BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U 39 E) for Authority to Increase Revenue Requirements to Recover the Costs to Replace Steam Generators in Units 1 and 2 of the Diablo Canyon Power Plant.	Application 04-01-009 (Filed January 9, 2004)

COMMENTS ON THE DRAFT PROPOSED DECISION
DIABLO CANYON POWER PLANT
STEAM GENERATOR REPLACEMENT PROJECT

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COMMENTS OF THE SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, PUBLIC CITIZEN, AND ENVIRONMENT CALIFORNIA ON THE PROPOSED DECISION DIABLO CANYON POWER PLANT STEAM GENERATOR REPLACEMENT PROJECT

These comments are submitted on behalf of the San Luis Obispo Mothers for Peace, the Sierra Club, Public Citizen and Environment California (hereinafter "Joint Parties"). The comments concern the October 13, 2005 Proposed Decision of ALJ O'Donnell for the California Public Utilities Commission ("CPUC" or "Commission") regarding the Diablo Canyon Power Plant ("DCPP") Steam Generator Replacement Project ("SGR Project"). On October 25, 2005, ALJ O'Donnell orally granted Joint Parties permission to file comments up to 25 pages in length on the premise that the SGR Project could be treated as a major plant addition under Rule 77.3 of the Commission's Rules of Practice and Procedure.

Joint Parties have been active in this proceeding since January 9, 2004. They have sponsored several pieces of expert testimony, participated actively in hearings including extensive cross-examination of witnesses, participated in All Party Meetings, made oral presentations before the Commission, filed briefs and reply briefs, as well as comments and reply comments and various motions and responses to motions. With respect to the preparation of the EIR, Joint Parties filed comments on the scope of the EIR in response to the Notice of Preparation and comments on the Draft EIR, and attended the CPUC's EIR public meetings.

The Proposed Decision notes that "the Commission must conclude that the Final EIR has been completed in compliance with CEQA" and states that it is in compliance. (pp. 13-14). This conclusion is expressly based only on the format of the final document, its avowed "interdisciplinary approach," and the conclusion that it is "meaningful and useful to decision-makers and the public." (p. 14). The recitation of these factors is not sufficient to show that it is in compliance with the California Environmental Quality Act ("CEQA").

As we reiterate in the comments below, the Final EIR issued by the CPUC does not comply with CEQA in fundamental respects. In order for the CPUC to have an adequate basis under CEQA for its decisions these deficiencies would have to be remedied. Therefore, it should be redrafted to correct these deficiencies and recirculated so that the public has an opportunity to comment on an EIR which adequately reviews the full range of the impacts and a reasonable range of true alternatives to the Project.

At a minimum, the Proposed Decision must address these issues. But, Joint Parties submit that when those deficiencies are examined it will be apparent that the preferable course would be to withdraw the Proposed Decision, require recirculation of an adequate EIR with an opportunity for public comment, and then issue a new Proposed Decision.

I. THE EIR'S "BASELINE" ACCEPTED BY THE PROPOSED DECISION DOES NOT COMPLY WITH CEQA BECAUSE IT EXCLUDES A REVIEW OF THE FULL SCOPE OF IMPACTS OF THE PROJECT.

The Proposed Decision reports that the EIR's "baseline" for the evaluation of the Project's impacts includes DCPP as an operating power plant and its current NRC operating licenses. (p. 15). However, the Proposed Decision does not evaluate whether the EIR complied with CEQA in using this baseline to exclude review of the impacts of the *stated purpose* of the Project – to enable continued operation of the plant beyond 2013/14. The Proposed Decision must address this issue, and Joint Parties submit that this use of the "baseline" is clearly in violation of CEQA.

A. The EIR Violates CEQA by Treating the Project Simply as a Construction Project and Avoiding any Analysis of the Impact of the Continued Plant Operation Enabled by the Project.

In their comments on the scope of the EIR and again on the Draft EIR, the Joint Parties urged the CPUC to include within its review of the Project an evaluation of the impacts of the operation of this nuclear power plant that will be *enabled* for the period from 2013/2014 to the end of its current NRC license in 2021/2025. Extensive legal argument was made in both contexts

demonstrating that this scope of review was required by CEQA. Yet, the Final EIR persists in treating the Project as if it involved only the "construction" of facilities and not their operation, and the attempted justification for this circumscribed approach is inherently flawed.

1. The Final EIR's Response to Comments Mischaracterizes the Joint Parties' Comments.

The Final EIR's Response to Comments ("Response") mischaracterizes Joint Parties' arguments. Joint Parties were not arguing that a "baseline" different than the date of the Notice of Preparation should be used. Thus, contrary to the Response, we did not argue that the baseline should be moved up to 2013/2014, when the existing plant will be unable to continue operation without the approval of the Project. Rather, we argued one of the effects of the approval of this project *at this time* – indeed, *its stated purpose* – will be to enable the plant to operate beyond 2013/2014. I FEIR at A-1.

