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November 8, 2004

Mr. Nicolas Procos
California Public Utilities Commission
c/o Aspen Environmental Group
235 Montgomery Street, Suite 935
San Francisco, CA 94104

Re: Comments of Pacific Gas and Electric Company on the Notice of Preparation of Environmental Impact Report for Application No. 04-01-009, Steam Generator Replacement Projects For Diablo Canyon Power Plant.

Dear Mr. Procos:

On behalf of Pacific Gas and Electric Company ("PG&E"), we submit these comments on the scope of the Environmental Impact Report ("EIR") to be prepared by the California Public Utilities Commission ("Commission" or "CPUC") for the Steam Generator Replacement Projects ("SGRPs" or "Projects") at Diablo Canyon Power Plant ("DCPP").

I. SUMMARY OF KEY POINTS

PG&E appreciates the work of the Commission Staff in completing the Notice of Preparation ("NOP") and welcomes the opportunity to submit these comments. At the outset, PG&E would like to reiterate its contention that the Commission's ratemaking proceeding does not trigger environmental review under the California Environmental Quality Act ("CEQA") or are excluded from CEQA review under statutory and regulatory exemptions.[1] Moreover, given that the Projects will create no significant unmitigable environmental impacts, CEQA does not require the preparation of an EIR in this case. For this reason, PG&E maintains that even if CEQA were to apply here, a negative declaration or a mitigated negative declaration would be the appropriate vehicle for satisfying the mandates of CEQA. Nonetheless, we provide these comments on the CPUC's plan to prepare an EIR for the SGRPs.

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1 For a complete analysis of the inapplicability of CEQA to the SGRPs please see PG&E's Opposition to Motion of San Luis Obispo Mothers For Peace, Sierra Club, Public Citizen and Greenpeace for Consideration of New Scoping Matters, filed June 7, 2004. By cooperating in this environmental review, PG&E does not waive its position that the SGRPs do not trigger CEQA review.

In these comments, PG&E raises the following important points for consideration by the Commission as it conducts environmental review in this case:

- Existing operations at DCPP constitute part of the environmental baseline that the Commission must use in assessing the environmental impacts of the SGRPs. CEQA requires that the environmental setting and the environmental baseline be captured as a snapshot in time as of the date that the NOP is issued. The Commission cannot, as some intervenors have suggested, recharacterize the project environmental baseline to eliminate existing DCPP operations at some point in the future.

- Existing DCPP operations are not part of the project description and do not constitute a project impact. Existing project operations through the life of DCPP's current Nuclear Regulatory Commission ("NRC") license have been approved by the NRC and this Commission and have undergone the environmental review required at the time of approval. Such approved, permitted and long-standing operations cannot be considered an impact of the SGRPs or part of the description of these Projects.

- The environmental impacts (both positive and negative) of not approving the SGRPs must be analyzed together as part of the No Project Alternative and the comparison of the No Project Alternative with the Project alternatives. The attempt by intervenors to force this analysis into the Project Description or Project environmental baseline violates CEQA.

- The possibility of seeking a renewal of the NRC license for DCPP is speculative and should not be analyzed in the EIR. PG&E has not decided to seek a renewal of the NRC operating license for DCPP. There is insufficient information available to support an analysis of license renewal either as a project impact or a cumulative impact. Should PG&E decide to seek license renewal in the future, all applicable environmental review would be conducted at that time.

- The NRC has *exclusive* jurisdiction over the management of radioactive material, and the design, operation, safety and security of nuclear power plants. Neither the Commission, nor any other state agencies or responsible, local or trustee agencies have the authority to set mitigation measures or require project changes associated with these preempted issues. Moreover, security and seismic issues unrelated to the SGRPs and instead associated with the ongoing operations of DCPP or the storage of spent nuclear fuel are unrelated to the Projects, constitute part of the existing environmental baseline, and are irrelevant to this CEQA process. They should be eliminated entirely from the Commission's review.

