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

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

Petitioners/Plaintiffs,

v.

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

Respondent/Defendants,

Pacific Gas & Electric Company,
Real Party in Interest

Does 1-10
Real Parties in Interest

Defendants.

Case No.: BS163811

**PETITIONER/PLAINTIFF'S
OPENING BRIEF**

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

Hon. Mary H. Strobel presiding

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1 **TABLE OF AUTHORITIES**

2 **Cases**

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4 60 Cal. 4th 1086, 343 P.3d 834 passim
5 *Wildlife Alive v. Chickering* (1976)
6 18 Cal. 3d 190, 205-206, 132 Cal. Rptr. 377, 553 P. 2d 537 6
7 *Citizens for East Shore Parks v. California State Lands Commission* (2011)
8 202 Cal.App.4th 549, 555 136 Cal.Rptr.3d 162, 168 1 (fn. 3), 16 (fn. 41)
9 *Save Our Big Trees v. City of Santa Cruz* (2015)
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11 *United States of America v. Pacific Gas and Electric Company*,
12 USDC, Northern District of California, Case No. CR14-0175-TEH 24 (fn. 76)

13 **Statutes and Regulations**

14 California Environmental Quality Act ("CEQA")
15 Cal. Pub. Res. Code, Section 21000 *et seq.* 1(& fn. 3), passim
16 California Administrative Code, Title 14, State CEQA Guidelines
17 §15301 2 (& fn. 7)
18 §15300.2 7 (& fn. 14)

19 **Legislative History**

20 Proposed Areas of Amendment to AB 889, V. ‘Categorical ‘Exemptions from Act’ (1972)
21 A26-A31 6 (& fn. 11)

22 **Other Legal Authorities**

23 A Preliminary Numerical Study of the Hazard from Local Landslide Tsunami
24 Scenarios at the Diablo Canyon Site in Central California 10 (fn.28)
25 California Energy Commission, 2015 Integrated Energy Policy Report 13 (& fn. 32), 14 (fn. 35)
26 Congressional Research Service, Nuclear Power Plants: Vulnerability to Terrorist
27 Attack 20 (fn. 60)
28 The 9/11 Commission Report: Final Report of the National Commission on
Terrorist Attacks Upon the United States. National Commission on Terrorist Attacks
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Material” 20-21 (& fn. 63)

INTRODUCTION

A. Background

On December 18, 2015, Lieutenant Governor ("Lt. Gov.") Gavin Newsom, was one of three members of the State Lands Commission ("Commission") holding a public hearing regarding the renewal of two separate existing leases for the use of state land where the Diablo Canyon Nuclear Power Plant ("Diablo") situated its cooling water discharge channel, water intake structure, breakwaters, and associated infrastructure. These existing leases were scheduled to expire, respectively, on August 27, 2018, and May 31, 2019. Pacific Gas & Electric Company ("PG&E"), owner of the plant, sought a new lease, to run co-terminously with the Nuclear Regulatory Commission ("NRC") revised operating licenses for the onshore facility, which were set to expire on November 24, 2024 (Unit 1) and August 26, 2025 (Unit 2).¹ The issue before the Commission was whether or not PG&E, whose initial leases were granted more than a decade prior to the enactment of the California Environmental Quality Act ("CEQA"),² was entitled to an exemption from the requirements of CEQA in connection with the Commission's issuance of that new lease. At that December 18 hearing, on open record, the Lieutenant Governor stated his opinion that there is no exemption from CEQA for Diablo. He likened it to the offshore oil derricks that are not exempt from CEQA when their leases are renewed. His initial legal assessment was correct under prevailing law.³

Unfortunately, politics crept in. Lt. Gov. Newsom participated in a series of meetings in which a "back room" deal was brokered under which the exemption would be allowed in exchange for PG&E's agreement to a plant closure at the end of 2025. The problem with this deal is that CEQA cannot be brokered away. On June 21, 2016, just one week prior to the Commission's scheduled final hearing on the lease application, PG&E announced a proposal under which it would agree to retire the plant after its current NRC operating licenses expire in 2024-2025, if certain non-profit groups agreed to forego challenges to its application for renewal

¹ See, Administrative Record (hereafter, "AR"), pp. 000264-000265.

² California Health and Safety Code, Section 21000, *et seq.*

³ See, AR, pp. 000940-000960. Importantly, there is a 2011 case addressing the renewal of a Commission lease for an oil company's off-shore marine docking platform, which the Commission had found **NOT** to fall within the "existing structures" exemption. *Citizens for East Shore Parks v. California State Lands Commission*, (2011) 202 Cal.App.4th 549, 555 136 Cal.Rptr.3d 162, 168.

1 of the state land leases. Conveniently, this deal⁴ coincided with the date when PG&E's
2 investment in the plant will be fully depreciated.

3 Thereafter, at its meeting on June 28, 2016, completely reversing course from its
4 previously stated inclination to apply CEQA, the Commission officially approved Calendar Item
5 96, granting Diablo a new lease until 2025 without any substantive environmental review, on
6 grounds that the project was exempt from CEQA review as an "existing" facility⁵ – *despite the*
7 *fact* that no Environmental Impact Report ("EIR") has ever been conducted for Diablo, *despite*
8 *the fact* that numerous attendees commenting at the June 28, 2016 meeting clearly pointed out to
9 the Commission that the purported exemption did not apply to cases, such as this one, where
10 there is a reasonable possibility that the activity will have a significant effect on the
11 environment due to unusual circumstances,⁶ and *despite the fact* that the continuing operation of
12 a nuclear power plant presents a “reasonable possibility of a significant environmental effect” to
13 the entire Central Coast.

14 **B. The Commission's Legal Errors**

15 The Commission violated CEQA when it issued the new lease without first requiring the
16 preparation of an EIR. Specifically, the Commission improperly relied on State CEQA
17 Guidelines Section 15301,⁷ which provides an exemption for an "existing" facility.⁸ The
18 Commission further violated CEQA when it disregarded the facts and the law to support a non-
19 binding arrangement brokered by Lt. Gov. Newsom with PG&E and several private parties, as
20 discussed by Lt. Gov. Newsom in his closing remarks at the June 28, 2016 meeting.⁹

21 CEQA **mandates** an environmental review of an agency's proposed action when there is
22 a "reasonable possibility of one or more significant adverse environmental effects," which, as
23 demonstrated by the Administrative Record before this Court, indisputably exist in this case. As

24 ⁴ See, the "Joint Proposal" of PG&E and various public interest and labor organizations [AR pp. 00940-
25 00960] that was formally presented to the Commission at the June 28, 2016 meeting [AR pp. 00961-00977].

25 ⁵ See, AR, pp. 000037, 000714-000716, 000920.

26 ⁶ See, AR, pp. 000773, 000780, 000782, 000787, 000797-000798, 000803, 000809, 000825-000826,
27 000851, 001683, 001918a-001918e, 002274, 002277-002279. Also see, CEQA Guidelines Section 15300(c), which
states: "[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the
activity will have a significant effect on the environment."

27 ⁷ California Code of Regulations ("Cal. Code Regs."), Title 14, Section 15301.

28 ⁸ See, AR, p. 000037

⁹ See, AR, pp. 00912-00919.

1 detailed below, there are multiple significant adverse environmental effects present here. For this
2 Court to rule otherwise would both weaken the law and set a dangerous precedent. CEQA
3 cannot and should not be used as a bargaining chip.

4 **C. Summary of Legal Arguments**

5 There are five legal reasons, backed by solid facts in the administrative record, as to why
6 such an exemption cannot -- and does not -- apply in this case:

7 First, the limited exemption for “existing structures” does not include nuclear power
8 plants. Classes for exemptions, such as the one for “existing structures,” are created by the
9 Secretary of Resources (the "Secretary"), and not specifically by the CEQA statute, for a class of
10 projects that the Secretary determines “do not have a reasonable possibility of causing significant
11 environmental harm.” A nuclear power plant could never fit into such a class – its operation
12 inherently creates a reasonable possibility of causing significant environmental harm, and the
13 Secretary did not intend -- and cannot be imputed to have intended -- for nuclear plants to be
14 included within the class of projects to which the “existing structures” exemption would apply.

15 Second, if the Secretary did intend for nuclear power plants (which pose unique and
16 extremely serious risks) to come within the “existing structures” exemption, then the Secretary
17 exceeded his or her authority, and the exemption itself is invalid. The Legislature specifically
18 withheld for itself the power to provide exemptions to CEQA when the project has a reasonable
19 possibility of causing a significant environmental effect, and restricted the Secretary to creating
20 exemptions only for classes of projects where the projects within the class would not have a
21 reasonable possibility of causing a significant environmental effect.