Nor did Joint Parties argue that "the Draft EIR is flawed *because* the baseline for assessing environmental impacts is defined as the existing environmental condition" as the Response implies. II FEIR at 8 (emphasis added). In fact, Joint Parties argued that the baseline for this Project under CEQA *is* its existing environmental condition. We further argued that this "environmental setting" includes only the existing physical environmental conditions at the time the Notice of Preparation was issued and not a paper license from the NRC. Particularly, in light of the fact that the operation of the plant had never before undergone CEQA review, it was impermissible for the Final EIR to include within the baseline the operation of the power plant through the existing NRC license period, and thereby exclude from analysis the impact of the Project in enabling continued operation of the power plant.

Finally, Joint Parties did not dispute that the "existing environmental setting" includes "an operating nuclear generating facility," as the Response implies. II FEIR 10. What the baseline *does not* include is a nuclear generating facility which will operate until 2021/2025 without

approval of the Project. Yet, the Final EIR proceeds on this patently incorrect assumption by its definition of the baseline.

2. The Response Systematically Miscites CEQA cases in an Attempt to Justify the Final EIR's Narrow Perspective.

The Response cites a number of cases for the proposition that the NRC license (and the operation of the power plant for the full license period) was properly treated as part of the baseline. However, a proper reading of these cases makes clear that they do not support this position.

First, all of the cases which held that a permitted level of operation was properly treated as part of the baseline did so because that permitted level of operation had previously been subject to a full CEQA review. In *Committee for a Progressive Gilroy v. State Water Resources Control Bd.*, 192 Cal. App. 3d 847 (1987), the court ruled that the baseline could include the previously permitted level of operation because an EIR had previously been prepared under CEQA for the facility's impacts. As the court stated: "Since the project was originally built and approved for 6.1 mgd *in full compliance with CEQA*, the order restoring that capacity related to an existing facility and was exempt from CEQA." 192 Cal.App.3d at 864 (emphasis added). Similarly, in *Fairview Neighbors v. County of Ventura,* 70 Cal.App.4th 238, 240-43 (1999), the court held that the existing permitted level of operation could be assumed in an EIR as part of the baseline because that level of operation had been the subject of a previous EIR.

The Response does not address the case of *Azusa Land Reclamation Company, Inc. v. Main San Gabriel Basin Watermaster*, 52 Cal. App. 4th 1165 (1997), which did not involve a prior CEQA review of the facility. In that case, the court required a CEQA review for the ongoing impacts of a landfill's operation, despite fact that it had been in existence since before CEQA was enacted. In *Azusa*, the court noted that *Committee for a Progressive Gilroy* "implicitly supports a position that the existence--or nonexistence--of a prior environmental evaluation [under CEQA] is a relevant factor in deciding whether the existing facility exemption should be applied."

Second, other cases cited to justify this baseline approach did not in fact involve a preexisting regulatory license or a permitted level of operation, but rather involved the question of whether *prior illegal activity* – not involved in the present matter – had to be evaluated in an EIR on a project. *Riverwatch v. County of San Diego*, 76 Cal.App.4th 1428 (1999) (previously unauthorized mining and grading activities); *Fat v. County of Sacramento,* 97 Cal.App.4th 1270 (2002) (operation of airport without required county authorization). The courts rejected this contention in part because the impacts at issue had already occurred and were not impacts that would be caused by the projects involved there. In the present case, there is no question that the continued operation of the power plant after 2013/2014 is not just an impact of the approval of the Project but is its *stated purpose.*

Third, the Response relies on cases "involving the issue of subsequent environmental review" where "the courts have treated the project approved pursuant to a previous environmental document as the baseline." II FEIR at 6. But it is precisely because there was a "previous environmental document" prepared under CEQA for the project that the courts treated the prior project approval as the baseline. This is what Joint Parties argued in their comments: *There was no "previous environmental document" prepared under CEQA for the impacts of the operation of this power plant.* Accordingly, the present Final EIR prepared on a project to enable the continued operation of that power plant must evaluate the potential impacts associated with the extended operating period.

In fact, the Response's reliance on these "subsequent environmental review" cases leads to a *reductio ad absurdum* under CEQA. In those cases, the agency is required to update its prior environmental review of the project in light of any "substantial changes" in the "circumstances" or "new information" regarding impacts of the project's operation. *See* CEQA Guideline § 15162. Yet, the position taken in the Response is in effect that when an existing facility has had no prior environmental review under CEQA, an EIR prepared later on a proposed change to that facility

does not have to consider any changed circumstances or new information regarding impacts of the project's operation. Clearly, this is an untenable position.

The absurdity of this position is reflected in the modes of analysis that the Final EIR employs. For example, it does attempt to apply "new information" regarding seismic risks to its evaluation of the integrity of the facility for housing the *replaced* steam generators, but ignores the integrity of the facility for housing the *new* steam generators – namely, the reactor vessel. In analyzing the earthquake-related risks to SGR Project workers, the Final EIR considers the potential that an earthquake could cause construction equipment to topple on workers but completely ignores the potential for release of radioactive materials and the resulting health impacts on these workers caused by such an event.

