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April 29, 2005

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Comments of the Santa Lucia Chapter of the Sierra Club on the Draft Environmental Impact Report, Diablo Canyon Power Plant Steam Generator Replacement Project

Application No. A.014-01-009
SCH No. 2004101001

Comment: The Diablo Canyon facility is a nuclear power plant. We have corrected the DEIR's use of the acronym "DCPP" to the correct and traditional "DCNPP" in our comments, except in direct quotes. The final EIR should employ the correct DCNPP acronym in its text, and the word "nuclear" in its title.

D.1.2.1:
"...routine operation of the nuclear power plant affects the existing environment.... These environmental effects have been previously reviewed and approved by the NRC and predecessor and cooperating agencies prior to and at periodic intervals over the life of the licenses."

Comment: In a footnote, the DEIR bases its presumptive exemption from any requirement to assess current and future impacts of ongoing operation of the DCNPP on an Atomic Energy Commission environmental review commissioned in 1973. The assumption that there has been no change in CEQA environmental study areas since then, nor improvements in the study techniques, methodologies and technology now in use for environmental reviews over those used 32 years ago is clearly incorrect. For example, the California Dept. of Fish and Game noted on February 29, 2000, that the effects of DCNPP's thermal discharge and entrainment "include loss and degradation of habitat, decreases in several species' diversity and density, and loss of entire species," and that "the effects continue to expand beyond Diablo Cove and are greater than predicted." But for the Proposed Project, these impacts would cease in 2013/2014. The Proposed Project will extend these impacts, at minimum, to 2025.

The DIER does not estimate the amount of uranium that must be mined to power the plant from 2014-2025 should the Proposed Project be approved, nor of the waste and water pollution that would be produced as a result of the mining, enriching, packaging, and transport of that uranium for the operation of the DCNPP. According to the estimate of Christopher Sherry, research director for the Safe Energy Communication Council, uranium enrichment in the U.S. currently generates about 14 million tons of CO2 annually. There is no analysis of DCNPP's share of these cumulative impacts in the DEIR.

In order to rely on the 1973 review to avoid analysis of current and ongoing impacts facilitated by the Proposed Project, let CPUC cite where in that review are to be found analyses of the Hosgri fault, the impacts on global warming produced by the mining and enrichment of the uranium used to power the plant, and an expanding dry cask storage facility extending the storage of spent fuel on site to an unknown future date. If this was not analyzed by the Atomic Energy Commission in 1973, these impacts must be included in a new DEIR.

The footnoted prior "project-specific CEQA review...for certain permits for construction of structures at the plant" is cited as further justification for the omission of analysis of the impacts of ongoing operation. These reviews are unlikely to have been any more inclined than the current DEIR toward comprehensive analysis of impacts beyond the narrow scope of the specific project or update of the impacts of continued operation beyond the 1973 analysis, and hence are not a basis for the exclusion of such analysis from the DEIR. The omission of this analysis and reliance on the existence of outdated and partial prior review requires the preparation of a new DEIR assessing the impacts of continued operation of the DCNPP from 2013-14 through 2021/2025, including in its scope the larger context of the state's energy resource goals (14 CCR, § 15378(c).) A finding must be made that the proposed project will minimize risks to life and property in areas of high geological hazard and assure stability and structural integrity of the proposed development.

Ibid:

"The existence of the operating nuclear power plant through the NRC authorized license period and its ongoing effects...are not a consequence of the Proposed Project. However...the analysis in this DEIR of the No Project Alternative does provide comparative data concerning effects to those resources if DCPP were to not operate between 2013/2014 and the end of the NRC operating licenses in 2021/2025."

Comment: But for the Proposed Project, the "existence of the operating nuclear power plant" will cease. The statement to the contrary betrays a fundamental flaw in the environmental assessment methodology, and, by itself, negates the document and its analysis and mandates the preparation of a new DEIR.

The DEIR proffers the comparative data of the No Project Alternative analysis as some compensation for this glaring omission, but admits to the inadequacy of this analysis at D.1.2.3, stating "the environmental consequences of the No Project Alternative are discussed in a general manner" and "at a lesser level of detail than the Proposed Project."

