuming that there are unusual circumstances in this case, the Court then jumps immediately to decide whether "there is a reasonable possibility of a

significant effect on the environment due to those unusual circumstances." This is the "fair argument" prong. (Opn. at pg 29)

The problem is that this Court jumps to the "fair argument" prong too quickly. It skips over the clear Supreme Court directive in *Berkeley Hillside* that if there are unusual circumstances that "will" have a significant effect on the environment, then you do not even reach the fair argument analysis. The majority opinion and the concurrence in *Berkeley Hillside* are in accord on this.

The present Court's opinion at Page 28 misstates the *Berkeley Hillside* test for when an unusual circumstance "will" have a significant effect on the environment: "if a project *certainly* will have a significant environmental effect, that project necessarily presents unusual circumstances and the party does not need to separately establish some feature of the project distinguishes it from others in the exempt class." (Opn. Page 28) (Emphasis added).

The opinion cites *Berkeley Hillside, supra,* at 1105, for this statement of law. Nowhere on page 1105 does the word "certainly" appear. This Court has misstated *Berkeley Hillside* and raised the standard for when an unusual circumstance "will" have a significant effect above the standard set forth by the Supreme Court, thereby narrowing the Supreme Court's opinion without explaining why it would do so.

What the Supreme Court actually stated on pages 1105-1106 in *Berkeley Hillside*, is that "a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect. That evidence, if convincing, necessarily also establishes 'a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.'"

Had this Court made a proper analysis and looked to see if some of the unusual circumstances "will" have a reasonable possibility of a significant effect on the environment using the *Berkeley Hillside* standard, and not inserted the word "certainly," it would have realized that some of the unusual circumstances *will* have a significant effect and, therefore, satisfy the fair argument prong.

For example, the expanding dead zone from the contaminated and superheated water; the increasing numbers of people getting cancer from airborne radioactive isotopes routinely released from Diablo; infants dying in ZIP Codes near the plant, and the accumulation of tubes of toxic nuclear waste containing plutonium are all examples of unusual circumstances that *will* have a significant effect on the environment over the next seven years of the lease operations. These conditions are *worsening*.

The opinion jumps forward to the fair argument analysis and concludes that because the operations remain the same, therefore, the

physical effects remain the same (a factual fallacy), and there cannot be a fair argument. This analysis is not only erroneous, it is out of order. The court should first look to see if the unusual circumstances "will" have a significant effect. In this case there is no doubt that they will. As was explained earlier in this brief, even if the operations remain the same, significant cumulative environmental effects are *worsening*.

The opinion should be modified to state the following: "Once the conclusion has been reached, as it was by both the trial court and this Court in this case, that there are unusual circumstances, then the question becomes whether some of those unusual circumstances "will" have a significant effect on the environment. Here, some of the unusual circumstances will have a significant effect on the environment. It is not enough, for example, to show that 2.5 billion gallons of water are being drawn in, contaminated, superheated, and then returned to sea in the same manner if the day to day operations are expanding a dead zone. Similarly, it is not enough to show that the same amount of radiation is bombarding the flawed welds in reactor core of Unit 1 each day *to assume there is no change in the amount of risk* created by the reactor becoming more and more embrittled, and therefore more prone to failure. Since there are unusual circumstances that "will" have a significant effect on the environment, as the Court as stated in *Berkeley Hillside*, this evidence "necessarily also establishes a 'reasonable possibility that the

activity will have a significant effect on the environment due to unusual circumstances." (*Berkeley Hillside*, *supra*, at 1105-1106.)

F. The Opinion Makes a Mistake of Law on the Baseline Analysis

Next, the opinion errs with a mistake of law at page 30 with its application of "baseline." It errs with respect to baseline by relying upon an appellate decision, *North Coast*, a *decision two years prior* to the Supreme Court's ruling in *Berkeley Hillside*, to narrow and partially negate the Supreme Court's holding and intent in *Berkeley Hillside.*

Both parties, and the Court in its opinion, are in agreement that the "baseline" reflects the current conditions being assessed at the time the project is under consideration. Where the parties disagree, and where this Court errs, is with respect to the interpretation and significance of unchanged ongoing operations. According to *Berkeley Hillside*, the assessment of current conditions is *comprehensive*. The Commission should have looked at *all* of the circumstances, including *worsening* cumulative physical effects from operations, not just whether PG&E is continuing to operate Diablo in the same manner as it has in the past.

This failure to meet the comprehensive standard in *Berkeley* Hillside was committed by the Commission, the trial court, and now this Court. Following a letter from a PG&E lawyer on June 21, 2016 the Commission, and the courts so far, have concluded that looking to see if

ongoing operations remain the same is conclusive.

The erroneous assumption by the Commission that it can just look to see whether there is a change in ongoing operations is clear from the Notice of Exemption that the opinion quotes at length. At page 11: "The notice contains the following 'Reasons for exemption': 'Issuance of a General Lease - Industrial Use for the above-mentioned structure(s) will not cause a physical change in the environment and will not change existing activities in the area." (Opn. pg 11.)

The flaw in the Commission's reasoning is that although the leases will not change existing activities (i.e. operations) it will cause a physical change in the environment. This initial statement in the notice serves as the inception point for the repeated error that if there is no change in existing activities, then there is no change to the environment. Following this reasoning, an offshore rig may continue its pumping operations in the same manner and be exempt from CEQA as an existing structure when the leases are renewed, even if there is a genuine possibility that the pumping infrastructure may be wearing out, or the pumping operations themselves may be creating pressures that could result in a large discharge of oil.

These future risks have precluded the application of exemptions for offshore rigs, as they should, and this was explained by Mr. John White in his testimony at the December 18, 2015 hearing. He said: "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 baseline. Every year this plant continues to operate, that risk goes up. That is an impact under CEQA significant. So therefore, (sic) cannot rely on this categorical exemption. (AR 000261)

Mr. White was right. One reason this is so is that sometime future risks only become apparent over time. For example, PCBs and DDT were being consistently used over and over again for years, but over time it was recognized that the consistent use could kill off the Brown Pelican and other bird species, along with other cumulative harmful effects. Just looking at the consistency of ongoing operations prevents this type of analysis from being made.