22 Third, even if an exemption did presumably apply in this case, the Commission and its
23 staff did not follow the required procedure for applying an applicable exemption to the
24 exception, because they simply ignored extensive evidence of increasing rates of infant mortality
25 and cancer near the plant. The Commission also refused to consider the risk of a major seismic
26 event or Fukushima-class tsunami. The record is replete with evidence on these issues, and yet
27 none of these concerns were mentioned, much less addressed, by the staff and Commission in
28 reaching the decision to approve the requested new lease.

Fourth, even if the Secretary did have authority to create an exemption including nuclear power plants, and even if proper procedures were followed, then an *exception to the exemption* applies in this case, because the issuance of a new lease to a critical component of a nuclear power plant sited right along the California coast raises a reasonable possibility of significant environmental harm due to unusual circumstances. Among others, these “unusual circumstances” include the large size of the plant, its location extremely close to earthquake faults, scientific evidence that infant mortality and breast cancer are significantly increasing around the plant, billions of fish are killed each year along with other marine damage, the fact that an offshore earthquake could cause a tsunami similar to the Fukushima catastrophe, and the possibility that a single cyber or physical terrorist attack could release a radioactive plume traveling with the daily coastal winds right down on Santa Barbara and further south towards the Los Angeles megalopolis.

Fifth, if somehow a legitimate exemption was created, and an exception to the exemption does not apply in this case, then the Public Trust Doctrine¹⁰ requires that CEQA be followed. However, the Court need not reach this issue for all of the reasons previously given, which are set forth in greater detail below.

This honorable Court should therefore invalidate the approval of the new Diablo lease, and instruct the Commission that any extension of the current leases or any issuance of a new lease will require strict adherence to the environmental requirements of CEQA.

I. THE SECRETARY OF RESOURCES DID NOT INTEND TO INCLUDE NUCLEAR POWER PLANTS WITHIN THE EXEMPTION FOR “EXISTING STRUCTURES,” BECAUSE A NUCLEAR POWER PLANT INHERENTLY HAS A “SIGNIFICANT EFFECT ON THE ENVIRONMENT”

In *Berkeley Hillside Preservation Council v. City of Berkeley* (2015) 60 Cal. 4th 1086, 343 P.3d 834, the California Supreme Court crisply stated well-established law with respect to the power of the Secretary of Resources to create classes of exemptions to CEQA:

The guidelines prepared and adopted pursuant to Section 21083 shall include a list of

¹⁰ A detailed explanation of this common law doctrine can be found at the Commission's website: http://www.slc.ca.gov/About/Public_Trust.html

1 classes of projects which have been determined not to have a significant effect on the
2 environment and which shall be exempt from the provision of CEQA. **In adopting the**
3 **guidelines, the Secretary ...shall make a finding that the list or classification of**
4 **projects referred to in this section do not have a significant effect on the environment.**
(citing §21084 of the Resources Code, as added by Stats. 1972, ch. 1154. §1 pp. 2271.
2273. 60 Cal. 4th at 1101. (Emphasis added.)

5 Given the explicit requirement that the Secretary “shall make a finding” that projects
6 within an exemption “do not have a significant effect on the environment,” the Secretary of
7 Resources cannot have intended to include nuclear power plants within the exemption for
8 “existing structures.” No party in this case has asserted, nor can any scientifically valid or
9 rational case be made, that Diablo “does not have a significant effect on the environment.”
10 Moreover, there is no evidence in the Administrative Record of this case to even suggest that the
11 Secretary of Resources ever considered, or has ever found, that a nuclear power plant does not
12 have a significant effect on the environment.

13 Commission staff cannot, given a political mission to implement a deal that PG&E can
14 ultimately withdraw from, attribute to the Secretary what would be both an illegal act and a
15 dereliction of responsibility. This Court can and should therefore quickly conclude that the
16 Secretary never intended for nuclear power plants to be classified the “existing structures”
17 exemption.

18 **II. EVEN IF THE SECRETARY INTENDED NUCLEAR PLANTS TO BE**
19 **WITHIN THE EXEMPTION, SUCH A DECISION WOULD BE INVALID**
20 **AS AN ABUSE OF AUTHORITY**

21 The Legislature was careful to limit the authority of the Secretary to create exemptions
22 from CEQA. That is why the Secretary must make a specific finding that the types of projects to
23 be included within an exemption do not have a significant effect on the environment. Again, the
24 Supreme Court in *Berkeley Hillside* made perfectly clear the intent of the Legislature to restrict
25 the authority of the Secretary.

26 Collectively, these provisions indicate that the Legislature intended to establish by statute
27 ‘classes of projects’ that ‘have been determined not to have a significant effect on the
environment.’ To *require* the OPR and the Secretary to apply their expertise and identify
those “classes” by ‘making a finding’ that the projects they comprise ‘do not have a
significant effect on the environment.’ (*emphasis in original*) *Berkeley*, Cal. 4th at 1101.¹¹

28 ¹¹ It is fitting that the Court put the word *require* in italics. The legislature did something similar in the
legislative history limiting the Secretary’s power to “the types or categories of projects which would not be

1 Given this instruction, the Secretary lacks authority to classify nuclear power plants,
2 which undeniably do have a significant effect on the environment, as eligible for an exemption
3 under CEQA. This is true whether it is an exemption for “existing structures,” or anything else.
4 If such a project has a significant effect on the environment under any circumstance, the
5 Secretary simply cannot exempt it from CEQA's requirements. As the Court put it bluntly in
6 *Berkeley Hillside*: “No regulation is valid if its issuance exceeds the scope of the enabling
7 statute. The secretary is empowered to exempt only those activities which do not have a
8 significant effect on the environment.” (citing Pub. Resources Code. §21084). *Berkeley Hillside*,
9 at 1107, citing *Wildlife Alive v. Chickering* (1976) 18 Cal. 3d 190, 205-206, 132 Cal. Rptr. 377,
10 553 P. 2d 537.¹²

11 The Court’s statutory interpretation fits perfectly with the intent of the author of the
12 legislation, John Knox. At first, the Sierra Club objected to the Secretary of Resources being
13 given “carte blanche” to create exemptions. However, the bill passed ultimately with no
14 opposition from the Sierra Club, since the statutory language was clarified that the Secretary was
15 required to make a finding of no significant effect on the environment in order to create an
16 exemption. In a January 3, 1973 letter (shortly after the Bill passed on December 5 1972) (1973-
17 74/A-7 – A-9), Knox defined significant effect and emphasized that it can be shown when “[a]
18 proposed project has the potential to degrade the environment...can have a cumulative effect on
19 the environment...or the project will cause substantial adverse effects on human beings, either
20 directly or indirectly” – all of which exist in this case.

21 **III. EVEN IF AN EXEMPTION APPLIED FOR DIABLO, WHICH IT DOES**
22 **NOT, THE COMMISSION AND ITS STAFF FAILED TO FOLLOW**
23 **PROPER PROCEDURES FOR THE APPLICATION OF AN EXEMPTION**

24 *Berkeley Hillside* clearly set forth the procedure to determine if an exception applies due
25 to unusual circumstances.

26 ‘environmentally significant.’” (Emphasis in original) Whether it is italics or underlining, the intent to limit the
27 Secretary’s power is clear. (Proposed Areas of Amendment to AB 889, V. ‘Categorical ‘Exemptions from Act, (1972)
A26-A31). Also see, contemporaneously filed Request for Judicial Notice (“RJN”) Exhibit 1.

28 ¹² The concurrence in *Berkeley Hillside* reinforces this majority holding “[W]here there is any reasonable
possibility that a project or activity may have a significant effect on the environment, an exemption would be
improper.” *Berkeley Hillside* at 1131, citing *Chickering, supra*, 18 Cal. 3rd at p. 206.

