

May 5, 2005

VIA FACSIMILE AND OVERNIGHT MAIL

Andrew Barnsdale
California Public Utilities Commission
c/o Aspen Environmental Group
235 Montgomery Street, Suite 935
San Francisco, CA 94104

Re: Draft Environmental Impact Report for the
Proposed Diablo Canyon Power Plant Steam
Generator Replacement Project

Dear Mr. Barnsdale:

This letter provides Southern California Edison Company's (SCE) comments on the California Public Utilities Commission's (CPUC) Draft Environmental Impact Report (EIR) on the Proposed Diablo Canyon Power Plant (DCPP) Steam Generator Replacement Project. SCE's comments involve three issues, which our letter discusses in more detail below:

1. Environmental Baseline

The Draft EIR's Executive Summary properly provides that "[t]he environmental baseline includes an operating nuclear power plant at DCP, including two essentially identical nuclear reactor units, radio active waste storage facilities, electrical transmission infrastructure, and other facilities, buildings, and systems."¹ The document provides further that the "EIR analyzes only the incremental changes that would be caused by the steam generator replacement project."² However, this is not actually the case when the Draft EIR is closely read.

Specifically, in Section D.3 Biological Resources, D.3.1.5 Existing Marine Resource Issues, the Draft EIR inappropriately analyzes the baseline of an operating plant. The proper baseline for this proposed project is as an operating plant and not the impacts that such a plant may be having on the environment. This position is supported by the California Environmental Quality Act (CEQA) as well as case law that have interpreted the Act over the years.

¹ Draft EIR, Executive Summary page ES-2

² Id.

Section 15125(a) of the CEQA Guidelines, the “Environmental Setting” section, provides express guidance regarding the issue of establishing the environmental “baseline,” at least when an EIR is pursued by the lead agency. That section provides in pertinent part:

An 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. 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.*)

Consequently, the impacts of existing activities as of the date of the Notice of Preparation (or the date on which the environmental analysis commences, if appropriate) must be considered to be part of the environmental “baseline.”

The environmental “baseline” issue has also been addressed in several cases involving the appropriate scope of CEQA review for existing sources. These cases typically concern whether the environmental impacts associated with the continued operation of an existing facility for which a project application is being filed should be considered to be part of the environmental “baseline” or whether they should be evaluated as project impacts. Generally, the cases held that the operational impacts of the existing facility should be included in the environmental “baseline,” not evaluated as project impacts. *See Fairview Neighbors v. County of Ventura* (1999) 70 Cal. App. 4th 238, 82 Cal. Rptr.2d 436; *Bloom v. McGurk* (1994) 26 Cal. App. 4th 1307, 31 Cal. Rptr.2d 914; *Benton v. Board of Supervisors* (1991) 226 Cal. App. 3d 1467, 277 Cal. Rptr. 481; *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal. App. 3d 847, 237 Cal. Rptr. 723.

These cases stand for the premise that the environmental setting at the time of the lead agency’s review is the baseline condition against which all environmental impacts must be measured. Based on the above analysis it is inappropriate for the Draft EIR to evaluate any condition that involves the baseline of an operating plant. These issues should be removed in their entirety from the final EIR.

2. Jurisdictional Issues Related to Seismic, Nuclear Safety or Terrorism

The Draft EIR attempts to establish CPUC jurisdiction on issues related to seismic, nuclear safety, and terrorism.³ It is well-established in United States Supreme Court precedent interpreting the Atomic Energy Act, 42 U.S.C. § 2001 *et seq.* (AEA), that federal preemption precludes the CPUC from considering the radiological health and safety aspects of a nuclear plant. *See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 212 (1983) (“the federal government maintains complete control of the safety and ‘nuclear’ aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like”), *see also county of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 58-59 (2d Cir. 1984). As the *PG&E* Court wrote:

State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether “the matter on which the state asserts the right to act is in any way regulated by the federal government.”

PG&E, 461 U.S. at 212-13.

Accordingly, the AEA preempts state requirements that attempt to directly regulate radiological health and safety, as well as, state laws or regulations that have “some direct and substantial effect” on the radiological safety decisions made by those who build or operate nuclear facilities, regardless of the purpose or intent of the law. *See Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1245 (10th Cir. 2004), *quoting English v. General Electric Co.*, 496 U.S. 72, 85 (1990). It follows that a CEQA analysis of a nuclear facility may not rely on the health or safety impact of either a seismic event or a terrorist attack. Therefore by writing the Draft EIR to give the CPUC, or for that matter other state agencies, oversight or approval of conditions in the Draft EIR as they relate to the radiological health and safety impacts of either a seismic event or a terrorist attack, would contravene the well-established “purpose” and “effects” tests. Thus, the CPUC may not consider the radiological health and safety effects of either a seismic event or a terrorist attack when conducting a CEQA analysis and all such references in the Draft EIR should be removed.

³ For example, see Draft EIR condition G3-a.

3. Mitigation Measure H-1b: Conduct Routine Inspections and Maintenance of Transporter

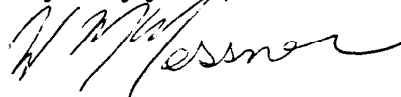
This condition as written is too restrictive and not practical as it relates to requiring inspections of the transporter "during any stop of 15 minutes or longer." It is expected that there may be occasions, when to position equipment and personnel, it will be necessary to halt movement for more than 15 minutes at a time. To do a complete inspection under this condition, it could cause an additional 5 to 10 minute delay before continuing transport. This 5 to 10 minute delay for inspection would require continual operation of the equipment to inspect for leaks. This would increase the time required for the overall transport which could potentially create impacts that otherwise could be avoided (traffic and circulation, safety, longer equipment run time). We believe this would produce more of an impact without a substantial benefit.

We propose an alternative condition:

All transport vehicles shall be inspected at the beginning of each work day and at the end of each work shift. While in transport, continual visual inspections shall be conducted by the crew. If any leaks are observed during transport appropriate action will be taken to stop the leak prior to continuance of transport. Any necessary spill response shall be conducted according to Condition H-1a.

Thank you for the opportunity to provide these comments, and if you should require additional information please do not hesitate to contact me.

Very truly yours,



William M. Messner