



June 11, 2008

Ms. Angela Hockaday  
Dockets Unit  
California Energy Commission  
1516 9<sup>th</sup> Street  
Sacramento, CA 95814

**SUBJECT: PG&E'S MOTION IN LIMINE TO  
STRIKE CEC STAFF TESTIMONY  
HUMBOLDT BAY REPOWERING PROJECT  
DOCKET NO. (06-AFC-7)**

Dear Ms. Hockaday:

Enclosed for filing with the California Energy Commission are one (1) original and twelve (12) copies of **Pacific Gas & Electric Company's (PG&E) Motion in Limine to Strike CEC Staff Testimony**, for the Humboldt Bay Repowering Project (06-AFC-7).

Sincerely,



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STATE OF CALIFORNIA

Energy Resources  
Conservation and Development Commission

In the Matter of:

Application for Certification for the  
Humboldt Bay Repowering Project

**DOCKET NO. 06-AFC-7**

**PACIFIC GAS & ELECTRIC  
COMPANY'S MOTION IN LIMINE TO  
STRIKE CEC STAFF TESTIMONY**

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Pacific Gas & Electric Company (PG&E) hereby files this motion in limine to strike portions of Staff's Cultural Resource testimony relating to the determination that the Humboldt Bay Repowering Project (HBRP) causes significant impacts to Units 1 and 2 of the existing Humboldt Bay Power Plant (HBPP) and that Units 1 and 2 are significant historical resources. Consequently any mitigation proposed to mitigate these impacts should similarly be stricken from Staff's testimony. The legal basis for striking the Staff testimony is that the information is irrelevant to the proceeding and is not reasonably necessary for the Commission to make any finding relating to the HBRP.

PG&E files this motion in limine at this time rather than making an oral objection at evidentiary hearing in order to allow the Committee and Staff to understand the basis for the objection and to enable more informed oral argument at the evidentiary hearing.

PG&E contends that the subject testimony is not relevant to the proceeding and is not reasonably necessary for the Commission to make any finding relating to the HBRP. This contention is based on the following uncontroverted facts.

1. The demolition of Units 1 and 2 is not part of the HBRP.
2. PG&E has not requested that the Commission authorize demolition of Units 1 and 2 in the HBRP License.

3. The demolition of Units 1 and 2 is subject to the exclusive permitting authority of the California Coastal Commission.

Further, PG&E contends that the subject testimony is neither relevant nor necessary for the following matters of law.

1. The demolition of Units 1 and 2 is not a “related facility” as defined by the Commission regulations.
2. The demolition of Units 1 and 2 is not an indirect impact of the HBRP.
3. The demolition of Units 1 and 2 is a future foreseeable project.

For the more detailed reasons discussed below, since demolition of Units 1 and 2 is not an indirect impact of HBRP but rather is a future foreseeable project under the exclusive jurisdiction of the California Coastal Commission, any determination of the historical significance of Units 1 and 2 is premature, will be performed by the California Coastal Commission during its CEQA certified regulatory program, and the HBRP does not directly or indirectly cause the physical change in the environment for which Staff has proposed mitigation.

## **I. UNCONTROVERTED FACTS**

### **A. DEMOLITION OF UNITS 1 AND 2 IS NOT PART OF THE HBRP**

Staff and PG&E agree that the demolition of the HBRP is not part of the HBRP project description. The AFC<sup>1</sup> clearly identifies that the demolition of Units 1 and 2 are not part of the HBRP. Staff agrees that the demolition of Units 1 and 2 are not part of the HBRP<sup>2</sup>. Since there is agreement among the parties, and there is no evidence to the contrary, the Committee may treat this as an uncontroverted fact not requiring adjudication.

### **B. PG&E HAS NOT REQUESTED THE COMMISSION AUTHORIZE THE DEMOLITION OF UNITS 1 AND 2**

The AFC does not request the CEC authorize the demolition of Units 1 and 2 and only requests that the CEC authorize demolition of certain structures within the footprint of the HBRP that must be demolished in order to construct the HBRP<sup>3</sup>. The Committee may treat this fact as uncontroverted.

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<sup>1</sup> Exhibit 1, page 2-4

<sup>2</sup> FSA, pages 3-4 and 3-5

<sup>3</sup> Exhibit 1, pages 2-2 through 2-4

These facilities are outlined in the AFC and the FSA<sup>4</sup> and are not the subject of this motion to strike. PG&E concedes that since the demolition of these structures is necessary to construct the HBRP, they are related facilities and potential impacts as a result of such demolition are within both the permitting jurisdiction and CEQA review responsibility of the Commission. In fact, while PG&E disagrees with Staff's conclusion that these facilities are significant cultural resources, the dispute is moot since PG&E has agreed to Staff's proposed Conditions of Certification treating these structures as historically significant.

