Comments and Responses to Comments

This volume presents copies of all comments submitted on the Draft EIR, as well as comments received at the Public Workshops held on April 19 and 20, 2005. In addition, the section, Master Responses to Major Comments, addresses issues that were raised by many commenters during the public comment period. Each comment set is followed by the corresponding responses. Comment letters are in the following categories:

- Comments from Public Agencies
- Comments from Organizations and Companies
- Oral Comments from Public Information Workshops
- Comments from Private Citizens
- Comments from PG&E

Table 1 lists all parties that commented on the Draft EIR, the date of their comments, and the comment set number that defines the organization of responses in this Final EIR.

Table 1. Commenters and Comment Set Numbers
(generally listed by date; multiple letters from one entity are grouped with first letter)

Agency / Affiliation	Name / Title of Commenter	Date of Comment	Draft EIR Comment Set
Public Agency			
Port San Luis Harbor District	Bryan Kreowski, President	5/2/05	A
CDF/San Luis Obispo County Fire Department	Robert Lewin, Fire Marshal	5/4/05	B
SLO County, Department of Planning and Building	James Caruso, Senior Planner	5/5/05	C
California State Lands Commission	Stephen L. Jenkins, Asst Chief Division of Environmental Planning & Management	5/5/05	D
California Coastal Commission	Tom Luster, Energy & Ocean Resources Unit	5/5/05	E
Air Pollution Control District	Andy Mutziger, Air Quality Specialist	5/6/05	F
Organizations and Companies			
Arroyo Grande Valley, Chamber of Commerce	Heather Jensen, President/CEO	4/25/05	CC1
Sierra Club, Santa Lucia Chapter	Unsigned letter	5/2/05	CC2
SLO Green Party	Klaus Schumann	5/3/05	CC3
Avila Valley Advisory Council	Robert J. Pusanik, Chair	5/4/05	CC4
Alliance for Nuclear Responsibility	Rochelle Becker	5/5/05	CC5
Joint Parties (San Luis Obispo Mothers for Peace, Sierra Club, Public Citizen, Environment California)	Clyde Murley, Murley Consulting	5/5/05	CC6
Southern California Edison	William Messner, Attorney at Law	5/5/05	CC7
Public Information Workshops			
Meeting #1 – Tuesday, 4/19/05	Various	4/19/05	PM1
Meeting #2 – Wednesday, 4/20/05	Various	4/20/05	PM2

Table 1. Commenters and Comment Set Numbers
(generally listed by date; multiple letters from one entity are grouped with first letter)

Agency / Affiliation	Name / Title of Commenter	Date of Comment	Draft EIR Comment Set
Private Citizens			
n/a	Michael M. Marinak	12/27/04	1
n/a	Ann Calhoun	3/29/05	2
n/a	Val R. McClure	3/29/05	3
n/a	Perry Martin	4/6/05	4
n/a	Michele Flom	4/19/05	5
n/a	Marty Brown	4/19/05	6
n/a	Steve and Janal Lorence	4/21/05	7
n/a	George E. Galvan	4/21/05	8
n/a	Betty McElhill	4/22/05	9
n/a	Gabor Bethlenfalvay	4/25/05	10
n/a	Marina Bethlenfalvay	4/25/05	11
n/a	David Weisman	4/29/05	12
Letters from individuals in support of comments submitted by the Joint Parties (see Comment CC6 above)	Alexis Olds and Various - see names listed below following the table*	5/5/05	13
n/a	Jack McCurdy	5/5/05	14
n/a	Jan Howell Marx	5/5/05	15
n/a	Kim Dunn	5/5/05	16
n/a	Kim Dunn	5/5/05	17
n/a	Klaus Schumann	5/5/05	18
n/a	Marty Brown	5/5/05	19
n/a	Mary Jane Adams	5/5/05	20
n/a	Nancy Reinstein	5/5/05	21
n/a	Russ Ferriday	5/5/05	22
n/a	Susan Biesek	5/5/05	23
n/a	Sylvia Alcon	5/5/05	24
Applicant			
Pacific Gas & Electric Company	J. Wesley Skow, Latham & Watkins LLP	5/10/05	PG

***** 5/5/05 Signers of Letters in Support of Comments Submitted by the Joint Parties (see Private Citizens category, item 13):

Alexis Olds	Henriette Groot PhD	Klaus Schumann	Nancy and Tom Norwood
Barry Dorfman	Jack McCurdy	L. Jane Swanson	Noah Smukler
Carrie Foster Evans	Jamie Baker-Addison	Leslie Beierle	Russ Ferriday
Constance Dunbar	Jan Howell Marx	Lisa Foster	Stephnie Wald
Elaine Holder	Jeannie V. MacDougall	Lorraine Donegan	Steven Zamek
Evelyn Justesen	Jill Zamek	Marty Brown	Susan Biesek
Frank Nolan	Kathleen Teufel	Mary Jane Adams	Sylvia Alcon
Geoff Godfrey	Kim Dunn	Morgan Rafferty	Teresa Lynn Campbell
Grace McCleskey	Kit Hamilton	Nancy Reinstein	Betty Winholtz

Master Responses to Major Comments

The following topics address issues that were raised by many commenters and that therefore required detailed responses. Master Responses address the following topics:

- MR-1 Project Baseline
- MR-2 NRC License Renewal
- MR-3 NRC/CPUC Jurisdiction
- MR-4 RWQCB Consent Judgment

Master Response MR-1: Baseline

Certain commenters have suggested that the environmental setting (or baseline) against which the environmental impacts of the Proposed Project should be measured is the future date when the existing steam generators that the project would replace are expected to fail. PG&E has indicated that if the steam generators are not replaced, the most likely scenario for the shutdown of Units 1 and 2 due to tube degradation is 2014 and 2013, respectively.

As explained below, the appropriate baseline under CEQA consists of the existing physical environmental conditions in the vicinity of the project as they exist at the time the notice of preparation (NOP) is published. The NOP for the project was published in October 2004. Here, such existing conditions consist of the operating Diablo Canyon Power Plant, which is licensed to operate through its current term, i.e., 2021 and 2025 for Units 1 and 2, respectively. It would be inappropriate to incorporate the element of potential equipment failure and possible future non-operation suggested by commenters as the baseline since it does not reflect existing on-the-ground environmental conditions, relating to operating power plant. For the CPUC to deviate from using a baseline defined by the existing conditions at DCPP would not be supported by the rationale applied by the courts in reviewing agency discretion in determining the appropriate baseline. The likelihood that the plant would be forced to close if the project were not approved is properly analyzed as the No Project Alternative.

A. The Baseline Consists of the Existing Environmental Conditions, Including the Operating Diablo Canyon Power Plant.

The following discussion is intended to clarify for commenters the reasoning derived from CEQA statutes and case law that supports the definition of baseline used for purposes of preparing the EIR for the proposed steam generator replacement project.

As noted by the Court of Appeal in *County of Amador v. El Dorado County Water Agency*, 76 Cal.App.4th 931, 952 (1999), "Before the impacts of a project can be assessed and mitigation measures considered, an EIR must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined." *See*, *also*, *Cadiz Land Company, Inc. v. Rail Cycle, L.P.*, 83 Cal.App.4th 74, 85-86 (2000) ("An EIR must describe the physical conditions and environmental resources within the project site and in the project vicinity, and evaluate all potential effects on those physical conditions and resources.").

CEQA Guidelines §15125 provides the following definition of "environmental setting" against which the environmental impacts of a project are to be measured as part of the CEQA process:

> An EIR must include a description of the ***physical environmental conditions***[1] in the vicinity of the project, ***as they exist at the time the notice of preparation is published***, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. ***This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.*** The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the Proposed Project and its alternatives. (emphasis added)

See also, *CEQA Guidelines* §15126.2(a) ("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 in the affected area as they exist at the time the notice of preparation is published, or where no notice of preparation is published, at the time environmental analysis is commenced.").

Courts have repeatedly and consistently referred to the baseline as the environmental conditions as they exist prior to commencement of environmental review of the project. As the *County of Amador* court recently explained, "[a]n EIR must focus on impacts to the existing environment, not hypothetical situations." *County of Amador*, *supra*, 76 Cal.App.4th at 955. In *Riverwatch v. County of San Diego*, 76 Cal.App.4th 1428, 1453 (1999), the court similarly noted the "generally accepted principle that environmental impacts should be examined in light of the environment as it exists when a project is approved." Likewise, in *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, 87 Cal.App.4th 99, 121, 123 (2001), the court said that "the impacts of the project must be measured against the 'real conditions on the ground.' . . . A baseline figure must represent an environmental condition existing on the property prior to the project." *Id.* at 127 (noting that the central function of an EIR is to "inform decision makers about the impacts of the proposed project ***on the existing environment***."). (emphasis added)

Some commenters claim the permitted regulatory environment, i.e., the Nuclear Regulatory Commission (NRC) licenses to operate the power plant through 2021 and 2025, should not be taken into account as part of the environmental setting. However, the EIR relies on established CEQA principles which conclude otherwise. For instance, in *Fairview Neighbors v. County of Ventura,* 70 Cal.App.4th 238 (1999), the court upheld an EIR that treated the maximum level of mining operations allowed under previous entitlements as the environmental baseline for purposes of analyzing a proposed project to expand mining operations. The court held that, because a prior permit related to mining operations had been approved, the maximum level of operations (e.g., 810 daily truck trips) authorized by that permit should be treated as the baseline for purposes of an EIR evaluating a proposed expansion of mining operations. Along those lines, the court said that "[t]he EIR properly discussed the existing physical condition of the affected area as including the long-operating mine." *See*, 70 Cal.App.4th at 242.