1 [A]n agency may not apply a categorical exemption without considering
2 evidence in its files of potentially significant effects, regardless of whether
3 the evidence comes from its own investigation, the proponent's submission,
4 a project opponent, or some other source. *Berkeley Hillside*, at 1103

5 On March 14, 2016, Petitioner World Business Academy ("Academy") representatives,
6 Matt Renner, Jerry B. Brown, Ph.D., and legal counsel, Laurence Chaset, met with Commission
7 staff and counsel at the Commission's headquarters in Sacramento. The purpose was to discuss
8 the legal and public policy requirements for the preparation of a full EIR under CEQA prior to
9 any action on the part of the Commission to grant the requested lease.¹³

10 During that meeting, the Academy asserted the applicability of the *exception* to the
11 "existing structures" exemption when there is "a reasonable possibility that the activity will have
12 a significant effect on the environment due to unusual circumstances."¹⁴ To support its position
13 that such "unusual circumstances" do exist, the Academy presented detailed information from a
14 2014 study on the health impacts associated with the continuing operation of Diablo Canyon (the
15 "2014 Study"). The 2014 Study, published on March 3, 2014, and titled "*Report on Health*
16 *Status of Residents in San Luis Obispo and Santa Barbara Counties Living Near the Diablo*
17 *Canyon Nuclear Reactors Located In Avila Beach, California*," demonstrated that in the decades
18 following the opening of Diablo Canyon in the mid-1980s, San Luis Obispo devolved from
19 being a *low-cancer* county to a *high-cancer* county, and also documented significant increases in
20 infant mortality and low birth weights in the zip codes closest to and downwind from the
21 reactors.¹⁵

22 In addition to the 2014 Study, Academy representatives also presented Commission staff
23 with publicly available information regarding significant 2010-2014 increases in infant mortality
24 in the vicinity of the Diablo Canyon plant and noted that the Academy was commissioning a

25 ¹³ Lucchesi, Jennifer, Forward of Jan. 29, 2016 World Business Academy Email to M. Meier/C. Oggins for
26 March 14 Commission Meeting, p 1, [AR 001770]; Brown, Jerry B, Letter to Jennifer Lucchesi, Jan. 29, 2016.
27 Academy, pp. 1-2, [AR 001771-001772]; Lucchesi, Jennifer, Forward of March 17, 2016 World Business Academy
28 Email to M. Meier/C. Oggins for March 14, 2016 Commission Meeting, pp. 1-2 [AR 001773-001774]; Brown, Jerry
B., Letter to Jennifer Lucchesi, Jan. 29, 2016, pp. 1-2 [AR 001775-001776].

¹⁴ See, Cal. Code Regs., Title 14, Section 15300.2(c).

¹⁵ Report on Health Status of Residents in San Luis Obispo and Santa Barbara Counties Living Near the
Diablo Canyon Reactors Located in Avila Beach, California, March 14, 2016, pp. 1-36 [AR 017699-017734].

1 scientific study of this new data (the "2016 Study").¹⁶ This 2016 Study was published on
2 September 19, 2016¹⁷

3 The 2016 Study was prepared by a renowned radiation health expert, Dr. Chris Busby,
4 concerning ongoing infant mortality risks associated with Diablo Canyon, and was completed
5 just weeks before the Commission Hearing of June 28, 2016 and has since been published as
6 peer reviewed in a noteworthy scientific journal. The 2014 Study and the 2016 Study
7 demonstrate that the continuing operation of the plant will cause serious adverse public health
8 impacts, including excess cancers and infant mortality.

9 Highlights of the infant mortality data in the 2016 Study were provided to the
10 Commission at the June 28 hearing, at which point the Academy specifically invited the
11 Commission to examine the extremely disturbing findings of the 2014 and 2016 Studies as part
12 of an EIR¹⁸ to determine whether what the Academy was discovering would hold up under the
13 full scrutiny of an EIR review. The evidence shows that there have been dozens of cases of
14 excess infant mortality and hundreds of cases of additional cancers, as well as other serious
15 adverse health effects caused by the routine emissions of carcinogenic, radioactive isotopes,
16 including Strontium-90 and Tritium, that result from the normal operations of an existing nuclear
17 power plant. This is precisely the type of evidence that the *Berkeley Hillside* Court ruled that the
18 Commission cannot "simply ignore" (at p. 1103) when deciding whether there is an "unusual
19 circumstance."¹⁹

20 Incredibly, neither of the Commission's Staff Reports published after the Academy
21 presentation to the Commission Staff on March 14, 2016, contained any reference to the health
22 data presented by the Academy.²⁰ Moreover, at the June 28, 2016 Commission meeting, neither
23

24 ¹⁶ Brown, Jerry B., March 31, 2016 email to Cy Oggins, Calculation of Infant Health Data in Diablo
Canyon Power Point and Academy Presentation to Commission Staff, March 14, 2016 [AR 001777-001810].

25 ¹⁷ Busby, Christopher, "[Is There Evidence of Adverse Health Effects Near US Nuclear Installations? Infant](http://epidemiology.jacobspublishers.com/images/Epidemiology/J_J_Epidemiol_Prevent_2_3_030.pdf)
26 [Mortality in Coast Communities near the Diablo Canyon Nuclear Power Station in California, 1989-2012,](http://epidemiology.jacobspublishers.com/images/Epidemiology/J_J_Epidemiol_Prevent_2_3_030.pdf)" *Jacobs*
Journal of Epidemiology and Preventive Medicine, September 19, 2016,
(http://epidemiology.jacobspublishers.com/images/Epidemiology/J_J_Epidemiol_Prevent_2_3_030.pdf).

27 ¹⁸ Brown, Jerry B., Transcript, Commission Meeting of June 28, 2016, pp. 141-143 [AR 000809-000811].

28 ¹⁹ Brutoco, Rinaldo S., Transcript, Commission Meeting of June 28, 2016, pp. 143-145 [AR 000811-
000813].

²⁰ Commission Staff Report, April 5, 2016, Calendar Item 64, pp. 1-8 [AR 000017-000024]; and
Commission Staff Report, June 28, 2016 [AR 000025-000045].

1 the Commission Staff nor any of the Commissioners present either acknowledged or referenced:
2 (a) the Academy's March 14, 2016 meeting with Commission staff at which the serious adverse
3 health effects associated with the continuing operation of Diablo Canyon were presented; (b) the
4 scientific studies demonstrating the existence of such adverse health effects that the Academy
5 submitted to the Commission; or (c) the written comments submitted in advance of the June 28
6 meeting regarding the likelihood of adverse health impacts from the radioactive emissions
7 caused by operation of the Diablo Canyon plant.²¹

8 The death of children and increased cases of cancer are not circumstances that can be
9 simply ignored, particularly when the evidence is presented through serious meetings and
10 empirical, peer-reviewed and published scientific studies embodied in a report by a well-
11 qualified expert.

12 Unfortunately, it is not only health effects that the Commission ignored. It also ignored
13 the dangers of a Fukushima-class of tsunami. Despite many references to the Fukushima
14 catastrophe in the Administrative Record²², both in written statements and at public hearings, the
15 name Fukushima is never addressed or even mentioned in the staff report, or the comments of
16 Commissioners for Calendar Item 96, the docket item addressing the requested new Diablo lease
17 at the June 28 hearing.

18 The risk associated with tsunamis was never seriously considered when Diablo was
19 initially approved.²³ However, there is evidence of historical tsunamis²⁴ having occurred at
20 precisely that section of the central California coastline where Diablo is located. The possibility
21 of such a risk has become even more apparent in the three years following the 2011 Fukushima
22 tsunami in Japan that contributed directly to failure of the Fukushima intake structures, which
23

24 ²¹ A careful review of the entire Administrative Record will show that there is not a single mention of the
25 health impacts caused by normal radiation releases from the Diablo Canyon Nuclear Power Plant, neither by the
26 SLC staff nor by the Commissioners in their deliberations regarding the Diablo Lease. See, generally, AR 0000001-
017734.

26 ²² See, AR, pp. 000772, 000785, 000790, 000795, 000831, 000854-000855, 001918, 002130, 002271,
002272.

27 ²³ Diablo Canyon Power Plant Units 1 and 2 Flood Hazard Reevaluation Report (March 2015), Sec. 2.3.2.6
[AR 005299-005300], Sec. 2.3.2.13 [AR 005302-005304], Sec. 3.6 [AR 005319-005328], Sec. 3.9 [AR 005320-
005321], Sec. 4.6 [AR 005332-5334], Sec. 5.6 [AR 005336-005337].

28 ²⁴ Diablo Canyon Power Plant Units 1 and 2 Flood Hazard Reevaluation Report (March 2015), Enclosure 1,
Tables 3-13 and 3-14 [AR 005361-005362].

1 are, in many ways, the Achilles heel of such plants, including Diablo. What happened there
2 could happen here. Moreover, a tsunami event resulting from the subduction plate moving could
3 happen again offshore from Diablo, with similar results to those seen at Fukushima, which
4 continues to experience an on-going nuclear reaction beneath the plant which creates hourly
5 radiation effects *double* those of Chernobyl.²⁵

6 However, at the June 28 hearing, the Commission made no examination of tsunamis, nor
7 of the seismic risks, nor any findings with regard to these issues. This is yet another example of
8 why a consistent application of CEQA is so important, so that serious issues are not swept under
9 the rug for political expediency, even when significant geologic data is provided as part of the
10 Administrative Record.²⁶

11 As happened in Japan, the vulnerability of the Diablo intake structures to tsunamis²⁷
12 could lead to an emergency shutdown of the plant and a serious, unplanned release of
13 radioactivity to the atmosphere. Under these circumstances, the daily prevailing winds would
14 blow the radioactivity through communities south of Diablo down to upon Santa Barbara, and
15 perhaps even further south toward the millions residing in the Los Angeles megalopolis. A June
16 2016 presentation based on a 2003 report²⁸ prepared for the NRC identifies a local tsunami risk
17 immediately proximate to the Diablo site. This kind of evidence cannot be “simply ignored.”
18 *Berkeley Hillside*, at 1103.