The HBRP is distinguishable from the Morro Bay proceeding, where the applicant specifically requested the Commission to License all of its on-site demolition activities and described those activities as part of several phases of one activity to be covered under one permit.<sup>5</sup>

### **C. DEMOLITION IS SUBJECT TO THE EXCLUSIVE PERMITTING JURISDICTION OF THE CALIFORNIA COASTAL COMMISSION**

As discussed in Exhibit 53 it is clear that PG&E must obtain a Coastal Development Permit (CDP) from the California Coastal Commission (CCC) to demolish Units 1 and 2.<sup>6</sup> Staff does not disagree with this contention<sup>7</sup> and therefore the Committee may treat this as an uncontroverted fact.

## **II. LEGAL ANALYSIS**

As discussed below, the Commission does not have the permitting jurisdiction for Demolition of Units 1 and 2. PG&E concedes that the Commission has an obligation under its CEQA review authority to consider the demolition of Units 1 and 2. However, the appropriate review methodology is that the demolition activities should be treated as a future foreseeable project and not as an indirect impact of the HBRP.

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<sup>4</sup> Paint building and railroad spur. The 115 kV transmission tower was removed by PG&E for safety reasons as outlined in Exhibit 24 and in PG&E's Status Report Number 3

<sup>5</sup> 00-AFC-12, Morro Bay Power Plant Project, 3<sup>rd</sup> Revised Presiding Member's Proposed Decision, pages 2 and 3

<sup>6</sup> Section 30106 of the California Coastal Act includes demolition as a development activity for which a Coastal Development Permit is required.

<sup>7</sup> FSA at pages 4.3-38 and 4.9-39.

**A. THE DEMOLITION OF UNITS 1 AND 2 IS NOT A “SITE” OR “RELATED FACILITY” AS DEFINED BY COMMISSION REGULATIONS**

Public Resources Code Section 25500 provides “the commission shall have the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or change or addition to an existing facility”. The existing HBPP does not have a Commission License as it was developed prior to the creation of the Commission. The HBRP site is defined in the AFC and does not include any portion currently occupied by Units 1 and 2. Therefore, the demolition of Units 1 and 2 are not within the “site”.

Section 1702 (n) defines a related facility as “a thermal power plant, electric transmission line, or any equipment, structure, or accessory dedicated to and essential to the operation of the thermal power plant or electric transmission line. As described in the AFC, Units 1 and 2 will no longer be operational after the HBRP becomes operational. The demolition is not essential to the operation of the new HBRP<sup>8</sup>. Therefore the demolition of Units 1 and 2 is not a “related facility”. Since the demolition is neither a “site” nor a “related facility” to the HBRP, the Commission does not have exclusive permitting jurisdiction for Unit 1 and 2 demolition activities.

**B. DEMOLITION OF UNITS 1 AND 2 ARE NOT INDIRECT IMPACTS OF THE HBRP**

CEQA Guidelines define a significant effect on the environment as a:

substantial adverse change in the physical conditions which exist in the area affected by the proposed project.<sup>9</sup>

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<sup>8</sup> Exhibit 1, page 2-4

<sup>9</sup> CEQA Guidelines Section 15002 (g)

The Guidelines also provide that:

In evaluating the significance of the environmental effect of a project, the Lead Agency shall consider direct physical changes in the environment which may be **caused by the project** and reasonably foreseeable indirect physical changes in the environment which may be **caused by the project**. (emphasis added)

The Guidelines also provide that:

an indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is **caused indirectly by the project**. If a direct physical change in the environment in turn **causes another change** in the environment, then the other change is an indirect physical change in the environment.<sup>10</sup> (emphasis added)

This definition has two primary elements; foreseeability and causation. Staff asserts that the indirect physical change to the environment is the demolition of Units 1 and 2. Since they have deemed these structures to be historically significant, they conclude that this impact is significant and therefore requires mitigation. However, Staff inappropriately bases its analysis entirely on the foreseeability aspect inherent in the Guidelines and does not consider the requisite element of causation.