Existing case law supports that future risks must be considered. In *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1196-1197 the court held that "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." The opinion in this case recognizes that L*ighthouse* is good law. (Opn. pg. 33) The problem is this opinion does not properly apply *Lighthouse. Lighthouse* states "increases in the

intensity ***or*** rate of use." (Emphasis added) "Or" is a conjunction. The opinion goes on to only consider rate of use stating: "appellant has not pointed to any evidence showing that the project will increase the intensity or rate of use of the cooling system infrastructure."

The error lies in only looking at the rate of use of the infrastructure, and ignoring the "intensity" of harm to the environment. As the intensity of the number of people afflicted with cancer and infants dying is increasing, the intensity is increasing. In addition, there is the intensity of the welds in the core reactor becoming worse and worse through embrittlement. If there was a risk on an offshore oil rig that the rate pumping would remain the same, but the aging infrastructure could possibly explode from the pumping operations, the intensity of a likely failure would have to be considered. (*Citizens for East Shore Parks v. California State Lands Commission* (2011) 202 Cal.App.4th 549, 555.) ("The Lands Commission concluded future oil spills constituted a potentially significant environmental impact, requiring analysis in an environmental impact report"). Here, the accumulating risk of future weld and core failures due to embrittlement constitute a potentially significant environmental impact, and require that at least an initial study be performed, not an EIR.

It will be a terrible precedent if defendants can argue in subsequent CEQA cases across the state that "future risks" such as oil spills,

chemical spills, radioactive leaks, and a host of other possibilities need not be taken into consideration when performing the CEQA analysis – that in accordance with this decision, project proponents need only show that the rate of use for infrastructure has not change regardless of what the intensity of the effect on the environment. This will become known as the "business as usual" exemption and severely undermine CEQA's core purpose and the Supreme Court's holding in the *Berkeley Hillside* case.

Eliminating the importance of future risk will also reduce incentives for the public to participate in the CEQA hearing process. What purpose is served for public members to spend their time and money to come and comment extensively about potential and likely dangerous situations, only to find that project proponents can just say that their operations are the same as before, therefore it is part of the "baseline" and the breadth and scope of public input about potential dangers does not matter because those increasing dangers are incorporated in to the baseline.

Serious consideration of future risks is also important so public decision makers can effectively balance future risks against public benefits. Although the opinion states at page 6 that 10% of California's energy comes from Diablo, according to testimony before the Commission, as determined by the Energy Commission, Diablo only

provides ***6%*** of California's energy. The other nuclear power generated energy is coming from Palos Verdes Nuclear Power in Arizona. (AR 000395- AR 000396).

Californians are being exposed to the danger of a nuclear meltdown, billions of fish are being killed, waste is being created that will cost taxpayers a fortune to carefully isolate and manage for up to 250,000 years and all this for 6% of energy supplies at a time when California is in an energy glut with a surplus of about 20%. (AR 000396). As the testimony of Ben Davis Jr. explains "So when we're considering the risks and benefits of this [the leases], there really is no benefit to operating Diablo Canyon at the current time for anybody but PG&E." (AR 000396.) The Commission ignored this testimony and assumed that "Diablo provides nearly 10% of California's electricity generation." (Opn. pg. 6.)

Given that future risk must be considered as part of the baseline, not just operations, the opinion should be modified with the following language: "Baseline is an assessment of current conditions at the time of the consideration of the project. This is a comprehensive analysis including whether there is a change in operations and whether there is a change in cumulative effect that is worsening due to those continuing operations, or there is risk of a severe environmental event occurring due to ongoing operations."

G. **The Opinion Misapplies the Standard for Fair Argument**

It is clear from the Court's decision in *Berkeley Hillside*, that once there is a determination that there are unusual circumstances, as is the case here by both the trial and appellate courts, then it is a *low threshold* to show that there is a "reasonable possibility of a significant environmental effect due to those unusual circumstances." *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 820 ("the agency is not to weigh the evidence to come to its own conclusion about whether there will be a significant effect. It is merely supposed to inquire, as a matter of law, whether the record reveals a fair argument." (*Citing Berkeley Hillside,* at p.1104).

Despite this directive from the Supreme Court, which is being followed by other appellate courts, the opinion in this case weighs the evidence to reach its own conclusion, rather than merely looking to see if there is a fair argument. A fair argument does not require a winning argument necessarily, but one that presents genuine issues. The opinion makes this error with respect to several of the unusual circumstances in this case.

1. **Fair Argument on Health**

Health Effects, starting on page 36, is an example where the opinion makes a conclusory statement that "The Mangano study does not demonstrate a causative link between the plant's operations and the

observed adverse health outcomes." (Opn. pg. 37.) First, the Appellate Court is in no position to make this determination. The Mangano report is a 36-page study, complete with detailed statistics by zip code, including diagrams showing where zip code areas are in relation to the plant. (AR 017699 to AR 017734.)

Among those 36 pages is a detailed explanation of how teeth from babies were taken from the area near Diablo and compared with teeth from babies in other locations in California. The teeth from babies near the plant were found to have higher levels of Strontium-90 (SR-90) than in other parts of California. The Sr-90 concentration in 50 baby teeth from San Luis Obispo and Santa Barbara Counties – mostly San Luis Obispo – was 127 millibecquerels per gram of calcium, or 30.8% greater than the Sr-90 levels of 97 millibecquerels in the 88 baby teeth from the rest of California. (AR 017714)

As the study further explains, Sr-90 attaches to teeth and bone and penetrates into bone marrow. Each of these radioactive isotopes raises cancer risk by breaking cell membranes and damaging cell DNA, thereby creating mutations which are especially harmful to fetus, infant and child. Finally, the study notes that "Sr-90 has a half-life of 28.7 years." (AR 17707)

While the scientific facts cannot conclusively prove causation, this Court cannot claim that they "do not demonstrate a causative link

between the plant operations and the observed adverse health outcomes." Not only can this Court not make this determination, it is not supposed to do so. That is not how CEQA works - particularly at the threshold exemption level.