19 Since it is the Commission that invoked the exemption for existing structures, it bore the
20 burden to demonstrate with substantial evidence that the proposed new lease fell within the
21 existing structures exemption. *Save Our Big Trees v. City of Santa Cruz*, (2015) 241 Cal. App.
22 4th 694, 710-711. The failure by the Commission to even mention the analysis provided to it
23 about Diablo's on-going adverse impacts on public health, and the dangers of a seismic and/or

24 ²⁵ See, <http://akiomatsumura.com/2017/02/the-potential-catastrophe-of-reactor-2-at-fukushima-daiichi.html>.

25 ²⁶ See, generally, “Administrative Record - Seismic Information.” [AR 005901-16090]

26 ²⁷ Diablo Canyon Power Plant Units 1 and 2 Flood Hazard Reevaluation Report (March 2015), Enclosure 1, Table 3-17 and 3-18 [AR 005363-005364].

27 ²⁸ Dr. R.T. Sewell, “[A Preliminary Numerical Study of the Hazard from Local Landslide Tsunami Scenarios at the Diablo Canyon Site in Central California](#),” Summary Report (Draft), November 22, 2003, prepared for Southwest Research Institute, U.S. Nuclear Regulatory Commission. See, also, Dr. R.T. Sewell, Presentation, “[A Hazard and Risk Analysis Perspective on: Tsunami Safety Evaluation for the Diablo Canyon Power Plant, Public Meeting of the Diablo Canyon Independent Safety Committee \(DCISC\)](#),” June 21, 2016 (UPDATE TO ORIGINAL REPORT). Also see, RJN Exhibit 2.

1 tsunami event – which are included in the public record in this case – shows that the Commission
2 lacked substantial evidence to apply the exemption. Furthermore, the Commission’s refusal to
3 consider evidence presented to it on these subjects represents a serious breach by the
4 Commission of its legal obligations to consider and address potentially significant effects,
5 “regardless of whether that evidence comes from its own investigation, the proponent’s
6 submissions, a project opponent, or some other source.” *Berkeley Hillside*, at 1103. On this basis
7 alone, the Court can invalidate the Commission's issuance of the new lease on grounds of non-
8 compliance with CEQA.

9 **IV. EVEN IF AN EXEMPTION FROM CEQA APPLIED IN THIS CASE,**
10 **WHICH IT DOES NOT, THE EXCEPTION TO THAT EXEMPTION**
11 **WOULD APPLY, BECAUSE THERE IS A REASONABLE POSSIBILITY OF**
12 **A SIGNIFICANT ENVIRONMENTAL EFFECT DUE TO UNUSUAL**
13 **CIRCUMSTANCES**

14 In *Berkeley Hillside*, the Court held that even where an exemption applies, there will be
15 an exception when there is a “reasonable possibility of a significant environmental effect due to
16 unusual circumstances.” *Berkeley Hillside*, at 1105. This case is replete with “unusual
17 circumstances” that raise a reasonable possibility of a significant environmental effect due to
18 these unusual circumstances. Individually, and combined, these unusual circumstances create an
19 clear exception to the applicability of the "existing structures" exemption in this case.

20 The Court in *Berkeley Hillside* gave some examples of what constitutes "unusual
21 circumstances," such as “size or location,” *Id.*, at 1105. The following are specific examples of
22 the "unusual circumstances" that create an *exception* to the application of an “Existing
23 Structures” exemption to this case.

24 **A. Diablo is Massive in Size and Effect**

25 It is indisputable that Diablo is a massive project. The facility is located on 900 acres
26 west of Avila Beach, California. The power generation portion of the plant is 12 acres with two
27 nuclear reactors. There are also large water intake structures and numerous other facilities
28 spanning both on and off shore. By any reasonable application of *Berkeley Hillside*, this massive
size alone is an “unusual circumstance” that creates an exception to the exemption from CEQA
review. The discussion in *Berkeley Hillside* carefully parses the difference between an "unusual

1 circumstance" that "will" or "may" have a significant effect on the environment. *Id.*, at 1105
2 ("[U]nder our reading of the guideline, a party may establish an unusual circumstance with
3 evidence that the project will have a significant environmental effect.").

4 Moreover, there is no serious dispute that the operation of the new lease for at least seven
5 years *will* have a significant environmental effect. The extension of the existing lease to 2025
6 will increase the public's exposure to potential reactor core-damaging seismic risk at Diablo
7 Canyon by an amount equal to twenty-one percent (21%) of its operating history to date.²⁹ On
8 this basis alone, due to the size and effect of Diablo, the Court can find that an exception to the
9 exemption from CEQA review for "existing structures" applies. As the Court states in *Berkeley*
10 *Hillside*, "When it is shown that a project otherwise covered by a categorical exemption *will*
11 have a significant environmental effect, it necessarily follows that the project presents unusual
12 circumstances." *Id.*, at 1105-1106 (*emphasis in original*).

13 **B. Diablo is in a Dangerous Location Near Earthquake Faults**

14 Following *Berkeley Hillside*, location can also constitute an unusual circumstance. Here,
15 the plant is built within a web of fault lines and specifically less than a mile from the Shoreline
16 fault line, which was not known to exist at the time of construction, but is now an undeniable
17 fact. The Commission did not conduct any seismic analysis prior to approving the lease
18 submitted by PG&E, even though there is substantial evidence in the Administrative Record
19 supporting the conclusion that the plant's location constitutes an "unusual circumstance."
20 Seismic risk is a particular concern for Diablo Canyon's Unit 1 reactor, which the NRC identified
21 in 2013 as the third-most embrittled reactor in the United States.³⁰

22 The California Energy Commission's ("CEC") 2015 Integrated Energy Policy Report
23 contains a stunning graph (see below) from the Electric Power Research Institute regarding the
24 ground motion response spectrum acceleration reported by each U.S. nuclear plant, noting "the
25 unique nature of the seismic analysis imposed upon" Diablo Canyon as the "most significant
26 outlier" in the national nuclear fleet.³¹ Per the CEC's 2015 Integrated Energy Report,

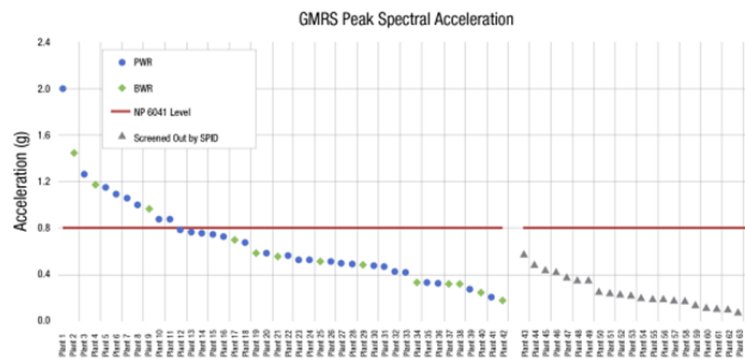
27 ²⁹ Geesman, John, Alliance for Nuclear Responsibility, Letter to Betty T. Yee, State Controller and Chair,
28 California State Lands Commission, July 27, 2016, ("Geesman Letter"). pp. 1-2 [AR 002277-002278].

³⁰ Geesman Letter, p. 2 [AR 002278].

³¹ Geesman Letter, p. 3 [AR 002279].

Figure 55 is a plot of the Ground Motion Response Spectrum (GMRS) acceleration of the United States' nuclear power plants. This plot compares the spectral acceleration, a measure of structural perturbation during a temblor, for the unnamed nuclear plants. Based upon the NRC's evaluation method, the grey triangles represent facilities that are deemed seismically sound while the plants above the 0.8 g spectral acceleration level are still undergoing a more extensive analysis. The most significant outlier, identified as Plant 1, represents PG&E's Diablo Canyon Nuclear Power Plant, hence, the unique nature of the seismic analysis imposed upon the facility.³²

Figure 55: Ground Motion Response Spectrum Acceleration for the Nation's Nuclear Power Plants



Source: EPRI, 2015 (via California Current, July 24, 2015, Volume 13, Number 29, p. 12)

There is also an ongoing controversy over whether Diablo Canyon is in current compliance with its licensed seismic design basis, the so-called Double Design Earthquake ("DDE"). As the NRC has acknowledged since 2012, "using the DDE as the basis of comparison will most likely result in the Shoreline fault and the Hosgri fault earthquake being reported as having greater ground motion" than the plant's Safe Shutdown Earthquake."³³ The NRC senior resident inspector at Diablo Canyon, who cited PG&E for violation of its seismic design standard, and recommended that the plant be shut down until compliance could be established.³⁴ However, before such a recommendation could be fully considered, the NRC inspector was subsequently transferred to an NRC position in Chattanooga, Tennessee. His determination and

³² See, California Energy Commission ("CEC"), 2015 Integrated Energy Policy Report ("IEPR"), chapter 7, p. 183 (http://www.energy.ca.gov/2015_energy_policy/). Also see, RJN Exhibit 3.

