

**Comment Set CC6**

**San Luis Obispo Mothers for Peace, Sierra Club, Public Citizen, and Environment California  
(the "Joint Parties")**

**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 ENVIRONMENTAL IMPACT REPORT  
DIABLO CANYON POWER PLANT  
STEAM GENERATOR REPLACEMENT PROJECT**

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ENVIRONMENT CALIFORNIA

May 5, 2005

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**COMMENTS OF THE SAN LUIS OBISPO MOTHERS FOR PEACE,  
SIERRA CLUB, PUBLIC CITIZEN, AND ENVIRONMENT CALIFORNIA  
ON THE DRAFT ENVIRONMENTAL IMPACT REPORT  
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 Draft Environmental Impact Report ("DEIR") issued by the California Public Utilities Commission ("CPUC") regarding the Diablo Canyon Power Plant ("DCPP") Steam Generator Replacement Project ("SGR Project").

As set forth in the comments below, the DEIR issued by the CPUC does not comply with the California Environmental Quality Act ("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 in the Final EIR. However, that would deprive the public of an opportunity to review and comment on the important topics that have been omitted from the DEIR. Therefore, it should be redrafted to correct these deficiencies and recirculated so that the public has an opportunity to comment on a DEIR which adequately reviews the full range of the impacts and a reasonable range of true alternatives to the Project.

**I. THE EIR IS NOT FRAMED TO SUPPORT THE CPUC'S  
DECISIONMAKING PROCESS ON THE PROJECT.**

**A. There is a Disconnect Between the DEIR and the CPUC Action.**

**1. The Interim Opinion must be revisited in light of the  
information in an adequately prepared EIR.**

Joint Parties and others opposed the issuance of any Interim Opinion because the CPUC is required by CEQA to consider the information in the EIR prior to reaching any

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decisions on the Project. Despite the caveats sprinkled throughout the decision that it was “preliminary” and that no final decision would be made until after completion of the EIR, Joint Parties continue to believe the CPUC’s action was improper. The decision was issued at the behest of Pacific Gas and Electric Company (“PG&E”) to provide it with the comfort to enter contracts for the manufacture of the Replacement Steam Generators (“RSG’s”), and PG&E apparently assumed that the final decision would follow in its path. It remains to be seen, however, just how “preliminary” that decision was, and whether the CPUC will endeavor to make meaningful use of the EIR in reaching a “final” decision.

Unfortunately, the DEIR issued by the CPUC is disconnected from the CPUC’s decision, artificially narrow in scope, and inadequate in its treatment of the issues considered. Joint Parties submit that the CPUC’s compliance with CEQA requires that it make fundamental changes to the DEIR.

As the Supreme Court has stated in *Laurel Heights Improvement Assn v. Regents of University of California*, 47 Cal.3d 376, 394 (1988): “A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding *whether* to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved.” This is necessary because “the EIR is not only an informational document, which must contain all pertinent information on the environmental impacts of a project, but it is also a “document of accountability.” *Id.* at 392.

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**2. The DEIR does not relate its analyses to the CPUC's ultimate decision.**

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The DEIR states that it "will be used by the CPUC in considering whether or not to approve the Project as proposed or an alternative." A-1. However, the "Project" is defined as the replacement of the Original Steam Generators ("OSG's") at DCP. *Id.* The DEIR briefly acknowledges that "the rate making proposal is also a component of the CPUC general proceeding." *Id.*<sup>1</sup> In fact "the Project" is presented to the CPUC only as a ratemaking proposal. The DEIR also takes the position that "the economic and social effects of a project cannot be treated as significant effects on the environment," and therefore refuses to consider the effects of the ratemaking proposal. D. 1-4, see also A-1. Overall the DEIR never explains how its environmental analyses relate to the CPUC's decision on "the ratemaking proposal." See also A-12.

The DEIR thus ignores the broad mandate that the CPUC has in ruling on PG&E's ratemaking application. That mandate includes not only the question of whether the SGR Project will be cost effective, but also whether it will serve the broader public interest. "The Commission's legislative mandate is to ensure that all utility customers receive reliable service at just and reasonable rates, as specifically stated in Public Utilities Code § 451, with § 701 giving the Commission power to undertake all necessary actions to properly regulate and supervise California's investor-owned utilities." *In re Rulemaking*, Decision 04-01-050, 2004 WL 188191, \*31 (Cal. P.U.C. Jan 22, 2004). Section 451 specifically requires that "[e]very public utility shall furnish and maintain

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<sup>1</sup> It is *assumed* that if the "Proposed Project" doesn't "move forward" DCP will cease operation in 2013-2014. D.12-28. Elsewhere, the DEIR states that only cost recovery is at issue before the CPUC. There is no evaluation of whether the approval of the ratemaking proposal is a necessary condition of the replacement of steam generators.

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such adequate, efficient, just and reasonable...instrumentalities, equipment, and facilities as are necessary to promote the safety...comfort and convenience of its patrons...and the public.”