This issue highlights the importance of the earlier discussion about not jumping from exemption to EIR. If in fact causation is weak, that is to be fleshed out in an Initial Study to decide whether a Negative Declaration or an EIR should be prepared. That is why the fair argument standard only requires that the issue be sufficiently raised and not proven.

The 36-page study also includes information about other contaminants from the plant that cause cancer. For example, using a database from the Nuclear Regulatory Commission, the study shows that Diablo was the number one nuclear plant for the release of Liquid Tritium in the United States in 2007, and based on the totals for the years thereafter, Diablo released more liquid tritium into the environment than any other U.S. nuclear plant in recent years. (AR 017712) Exposure to liquid tritium can cause cancer. Again, this is not conclusive proof of causation, but that standard is not required – it is enough to raise a fair argument.

The Magano report is 36 highly detailed pages, and it did not merely contain conclusory statements, but relied on at least 19 medical journal articles that identify elevated childhood cancer rates near different

nuclear sites, mostly nuclear power plants, and attached them as an appendix. (AR 017715)

A fair argument is further supported by the testimony before the Commission on June 28, 2016 by Jerry B. Brown that adjacent cancer rates plummeted after the Rancho Seco nuclear power plant closed. According to his testimony, "there were 4,319 less cancers that occurred because of the closing of Rancho Seco." (AR 000811) Once again, this too does not prove causation, but it is more than coincidence and supports a fair argument finding given that similar findings for other nuclear plant closings have been reported in peer-review articles.

Causal links are also shown through the elaborate ZIP Code analysis provided in the study. Fortunately, in California information is available by ZIP Code with respect to infant mortality. The report shows that there is a 28% increase in infant mortality in ZIP Codes located near the Diablo plant. (AR 017718.) This too does not absolutely prove causation, but it serious and it does satisfy a fair argument threshold.

When children are dying, and cancers are increasing, why should the opinion give a blanket exemption? The Commission never even addressed these health issues that were presented to it, despite the fact that on June 28, 2016, the President of the World Business Academy, Rinaldo Brutoco, presented evidence based upon a study done by one of the foremost authorities on radiation world, Chris Busby, that if the leases

go forward "about two dozen children will die." (AR 000812.) Still, the Commission did not even address this testimony.

Given what is in the record, and perhaps the Court had difficulty finding everything in the record previously, this Court should not simply conclude there is no possibility of a causal link. There is a possibility and that is all that is required to move forward to an initial study. PG&E should be required to go to the next step and have a modicum of environmental review through the Initial Study process.

In Justice Lui's concurring opinion in *Berkeley Hillside*, he suggested that the second prong of connecting a reasonable possibility of a significant effect to the unusual circumstances was not even necessary. The response of the majority was that yes, second prong was needed – there has to be some connection of the significant effect to the unusual circumstances, but this connection is limited. All of the Justices on the Supreme Court agree that the fair argument standard is minimal and does not require proof of causation.

PG&E recognizes that the fair argument standard is a low threshold, that is why PG&E has reached back to a case, *North Coast*, decided *two years* prior to *Berkeley Hillside*, and stretched it to create a baseline analysis that negates a fair argument analysis by saying that business as usual is enough, even when the facts are looked at in their entirety a fair argument is shown.

In addition, it is not only the Magano study that shows a fair argument with respect to the health issues. As the court acknowledges, the World Business Academy held meetings with Commission staff to explain the health issues, and provided additional information collected for a article by Christopher Busby, one of the foremost authorities on radiation in the world.

The Busby article was not quite complete by the time of the June 28, 2016 hearing, but much of the information in it had already been presented in meetings. The President of the World Business Academy, Rinaldo Brutoco, asked the Commission at the June 28, 2016 hearing to wait to make its decision until it had opportunity to review this additional information. Not only did the Commission refuse to wait, it refused to ever even acknowledge or address health issues.

As pointed out previously, the purpose of the CEQA public participation process is to *identify* problems, not prove them. A fair and serious argument has been made at considerable time and expense and with expertise. The fact that PG&E is not changing its operations which will continue to contaminate teeth and bone marrow of children with carcinogenic radioactive isotopes only proves that there is an unusual circumstance with a reasonable probability of a significant effect due to that unusual circumstance.

The opinion should be modified stating: “The Appellate has not

proved a causal link between Diablo operations and the health issues raised, however, at this early stage they do not need to do so. If PG&E can show convincingly during the Initial Study process that there is no causal link, then a Negative Declaration can be issued."

2. Fair Argument on Embrittlement and PG&E Management

The error made with respect to health is compounded in the opinion with respect to embrittlement. With respect to this unusual circumstance, the court makes the conclusory statement in the opinion that, "appellant has not pointed to any evidence before the Commission showing that the lease replacement would worsen any embrittlement or make related problems more likely." (Opn. pg. 40) This is incorrect. Appellant did submit evidence before the Commission explaining how embrittlement will become worse over the next seven years and how that worsening could lead to a catastrophic effect.

First, there is common sense. Embrittlement is caused by the daily radioactive bombardment of the 8 inches of stainless steel plates that are welded together at the core the reactor. As each day passes, the reactor becomes more embrittled, weaker, and more prone to either failing during an earthquake, or failing during execution of the high-pressure safety protocols implemented after an earthquake, or some other event such as an accident. Not even PG&E denies that embrittlement is occurring, as it

is inherently part of the Diablo's operations. Embrittlement will cumulatively worsen each day over the seven years of the new lease.

The embrittlement problem is also identified in the administrative record, and so is the type of repair needed to fix it. Under CEQA, it would be enough if a layperson went before the Commission and said that there was an embrittlement problem. It is the *identification* of the problem that CEQA seeks to achieve.

Justice Lui in his concurrence in *Berkeley Hillside* accurately stated the law that applies in this case: "The main purpose of environmental review under CEQA is to 'identify the significant effects on the environment of a project' and to identify project alternatives or feasible mitigation measures." (*Berkeley Hillside* at 1124) (Citing Pub Resources Code Sec. 21002.1. subd. (a).) . This is exactly what happened here. A memo from the Nuclear Regulatory Commission (NRC) stating that Diablo is the third most embrittled reactor in the United States is in the record, and the problem associated with that embrittlement is "identified", along with the potential repair being identified as well. This is all that is required to show a fair argument.

