September 25, 1997

By Email and Personal Delivery

Bruce Kaneshiro, Project Manager
c/o Environmental Science Associates
225 Bush Street, Ste. 1700
San Francisco, California 94104

Re: Comments on Mitigated Negative Declaration and Initial Study, CPUC, PG&E Application No. 96-11-020, Proposal for Divestiture

Dear Mr. Kaneshiro:

[Begin SAEJ-1]
The Southeast Alliance for Environmental Justice (SAEJ) submits these comments on the proposed Mitigation Negative Declaration for the divestiture of three PG&E power plants. Since Hunters Point is no longer included in the current project, the members of SAEJ may not be directly affected by the divestiture these first three plants. However, SAEJ is concerned that the Commission may adopt the faulty reasoning and analysis in the Mitigated Negative Declaration. It may also lead to the failure to address certain cumulative impacts which could directly impact SAEJ upon the sale of the Hunters Point and Potrero facilities if not property addressed. SAEJ also refers to and incorporates herein its prior comments on the draft Initial Study, which seem to have been substantially ignored.

It is important to note at the outset that SAEJ's concerns with the proposed divestiture of the Hunters Point power plant are not limited to those set forth here. SAEJ will address further issues when the proposed sale of Hunters Point undergoes CEQA review. SAEJ had previously recommended that the Commission use a programmatic EIR to examine the environmental impacts of divesting all the fossil-fueled plants that PG&E has proposed to sell. A programmatic EIR would avoid the unfortunate consequences of piecemealing found in the proposed Mitigated Negative Declaration, especially the underestimation of cumulative impacts. SAEJ also urges the Commission to reconsider its approach to mitigation in the Mitigated Negative Declaration, which seeks to defer environmental review and mitigation to other agencies in the future.
[End SAEJ-1]

[Begin SAEJ-2]
The Mitigated Negative Declaration may lead to a "piecemealing" of the larger divestiture project because the proposed additional sales under the second phase of PG&E divestiture are not considered.

On November 15, 1996 PG&E filed an application to sell four of its fossil-fueled electric generation plants: Hunters Point, Morro Bay, Moss Landing, and Oakland. On June 25, 1997, PG&E amended its application to withdraw Hunters Point and announced its intention to file a second application to withdraw Hunters Point and announced its intention to file a second application in the fall to sell Hunter's Point along with most of its remaining fossil fuel power plants and one geothermal plant. PG&E thus intends to sell all but one of its fossil fuel electric

generation plants and its geothermal plant. The Mitigated Negative Declaration examines only one portion of PG&E's divestiture project, and if certified would "piecemeal" the divestiture project.

CEQA Guidelines section 15165 states:

> "Where individual projects are, or a phased project is, to be undertaken and where the total undertaking comprises a project with significant environmental effect, the Lead Agency shall prepare a single program EIR for the ultimate project . . . Where one project is one of several similar projects of a public agency, but is not deemed a part of a larger undertaking or a larger project, the agency may prepare one EIR for all projects, or one for each project, but shall in either case comment upon the cumulative effect."

"Piecemealing of a project is inconsistent with the principles of CEQA. *Bozung v. Local Agency Formation Comm*. (1975) 13 Cal.3d 263, 283-284; *Citizens Assoc. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 165-166. In *Bozung*, the California Supreme Court stressed that CEQA "mandates . . . that environmental considerations do not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences." (13 Cal.3d. at 283-284). In that case, a county commission approved a proposal to annex certain properties without analyzing the environmental impacts of the annexation, nor the anticipated development of those properties. (Id. at 270, 284). The Court, however, required the environmental analysis to address the annexation of the properties and the anticipated development of those properties. (d. at 278, 284). In *County of Inyo*, the court held that he county had improperly described a proposed shopping center as two projects, and thus, the two separate negative declarations prepared were invalid.
[End SAEJ-2]

[Begin SAEJ-3]
CEQA Guidelines sections 15165, 15378 subd. (c) require, whenever possible, that the lead agency fully analyze a "project" in one environmental review. Project refers to the activity which is being approved and which may be subject to several discretionary approvals . . . "Project does not mean each separate governmental approval." (Guidelines section 15378, subd. (c)). PG&E's sale of almost all its fossil-fuel electric generation plants and its geothermal plant is the proper and accurate project description for divestiture.