D.1.2.2:

"License renewal is not a reasonably foreseeable consequence of the Proposed Project given the feasibility, analytical and regulatory hurdles to license renewal (let alone PG&E's decision on whether to apply for license renewal.)"

Comment: The portrait painted of the alleged "hurdles" to license renewal is belied by the history of extreme affinity of the NRC to relicensing requests from nuclear utilities.

The "regulatory hurdles" to license renewal have been removed or significantly reduced by the NRC. In January 2004, the NRC adopted regulatory changes which eliminated formal adversarial hearings on license renewals and established informal hearing procedures for all but a few types of licensing proceedings. (Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2,181-2282 (2004) (codified at 10 CFR Parts 1, 2, 50 et al.)("Final Rule"). Per the First Circuit amicus brief filed June 15, 2004, by the Massachusetts Attorney General, these informal procedures restrict participation by the public and the states, eliminate the parties' right to discovery, severely restrict cross-examination, and adversely impact the quality of the record for judicial review. Hence, the DEIR's reference to "analytical and regulatory hurdles to license renewal" that PG&E would face at the NRC, painting a picture in which the granting of a renewed license is less than likely, does not compel credulity.

Nor is it likely that the utility would seek to abandon a lucrative financial operation such as the DCNPP. The tortured construction necessary for CPUC to claim that PG&E's clear movement toward license renewal is "remote and speculative" is belied by the statement that "PG&E has taken preliminary steps toward gathering the information that would be needed to consider license renewal for DCPP." If one is denying any interest in marriage while pricing wedding rings, one's denials should not be given great weight. The statement that "PG&E has indicated that it currently has no plans to apply" for a license renewal "in response to a data request from the CPUC" does not consider the likelihood that PG&E was aware that a reply in the affirmative to CPUC's request would have triggered an environmental review of the impacts of a license renewal, and that PG&E's demurral might be sufficient to avoid that review -- as, indeed, it has been.

On the matter of the DEIR's consistency: At D.3.1.5.1 the DEIR presents the "Consent Judgment" on the continuing marine impacts of DCNPP's cooling water entrainment and thermal discharge and their proposed mitigation as though this were a matter of settled fact. As we note in our comment at D.3.1.5.1, there is, as yet, no Consent Judgment, and the issuance of an NPDES permit is therefore in doubt. If the DEIR wishes to cite PG&E's relicensing as "remote and speculative" because an actual request has not yet been filed, it must find the terms of the not-yet-entered Consent Judgment equally "remote and speculative," and cannot cite these terms as mitigation for the impacts of the plant's continued operation facilitated by the Proposed Project. If CPUC considers the prospect of a consent judgment and NPDES permit likely, as it clearly does, then the prospect of PG&E's request for relicensing is also likely. The DEIR cannot have it both ways.

A new DEIR must be prepared that considers the impacts of the Proposed Project given the likelihood of DCNPP operating beyond the license expiration dates. In view of the fact that the current Proposed Project has been necessitated by the unexpected failure of the Original Steam Generators to continue to function until the end of the

current license period, the revised analysis should consider the impacts of yet another replacement of the steam generators during the relicensing period.

Ibid:
"...this DEIR analyzes the incremental changes of the Proposed Project, which are limited to short-term effects of steam generator replacement activities and the long-term presence of the OSG."

Comment: As stated in our Supplemental Protest to the application of PG&E (Application 04-01-009 filed November 8, 2002), there is no basis for PUC to narrow the scope of the CEQA review. The Court has held that agencies must apply CEQA "so as to afford the fullest protection of the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v.Board of Supervisors*, (1972) 8 Cal.3d 247.) To the extent that there is any doubt about the scope of CEQA review, the Commission should proceed in the manner most protective of the environment.

A CEQA review narrowed to "incremental changes" wrought by a project that will also directly result in an additional eleven years of operation of a nuclear power plant and the production and on-site storage of spent fuel is clearly inadequate.

D.1.2.3:
"This environmental assessment does not analyze any specific scenarios for providing replacement power-generating capacity..."