If, as the opinion asserts, the standard is that identification is not enough, and it needs to be proven, or that causation must be proven, then the public will not bother to publicly comment on these issues. Why should they? Who has the time to figure out the intricacies of

embrittlement and present them to the Commission? The idea behind CEQA is that when there is a truly dangerous situation, as now exists within Unit 1 at Diablo, bringing it to the attention of public decision makers is a valuable step so that they can look into it further, not ignore it and then seek an exemption so they can ignore it forever – even as it gets worse each day.

Here, in the administrative record (AR 16450), the dangers of embrittlement were put squarely before the Commission during its hearing process, not just by a layperson, but by one of the foremost authorities in the U.S on embrittlement, S. David Freeman, the former head of the Tennessee Valley Authority and the Sacramento Municipal Utility District. Mr. Freeman 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.
>
> (AR 16450)

As with health issues, neither the staff report nor the Commission's findings addressed this embrittlement problem. Of course, PG&E does not want to address embrittlement, or to perform the costly work of annealing the core reactor– that is, "making solid again," but the

problem was squarely before the Commission and now it is squarely before this honorable panel.

As was explained during oral argument by counsel for the Appellant:

> "In there he [David Freeman] talks about annealing [AR 16450] not only does he mention the problem, but he mentions the fix. In order to do the annealing, they would have to drain the reactor core- it would take about a year and it would take about 45 to 100 million dollars and that is part of the reason why CEQA is so important, so that people can raise these flags before the decision makers that must be addressed. They [the Commission] never mention this at all in their findings, they totally ignore embrittlement, they don't say a word, and they totally ignore the health issues, and don't say anything."
>
> (Oral arg. audio 11:11- 11:40)

One of the worst errors in the opinion is that it marginalizes public input on a matter of extreme danger. When the lives of tens of thousands of people are at risk, and the very fabric of the reputation of California is at risk, not to mention dire economic effects that would fiscally devastate California, the opinion says the public warning just is not enough to even trigger an Initial Study. It says that even though the record points out the problem and solution, plus confirms that even the NRC recognizes that Diablo is the 3rd most embrittled plant in the U.S. -- that is not enough. The opinion gives the Commission PG&E a complete pass. Because the public did not say enough, the public input can be ignored all together! That is not conceivably a legal standard that squares with *Berkeley Hillside*. This is

not the intent of CEQA, nor does it follow the intent and holding of *Berkeley Hillside* that identification of the problem is enough to require an Initial Study.

The opinion in this case sets an excessively high standard for when points made during public comment create a fair argument. According to the opinion, *identification* of the problem is enough for a fair argument. If PG&E can show during the CEQA Initial Study process that the welds in their current condition are fine and embrittlement is not a problem, then fine, so be it. That is how CEQA is supposed to work. A Negative Declaration should issue. CEQA, however, does not just give a pass when an issue of great consequence has been identified in order that PG&E can turn a blind eye for the next seven years at great risk to the public.

The focus on identification as "the main purpose of CEQA" was highlighted during oral argument by a question put to counsel by Presiding Justice Epstein. At 30:44 of the hearing audio he asked the following:

> "I would like to ask a question that follows directly on the argument you just heard. Assume for the sake of argument only that the arguments we have heard about embrittlement, the dangers catastrophe that could result from the continued operation of Diablo Canyon, but assume that there is no proposal to make any physical change and that these dangers occur as essentially as described, then what is the remedy, if CEQA is not."
>
> (Oral arg. audio 30:44 – 31:32)

Counsel for the State was stumped, and it is not her fault because there is no remedy. So, she made the bold claim "there is no evidence of this alleged embrittlement." (Oral arg. audio 32:06 – 32:12). Then, when asked again by Presiding Justice Epstein to assume that there was a substantial danger, counsel for the State refused to answer the hypothetical and said, "I'm only familiar with the facts in this case and that is in this matter we have no evidence of any danger of embrittlement." Dubious, Presiding Justice Epstein then asks, "We have no evidence of embrittlement did you say?" "Correct" answers counsel for the state. (Oral arg. audio 33:12 – 31:32)

It is clear from the record discussed above that the claims of counsel for the State that "there is no evidence of this alleged embrittlement," and "in this matter we have no evidence of any danger of embrittlement" are incorrect. There is evidence, and not from one expert, but two.

There is explicit reference in a letter from John Geesman, an expert who previously served by appointment on the California Energy Commission and is quite familiar with Diablo safety issues. He knows from first-hand experience that Diablo has an embrittlement problem, and the Commissioners know him because he testified several times before the Commission at the Diablo hearings. In his letter to the Commission, Mr. Geesman stated the following: "Seismic risk is a particular concern for Diablo Canyon's Unit 1 reactor, which the Nuclear Regulatory Commission

("NRC") identified in 2013 as the third most embrittled reactor in the United States." (AR 002278.) Mr. Geesman did not just *identify* the problem; he also provided a footnote with a direct link to the NRC document stating that Diablo is the 3rd most embrittled plant in the United States. (AR 002278.)

Counsel for the state was inaccurate in her representation. There is evidence of embrittlement, and it does, fortunately for the people of California, *identify* a dangerous problem thereby making a fair argument and fulfilling the "main purpose" of CEQA.

Presiding Judge Epstein then asked the same question of counsel for PG&E. Counsel for PG&E then answered the question more directly stating the following:

> "Your honor seems to be asking about, what if they met their burden to show that there was some effect that was exacerbated when you do the comparison with baseline, if that in fact had been shown, then, if they had also first achieved successfully showing that there was an unusual circumstance, then perhaps on that assumed set of facts, we would have had fulfillment of the second branch, the second prong, under CEQA, but they didn't, and here, you know, their biggest concern is the continued operation of the plant."
>
> (Oral arg. audio 39:28 – 40:08)

In response to the question, counsel for PG&E is suggesting there are two steps. Appellant satisfies them both. First, there must be the threshold showing of unusual circumstances. This is met. Both the trial

court and this Court have agreed that there are unusual circumstances, which is correct because there are.