CEQA requires consideration of complex or phased projects in a single environmental review. (see CEQA Guidelines section 15165, supra). The project description must incorporate future phases that 1) are reasonably foreseeable, and 2) change the scope or nature of the initial project. *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 396. The sale of PG&E's remaining fossil fuel power plants is certainly reasonably foreseeable, as noted in the Mitigated Negative Declaration(1), and must be considered. See *Bozung*, 13 Cal.3d at 269, 284 (stressing that the owners' intent to develop the properties was clear and must be included in the analysis of the "project").
[End SAEJ-3]

[Begin SAEJ-4]

The second prong of the *Laurel Heights* test has also been satisfied, since the scope of the project has changed. PG&E's application filed in November, 1996 (A.96-11-020) requested authority from the Commission to sell four of its eight fossil-fueled power plants. In late June, 1997, PG&E withdrew the Hunters Point power plant from the application and announced its intention to auction it off with several other plants at a later date, leaving only Morro Bay, Moss Landing, and Oakland in the first phase of the divestiture. Since the proposed second sale changed both the present and future scope of the project, a single programmatic EIR was required. See *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397, 410 n.6 (explaining that the scope of the project, originally the drilling of one oil well, should include the additional five oil wells subsequently granted permits for drilling). The Commission should thus analyze the entire divestiture in one environmental review.
[End SAEJ-4]

[Begin SAEJ-5]
Cumulative impacts are not adequately addressed in the Mitigated Negative Declaration as a result of "piecemealing."

As a result of the piecemealing, cumulative impacts from the entire divestiture project, such as global warming and federal ozone standard violations, are not adequately considered. Cumulative impacts are those that "are individually limited but cumulatively considerable." *Whitman v. Board of Supervisors,* (1979) 88 Cal.App.3d 397, 406. The "Potential Cumulative Impacts" section of the Mitigated Negative Declaration states:

> "Although the issues and analysis for the PG&E power plants that are to be included in the second round application for divestiture may be similar to the issues and analysis for the current PG&E application, at this time the Proponent's Environmental Assessment (PEA) has not been completed or submitted to the Commission and, thus far, the project's potential impacts have not been analyzed." Mitigated Negative Declaration 4.16.3.(2)

This conclusion is troubling since CEQA requires a cumulative impact analysis of all reasonably foreseeable future projects. Public Resources Code section 21000. This requirement was analyzed by the Court of Appeal in *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 904-905. The court held that the lack of specific detail in a future project is no basis for the refusing to include it in a cumulative impacts analysis.
[End SAEJ-5]

[Begin SAEJ-6]
One glaring example of the Mitigated Negative Declaration's piecemealing of the entire divestiture project resulting in a failure to analyze cumulative impacts is the isolation of the Oakland facility analysis for purposes of regional San Francisco Bay Area air quality. The Initial Study ignores the cumulative impact from the divesting of all the Bay Area power plants because data from four of them is not presented. CEQA prohibits agencies from treating one project as a progression of smaller projects when cumulatively they may result in potentially adverse impacts. An agency may not break "a larger project into components in order to avoid analyzing it as a whole." *Rural Landowners Association v. Lodi City Council* (1983). 143 Cal.App.3d 1013, 1024-1025. If several small projects may result in cumulative impacts, an analysis must be done.
[End SAEJ-6]