II. EXISTING OPERATIONS AT DCPP DO NOT CONSTITUTE PART OF THE "PROJECTS" BEING REVIEWED.

During public scoping meetings associated with the release of the NOP, certain intervenors argued that the EIR should describe the Projects as the "extension" of operations at DCPP from the point at which the old steam generators would fail until the end of DCPP's current license with the NRC. This argument mirrors earlier statements by the San Luis Obispo Mothers for Peace ("MFP"). In its Motion for Consideration of New Scoping Matters, filed on May 21, 2004 ("MFP Motion"), MFP claimed that the Projects called for the "extension" of operations at DCPP for "an additional 15 years."[2] At that time, and here again, intervenors claim that the SGRPs should be defined as "the operation of Diablo Canyon for an additional 15 years." MFP Motion at 5. This attempt to redefine the scope of the SGRPs is inconsistent with CEQA.

Even assuming *arguendo* that the replacement of existing steam generators at DCPP constitutes a "project" under CEQA, the existing ongoing operations at DCPP certainly do not. Under the CEQA Guidelines, the "term 'project' refers to the activity which is being approved." 14 Cal. Code Regs. § 15378(c). These continued operations are not the subject of any Commission approval in this case. As described below, these operations have already been approved by the Commission and the NRC. Therefore, the continuation of these operations should not be considered part of the Projects here or included in the Project Description section of the EIR.

In its Application, PG&E defined the Projects for which it seeks Commission approval to recover the costs of implementation. These Projects involve the delivery and installation of large replacement parts for DCPP's two existing generating units. As described in PG&E's Application:

> The Projects consist of two major overlapping phases for each of Unit 1 and Unit 2. The first phase is the design, construction and delivery of new steam generators with state of the art materials and design. . . . The

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2 Apparently, MFP's "15 year" claim was based on the erroneous assertion that DCPP will be forced to cease operations in 2008 or 2009 if the steam generators are not replaced, which is approximately 15 years before expiration of current license terms for DCPP Units 1 and 2. While we cannot know for sure when the old steam generators may fail, the best estimate was in PG&E's Opening Testimony, based on the "Monte Carlo" analysis performed by Strategic Decisions Group and degradation analysis provided by Dominion Engineering, Inc. Under that analysis, the most likely scenario for the shutdown of Units 2 and 1 due to tube degradation in the steam generators is 2013 and 2014 respectively, not 2008/2009. *See, e.g.*, PG&E's Opening Testimony at 1-7, 2-2, 2-35, 5-13. Based on this analysis, Unit 1 is expected to be forced to shut down 10 years before the end of its expected extended license term, while Unit 2 would be forced to shut down 12 years prior to the expiration of its NRC-approved license term.

> second major phase for each unit is the removal and storage of the existing steam generators from the containment building and the installation and testing of the new steam generators in the reactor coolant system.

PG&E's Application at 11. While the Projects consist of these needed maintenance activities, PG&E is not seeking Commission approval to perform these necessary repairs to DCPP for the simple reason that Commission approval is not required to conduct these activities. Rather PG&E is simply asking for Commission approval to recover in rates the costs associated with these maintenance projects. This approval focuses on whether the steam generator replacement is reasonable and prudent because it is cost effective and in the best interests of PG&E's customers.

Nothing in PG&E's Application or its description of the Projects requests or implicates an "extension" of PG&E's authority to operate DCPP, nor is any extension of that authority necessary. PG&E holds valid approvals from both this Commission and the Nuclear Regulatory Commission ("NRC") for the operation of DCPP. The Commission long ago approved a CPCN for each DCPP Unit. The Commission issued the CPCN for Unit 1 on November 7, 1967 and the CPCN for Unit 2 on March 25, 1969. *See* Decision No. 75471 (Mar. 25, 1969); Decision No. 73278 (Nov. 7, 1967). The CPCN's were conditioned on approval of operating licenses by the NRC. *See id.* The NRC issued two separate operating licenses for DCPP, one for each Unit. The Unit 1 operating license was issued by NRC on November 2, 1984, while the license for Unit 2 was issued on November 16, 1985. Unit 1 License No. DPR-80, Docket No. 50-275; Unit 2 License No. DPR-82, Docket No. 50-323. These NRC licenses authorize PG&E to operate Unit 1 until September 2021 and Unit 2 until April 2025.[3] Moreover, the required environmental review was performed prior to granting these licenses. In 1973, the U.S. Atomic Energy Commission, precursor to the NRC, conducted an environmental review under the National Environmental Policy Act ("NEPA") associated with granting the NRC licenses, an addendum to this environmental review document was issued in May 1976.