Comment: As stated in our Supplemental Protest to the application of PG&E (Application 04-01-009 filed November 8, 2002), the Proposed Project presents the Commission with a question of long-term resource planning for the State. The Commission, the Legislature and the Governor have strongly stated their preference for energy conservation and renewables to meet future resource needs. The failure to engage in an alternatives analysis for the Proposed Project is deficient because the Project has the potential to "achieve short-term goals to the disadvantage of long-term goals" (Pub.Res.Code § 21083), specifically, the long term resource goals of the state of California, by precluding the development of environmentally preferable alternatives.

D.3.1.5:
"The existing thermal plume, impingement and entrainment issues...would be considered part of the baseline conditions of the project."

Comment: CPUC may consider the impact of the proposed project against the physical environment that exists at the time of filing only if a project leaves intact an existing project that has previously been the subject of environmental review. The impacts of the replacement of the steam generators at DCNPP facilitating extension of the life of the plant beyond its licensing period have not been subject to specific environmental review. Prior review has been for the impacts of the plant through 2025, and that review was deficient – see comment at D.1.2.1 re: thermal discharge impacts found in 2000 to be "greater than predicted."

D.3.1.5.1:
"RWQCB and the Attorney General's office negotiated a settlement with PG&E, which is defined in the Consent Judgment. 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."

Comment: Per Lori T. Okun, RWQCB Staff Counsel: "Although the settlement agreement was signed by PG&E, it was not entered by a court as a judgment so there was no actual Consent Judgment. The agreement was contingent upon the Regional Board adopting the NPDES permit described in the agreement. When the permit came before the Regional Board, the Board directed staff to consider additional alternatives and make further recommendations to the Board. The matter has been tabled since then." (pers. comm., 11/02/04.)

The DEIR appears to engage in a deliberate attempt to mislead in referring to the settlement agreement as though it has already been entered by a court as a Consent Judgment, and in failing to note the legal deficiencies in the settlement agreement (see Attachment A) which have a likelihood of either bringing about substantial modifications in the terms of the agreement prior to its entering into force or the rejection of the agreement and revocation of the NPDES permit for DCNPP.

The conservation easement portion of the settlement agreement is unlikely to win approval as a condition of renewal of Diablo Canyon's NPDES permit, due to the inclusion of paragraph 10.1., pg 15 of the agreement, attached as part of the conservation easement:

TERMINATION OF CONSENT JUDGEMENT
10.1 If, during the Operating Life of the Plant, for any reason any federal or state government entity, or court imposes, whether through the exercise of its discretion or as the result of a change in applicable federal, state of local laws, regulations, ordinances, plans, guidelines, guidance documents, or policies, a requirement that would require the Company to comply with a more stringent standard with respect to thermal effluent limitations than exists in the Plant's current Permit, a copy of which is attached as Exhibit B to this Consent Judgment, or that would require a cooling water system technology that is more costly or burdensome than the cooling water intake and discharge system which existed at the Plant as of August 2000, the Company, in its sole discretion, may elect to rescind the Consent Judgment, including without limitation the Conservation Easement, in the manner set forth below.

This is a gun to the head of USEPA, RWQCB, SWRCB, and California Coastal Commission, threatening to rescind the easement if any additional regulatory requirements are ever put on the plant in the future. This is so patently ridiculous that on page 11, section 17(a) of the Easement, they state "The parties acknowledge that the Conservation Easement may not qualify as a conservation easement" under Section 815 of the California Civil Code, because Section 815.2(b) provides that "a conservation easement shall be perpetual in duration." Yet earlier in the document PG&E relies on Section 815 to make the findings of necessity of the easement. This supposes a never-land where even though the easement doesn't meet the definition of a conservation easement as defined in the Civil Code, PG&E is relying on that definition to justify the easement.

As written, the easement conflicts with PG&E's recently approved Coastal Development Permit for dry cask storage of spent fuel rods, as it precludes all development activities, which would apply to the construction of trails, signs, benches or anything else associated with the now mandated public access.