[Begin SAEJ-7]
Although the Mitigated Negative Declaration recognizes that it is reasonably foreseeable that new owners will have a tendency to increase generation at all of these plants, it concludes that the "impacts associated with the divestiture are primarily site specific and would not result in synergies or impacts on a cumulative basis" and that the cumulative impacts associated with divestiture will therefore be "less than significant." (4.16.4). This conclusion is unsupported by fact. PG&E's proposed divestiture includes five Bay Area power plants(3). The Initial Study concedes that it is reasonably foreseeable that divestiture could result in increased generation at individual plants ("With divestiture, a new buyer of such a power plant could likely have an economic incentive to operate the facility at higher levels . . . MND at 3.1). There is no assurance that these five facilities will not all operate at increased levels and accompanying increased air emissions. The cumulative impact on air quality of five plants operating at increased levels in the same air quality district is regional, not "site specific," and must be considered.
[End SAEJ-7]

[Begin SAEJ-8]
The cumulative impacts from air quality in the Bay Area are even more important to analyze properly and require greater attention because the region has recently been proposed to be classified by the United States Environmental Protection Agency (EPA) Region IX as a nonattainment area for ozone due to a number of year of violation of the current federal 1 hour standard. See Attachment 1. Further, EPA on the national level has adopted new standards for ozone that when in place will cause the region to be out of attainment, requirement more stringent requirements. See Federal Register, Vol. 62, No 138, page 38421 et seq., July 18, 1997. Instead of analyzing the impacts of the Oakland plant in isolation, the Commission should analyze the cumulative impacts of divestiture of the Bay Area power plants cumulatively, and not dismiss the results as "speculative."
[End SAEJ-8]

[Begin SAEJ-9]
Another cumulative impact not addressed in the Mitigated Negative Declaration due to piecemealing and, perhaps, inattention is global warming. The Draft Initial Study notes at 4.5.36 that excess CO2 emission may impact global warming. This discussion was deleted from the Mitigated Negative Declaration without comment. It is certainly foreseeable that increased generation at the plants could result in increased emissions of CO2, a known greenhouse gas, especially since Selective Catalytic Reduction systems ("SCR's") included as mitigation measures at Moss Landing and Morro Bay actually increase emissions of CO2, which is a byproduct of the catalytic reaction that breaks down NOx. If all of these facilities are increasing their CO2 emissions the result could be significant if collectively analyzed.
[End SAEJ-9]

[Begin SAEJ-10]
The Commission is now faced with two phases of one PG&E sale process, which requires a single environmental review. The CPUC should not analyze the sale of each and every power plant in isolation, nor divide the environmental analysis of the sale into segments. Dividing a project into segments and considering the segments as mutually exclusive little projects would constitute an abuse of discretion by the Commission as the CEQA Lead Agency. *County of Inyo*,

172 Cal.App.3d at 167.
[End SAEJ-10]

[Begin SAEJ-11]
The Mitigated Negative Declaration inappropriately analyzes what it calls "considerable uncertainty and countervailing factors", although those factors raise a fair argument that potentially significant impacts could occur.

The Mitigated Negative Declaration also states that here is "considerable uncertainty and countervailing factors that would make it infeasible to accurately predict the particular plants at which operation would increase as a result of divestiture or the amounts by which generation would increase at any particular plant." (4.16.3). This statement apparently rests on the assumption contained in the Mitigated Negative Declaration that increased generation will not necessarily result in increased emissions. Even if increased generation will not "necessarily" result in higher emissions, it still provides the basis for a "fair argument" standard.

The "fair argument standard," states that an EIR is required whenever it can be fairly argued on the basis of substantial evidence that significant impacts may occur. No Oil, Inc. v. City of Los Angeles ("No Oil I") (1975) 13 Cal.3d 68, 75, 188 Cal.Rptr. 34. Even if other substantial evidence supports the opposite conclusion, the agency must still prepare an EIR. Long Beach Savings and Loan Assn. v. Long Beach Redevelopment Agency (1986) 188 Cal. App.3d 249, 264, 232 Cal.Rptr. 413. The rule was succinctly explained in Sierra Club v. County of Sonoma (1992) 6 Cal.App.4th 1307, 1381, 8 Cal.Rptr.2d 473. "An agency's decision not to require an EIR can be upheld only when there is no credible evidence to the contrary."
[End SAEJ-11]