Given this history of state and federal approval and environmental review, the EIR cannot now reopen the question of DCPP's basic operations. Just because a power plant requires repair or replacement of parts to continue operations does not mean that there is a CEQA "project" consisting of "continuing operation" of the plant. In this case, the "projects" are just as PG&E has described them, the replacement of existing steam generators with new steam generators. Because PG&E currently has the authority to operate DCPP through 2021/2025, and has already undergone environmental review for these operations, any attempt to redefine the SGRPs as an extension of DCPP operations through this same time period is improper and inconsistent with CEQA case law.

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3 As discussed in PG&E's May 27, 2004 Revised Testimony Supporting PG&E's Application to Replace The Steam Generators in Units 1 and 2 of the Diablo Canyon Power Plant ("Opening Testimony") at 1-15, PG&E expects to obtain a three year "recapture" extension of the license term for Unit 1.

In *Committee For A Progressive Gilroy v. State Water Resources Control Board*, 192 Cal. App. 3d 847 (1987), the California Court of Appeal rejected plaintiff community group's attempts to redefine the operation of an existing water treatment facility as a new source of significant environmental impacts under CEQA. The court found that "the reestablishment of discharge requirements within the levels previously approved under CEQA was not a new project subject to a new EIR." 192 Cal. App. 3d at 863. As in *Gilroy*, the government approvals and environmental reviews concerning the normal operations of DCPP through its license terms "have long been final and cannot be challenged at this time." *Id.* Moreover, in *Gilroy* the court rejected the notion that the operations of the wastewater facility somehow became subject to CEQA again because the applicant had to take additional steps to make use of its previously permitted capacity. The court held that the "reestablishment of discharge requirements within previously approved levels" did not trigger a new environmental review of these operations. *Id.*

Moreover, as the Court of Appeal found in *Bloom v. McGurk*, 26 Cal. App. 4th 1307, 1314 (1994), the existing operations of a facility need not even have undergone environmental review originally to be immune from further impact analysis. Where, as in the case of DCPP, the statute of limitations for challenging the applicability of CEQA has run on the existing operations of a facility, a plaintiff may not reopen this set of operations to review in a subsequent CEQA challenge. Such an approach "would derogate the brief statutes of limitation for challenges to agency actions under CEQA . . . ." 26 Cal. App. 4th at 1314. As in *Bloom*, review and approval of the DCPP operations at issue here occurred decades ago. The EIR cannot now try to bootstrap a new review of basic DCPP operations onto the straightforward repair and replacement projects now before the Commission. CEQA will not allow it.

III. PROPER DESIGNATION OF THE CEQA BASELINE MUST CONSIDER EXISTING CONDITIONS AT DCPP.

Under CEQA, the baseline against which project impacts should be measured for any environmental analysis is "the existing physical environmental conditions in the vicinity of the project as they exist at the time the Notice of Preparation ["NOP"] is published, or if no [NOP] is published, at the time the environmental analysis is commenced, from both a local and regional perspective." CEQA Guidelines § 15126.2(a). *See also* CEQA Guidelines§ 15125(a) ("An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the [NOP] is published or if no [NOP] is published at the time environmental analysis is commenced"). These "existing physical conditions" provide the only proper standard for determining whether a project has significant environmental impacts. *See* CEQA Guidelines § 15126.2(a). "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." *County of Amador v. El Dorado County Water Agency*, 76 Cal. App. 4th 931, 952 (1999).

CEQA requires that existing DCPP operations be considered part of the existing "environmental setting" or environmental baseline for purposes of any environmental analysis of the SGRPs. Under CEQA, the environmental baseline provides the benchmark against which project impacts are measured for purposes of assessing the significance of any <u>changes</u> to the environment caused by the Projects. *See* Discussion Notes, 14 Cal Code Regs. § 15125 ("CEQA

Guidelines"). Because CEQA requires that the environmental setting be measured at the time that the environmental analysis commences, operations at DCPP must be considered as part of the existing baseline, not as a project impact. *See Save Our Peninsula Committee v. Monterey Bd. of Supervisors*, 87 Cal. App. 4th 99, 123 (2001) ("A baseline figure must represent an environmental condition existing on the property prior to the project.").