Similarly, in *Committee for a Progressive Gilroy v. State Water Resources Control Board*, 192 Cal.App.3d 847 (1987), the court ruled that no EIR was required for State Water Board orders restoring waste discharge levels for an existing wastewater treatment plant to previously authorized levels. The regional board had ordered the waste discharge levels reduced pending certain improvements to the plant, which the affected agencies had subsequently undertaken. The court reasoned that the restoration of the waste discharge levels did not constitute a "project" pursuant to CEQA. *See*, 192 Cal.App.3d at 863 ("The

[1] "Environment" is defined as "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, [and] objects of historic or aesthetic significance." Public Resources Code §21060.5.

reestablishment of discharge requirements within previously approved levels is merely a separate governmental reapproval of the original project and does not itself constitute a new project under CEQA."). Alternatively, the court reasoned that restoration of the waste discharge levels was exempt from CEQA pursuant to the existing facilities exemption (discussed in more detail below). *See*, 192 Cal.App.3d at 864: "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."[2]

Guided by these cases, the EIR for the proposed steam generator replacement project properly discusses the existing physical conditions of the affected area as including the long-operating power plant. The baseline here properly assumes a power plant duly licensed to operate through 2021 and 2025. This existing on-the-ground condition comprises the environmental setting. Ignoring the permitted operation of DCPP would be akin to ignoring the permitted truck activity at issue in *Fairview* and would similarly produce misleading and illusory results. *See*, e.g., 70 Cal.App.4th at 243. The proposed steam generator replacement project would allow DCPP to operate at its maximum permitted capacity, similar to the restoration of waste discharge levels at issue in *Committee for a Progressive Gilroy*.

Even in cases where the original activity was not permitted and thus not subjected to prior environmental review, courts have upheld the notion that the baseline is the existing environmental conditions at the time environmental review of a project commences. For instance, in *Fat v. County of Sacramento*, 97 Cal.App.4th 1270 (2002), the court upheld the agency's use of the existing conditions as the baseline in adopting a negative declaration for a use permit to operate and expand a private airport. The airport had been operating without county authorization for 30 years and had not previously been reviewed under CEQA. The court nevertheless concluded that there was substantial evidence to support the agency's decision to use the existing pre-project conditions as the baseline. Thus, the proper baseline used was an operating airport as it existed immediately prior to the new project and not the pre-airport conditions as argued by the project opponents. Similarly, for the proposed steam generator replacement project, the proper baseline for purposes of evaluating the potential incremental impacts of the Proposed Project is the currently operating nuclear power plant.

Also, the court in *Riverwatch v. County of San Diego*, *supra*, found that an EIR for a rock quarry project did not need to consider a baseline date some 12 years prior to the commencement of the project, in order to account for previous unauthorized mining and grading activities that had degraded the property. *See*, 76 Cal.App.4th at 1452: "The superior court found that the EIR should have developed an environmental baseline which accounted for the prior illegal activity both on the quarry project and offsite. We disagree with the superior court. We believe that in general preparation of an EIR is not the appropriate forum for determining the nature and consequences of prior conduct of a project applicant."

In both *Fat* and *Riverwatch* , the courts found that the baseline for environmental review was the existing operating facility, even though the facilities were not authorized. Based on these cases, the facts surrounding the proposed steam generator replacement project are even stronger to support the EIR's reliance on the existing environmental conditions as the baseline. Here, the DCPP facility is fully permitted and licensed to operate. Moreover, as explained in more detail below, the federal agency with jurisdiction over the project conducted environmental review of the power plant prior to its initial licensing action. If the Draft EIR for the Proposed Project used the baseline urged by certain commenters (i.e.,

[2] Since no state or local agency had regulatory jurisdiction over the original power plant proposal, no CEQA review was conducted of that proposal. However, environmental review of the power plant was conducted by the federal agency with regulatory jurisdiction over the project in accordance with the analogous National Environmental Policy Act, upon which the CEQA statute is based.

assume no operating power plant in nearly a decade), it would produce a grossly inequitable result under current law. That is, the existing environmental conditions would be used in other cases even where development occurred without necessary permits and environmental review (i.e., *Fat* and *Riverwatch*), but not in this case where environmental review was conducted and all appropriate permits were procured.

Along these lines, the CPUC received many questions and comments both at the public meetings and in written comments on the Draft EIR regarding the definition of the Proposed Project. In particular, a significant number of people raised concerns with the existing and underlying nuclear power plant operations. Some written comments suggest that the EIR is not adequate because it does not evaluate the potential impacts and risks inherent to the operation of DCPP itself, such as: terrorist and public safety risks; risks related to radiological waste, storage and disposal: possible underlying seismic design deficiency; and on-going marine biological resource degradation.

The EIR for the proposed steam generator replacement project correctly does not attempt to reassess the environmental impacts associated with the already permitted, constructed, and operating power plant. In related cases involving the issue of subsequent environmental review, the courts have treated the project approved pursuant to a previous environmental document as the baseline for purposes of evaluating proposed changes to the project. These cases indicate that the baseline consists of the existing, operating power plant especially since the plant was the subject of an environmental document that is immune from collateral attack in this proceeding. For example, in *Benton v. Board of Supervisors*, 226 Cal.App.3d 1467 (1991), involving proposed changes to an approved winery project, the court said "the actual physical environment includes that which Whitbread [i.e., the applicant] has a legal right to build under permits which have already been issued and on which construction has already begun." 226 Cal.App.3d at 1477, fn.9. The court further explained that "the original winery was not before the board when it issued the mitigated negative declaration; it had already survived environmental review. The only item subject to board approval was modification of the original permit to allow relocation of the winery building on the enlarged site. Therefore, we must evaluate the board's environmental review of the modification." *Id.* at 1482; *see*, *also*, *id.* at 1484 ("The county properly considered only the incremental differences between the original project and the modification when evaluating whether the modifications to the original proposal would result in any significant environmental impacts."). *Accord*, *Temecula Band of Luiseno Mission Indians v. Rancho California Water District*, 43 Cal.App.4th 425 (1996) (court upholds environmental document focused on the impacts of a pipeline to provide water to a previously approved groundwater recharge program).[3]

In light of the *Benton* and *Temecula* line of cases, the EIR for the proposed steam generator replacement project properly incorporates the existing, operating power plant (which is authorized to operate until 2021 and 2025) as part of the baseline. DCPP, like the original approved winery project at issue in *Benton* or the groundwater recharge program at issue in *Temecula,* is the existing environmental setting against which the potential impacts of the replacement steam generator project are to be evaluated. As such, the EIR then correctly proceeds to evaluate potential environmental impacts based on the incremental changes to the existing environment which are attributable to the proposed replacement project. The EIR compares the proposed steam generator replacement activities the existing operating plant for the purpose of identifying and evaluating impacts.

[3] In commenting on these cases, noted CEQA commenters have observed that "the baseline for purposes of CEQA is adjusted such that the originally approved project is assumed to exist." *See*, Remy, Thomas, Moose & Manley, *Guide to the California Environmental Quality Act*, p. 101 (9th ed. 1996).

The Proposed Project which is the subject of environmental review in the EIR includes the replacement of the steam generators for Units 1 and 2 at DCPP. (See Section B of the Draft EIR) The Proposed Project consists of four basic components, which include: (1) transport of the replacement steam generators (RSG) to DCPP; (2) RSG staging and preparation at a temporary staging area; (3) original steam generator removal, transport and storage at an onsite facility; and (4) replacement steam generator installation. Construction activities associated with the Proposed Project would occur on previously developed, disturbed land within the DCPP site boundary. The temporary staging area would consist of temporary buildings that would be removed after completion of the Proposed Project.

Consistent with CEQA, the Draft EIR evaluated the potential impacts associated with transport, staging and preparation, removal, installation and disposal activities needed to accomplish the proposed replacement. The potential environmental impacts associated with the four components were compared against predetermined CEQA significance criteria for 13 issue areas (See Sections D.2 through D.14 of the Draft EIR). As explained in the EIR, the only appreciable changes result from construction-related impacts associated with the actual transport of new steam generators, replacement of the units, and storage of the old generators onsite. The CPUC identified 30 mitigation measures which, if implemented, would avoid or reduce all potentially significant project related impacts to less than significant levels.

Finally, while an agency does have discretion to use an environmental baseline other than existing conditions at the time the NOP is published, the agency's choice must be supported by substantial evidence. *Fat*, *supra*, 97 Cal.App.4th at 1277. Cases have suggested limited circumstances (e.g., involving issues of water supply or future traffic conditions) in which deviation from existing environmental conditions is appropriate. For instance, in *County of Amador*, *supra*, the court overturned an EIR that relied on end-of-month lake levels as the baseline for a proposed project to release water for consumptive use from lakes previously relied on for hydroelectric use, reasoning that such a baseline did not provide an adequate description of the existing environment. The court explained the complex nature of developing an existing baseline for water purposes since levels vary widely over a short period of time. The court went on to say that topics such as frequency and amount of releases of water are relevant to compile a meaningful baseline for examining impacts to fish, recreation, etc.

In *Save Our Peninsula Committee*, *supra*, the court provided the following discussion regarding times when it could be appropriate to deviate from the existing environmental conditions baseline:

> *Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods. In some cases, conditions closer to the date the project is approved are more relevant to a determination whether the project's impacts will be significant. For instance, where the issue involves an impact on traffic levels, the EIR might necessarily take into account the normal increase in traffic over time. Since the environmental review process can take a number of years, traffic levels as of the time the project is approved may be a more accurate representation of the existing baseline against which to measure the impact of the project.* 87 Cal.App.4th at 125-126.

There are no unique environmental circumstances such as varying water supply or future traffic conditions to support the use of the alternative baseline urged by certain commenters here. Some comments proposed the baseline should assume DCPP will not operate in approximately 10 years thereby requiring a baseline definition to take into account future equipment failure. However, potentially varying equipment condition is not akin to the varying environmental conditions envisioned by these cases in reviewing agency discretion. To use potential equipment failure as a factor in this case would not accurately portray the existing environmental conditions, and would vastly and artificially overstate the impacts of

the replacement project. Moreover, as noted above, such a baseline would be directly contrary to the cases establishing that the baseline includes the permitted regulatory environment. The permitted regulatory environment here consists of a power plant licensed to operate through 2021 and 2025. In short, substantial evidence would not support the use of an alternative baseline such as the future baseline urged by commenters here.