Fourth, the Response argues that cases cited by Joint Parties are inapt because they consider whether an existing facility is exempt from CEQA review. II FEIR 9. But the position in effect taken by the Final EIR *is* that this existing facility is exempt from environmental review under CEQA. The cases that refused to exempt review for a facility that had not previously been subject to CEQA review clearly required that review be conducted. The same is true here. The CEQA review conducted cannot assume the existence of the facility as the "baseline" as this EIR does. [1]

3. The Response Continues the EIR's Improper Reliance on a 30 Year Old Environmental Document Not Prepared Under CEQA, but then Inconsistently Claims that it is Not Relying on that Document.

What the above Response shows is that the CPUC is continuing improperly to rely on the prior "environmental review" conducted by the Atomic Energy Commission ("AEC") over 30

[1] The Final EIR also relies on *Bloom v. McGurk*, 26 Cal. App. 4th 1307 (1994), which held that no further CEQA review was required for a permit renewal that did not involve any modification of a facility despite the fact that it had not previously been subject to CEQA review. This case stands alone among all of the authorities cited above. Nevertheless, even by its own terms it does not apply here. The present matter is a project involving modifications to the DCPP that requires CEQA review, and an EIR is being prepared. The issue before the CPUC is the scope of that EIR, not whether the project is exempt from CEQA.

years ago. That is the prior "environmental review" which the Response refers to. Indeed, the Response argues that it would be inequitable to let the defendants in the *Riverwatch* and *Fat* cases – discussed above – forgo review of prior illegal activity but to require it of the CPUC in the instant matter "where environmental review was conducted" by the AEC. II FEIR at 6. While this entirely ignores the obvious distinction between an agency's refusal in an EIR to look backward at past impacts that are unaffected by the project as opposed to an agency's refusal to look forward to the impacts of the approval of the project, it also simply ignores all of CEQA's prescriptions for what prior "environmental review" counts for purposes of determining CEQA compliance.

As Joint Parties observed in their comments on the Draft EIR:

> 'The only allowance for the use of a prior EIS to address topics in an EIR is contained in Public Resources Code § 21083.5. That section provides that "when an environmental impact statement has been, or will be, prepared for the same project pursuant to the requirements of the National Environmental Policy Act of 1969…all or any part of that statement…may be submitted in lieu of all or any part of an environmental impact report required by this division, if that statement…, or the part which is used, complies with the requirements of this division and the guidelines adopted pursuant thereto." However, this section applies only when the EIS has been "prepared for the same project"; it must be "submitted" by the California Lead Agency under CEQA; and the EIS must comply with CEQA and the CEQA Guidelines. None of these conditions has been met in the instant case." (p. 15)

Joint Parties also pointed out that "[a]ll of the other CEQA provisions allowing reliance on prior environmental documents do so only for environmental documents previously prepared under CEQA and certified by the Lead Agency. See, e.g., CEQA Guideline § 15153." *Id.*

The Response does not attempt at all to show that the Final EIR satisfies these CEQA requirements for reliance on a federal agency's "environmental review." Indeed, the Response

simply ignores altogether these specific requirements. Instead, the Response advances two propositions which are either patently false or have no bearing on the current issue.

The Response states that "CEQA recognizes that federal NEPA review can be used to satisfy state CEQA review requirement and further discourages duplication between different levels of government." II FEIR 8. While this is true, it has no bearing on this EIR's improper reliance on the 30 year old AEC EIS. As noted, CEQA contains specific requirements for reliance on NEPA documents for compliance with CEQA, described above. Those requirements have not been met, and nothing in CEQA allows an agency to evade analysis of particular project impacts simply by invoking – without further description – the fact that an EIS was done on a facility 30 years before. As noted, the Final EIR does not attempt at all to address these defects.

The Response also states that "the original power plant proposal was not subject to CEQA since the AEC had exclusive jurisdiction over that project, i.e., preempting any state or local regulation that would otherwise have triggered the requirement for CEQA review." II FEIR 8. This is patently false. The original power plant proposal was not subject to CEQA because the Certificate of Public Convenience and Necessity was issued prior to CEQA's enactment. (As Joint Parties have noted, that fact requires review of the operational impacts of the plant enabled by the Project under the cases construing CEQA.) In any event, it is not true that the federal government has "exclusive jurisdiction" which "preempts any state or local regulation" that would "trigger" CEQA review. Had the original application for a CPCN come before the CPUC after CEQA's enactment, an EIR would have been required to evaluate the impacts of the power plant's operation. Indeed, if the Response were correct, then the present EIR would have been "preempted." The Response simply ignores Joint Parties' prior comments demonstrating the

Supreme Court's specific recognition of this agency's jurisdiction over the construction of nuclear power plants in this state. [2]

At the same time, once the Response turns from its effort to justify the Final EIR's exclusion of review of the plant operation enabled by the project, it then inconsistently denies that it is in fact relying on the AEC's old EIR.

4. The Final EIR continues its reliance on inconsistent "baselines" for the Project as compared to the "No Project" Alternative.