The DEIR catalogs the enormous impacts of DCNPP's thermal discharge ("discharge affects a greater area of the subtidal zone than was predicted...a major increase in 'bare rock'... a major community shift...significant community-wide change in 150 species..."), but then parrots the RWQCB on the options to thermal discharges as being too costly and concludes that these options "would not be ecologically effective."

D.3.1.5.2:
"The larval losses for nearshore taxa cannot be converted into an equivalent number of adults because very little is known about these species.... The cost of closed cooling systems is wholly disproportionate to their benefit."

Comment: The DEIR is unable to evaluate losses of the affected species, yet makes a declarative statement on the value of the closed cooling system -- the Best Available Technology -- that would avoid these impacts. The U.S. Second Circuit Court of Appeals has ruled that restoration efforts cannot be substituted for the use of Best Available Technology (BAT) in new cooling water intake systems, and noted that statutory BAT requirements apply equally to existing facilities (*Riverkeeper v. EPA*). The Clean Water Act's 316(b) rules mandating BAT in power plant cooling water intake systems are in flux and under legal challenge. The Federal Draft Phase II regulation for BAT requires meeting performance standards that reduce entrainment by at least 60% or the imposition of numerous cost/benefit and cost/cost analyses by the discharger. PG&E has not implemented such technology nor conducted such studies at DCNPP.

D.10.5:
"New power plants could, however, require substantial water supplies for cooling. This potential impact could be mitigated through the use of recycled water."

Comment: CPUC should issue a revised DEIR with this helpful suggestion, cited for the No Project Alternative of the construction of new power generation facilities, applied to the continued operation of the DCNPP, which would cease to operate but for the Proposed Project, as this would resolve the ongoing significant impacts of entrainment and thermal discharge.

I.- Public Participation, I.1.4.1 - .5:
Comment: These four pages detailing public comment on Purpose and Need, Human and Physical Environment Issues and Concerns, Alternatives, and the Environmental Review and Decision-Making Process throw into high relief the inadequacies of the DEIR, which virtually ignores every concern here expressed by community organizations, public agencies, and members of the public. The DEIR's dismissal of public input necessitates the preparation of a new DEIR that addresses the "major issue[s] addressed in the comments" as "strong concerns" by "nearly all of the public and agency comments," by "a clear majority of comments," etc.

I.1.4.5:
Comment: The causes of the above-noted deficiency – "concerns regarding the scope of the environmental review" and "dissatisfaction with the scope of the project description as it was written in the NOP" are noted and passed over without comment.

It is noted that "The comments overwhelmingly identified the extension of the operating life of DCPP and the associated cumulative impacts of long term operations as a critical issue that should be included in the environmental review," and we are assured that this critical issue "is discussed further in the following section." The discussion that follows consists of four sentences summarizing the associated impacts, which the DEIR otherwise ignores.

A new DEIR must correct these deficiencies and omissions prior to the issuance of a Final Environmental Impact Report.

ATTACHMENT A

July 30, 2004

Mr. Jeffrey Young, Chairman
Central Coast Regional Water Quality Control Board
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401

RE: Comments on the Proposed Diablo Canyon Nuclear Power Plant Consent Judgment

Dear Mr. Young and Members of the Board:

The undersigned, representing the World Wildlife Fund, The Ocean Conservancy, the Surfrider Foundation, EcoSlo, and the Sierra Club present to you the following comments on the proposed Consent Judgment regarding the Diablo Canyon Nuclear Power Plant cooling water intake system (Consent Judgement). We appreciate your efforts in preserving our coastal and marine habitats, and hope to continue to work with you on this project in the future.

We urge the Central Coast Regional Water Quality Control Board (Regional Board) to reevaluate and ultimately reject the Diablo Canyon Consent Judgment (Consent Judgment). First, a consent judgment that purports to circumvent the consideration of cooling water intakes under the permit renewal process for the remaining operating life of the plant is neither legal nor within the public interest. Second, the Consent Judgment, in adopting a permanent site-specific determination of "best technology available" (BTA) without consideration of the legal requirements for such a determination, is inconsistent with the EPA's Phase II rules implementing Clean Water Act § 316(b). Third, an agreement binding the State Water Board in the face of the rapidly changing § 316(b) rules is unreasonable. Fourth, the Consent Judgment fails to equitably compensate the People of the State of California. Consequently this consent judgment is both illegal and contrary to good public policy.