A. Intervenors Wrongly Argue That The Proper Baseline Is An Undeveloped DCPP Site.

The intervenors further confuse CEQA's mandates by arguing that the potential impacts from basic DCPP operations starting at the time the existing steam generators are predicted to fail until the expiration of DCPP's NRC license must be analyzed as project impacts. In essence, they argue that the EIR's environmental setting or "environmental baseline" should fluctuate; it should begin by assuming existing DCPP operations, but at the moment in the future when the existing steam generators are expected to fail, the baseline should be adjusted to assume the shutdown of DCPP. This approach would create an environmental baseline that shifts over time based on the occurrence of future events. This offers an impractical method for conducting environmental review and is inconsistent with the express requirements of CEQA.

First, the EIR cannot create an environmental baseline that fluctuates over time. With the physical environment constantly changing, the CEQA Guidelines recognize that the only way to accurately measure project impacts is to use a fixed environmental baseline. Based on this understanding and "in the name of avoiding the creation of a 'moving target,' the [California Resources] Agency chose to freeze 'existing conditions' at the time the NOP for an EIR is issued." Remy et al., *Guide To The California Environmental Quality Act* at 165 (Tenth Ed. 1999). As a result of 1998 amendments to the CEQA Guidelines, CEQA now requires that the environmental baseline constitute a snapshot in time, anchored to the specific time that the environmental analysis commences. As mentioned above, these amendments required that

> "[a]n EIR must include a description of the physical environmental conditions 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.

CEQA Guidelines § 15125(a) (emphasis added). In this case then, the environmental setting or baseline must be fixed as of October 1, 2004, the date of the NOP.

The environmental baseline is not meant to reflect, as the intervenors appear to suggest, speculation about what may or may not occur in the future, no matter how reasonable or likely. *See, e.g., City of Carmel by-the-Sea v. Board of Supervisors* 183 Cal.App.3d 229 (1986)(agency must examine potential impact of project on the existing physical environment; comparison between the project and potential future action is improper); *Environmental Planning and Information Council v. County of El Dorado*, 131 Cal. App. 3d 350, 354 (1982) (planned future development under existing general plan irrelevant to CEQA baseline). As discussed further

below, CEQA provides avenues, specifically through the no project alternative, for assessing likely future events if the Project is not approved, however, the environmental baseline is not one of them.

In *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors,* 87 Cal. App. 4th 99 (2000), the court was faced with the question of how closely in time the environmental baseline description needed to correspond to the start of the environmental analysis. The case centered on water availability for a proposed residential development and the lead agency used data generated after the NOP but before the final certification of the EIR to determine baseline water use. *Id.* at 109-16. The court found reversible error by the agency in relying on water usage data from after the commencement of the environmental analysis. The court held that the existing conditions must be evaluated as closely as possible to the date the notice of preparation of the EIR is filed. *Id.* at 125-26. The court rejected the notion that the lead agency has substantial discretion in preparing the environmental baseline, stating that "this was not a case where the Board was called upon to perform its discretionary function of resolving a factual dispute or choosing from conflicting expert opinions or methodologies regarding water use." *Id.* at 124. While the court found that the lead agency has some flexibility as to how it measures pre-project conditions, the focus must be on the environment "as it exists before commencement of the project." *Id.* at 126 (citations omitted).

As described above, the physical environmental conditions in the project vicinity that exist now and existed at the time PG&E filed its Application include the current operations of DCPP. The plant has been producing power for California ratepayers at this location, requiring the same regular refueling outages, generally involving the same activities, and resulting in the same modest impacts to the environment since 1985. In addition, though a previous environmental analysis is not required to bring a project or activities within the environmental baseline, *see Bloom v. McGurk*, 26 Cal. App. 4th 1307, 1314 (1994) (facility that did not undergo CEQA review for its original operations, nonetheless constituted an existing facility), DCPP was subject to review under NEPA before the issuance of its NRC licenses in 1973.

Because the environmental baseline under CEQA is a snapshot in time fixed as of the initiation of the CEQA process, the Commission must incorporate existing operations at DCPP into that baseline. The No Project Alternative, and not manipulation of the environmental baseline, offers the proper vehicle for considering early shutdown of DCPP.