The Response confirms what was evident in the Draft EIR: that the "baseline" used for the evaluation of Project impacts is inconsistent with the baseline used for the No Project Alternative. In the Final EIR, the baseline is purportedly *defined* as the "existing environmental conditions," and the Final EIR claims that the "common baseline allows a meaningful comparison of the No Project Alternative and the Proposed Project." II FEIR 349. However, as noted above, for purposes of the Project the baseline is defined to include an NRC-licensed power plant assumed to operate at least for its full license period to 2021/2025. But when the baseline is defined for the No Project Alternative the assumption that the power plant will operate for its full license period is discarded. *See* II FEIR 10. Obviously, if the EIR were dealing honestly with this definition of the baseline, the "existing environmental conditions" would not change depending on the context. *They are the existing conditions*.

The fact that the Final EIR manipulates this concept is further evidence of the failure to abide by the requirements of CEQA for a full evaluation of the Project's impacts. One

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[2] As we stated on page 9 of our comments on the Draft EIR: "In *Pacific Gas & Electric. Co. v. State Energy Resources Conservation & Development. Comm'n*, 461 U.S. 190, 216 (1983), the court held that 'it is clear that the States have been allowed to retain authority over the need for electrical generating facilities easily sufficient to permit a State so inclined to halt the construction of new nuclear plants by refusing on economic grounds to issue certificates of public convenience in individual proceedings.' Indeed, the Supreme Court noted that 'there already is a body, the California Public Utilities Commission, which is authorized to determine on economic grounds whether a nuclear power plant should be constructed. 461 U.S. at 215." Of course, the same kind of non-preempted jurisdiction exists to determine whether the instant application should be granted.

consequence of this is that the EIR's required comparison of the Project and the No Project Alternative doesn't in fact provide any basis for comparison at all. The major impact of the No Project Alternative as it is formulated is the impact of the presumed gas-fired generation that is hypothesized as the replacement for the electricity generated by DCPP. One would assume that the honest comparison to make here would be between the impact of this gas-fired generation and the impact of the continued operation of a nuclear power plant. However, because of the inconsistent treatment of the baseline between the Project and the No Project Alternative, the Final EIR assumes that approval of the Project will not cause any impacts from the continued operation of DCPP. Therefore, generating sources with impacts are being compared with a generating source assumed to have no impacts. This is absurd.

B. The Final EIR Violates CEQA by the Refusal to Consider the Impacts of the Project in Enabling NRC License Renewal.

The Final EIR acknowledges that any reasonable "observer" looking at the facts would conclude that the renewal of the plant's NRC's license is "reasonably foreseeable." II FEIR 11. Indeed, the Final EIR states that "…it is true that replacement of the steam generators could make it more likely that DCPP is functionally capable of operating beyond the current license term, and even that the overall investment needed to accomplish the project in conjunction with a utility's normal tendency to continue as a working enterprise would suggest to an observer that *relicensing is reasonably foreseeable."* *Id.* Elsewhere, the Final EIR reiterates that this would be the conclusion of "a lay observer." II FEIR 13.

But the Final EIR never offers any "expert" analysis or other evidence to counter this obvious, common sense conclusion of the "lay observer." In fact, it ignores the "substantial credible evidence" offered by the Joint Parties to support this conclusion. Ultimately, it hides behind the PG&E's self-serving claims that it has not yet decided to seek renewal, and misstates the standards for determining whether the impact of renewal must be considered in this EIR.

1. The Final EIR Misstates the CEQA Standard for Determining Whether these Impacts Must be Included.

The Final EIR acknowledges that the standard for determining whether the NRC license renewal must be considered in this EIR is wither it is a "reasonably foreseeable consequence" of the approval of the current project, and whether the future expansion or action will likely change the scope or nature of the project or its environmental effects. *Laurel Heights Improvement Association v. Regents of the University of California,* 47 Cal.3d 376 (1988). As previously noted, the Final EIR offers no evidence that NRC license renewal is not a "reasonably foreseeable" result of this project.

It also attempts to avoid the second prong of the standard by suggesting that "future relicensing would not change the purpose or scope of the *current project."* II FEIR 12. But that is not the question. It is rather whether the significant prolongation of the operating life of a nuclear power plant through NRC renewal – a reasonably foreseeable consequence of approval of this project – would constitute a change in the environmental effects of the project. Clearly, it would.[3]

The Final EIR attempts to justify its refusal to consider these impacts by asserting that "relicensing is not a *crucial element* without which the proposed steam generator replacement project cannot go forward." II FEIR 11. This "crucial element " test is nowhere supported in *Laurel Heights*, and is contrary to that decision's requirement that an EIR consider those impacts which are a reasonably foreseeable consequence of the Project's approval. CEQA Guideline § 15378(a) defines a "project" which is subject to CEQA to mean "the whole of an action, which

[3] The Final EIR asserts as another reason that the relicensing is under the exclusive jurisdiction of the NRC. But this argument ignores the fact that it is the consequences of *the current project* which must be considered in this EIR, not a "future project." Also, for this reason, the reliance in the Final EIR on cases involving "future projects" is misplaced. *See* II FEIR 14 (citing *Berkeley Keep Jets over the Bay Com. v. Board of Port Comrs.*, 91 Cal. App. 4th 1344, 1358 (2001)).