Second, "there must be some effect that was exacerbated when you do the comparison with baseline." This language is remarkably similar to the language this Court used in its opinion addressing the unusual circumstance of effects on marine life stating at page 38; "Evidence of an 'exponential' impact on surrounding marine life may well support a fair argument that the lease replacement will have a significant environmental effect." (Opn. pg 38.)

Later in this brief appellant describes in detail a number of "exponential effects" for marine life, health, embrittlement, earthquakes and waste. These facts will not be repeated here. The important point is that when pushed with an insightful question, counsel for PG&E admitted that a fair argument of an exacerbated effect is enough.

Even though either and "exacerbated" or an "exponential" effect can be shown, they do not need to be. These stated standards are *higher* than the actual *Berkeley Hillside* standard. After many pages of deliberate thought, *Berkeley Hillside* states the second prong as "a reasonable possibility of a significant effect due to those unusual circumstances." (*Berkeley Hillside, supra,* at 1105.) There is nothing about an "exacerbated" or "exponential effect." The words are not even in the standard.

The *Berkeley Hillside* standard is a "significant effect," plus it is only a "reasonable possibility" of a significant effect – a *low standard* whereby the significant effect need not be proven absolutely. All that must be shown that there is a *reasonable possibility* that a significant effect is happening, like the welds are getting worse every day, more people closer to the plant are dying from cancer and more young children are dying, the marine dead zone is expanding and the stacks of plutonium on earthquake faults are getting higher. These all satisfy both the applicable *Berkeley Hillside* standard, and the made up "exacerbated" and "exponential" standards.

Given that the accurate legal standard of *Berkeley Hillside* is easily met, counsel for PG&E "concurs" with counsel for the State that there is no evidence of embrittlement and then resorts to a personal attack stating "here, you know, their biggest concern is the continued operation of the plant." (Oral arg. audio 40:04 – 40:10)

As was explained earlier in this brief, appellant does not want to "shut down Diablo." The political deal can be kept, and Diablo can continue to operate while an Initial Study is done. What appellate wants is the same as the question Presiding Judge Epstein asked for: a remedy! When a problem such as embrittlement is identified, CEQA provides a remedy because it requires that an Initial Study be prepared so the identified problem can be addressed. And if the problem can be resolved

with a Negative Declaration, then at least a remedy will have been provided and the purpose of CEQA, public participation to identify a dangerous problem, will be fulfilled.

There is strong evidence in this case showing just how important that public purpose is. Counsel pointed this out during oral argument saying the following:

> "CEQA is intended to be the Canary kind of approach where - in this case we had an even better expert on embrittlement, but sometimes you just have people that are flagging it for the public."
>
> (Oral arg. audio 46:40 – 46:52)

As was further explained in oral argument, the Canary here has served a valuable purpose given the serious dangers involved due to PG&E's deliberate effort to avoid inquiry about embrittlement of the welds. Counsel explained the following in response to the claim of counsel for PG&E that the NRC could be counted on to oversee embrittlement:

> "What happened was these welds in 2005, they were supposed to go back, these welds are at the very core of eight sheets of stainless steel that are welded together at the core of the reactor and in 2005 they inspected them, and then when they came up for inspection again, it was supposed to happen 10 years later, they went to the NRC and they said we don't want to do these inspections, PG&E does not want there to be a hard look at the annealing requirement that is necessary out there at that plant because it will cost between 45 and 100 million dollars and if there is any kind of separate environmental review at our State level that CEQA requires, that's the kind of thing that's going to be uncovered and they are going to have to respond to it. They don't want that to happen and the NRC gave them that 10 years, said don't do the inspections, so now, those welds are out there on that plant today [to the Presiding Judge] (that's the answer to your question about the dangerous situation out

> there, it truly is) that's the same welds with the same copper since 1973 are sitting out there today and it's becoming more and more embrittled and the NRC recognizes it and that's why they have listed them as number three."
>
> (Oral arg. audio 45:15 – 46:30)

Now that the NRC has waived inspections into the faulty welds for 10 years until 2025, if, as a result if this Court's opinion, the leases are also exempt from CEQA, there is no remedy. PG&E can do nothing for seven years and just cross its fingers while it saves money and hopes that there is not even a moderate earthquake, perhaps a 6.0, that could either trigger a nuclear meltdown during the quake itself, or cause one during execution of safety protocols from the injection of highly pressurized cold water.

There is no doubt that the welds are faulty because they have too much copper. PG&E admits that they recognized this and with Unit 2 they reduced the copper." *Even though PG&E stopped using the excessive copper in Unit 2, it never went back to repair Unit 1.*

When looking at fair argument it is also important that it be considered *comprehensively*. The test is not to just take one unusual circumstance at a time, but to consider them together. For example, it would be an unusual circumstance for any plant in the United States to be designated the third most embrittled, and when you couple that fact with the ranking by the NRC in 2011 of Diablo as "the nation's nuclear plant

most vulnerable to earthquakes," (AR 001541) the embrittlement concerns become exponentially magnified.

When making a comprehensive fair argument assessment, it is also appropriate to consider the unusual circumstances of how PG&E has handled faulty welds in the past. *It was a cracked weld that ruptured on a transmission pipeline in San Bruno*, triggering the explosion that devastated a neighborhood, killing 14 people. According to the federal criminal indictment, the San Bruno pipeline was among those where PG&E had failed to check for damage after years of gas-pressure surges. Had PG&E heeded the federal rules, the company would have had to use costly methods to check for pipeline damage such as testing with high-pressure water or running automated devices through lines. Instead, PG&E relied heavily on an above-ground method approved only to check for corrosion, *not weld cracks*, and did so only during regularly scheduled testing, not after pressure surges. In an attempt to save money by avoiding inspections, PG&E created a catastrophe. The same cannot be allowed to repeat in this instance, where a nuclear power plant failure could produce an exponentially worse disaster.