B. The Authorities Presented by Commenters to Justify Deviation from the Existing Environmental Conditions as the Baseline are Inapplicable and/or Distinguishable.

Some comments cite various cases to support the assertion that the Draft EIR is flawed because the baseline for assessing environmental impacts is defined as the existing environmental conditions. These comments cite cases pertaining to the existing facilities exemption under CEQA. The existing facilities exemption would eliminate the requirement for environmental review for "operation, repair, maintenance . . . or minor alteration of existing public or private structures, facilities, mechanical equipment, [etc.], involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. Examples include but are not limited to . . . Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services . . . ." *CEQA Guidelines* §15301.

Comments present these cases in a manner to propose that a project which consists of modifying an existing facility is ineligible for the existing facilities exemption if the underlying facility was not subject to CEQA review. The cases are put forth to support an argument that a review of a facility's impacts (such as DCPP) may be avoided only if the facility predates the enactment of CEQA or was originally implemented in compliance with CEQA.

As explained below, these cases are misleading because they do not apply to the preparation of an EIR for the steam generator replacement project. The cases cited and the rationale attendant to them apply only in the situation where an agency has considered granting an exemption from CEQA review, i.e., conducting no environmental review, for a currently proposed project associated with an existing facility. In those cases the courts reasoned the impacts of the underlying facility would also be required unless the facility predates CEQA or originally received CEQA review.

In this case, the CPUC is not attempting to exempt the steam generator replacement project from CEQA review. Although PG&E initially argued in pleadings that the CPUC could grant an existing facilities exemption for project, the CPUC determined to prepare a full environmental impact report — the most comprehensive and conservative form of CEQA review — to analyze the potentially significant environmental impacts of the project. Thus, cases analyzing application of the existing facilities exemption do not apply here.

Even if the exemption cases were to apply, they are distinguishable in that DCPP did receive full environmental review by the Atomic Energy Commission ("AEC"), predecessor-in-interest to the current NRC, in connection with its original approval of the plant construction and licensing. As a federal agency, the AEC prepared an environmental impact statement pursuant to the National Environmental Policy Act (NEPA) in connection with the AEC's action on the original power plant proposal. A federal NEPA environmental impact statement is comparable to a state CEQA environmental impact report. CEQA recognizes that federal NEPA review can be used to satisfy state CEQA review requirements and further discourages duplication between different levels of government. (See *CEQA Guidelines* Sections 15220 to 15229). In addition, the original power plant proposal was not subject to CEQA since the AEC had exclusive jurisdiction over that project, i.e., preempting any state or local regulation that would have otherwise triggered the requirement for CEQA review.

A primary exemption case relied upon to argue that the EIR is flawed is *Lewis v. Seventeenth District Agricultural Association,* 195 Cal.App.3d 823 (1985). *Lewis* was used to suggest the underlying DCPP operation must be studied in the EIR for the steam generator replacement project because there, the court found that a racetrack in operation since 1958 would require CEQA review for it's continued operation unless its impacts were originally reviewed under CEQA. Apart from the fact that no exemption is being considered for the Proposed Project and that DCPP did receive original environmental review recognized as comparable to CEQA, commenters fail to note that the court in *Lewis* also reasoned that review of the racetrack was warranted because there had been a significant change in the scope of use since the racetrack was originated. With respect to DCPP, there has been no change in scope of operations since the plant originated, nor will the Proposed Project cause any change in scope or operations. The Proposed Project would merely continue the status quo as authorized under the original operating licenses.

Further, in *Bloom v. McGurk*, 26 Cal.App.4th 1307, 1311 (1994), the court upheld an agency's reliance on the existing facilities exemption even though (unlike the case here) no prior environmental review had been conducted of the facility. Distinguishing *Lewis,* the court reasoned that the nature of ongoing operations must be determined as of the time of the agency's action rather than at the time CEQA was enacted. *See*, 26 Cal.App.4th at 1315 ("We presume that thousands of permits are renewed each year for the ongoing operation of regulated facilities, and we discern no legislative or regulatory directive to make each such renewal an occasion to examine past CEQA compliance at every facility built in the last 24 years.").[4] The court noted that its conclusion was consistent with previous cases requiring that potential impacts be examined in light of the environment as it exists when a project is approved. *Id.* at fn. 3.

The scope of environmental review in the Draft EIR is supported by CEQA principles. The exemption cases presented in comments either do not apply because no exemption is at issue here, or can be distinguished because prior environmental review was indeed undertaken in connection with the approval of the power plant and its operations to the years 2021 and 2025. In any event, the *Bloom* case makes it clear that even when no CEQA review has been conducted on an existing facility, the determination of whether a project proposing to modify that facility (such as the project at issue here) would have a significant effect on the environment is made based on the existing environmental conditions.

C. The EIR Correctly Analyzes Environmental Conditions in 2013/2014 as the No Project Alternative.

A number of comments received by the CPUC state that the baseline for purposes of EIR analysis should be, or include, the potential scenario that DCPP may be forced to shut down in approximately 2013/2014 if the steam generators are not replaced. However, under the EIR, the potential impacts associated with not approving the project, i.e., the likelihood that the plant would cease operations in 2013/2014 if the steam generators were not replaced, is evaluated as the No Project Alternative. This discussion attempts to clarify why that distinction is correctly drawn under *CEQA Guidelines*, so that the baseline and the No Project definitions are not identical in this instance.

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[4] *See*, *also*, 26 Cal.App.4th at 1314: "[I]t would derogate the brief statute of limitation for challenges to agency actions under CEQA to construe the [existing facilities] exemption so as to make a facility established in 1971, and operated without any change thereafter, initially subject to CEQA by renewal of a permit in 1994 . . . The time to contest approvals for the establishment of IES's facility in 1982 or the addition of the microwave unit in 1990 had expired long before the filing of appellant's petition."

CEQA provides that the No Project Alternative should discuss the environmental impacts that are reasonably likely to occur if the project is not approved. *CEQA Guidelines* §15126.6(e)(2) explains that the No Project Alternative consists of existing conditions, i.e., the baseline, *plus* "what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services."[5] In *Planning & Conservation League v. Department of Water Resources*, 83 Cal.App.4th 892, 911 (2000), the court similarly stated that "[t]he existing conditions supplemented by a reasonable forecast are characterized as the no project alternative."

In accordance with these authorities, Section D.1.2.3 of the Draft EIR provides the following summary of the No Project Alternative:

> *The No Project Alternative represents a continuation of current environmental conditions, with the foreseeable closure of DCPP [i.e., the Diablo Canyon Power Plant], forced by deterioration of the steam generators. Because the original steam generators would not be replaced, they would likely need to be taken out of service sometime after approximately 2013 or 2014, and DCPP would likely be shut down before the NRC license expiration dates. The surroundings would experience beneficial environmental effects by shutting down the routine operation of DCPP, most notably in the areas of marine biological resources and public safety.*
>
> *With regard to consequences of shutting down the DCPP facility, power generated by DCPP would need to be replaced and modifications to the state-wide transmission system would be needed. A range of replacement generation (including renewable energy sources and demand-side management or conservation) and transmission solutions is considered.*

CEQA Guidelines §15126.6(e)(1) also provides that "[t]he no project alternative analysis is not the baseline for determining whether the Proposed Project's environmental impacts may be significant, unless it is identical to the existing environmental setting analysis which does establish that baseline [citing *CEQA Guidelines* §15125]."[6] (emphasis added) The EIR reflects both CEQA principles: one, that the No Project Alternative analysis is only the same as baseline if it is identical to the existing environmental setting; and two, that the No Project Alternative reflects existing setting plus what is expected to happen if the project is not approved.

A typical situation where the baseline and the No Project Alternative analysis are likely to be the same for purposes of assessing impacts is in the case of an application to construct a new facility, such as a new power plant or transmission line. In that situation the existing setting where the applicant proposes to build is free of existing structures. Similarly if the project is not approved, the setting would be the same, i.e., free of structures. Thus, for purposes of assessing potential impacts, the baseline and No Project Alternative are identical. In contrast, the existing environmental setting for the proposed steam generator replacement project is an operating nuclear generating facility. That is the baseline. The No Project Analysis reflects that baseline, plus anticipated plant shut down if the Proposed Project is not approved. By definition under CEQA the two are not identical. Accordingly, the EIR correctly draws that distinction for purposes of analyzing impacts.

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[5] *See*, *also*, *CEQA Guidelines* §15126.6(e)(3)(C) (stating that the lead agency should "project[] what would reasonably be expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services.").

[6] As noted above, *CEQA Guidelines* §15125 states that the baseline constitutes the environmental conditions in the vicinity of the project as they exist at the time the NOP is published.

The Draft EIR does disclose and provide the relevant information to the public and to the decision-makers such that an environmentally informed decision can and will be made with respect to the steam generator replacement project. The EIR provides ample information such that the decision-makers could choose to implement the No Project Alternative if its impacts are preferred to those associated with the project. See, e.g., *CEQA Guidelines* §15126.6(e)(1) ("The purpose of describing and analyzing a No Project alternative is to allow decisionmakers to compare the impacts of approving the Proposed Project with the impacts of not approving the Proposed Project.").

In summary, the baseline in the Draft EIR is properly established as the existing environmental conditions at the time the NOP is published. This includes an operating power plant, licensed to operate through 2021 and 2025. Applicable CEQA principles do not support deviating from the existing setting definition of baseline to use an alternative baseline urged by the commenters here. The possibility that the Diablo Canyon Power Plant would be forced to close if the project is not approved and the likely environmental impacts associated with that action are properly presented and analyzed as the No Project Alternative.