Even apart from the authority over long term resource planning specifically granted by Section 451, the Commission has inherent power to determine how the broader public interest will be affected by the SGR Project. By itself, Section 701 gives the Commission power to “supervise and regulate every public utility in the State and ...do all things, whether specifically designated in this part of in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.” The Commission itself recognizes that its jurisdiction over issues affecting electric generating facilities like DCPD is very broad. “With respect to electric power plants, the Public Utilities Commission’s primary responsibility is to assure the provision of adequate, reliable service at the lowest reasonable rates.” *In re PG&E Co.* (1980) 4 Cal.PUC.2d 139, 1989 WL 128935, at \*2 (Order denying petition to set aside submissions).

In Southern California Edison’s application to the CPUC for steam generator replacement, it has recognized the breadth of the CPUC’s responsibilities in this context.

In its April 23, 2004 filing, SCE stated:

The SONGS 2 & 3 SGRP Application presents the Commission with a question of long term resource planning for the State, SCE, and SDG&E. It presents to the Commission the issue whether SONGS 2 & 3 will be necessary to meet SCE and SDG&E capacity needs forecast for 2009 and beyond and, if so, whether SDG&E should join SCE in furnishing the equipment and facilities – i.e., RSGs – needed to allow that continued operation. (SCE Motion, at 3.)



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SCE has also stated that its Application for the SGR Project “presents the Commission with an important question of California energy policy at the heart of the Commission’s mandate: Should SONGS 2 & 3, the second largest electric generating facility in California, providing approximately 4% of the state’s generating capacity, continue in operation beyond the life of its original steam generators?” *Id.*

These questions are raised equally by the PG&E Application. PG&E argues that the continued operation of Diablo Canyon is “vital to the adequacy of electric resources in California” in that it will prevent the loss of approximately 20% of the power delivered in PG&E territory, the vast majority of replacement power will be gas fired generation, the Project will save consumers over \$1.38 billion dollars and that the Project is in the best interest of its customers. Application at 6-7; Revised Testimony at ES-3.

It is imperative that the EIR provide the CPUC with the full scope of environmental effects of DCP’s future operations to match the Interim Opinion’s review of the economics of those future operations. In the Interim Opinion, the CPUC did not consider the cost effectiveness of the replacement of the steam generators in isolation from their use in the future operation of the nuclear power plant. If it had done so, presumably its review would have concerned matters such as whether the replacement steam generators were over-priced in comparison to those of other manufacturers. Rather, the Interim Opinion judged the cost effectiveness of the future operations of the plant with the replaced steam generators.

The Interim Opinion expressed the relevance of the environmental impacts associated with DCP’s future operations to its final decision in this proceeding. In concluding its discussion of the SGR Project’s cost effectiveness the Interim Opinion

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references a number of both beneficial and adverse environmental impacts, including "...the increased likelihood that Diablo will remain in operation as a reliable energy source, reduced air pollution compared to fossil generation, reduced dependence on fossil fuel [and]...risks associated with additional spent nuclear fuel that will be generated by the continued operation of Diablo due to the SGRP." Interim Opinion at 44. All of these impacts are obviously related to the extended period of operation that would be made possible by the SGR Project, not to the impacts associated with the SGR Project *per se*.

CC6-3

The DEIR, in contrast, entirely detaches the replacement of the steam generators from the future operation of the DCP. By isolating the steam generators from their function and effect on future operations of the plant, the DEIR has treated the Project as if it were essentially a "construction project." By so doing, the DEIR has deprived the CPUC of the information that it needs to determine the environmental effects of the future operations of the plant as part of its determination of whether to approve the rate making proposal.

In two fundamental respects the DEIR thus departs from the approach taken in the Interim Opinion. *First*, the DEIR examines only the physical acts of replacing the components rather than their role in enabling the future operation of the plant. *Second*, the DEIR departs from the time line of the analysis in the Interim Opinion. The DEIR generally examined only the immediate period of construction effects, in contrast to the Interim Opinion's consideration of the future operations of DCP through the end of its current operating license.

CC6-4

This de-coupling of the analysis in the DEIR from the information needed to support the CPUC's ultimate decision is clearly a violation of CEQA.

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**B. The Scope of Preemption is Not Clearly Defined in the EIR.**

The DEIR takes the position that impacts within the jurisdiction of the NRC are beyond the scope of the DEIR. This is one of the reasons advanced for the exclusion of important topics from the EIR. For some topics that are addressed, the DEIR relegates them to "information" that cannot be considered by the CPUC. For example, the DEIR states in the Safety section: "The CPUC and San Luis Obispo County cannot use the information contained in this section of the EIR to regulate or condition the safety issues of the Proposed Project given the NRC's sole jurisdiction over safety issues associated with the permitting, construction, and operation of the DCPP, including the replacement of steam generators." D.12-1.

As a further example, the DEIR vaguely describes these jurisdictional issues as follows:

"The CPUC and San Luis Obispo County have jurisdiction over limited activities that are not pre-empted by federal government control. This includes the permitting of the construction and transport activities for the Proposed Project (jurisdiction over possible activities offsite, such as for the Original Steam Generator Offsite Disposal Alternative, is discussed separately above). These activities are governed by the County's Local Coastal Program. However, San Luis Obispo County does not have any jurisdiction over safety issues related to the proposed DCPP Steam Generator Replacement Project." D.12-17.

There is no clear demarcation here or elsewhere as to what practically constitutes a "safety issue" beyond the jurisdiction of the CPUC and the County in the various actions which make up the "Project," or the extent to which a safety issue may have implications for ratemaking which are within the CPUC's authority.