PG&E has been clear that once the HBRP is operational, Units 1 and 2 will no longer operate. Further, Units 1 and 2 will eventually be demolished. This future project is foreseeable not because the units become obsolete, but rather because PG&E has committed to these demolition activities. As discussed in the AFC and Data Responses, the demolition of Units 1 and 2 will be coordinated with the decommissioning and demolition of Unit 3.<sup>11</sup> Unit 3 is the nonoperational nuclear unit that shares infrastructure with Units 1 and 2. The demolition of Units 1 and 2 is much more closely related with Unit 3 than the HBRP.<sup>12</sup>

As a matter of law, the HBRP does not cause the demolition of Units 1 and 2 because the demolition cannot take place without the California Coastal Commission issuing a Coastal Development Permit, which is a discretionary action. Applying the standard common law concept of "causation" to this analysis clearly results in concluding that the discretionary Coastal Development

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<sup>10</sup> CEQA Guidelines Section 15064 (d)(2)

<sup>11</sup> Exhibit 1, page 2-4

<sup>12</sup> Exhibit 48

Permit is a superseding intervening force that breaks the chain of causation between the development of the HBRP and the actual demolition of Units 1 and 2. If such a permit was not required, Staff's conclusion may be correct. However, the HBRP, at most, removes a barrier to demolition of Units 1 and 2 but is not the legal cause of it. Therefore, since the HBRP does not cause the demolition of Units 1 and 2, the impacts associated with such demolition cannot be an indirect impact of the HBRP.

The fact that the HBRP comes first does not mean that all subsequent activities are caused by and therefore indirect impacts attributed to HBRP. The fact is that if PG&E was not demolishing Unit 3 in order to limit the scope of its license with the Nuclear Regulatory Commission to the area necessary to operate the Independent Spent Fuel Storage Installation (ISFSI), it would be under no obligation to demolish Units 1 and 2.

Using Staff's logic that if an activity is foreseeable it is an indirect impact, regardless of causation, would lead to the conclusion that the demolition of Unit 3 is also an indirect impact, since the demolition of Unit 3 would only take place if the HBRP were constructed and after the HBRP is operating and Units 1 and 2 are rendered nonoperational. However, Staff correctly concludes that demolition of Unit 3 is not an indirect impact of the HBRP.<sup>13</sup>

**C. DEMOLITION OF UNITS 1 AND 2  
SHOULD BE TREATED AS A FUTURE  
FORSEEABLE PROJECT AND  
INCLUDED IN THE CUMULATIVE  
IMPACTS ANALYSIS**

The Guidelines make a clear distinction between a foreseeable change in the environment and a foreseeable future project. The Guidelines provide that an EIR should address cumulative impacts and defines a cumulative impact as:

A cumulative impact consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts. An EIR should not discuss impacts which do not result in part from the project evaluated in the EIR.<sup>14</sup>

Additionally, the Guidelines provide direction on what projects to consider:

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<sup>13</sup> FSA, page 4.3-29

<sup>14</sup> CEQA Guidelines Section 15130(a)(1)

A list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency...<sup>15</sup>

As described above, the demolition of Units 1 and 2 is a project that PG&E will undertake in the future once the appropriate Coastal Development Permit is obtained and in coordination with the decommissioning and demolition of Unit 3. The demolition of Units 1 and 2 have been evaluated in every environmental section of the AFC to determine whether the impacts of the HBRP, when considered with the impacts of the demolition of Units 1 and 2, result in a combined cumulatively considerable impact.

This approach is consistent with the approach applied in the Moss Landing proceeding.<sup>16</sup> In that proceeding the Commission held:

Three related projects are on a separate agency approval track. Duke will be removing the large fuel storage tanks on site, will be adding Selective Catalytic Reduction (SCR; an air emission control technology) to existing Units 6 and 7, and will carry out onsite maintenance activities related to outage work on Units 6 and 7. Monterey County is the lead agency for the environmental review of these projects. However, the analysis in this document includes a summary a discussion of any potential cumulative impacts from these related projects.<sup>17</sup>

It should be noted that all of these projects would take place on site. Therefore, the Commission should not treat the demolition of Units 1 and 2 as indirect impacts but rather should treat the demolition of Units 1 and 2 as a future foreseeable project and should conduct a cumulative impacts analysis.

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<sup>15</sup> CEQA Guidelines Section 15130 (b)(1)(A)

<sup>16</sup> 99-AFC-4, Moss Landing Power Plant Project

<sup>17</sup> 99-AFC-4, Moss Landing Power Plant Project, Commission Decision, Page 15



**D. FOR THE PURPOSES OF A  
CUMULATIVE IMPACT ANALYSIS  
THE HBRP IS ONLY REQUIRED TO  
MITIGATE ITS FAIR SHARE  
CONTRIBUTION TO THE  
CUMULATIVE IMPACT**

The CEQA Guidelines define the term cumulatively considerable as

“Cumulatively considerable” means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects as defined in Section 15130<sup>18</sup>

The Guidelines provide that a

A project’s contribution is less than cumulatively considerable if the project is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact.

The full cumulative impact that Staff has identified as an indirect impact is the demolition of the existing HBPP facilities. Assuming that every structure on the site is a significant historical resource, CEQA requires that HBRP only need to mitigate its fair share contribution to that impact. The only contribution to demolition of the existing HBPP is limited to the structures that will be demolished for purposes of the construction and operation of the HBRP. PG&E has already agreed to Staff’s proposed mitigation for these facilities. These conditions fully mitigate the HBRP full contribution to the future demolition of all structures on the site. Requiring the HBRP to mitigate demolition performed later under a future discretionary permit would be requiring it to fund more than its fair share contribution to the cumulative impact.