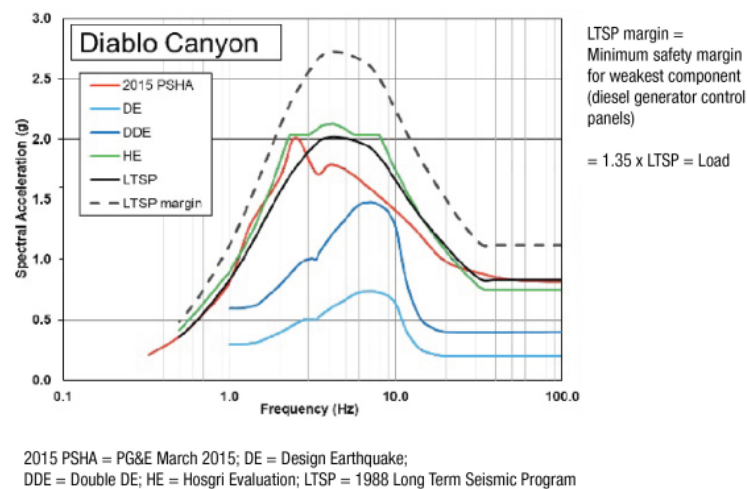
³³ See, Letter to Edward D. Halpin from Joseph M. Sebrosky, NRC Senior Project Manager for Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, October 12, 2012, p. 4. [AR 001554-001560].

³⁴ Prepared Rebuttal Testimony of John Geesman on Behalf of A4NR, June 28, 2013 [AR 003316-003445], Sections II-IV [AR 003321-003327], Exhibit B (Non-Concurrence of Dr. Michael Peck, NRC Senior Resident Inspector) [AR 003356-003368].

recommendation remains unsatisfactorily resolved.

Figure 56 from the CEC's 2015 Integrated Energy Policy Report (see below) graphically displays the substantial exceedance of the DDE standard in the probabilistic seismic hazard assessment contained in PG&E's March 11, 2015 Seismic Hazard Re-evaluation Report. The CEC's conclusion: "Presumably for this reason, and after a preliminary review of PG&E's PSHA study, the NRC directed PG&E to undertake additional earthquake risk analysis and to submit the additional analysis by June 2017."³⁵

Figure 56: Comparison of Diablo Canyon Response Spectra



Source: NRC Presentation, Adams Number ML15266A275, September 23, 2015, Slide 9

The NRC in 2012 directed PG&E to notify the NRC if, "during the collection of the data, new faults are discovered or information is uncovered that would suggest the Shoreline fault is more capable than currently believed."³⁶ PG&E did just that on September 10, 2014, admitting that "additional offshore seismic studies revealed that the Shoreline fault is longer by extending farther south than in the Shoreline Fault report (Reference 3), and therefore, more capable as described in the enclosure."³⁷

As was noted in the Commission's June 28th Staff Report (footnotes deleted): "PG&E instead relies largely upon data from the Shoreline seismicity lineament. A lineament is a

³⁵ See, CEC IEPR, *supra*, at fn. 31, chapter 7, p. 184. Also see, RJN Exhibit 3.

³⁶ See, Letter from Joseph M. Sebrosky, NRC Senior Project Manager for Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, to Edward D. Halpin, PG&E Senior Vice President and Chief Nuclear Officer, October 12, 2012, p. 4 [AR 009030-009035].

³⁷ See, PG&E Letter DCL-14-081 from Edward D. Halpin, PG&E Senior Vice President and Chief Nuclear Officer, to NRC Commissioners and Staff, September 10, 2014, p. 2. [AR 003115]

1 topographic feature believed to reflect underlying structures. PG&E identifies the Shoreline
2 seismicity lineament more precisely as three sublineaments: northern, central, and southern.
3 PG&E concludes that there must be three fault segments causing these three distinctive features
4 and seismic trends because there are three distinct sublineaments with variations in the features
5 and seismic trends."³⁸

6 The Staff Report continues: "Moreover, finding differences in seismicity between the
7 Shoreline and Hosgri faults and relying on the lack of intersection of surface traces between the
8 two faults, PG&E concludes that the Shoreline and Hosgri faults do not connect and are not
9 capable of jointly rupturing" and "[t]he NRC also reached this conclusion: '[l]arge earthquakes
10 from simultaneous rupture on the two faults (i.e., those greater than M7) would produce large
11 surface displacement, which are [sic] not evident in the geologic record. The NRC concludes that
12 the lack of significant horizontal displacement across the Shoreline fault rules out the possibility
13 of joint rupture.'"³⁹

14 However, contrary conclusions are reached in the Independent Peer Review Panel Report
15 No. 7:

16 "The Shoreline fault is essentially a continuous feature from its intersection with the
17 Hosgri fault . . . With respect to seismic hazard, this investigation has shown that
18 effectively, there is a direct connection between the two fault zones, with the
19 intersection located at a graben that is structurally controlled by the Hosgri and
20 Point Buchon fault zones. Furthermore, this graben is located about 500 meters east
21 of the main trace of the Hosgri fault zone, which is well within the upper limit of 5
22 km that is typically viewed as the maximum distance that earthquake ruptures can
23 jump from fault to fault (*e.g.* Wesnousky, 2008). Based on this work, it appears that
24 this study has provided the data necessary to address the question regarding if and
25 how the two fault zones are connected, at least in the near surface. . . . One minor
26 recommendation the IPRP has is that PG&E simplify the naming nomenclature for
27 the zone of faults currently referred to as the Point Buchon and Shoreline fault
28 zones. Based on this work, it is apparent the Shoreline fault zone, the Point Buchon
29 fault zone, and possibly the Shoreline seismicity lineaments are related structures."⁴⁰

30 While there may be dispute about whether the Shoreline and Hosgri faults connect, and
31 whether they are capable of jointly rupturing, there can be no dispute that the Diablo plant sits

32 ³⁸ Commission Staff Report (Revised), June 28, 2016, p. 6 [AR 000030].

33 ³⁹ Commission Staff Report (Revised), June 28, 2016, p. 7 [AR 000031].

34 ⁴⁰ IPRP Report No. 7, "Comments on PG&E's Central Coastal California Seismic Imaging Project Report
35 part 1: offshore seismic studies intended to reduce the uncertainty in seismic hazard at Diablo Canyon Power Plant,"
36 November 21, 2014, pp. 14, 19-20 [AR 003054-003060].

1 atop the seismically most dangerous location in the United States for a nuclear power plant. This
2 too is an "unusual circumstance" requiring an exception to any possible exemption. In a situation
3 like this with such potentially catastrophic consequences for numerous communities that could
4 suffer from radioactive fallout following an earthquake, science presented as part of a CEQA
5 review is intended to be the guide, not a cursory, one-sided staff review.⁴¹

6 **C. Risks from Tsunami and Rising Sea Levels Also Create Unusual
Circumstances**

7 Even though the staff and Commission failed to consider (or simply ignored) evidence of
8 tsunami risks, evidence regarding rising sea levels also establishes another instance of "unusual
9 circumstances," and evidence of "unusual circumstances" can be both individual and cumulative,
10 the cumulative relationship between tsunami, rising sea levels and other seismic considerations is
11 clearly evident in this case.

12 As with tsunamis, ocean level rise was not considered as a possibility at the time that the
13 Commission granted the original Diablo leases to PG&E. However, since that time, a large body
14 of scientific data and analysis has been gathered, establishing an accelerating rate in rising ocean
15 levels that could directly impact breakwater functionality and the integrity of intake structures,
16 especially in severe storms or in conjunction with a localized tsunami.⁴²

17 In the case of Diablo, such intake structures are located within the area subject to PG&E's
18 leases, and the vulnerability of these intake structures to rising ocean levels⁴³ could lead to and
19 exacerbate other dangerous circumstances. Tsunamis and rising ocean levels constitute further
20 evidence of "unusual circumstances" that call for the preparation of a full EIR by the
21 Commission prior to the approval of a new lease.

23 ⁴¹ *Citizens for East Shore Parks v. California State Lands Commission*, (2011) 202 Cal.App.4th 549, 555
24 136 Cal.Rptr.3d 162, 168, addressed the renewal of a Commission lease for an oil company's off-shore marine docking
25 platform, which the Commission had found **NOT** to fall within the "existing structures" exemption. Exactly the same
analysis applies here, even more so, as the risk of radioactive "spills" is more egregious and long lasting.