B. The No Project Alternative Should Consider Environmental Impacts From Early Shutdown Of DCPP.

CEQA requires the preparation of a "no project alternative" as part of any EIR. *See* CEQA Guidelines § 15126.6(e). By necessity, the no project alternative must take into account likely future events, namely the assumption that the project is not approved. In this case, if the Commission does not grant PG&E's Application and the existing steam generators are not replaced, it is very likely that DCPP will have to shutdown prior to the expiration of its existing NRC license. This scenario is the essence of the no project alternative. CEQA requires that an agency analyze the impacts of the no project alternative and compare those impacts with the

project impacts "to allow decision-makers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project." *See id.* § 15126.6(e)(1).

By arguing that continued DCPP operations after 2013/2014 is a project impact, the intervenors confuse the environmental baseline with the no project alternative. This mistake is addressed squarely by the CEQA Guidelines. Section 15126.6(e) of the Guidelines states:

> The purpose of describing and analyzing a no project alternative is to allow decision makers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project. The 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.

CEQA Guidelines § 15126.6(e)(1)(emphasis added). The regulatory definition of the "no project alternative" includes two parts. The first mirrors the environmental baseline and requires a discussion of the "existing conditions at the time the notice of preparation is published". *Id.* § 15126.6(e)(2). The second part of the definition distinguishes it from the environmental baseline by requiring an analysis of foreseeable future events. Specifically, the definition states:

> The "no project" analysis shall discuss the existing conditions at the time the notice of preparation is published or if no notice of preparation is published, at the time environmental analysis is commenced, as well as 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.

Id. § 15126.6(e)(2). The Guidelines provide further direction concerning how the no project analysis should occur, 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." *Id.* § 15126.6(e)(3)(C).

In this way, CEQA provides for consideration of the environmental impacts of not approving the project, which is distinct from the environmental impacts of implementing the project. For example, here CEQA review would focus on the environmental impacts of replacing the steam generators (*e.g.,* added noise, additional workers' traffic, construction of temporary buildings and so forth) against the existing environmental baseline (*i.e.* DCPP's current operations). A "no project" alternative would consider the environmental impacts of not replacing the steam generators, including the shutdown of DCPP as well as the impacts of obtaining replacement energy from other sources, most likely newly constructed fossil-fuel combined cycle power plants.

Based on the clear comparison of the environmental baseline and the "no project" alternative under the CEQA Guidelines, there is no question that events or conditions "reasonably expected to occur in the foreseeable future, if the project were not approved," such

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as the likely shutdown of DCPP, can and should be considered under the no project alternative. It is equally clear from the CEQA Guidelines and case law that possible or even likely future events cannot and should not be incorporated into the project description or the project environmental baseline.

IV. POSSIBLE FUTURE LICENSE RENEWAL IS NOT A REASONABLY FORESEEABLE FUTURE PROJECT AND SHOULD NOT BE ANALYZED AS A CUMULATIVE IMPACT.

During the course of the public meetings held as part of the CEQA scoping process, certain intervenors suggested that the Commission evaluate the possibility that PG&E will seek license renewal from the NRC to operate DCPP after the expiration of the current license term. PG&E has not decided to seek license renewal at this time and, prior to making any decision to seek such a renewal, PG&E would have to engage in a multi-year feasibility process to gather the necessary information on which to base such a decision. The prospect of license renewal is speculative, does not constitute a likely project impact or a "probable future project" that would require analysis under CEQA. Therefore, PG&E agrees with the NOP which found that "[r]eplacing the steam generators and upgrading the infrastructure could provide an incentive for extending the operable life of the nuclear facility beyond its current license." NOP at 9.

Under the CEQA Guidelines, a "probable future project" or future activity must be analyzed in an EIR, either as a project impact or a cumulative impact.[4] *See* CEQA Guidelines, 14 Cal. Code Regs. § 15030(b)(1)(A). The EIR's "impacts analysis must include reasonably anticipated future activities of a project or associated with the project." *See* CEQA Guidelines, 14 Cal. Code Regs § 15030 (Discussion Notes). In determining the scope of future projects or activities which 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." *Id.* The limited scope of review of future activities is necessary to comply with CEQA's mandate that if "a Lead Agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the project." *See* CEQA Guidelines, 14 Cal. Code Regs. § 15145.