In its review to determine the cause of the San Bruno explosion, the National Transportation and Safety Board ("NTSB") determined there was an "inadequate pipeline integrity management program." (Nat'l Transp. Safety Bd., NTSB/PAR–11/01, Pacific Gas and Electric Company Natural

Gas Transmission Pipeline Rupture and Fire, San Bruno, California, Sept. 9, 2010, at xii (2011),) *see* http://ntsb.gov/investigations/AccidentReports/Pages/PAR1101.aspx. and cited regulatory provisions *exempting*[1] (emphasis supplied) the ruptured pipeline from pressure testing requirements. The NTSB's chairman, joined by two other members, wrote a concurrence observing that PG&E exploited weaknesses in a lax system of oversight and that "regulators ... placed a blind trust in the companies that they were charged with overseeing—to the detriment of public safety." This is exactly what is happening now between PG&E and the NRC concerning Diablo with the 10-year waiver, and now PG&E is asking this Court to join in on that blind trust as a matter of law.

If this Court decides that having a renowned expert raise both the problem of embrittlement and the remedy for the problem in the public record, and another expert presenting NRC findings that that Diablo is the 3rd most embrittled plant, is not enough for a fair argument under CEQA, then this Court is also putting a misguided trust in the arguments of PG&E that could lead to tragedy for the people of California.

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[1] As part of its sentencing for five felonies, PG&E was required to spend three million dollars on advertising telling Californians how it was going to manage differently. After the ads have run, here it is before this Court again seeking an exemption so it can avoid the costs associated with embrittlement testing, and the repairs that may need to be done as a result of that testing.

A fair argument is not made in a vacuum, only one piece at a time. PG&E eventually admitted it had avoided inspecting some lines in San Bruno where pipeline pressure exceeded federal limits. PG&E records given to federal investigators show that at least a half-dozen times where pressure surged on various lines, but *the utility failed to order tests for weld damage.*

Pointing out a history like this, including convictions by a federal jury, is not an "*ad hominem*" argument as is suggested in the opinion pg. 42. It is factual. A Federal court jury decision with five felony convictions is not haphazard, it is a serious matter, and mention of the convictions is in the record. Testimony was given about PG&E's five felony convictions. (John Geesman: AR AR000731-000732; David Grace: AR 000777-000779; Rinaldo Brutoco: AR 000812-000813) The fact that one of these convictions was for cover up of the failure to properly inspect welds, and at Diablo there are welds that PG&E admits are faulty, does support a fair argument of an unusual circumstance.

Give the fair argument regarding embrittlement, and the annealing process that is needed to repair the dangerous welds, combined with the history of PG&E intentially avoiding inspecting welds that has already led to one catastrophe and could lead to another, the opinion should be modified to include the following: "In accordance with *Berkeley Hillside*, 'the agency is not to weigh the evidence to come to its own conclusion

about whether there will be a significant effect. It is merely supposed to inquire, as a matter of law, whether the record reveals a fair argument…' (*Walters v. City of Redondo Beach*, *supra*, 809, 819-820.) In this case, combining evidence from the NRC that Diablo is the third most embrittled plant in the United States with testimony from one of the foremost energy authorities in the United States that a cure requires shutting the plant down and annealing the embrittled area -- that is, making it solid again -- along with testimony that the NRC has found Diablo to be the 3rd most embrittled plant in the country, plus the factual history of PG&E failing to make inspections of welds for San Bruno that led to a disaster and that PG&E is once again not inspecting welds at Diablo, a 'fair argument' has been shown."

3. **Fair Argument on Marine Life**

It is with respect to marine life where the opinion comes closer to the correct legal standard, but still improperly heightens the standard. The opinion states on page 38, "Evidence of an 'exponential' impact on surrounding marine life may well support a fair argument that the lease replacement will have a significant environmental effect." The problem, as previously described, is that "exponential" is not in the standard in the holding of *Berkeley Hillside.* Also, this Court's opinion then erroneously applies its overly high standard stating, "appellant does not point to any such evidence in support of its sweeping claim." (Opn. pg 38.)

Appellant has cited extensively to testimony in the record showing that there will be an exponential, worsening effect on marine life if the seven-year leases are put in the place. It has satisfied even this higher, incorrect standard, and certainly the *Berkeley Hillside* standard which is "whether there is a reasonable possibility of a significant effect due to those unusual circumstances."

For instance, there is testimony in the record that "a new lease that permitted the reactors to operate for an additional six years could result in the destruction of 9 billion fish larvae that would not be impacted absent the lease." (AR 001503) This is exponential. Wiping out fish in such numbers means that there are fewer of them to reproduce, and exponentially the numbers of fish will decline.

It is important to recognize that Diablo has a once through cooling system (OTC) that is recognized as particularly egregious in killing fish and marine life. It draws in billions of gallons, kills fish and marine life along the way, contaminates the water with impurities, superheats it by 18 degrees and pushes it back into the ocean in five minutes. The State Water Board's review of OTC systems noted, "[T]hese OTC systems, many of which have been in operation for 30 years or more, present a considerable and chronic stressor to the state's coastal aquatic ecosystems by reducing important fisheries and contributing to the overall degradation of states marine and estuarine environments. (AR 001509).

And it is not just fish. For example, Diablo has killed off abalone in the vicinity of the plant at a time when California's wild abalone population is in serious decline. This too is exponential, ongoing, and is a broadening significant effect hastening the decline in abalone.

The opinion's statement at page 38 that "none of the evidence to which it points shows that the lease replacement will change or expand the plant's current marine life impacts beyond the baseline conditions" is incorrect. For example, there is a marine fishery protected area only a mile away from Diablo: Point Buchan. By killing more than 1.5 billion larvae, and over 700 pounds of marine resources annually, "Diablo's proximate location to the Point Buchon MPA is reducing larval connectivity between the reserve and other protected areas through entrainment and impingement, thereby compromising the effectiveness of the broader network." (Written comments by the California Coastkeeper Alliance - AR 001540) Diablo is compromising marine life in protected areas and worsening them to a greater degree with passing time. Again, this is exponential, even though a reasonable possibility of a significant effect is all that needs to be shown for a fair argument.