26 ⁴² California Coastal Commission - Sea Level Rise Policy Guidance, Appendix A – "California-Specific
27 Projections of Sea Level Rise and Best Available Science," [AR 005602-005605]. See also, Susanne C. Moser and
28 Julia Ekstrom, UC Berkeley, "Developing Climate Adaptation Strategies for San Luis Obispo County: Preliminary
Vulnerability Assessment for Social Systems," Sec. 4.6 - Energy: Nuclear Power Plant and Electricity Transmission,
pp. 59-60 (July 2012), California Coastal Commission - Sea Level Rise Policy Guidance, cited in Appendix C – Table
C-5: "Examples of Sea Level Rise Vulnerability Assessments in California" [AR 005656].

⁴³ Diablo Canyon Power Plant Units 1 and 2 Flood Hazard Reevaluation Report (March 2015), Enclosure 1,
Table 3-17 and 3-18 [AR 005363-005364].

1 **D. Adverse Health Impacts Following the Operation of Diablo Are**
2 **Evidence of Unusual Circumstances**

3 As with tsunamis, the fact (discussed above) that the staff and Commission simply
4 ignored evidence of infant mortality and cancer rates does not mean that they cannot be
5 considered as "unusual circumstances." To the contrary, evidence of a low-cancer county
6 deteriorating into a high-cancer county following the construction and operation of a nuclear
7 power plant is itself strong evidence of an "unusual circumstance" triggering an exception to the
8 "existing structures" exemption. Again, evidence of "unusual circumstances" can be both
9 individual and cumulative. Here, public health dangers, combined with other dangers, amounts to
10 overwhelming evidence of "unusual circumstances."

11 **E. Continuing Damage to Marine Life Also Constitutes Unusual**
12 **Circumstances**

13 The Resolution adopted on April 17, 2006, articulating the Commission's policy on
14 Once-Through Cooling observes that "once through cooling significantly harms the environment
15 by killing large numbers of fish and other wildlife, larvae and eggs" and "also significantly
16 adversely affects marine, bay and estuarine environments by raising the temperature of receiving
17 waters, and by killing and displacing wildlife and plant life . . . " 44, 45, 46, 47, 48, 49

18 In the words of the California Coastal Commission staff recommendation to the State
19 Water Resources Control Board, Diablo is California's largest marine predator.⁵⁰ Every day,
20 Diablo's cooling system takes in 2.5 billion gallons of seawater, the equivalent of 3,788
21 Olympic-size swimming pools. An estimated 1.5 billion fish eggs and marine larvae a year get

22 ⁴⁴ Resolution by the California State Lands Commission regarding Once-Through Cooling in California
23 Power Plants, April 17, 2006, page 1, ¶ 7, [AR 002349-002351].

24 ⁴⁵ Miller, Peter, Senior Scientist, Natural Resources Defense Council, Transcript, Commission Meeting,
25 June 28, 2016, p. 65 [AR 000735].

26 ⁴⁶ Christie, Andrew, Director, Santa Lucia Chapter, Sierra Club, Transcript, Commission Meeting, June 28,
27 2016, pp. 128-130 [AR 000796-000798].

28 ⁴⁷ Brown, Marty, Mothers for Peace, Transcript, Commission Meeting, June 28, 2016, pp. 151-152 [AR
000819-000820].

⁴⁸ Jencks, Michael, attorney, Biodiversity First, Transcript, Commission Meeting, June 28, 2016, pp. 167-
169 [AR 000835-000837].

⁴⁹ Resolution by the California State Lands Commission regarding Once-Through Cooling in California
Power Plants, April 17, 2006, pp. 1-3 [AR 002349-002351].

⁵⁰ Comments of Tom Luster, California Coastal Commission ("CCC"), on the matter of once-through-
cooling at the Diablo Canyon Nuclear Power Plant, delivered by CCC Legislative Director Sarah Christie to the
Commissioners of the State Water Resources Control Board, November 18, 2014, Sacramento, California
(<https://www.youtube.com/watch?v=VcqQtHBq6m8>, at 2:00).

1 swept along for the ride, and in the process are churned, cooked and killed. Indeed, Diablo
2 currently represents 85% of the damage to our coastal environment from all costal power plants
3 combined. To date, over 45 billion fish eggs and marine larvae have died over Diablo's 32-year
4 operational lifetime. Another seven years of operating Diablo will increase the number of marine
5 organisms killed by the plant to nearly 60 billion deaths, clearly an "unusual circumstance."⁵¹

6 Furthermore, Diablo is located less than a mile from the Point Buchon Marine Protected
7 Area ("MPA"). The MPA is known for its biological diversity and is home to more than 700
8 species of invertebrates, as well as 120 fish species, marine plants, seabirds, and marine
9 mammals. As the California Coastkeeper Alliance points out:

10 "The reserve does not allow 'damage or take of living marine resources,
11 geologic or cultural resources', yet Diablo – sited less than a mile away – is
12 currently killing 1.5 billion larvae and over 710 pounds of marine resources
13 annually. Diablo's proximate location to the Point Buchon MPA is reducing
larval connectivity between the reserve and other protected areas through
entrainment and impingement, thereby compromising the effectiveness of the
broader network."⁵²

14 Over time, Diablo has seriously diminished California's marine populations as well as
15 reduced the oceanic food supply. The cumulative, potentially exponential, impacts from seven
16 more years of plant operations constitutes an "unusual circumstance" and supports a
17 comprehensive environmental review under CEQA.⁵³ These are not minor impacts. According
18 to the Alliance for Nuclear Responsibility's ("A4NR") Attorney, John Geesman:

19 "By simple arithmetic, the extended period of time of the new lease will enable a
20 21% increase in the creation of nuclear fuel (aka radioactive waste) and a 21%
increase in damage to marine organisms."⁵⁴

21 The new PG&E lease would also affect the habitat of at least 6 endangered species.⁵⁵ Given
22 that there was no environmental review under CEQA, either of the original licensing of Diablo or
23 of the Commission's issuance of the previous Diablo leases, there has never been a formal

24 ⁵¹ TENERA Environmental, Report Supplement: Length-Specific Probabilities of Screen Entrainment of
25 Larval Fishes Based on Head Capsule Measurements (In DFPP Site-Specific Estimates, October 29, 2013, pp. 1-22
plus appendixes [AR 002292-002348].

26 ⁵² Bothwell, Sean, California Coastkeeper Alliance, Letter to Jennifer Lucchesi, California State Lands
Commission, December 15, 2015, pp. 1-2 [AR 001539-001540].

27 ⁵³ PG&E, Application for Land Lease, Amended Application, Attachment D, Project Description, January
20, 2015, pp. 2-1 to 2-18 [AR 001203-0001222].

28 ⁵⁴ Geesman letter, pp. 1-2 [AR 002277-002278].

⁵⁵ Christie, Andrew, Director, Santa Lucia Chapter, Sierra Club, Transcript, Commission Meeting, June 28,
2016, pp. 128-130 [AR 000796-000798].

1 regulatory consideration of the tidelands impacted by Diablo's operations as habitat for endangered
2 species. The existence of this habitat for endangered species in the immediate vicinity of the
3 Diablo plant is yet another instance of a reasonable possibility of significant effect due to "unusual
4 circumstances."

5 There is also cause for concern regarding adverse environmental impacts that result from
6 the operation of Diablo's desalination plant which, like the nuclear plant, has never before been
7 assessed in the context of an EIR under CEQA.⁵⁶ The desalination plant was installed as part of the
8 1985 license to operate Diablo⁵⁷ without specific review by any State authority. It discharges toxic
9 chemicals and brine into the cove, which is designated as an endangered species habitat. The
10 desalination facility was not mentioned in the original leases and its existence is an example of
11 another "unusual circumstance" that will have a significant effect on the environment.

12 Over generations, the cumulative impacts of the non-reproduction of 1.5 billion fish and
13 invertebrates a year adds up to trillions of lost lives over the past 30 years. In addition, a Bechtel
14 Power Corporation report on PG&E's Once-Through Cooling technologies found that, regarding
15 Diablo's Deepwater Offshore Intake, "Studies have shown that the entrainment is not likely to be
16 improved for this design, so this is considered not to be viable."^{58,59} Moreover, water
17 overheating, ocean acidification, radiation, and heavy metals being discharged into the cove will
18 result in cumulative effects, none of which were ever part of any baseline study of the potential
19 adverse impacts of Diablo.

20 Taken together, all of the foregoing cumulative adverse impacts on marine life that will
21 result from operation under the Diablo lease, many of which have only been identified in the past
22 few years, constitute an "unusual circumstance" that creates an exception to the "existing
23

24 ⁵⁶ Seeley, Linda, Mothers for Peace, Transcript, Commission Meeting, June 28, 2016, pp. 147-148 [AR
000815-000816].