The EIR also does not adequately distinguish between the mitigation measures and alternatives that the state has authority to impose and those that are within the

CC6-5

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exclusive jurisdiction of the federal government. While the DEIR contains a general discussion of the preemptive jurisdiction of the NRC and Department of Transportation (A-10 through 13), it does not clearly identify the alternatives or mitigation measures which fall outside State authority. See also D.1-4.

CC6-6

The DEIR is inconsistent in its treatment of "safety issues." The DEIR declares these beyond the purview of the CPUC in excusing its refusal to consider the safety impacts of the future operation of DCP. However, it mentions the hazards to residual contamination radiation exposure from the alternative of transporting the OSG's offsite as one of the reasons for rejecting this alternative. E-6, 7. It does so despite its recognition that the transport of the OSG's is under the exclusive jurisdiction of the NRC and the Department of Transportation. E-6.

CC6-7

The DEIR's approach to preemption is inadequate in two respects. First, it is clear that the fact that an alternative or impact may be beyond an agency's authority to address under existing law does not excuse it from evaluating it under CEQA. *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 573 (1990). Cases decided under the analogous National Environmental Policy Act are to the same effect. *See City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986); *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1135 (5th Cir. 1974) (alternatives may include "methods of accomplishing the aim" of the Project, "including those without the area of the agency's expertise and regulatory control as well as those within it"). In its scoping comments, PG&E itself recognized that "CEQA allows the commission to address issues in an EIR even when it can take no further action on them." (p.12)

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Second, the DEIR is incorrect in concluding that so-called "safety issues" are entirely beyond the purview of the CPUC in the context of its current decision. While it is certainly true that the CPUC cannot dictate to PG&E what safety measures must be employed in the handling of nuclear materials or the design of equipment using these materials, that does not mean that the CPUC cannot consider "safety issues" in deciding as an economic matter whether it is prudent to enable the continued operation of DCPD by approval of the ratemaking proposal.

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 powerplant should be constructed." 461 U.S. at 215.

Clearly, the Commission has authority to consider environmental effects, economic uncertainties and reliability in evaluating the PG&E application. The DEIR states that "environmental and safety concerns are likely to preclude the addition of new nuclear, hydroelectric, or coal and oil-fired generation as replacement for DCPD." ES-19. But the same considerations are relevant to the extension of the life of this nuclear generation facility. The DEIR must provide the relevant information for this determination, but has failed to do so.

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II. THE PROJECT DESCRIPTION IS INCOMPLETE

CC6-10

A complete description of the project is the essential starting point for an EIR. The discussion appended to CEQA Guideline § 15124 emphasizes that the project description is the only way for the CEQA analysis “to make sense,” and the courts have attached great importance to the accuracy and completeness of the project description. As the court stated in *County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 192-3 (1977): “Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the “no project” alternative) and weigh other alternatives in the balance.”

CEQA requires that a project subject to preparation of an EIR be defined as “the whole of an action which has the potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment.” Pub.Res.Code § 21065. “Project” refers to the “underlying activity being approved by an agency, not just the governmental permits necessary to develop such an undertaking.” 14 CCR §15378(c). As the above provisions make clear, an agency must consider all “reasonably foreseeable consequences” of the action. *Laurel Heights Improvement Association v. Regents of the University of California*, 47 Cal.3d 376 (1988) (future expansion of a development must be considered because it is foreseeable).<sup>2</sup>

Unfortunately, the Project Description in Section B of the DEIR is improperly confined to describing the process of removing, transporting, and storing the existing

<sup>2</sup> The courts have also held that all of the project’s components must be discussed. *See City of Santee v. County of San Diego*, 214 Cal.App.3d 1438, 1450 (1989). CEQA Guideline § 15124, *inter alia*, requires that an EIR include a general description of the project’s “economic” characteristics, including any supporting public service facilities.

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generators and transporting, staging, and installing the new steam generators. This description omits the most critical aspect of the project – recognized in the immediately preceding section of the DEIR – that the purpose and direct impact of the SGR Project at DCPP is to extend the operating lifetime of DCPP for an additional 11 or more years (from 2013/14 to 2021/2025).

**CC6-10**

The DEIR in Section A accurately states that the function of this Project is to extend the operating lifetime of DCPP. Absent the CPUC’s approval of PG&E’s application, PG&E concedes that DCPP will not operate to the end of its current license periods; likewise PG&E agrees that a direct impact of the Project will be to extend the operating life of DCPP until 2024/25. See PG&E Revised Testimony Supporting PG&E’s Application to replace the Steam Generators in Units 1 and 2 of the Diablo Canyon Power Plant, (May 27, 2004, A.04-01-009) pp. 1-7. Yet, the DEIR refuses to consider the impacts of the future DCPP operation enabled by the Project.

**CC6-11**

The DEIR is not consistent in this approach. It does include limited discussion of the impact of cessation of DCPP operations in the No Project Alternative. This discussion focuses on the construction of transmission and generation facilities to replace the output of Diablo Canyon after 2013/2014 – although it does so in hypothetical, abstract terms that are not helpful. This mismatch between the Project Description and the No Project Alternative of the DEIR is prima facie evidence of the inappropriately narrow scope of the Project Description in the NOP.