has a potential for resulting in either a direct physical change in the environment, directly or ultimately or a reasonably foreseeable indirect physical change in the environment." [4]

The Final EIR also attempts to rely on the exemption for "feasibility or planning studies" in CEQA Guideline § 15262. That exemption might be available if the only matter pending before the CPUC was PG&E's application to fund that study, but the current matter is an application for replacement of steam generators which will greatly prolong the operating life of this nuclear power plant and without which there could be no NRC license renewal. The CPUC is doing an EIR on that project and is required to consider its reasonably foreseeable consequences. The exemption for "feasibility or planning studies" does not purport to excuse an agency from considering these impacts simply because there will be further "feasibility or planning studies" before they will occur. In *Laurel Heights,* there were clearly further "feasibility or planning studies" that would have to be done before the expansion could occur but that expansion was required to be considered in the EIR. [5]

2. The Final EIR Ignores the Credible Evidence Presented that NRC Licensing is a Reasonably Foreseeable Consequence of the Approval of the Project.

In the comments filed by the Joint Parties, we submitted evidence that a renewal of the NRC licensing of DCPP beyond 2021/2025 is not just enabled by the Project but a "reasonably foreseeable consequence" of it. This evidence included (1) an analysis of PG&E's own economic assumptions about the costs of future energy supplies, (2) the significant investment PG&E is making in other DCPP equipment at capacities that will accommodate operations under a renewal license, and (3) the confirmation of the likelihood of NRC license renewal by representatives of

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[4] Joint Parties would certainly agree that the renewal of NRC licensing is not part of the "project description" II FEIR 15. The prolonged operation under such a renewal is rather an impact of the project.

[5] The Final EIR also ignores the caveat to CEQA Guideline § 15262 that while a "project involving only feasibility or planning studies for possible future actions" does not in itself require the preparation of an EIR or Negative Declaration, it "*does require consideration of environmental factors*." (emphasis added).

the NRC, PG&E and the CPUC. *See* Joint Parties' DEIR Comments at 22-26. Neither the text of the Final EIR nor the Response even acknowledges – much less considers or evaluates – the evidence that was submitted by Joint Parties.

II. THE EIR NOT ONLY FAILS TO EXPLICITLY CONSIDER JOINT PARTIES' COMMENTS ON POTENTIAL SEISMIC IMPACTS BUT ALSO FAILS TO PROVIDE ANY SUPPORTING REVIEW OR EVALUATION FOR ITS CONCLUSIONS REGARDING SEISMIC HAZARDS.

The Final EIR states that Dr. Jay Namson's testimony, which was included as an exhibit in Joint Parties' Draft EIR comments as well as discussed therein, was "considered" in the CEQA process. II FEIR at 352. However, there is no evidence in the Draft EIR that Dr. Namson's testimony was considered. Neither his testimony nor any of his relevant scientific papers was listed as a reference in the relevant Draft EIR chapter (i.e., Geology, Soils, and Paleontology), nor does the Draft EIR contain any discussion of the information provided by Dr. Namson and the Joint Parties on the subject of potential seismic impacts.

Dr. Namson's testimony describes a well-known and respected school of thought that the Diablo Canyon vicinity may in fact be susceptible to a kind of seismic activity that the Diablo Canon power plant was not designed to withstand. Based on his familiarity with more than 30 years of geological and seismological investigations in the Diablo Canyon area, including his own, Dr. Namson describes the possibility that large "oblique-reverse" or "thrust" earthquake ruptures could occur in close proximity to or directly underneath the plant site. This view is in contrast to the view that the relevant fault zone in the Diablo Canyon vicinity can be characterized as purely "strike-slip fault."

In the context of an EIR prepared for operating nuclear power plant the discussion of seismic hazards deserves to be extensive and prominent. The Draft EIR contains just two brief paragraphs (15 lines) addressing this important subject, which cannot possibly do justice to the treatment of this complex scientific subject. Within this section none of the scientific literature

on the subject of seismic hazards – Dr. Namson's or otherwise – is discussed. A total of two references are provided in support of a simple conclusory statement that surface rupture, liquefaction, and tsunami runup do not pose hazards to the areas of the Proposed Project. Draft EIR at D.5-7. There is absolutely no discussion in the EIR that supports this statement. Nor is there any substantive discussion of other kinds of seismic disturbances that could pose significant environmental impacts.

III. THE PROPOSED DECISION ACCEPTS AN ALTERNATIVES ANALYSIS IN THE FINAL EIR THAT DOES NOT COMPLY WITH CEQA.

The Response asserts that the EIR provides "ample information" for the decision-makers to choose between the Project and the No Project Alternative. CEQA requires that it provide this level of information, but the Response is flatly wrong in asserting this. Neither the Proposed Decision nor the Final EIR addresses the contentions made by the Joint Parties in their comments on the Draft EIR regarding the inadequacy of the alternatives analysis.

