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

Energy Commission Staff's Response and Objection to PG&E's Motion in Limine to Strike CEC Staff Testimony

On June 11, 2008, the applicant filed a motion in limine to strike portions of staff's cultural resources testimony. Staff objects to the motion and provides the following response to the assertions contained therein. Additionally, staff received, and has attached to this document, a response to its queries concerning the California Coastal Commission's review process for demolition of Units 1 and 2.

I. The Demolition of Units 1 and 2 is Appropriately Analyzed as Part of HBRP under the California Environmental Quality Act (CEQA)

There are two different concepts that seem to be conflated in PG&E's arguments: (1) what, specifically, constitutes the project for purposes of permitting and (2) what constitutes the project for purposes of CEQA analysis. PG&E implies that the scope of CEQA review is limited to what the Energy Commission may permit and, more specifically, what the applicant specifies as the project to be permitted. This, however, is counter to established law. CEQA requires analysis of a project's impacts, including those that extend beyond what is proposed for certification. Staff has not argued that the Energy Commission has permitting jurisdiction over Units 1 and 2. Staff simply asserts that the demolition of Units 1 and 2 is a reasonably foreseeable impact resulting from the construction and operation of HBRP and, as such, must be part of staff's analysis of the proposed project's environmental effects. Moreover, the demolition of Units 1 and 2 constitute part of the entire project or "the whole of the action" that must be analyzed pursuant to CEQA.

The applicant erroneously asserts that staff concurs with its statements that the demolition of Units 1 and 2 are not part of the HBRP. (Motion, p. 2.) The discussion in staff's final staff assessment (FSA) referred to by the applicant states, "According to the applicant, the demolition of Units 1 and 2....[is] not part of the HBRP project description." (FSA p. 4.3-5.) That statement is not one of staff's concurrence, but of applicant's claim. The important point is that the scope of a project, what constitutes "the whole of the action" under CEQA, is a legal determination, not a purely factual one that is decided by staff's assessment or by the applicant's assertions. (see, *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007), 155 Cal.App.4th 1214, 1223.) It is a determination that must ultimately in this proceeding be made by the Energy Commission based on law as applied to the facts of the case, and does not hinge on the applicant's choice of what to include in the project description.

Under CEQA, a "project" subject to analysis is an "activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment..." (Pub. Resources Code, §21065.) The CEQA guidelines provide further guidance in defining it as "the whole of an action, which has a potential for resulting in" the above identified changes. (Cal. Code Regs., tit. 14, §15378.) The term is to be given a broad interpretation in order to maximize protection of the environment. (McQueen v. Board of Directors of the Mid-peninsula Regional Open Space District (1988) 202 Cal.App.3d 1136.) The Guidelines also define "indirect physical change in the environment" as 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...." (Cal. Code Regs., tit. 14, §15064(d)(2).) And lastly, indirect effects are also described as effects caused by the project that are "later in time or farther removed in distance, but are still reasonably foreseeable." (Cal. Code Regs., tit. 14, §15358.)

PG&E owns and operates Units 1 and 2 and will own and operate HBRP, which is currently before the Energy Commission for permitting approval. PG&E acknowledges that "the HBRP will require the cessation of operation of Humboldt Bay Power Units 1 and 2." (AFC, p. 1-16.) The applicant also acknowledges that "it is foreseeable that the structures and associated equipment of the Humboldt Bay Power Plant will be demolished after the HBRP is constructed and operating." (AFC, p. 2-4.) It would seem that Units 1 and 2 cannot be demolished without the construction and operation of HBRP, thus establishing a causal relationship between

operation of HBRP and demolition of Units 1 and 2. In other words, it is reasonably foreseeable that construction and operation of HBRP will foreseeably lead to demolition of Units 1 and 2. In fact, PG&E acknowledges as much in its AFC, which accedes that "[t]he HBRP will contribute indirectly to the demolition of Units 1 and 2 by providing a new power supply for the region and thus making it possible to retire these units." (AFC, p. 8.3-14.) To comply with CEQA, an analysis must consider whether changes caused by the project may set in motion a chain of events that would foreseeably culminate in impacts on the physical environment. (*Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985), 172 Cal.App.3d 151.) The facts show that the construction of HBRP will set in motion a chain of events that will foreseeably lead to the demolition of Units 1 and 2.

A similar situation was considered in *Association for a Cleaner Environment v. Yosemite Community College District* (2004), 116 Cal.App.4th 629, involving a community college district's decision to close a firing range. The district argued that it had only decided to close, not physically remove the facility, and as such an environmental analysis was not required. (*Id.* at 638.) The court disagreed, holding that evidence in the record showed the decision had been made either to dismantle or demolish the range and, because CEQA "must be construed to effectuate its purpose of protecting the environment, and because a group of interrelated actions may not be chopped into bite-size pieces to avoid CEQA review," closure and demolition of the range constituted "the whole of an action" requiring environmental review. (*Id.*) PG&E does not dispute that HBRP will directly cause the closing down of Units 1 and 2 and does not object to this being analyzed. Stopping the analysis here, without proceeding to the impacts associated with the foreseeable demolition, would piecemeal the analysis in contravention of CEQA.