The disconnect between the DEIR and the CPUC’s decisionmaking is also evident in the DEIR’s statement of the Project “purpose and need.” A-6. This recitation simply repeats PG&E’s proposed statement of need. See PG&E Application for Diablo

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Canyon Steam Generator Replacement Projects, Attachment 1 to Chapter 8, pgs. 2-1 to 2-3 and 3-1 (Environmental Assessment, A.04-01-009). However, the CPUC is responsible for making a discretionary decision in response to PG&E's SGR Project Application – a decision that can only be made by reference to the CPUC's statutory responsibility as a regulator of investor-owned energy utilities.

CC6-12

The DEIR states that "[t]his EIR does not endorse, nor is it governed by, the project objectives as defined by PG&E; instead it uses these objectives as guidance for determining the positive and negative benefits of the project as proposed by PG&E." C-3. But, the CPUC's responsibility in this case is to ensure that any application it approves is consistent with *its* regulatory mandate to provide for sound long term resource planning and acquisition. This mandate is given focus by the state's Energy Action Plan, the State's environmental policies and laws (including CEQA), and the CPUC's resource procurement case (R.04-04-003) in which PG&E is actively participating. The CPUC's decision on PG&E's DCPD application must be made in relation to these broader mandates, responsibilities, laws, and activities, and the EIR must be directed to providing the environmental information and analysis to fulfill this function. The DEIR fails to do so.

**III. THE DEIR IMPROPERLY EXCLUDES REVIEW OF THE  
IMPACTS OF FUTURE DCPD OPERATIONS AND NRC  
LICENSE RENEWAL ENABLED BY THE PROJECT**

CC6-13

**A. The DEIR Improperly Excludes Review of the Impacts of Future  
DCPD Operations Through the Current NRC License Enabled by  
the SGR Project.**



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**1. The operation of DCPD for the remainder of its NRC license term is improperly treated as part of the "baseline."**

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The baseline is described as including the operation of DCPD through the end of the two existing NRC licenses (2021-2025), because the NRC licenses "were approved after a federal environmental review was conducted that included an analysis of the potential environmental impacts associated with the operation of DCPD units 1 and 2 for 40 years." See ES-21, D.1-1,2. On this basis the DEIR refuses to examine the impacts of continued operation of DCPD through the end of the NRC license. See D.12-25. It does so despite its acknowledgment that "the Proposed Project would extend the operating life of the DCPD and the environmental effects of current operations would continue as a result of CPUC approval of the project." D.12-25. Indeed, this is identified as one of the "basic objectives" of the Project. C-4.

The DEIR purports to be applying the baseline concept in CEQA Guideline § 15125, but misuses it. In general, CEQA Guideline § 15125 establishes the existing "physical environmental conditions in the vicinity of the project" as the "baseline" for review of the environmental impacts of the project. Subdivision (a) states that "this environmental setting will normally constitute the physical baseline conditions" used to determine whether an impact is significant. The baseline also includes "environmental resources that are rare or unique to that region and would be affected by the project." 14 Cal.Code Regs. § 15125(c). In turn, Guideline § 15126.2(a) states that "in assessing the impact of a proposed project on the environment, the lead agency should normally limit its examination to changes in the existing physical conditions on the affected area as they exist at the time the notice of preparation is published."

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Thus, the baseline concept in the DEIR departs in two respects from that mandated by CEQA Guideline § 15125. *First*, regulatory licenses, such as the NRC license, are not part of the “physical environmental conditions in the vicinity of the project.” Nor are they an “environmental resource rare or unique to the region.” In short, the CPUC cannot avoid examining the impacts of future operations of DCPD by treating the NRC license as part of the “baseline.”

CC6-14

*Second*, the baseline under CEQA Guideline § 15125 establishes the “physical environmental conditions” as they exist at the time of the NOP, and § 15126.2(a) requires that the EIR examine the “changes in the existing physical conditions” caused by the Project. Clearly, the future operation of DCPD enabled by the CPUC’s approval of the SGR Project will cause further damage and risks to the existing environment – i.e., “changes in the existing physical conditions.” Nothing in these provisions allows an EIR to avoid examining these changes simply because similar *kinds* of impacts have occurred in the past.

CC6-15

It is certainly true that an operating nuclear power plant is part of the existing “environmental setting.” However, the DEIR is incorrect in accepting PG&E’s assertion that “the continued operation of the DCPD through the existing license period is part of the CEQA baseline.” D.12-25. What this formulation ignores is that the baseline also includes eight deteriorating steam generators which are not estimated to last beyond 2013-2014, which means that the baseline is that the plant will not operate beyond those years. The EIR must review all of the impacts of approval of PG&E’s application, which includes operation of the entire plant from 2013-2014 through 2021-2025.

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**2. The DEIR cannot rely on a 30 year old NEPA document to excuse CEQA review of the impacts of DCPD operation enabled by the SGR Project.**

CC6-16

The DEIR asserts that “a federal environmental review was conducted that included an analysis of the potential environmental impacts associated with the operation of DCPD units 1 and 2 for 40 years, through the end of the licensing periods.” ES-21. The reference is to the 30 plus year old Environmental Statement (“ES”) prepared by the Atomic Energy Commission (“AEC”), and the DEIR claims that it is thereby excused from considering the impacts of DCPD operations enabled by the SGR Project. *Id.* The authority for this position is not cited, and it is clearly incorrect. Nothing in CEQA authorizes the CPUC to “tier” off an old AEC ES in this manner.