If the HBRP was owned by a third party, as was initially proposed in the Long Term Request For Offers, any mitigation measure imposed on the third party requiring mitigation for PG&E facilities would be unenforceable. The fact that PG&E will own both the HBRP and will eventually demolish Units 1, 2 and 3 should not nullify the CEQA guidance that a project is only responsible for its fair share contribution to a cumulative impact.

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<sup>18</sup> CEQA Guidelines Section 15065 (c)

**E. THE CALIFORNIA COASTAL COMMISSION WILL CONDUCT A CEQA REVIEW OF THE DEMOLITION OF UNITS 1 AND 2 AND WILL CONSULT WITH THE STATE HISTORIC PRESERVATION OFFICER**

As described in Section I. C. of this motion and in Exhibit 53, the California Coastal Commission will be required to issue a Coastal Development Permit before PG&E would be authorized to demolish Units 1 and 2. The California Coastal Commission's permitting program is a Certified Regulatory Program under CEQA<sup>19</sup>

In reviewing PG&E's application for a Coastal Development Permit for the demolition of Units 1 and 2, the CCC will be required to conduct a full evaluation of the historical significance of Units 1 and 2 and, if so, the potential effects of the demolition on their potential public-interest value as historic properties. In addition, the California Coastal Act specifically includes a provision to ensure that impacts to cultural resources are sufficiently mitigated. Section 30244 states:

Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer (SHPO), reasonable mitigation measures shall be required.<sup>20</sup>

Therefore, the California Coastal Commission will be the Lead Agency for the demolition of Units 1 and 2, will perform a CEQA review and will consult with the SHPO.

**F. STAFF'S CULTURAL RESOURCE TESTIMONY RELATING TO THE HISTORICAL SIGNIFICANCE OF UNITS 1 AND 2 IS NOT RELEVANT TO THE PROCEEDING AND NOT NECESSARY FOR THE COMMISSION TO REACH A DECISION ON THE HBRP**

Cultural Resource Staff Testimony is the only technical area that attempts to identify the demolition of Units 1 and 2 as indirect impacts of the HBRP. For the reasons outlined above, this approach should be rejected. Further, if the

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<sup>19</sup> The CEC may prepare an Initial Study or EIR to demonstrate that certain small power plants are exempt from their certification process.

<sup>20</sup> Public Resource Code Section 30244

demolition of Units 1 and 2 are appropriately analyzed as cumulative impacts, a determination of whether Units 1 and 2 are historically significant is not relevant to the Commission Decision because whether or not Units 1 and 2 are historically significant would not change the requirement that HBRP mitigate its fair share contribution to a cumulative impact. Additionally, the Commission's determination of whether or not Units 1 and 2 are historically significant could differ from the conclusions reached by the California Coastal Commission and the State Historic Preservation Officer (SHPO) pursuant to the evaluation conducted under the review of PG&E's application for a Coastal Development Permit.

### III. CONCLUSION

PG&E respectfully requests the Committee strike the Cultural Resources Testimony that Units 1 and 2 are historically significant and that the HBRP causes an indirect impact to them as irrelevant and unnecessary. Further the Committee should not include Conditions of Certification **CUL-11** and **CUL-12** in the Final Decision. We will be ready to argue this motion at the evidentiary hearing.

Dated: June 11, 2008

Respectfully Submitted,



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Scott A. Galati  
Counsel to PG&E

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE  
STATE OF CALIFORNIA

APPLICATION FOR CERTIFICATION FOR THE  
HUMBOLDT BAY REPOWERING PROJECT  
BY PACIFIC GAS AND ELECTRIC COMPANY

Docket No. 06-AFC-7  
PROOF OF SERVICE  
(Revised 3/21/2008)

**INSTRUCTIONS:** All parties shall 1) send an original signed document plus 12 copies OR 2) mail one original signed copy AND e-mail the document to the web address below, AND 3) all parties shall also send a printed OR electronic copy of the documents that shall include a proof of service declaration to each of the individuals on the proof of service:

CALIFORNIA ENERGY COMMISSION  
Attn: Docket No. 06-AFC-07  
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**DECLARATION OF SERVICE**

I, David L. Wiseman, declare that on June 11, 2008, I deposited copies of the attached **Pacific Gas & Electric Company's Motion in Limine to Strike CEC Staff Testimony** in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

**OR**

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

I declare under penalty of perjury that the foregoing is true and correct.



David L. Wiseman  
Counsel to Applicant  
GalatiBlek