PG&E has not decided to seek license renewal for DCPP at this time nor has "an application [been] made at the time the NOP [was] released for review" to renew the NRC license for DCPP. *See* 14 Cal. Code Regs. § 15030 (Discussion Notes). The question of whether PG&E should seek license renewal for DCPP constitutes, at most, part of a "long range

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4 The Guidelines concede that these reasonably foreseeable future activities can be analyzed in either location in the EIR. The Discussion Notes accompanying § 15030 state: "Cumulative impacts analysis must include reasonably anticipated future activities of a project or associated with the project. Whether these activities are addressed in the cumulative impact analysis section or in the impacts associated with the project, as defined, if there is substantial evidence indicating reasonable foreseeable future projects or activities, an EIR must analyze the impacts of those future activities."

planning" process for DCPP which PG&E has barely begun. Such a long range planning proposal or process is not the type of future activity or project that should be analyzed under CEQA. *See Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland*, 91 Cal. App. 4th 1344, 1358 (2001) (in analyzing airport development plan, EIR need not consider long range plan to add additional runway which was only in the feasibility stage).

As discussed below, before PG&E could even make a decision on whether to pursue license renewal with the NRC, PG&E would need to complete substantial analyses in order to develop the factual and regulatory information necessary to inform any PG&E decision. Where, as here, there is a lack of "sufficient reliable data to permit preparation of a meaningful and accurate report," a future project or activity should not be part of the CEQA analysis. *See Laurel Heights Improvement Association of San Francisco, Inc. v. The Regents of the University of California*, 47 Cal. 3d 376, 396 (1988) (specific statements by university chancellor and dean describing plans for "bio-medical research" facility, as well as private correspondence by university officials describing the same plans was sufficiently reliable evidence of university's future plans).

PG&E has taken only preliminary steps to begin to develop the information necessary to consider the feasibility of license renewal. In June 2003, PG&E completed a preliminary feasibility assessment to determine the additional information gathering, regulatory hurdles, analyses and evaluations that would need to be completed before PG&E could determine whether to pursue license renewal. Based on the substantial further studies and analyses necessary to inform any decision by PG&E to seek license renewal, this feasibility study recommended establishing a "License Renewal Feasibility Project" which would study further the prospect of license renewal and develop the necessary factual record to support PG&E's decision whether to seek license renewal. This License Renewal Feasibility Project would require an additional 3 years of analysis. The feasibility study found that only after completing this 2-3 year study would there be sufficient evidence to inform PG&E's decision whether to seek license renewal. While the Feasibility Assessment recommended that the Feasibility Project be initiated in January 2004, PG&E decided not to pursue this Feasibility Project at that time. The only additional activity PG&E has taken is to assign a single employee to assist in the current license renewal process for the Wolf Creek nuclear power plant as a way of gathering some additional information on license renewal. With that exception, PG&E has performed no further work to pursue license renewal.

This level of preliminary analysis does not provide "credible and substantial" information on which to base environmental review. *See Laurel Heights*, 47 Cal. 3d at 397-98. California courts have previously addressed possible future activities that were merely in the feasibility stage at the time of the CEQA process and consistently concluded that such activities should not be included in the CEQA review. In *Berkeley Jets*, the court held that "[t]he fact that the Guideline refers 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." 91 Cal. App. 4th at 1358. The court further held that, "long-range planning proposals are exempt from EIR requirements: '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...(Guidelines, Section 15262).'" *Id.* at 1358 (emphasis added).

The mere fact that the replacement steam generators at issue here are expected to be able to operate longer than the existing NRC license does not change this conclusion and justify including license renewal in the Commission's CEQA review. As California courts have found, the expected license life of operating equipment is not determinative where the practical reality, based on legal and regulatory factors, shows that the facility will operate for a shorter period. In *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692 (1990), a power-generating facility was operating under a 20-year power sales agreement, while from an engineering perspective, the facility had a "realistic operating period of 30 years." 221 Cal. App. at 739. The court determined that CEQA review could only be conducted based on the realistic 20-year power sales contract, rather than based on the 30-year expected life of the equipment. It held:

> 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. GWF and PG&E may agree to extend the life of the contract upon its expiration in 20 years, or another purchaser of electricity may be found. However, CEQA does not require discussion in an EIR of future developments which are unspecified and uncertain. Such an analysis would be based upon speculation about future environmental impact.