[Begin SAEJ-12]
Although increased generation does not necessarily mean increased emissions, the possibility remains that increased emissions may result. Whether increased generation will result in higher emissions, and whether the foreseeable levels of future emissions will pose potentially significant impacts, are the types of questions that should be addressed in an EIR. Determining the foreseeable level of emissions from divested powerplants and the cumulative impacts of these new levels is not possible based on the information contained in the Mitigated Negative Declaration. As noted above, the Mitigated Negative Declaration does not in fact analyze the potential cumulative impacts associated with the proposed sale of PG&E's four other Bay Area fossil fuel plants. Since it has already been noted in the Draft Initial Study that the Hunters Point plant alone contributes 7.26% of the county's NOx emissions, the failure to consider air quality data renders a conclusion that no potentially significant cumulative effects will result from the project meaningless.
[End SAEJ-12]

[Begin SAEJ-13]
The Commission's approach to evaluating and mitigating potentially adverse impacts is contrary to CEQA.

Rather than proposing concrete mitigation measures to address specific potential adverse impacts, the Commission has instead chosen to deem existing regulatory schemes sufficient to

render impacts less than significant. This is seen in the Mitigated Negative Declaration's handling of water quality (section 4.4), air quality (section 4.5), hazards (section 4.9), and noise (section 4.10). Reliance on hoped for future action by other agencies does not meet the requirements set forth in CEQA for mitigated negative declarations. The Commission is unable to ensure that mitigation measures will be implemented or that they will actually mitigate against significant adverse environmental impacts. Where the success of mitigation is uncertain, the Commission can not reasonably determine that significant impacts will not result.
[End SAEJ-13]

[Begin SAEJ-14]
This deferral of mitigation analysis until after project approval violates CEQA's policy that impacts must be identified before project momentum reduces or eliminates the agency's flexibility to subsequently change its course of action. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296. The *Sundstrom* court specifically disapproved of a deferral of environmental review. 202 Cal.App.3d at 306-309. See also *Oro Fino Gold Mining Corporation v. County of El Dorado* (1990) 225 Cal.App.3d 872, 884-885 (There cannot be meaningful scrutiny of a mitigated negative declaration when the mitigation measures are not set forth at the time of project approval); *Gentry v. City of Murieta* (1995) 36 Cal.App.4th 1359, 1393-94. It is especially inappropriate to rely on existing BAAQMD rules and permits based upon those rules to prevent potential adverse effects on air quality posed by the project, since, as discussed above, the Bay Area is now proposed to be a non-attainment area under the current 1 hour ozone standard, a new 8 hour ozone standard has been adopted, and new permits with unknown requirements may need to be issued.
[End SAEJ-14]

Thank you for considering our comments.

Sincerely,

/s/
on behalf of

Alan Ramo Supervising Attorney under State Bar of California Student Certification Rules

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Enclosure

Footnotes:

1. "PG&E has announced its intent to apply in Fall, 1997, for approval to sell most of its remaining fossil-fueled power plants (Contra Costa, Hunters Point, Pittsburg, and Potrero, but not Humboldt) and the Geysers geothermal power plant." Mitigated Negative Declaration ("MND") at 1.2.

2. This statement suggests that the MND was in error in also claiming that, "PG&E's anticipated second divestiture application (encompassing the four fossil-fuel power plants and one geothermal plant) is considered in the cumulative impacts analysis of this Initial Study." MND at 2.13.

3. Oakland, Hunters Point, Potrero Hill, Pittsburg and Contra Costa. Mitigated Negative Declaration 1.2.

SAEJ - SOUTHEAST ALLIANCE FOR ENVIRONMENTAL JUSTICE

SAEJ-1.

The comments submitted on the Draft Initial Study by the Southeast Alliance for Environmental Justice (SAEJ) were reviewed and considered in the process of preparing the Initial Study and proposed Mitigated Negative Declaration. The remainder of the topics raised by this comment (e.g., use of a program EIR, underestimation of cumulative impacts, and deferral of mitigation measures) are addressed in detail in the responses to this letter, below.