Written comments by the Natural Resources Defense Council to the Commission explain why the impact to Point Buchon is exponential - it is the "backbone" for marine life in the area. As the comments explain, "the exceptionally high-quality habitats found at Point Buchon support

diverse assemblages of nearshore and deep rocky reef fish species, as well as intertidal invertebrates, seabird colonies and marine mammals. Impacts to marine life from the Diablo Canyon power plant in this crucial 'backbone MPA' are of particular concern." (AR 001545) It is clear in the record that the impacts on marine life from these leases extends all the way through to seabird colonies and marine mammals and that is exponential as well as significant.

In addition, appellant explained how PG&E installed a desalination plant on the Diablo lease grounds without first obtaining an EIR and that this desalination plant is producing cumulative effects to the point where it can cause not only a decline, but even perhaps an extinction of species.

It is an error of omission that the opinion does not even discuss the desalination plant when the public testimony specifically criticized the Commission for not addressing the desalination plant. "There is no mention whatsoever in the staff report about the environmental effects of a desalination plant at Diablo Canyon. It is not even there." (Linda Seeley, Mothers for Peace AR 000815) It is impossible to take into consideration worsening harms and future risks if the opinion does not even take into consideration the significant environmental effects of the desalinization plant when deciding whether there is a fair argument. At

the least, as part of the modification of its opinion, this Court should address the desalination plant.

This is particularly true given that according to the testimony of one of PG&E's own employees PG&E "is moving forward to expand the operating desalination plant at Diablo Canyon." (AR 000515) This testimony shows that PG&E cannot even claim that is maintaining its operations at the same level as it has in the past – it is "expanding" them. Given this fact, the linchpin of their baseline argument has been pulled.

But even if the desalinization plant was not being expanded, the opinion would be required to take into consideration the impact of the desalination plant, along with the impact of the 2.5 billion gallons of water that are drawn in and redeposited into the sea via the OTC system. With the two systems combined, daily pumping and desalinization activities heighten the unusual circumstance and must be analyzed comprehensively. This is what an Initial Study would yield.

There was testimony before the Commission at the hearing on June 28, 2016 about how the desalinization plant was causing brine to build up on the bottom of the ocean when it is dumped there from the plant. "There is no doubt that the brine is a pollutant, yet no studies have been done and it has not been investigated." (AR 000801 – AR 000802) PG&E is producing more than 1 million gallons a day of water from the desalination plant, and is now expanding it. This is a significant effect on

the environment creating an unusual circumstance, and there is a fair argument that all that brine sitting on the bottom is creating a risk of a significant effect to the environment. At the very least, the opinion must address this issue.

When this Court reconsiders whether there is an exponential effect, or a significant effect, on marine life, it should also look at the health issues. One of the major errors that the opinion makes is to dispatch with each of the unusual circumstances individually when considering a fair argument, and *never make a cumulative analysis* of all the unusual circumstances to determine if there is a fair argument.

For example, when the administrative record shows that with respect to health issues for humans, the release of liquid tritium is the highest at Diablo in recent years for all nuclear power plants in the United States, (AR 017712) this is discussed as one of the health issues for humans. But tritium is not just a health issue for humans, tritium is a form of radioactive water with a half-life of 12 years and has been associated with harmful developmental effects on invertebrates. Tritium does not just injure humans, it also injures marine life.

As with the health issues, the effects of tritium over time and marine life are exponential. Given its long half-life, tritium accumulates in the ecosystem and marine life, so it is improper to just take a snapshot and say, as this Court does in its opinion, well, the same amount of

tritium is being put into the water with operations therefore there is no significant effect on the environment. With each daily dose, just as embrittlement gets worse, so does the concentration of tritium in humans and marine life.

It is widely accepted that cancer is a genetic disease expressed at the cellular level and the environmental carcinogens like tritium are causally related to cancer. Plus, there is evidence for low dose effects over time building up to where cancer is triggered, or in the case of invertebrates, deformities occur. A *North Coast* type of snapshot of operations, followed by an assumption that things are not worsening, is contrary to marine science.

There is a fair argument, which does not have to be proven, but plausible, that in the coastal regions near Diablo air and sea-born contaminants have led to gradual exposures over time that it increased infant mortality and are harming marine life. These unusual circumstances need to be considered together because that is how they act in nature. Again, this is why an Initial Study is so important and is a critical part of the CEQA process.

The Commission never considered the health effects on marine life, it merely looked to see if operations are the same. Due to the numerous and exponential physical effects on marine life, an Initial Study is needed. If there is no evidence that contaminants such as tritium have

a cumulative effect that is harming marine life, and there are not signs that contaminants will trigger a significant effect to marine life, then a Negative Declaration can be issued. Still, the purpose of CEQA will be fulfilled - science will be considered, not ignored.

4. **Fair Argument on Seismic Conditions**

The opinion takes the position that "the risk of seismic events is independent of the lease replacement" and then asserts that because "earthquake specifications of the plant are not slated to change" (i.e. there is no change in operations), there is therefore no evidence of a fair argument of a significant effect. The error, as in other instances, is that the assessment of a fair argument is too narrow and does not comply with *Berkeley Hillside*.

Berkeley Hillside specifically noted that location was one of the considerations for unusual circumstances and whether there is a fair argument of a significant effect due to those circumstances. (*Berkeley Hillside* at 1105 (discussing "size and location".)) Once again, the opinion errs by looking at the fair argument in a myopic way, only through consideration of operations. Fair argument requires a *comprehensive* analysis, including whether the existence of four active earthquakes, coupled with increasing embrittlement, is creating an increasing, cumulative risk of a significant effect over the years.

As pointed out in written testimony, "the Union of Concerned Scientists reported in 2013 that, of the 100 reactors currently operating in the US, the two at Diablo Canyon top the NRC's list as being most likely to experience an earthquake *larger than they are designed to withstand* using NRC data to calculate the probability of such that is more than 10 times greater than the nuclear fleet average." (Emphasis added). (AR 002974)

This significant risk is increased exponentially when embrittlement is taken into consideration as part of the fair argument assessment, as it must be. The evidence in the record shows that there is a reasonable possibility that an earthquake through a dual rupture of the Shoreline and Hosgri faults can exceed ground motion limits for the plant as built, even without the effects of embrittlement. Embrittlement weakens the ability of the reactor core to withstand an earthquake.