25 ⁵⁷ "Diablo desal project moving forward," *Santa Maria Times*, March 23, 2016, pp. 1-3 [AR 001832-
001834].

26 ⁵⁸ Bechtel Power Corporation, Alternative Cooling Technologies or Modifications to the Existing Once-
Through Cooling System for the Diablo Canyon Power Plant, September 17, 2014, pp. 1-56 [AR 016460-016529]. For
27 citation, see Table 1-2, Overall Conclusions, Status of Each Technology, p. 14 [AR 016487].

28 ⁵⁹ Subcommittee of the Review Committee for Nuclear Fueled Power Plants consisting of representatives
from the California Energy Commission, California Public Utilities Commission, the Center for Energy Efficiency and
Renewable Technologies and the Alliance for Nuclear Responsibility, Exhibit A, Subcommittee Comments on
Bechtel's Assessment to Alternatives to Once-Through-Cooling for Diablo Canyon Power Plant, p. 1 [AR 001506].

1 structures" exemption.

2 **F. Risks from Both Cyber and Physical Attacks Constitute Unusual**
3 **Circumstances**

4 Nuclear facilities and nuclear materials present appealing targets to terrorists. Wherever
5 nuclear fuels are produced, transported, and consumed, and wherever production wastes are
6 accumulated there is a risk of a terror attack.⁶⁰ Terrorists could also target nuclear power plants,
7 digitally or physically, in an attempt to release radioactive contamination into communities.

8 There is a more than a reasonable possibility that California's elongated and highly
9 vulnerable electric grid can be brought down by sophisticated cyber (and physical) attacks.
10 Because Diablo Canyon relies on grid power when disabled, these malicious digital assaults could
11 trigger a devastating nuclear meltdown. Such a scenario, unfortunately, is increasingly likely in an
12 internationally conflicted world, and must be considered as another "unusual circumstance."

13 The United States 9/11 Commission has said that nuclear power plants were potential
14 targets originally considered for the September 11, 2001 attacks (in fact, the primary back up to
15 attacking the World Trade Center was a nuclear plant near the New York metropolitan area).⁶¹ If
16 terrorist groups could sufficiently damage cooling and/or safety systems to cause a core meltdown
17 at a nuclear power plant, and/or sufficiently damage spent fuel pools (with electronic sabotage or a
18 "dive bombing" small plane), such an attack could lead to widespread radioactive contamination.
19 This includes radioactive contamination due to spent fuel fires or leaks, which has already been the
20 subject of a Generic Environmental Impact Statement prepared by the NRC.⁶²

21 Furthermore, according to a 2004 report by the U.S. Congressional Budget Office, "The
22 human, environmental, and economic costs from a successful attack on a nuclear power plant that
23 results in the release of substantial quantities of radioactive material to the environment could be
24

25 ⁶⁰ Congressional Research Service, Nuclear Power Plants: Vulnerability to Terrorist Attack, CRS Report for
Congress RS21131 (Updated August 8, 2007). Also see, RJN Exhibit 4.

26 ⁶¹ The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the
United States. National Commission on Terrorist Attacks, chapter 7, p. 245, July 30, 2010, ISBN 978-1- 61640-219-8.
Also see, RJN Exhibit 5.

27 ⁶² U.S. Nuclear Regulatory Commission, Generic Environmental Impact Statement for Continued Storage
of Spent Nuclear Fuel, Volume 1 and Volume 2, September 2014 [AR 003617-005034]. "The GEIS contains several
28 appendices that discuss specific topics of particular interest, including the two technical issues involved in the remand
of *New York v. NRC*—spent fuel pool leaks and spent fuel pool fires" [AR 003637, para. 3].

1 great."⁶³ An attack on a reactor's spent fuel pool is also a serious threat, as these pools are less
2 protected than the reactor core. The release of so much radioactivity could lead to thousands of
3 near-term deaths and greater numbers of long-term fatalities.⁶⁴

4 If a meltdown resulting in large scale releases of radioactivity from the reactor core or the
5 waste pools occurred at Diablo Canyon, many nearby residents would suffer from acute radiation
6 poisoning (short term) and cancer (long term). In 1982, the Sandia National Laboratories
7 submitted estimates to Congress for each U.S. nuclear plant in the case of core meltdown. The
8 Sandia figures are known as CRAC-2 (Calculation of Reactor Accident Consequences). Within
9 17.5 miles of Diablo Canyon, 22,000 acute radiation poisoning cases (10,000 fatal) would be
10 expected; and within 35 miles, 12,000 cancer deaths would occur. Estimates would be much
11 larger today, since the local population has grown sharply since the calculations, which used
12 1980 census figures, were made. The San Luis Obispo County population has nearly doubled
13 since 1980.⁶⁵ This risk of reactor core meltdown certainly constitutes an "unusual circumstance."

14 **G. Accumulation and Leakage of Radioactive Waste Constitute Unusual**
15 **Circumstances**

16 Nuclear facilities have a large drawback in that their operation results in the creation of
17 large amounts of low- and high-level radioactive waste. High-level waste consists of spent
18 uranium fuel rods that can no longer be used for energy or reprocessed into another element that
19 can yield power. For up to seven years, the high-level radioactive waste in the spent fuel rods at
20 Diablo Canyon are stored in spent fuel pools,⁶⁶ which, unlike the reactor core, are not protected
21 by a containment building, and are therefore more vulnerable to natural disasters, such as
22 earthquakes⁶⁷ and tsunamis, as was the case at Fukushima. For this reason, the CEC stated in its

23 ⁶³ Congressional Budget Office, "Homeland Security and the Private Sector, Civilian Nuclear Power -
24 Vulnerabilities from Attacks on Power Reactors and Spent Material," p. 11. Also see, RJN Exhibit 6.

25 ⁶⁴ Charles D. Ferguson & Frank A. Settle (2012). "The Future of Nuclear Power in the United States," p. 73,
Federation of American Scientists.

26 ⁶⁵ Sandia National Laboratories, Calculation of Reactor Accident Consequences (CRAC-2) for U.S. Nuclear
Power Plants, prepared for U.S. Congress, Subcommittee on Oversight and Investigations, Committee on Interior and
Insular Affairs, cited in Report on Health Status of Residents in San Luis Obispo and Santa Barbara Counties Living
Near the Diablo Canyon Reactors Located in Avila Beach, California, March 3, 2014, p. 11 [AR 017709].

27 ⁶⁶ Williams, Geisha, President, PG&E, Transcript, Meeting, State Lands Commission, PG&E, June 28,
2016, p 75 [AR 000743].

28 ⁶⁷ Independent Peer Review Panel, Report No. 6, Site shear wave velocity at Diablo Canyon: summary of
available data and comments on analysis by PG&E for Diablo Canyon Power Plant, August 12, 2013, pp. 1-23 [AR

1 2013 Energy Policy Report that Diablo Canyon should “[t]ransfer spent fuel to dry casks as
2 expeditiously as possible.”⁶⁸

3 By 2025, there will be approximately 4,300 spent fuel assemblies stored on site at Diablo
4 Canyon.⁶⁹ Low-level waste consists largely of water and used equipment from the nuclear facility
5 in which power is being generated. Both types of waste are highly toxic and may have to be stored
6 onsite indefinitely. The low- and high-level wastes accumulating at Diablo Canyon are dangerous
7 to the environment as well as to the people living in nearby communities. Should waste not be
8 stored adequately, radioactive substances could find their way into ground water, or contaminate
9 other valuable resources or sites. In fact, the NRC's “Effluent Database for Nuclear Power Plants”
10 ranks Diablo Canyon among the top five U.S. power plants for releases of each the following
11 carcinogenic, radioactive nuclear fission byproducts: airborne tritium, liquid fission and activation
12 products, and liquid tritium.⁷⁰

13 Here we can see how the “unusual circumstances” of evidence of cancer clusters
14 combines with the “unusual circumstances” of storage and containment of cancer causing
15 radioactive waste to cause a potentially significant environmental effect warranting an exception
16 from the “existing structures” exemption from the CEQA process.

17 **H. Diablo Canyon’s Distinction as the Sole Operating Nuclear Plant in** 18 **California Constitutes an Unusual Circumstance**

19 The Court also explained in *Berkeley Hillside* that the “unusual circumstances” exception
20 applies whenever, “the project has some feature that distinguishes it from others in the exempt
21 class....” *Id.* at 1105. If any such feature is present, CEQA sets an extremely low bar to
22 disqualify the project from the exemption: there need only be a “reasonable possibility of a
23 significant effect due to that unusual circumstance.” *Id.* Diablo is unique among existing power

24 003291-003313]; and Direct Testimony of Douglas H. Hamilton, Ph.D., before the CPUC, submitted by A4NR,
25 February 10, 2012, pp. 1-54 [AR 003529-003582]. Mr. Hamilton has more than 50 years of experience in engineering
and seismic geology.