SAEJ-2.

PG&E's current proposal to sell three plants is a "project" in and of itself under CEQA. The commentor is correct that PG&E has stated its intention to submit an application in the future for the sale of additional fossil fuel power plants and its Geysers geothermal plants. However, the CPUC's action on PG&E's current application will not affect or in any way curtail the CPUC's discretion with respect to such later application, which would be subject to CEQA. The near-term sale by PG&E of three plants, if approved by the CPUC, is not the initial step toward, or a necessary precedent for action on, the sale of additional plants. As the commentor has noted, *CEQA Guidelines* §15165 states:

> Where one project is one of several similar projects of a public agency, but is not deemed to be part of a larger undertaking or a larger project, the agency may prepare one EIR for all projects, or one for each project, but shall in either case comment upon the cumulative effect.

This section of the *CEQA Guidelines* speaks to cases in which an EIR is required, but can be analogized to a project such as this where a Mitigated Negative Declaration is prepared. Since PG&E's pending divestiture application is not deemed to be part of a larger undertaking or larger project, but is a separate and distinct "project" under CEQA, the CPUC may conduct CEQA review for that project separately from any others. Recognizing, however, the potential for cumulative impacts of PG&E's application together with Southern California Edison's pending divestiture application, as well as the possible future sale by PG&E of additional plants, the cumulative impacts analysis within the Initial Study addresses any combined impacts of these related projects. See, pages 4.16.2 - 4.16.14 of the Initial Study.

SAEJ-3.

As explained , in response to SAEJ-2, the Mitigated Negative Declaration properly applies to one "project" under CEQA — PG&E's proposed sale of the Moss Landing, Oakland and Morro Bay power plants. As *CEQA Guidelines* §15378(c) notes, a "project" may be subject to several discretionary

approvals. For instance, PG&E's current divestiture project requires approval by the CPUC, but may also require approvals from other agencies, such as the pertinent air quality management districts.

The commentor has cited the case of Laurel Heights Improvement Assn. v. Regents of University of California, 47 Cal. 3d 376, 396 (1988), somewhat incorrectly. That case requires an analysis of future activity or expansion only if "(1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." Id. PG&E's stated intention to sell additional plants is not a reasonably foreseeable consequence of the CPUC's action on the current proposal. However, as noted in response to SAEJ-2, above, because the sale of additional plants by PG&E is reasonably foreseeable, the potential additional sales are addressed in the cumulative impacts discussion of the Initial Study.

SAEJ-4.

The possible sale by PG&E of additional plants in the future will not change the impacts of the sale of the three plants covered by the pending application. There is no basis for requiring a program-level document to be prepared. In any event, the cumulative impacts of all foreseeable sales have been analyzed in the Initial Study.

SAEJ-5.

The sentence quoted from the Mitigated Negative Declaration merely pointed out that, since PG&E has not yet submitted an application for the sale of additional plants, the CPUC has not received a Proponent's Environmental Assessment or conducted its own project-level environmental assessment of such potential future application. Contrary to the indication of the commentor, however, the CPUC has not refused to include such a foreseeable project in its cumulative impact analysis. The cumulative impacts analysis within the Initial Study does take into account a projected second divestiture application from PG&E.

SAEJ-6.

The four Bay Area power plants referred to are identified in the second paragraph on page 4.16.3 and considered in the cumulative impact analyses on pages 4.16.3 and 4.16.4. Specific data from these four plants were not included because it was not considered relevant to the conclusions. What is important for this divestiture project is that, as shown in Table 4.5.6 on page 4.5.23 of the Initial Study, the Oakland power plant is a very minor generator of air emissions in Alameda County (and in the San Francisco Bay Area). Table 4.5.6 shows that historical emissions from this plant are less than 0.01% of Alameda County total emissions for reactive organic gasses (ROG), carbon monoxide (CO) and respirable particulates (PM10); 0.01% of the Alameda County total for NOx; and 0.2% of the Alameda County total for SOx.