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.<sup>3</sup>

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<sup>3</sup> All 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.

**Comment Set CC6, cont.**

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CEQA also allows incorporation of other documents and studies into an EIR to save space but only under specified procedures that have not been followed here for the old Atomic Energy Commission ("AEC") ES, and not as a wholesale replacement for the impact analysis required to be performed under CEQA. See CEQA Guideline § 15150. Even if the AEC's ES were deemed adequate for evaluation of the future operational impacts of DCPD enabled by the present project, CEQA would not be satisfied by the DEIR's oblique reference to it.

As the Supreme Court observed in *Laurel Heights, supra*, the environmental evaluations required under CEQA "must be discussed in the EIR in sufficient detail to enable meaningful participation and criticism by the public." 47 Cal.3d at 405. The court quoted *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* 27 Cal.App.3d 695, 706 (1972): "[Whatever] is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report." See also *Santiago County Water District v. County of Orange*, 118 Cal.App.3d 818, 831 (1981).

In fact, the 30 year old AEC ES is out of date and does not provide the analysis of future operations that would satisfy CEQA. In order to serve as a reasonable basis for describing the environmental baseline at the time of the SGR Project NOP the AEC ES would have had to accurately predict these conditions 33 years into the future. This would require an extremely high degree of predictive accuracy about dozens of types of potential environmental impacts as well as similar accuracy regarding changing environmental standards and regulations.

CC6-16

**Comment Set CC6, cont.**

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In fact, an Addendum to the ES<sup>4</sup> had to be issued in 1976 due to some of the predicted environmental impacts having been proved wrong in the relatively short time since the issuance of the FES in 1973. One impact described in the Addendum that was not anticipated in the FES was that the construction of DCPD would lead to the destruction of the benthic ecosystem of Inlet Cove. Addendum at (i). The Addendum also noted that in the short time since the issuance of the FES the state of California had imposed stricter limits on thermal discharges. As reported in the SGR Project DEIR and as noted elsewhere in these comments it is now broadly understood that the marine ecological impacts associated with DCPD's thermal discharges have been and continue to be greater than initially predicted. This is but one clear example of the inappropriateness of relying on the AEC ES as a basis for properly characterizing the existing physical conditions at the time of the SGR Project NOP. Numerous additional environmental issues were covered in the 1976 Addendum in order to correct the analyses in the 1973 FEIS.

**CC6-17**

Both the original ES and the Addendum anticipated these developments. With the National Environmental Policy Act having been enacted just a few years prior to the issuance of the DCPD ES, environmental impact science was in its relative infancy. There was clear recognition on the part of the ES preparers that properly understanding the environmental impacts associated with DCPD was a dynamic process, requiring regular monitoring through the operating period of the facility by responsible agencies and the applicant in a variety of environmental issue areas. Numerous monitoring

**CC6-18**

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<sup>4</sup> Addendum to the Final Environmental Statement for the Operation of the Diablo Canyon Nuclear Power Plant Units 1 and 2, U.S. Nuclear Regulatory Commission, May 1976.

Comment Set CC6, cont.

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requirements were imposed by the ES and Addendum due to the impossibility of relying on the environmental analysis conducted in the early 1970s to adequately predict the environmental impacts for several decades into the future.

CC6-18

Environmental standards and regulations have also changed dramatically over the past 33 years since the AEC ES was issued. Since these standards and regulations could not have been known in 1973 the ES could not possibly have reflected them in its analysis. This, too, makes the 1973 ES inadequate for the purpose of accurately describing DCP's existing physical conditions.

**3. Because there has been no prior CEQA review of the operations of DCP through the end of its current NRC license, CEQA requires that the operations enabled by the SGR Project be considered in the EIR.**

CC6-19

In several cases, the courts have refused to allow agencies to evade assessment of the impacts of a previously built facility. In particular, these courts have held that review of the facility's impacts may be avoided only if the facility either (1) predates CEQA and has not been modified since CEQA, or (2) was originally implemented in compliance with CEQA. *Lewis v. Seventeenth Dist. Agricultural Assn.*, 195 Cal.App.3d 823 (1985); *Campbell v. Third District Agricultural Assn.*, 195 Cal.App.3d 115 (1987). In *Lewis* the court upheld a suit by local residents in 1980 against the continued operation of a local racetrack for auto racing unless its impacts were reviewed under CEQA. It did so despite the fact that the track was constructed in 1958 and had been used for auto racing since 1973. *See also Azusa Land Reclamation Company, Inc. v. Main San Gabriel Basin Watermaster*, 52 Cal. App. 4th 1165 (1997)(CEQA review required for landfill's impacts, despite fact that it had been in existence since before CEQA enacted.)