Master Response MR-2: NRC License Renewal

A. Introduction

A number of comments state that the EIR does not contain adequate discussion of possible future relicensing of the Diablo Canyon Power Plant (DCPP) and related study of the potential environmental impacts attendant to plant operation beyond 2021-2025 when the current license terms end. These comments rely primarily on *Laurel Heights Improvement Association v. Regents of the University of California*, 47 Cal.3d 376 (1988) for the proposition that an EIR must include an analysis of the environmental effects of future expansion or other action if it is a reasonably foreseeable consequence of the initial project.

As explained below, the facts in the present situation differ substantially in key aspects from those in *Laurel Heights*. Therefore, the requirement to assess the impacts of a later action does not apply to the CPUC's preparation of the EIR for the proposed steam generator replacement connected to PG&E's application for cost recovery and rate approval.

The *Laurel Heights* court held that an EIR must include an analysis of a future expansion if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will likely change the scope or nature of the initial project or its environmental effects. Neither point, however, has been met in the present case.

First, it is true that replacement of the steam generators could make it more likely that DCPP is functionally capable of operating beyond the current license term, and even that the overall investment needed to accomplish the project in conjunction with a utility's normal tendency to continue as a working enterprise would suggest to an observer that relicensing is reasonably foreseeable. However, as explained in more detail below, under the legal standard applicable to CEQA for assessing what is a "reasonably foreseeable consequence," it is premature to draw a conclusion that relicensing approval will be a consequence of this project. In particular, a relicensing decision is not foreseeable because the time for submitting an application with the NRC for plant relicensing is at least 15 years away and evaluation of information necessary to submit such an application is only in the preliminary feasibility stage. Assessment of future impacts associated with a possible later relicensing project is also not warranted as a foreseeable consequence because under *Laurel Heights* relicensing is not a crucial element without which the proposed steam generator replacement project cannot go forward.

Second, a future relicensing of the plant would not change the scope or nature of the current Proposed Project or its potential environmental effects. The scope of the Proposed Project is to replace the steam generators such that DCPP is assured of being capable to operate through the end of the current license terms. PG&E has requested rate approval through the current license term to recover the costs of the project. Future relicensing would not change the purpose or scope of the current project.

Another key difference between the present situation and the *Laurel Heights* line of cases is that the possible future action here, relicensing of DCPP, is under the exclusive jurisdiction of a separate federal government agency, the NRC. The CPUC has no authority over a relicensing review or determination. Accordingly, while one might presume that the steam generator replacement would help enable relicensing, the situation does not meet the "reasonably foreseeable consequence" standard under CEQA to warrant expansion of the EIR.

Finally, while the EIR does discuss cumulative impacts, possible future relicensing is not an action that should be identified as a cumulative project under CEQA because it is not yet close to being an actual proposed project and no environmental review has been commenced. Even if relicensing were to be considered a project warranting discussion in the EIR as having potential cumulative impacts, the general discussion contained in Section G of the EIR is more than sufficient to comply with CEQA requirements for the depth of discussion afforded cumulative analysis. *Laurel Heights* supports that the type of analysis that is in Section G is the level of analysis required by CEQA.

B. Laurel Heights Decision

In *Laurel Heights*, the University of California at San Francisco (UCSF) proposed the purchase and use, as a biological research center, of an office building in a residential neighborhood. This center was to be approved in two stages. UCSF limited its environmental review to the first stage covering the University's use of one area within the office building even though there was "credible and substantial evidence" in the record of the University's intent to eventually occupy the entire structure. The California Supreme Court held that the EIR was inadequate because, "it fails to discuss the anticipated future uses of the new facility and the environmental effects of those uses." (47 Cal.3d at 397). The Court found that specific statements by the university chancellor and a dean describing plans for a bio-medical research facility within the Laurel Heights building, as well as private correspondence by university officials describing the same plans, was sufficiently reliable evidence of the university's future plans. Indeed, the Court noted that, "The draft EIR acknowledged that UCSF will occupy the entire Laurel Heights facility when the remainder of the space becomes available." *Id.* at 396.

The *Laurel Heights* court established a two-pronged test for determining when a general analysis of future actions should be included in a project EIR. The court stated that "an EIR must include an analysis of the environmental effects of future expansion or other 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 project or its environmental effects. Absent these two circumstances, the future expansion need not be considered in the EIR for the proposed project." *Id.* at 396. The court went on to say that the standard it articulated "gives due deference to the fact that premature environmental analysis may be meaningless and financially wasteful." *Id.* Thus, it is clear that an EIR must include analysis of a future project only if both prongs of the *Laurel Heights* test are met. In *Laurel Heights,* the EIR was insufficient since the future action met both prongs of the test. The University's future plan to occupy the entire building was a reasonably foreseeable consequence in light of the evidence indicating that it intended to do so. Further, such an action, which would increase the research uses of the building from 100,000 square feet to 354,000 square feet, was found to be an obvious change in the scope of the project.

1. Relicensing is not a Reasonably Foreseeable Consequence of the Steam Generator Replacement Project and Therefore, the First Prong of the Laurel Heights Test is not met.

a. The Potential Later Action of Relicensing DCPP is not a Reasonably Foreseeable Consequence of the Initial Steam Generator Replacement.

Under the first prong of the *Laurel Heights* test, the EIR for the proposed steam generator replacement project should evaluate the environmental impacts of possible future DCPP relicensing, if relicensing is a foreseeable consequence of the proposed steam generator replacement. Relicensing and DCPP operation beyond 2021-2025 is not a reasonably foreseeable consequence of the CPUC's action in the current proceeding because relicensing is not caused by, or a consequence of, generator replacement under the legal standards applicable to CEQA review for drawing such a conclusion.

It is true that relicensing may certainly follow generator replacement and may be more likely because the plant would be functionally more capable of operating beyond 2021-2025 if the Proposed Project is approved. Similarly a lay observer may conclude that relicensing would be somewhat predictable given the overall investment associated with the steam generator replacement project and the utility's normal tendency to continue operating an existing enterprise or plant such as DCPP. Nevertheless, to be a foreseeable consequence under *Laurel Heights*, a future action must possess a greater degree of tangible legal certainty than "more likely." This situation involving a significant attenuation in time between two separate actions, the uncertainty of the utility's future decisions, the uncertainty of the NRC's future decisions as well as it's exclusive jurisdiction over relicensing, does not satisfy the CEQA standard for reasonably foreseeable consequence so as to warrant expansion of the EIR analysis.

In determining that the University's plan to occupy the entire building was "reasonably foreseeable," the *Laurel Heights* court said that UCSF had "either made decisions or formulated reasonably definite proposals." *Id.* at 397. By comparison, PG&E here has not decided to pursue license renewal or formulated any definite proposals to do so. PG&E has reported that it has completed only a preliminary feasibility assessment of relicensing that recommended a more comprehensive analysis should be taken that will take 2–3 years to complete. This analysis would be prepared as part of a License Renewal Feasibility Project. PG&E has not yet initiated this Feasibility Project. (Letter from J. Wesley Skow, Latham and Watkins to Nicholas Procos, CPUC, November 8, 2004). Consequently, there is no decision or reasonably definite proposal for a relicensing application as required under *Laurel Heights* from which to satisfy the test that relicensing is a reasonably foreseeable consequence of replacing the steam generators.

b. Future Relicensing is Only in the Preliminary Feasibility and Planning Stages and Therefore Would be Exempt From CEQA at This Time.

Possible future actions that are in planning or feasibility stages do not trigger the need for CEQA review. Section 15262 of the *CEQA Guidelines* states that, "A project involving only feasibility or planning studies for possible future actions which the agency, board or commission has not approved, adopted, or funded does not require the preparation of an EIR." *CEQA Guidelines* §15262. In interpreting *Laurel Heights*, subsequent cases have concluded that projects that are only in the preliminary planning stages — such as the relicensing action at issue here — do not rise to the level of being a reasonably foreseeable consequence of the underlying project and thus need not be analyzed in the EIR.

Certain commenters quote the *No Oil, Inc. v. City of Los Angeles,* 13 Cal.3d 68 (1974) case for the concept that the impacts of possible future oil development should be assessed in an initial EIR for oil exploration activities. These commenters claim that the issue in *No Oil* was framed 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.* at 77. This "framing" of the issue, however, was not actually used in the *No Oil* decision. In fact, the court declined to reach a decision as to whether future commercial production should have been covered in the EIR, stating "we need not decide whether the trial court erred in limiting the scope of inquiry to exclude consideration of the commercial production." *Id.* at 78. The language quoted by these commenters, therefore, was not a holding of the decision and was merely dicta. *No Oil* does not support a conclusion that the EIR for the steam generator replacement project should assess a possible future relicensing. The *Laurel Heights* decision later noted that in *No Oil,* "whether commercial oil production would ever occur was entirely speculative." 47 Cal.3d at 396.

Unlike in *No Oil*, later court decisions have actually come to conclusions on whether future projects in planning stages need to be fully addressed in initial EIRs. For instance, the issue of whether an initial project EIR should assess the impacts of a project in planning stages was decided in *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland*, 91 Cal.App.4th 1344, 1358 (2001). The court in that case considered whether it was necessary to include analysis of a potential future runway extension as well as a new runway and a new taxiway in an EIR covering an airport development plan. *Id.* at 1358. In *Berkeley Keep Jets*, the court held that in analyzing the airport development plan, the EIR need not consider a long range plan to add the additional runway that was merely in the feasibility stage. Referring to *CEQA Guidelines* Sections 15262 and 15378, the court held, "the fact that the Guidelines refer to projects to be undertaken confirms that it is intended to apply only to project components that an agency is proposing to implement. It does not extend to preliminary plans, feasibility studies or contemplated development the agency is not proposing to approve or undertake." *Id.*

Berkeley Keep Jets addressed the same issue that is presented by PG&E's application involving steam generator replacement — whether the impacts from a future project in a preliminary planning phase should be assessed at an earlier stage. The *Berkeley Keep Jets* decision held that the scope of an initial EIR should not cover future projects in feasibility or early planning stages. See, e.g., 91 Cal.App.4th at 1362. "The mere fact that a lead agency acknowledges that it contemplates such a long range goal is not, by itself, sufficient to conclude that it is a reasonably foreseeable consequence of the initial project." (quoting *Laurel Heights*, *supra* at 396.) *See, also, Id.* at 1362.