Divestiture is not expected to change the traditional operation of the Oakland power plant (see response PO-5) and, therefore, there would be no incremental air quality effects that would cumulate with other projects (including the four Bay Area power plants mentioned by the commentor).

SAEJ-7.

See response to SAEJ-6.

SAEJ-8.

See response to SAEJ-6. Any more stringent requirements that may be placed upon the combustion turbines at the Oakland power plant (presumably through revisions to BAAQMD Regulation 9, Rule 9) would apply to any owner of the power plant.

SAEJ-9.

The Draft Initial Study indicated that if nuclear power stations were displaced by the additional capacity resulting from the divestiture, then excess CO2 emissions may impact global warming. Comments received on the Draft Initial Study pointed out that there could be increased use of existing capacity, but there would be no capacity increase from divestiture, and that closure of nuclear plants is not a realistic consequence of divestiture of fossil-fuel fired power plants. Upon further consideration the lead agency agrees that this is not a likely consequence of divestiture, and for that reason, the Initial Study concluded that "The project will not impact ... temperature, or cause any change in climate" (fourth paragraph, page 4.5.30).

Selective Catalytic Reduction (SCR) has not been required as mitigation for this project. .

SAEJ-10.

The CPUC does not consider the current application to be one phase of a two-phase PG&E sale process, but rather a "project" in its own right. Approval of the current application would not commit the CPUC to approving a later application, and the first sales are not a necessary precedent to later sales, but are wholly independent. Thus, it is appropriate to conduct CEQA review for the current application, taking the potential future sales into account in a cumulative sense. Also, see responses to SAEJ-2, SAEJ-3 and SAEJ-4.

SAEJ-11.

The commentor appears to have mistakenly assumed a correlation between two concepts that are not in fact related. The Initial Study explains that it is not feasible to predict at which plants and by how much operations (and thus generation) would increase as a result of divestiture. Contrary to the commentor's assertion, that statement does not rest on the assumption that increased generation will not necessarily

result in increased emissions. That would be illogical since the first statement concerns the amount of generation and not emissions. Rather, the statement about generation is based on the factors presented in the Initial Study at pages 3.1-3.6. The air quality analysis within the Initial Study then explains that, even assuming (despite the uncertainty) that generation will increase at a particular plant, such increase would not automatically translate to increased emissions (see page 4.5.25). Furthermore, at page 4.5.25, the Initial Study explains that, even if it were assumed that the sales of the plants would result in higher emissions, such increased emissions would not result in a significant environmental impact. Thus, there is no substantial evidence to support a fair argument that divestiture will generate significant impacts. The commentor's reference to page 4.16.3 is to the cumulative impacts analysis, which discusses both of these concepts (increased generation and increased emissions) to the extent that they affect cumulative impacts.

SAEJ-12.

See response to SAEJ-6.

SAEJ-13.

The Initial Study appropriately recognizes that numerous existing regulatory models are in place to address such issues as water quality, air quality, hazards and noise. The Initial Study does not rely on "hoped for future action by other agencies." Rather, it recognizes that the plants will be transferred subject to existing permits and will continue to be governed by existing laws that protect environmental quality and human health and safety. There is no reason to assume that the new owners would violate pertinent laws and regulations.

As to the CPUC ensuring that mitigation measures will be implemented, a Mitigation Monitoring and Reporting Program has been prepared in accordance with Public Resources Code §21081.6. If PG&E's divestiture application is approved, the CPUC will monitor the mitigation measures in the Mitigation Negative Declaration to ensure that they are implemented in a timely manner. The Initial Study demonstrates that as long as such mitigation measures are implemented, the project will not result in significant environmental impacts.

SAEJ-14.

The Mitigated Negative Declaration and Initial Study do not defer either the development of specific mitigation measures or the analysis of whether such measures will successfully mitigate the impacts to which they are addressed. The mitigation measures are detailed, directive and clear. They contain objective standards, and they plainly indicate the time frame for compliance. With respect to reliance on existing rules and permits (such as those of the BAAQMD), see the response to SAEJ-13.