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In its scoping comments, PG&E argued that no CEQA review was required for the impacts of existing facilities, relying on *Committee for a Progressive Gilroy v. State Water Resources Control Bd.*, 192 Cal. App. 3d 847 (1987). However, that court so ruled only 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). In *Azusa, supra*, 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."<sup>5</sup>

CC6-19

**B. The Impacts of Operation of DCPD Past 2021-2025 Under an NRC License Renewal Should Also be Considered in the DEIR.**

CC6-20

**1. The DEIR does not contain sufficient analysis or information to dismiss NRC license renewal as "speculative."**

The DEIR acknowledges that the project may provide an "incentive" for PG&E to seek an NRC license renewal. D.1-2. In its scoping comments, PG&E agreed that the Project "could provide an incentive for extending the operable life of the nuclear facility beyond its current license." (p.9). Nevertheless, the DEIR dismisses this as "speculative" without further analysis of this incentive. D.1-2. CEQA requires a greater level of analysis than this to support a conclusion that an impact is "speculative." In this case, the

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<sup>5</sup> PG&E 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 DCPD 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.

**Comment Set CC6, cont.**

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DEIR must include analysis of the economic and other factors bearing on the likelihood of license renewal in order to prove that it is “speculative.”

CEQA Guideline § 15144 states that “[d]rafting an EIR...necessarily involves some degree of forecasting,” and that “an agency must use its best efforts to find out and disclose all that it reasonably can.” In turn, while § 15145 allows an agency to terminate discussion of an impact if it is “too speculative for evaluation,” the agency cannot reach this conclusion without conducting a “thorough investigation.” In *Citizens to Preserve the Ojai v. County of Ventura*, 176 Cal. App. 3d 421, 430 (1985), the court stated: “Although the County was not required to engage in sheer speculation as to future environmental consequences..., the EIR was required to set forth and explain the basis for any conclusion that analysis of the cumulative impacts of offshore emissions was wholly infeasible and speculative.” The court struck down an agency’s attempt to escape analysis of an impact as speculative.

The DEIR does not claim that the impacts of the future operation of DCPD under a renewed license are “speculative” or infeasible to evaluate. Rather, it relies solely on the assertion that it is speculative whether PG&E will apply for a license renewal and whether one will be granted by the NRC. The Joint Parties submit that CEQA requires that the EIR evaluate the impact of DCPD operations under a future NRC license renewal unless the CPUC can prove that a license renewal is unlikely.

The California Supreme Court has determined that an EIR for a proposed project must include analysis of the environmental effects of future action 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

CC6-20



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project or its environmental effects." *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal.3d 376, 396 (1988). Here, the extension of the operating life of DCPD is clearly a change in the scope or nature of the initial project and will add significantly to its environmental effects.

In *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 86 (1974), the plaintiffs contended the agency had erred in limiting the scope of the project at issue to the drilling of two exploratory oil wells and that the project should have been defined to include commercial oil production that would likely commence if the test wells were successful. Just as PG&E argues here that whether it will apply for an NRC license is dependent on its ongoing feasibility analysis, the defendants in *No Oil* argued that geologic information obtained from the two test wells was essential to the preparation of a meaningful EIR on the effect of future commercial production. *Id.* at 77, n. 5. The Supreme Court framed the issue as whether the public agency had "sufficient reliable data to permit preparation of a meaningful and accurate report on the impact of commercial production." *Id.*

There is clearly sufficient information to evaluate the impacts of future operation of DCPD under a renewed NRC license. Thus, the DEIR is mistaken in relying simply on the fact that "PG&E has stated that is currently has no plans to apply to the NRC for renewal of the operating licenses at DCPD (PG&E, 2004)." G-1. As the court later observed in *Laurel Heights* about its decision in *No Oil*: "We did not frame the issue in terms of whether the public agency or the project proponent had any *definite plans* for action after test drilling." 47 Cal.3d 376, 396 (emphasis added).<sup>6</sup>

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<sup>6</sup> In *Laurel Heights*, the court therefore held that other evidence was sufficient to establish the likelihood of expansion, despite evidence from the Regents that only they could approve a plan for future expansion of the facility and had not approved any such plan. 47 Cal.3d at 397-398.

Comment Set CC6, cont.

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The question is whether license renewal is a “reasonably foreseeable consequence” of the SGR Project, and Joint Parties submit that the CPUC must prove that it is not so in order to treat it as “speculative.” As demonstrated next, there is substantial, credible evidence that NRC license renewal is a reasonably foreseeable consequence of the Project.

CC6-20

**2. Future DCPD operation under an NRC License Renewal is a  
“Reasonably Foreseeable Consequence” of the SGR Project.**

CC6-21

In *Laurel Heights*, the court emphasized that only “credible and substantial evidence” of the “reasonably foreseeable consequences” is required to mandate their review in an EIR. In *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692, 738, n. 15 (1990), the court distinguished this showing from the ordinary “substantial evidence” test which defers to the agency’s decision if it is supported by any substantial evidence. In contrast, *any* “credible and substantial evidence” of the likelihood of the future use is sufficient to require its analysis.<sup>7</sup>

There is clearly “credible and substantial evidence” of the likelihood of NRC license renewal. “The EIR preparers agree that it would be impossible to renew the NRC license without successful replacement of the steam generators.” G-1. As demonstrated below, the possibility of NRC license renewal – enabled by approval of the SGR Project