First, the Final EIR's identification of the "environmentally superior alternative" as consisting only of an alternative delivery method for the RSG's and onsite storage ignores all of the other aspects of the project and renders meaningless CEQA's requirement for the identification of such an alternative *to the Project*. The Proposed Decision obscures this failure by asserting that the environmentally superior alternative includes not only this delivery method but also on-site storage of the original steam generators and any of the Staging and Installation Phase alternatives. (p. 18, n. 20). This is incorrect as the Proposed Decision elsewhere recognizes. *See* p. 16.

Second, the near identical impacts of all of the alternatives with the proposed project in itself indicates that the alternatives chosen for review do not comply with CEQA, which requires that alternatives be selected which will substantially reduce the impacts of the project.

Third, the comparison of the impacts of the No Project Alternative with the Project is no comparison at all because it includes the operational impacts of alternative generating sources in the former and omits the operational impacts of the nuclear generating source in the Project. That comparison is further skewed because it omits any reference to the beneficial impacts of the cessation of operations in the No Project Alternative. The Proposed Decision fails to recognize this mismatch in stating that the Project "is found to be superior to the no project alternative" (p. 16), and Finding of Fact ¶ 14 to the same effect is therefore misleading.

Fourth, the determination that the Project is environmentally preferable to the No Project Alternative is entirely subjective and is not supported by any data or analysis in the EIR.

The mismatch between the treatment of the No Project Alternative and the Project is also made evident in the discussion of the Proposed Project's purported cost effectiveness in the Interim Opinion, which contains the following statement (numbers inserted for ease of reference):

> "Additional benefits that derive from the SGRP are the [1] increased likelihood that Diablo will remain in operation as a reliable energy source, [2] reduced air pollution compared to fossil generation, [3] reduced dependence on fossil fuel, and [4] diversity of electricity resources. These unquantified benefits increase the cost-effectiveness of the SGRP. [5] We also note that there are additional unquantified costs that result from risks associated with additional spent nuclear fuel that will be generated by the continued operation of Diablo due to the SGRP. Such costs would decrease the cost-effectiveness of the SGRP." Interim Opinion at 43.

However, the first stated benefit [1] is not "additional" to those considered previously, since the probability of the plant's future operation has already been formally incorporated into the cost effectiveness analysis. This statement should therefore be deleted.

With respect to [2] and [5], it is true that approving the Proposed Project would be expected to result in reduced air pollution compared to fossil generation as well as increased risks associated with the additional spent fuel that would be generated as a result of the SGR Project approval. The former is a factor in favor of the Proposed Project while the latter is a factor in

favor of non-nuclear alternatives. This statement reflects an appropriate conceptual standard for comparing the Proposed Project's attributes with those of other possible resource alternatives, namely, that the full set of costs and benefits – economic and environmental – of each potential resource option be compared on a consistent basis.

Unfortunately, the Commission's Proposed Decision does not apply this standard. Instead, it certifies a Final EIR that categorically ignores the additional operation period that would be enabled by the SGR Project. Here we see that the Commission's own Interim Opinion belies this approach.

The Commission cannot have it both ways: it cannot argue that the Proposed Project avoids the environmental impacts of a competing resource option without also considering the incremental potential environmental impacts associated with approving the Proposed Project. Sensible, responsible, decision making requires that the full set of costs and benefits – economic and environmental – of each potential resource option be compared on a consistent basis. CEQA requires this as a matter of law. The Proposed Decision, by adopting most of the Interim Opinion's preliminary recommendations as final, and by certifying the Final EIR, therefore commits a legal error which must be remedied.

Furthermore, it is not possible or appropriate to achieve this remedy simply by deleting or disavowing the passage in [2] above since the comparison framework implied in that statement – that the environmental benefits and costs of various resource options ought to be evaluated against each other in deciding which resource options are superior – is fundamentally sound and required under CEQA and under the Public Utilities Code. The only remedy is therefore to consider the potential environmental impacts associated with the extended operating period enabled by the approval of the SGR Project.

Finally, statements [3] and [4] should be deleted since approving the SGR Project would not change but rather would maintain both the existing degree of fossil fuel dependence and the existing mix of resources.

IV. THE CUMULATIVE IMPACT ANALYSIS REMAINS INADEQUATE

The Joint Parties stressed in their comments that CEQA's requirement for analysis of cumulative impacts requires consideration of the impacts not only of future projects, but also "past projects." As those comments noted, the past project with the greatest impact that will cumulate with the Project in the vicinity (even as narrowly defined in the EIR) is the operating nuclear generating facility. The Final EIR tries to skirt this comment – and the CEQA requirement – by referring to "past projects" offsite of DCPP and by claiming that the operation of DCPP has been included in the cumulative impact analysis because it is part of the "baseline."

This is disingenuous. The inclusion of the existing nuclear plant in the baseline (for the remaining period of its NRC license) is the artifice by which the EIR *avoids* consideration of the impacts of these operations. These impacts are not considered in the EIR *because* they are treated improperly as part of the baseline. Thus, their inclusion in the baseline cannot satisfy the separate CEQA obligation to consider them as part of the cumulative impacts analysis.