As Lt. Governor Newsom pointed out record: "But the question is is this the site that it should operate, with all of the questions of 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." (AR 000263) This continuing uncertainty, and consistent new information about new earthquake faults and greater dangers is part of the fair argument.

These concerns are heightened by an article in the New York Times on the day of this filing, June 28, 2018. The headline is *A Seismic Change in Predicting How Earthquakes Will Shake Tall Buildings* (Written by Thomas Fuller). The article reports how engineers have come to realize "how far-off our ground motion models have been." Tests show that "In some areas of Los Angeles County the new projections for ground motion are "*nearly double* the previous estimates." Diablo is not far from Los Angeles and some of the earthquake faults impact both places. This new information shows that the calculations for ground movement at Diablo are underestimated, and this is in addition to the fact that embrittlement is increasing.

The warning could not be more clear, the identification of the problem by the public is sufficient for a fair argument and an Initial Study is necessary to at least consider the ramifications of the circumstances. As the engineers explain in the article "Greater shaking could also bring out the vulnerabilities in older buildings already known to have defects." Diablo is an "older building" with vulnerabilities. Buildings like the Diablo reactor are thought have a lifespan of 40 years, and Diablo, Unit 1, is 45 years old!

Since there is an issue about whether an earthquake could exceed the design parameters for Diablo, even without embrittlement, the reality of embrittlement heightens the fair argument that an Initial Study is

needed to look and see just what the condition of embrittlement is and to weigh the present ability of the plant to withstand an earthquake. Again, if PG&E can show that the plant is perfectly capable of currently withstanding earthquakes, even with embrittlement, then a Negative Declaration should issue. The important thing is that under CEQA, PG&E cannot just turn a blind eye, and the interplay between embrittlement and earthquake risks needs to be taken into consideration.

Requiring at least an Initial Study is further supported when considering the history of earthquake discoveries at Diablo. First PG&E said when it built Unit 1 that there were no earthquake faults within 30 km of the Diablo site. When it was proven that there was an active fault less than 30 kilometers, and that the plant could not meet the safety design standards, PG&E just changed the design standards rather than upgrade the plant. "The shaking predicted by PG&E for these increasing threats [newly discovered faults] has systematically decreased as PG&E adopted less and less conservative analytical methodologies, and they did so with the NRC approval." (AR 002542 part of 26 page letter by Sam Blakeslee, PH.D, former California State Sen., former California Seismic Safety Commissioner.)

As more faults became known, in 2012, Michael Peck, who for five years was the lead NRC inspector at Diablo Canyon, argued that the plant was no longer operating within its license and should be shut down until

PG&E demonstrated reactors and other equipment could survive an earthquake on the newly discovered faults. This firsthand evidence from Mr. Peck does not prove that there will be an earthquake, but it does support a fair argument of an unusual circumstance because more and more earthquake faults have been discovered (one as close as 2,000 feet away from the reactors) and an expert with a first-hand information is concerned that the plant cannot withstand earthquakes from these faults.

When PG&E is required to take a close look, new information generally does surface. For example, in 2014, when PG&E was pressured into performing some additional seismic testing, it had to admit that "additional offshore seismic studies revealed that the Shoreline fault is longer by extending farther south than in the Shoreline fault report, and therefore, more capable" (AR 002280) i.e. "more capable" of combining with the Hosgri fault to create an earthquake that would exceed the Diablo ground motion capabilities - and that is before embrittlement is taken into consideration.

In 2015, a report by the Electric Power Research Institute of the ground motion response spectrum acceleration reported by each US nuclear plant, noted that due to "the unique nature of the seismic analysis" of Diablo Canyon it is the "most significant outlier" in the national nuclear fleet. (AR 002279.) Aspects such as being "the most significant outlier" in

the nuclear fleet due to seismic dangers cannot be ignored simply because operations are maintained as usual.

5. **Fair Argument on Nuclear Waste**

As of 2010, Diablo maintained 1,126 metric tons of radioactive waste on site. This equates to 221,588,400 curies of radioactivity, the standard for measuring radioactivity. This exceeds the 150,000,000 curies that were released by the Chernobyl explosions. (AR 017707) PG&E told the public that all of the waste was going to be removed off-site, yet here it sits atop four active earthquake faults and supposedly it does not constitute a fair argument of a significant effect even if PG&E keeps stacking more and will keep stacking more for the next seven years as business as usual.

This accumulation of waste is not insignificant. According to the testimony of John Geesman before the Commission on February 9, 2016, if the leases are extended by another seven years the pile up of nuclear waste will increase by another 21%. (AR 000401.) Also, here is another example of how the unusual circumstances need to be looked at comprehensively in order to make a determination on fair argument. In this instance, there is linkage between the piling up of nuclear waste and the potential for a devastating terrorist attack. When considering the prospect of a terrorist attack, the opinion states that there is no evidence "that the lease replacement is likely to heighten the damage a terrorist

attack would cause." If there is a 21% increase in tubes containing plutonium, and the tubes are exploded by a terrorist attack, it is certain that the radioactive fallout will be even greater than if there was not a 21% increase.

It is not necessary to prove that terrorists will explode the plutonium waste to make a fair argument, and forbid the thought of it, but as dangerous things get stacked up they can have all kinds of ramifications from leakage, to breakage in an earthquake, or as a target by terrorists, and each of these is a legitimate concern as part of a fair argument. PG&E said that it was going to remove all this waste and never did – now it wants to add another 21%. An Initial Study needs to consider the ramifications of this as well.

CONCLUSION

This is a significant case in two ways. First, as a published opinion it will establish important law that either follows or digresses from the Supreme Court's intent and holding in *Berkeley Hillside.* Modification of the opinion is needed so that *Berkeley Hillside* is followed correctly. Second, there are grave ongoing harms and future risks to the health of the people and marine life in California that require at least an Initial Study be prepared in accordance with CEQA. The mistakes of San Bruno must not be allowed to happen again on much grander scale.

The best course to fully air this matter is to ask PG&E to file an Answer and hold a rehearing so that with so much at stake, the record is complete and all questions and issues before this Court are fully addressed.

Dated: June 28, 2018

Respectfully submitted,

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