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<sup>7</sup> In its scoping comments, PG&E claimed that the decision in *Kings County* foreclosed the EIR’s consideration of NRC license renewal because the court upheld an EIR’s assumption that a proposed cogeneration plant would operate for the 20-year period of its contract for the sale of electricity to PG&E rather than the 30-year life of the equipment. However, the court emphasized that the plant owner had not just presented evidence of the term of the contract, but had also presented evidence that renewal of the contract with PG&E (required for the plant’s operation by law) beyond the 20 year period was unlikely. In particular, the court cited the applicant’s “evidence PG&E was forced by the Public Utilities Commission to buy electricity from GWF despite unfair pricing and an excess power dilemma.” 221 Cal. App. 3d at 739. These factors made renewal of the contract unlikely. On the other hand, the challengers apparently presented no evidence to support the likelihood of a longer period of operation beyond citing conflicting assumptions elsewhere in the EIR. *Id.*

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– is likely to be realized because of PG&E’s own economic assumptions about the costs of future energy supplies and the significant investment PG&E is making in other equipment at capacities that will accommodate operations under a renewal license. Moreover, representatives of the NRC, PG&E and the CPUC have all confirmed the likelihood of NRC license renewal. Therefore, the EIR’s review of all of the impacts of approval of PG&E’s application must include operation of the entire plant beyond 2021-2025 under an NRC license renewal.<sup>8</sup>

**PG&E’s economic assumptions make license renewal likely.** The EIR needs to consider the potential environmental impacts arising from a license renewal. PG&E’s testimony stated that without a steam generator replacement, neither unit would last until the end of its current license. However, with a steam generator replacement, under many conditions (e.g., unless replacement energy prices were extremely low or the plant developed other serious problems), license renewal would be likely.

To understand why license renewal is a likely consequence of steam generator replacement, one cannot look at PG&E’s testimony in this case, which only produced data for individual scenarios in the form of a single net present value figure, without annual data that underlie the data. However, the testimony of TURN witness Marcus<sup>9</sup>

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<sup>8</sup> The DEIR claims that Section G “describes the types of environmental impacts that may be associated with license renewal, if such renewal were ultimately approved by the NRC.” G-1. This is misleading. Section G only lists the generic labels for impacts that the NRC will consider in license renewals. G-3.

<sup>9</sup> W. B. Marcus, Economic Review of Scenarios Associated with the Replacement of Steam Generators at the Diablo Canyon Nuclear Plant, Prepared testimony for The Utility Reform Network, CPUC App. 04-01-009, with errata August 19, 2004.

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and public information provided by PG&E in response to TURN Data Request 3-8 presented annualized data for PG&E's base case scenario.

This base case scenario represents PG&E's own expectations for the plant, including a 90.6% capacity factor and its estimates of O&M and capital additions, as well as its scenarios for replacement energy costs. Under this scenario, the operating costs for Diablo Canyon (nuclear fuel plus O&M) are projected to be 3.18 cents per kWh. The capital costs in 2023 are projected to be \$39 million (plus or minus 10%) according to TURN DR 3-8, which converts into less than 0.3 cents/kWh. The total going forward costs are thus less than 3.5 cents/kWh. O&M plus total capital costs are projected to be 4.2 cents per kWh (including sunk costs of the steam generator that would not be part of a decision to go forward). By comparison, replacement power costs in 2023 are projected to be 6.45 cents/kWh. The difference between Diablo Canyon running costs of 3.5 cents and replacement power costs of 6.45 cents/kWh (at PG&E's 90.6% capacity factor) would be \$505 million in 2023. Even if costs are higher or capacity factors slightly lower, the benefits are quite large. For example, with 10% higher costs and an 85% capacity factor, the benefits in that one year could be \$378 million.

This fact strongly suggests that (in the absence of some type of currently unforeseen serious problem), PG&E is very likely to seek a license renewal for the plant.

**The NRC expects all existing plants will seek license renewal.** On July 15, 2003, the NRC held a public meeting on license renewal for nuclear power plants. During this meeting, Mr. John Tappert, Chief of the Environmental Review section of the NRC's license renewal and environmental impact program, stated: "Now, to date, the NRC has received 14 applications for the renewal of 30 power reactor licenses and the

CC6-21

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NRC has issued renewal licenses to 16 power reactors. All indications are that multiple license renewal applications will continue to be filed with the Commission over the next decade and *eventually the entire fleet of nuclear power plants will request license renewal.*<sup>10</sup> (Emphasis added). Table G-2 in the DEIR shows that 30 nuclear plant units have so far been granted renewal, that 16 more have applications pending, and that the renewals were granted within two years or less of the filing of the application. G-6.

CC6-22

**The ISFSI has been sized in anticipation of license renewal.** The DEIR ignores the fact that the capacity of the proposed ISFSI is significantly greater than needed for spent fuel storage just through the end of the license terms of 2021 and 2025. In fact, it is readily apparent from PG&E's filings in proceedings before the NRC (DIL-01-002) and its Environmental Report on the ISFSI, that the ISFSI has been sized in anticipation of an extended operating life under a renewal of the NRC license.