Another decision addressing the *Laurel Heights* test and citing *CEQA Guidelines* Section 15262 has similarly concluded that an EIR need not address future projects in feasibility or early planning stages. In *Pala Band*, 68 Cal.App.4th 556, the court upheld a negative declaration for a countywide integrated waste management plan against claims that the document should have included analysis of the impacts of developing a landfill at a particular site identified in the plan, i.e., Gregory Canyon. The court held that, "[b]ecause the proposed potential landfill sites, identified in the siting element are only 'tentatively reserved,' there is nothing in the administrative record to establish it is reasonably foreseeable at the current planning stage that any of the sites will actually be developed." *Id.* at 575.

The Proposed Project and the EIR are similar to the cases cited above because PG&E's current activities in considering whether to renew its license are also long range planning processes. While replacement of the steam generators may make PG&E's eventual license renewal more likely, like the future runway in *Berkeley Keep Jets* and the future landfills in *Pala Band,* relicensing is only in preliminary feasibility stages. In these cases, later related projects that were not proposed were not required to be included in the initial project scope. Similarly, here there is no evidence that PG&E's current early planning initiated for plant relicensing has led to a commitment or a specific proposal. As noted above, PG&E estimates that it would take at least 2-3 years of further studies to make a preliminary decision as to whether it would pursue license renewal. For these reasons relicensing is not considered a reasonably foreseeable project in the EIR for the proposed project.

c. The Current License Period is the Relevant Time Period for Assessing Impacts, not the Possible Life Span of the Equipment.

The Draft EIR properly assesses the impacts of the steam generator replacement within the time period of the existing regulatory licenses for the plant. Certain commenters cite *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d 692 (1990), for the proposition that the EIR must include operation of the entire plant beyond the existing NRC licenses, which expire in 2021 and 2025. In *Kings County*, a power generating facility was operating under a 20-year power sales agreement. From an engineering perspective, the facility had a realistic operating period of 30 years. The court concluded that CEQA review of the plant's impacts was properly based on the realistic 20-year power sales contract period rather than on the 30-year expected life of the equipment. Commenters cite *Kings County* for their contention that because the replacement generators could operate past the current license period, the potential for plant operation past the current license period would be made more likely. The court in *Kings County*, however, reached just the opposite conclusion in holding that the expected life of operating equipment was not determinative where contractual, regulatory factors limited the facility to a shorter operating period.

The court in *Kings County* did mention that there were uncertainties of contract renewal between GWF, the power plant owner, and PG&E, the other party to the power sales agreement. This factor, however, was not as important to the *Kings County* court as the fact that the contract period was the correct period for review; in fact, the court relied almost exclusively on the existence of the contract period to support its conclusion that operating equipment life is *not* the determinative factor. The court stated that, "From our review of the record, we conclude although the facility may have the capacity to operate for 30 years, there is no credible and substantial evidence GWF plans to operate the project beyond the 20 year life of the PG&E contract." *Id*. at 739.[7] As in *Kings County*, the expected life of the operating equipment at the plant in the present case is not the determinative factor regarding CEQA analysis; instead, the existing NRC license period is the correct time frame.

d. Relicensing is not a Crucial Element of the Replacement of the Steam Generators.

Where a future action is not a crucial element to approval and operation of a proposed project, that future action does not need to be discussed in the Proposed Project EIR. In *San Joaquin Raptor v. County of Stanislaus,* 27 Cal App. 4th 713 (1994), the Court of Appeal found an EIR project description inadequate for a residential development proposal. The court found that a separate project that would support the residential development — a sewage treatment plant — should have been assessed in the same document. *Id*. at 729-734. The court in *San Joaquin* developed a test to determine whether analysis of a later, related project is required. The test is whether the later expansion or action is "a crucial element without which the proposed project cannot go forward." *Id*. at 732. The *San Joaquin* court logically found that the approval of a sewage treatment plant was indeed crucial to the feasibility of the proposed residential development. The court analogized the "crucial" sewage treatment plant to a later water supply project which was necessary for an initial mining operation considered in *Santiago County Water Dist. v. County of Orange*, 118 Cal App. 3d 818 (1981). To meet the *San Joaquin* test, therefore, the possible future action in the present case — relicensing — would have to be a crucial element

[7] See also *Selkirk Conservation Alliance v. Forsgren*, 336 F. 3d 944 (9th Cir. 2004), where the Ninth Circuit held that under NEPA, the federal law analogous to CEQA, a state license time period was the appropriate temporal limit for an Environmental Impact Statement. In *Selkirk*, the court pointed out that it was significant that the project proponent had not made any requests for extension of its logging permit and that, therefore, the Federal agency could limit its review to the period in which the logging was currently permitted by the State of Washington.

without which the steam generator replacement project could not go forward. This is simply not the case. PG&E's application states that the purpose of the Proposed Project is to enable DCPP to run under current NRC license terms until 2021 and 2025 and cost-effectiveness for the Proposed Project is tied to the current license term. Accordingly, there is no indication that relicensing is crucial to the need for the current project or the steam generator operation during the current license term.

Other cases help illustrate instances where the later action is not crucial for approval of the Proposed Project and therefore, need not be analyzed. For example, in *National Parks*, 42 Cal.App.4th 1505, the court rejected claims that an EIR for a regional solid waste landfill was inadequate for failing to analyze the impacts of solid waste transfer stations that would sort, recycle, and compact the solid waste before sending it to the landfill. The *National Parks* court used the *San Joaquin* test, but distinguished the facts of the *San Joaquin* and *Santiago* cases in deciding that the transfer stations were not crucial elements of the initial project. *Id.* at 1520. In the same way that the solid waste transfer stations in *National Parks* were not found to be crucial elements of the landfill decision, relicensing is not a crucial element of a CPUC decision on the proposed steam generator replacement project. The CPUC's decision in this proceeding centers on whether to authorize the costs of and rate recovery for the proposed project. The decision is limited by the CPUC's authority over nuclear generation facilities, which does not include regulation of plant operations. In order for a later action, relicensing, to be a crucial element in the CPUC rate setting/steam generator replacement decision, it would somehow have to affect that decision. As explained above, that connection does not exist.

A similar approach was taken in *Dry Creek Citizens Coalition v. County of Tulare*, 70 Cal.App.4th 20 (1999), in which the court, describing the crucial element factor in *San Joaquin* and *Santiago*, explained that "Those cases involved EIRs which omitted an integral component of a Proposed Project from the project description." This integral element test reinforces that used in *San Joaquin* and *National Parks*. Relicensing is not crucial, nor is it an integral component to replacement of the steam generators. Even more recently, in *Berkeley Keep Jets, supra*, the court held that long range plans for runway expansion were not functionally linked to the proposed airport redesign and therefore, the runway projects were not necessary for completion of the airport development plan. As the court noted, "the ADP [airport development plan] does not depend on a new runway and would be built whether or not runway capacity is ever expanded." *Id.* at 1362.

The scope of the EIR for the steam generator replacement project relies on the standards set by these cases. These cases establish that where the later project is not a crucial or integral element of the proposed project, it need not be included in the EIR analysis as a reasonably foreseeable project. A potential future DCPP relicensing decision does not meet the crucial element or integral component tests of the cases because in this instance DCPP is already licensed and the generators can be replaced and operated independent of later relicensing. Further, it is proposed that the new generators and project costs will be fully paid for (such that the project will serve its independent purpose) during the existing NRC license period. For these reasons, future relicensing is not a crucial element to operation of the generators and need not be explored in this EIR. The EIR does note, however, that any relicensing application should receive environmental consideration. If and when PG&E applies for license renewal, NRC as the agency with exclusive jurisdiction over the relicensing function will conduct all applicable environmental review.

2. Relicensing Would not Change the Scope or Nature of the Proposed Project, Therefore, the Second Prong of the Laurel Heights Test is not met.

Under the second prong of *Laurel Heights,* the EIR for the proposed steam generator project should evaluate the environmental impacts of possible DCPP relicensing if relicensing would change the nature or scope of this project or its environmental effects. In *Laurel Heights*, later expansion of the University's conversion of the office complex was held to be a change in the scope of the initial project that would plainly implicate environmental effects. The CPUC's decision in this case, is not comparable to the UCSF decision process in *Laurel Heights*. In that situation, UCSF was plainly contemplating a two-staged development project. The CPUC action that is reviewed in the EIR is limited to deciding whether PG&E may charge ratepayers to compensate PG&E for its costs in replacing the steam generators at the plant.[8] This CPUC ratemaking decision is not related to possible future relicensing in terms of either cost recovery or plant operations. The rate setting as proposed would fully compensate PG&E for the costs of the project within the current license period. The CPUC has no jurisdiction or approval authority over relicensing or plant operations. There is no suggestion that the scope of the CPUC's rate recovery decision or the scope of the actual replacement activity itself would change whether relicensing does or does not occur.

Further, relicensing would not change the effects of the replacement steam generator project, which are fully evaluated in the EIR. These effects relate to the actual transportation, construction and disposal related to steam generator replacement. There is no later stage that would change the scope or nature of the replacement steam generator project or its environmental effects. In contrast, UCSF acknowledged in its Laurel Heights EIR that it was going to expand the facility and change the scope of its initial project.

C. Relicensing is Under the Exclusive Jurisdiction and Control of a Federal Agency; the CPUC Lacks Any Authority Over Relicensing.

