

Comment Set SCE
Southern California Edison



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VIA FACSIMILE & UPS

Mr. Andrew Barnsdale
California Public Utilities Commission
c/o Aspen Environmental Group
235 Montgomery Street, Suite 935
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Draft Environmental Impact Report for the
Proposed San Onofre Nuclear Generating Station
Re: Steam Generator Replacement Project

Dear Mr. Barnsdale:

The California Public Utilities Commission's (CPUC) Draft Environmental Impact Report (EIR) on the San Onofre Nuclear Generating Station Units 2 and 3 (SONGS 2 & 3) Steam Generator Replacement is a comprehensive document that analyzed the wide breadth of potential environmental impacts of the Proposed Project. The Draft EIR correctly concludes that the Proposed Project is acceptable to ensure reliable source of electricity to the southern California region for the duration of the facilities operating licenses and can be accomplished without significant impacts to the environment. This comment letter identifies issues in the Draft EIR that either need clarification or modification: (1) the approach to approving all three transportation options, (2) the appropriate recommendations for the mitigation on the United State Marine Corp Base Camp Pendleton (MCBCP), the lead agency for the National Environmental Policy Act (NEPA) analysis required for this project to proceed, (3) the areas under the direct control of the Nuclear Regulatory Commission (NRC), and (4) the industrial plant's baseline operations.

This letter summarizes these items below. The attachment provides additional detail about these items, as well as other general comments.

1. The Final EIR Must State That All Three Transportation Routes Options are Acceptable

Southern California Edison's (SCE) application identified three options for transport of the replacement steam generators (RSGs) from MCBCP's Camp Del Mar boat basin to the SONGS 2 & 3 project site, and requested approval of all three of

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these options as part of the Proposed Project. These three transport options are not, therefore, alternatives pursuant to California Environmental Quality Act (CEQA).

SCE anticipates that it may need to use any one of these three options at the time of transport. The transport is projected to occur in 2009 and 2010. It is not possible to guarantee conditions or availability of any of the transport options at those times.

Each of the three transport options involves transport on MCBCP. Activities on MCBCP are subject to MCBCP's environmental review and authorization under NEPA. MCBCP may require use of a specific transport option at the time of transport. Also, the three options are relatively equal in terms of environmental impact and have no impacts that cannot be reduced to less than significant levels, as explained in more detail in the attachment. Therefore, SCE requests approval of all three transport options. All references to these options as alternatives, including an environmentally superior alternative, should be removed from the EIR.¹

2. Mitigation Measures Related to the MCBCP Should be Recommendation Rather Than Requirements

The vast majority of the transportation portion of this project occurs on land within the exclusive jurisdiction of the MCBCP. The MCBCP will, therefore, be the lead agency for the permitting and associated environmental review for the transport activities. MCBCP will dictate what mitigation measures, if any, will be implemented. The Draft EIR should reflect that proposed mitigation measures within the MCBCP are recommendations subject to the approval of the MCBCP.

MCBCP was recently the lead agency on a similar project for the transportation of SONGS 1 reactor pressure vessel (RPV) under NEPA. MCBCP issued a Finding of No Significant Impact (FONSI) and issued a Real Estate license approving transport of the RPV along the Beach and Road Route. There are no substantive differences between the Proposed Project and the RPV transport project. No changes have occurred that are expected to change that determination by MCBCP during its NEPA analysis of the Beach and Road Route option.

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

Despite the Draft EIR correctly stating that items related to seismic, nuclear safety and terrorism are in the exclusive jurisdiction of the NRC, the Draft EIR attempts to influence these issues. For example, mitigation measures G-4a "Prevent accelerated erosion during OSG Storage Facility construction", G-5a "Prepare site-specific geotechnical investigation for OSG Storage Facility", and G-6a "Prepare an

¹ This type of approach is consistent with the Diablo Canyon Power Plant Generator Replacement Project Draft EIR, which in that analysis did not identify an environmentally superior option for that project's old steam generators storage facility and pointedly stated any location was appropriate, while some locations may have some minor benefit.

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updated Safety Analysis Report to accommodate the OSG Storage Facility” address issues in the exclusive jurisdiction of the NRC. Well-established United States Supreme Court precedent interpreting the Atomic Energy Act, 42 U.S.C. § 2001 *et seq.* (AEA), 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). CEQA analysis of a nuclear facility may not rely on the health or safety impact of either a seismic event or a terrorist attack. 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 related to 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. All such references in the Draft EIR should be removed.

4. Environmental Baseline

The Draft EIR properly provides that “[t]he environmental baseline includes an operating nuclear power plant at SONGS, including two essentially identical nuclear reactor units, radioactive waste storage facilities, electrical transmission

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infrastructure, and other facilities, buildings, and systems.”² The document provides further that the “EIR analyzes only the incremental changes that would be caused by the steam generator replacement project.”³ However, this is not actually the case when the Draft EIR is closely read. Furthermore, the baseline also includes an active military base at MCBCP, which conducts military operations employing numerous military vehicles along the transportation routes.

Specifically, in Section D.3 Biological Resources, D.3.1.3 Existing Marine Resource Issues, the Draft EIR inappropriately analyzes the impacts that an operating plant may be having on the environment. Furthermore, the Draft EIR tends to overlook the existing operations of a fully functional military base when evaluating the transportation routes. This is evident, for example, in Section D.1 Visual Resources, which tends to treat views as pristine and does not take into account the numerous military vehicle operations that occur in the transport routes.

CEQA as well as case law interpreted “baseline” to be the existing conditions at the time of the project. Section 15125(a) of the CEQA Guidelines, the “Environmental Setting” section, provides express guidance regarding the issue of establishing the environmental “baseline,” 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) are 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 of continued operation of an existing facility should be considered part of the environmental “baseline” or whether

² Draft EIR, Executive Summary page ES-2.

³ Id.

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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.

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

Attachment

WMM/mcr

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