CC6-23

Those documents show that the capacity of the proposed ISFSI will be at least double, if not triple, the capacity needed for operations through the existing license term. Once the spent fuel storage pools are filled in 2006, PG&E will need storage capacity for another 34 reactor-years for the two units (2007 through 2021 and 2007 through 2025). For a 21-month refueling cycle, there will be 20 refueling outages. For an 18-month refueling cycle, there will be 23 refueling outages. If, as PG&E asserts, 76 to 96 spent fuel assemblies are discharged in each refueling outage, then the total number of fuel assemblies for which more storage space is required will be between 1,520 and 1,920 for a 21-month refueling cycle, and between 1,748 and 2,208 for an 18-month refueling cycle.

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<sup>10</sup> NRC Public Meeting transcript, July 15, 2003, Anaheim Hilton Hotel, page 12, lines 11-15.

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Yet, PG&E proposes to build a facility that will hold 4,400 fuel assemblies. License Application at 8. This is two to three times as many fuel assemblies as PG&E will generate if it operates the two Diablo Canyon units only to the end of their license terms. The capacity of the proposed ISFSI will allow Diablo Canyon to continue to operate for another 34 to 66 reactor-years past the expiration of the license terms for Units 1 and 2, potentially representing 17 to 33 years of additional operation for each unit. The most likely purpose for building an ISFSI twice as large as needed is to allow for spent fuel storage during a term of license renewal.

CC6-23

**Representatives of PG&E and the CPUC have confirmed the likelihood of license renewal.** While PG&E has not formally committed to seeking to renew its license, in a recent public meeting it did indicate that it plans on "50 more years" of operation after the upcoming refueling outage 1R11. *See* viewgraph presented by PG&E at June 6, 2002, meeting between PG&E and Diablo Canyon Independent Safety Committee. A copy of the viewgraph is attached as Exhibit A. In addition, at a meeting on February 22, 2005 in San Luis Obispo, CPUC Commissioner Brown, in response to a question from the audience related to the DCPP SGR Project proceeding (A.04-01-009) at the CPUC, stated his belief that there is a high probability that DCPP will be relicensed.

CC6-24

The DEIR claims that "[l]icense renewal is not a reasonably foreseeable consequence of the Proposed Project given the feasibility, analytical and regulatory hurdles to license renewal..." D.1-3. But the preceding paragraph simply describes the *processes* which must be completed before the license could be renewed, not any of the factors bearing on the likelihood that the renewal will be applied for and granted. In

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contrast, Joint Parties have submitted substantial and credible evidence of the factors which make renewal likely.

CC6-24

**3. The impacts of operation under a license renewal are independently required as part of the analysis of "cumulative impacts."**

CC6-25

As the Supreme Court emphasized in *Laurel Heights, supra*, in rejecting the argument that future uses of a facility were not required to be reviewed in an EIR: "The Guidelines explain that a discussion of cumulative effects should encompass 'past, present, and reasonably anticipated future projects.'" 47 Cal.3d at 396 (citing CEQA Guideline § 15130 (b)(1)(A)). The purpose of the cumulative impacts analysis is to avoid considering projects in a vacuum. *Whitman v. Board of Supervisors*, 88 Cal.App.3d 397, 408 (1979). The analysis must include the cumulative impacts of other projects or activities that produce similar impacts in the relevant geographical area. *Kings County, supra*, 221 Cal.App.3d 692, 721 (1990).

In this context, the question is not simply whether there are *future* operations or activities that must be considered. Importantly, the cumulative impacts analysis must also consider "the effects of past projects" and "the effects of other current projects." Clearly, the existence of DCPD and the impacts of its continued operation must be considered in this context. The DEIR refuses, however, to include these impacts in its cumulative impacts analysis in violation of CEQA.

**4. It is neither appropriate nor possible to rely solely on NRC's Generic EIS for evaluating the potential environmental impacts associated with license renewal.**

CC6-26

The DEIR indicates that upon application by PG&E to the NRC for license renewal the NRC would conduct a Generic Environmental Impact Statement ("GEIS").

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Because the prospect of such a renewal is not speculative but quite likely, for the reasons explained above, an analysis of DCP's potential environmental impacts associated with a prospective license renewal period should not wait until PG&E actually submits its license renewal application. Such an analysis should be done now, as part of the SGR Project EIR process.

In conducting this further analysis the CPUC cannot properly rely solely on the programmatic GEIS<sup>11</sup> that is currently available. For one thing, as the DEIR notes, the GEIS limits its analysis to environmental issue areas that are expected to apply to a broad range of nuclear power plants. G-2. Issues that are more plant-specific are not treated in the GEIS but in a supplemental document that includes analyses specific to that plant. At least 24 of the 92 issues addressed in the NRC EIS process for license renewals are generally expected to require plant-specific review. These 24 issues include some of particular concern in the case of DCP, including thermal effects on aquatic ecology, entrainment, air quality, transportation of uranium fuel, and severe accidents. Until PG&E actually applies for a license renewal, plant-specific environmental reviews in these and other areas would not be performed by the NRC. The GEIS therefore cannot be solely relied upon for the purpose of conducting an adequate environmental analysis of the potential impacts associated with a license renewal period.

CC6-26

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<sup>11</sup> U.S. Nuclear Regulatory Commission; *Generic Environmental Impact Statement for License Renewal of Nuclear Plants* (NUREG-1437). May, 1996.