In its discussion of the methodology for environmental analysis, the EIR for the Proposed Project acknowledges the limitations of state-level review imposed by federal jurisdiction over nuclear power plant facilities. (See Draft EIR Section D.1) Several comments received by the CPUC appear to disagree with those limitations, and in particular ask that in this decision the CPUC impose mitigations and/or other requirements related to plant operation and safety that would be expected to arise in a relicensing scenario.

The CPUC decision involving rate recovery for replacement of the steam generators is a distinct regulatory process from NRC relicensing of the nuclear generating facility itself. This distinction is important for two reasons. First, the possible future relicensing would be done by a different agency and the standard for determining when review of a future project is warranted under *Laurel Heights* has never been applied to multiple agency situations. Second, the federal government, not the State of California, has exclusive jurisdiction over regulating the operations and operating life of the facility. The CPUC is preempted from relicensing the plant.

Laurel Heights and its progeny has never been extended to a different agency approval context. Although the *Laurel Heights* decision did not specifically limit its two-prong test to a single agency that was proposing both the initial and future actions, it and nearly every case that relied on it involved agency

[8] PG&E's application is before the CPUC at this time only because it seeks advance rate recovery for the costs of the proposed project. PG&E is not otherwise required to seek independent approval for the steam generator replacement itself under the California Public Utilities Code.

approval of an initial action plus related future actions that would be approved by the same agency.[9] In particular, commenters cited the following three cases regarding CEQA's requirements for assessing the impacts of future related projects: *Laurel Heights*; *No Oil*; and *Kings County*. All three cases involved the same agency permitting both initial and future projects: in *Laurel Heights,* the University of California; in *No Oil,* the City of Los Angeles; and in *Kings County,* the City of Hanford. This factor does not exist in the present situation. In the present situation, the CPUC has authority to approve rate recovery for the steam generator replacement project, however only the NRC has authority to approve the relicensing of the nuclear generating facility and its operations.

The CPUC has included a general discussion of relicensing in the EIR for the Proposed Project (see Section E below). However, only the NRC is charged with regulating plant operations and can impose mitigation measures related to relicensing issues that would not be considered for another 15 years. The rationale for limiting the responsibilities for review of future projects serves a realistic function. If there were no limitation, agencies with varying discretionary authority could be forced to try to impose mitigation measures on projects that are under the jurisdiction of a completely different agency to impose and monitor. As emphasized by *CEQA Guidelines* Section 15040(b), CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws.

In the recent case *Sierra Club v. West Side Irrigation Dist.*,128 Cal.App.4th 690 (2005), the court confirmed this approach to CEQA. In *West Side*, the Sierra Club alleged that separate water districts violated CEQA by using separate negative declarations instead of one EIR to analyze the impacts of separate water transfers to the City of Tracy. The court rejected the plaintiff's contention that all the water transfers must be evaluated in the same CEQA document. The court stated that, "The rule prohibiting segmentation of a CEQA project into smaller projects does not apply here because the assignments are two separate projects independent of each other. The assignments were approved by different independent agencies. The initial studies stated the assignments were not interrelated and could be implemented independently of each other. Neither was contingent on the other." *Id*. at 230.

In *National Parks*, the court rejected claims that an EIR certified by Riverside County for a regional solid waste landfill was inadequate for failing to analyze the impacts of solid waste transfer stations that would sort, recycle, and compact the solid waste before sending it to the landfill. While Riverside County approved the landfill, other local agencies would bear the responsibility for permitting later transfer stations. As the court noted, "Applicable land use approvals are within the responsibility and jurisdiction of other public agencies . . . ." *Id*. at 1518. This separate agency licensing was clearly a factor that the court relied on in not requiring Riverside County to analyze the later projects. Similarly here, relicensing would be within the responsibility and jurisdiction of another public agency, the NRC.

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[9] In *City of Santee v. County of San Diego*, 214 Cal.App.3d 1438 (1989) an EIR for a temporary county jail facility was inadequate because it did not evaluate the impacts of long-term use; those impacts were a reasonably foreseeable consequence of the initial project because the probable need for county jail facilities was projected to last longer than the temporary period set forth in the project description. The County operated and approved all expansions in the jail facility. In *San Joaquin Raptor,* 27 Cal App. 4th 713, the Court of Appeal found an EIR project description inadequate for a residential development proposal. The court found that a sewage treatment plant to support the development that would also be approved by San Joaquin County should have been assessed in the same document. *Id*. at pp. 729-734. In *Pala Band*, 68 Cal.App.4th 556, the court upheld a negative declaration for a countywide integrated waste management plan against claims that the document should have included analysis of the impacts of developing a landfill in Gregory Canyon. Both projects were to be approved by San Diego County.

Furthermore, many of the cases concerning whether a future potential project must be considered in an earlier project EIR involved public agency projects where the public agency was *both* the CEQA lead agency and the project proponent, and had expressed some intentions about its future actions. In the present case, the CPUC is not the project proponent and therefore has not and could not express its own intentions about future actions over which it lacks control.

Observers have commented that under *Laurel Heights* and its progeny, "an analysis of foreseeable future activities is only required when they are a consequence of project approval due to actual commitments *of the agency* that will approve or carry out the project (such as the laboratories in Laurel Heights . . .)." (Emphasis added). Kostka, Stephen and Zischke, Michael, *Practice Under the California Environmental Quality Act*, October 2004. This limitation on environmental review of projects subject to other agencies' approval processes has also been emphasized in a corollary setting by the United States Supreme Court regarding the federal counterpart of CEQA, the National Environmental Policy Act (NEPA). In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Supreme Court similarly ruled that the scope of initial project NEPA documents does not have to include future projects that are approved by other federal entities and over which the initial permitting agency has no control.[10]

As opposed to the facts in most of the pertinent cases, the CPUC would not, and could not, approve relicensing of the plant. The State of California simply has no authority to grant a license for operating the plant and therefore has no future decision authority for which CEQA analysis or mitigation measures would be required. This authority lies exclusively with the federal government.

As further discussed in Master Response MR-3 (Jurisdiction), exclusive authority to extend the life of the plant and regulate its operations is held by the federal Nuclear Regulatory Commission. The Federal Atomic Energy Act states that the NRC "shall retain authority and responsibility with respect to the regulation of . . . the construction and operation of any nuclear power plant . . . ." 42 U.S.C. §2021(c). In *Pacific Gas and Elec. Co. v. State Energy Resources and Development Commission* 461 U.S. 190,212-213 (1983), the United States Supreme Court interpreted these provisions of the Atomic Energy Act and concluded the NRC regulates the entire field of nuclear safety and that state action is preempted in this area. The CPUC, then, cannot approve or carry out the relicensing. Any future relicensing of DCPP and its operations by the Nuclear Regulatory Commission would require environmental review under the National Environmental Policy Act. 43 U.S.C. 4322(2)(c).

D. Relicensing is Not a Cumulative Project under CEQA.

Some comments received on the Draft EIR state that it is flawed because it does not identify possible future DCPP relicensing as a future project under the cumulative impact analysis section. In accordance with CEQA, effects of other projects causing related impacts must be considered along with those

[10] In *Department of Transportation v. Public Citizen*, 541 U.S. 752, 124 S. Ct. 2204 (2004), the Department of Transportation had approved an environmental assessment for approval of a safety program for Mexican trucks coming across the border. After this approval, the President of the United States was to make a final determination regarding whether the Mexican trucks could operate in the United States. The environmental assessment did not address the impacts of the President's future action. The U.S. Supreme Court examined the issue of whether the Department of Transportation's (DOT) lack of control over the future action also limited its requirements to prepare an Environmental Impact Statement under the National Environmental Policy Act (NEPA). The Court decided that because the agency had no future control over future necessary approvals, NEPA did not require the DOT to assess the environmental impacts of that future action. The Court stated that, "Since [DOT] has no ability to prevent such cross-border operations, it lacks the power to act on whatever information might be contained in an EIS and could not act on whatever input the public could provide." *Id*. at 2216.

of the proposed project. These "cumulative impacts" of the project are analyzed in an environmental document based on one of two methods: (1) "a list of past, present and probable future projects," or (2) a summary of projections contained in an adopted general plan or related planning document. *CEQA Guidelines* §15130(b)(1).

NRC relicensing would not be considered a cumulative project under either method since relicensing is not yet close to being an actual proposed project and is not set forth within any pertinent planning document. CEQA instructs that in determining the scope of future projects or activities that must be reviewed, an agency should "limit its analysis of probable future projects to those which are planned or which have had an application made at the time the NOP is released for review." (Discussion following *CEQA Guidelines* §15130). Case law interpreting CEQA's cumulative impact requirements further suggests that the universe of probable future projects is limited to those actual, pending projects then under environmental review. In *San Franciscans for Reasonable Growth v. City and County of San Francisco*, 151 Cal.App.3d 61, 75 (1984), the Court stated that, "experience and common sense indicate that projects which are under review are reasonably foreseeable probable future projects."

The EIR for the Proposed Project is based on these considerations and thus does not treat plant relicensing by the NRC as a probable future project for cumulative impact purposes. As previously indicated, PG&E is still in the preliminary stages of determining whether to apply for license renewal (Letter from J. Wesley Skow, Latham and Watkins to Nicolas Procos, CPUC, November 8, 2004) and that time for application is still at least 15 years away. Under the CEQA cumulative project criteria, there is no application for environmental review pending nor is relicensing contained in a summary of projections in a general plan or other planning document.

Additionally, the EIR demonstrates the Proposed Project would not have impacts that would contribute to any cumulative impacts. Potential impacts associated with the project are mainly limited to those construction-related matters associated with physical replacement of the old generators with new ones. Those impacts are temporary and isolated in nature. Even if relicensing itself were to result in significant impacts, the environmental effects of the generator replacement project would in no way join (or cumulate) with such future effects. Thus, the Proposed Project would not result in any cumulatively considerable impact vis-à-vis the possible future relicensing.

E. Even if Relicensing Were Considered a Cumulative Project, the Level of Discussion Contained in Section G of the EIR is Adequate.