Id. at 739. In this case, DCPP is under an even more stringent constraints than the power contract that limited environmental review in *Kings County*: specifically an NRC license that prohibits plant operations beyond 2024/25. Moreover, as in *Kings County*, "there is no credible and substantial evidence that [PG&E] plans to operate the project beyond the . . . life of the" existing NRC license. *Id.*

In sum, PG&E has not decided to seek license renewal for DCPP. Before it could even consider such a decision, PG&E would have to engage in a 2 to 3 year feasibility process in order to develop the factual and regulatory data necessary to inform any PG&E decision. With license renewal in the early planning stages there is no "credible and substantial evidence" on which to base environmental review. In such a situation, license renewal does not constitute a "probable future project" under CEQA and any analysis would constitute improper speculation. *See* CEQA Guidelines, 14 Cal. Code Regs. § 15145.

Should PG&E decide at some future date to seek license renewal, the NRC and any other relevant state or local agency would ensure that appropriate environmental review is conducted. The NRC would ensure that license renewal results are in compliance with the National Environmental Policy Act, while any state or local agencies with permitting authority over activities associated with license renewal would have to comply with CEQA.

V. THE NUCLEAR REGULATORY COMMISSION HAS EXCLUSIVE JURISDICTION OVER NUCLEAR SAFETY AND MANAGEMENT OF RADIOACTIVE MATERIAL, INCLUDING SECURITY AND GEOLOGICAL ISSUES.

Issues related to the safety and security of nuclear materials and of plant operations at DCPP were raised by intervenors in the ratemaking portion of this proceeding and again have arisen in this EIR scoping process. As the Commission proceeds in its preparation of the EIR, recognition of the boundaries of federal and state jurisdiction are critically important. California courts, previous Commission decisions and the Administrative Law Judge in this proceeding have recognized that the NRC has exclusive jurisdiction over the management of radioactive material, the design and operation of nuclear power plants, and the safety and security of nuclear power plants. Therefore, neither the Commission nor any of the Responsible Agencies or any other state, local or trustee agencies are in a position to prescribe mitigation measures related to these issues. Moreover, although CEQA allows the Commission to address issues in an EIR even where it can take no further action on them, most of the security, safety and seismic issues raised to date in this proceeding are not uniquely related to the SGRPs, but rather are a consequence of basic DCPP operations. In addition, the confidential nature of DCPP's security measures presents significant limits on the CPUC's ability to explore these questions in the EIR.[5]

A. <u>NRC Exclusive Jurisdiction Restricts The Commission's Authority To Impose Mitigation Measures</u>

In this proceeding, intervenors have raised questions concerning nuclear safety and security at DCPP as well as the seismic design of DCPP. In addition, the NOP identified issues related to nuclear safety, security and seismic design. Specifically, Attachment 1 of the NOP sets forth a list of "potential issues or impacts" associated with the SGRPs, divided along the customary list of environmental issue areas. Under the "Hazards and Hazardous Materials" category, Attachment 1 presents as a potential issue the "[d]esign of the facility to safely protect the public and the environment from inadvertent or terrorist-induced release of radioactive material." Under the "Geology and Soils" category, the NOP identifies issues related to exposure of DCPP facilities to "seismic hazards from a large magnitude earthquake in the region." These issues related to nuclear safety, design and security are outside the bounds of the Commissions jurisdiction and the CPUC has no power to require mitigation measures related to them.

The federal Atomic Energy Act gives the federal government exclusive authority to regulate the design, construction and operation of nuclear power plants. The Act specifically states that the NRC "shall retain authority and responsibility with respect to the regulation of . . . the construction and operation" of any nuclear power plant to other nuclear facility. 42 U.S.C. § 2021 (c). In *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development.*

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5 As described in PG&E's Motion to Strike Testimony of Gordon Thompson (Aug. 10, 2004), PG&E is forbidden by NRC regulations from discussing DCPP's security measures. *See, e.g.*, 42 U.S.C. §§ 2011-14, 2021(c), 2167-68; 10 C.F.R. Part 73.

Commission, 461 U.S. 190, 212-13 (1983), the United States Supreme Court interpreted these provisions of the Atomic Energy Act and concluded that the NRC has "occupied the entire field of nuclear safety concerns" preempting all state action in this area. This exclusive jurisdiction extends to nuclear safety issues as well as the regulation over the methods of storage and permanent and non-permanent disposal of nuclear materials. *See Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1246 (10th Cir. 2004).