26 ⁶⁸ See, CEC, 2013 Integrated Energy Policy Report, as adopted January 15, 2014, pp. 170-171, quoted in
A4NR’s Opening Comments on ALJ’s Proposed Decision, July 8, 2014, p. 6 [AR 003125].

27 ⁶⁹ Schumann, Klaus, San Luis Obispo Nuclear Waste Management Committee, Transcript, Meeting, State
Lands Commission, June 28, 2016, pp. 180-181 [AR 000848-000849].

28 ⁷⁰ Table 6, U.S. Nuclear Plants with Greatest Emissions, Selected Types of Radioactivity and Selected
Years, in Curies, cited in Report on Health Status of Residents in San Luis Obispo and Santa Barbara Counties Living
Near the Diablo Canyon Nuclear Reactors, March 3, 2014, p 14 [AR 017712].

1 plants in California. It is the state's only remaining nuclear power plant, and it is located on the
2 coast. The only other nuclear power plant that had been operating in California in recent years,
3 located at San Onofre, was closed due to a massive radiation "event" that occurred in January
4 2012, and that plant was permanently designated as "closed" in June 2013.

5 As the Commission staff previously (and correctly) determined, while there are other
6 coastal power plants in California, Diablo is "the only active nuclear power plant in California"
7 and its "nuclear fuel source and proximity to fault lines distinguish it from other power plants in
8 California."⁷¹ Diablo will also continue to discharge high-temperature once-through-cooling
9 water into the coastal waters far longer than any other coastal power plant. These factors by
10 themselves – and certainly in combination – distinguish this facility from every other example
11 cited in the June 24, 2016 staff report.⁷² A catastrophic seismic event at a natural gas-fired plant
12 (like Moss Landing) would have a far smaller level of adverse effects, at a far lesser scale and
13 degree of permanence, than a similar event at Diablo.⁷³

14 Moreover, the daily effects of such facilities are not comparable. For example, other
15 natural gas facilities on the coast must terminate discharge of once-through cooling water far
16 earlier – many by the end of end of 2017, and the rest by no later than 2020. In contrast, the
17 harm from Diablo's high temperature discharges (and the impingement and entrainment of
18 marine life from the intakes) enabled by the PG&E lease will continue through 2025 (beyond, if
19 PG&E's political deal with the Commission falls through). The June 24 Staff Report refuses
20 even to acknowledge the "unusual circumstances" presented by the state's only operating nuclear
21 plant as the sole source of additional high-level nuclear waste,⁷⁴ even though Diablo Canyon's
22 nuclear fuel source and proximity to faults distinguish it from all other power plants currently
23 operating in California.⁷⁵

24 **I. Criminal Charges Against PG&E Resulting from the San Bruno**
25 **Explosion Constitute an Unusual Circumstance**

26 ⁷¹ Commission Staff Report for Calendar Item No. 83 (Feb. 9, 2016), p. 3, para. 3 [AR 000013].

27 ⁷² Commission Staff Report (Revised), June 28, 2016, Calendar Item No. 96, p. 4, para. 3 [AR 000028].

28 ⁷³ Letter from Mothers for Peace submitted on June 27, 2016, Section II – THE LEASE DOES NOT
QUALIFY FOR A CATEGORICAL EXEMPTION [AR 001918d].

⁷⁴ Commission Staff Report (Revised), June 28, 2016 [AR 000025-000045].

⁷⁵ Commission Staff Report for Calendar Item No. 83 (Feb. 9, 2016), p. 3, para. 3 [AR 000013].

1 PG&E's current federal prosecution on safety-related and agency obstruction felony
2 counts related to its natural gas business is unprecedented for any utility holder of an NRC
3 operating license. At a minimum, given that PG&E has been found guilty of operating
4 certain of its facilities in a dangerous condition, with careless disregard for public health and
5 well-being,⁷⁶ an "unusual circumstance" exists such that CEQA review is required in this case.

6 As the Court can see from the evidence of the nine separate instances of "unusual
7 circumstances" discussed above, many of them would **independently** support the application of
8 an exception to the "existing structures" exemption. However, taken as a group, and applying the
9 standard set forth in *Berkeley Hillside*, such a conclusion is without doubt.

10 **V. EVEN IF THE SECRETARY SOMEHOW HAD AUTHORITY TO EXEMPT**
11 **NUCLEAR POWER PLANTS AND THERE IS NO EXCEPTION TO THE**
12 **EXEMPTION, CEQA MUST BE APPLIED IN ACCORDANCE WITH THE**
PUBLIC TRUST DOCTRINE

13 The staff report that the Commission relied upon in reaching its June 28, 2016 decision
14 on the Diablo lease stated that Commission staff "recommends authorizing the subject lease as it
15 does not substantially interfere with public trust needs and values, is in the best interests of the
16 State, and is otherwise consistent with the common law Public Trust Doctrine."⁷⁷ However, the
17 cumulative environmental impacts from the continued operation of Diablo, as discussed above,
18 substantially interfere with both the express and implied responsibilities imposed on the
19 Commission by the Public Trust Doctrine to protect the public interest related to waterborne
20 commerce, fisheries, recreation and most importantly, habitat preservation.

21 Since no EIR has ever been conducted concerning all of the possible adverse
22 environmental impacts of the operation of Diablo, there are likely cumulative health,
23 environmental and other impacts associated with radioactive emissions from, and long-term
24 storage of radioactive waste at, Diablo that have yet to be fully measured. Absent the completion
25 of an EIR under CEQA, there can be no credible means of determining whether past or proposed
26 measures concerning plant operations adequately protect the public interest as required by the

27 ⁷⁶ [United States of America v. Pacific Gas and Electric Company](#), USDC, Northern District of California,
28 Case No. CR14-0175-TEH. See also, Pacific Gas & Electric Co., [Current Report on Form 8-K dated August 9, 2016](#).

⁷⁷ Commission Staff Report (Revised), June 28, 2016, Calendar Item 96, p. 14, Recommendation No. 3 [AR
000038].

1 Public Trust Doctrine.⁷⁸ Indeed, the existence of the Public Trust Doctrine in this case is just one
2 more "unusual circumstance" that mandates CEQA review. However, the Court need not reach
3 this issue. Based on the facts and the law set forth in this brief, it is beyond doubt that a CEQA
4 review must be conducted before the Commission can issue PG&E's requested new lease.

5 CONCLUSION

6 For all the foregoing reasons, Petitioners ask this Honorable Court to issue a peremptory
7 writ of mandate under Code of Civil Procedure §1094.5 doing the following: (1) compelling
8 Respondent Commission to set aside its decision dated June 28, 2016 on Calendar Item No. 96
9 (to terminate Lease numbers 4307.1 and 4449.1, and to approve the new lease requested by
10 PG&E); (2) requiring Respondent Commission to proceed with further CEQA compliance,
11 including preparation of an initial study and a determination of whether further environmental
12 review would require an EIR or a mitigated negative declaration under CEQA, before
13 Respondent extends, re-issues or issues any new or existing lease or leases to PG&E; and (3)
14 enjoining Real Party in Interest, PG&E, from any activity or operation under a new Diablo lease
15 unless and until Respondent complies with all applicable California regulations and statutes,
16 including CEQA, so as to bring its approval of the project into full compliance with CEQA.

17 Dated: February 25, 2017

18 Respectfully submitted,
19 **KEYES & FOX LLP**
20 **GRETCHEN DUMAS, ESQ.**
21 **HUMPHREY & RIST, LLP**
22 **BOYD & BERKOWITZ, LLP**

23 By: 

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27
28

⁷⁸ Perry, Bob, Director of Energy Research, World Business Academy, Transcript, Meeting, State Lands Commission, June 28, 2016, pp. 140-141 [AR 000808-000809].

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DECLARATION OF SERVICE

Case Name: **World Business Academy v. State Lands Commission**

No. : **Los Angeles County Superior Court Case No. BS163811**

I declare that I am an attorney with the law firm of Keyes & Fox LLP and am a member of the California State Bar. I am 18 years of age or older and not a party to this matter. By previous agreement of the parties to this proceeding, service of documents in this proceeding may be effectuated by e-mail.

On February 25, 2017, I served the attached **PETITIONER/PLAINTIFF'S OPENING BRIEF** on all known parties to the above-captioned proceeding by delivering a copy via electronic mail, addressed as follows:

Bill Manheim <wvm3@pge.com>,
"Damon Mamalakis (damon@agd-landuse.com)" <damon@agd-landuse.com>,
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on February 25, 2017, at Oakland, California.



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