V. THE PROPOSED DECISION ERRS IN DETERMINING THAT THE EIR CAN BE CERTIFIED FOR USE BY RESPONSIBLE AGENCIES.

Paragraph 13 of the Conclusions of Law of the Proposed Decision states that PG&E's right to construct the Project is "subject to other necessary state and local permitting processes and approvals," and Ordering Paragraph 11 specifies that the Final EIR "is certified for use by responsible agencies in considering subsequent approvals of portions thereof." However, the Proposed Decision fails to consider that the Final EIR does not adequately review the Project's consistency with the state and local plans and policies which will be applied by these Responsible Agencies to the Project and that the Final EIR does not otherwise provide the foundation for its certification for use by Responsible Agencies.

Joint Parties in their comments emphasized that the Draft EIR provided no systematic review of the Project's consistency with federal, state and local plans and policies as required by a number of separate CEQA Guidelines. In particular, we noted that the Draft EIR failed to apply

such plans or standards to the Project in its evaluation of the Project's impacts on biological resources (D. 3-29 et seq.), cultural resources (D.4-10 through D.4-13), hazardous materials (D.6-15 through D.6-20), hydrology and water quality (D.7-6 through D7-9), noise (D.9-7 through D.9-10), public services and utilities (D.10-5 through D.10-12), system and transportation (D12-19 through D12-29), traffic and circulation (D13-15 through D13-18), and visual resources (D.14-22 through D.14-27). The Final EIR does not correct these specific deficiencies or address these particular comments. See II FEIR 370.

Joint Parties also commented that the CPUC is required by CEQA to provide the environmental evaluation for other agencies' review of the Project as "Responsible Agencies" and that particularly with reference to the County of San Luis Obispo it had failed to do so. As examples, we noted that although the Project will be subject to the County's LCP and its Land Use Ordinance, there is no review in the EIR of the provisions of these policies that are applicable, whether the Project is consistent with them, and what modifications or mitigation measures may be necessary to satisfy the County's requirements. The Final EIR does not attempt to justify these omissions beyond stating the CPUC "consulted" with the County. II FEIR 370. This is clearly insufficient.

VI. THE FINAL EIR DOES NOT CONTAIN A GOOD FAITH RESPONSE TO COMMENTS.

CEQA requires that an agency "shall evaluate comments on environmental issues received from persons who reviewed the draft EIR and shall prepare a written response." CEQA Guidelines § 15088(a). Moreover, "[t]here must be a good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice." CEQA Guidelines § 15088(b). Throughout, the Response to Comments in the Final EIR contains conclusory and often misleading statements in response to the comments submitted by the Joint Parties and others. The above sections of these comments on the Proposed Decision detail some of the respects in which

the responses fail to satisfy CEQA's requirement that they consist of a "good faith, reasoned analysis."

VII. IN OTHER RESPECTS THE PROPOSED DECISION IS IN ERROR IN ACCEPTING CERTAIN DETERMINATIONS MADE IN THE INTERIM OPINION.

A. The Interim Opinion, and Therefore the Proposed Decision by Reference, Mistakenly Interprets Unrebutted Supplemental Testimony by Dr. Thompson as to the Reasonably Foreseeable Costs Associated with Enhanced Security

Joint Parties' witness Dr. Thompson submitted supplemental testimony in response to a ruling from the assigned ALJ requesting clarification regarding the *incremental* enhanced defense costs properly associated with the decision to approve the SGR Project. In this ruling the ALJ expressed skepticism that enhanced defense costs would vary significantly under different assumed operating periods of DCPP, specifically the operating period absent the SGR Project and the operating period with the SGR Project through the end of the existing NRC licenses. Dr. Thompson testified previously that an enhanced defense regime at DCPP is fairly likely and that costs of such a regime are significantly dependent on whether for each year in question one is protecting just the spent fuel or both spent fuel and operating reactors.

Dr. Thomson's supplemental testimony provides an illustrative calculation of how much more it would likely cost to implement an enhanced security regime such as could be ordered by the Nuclear Regulatory Commission ("NRC") if the SGR Project is approved and DCNPP thereby continues to operate to the end of its NRC license period, than the case in which the SGR Project is not approved and the plant ceases to operate twelve or so years earlier than NRC license expiration. This time period corresponds approximately with PG&E's representation that absent the SGR Project DCPP would cease operating in the 2013/2014 timeframe versus 2025 in the SGRP approval case.

Dr. Thompson's analysis led to the conclusion that a cost on the order of $900 million more would be needed to implement an enhanced security regime if the SGR Project is approved

than if it is not approved. Thompson Supplemental Testimony at page 4, lines 16-18. This is due to the fact that many components of an enhanced security regime – both capital and O&M components -- are specific to either the spent fuel or the operating reactors. Thus, fewer years of operating reactors means less cost, while more operating years mean greater costs. Dr. Thompson's testimony was unrebutted by other parties.