The Commission specifically recognized its lack of jurisdiction over these issues in *Bennett v. Pacific Gas and Electric Company*, 25 CPUC 2d 374, 1987 Cal. PUC LEXIS 211 (CPUC Sept. 10, 1987). In that case, the Commission held that it "has no power to consider or rule on safety issues such as an evacuation plan, PG&E's competence to construct, operate, and maintain the Diablo Canyon Plant, and disposal of radioactive waste." *Id.* at *4. Finally, in this proceeding ALJ O'Donnell has already found that "the imposition of security requirements" and "the imposition of seismic requirements for Diablo Canyon" are "not within the Commission's jurisdiction." ALJ Ruling Granting and Denying Motions to Strike at 1-2 (Aug. 31, 2004) ("ALJ Ruling").

B. Nuclear Safety and Seismic Issues Related To DCPP Operations Generally Are Not Project Impacts And Should Not Be Analyzed In The EIR.

Although an EIR may discuss issues that are beyond the scope of the lead agency's authority to impose mitigation measures, an EIR cannot analyze impacts that are unrelated to the Project. In this proceeding, MFP argued that the Commission should consider costs associated with additional security measures that might be required by the NRC in the future and seismic design issues related to a large reverse or thrust fault earthquake. As discussed above, ALJ O'Donnell found that both seismic and security measures are not within the Commission's jurisdiction. ALJ Ruling at 1-2. On PG&E's motion, ALJ O'Donnell struck all MFP testimony related to seismic issues as beyond the Commission's jurisdiction and irrelevant. *Id.* at 1. While the ALJ allowed security testimony from MFP to be considered on the question of costs, he called into serious question its relevance. The Judge found that "most of the recommended security expenditures, if required, would be necessary to protect the spent fuel at the Diablo site even if the reactors were shut down. As such they are costs that would be incurred whether the steam generator replacement project takes place or not and are, therefore, not relevant to the cost-effectiveness of the SGRP." ALJ Ruling at 2. He also concluded that "the remaining expenditures, if they occur, would likely happen before the plant ceases operation if the SGRP is not performed. If that is the case, those expenditures would not be relevant to the cost effectiveness of the SGRP." *Id.*

ALJ O'Donnell's concerns about the relevance of additional security measures on the issue of cost, are equally relevant to the issue of whether facility design and security issues should be considered in the environmental impacts analysis of the SGRP. Under CEQA, an impact or effect is defined as "[d]irect or primary effects which are caused by the project and occur at the same time and place." 14 Cal. Code Regs. § 15358(a)(1) (emphasis added). If an impact is not caused by the Project it cannot be analyzed as a project impact. General security issues related to the operation of a nuclear power plant or the presence or storage of radioactive material arise "whether the steam generator replacement project takes place or not", ALJ Ruling

at 2, and so cannot be considered effects which are caused by the Projects. Therefore, only security issues that directly relate to the delivery and installation of the new steam generators could be considered project impacts. As to this narrow subset of security issues, most activities related to the SGRPs would occur during a normal refueling outage and so raise no greater impacts than this regular baseline condition.[6]

Overall, the development of the EIR must be guided by these important principles of federal/state jurisdiction. Because the NRC has exclusive jurisdiction over the operation and safety of nuclear power plants as well as the storage and management of radioactive waste, neither the Commission nor any other state or local body has the authority to implement mitigation measures in these areas. Moreover, general issues related to the safety and security of DCPP are not related to the SGRPs and cannot be treated as project impacts under the EIR. As a result, the potential impacts and issues raised by MFP and identified in Attachment 1 of the NOP, concerning security and seismic issues are outside of the Commission's jurisdiction or unrelated to the SGRPs and need not be considered in the EIR.

VI. CONCLUSION

PG&E appreciates the opportunity to provide these comments and looks forward to continuing to working cooperatively with the Commission and Staff to complete efficiently the environmental review process for the SGRP.

Truly yours,

J. Wesley Skow
LATHAM & WATKINS

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6 The refueling outages during which PG&E proposes to replace the steam generators would be somewhat longer than a typical refueling outage, but would not raise different or greater impacts.