1. The Consent Judgment is Neither Within the Public Interest nor Legally Enforceable.

The Diablo Canyon Consent Judgment purports to bind the Regional Board to renew Diablo Canyon's NPDES permit for the operating life of the plant without consideration of legal requirements specifically relating to cooling water intake regulations. Such an agreement is legally invalid and fails to adequately protect the public interest. The Regional Water Board cannot legally prescribe a right to pollute indefinitely, in the face of federal law and regulations that would constrain such pollution. Furthermore, this agreement is contrary to the public interest. It is unprecedented for the Regional Board to bind future water boards in an agreement that attempts to provide a future right to PG&E to violate any and all state and federal entrainment and impingement regulations. Finally, NPDES permit renewals are subject to federal approval and consequently the Regional Water Board lacks the authority to unilaterally grant future NPDES permit renewals in an agreement without such approval.

2. The Consent Judgment Fails to Consider the Federal Draft Phase II Regulation for BTA.

The Consent Judgment illegally purports to define BTA under Clean Water Act Section 316(b) as the technology currently in place at the plant in combination with the restoration efforts agreed to in the Consent Judgment. The Phase II rule implementing Section 316(b) for existing plants provides a flexible framework under which a discharger can choose among five alternatives for achieving BTA. Four out of the five are based on meeting performance standards that require reductions in entrainment of 60 to 90 percent; there has been no demonstration that PG&E's efforts are consistent with any of these alternatives or will result in 60 to 90 percent reduction in entrainment. Under the fifth alternative, a discharger may use an alternative definition of BTA if it conducts a number of studies, including numerous cost-benefit and cost-cost analyses to support such a decision; no such studies have been conducted. Consequently, the Consent Judgment is inconsistent with the requirements of the Phase II rule.

3. The Consent Judgment is Unreasonable in the Face of Changing 316(b) Regulations

The Consent Judgment attempts to provide an NPDES permit to PG&E for the life of the Diablo Canyon Nuclear Power Plant. In *Riverkeeper v. EPA*, the U.S. Second Circuit Court of Appeals made it clear that restoration efforts could not be substituted for BAT in new industrial cooling water intake systems. The Court held that restoration measures that attempt to restore fish and shellfish populations killed by a cooling water system were plainly inconsistent with the statute's text, and clear Congressional intent that the *design* of intake structures be regulated directly, based on the best technology available. Although the case concerned new power plants specifically, the Court noted that the statutory BTA requirements applied equally to new and existing facilities and suggested that its analysis might apply to existing facilities as well. Riverkeeper, Surfrider, and several northeastern States have recently launched challenges to the Phase II rules on similar grounds. A consent judgment that attempts to bind the Regional Board to a definition of BTA in the face of Phase II rules that are under legal scrutiny and are likely to be remanded is against good public policy, and inapposite to the goals of the Clean Water Act.

4. The Consent Judgment Fails to Equitably Compensate the People of California

This agreement would permit PG&E to defiantly continue to degrade the marine and coastal environment through outdated and outmoded technology for a paltry price that is wholly inadequate to compensate the people of California for the resources that would be lost as a consequence. The funding offered by PG&E for marine reserves establishment is of little added value in a state in the process of establishing these reserves already. Furthermore, the conservation easement that PG&E offers is inadequate both in terms of its breadth, and in terms of ameliorative benefits. Finally, the funding for research that PG&E offers cannot be used to evaluate any increase in habitat destruction, or reduction in marine life due to impingement or entrainment, and thus expressly excludes the type of research that is most pertinent to these issues. These overtures simply fail to provide adequate compensation for the People of California, and consequently the agreement should be rejected.

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In sum, the DCNPP consent judgment should be firmly rejected as contrary to the Clean Water Act, in violation of EPA Phase II Rules governing the cooling water intakes of existing facilities, unreasonable in the face of changing law, and inequitable. Thank you for your consideration of these comments, and please feel free to call if you have any questions.