In their opening brief Joint Parties recommended that the Commission take account of this cost difference and thereby order PG&E to rerun its model using Dr. Thompson's cost estimates as a base case. The Commission declined to accept Joint Parties' recommendation, largely based on a factual misunderstanding of Dr. Thompson's testimony. Joint Parties believe that an accurate understanding of Dr. Thompson's testimony could significantly affect the Commission's cost effectiveness determinations for the SGRP.

The Interim Opinion's misunderstanding of Dr. Thompson's testimony begins on page 20:

> "MFP's[6] first scenario corresponds to the continued operation more than three years after the enhanced requirements are put into effect. This corresponds to the both the case where the SGRP is performed, and to the case where the SGRP is not performed, unless it is known at the time the security requirements are put into effect that neither Diablo unit will continue its operation for more than three years."

The Interim Opinion later states in a like vein that this "…first scenario would apply whether or not the SGR is performed." Interim Opinion at 20. In fact, the first MFP scenario stipulates that DCNPP operates for 15 years after the enhanced defense regime is initiated, not "more than three years" after initiation. This scenario also requires that the SGR Project be implemented since according to PG&E, and uncontroverted by any party, this is the only way DCPP could continue to operate for 15 or more years into the future. Therefore, the Interim

[6] The Interim Opinion refers to Dr. Thompson's testimony throughout as MFP's testimony.

Opinion's understanding that this scenario is consistent with both the SGRP case and the non-SGRP case is incorrect.

MFP's second scenario is constructed to show "spent-fuel only" costs associated with enhanced defense, in direct response to the ALJ's ruling. The Interim Opinion also appears to misunderstand this scenario, since it calls it "unlikely." *Id.* The scenario was not intended to represent a *likely* outcome but rather to clarify why and by how much costs can be expected to vary when spent fuel enhanced defense is combined with operating reactor enhanced defense. This was the apparent basis for the ALJ's skepticism in his 8/31/04 ruling and Dr. Thompson was simply providing the scenario in support of his overall explanation.

It is Dr. Thompson's expert judgment, unrebutted by any party, that the NRC would apply benefit/cost considerations in its implementation of the predicted enhanced defense regime. This judgment has a significant impact on his estimate that some $900 million more would be spent in the SGRP scenario than in the non-SGRP scenario, in that the fact of the SGRP would lead the NRC to call for more stringent forms of protection of the operating reactors, and hence impose greater costs. The Interim Opinion asserts that the inability to know today the shutdown dates of each of the Diablo units in the non-SGRP scenario makes it unlikely that the NRC would apply this principle. *Id.* This statement is made without reference to any evidence in the record. The Commission is simply substituting its own unsubstantiated opinion for unrebutted expert testimony. To remedy this deficiency, the Commission should correct its interpretation of Dr. Thompson's testimony regarding these issues, take account of this cost differences described in this testimony, and order PG&E to rerun its model using Dr. Thompson's cost estimates as a base case.

B. The Proposed Decision's SGR Project Cost Cap Leaves the Door Open to Piecemealing

Much of the evidentiary hearings held in this proceeding were appropriately concerned not only with the direct costs associated with the SGR Project but other costs reasonably foreseeable in order to keep DCNPP operating until the end of its NRC licenses. The Commission's Interim Opinion in this case appropriately gave considerable attention to these non-SGRP prospective costs in considering the overall economics of the SGRP. At this point, however, Joint Parties are concerned that the proposed SGRP cost cap in the Proposed Decision does not appear to apply to non-SGRP costs. In other words, while there is some ratepayer protection against SGR Project cost overruns, there appears to be no comparable protection from the possibility that actual non-SGR Project costs are significantly higher than were assumed in the Commission's SGRP cost effectiveness analyses.

This deficiency is serious. Hypothetically, PG&E could request and receive approval each year for the next 20 years to recover costs associated with refurbishing the aging DCPP facility. Each time PG&E could potentially claim that without the equipment in question replaced the plant would cease operating or operate less effectively. Each time PG&E could claim that the relatively modest investment required was substantially cheaper than alternative resource options. Each time this might be shown to be true, since a *portion* of DCPP's full cost would always be compared to the *full* cost of the alternatives. Only after 20 years of this would we be able to know the actual efficacy of those piecemeal investment decisions.

The Commission should not let DCPP's investment decisions be made in such piecemeal fashion. At the same time, this problem may not be solvable within this proceeding. A separate rulemaking may be required. Joint Parties urge the Commission to give this matter its attention and to formulate a means by which ratepayers are not unduly at risk from this piecemealing problem.

VIII. CONCLUSION

Joint Parties believe that there are fundamental errors in the Final EIR and the Proposed Decision. As it stands, the Proposed Decision does not even address the question of whether these are errors. At a minimum, it should be revised to consider these questions and to take steps to remedy them. Joint Parties submit that requires withdrawal of the Proposed Decision, recirculation of an adequate EIR with an opportunity for public comment, and then the issuance of a new Proposed Decision.

Dated: November 2, 2005

Respectfully submitted,

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