Section G of the EIR for the Proposed Project contains a general analysis of potential impacts that would be caused by possible future relicensing of the plant. Under the standard set by Laurel Heights, this level of analysis would be appropriate for discussion of future projects, even if they are deemed reasonably foreseeable and thus must be addressed in the cumulative analysis of an EIR for the initial project.

The *Laurel Heights* court found that the EIR was inadequate because it had *no* analysis of the later foreseeable proposed project. The court in *Laurel Heights* stated that the University "can provide meaningful data in the EIR as to the future activity at Laurel Heights and thus must do so." *Id*. at 398. Therefore, the court was addressing a situation where no analysis was done on a reasonably foreseeable future project that would alter the scope of the initial project. The court in *Laurel Heights* provided guidance for future compliance, stating that "UCSF should have discussed in the EIR at least the *general* effects of the reasonably foreseeable future uses of the Laurel Heights facility, the environmental effects of those uses and the currently anticipated measures for mitigating those effects." *Id*. The Court went on to say that, "We do not require prophecy. The Regents are not required by our deci-

sion to commit themselves to a particular use or to predict precisely what the environmental effects, if any, of future activity will be." *Id*. The court, then, did not require a full environmental assessment of future activities; instead, it required a general analysis including any relevant, meaningful data.

Despite the fact that DCPP relicensing does not meet the criteria for inclusion as a future cumulative project, the EIR for the Proposed Project has nevertheless attempted to provide the fullest possible disclosure by including a general analysis of possible relicensing that is commensurate with the level of analysis required in *Laurel Heights* for foreseeable projects.

Courts citing *Laurel Heights* have repeatedly and consistently held that such a general analysis is sufficient. For instance, in *National Parks*, *Rio Vista*, and *Christward Ministry v. County of San Diego*, 13 Cal.App.4th 31 (1993), a general analysis of reasonably foreseeable future projects was held sufficient for purposes of CEQA. In *Christward Ministry*, the court said that "when environmental review of one project includes *in general terms* discussion of the potential effects of an anticipated future project, which is still contingent on the happening of events that are currently outside the powers of the decision makers to cause, such an environmental impact report cannot be said to have failed to fulfill its purpose of providing adequate, complete, and good faith efforts at full disclosure of information about the effect the Proposed Project is likely to have on the environment." (emphasis added). *Christward Ministry*, *supra*, 13 Cal.App.th at 716. Environmental review of the proposed steam generator replacement is similar to the *Christward Ministry* situation because the EIR contains a general analysis of potential impacts related to a possible future relicensing, even though the events that will determine relicensing are outside the authority of the CPUC.

Section G of the EIR does discuss the possible environmental impacts of NRC relicensing. The Final EIR has expanded Section G, as requested by various comments, and has further discussed the impacts of possible relicensing. Section G also includes general discussion of possible mitigation measures that could be imposed to reduce the impacts of relicensing. Therefore, even if the future relicensing were characterized as a reasonably foreseeable consequence of the project, the EIR includes exactly the sort of general discussion required by *Laurel Heights* and its progeny of cases regarding the appropriate level of CEQA analysis for such future projects. Moreover, if and when the application for relicensing is submitted to the NRC, the appropriate level of environmental review pursuant to the National Environmental Policy Act would be conducted at that time. 43 U.S.C. 4322(2)(c). The EIR thus clearly comports in all possible manner with the requirements of CEQA.

Master Response MR-3: NRC vs. CPUC Jurisdiction

A. Introduction

The CPUC also received a number of comments on the Nuclear Regulatory Commission's (NRC) jurisdiction versus the CPUC's jurisdiction. Specifically, a number of comments requested that the CPUC consider and impose mitigation measures related to issues such as seismic design specifications, radiological waste disposal and transportation, accident safety, and potential terrorist attack safety issues. These matters, however, relate to DCPP operations over which the CPUC has no regulatory jurisdiction and which are also unaffected by the Proposed Project. Nonetheless, the EIR does provide decision makers and the public with general information relating to these issues (see Draft EIR Sections D.12 and E).

This Master Response MR-3 (Jurisdiction) aims to clarify that the CPUC is pre-empted by federal law from regulating DCPP operations and therefore has no authority to impose mitigation measures regulating such operations. As described in Section A.4 of this EIR, the NRC is an independent agency

established by the Energy Reorganization Act of 1974 to regulate the civilian use of nuclear materials. 42 U.S.C. 5841 *et seq*. The Atomic Energy Act, passed in 1954, sets out the Federal government's authority for regulating nuclear energy and safety. 42 U.S.C. §2011 et seq.[11] The NRC is responsible for oversight and licensing of all commercial power, research, and test reactors, as well as the use of nuclear materials in the United States. Specifically, the NRC has preemptive jurisdiction over state and local regulations regarding nuclear power plants, including radioactive hazards, safety issues, and spent fuel handling and storage. PG&E's operating licenses require it to comply with all NRC regulations that apply to the operations and activities conducted at its DCPP units, including the possession, use, and storage of nuclear fuel.

In contrast with the NRC's authority, the CPUC does not have an authority to regulate nuclear power plant operations relating to radioactive materials and spent fuel safety issues. The CPUC regulates privately owned telecommunications, electric, natural gas, water, railroad, rail transit, and passenger transportation companies. The CPUC oversees the regulation of investor-owned public utilities, including PG&E, and regulates utility service through setting rates and protecting utility customers from fraud.[12] The CPUC also has rate recovery authority regarding investor owned power plants in California.[13] While the CPUC does have jurisdiction related to operation and safety aspects of certain regulated utility facilities, it has no similar jurisdiction over nuclear generation facilities.[14] The CPUC's regulatory authority over the project consists mainly of authorizing PG&E's recovery of the costs associated with the proposed steam generator project. Project specific mitigation measures can be required only to the extent they do not directly effect areas subject to NRC jurisdiction.

The CPUC is the Lead Agency for CEQA compliance in evaluation of PG&E's Proposed Project and has fully and comprehensively evaluated the environmental effects associated with the Proposed Project and identified mitigation measures regarding all significant impacts as required under CEQA. The mitigation measures identified in this EIR can be imposed by the CPUC and none of these measures would be pre-empted by federal law. However, for informational purposes, this Master Response will explain why certain mitigation measures requested by commenters are pre-empted and instead may only be imposed by the NRC. This Master Response will also explain why pre-emption of the CPUC's regulation of ongoing DCPP operations also prevents the CPUC from imposing mitigation measures regarding such operations through its CEQA process.

B. The CPUC Lacks Any Authority Regarding Nuclear Safety Issues and is Pre-empted From Regulating DCPP Operations.

Exclusive authority to regulate the operations of the DCPP, including the possible future extension of the plant's life through relicensing, is held by the federal Nuclear Regulatory Commission. The federal Atomic Energy Act states that the NRC "shall retain authority and responsibility with respect to the regulation of . . . the construction and operation of any nuclear power plant . . . ." 42 U.S.C. §2021(c). In *Pacific Gas and Elec. Co. v. State Energy Resources and Development Commission*, 461 U.S. 190, 212-213 (1983), the United States Supreme Court interpreted this provision of the Atomic

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[11] The Energy Reorganization Act of 1974 divided the duties of the Atomic Energy Commission between the NRC, which regulates nuclear energy facilities, and the Department of Energy which conducts nuclear energy research. *See* 42 U.S.C. 5841 *et seq*.

[12] *See* Cal. Pub. Util. Code §§1-8301.

[13] *See* Cal. Pub. Util. Code §§360-379.6.

[14] *See* Cal. Pub. Util. Code §762, §768.

Energy Act and concluded that the NRC occupies the entire field of nuclear safety and that state action is pre-empted in this area. In *PG&E,* the utility brought an action challenging the statute imposing a moratorium on new nuclear plants in California.[15] The Supreme Court found that the moratorium was not pre-empted by federal law because of the state's avowed economic purpose in enacting it, which the Court found lies "outside the occupied field of nuclear safety regulation" *Id.* at 216. Where Congress has not explicitly pre-empted a state from acting in an area, state law is pre-empted where: (1) Congress intended the Federal government to occupy a field exclusively, and (2) where state law actually conflicts with federal law. *PG&E,* 461 U.S. at 203-204. Although the Court found that state regulation of power plants was not expressly pre-empted by the Act, it nonetheless found that such regulation is impliedly pre-empted based on Congressional intent. The Supreme Court found that Congress did intend that the federal government occupy the entire nuclear safety field.

The Court upheld the appellate court decision finding that the moratorium was not directed at radiation hazards and noted that states have been allowed to retain authority over the need for electrical generating facilities on economic grounds. *Id.* at 214-215. The Court contrasted such an economic-based statute with a statute aimed at regulating the operation of nuclear power plants. "[At] the outset, we emphasize that the statute does not seek to regulate the construction or operation of a nuclear power plant. It would clearly be impermissible for California to attempt to do so, for such regulation, even if enacted out of non-safety concerns, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation." To the extent that the CPUC were to regulate DCPP operations as part of the economic rate recovery action, its actions would clearly be impermissible as pre-empted by federal law, in accordance with the Court's decision in *PG&E*.

In later decisions, the Supreme Court and various federal circuit courts have repeatedly confirmed that state governments are flatly pre-empted from regulating safety and operational aspects of nuclear plants. In *English v. General Elec. Co*., 496 U.S. 72 (1990), the U.S. Supreme Court rejected a defendant's contention that federal law pre-empted state tort law stemming from complaints by whistle blowers. In so ruling, the Court reasoned that "for a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *Id.* at 85.[16] The state tort law in *English*, therefore, had no direct and substantial effect on nuclear power operations. Thus, it is well settled that state agencies, such as the CPUC, may possess economic regulatory power over nuclear power plants while such state agencies cannot regulate any aspects of nuclear power plant operation. Here, were the CPUC to address environmental and safety issues related to DPCC operation in the instant rate recovery action, as some commenters request, its actions would have a direct and substantial effect on plant operations in contravention of federal law.

This limitation on state authority was prescribed in detail in *The Skull Valley Band of Goshute Indians v. Leavitt,* 215 F. Supp 2d 1232 (D. Utah 2002). In *Skull Valley,* an Indian tribe and a private company that planned to operate a storage facility for spent nuclear fuel (SNF) on reservation lands brought an action for injunctive relief from operation of a number of Utah laws regarding management of the SNF facility. The State of Utah had passed laws attempting to regulate certain aspects of nuclear power

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[15] The Court's holding involved interpretation of the California state law provisions regarding facility and site certification of nuclear power plants. Pub. Res. Code §25500 *et seq*.

[16] *See also, Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 250-251 (1984), where the Court rejected the defendants' contention that federal law pre-empted state tort law regarding damages for conduct related to radiation hazards. The Court, citing *Pacific Gas*, held that state tort law is not based on safety and therefore does not enter the field of federal nuclear power plant safety regulation.

plants, including: (1) licensing for storage and transportation of SNF; (2) revoking limited liability for officers or directors of the SNF storage facility; (3) building roads in the area of a proposed facility; (4) requiring the counties to act to facilitate regulation of such a facility; (5) prohibiting the counties from providing services to such a facility. *See* 215 F. Supp. 2d at 1245-1250. Utah's state licensing scheme was found invalid and the court, citing *PG&E* and *English*, held that federal nuclear safety law pre-empted Utah from regulating plant operations relating to those regulatory areas mentioned above regarding transportation, storage and disposal of nuclear materials. *Id.* at 1247. The court stated that, "This state licensing scheme duplicates the NRC's licensing procedure in significant ways. Both licensing processes require an emergency plan, an *environmental report*, a safety analysis report and financial disclosure." *Id.* at 1246 (emphasis added). The *Skull Valley* decision, therefore, identified an environmental report and emergency plans as duplicating the NRC's licensing procedure. The *Skull Valley* decision leaves no doubt that state regulation of almost any area of nuclear plant operations is pre-empted by federal law because such regulation would affect radiological safety of nuclear plants. A CEQA environmental report prepared by the CPUC that required mitigation of environmental impacts from plant operation, radiological safety and emergency issues would similarly duplicate NRC's licensing procedure and thus be pre-empted by federal law.

The *Skull Valley* court was not alone in holding that state government regulations having a direct effect on nuclear plant operations are pre-empted by federal law. Decisions in various federal circuits have uniformly held that state governments may not establish themselves as parallel nuclear regulatory authorities with safety requirements over and above those of Nuclear Regulatory Commission.[17] The Ninth Circuit has likewise found that state regulation of nuclear safety is prohibited. *See Stokes v. Bechtel North American Power Corp.*, 614 F. Supp. 732 (D.C.Cal.1985). *Id.* at 741.

In sum, the U.S. Supreme Court has made it clear that states' regulatory authority over nuclear power plants is limited to economic and related matters and cannot overlap into plant operation and safety matters. If the CPUC were to regulate DCPP operational issues in its rate recovery decisions, it would be extending beyond its economic regulatory authority and impermissibly regulating plant operational and safety issues that lie solely within the province of the NRC. The CPUC, therefore, does not have authority to regulate DCPP operations in the present case.

C. Since the CPUC is Pre-empted from Regulating DCPP Operations, It Does Not Have the Authority under CEQA to Mitigate Impacts from Those Operations.

The CPUC has the authority to establish recovery costs regarding replacement of the generators, but only the federal NRC has authority to regulate radiological safety and related operational issues at DCPP. CEQA clearly limits agencies from imposing mitigation where the agency has no independent authority to do so. Since the CPUC does not have authority to make decisions regarding DCPP plant operations, it cannot expand its authority under CEQA to mitigate impacts from those operations.

As explained above, the CPUC has no authority to regulate DCPP operations and cannot impose mitigation measures for a project where the federal government occupies the entire regulatory field. CEQA, in fact, states that a public agency must impose mitigation measures to avoid or substantially lessen a project's significant environmental effects when it is "feasible" to do so. Pub. Res. Code §§21002, 21002.1(b).

[17] See, e.g., Northern States Power Co. v. Minnesota, 447 F2d 1143 (8th Cir. 1971), affd 405 US 1035 (1972); Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, 604 F Supp 1084 (1985, ED NY), affd 813 F2d 570 (2d Cir. 1986), Pennsylvania v. General Public Utilities Corp., 710 F2d 117 (3d Cir.1983).

One measure of feasibility is whether the agency has the legal authority to impose the measure and monitor its enforcement.[18] Further, *CEQA Guidelines* Section 15040(b) provides that "CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws." "The exercise of discretionary powers may take forms that had not been expected before the enactment of CEQA, but the exercise must be within the scope of the power." *CEQA Guidelines* Section 15040(d). As required by CEQA, the CPUC has fully identified the environmental effects associated with the Proposed Project and has identified feasible mitigation measures within the scope of its power that will lessen all significant impacts to a less than significant level.

The limits imposed by the above provisions are confirmed in case law, which makes it clear that agencies cannot use CEQA to expand their regulatory jurisdiction. In *Kenneth Mebane Ranches v. Superior Court*, 10 Cal.App.4th 276, 291 (1992), the court held that a flood control agency had no express or implied power to acquire property outside its jurisdiction by eminent domain to mitigate the environmental impacts of a flood control project. The court said that CEQA did not expand the flood control agency's eminent powers beyond those that it already held. *See, also, Corona-Norco Unified School Dist. v. City of Corona*, 13 Cal.App.4th 1577, 1587 (1993) (city lacks authority to impose school fees that exceed statutory limits on such fees).[19] The CPUC, like the flood control agency in *Kenneth Mebane Ranches,* must also operate within the scope of its power and cannot expand its powers to require mitigation for the operations of DCPP since, as noted above, it is pre-empted by federal law from regulating such matters.[20]

Although the CPUC has no jurisdiction to impose mitigation measures associated with nuclear safety issues, the EIR nonetheless includes an analysis of plant operation issues to provide full disclosure of potential environmental impacts and discuss possible mitigation measures that the NRC may choose to implement (See Sections D.12 and E).

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[18] *See, e.g., CEQA Guidelines* §15364 defining "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors."

[19] As discussed in Master Response MR-2 (License Renewal), the court in *Sierra Club v. West Side Irrigation Dist.*, 128 Cal.App.4th 690 (2005), held that one agency was not required to assess the impacts of a project authorized by a another agency. In *West Side*, the court held that separate water districts could use separate negative declarations to analyze the impacts of separate water transfers by various water districts to the City of Tracy. The court rejected the plaintiff's contention that all the water transfers must be evaluated in the same CEQA document. The court stated, "The assignments were approved by different independent agencies. The initial studies stated the assignments were not interrelated and could be implemented independently of each other." *Id.* at 699. The *West Side* holding further confirms that an agency's independent authority limits whether an agency must assess projects outside its jurisdiction.

[20] In other areas of CEQA, courts have found that CEQA does not apply where an agency does not hold authority over a project. In *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal.App.3d 259 (1987), a developer submitted building permit applications for construction of 26-story, 363,000 square foot office tower. The City of Los Angeles had determined that the building permits were ministerial and therefore the project was not subject to CEQA. The court overturned the City's decision, holding that the permits were discretionary because the city could require extensive changes through permit approval. The court noted that the lead agency's authority to require changes was a necessary prerequisite to determining if the CEQA process even applied to the project. "Thus the touchstone is whether the approval process involved allows the government to shape the project in any way which could respond to any of the concerns which might be identified in an environmental impact report." *Id.* at 267. In the case at hand, the CPUC is barred by federal law from regulating or "shaping" DCPP operations and thus, the CPUC could not impose mitigation measures regarding those plant operations.

Master Response MR-4: RWQCB Consent Judgment

There were a number of comments on the status of the Consent Judgment negotiated between PG&E and Regional Water Quality Control Board (RWQCB) staff, under guidance from the Attorney General's office. The Draft EIR states that the Consent Judgment provides permanent protection for 5.7 miles of near-shore marine habitat, funding for projects to enhance and protect marine resources, and other benefits.

DCPP Units 1 and 2 have current operating licenses until September 2021 and April 2025, respectively, and are considered part of the environmental baseline. The operation of DCPP under these licenses is considered part of the environmental setting (i.e., the baseline), and is not subject to review as part of this EIR process. The EIR provided information related to ongoing DCPP cooling water system issues (including the Consent Judgment — see Section D.3.1.5) in order to fully disclose environmental issues associated with the DCPP, which are part of the current baseline.

Section D.3.1.5 provides an overview of baseline issues associated with the DCPP cooling water system. The Attorney General's office negotiated a settlement with PG&E, which is defined in the Consent Judgment. Even though the Consent Judgment has not been authorized, issues associated with the existing DCPP cooling water system are considered part of the environmental setting (i.e., baseline) for the proposed steam generator replacement project.

Text in this Final EIR has been changed to reflect the latest information on the Consent Judgment. Currently, this Consent Judgment has not been approved by the RWQCB. According to Michael Thomas at the RWQCB, the Board Members have asked RWQCB staff for a status report to be submitted in September 2005. The RWQCB staff is looking for guidance from the Board on finalizing the Consent Judgment for the DCPP facility. The process of finalizing the Consent Judgment includes adopting the permit by the RWQCB and approval of the Consent Judgment by the court system.

The Draft EIR identified the beneficial effects of the No Project Alternative, a situation in where DCPP would cease operations before the end of the current license periods. Early shutdown of the cooling water system would stop marine organism impingement/entrainment and thermal plume effects. Regardless of the mitigation strategies identified in the proposed Consent Judgment, early shutdown of the DCPP cooling water system would result in a beneficial environmental impact on marine biological resources (see Section D.3.5.2 of the Draft EIR).