PG&E argues that the need to obtain a Coastal Development Permit to complete the demolition breaks this chain of causation, but cites no cases supporting this assertion, relying instead on one of dozens of definitions of causation found in tort law. (Motion, pp. 5-6.) With respect to CEQA, the courts have held that the concept of causation contained in the definition of "project" is intended merely to reflect a reasonable probability that environmental impacts will follow from certain kinds of decisions. (Laurel Heights Improvement Assoc v. Regents of the University of California (1988) 47 Cal.3d.376.) Does the fact that PG&E must obtain a subsequent permit make demolition of Units 1 and 2 no longer reasonably foreseeable? The courts have said no. In *Citizens for Quality Growth v. City of Mount Shasta*, (1988) 198 Cal.App.3d 433, the court rejected a similar argument. The city claimed that it need not consider a potentially feasible

measure to mitigate the loss of wetlands because, in order to develop the site at issue, the applicant would subsequently need to obtain a permit from the Army Corp of Engineers, which would then decide what mitigation measures to impose. The court cited section 15020 of the Guidelines, which states, "Each public agency is responsible for complying with CEQA and these Guidelines" and "must meet its own responsibilities under CEQA," and held that the city could not avoid its responsibility to make a determination under CEQA. (*Id.* at 442.) This case, then, stands for the proposition that "lead agencies, in contemplating the extent of their responsibility to mitigate impacts, should exercise their regulatory authority broadly, *even at the risk of addressing impacts subject to regulation by other public agencies*." (Remy Thomas, *Guide to CEQA*, p. 388; emphasis added.)

Additionally, PG&E erroneously states that staff agrees with its contention that it must obtain a Coastal Development Permit. In fact, PG&E has provided little detail regarding any subsequent review the Coastal Commission may conduct. At the beginning of this proceeding the Coastal Commission informed staff that it would not be able to conduct its concurrent review of HBRP due to staffing and resource constraints. It is likely that these constraints have not lifted, the Coastal Commission may have similarly scaled back its review of other projects under its jurisdiction, and, in any event, the Coastal Commission would make use of the Energy Commission's assessment of the "whole of the action," including the demolition that the Coastal Commission may permit. Additionally, PG&E's reference to section 30244 of the California Coastal Act as confirmation that that any impact to Units 1 and 2 will be analyzed by the Coastal Commission is unconvincing considering that the section only mentions impacts to archaeological and paleontological resources, not the historic resources at issue here. (Motion, p. 9.) This interpretation is also supported by the letter staff received from Mr. Tom Luster of the Coastal Commission, attached at the end of this document. (Letter from Tom Luster, Staff Environmental Scientist, California Coastal Commission, June 13, 2008.)

The mitigation of Units 1 and 2 are properly considered in this proceeding. As a practical matter, the conditions would not affect the schedule for construction of the HBRP, as they are only triggered once PG&E decides to go forward with the demolition, which PG&E asserts would be at some future point in time. The exact same mitigation being proposed, Historic American Engineering Record (HAER) recordation, was required in Morro Bay and staff does not believe it to be prohibitively expensive. If PG&E is concerned that the Coastal Commission may impose contradictory requirements, that outcome is supported by no evidence. HAER recordation is a

standard mitigation requirement and would likely be imposed by any agency finding a significant impact to historic resources, but allowing the demolition. Additionally, CEQA recommends that agencies utilize previously prepared environmental documents to the extent possible, including mitigation measures identified by a previous lead agency. To foster a coordinated approach to mitigation, the staff has in fact conferred with the Coastal Commission and the SHPO.

II. The Energy Commission has required mitigation for indirect impacts in other proceedings

Requiring mitigation for an indirect impact is not something new for the Energy Commission. In the Metcalf Energy Center proceeding, mitigation that included requiring the applicant to provide cows to graze a nearby patch of land was required for impacts resulting from the emission of nitrogen, which would subsequently fall to the ground, fertilizing nearby serpentine soils thereby encouraging the growth of non-native flora to the detriment of native flora and fauna. (Metcalf Energy Center Commission Decision, pp. 236-247.) In that proceeding, the applicant had not included the patch of land on which the grazing was ultimately required as part of the project's description, nor was it asserted that it was part of the project site or included in the definition of related facility. Nevertheless, the Energy Commission required mitigation.

Similarly, in the Blythe Energy Project Phase II proceeding, the Energy Commission required the applicant to establish a fund for farm workers for job retraining or some similar program to mitigate for potential job loss resulting from the applicant's water offset plan, which would convert some farmlands from high-labor to low-labor crops. (Blythe Energy Project Phase II Commission Decision, pp. 163-164.) Again, though the offset plan was presented as mitigation by the applicant for its water use, the lands involved in the offset plan were not themselves subject to Energy Commission jurisdiction as a site or related facility. And yet this did not prevent the Energy Commission from imposing mitigation. These are only a few of the many instances in which the Energy Commission has required mitigation for indirect impacts. Energy Commission also requires mitigation for ozone precursors which, though not an impact in and of themselves, combine with other chemicals and sunlight to form ozone, which is an impact.

PG&E cites to the Moss Landing Power Plant Project proceeding as an indication that we have treated other on-site activities as cumulative and not indirect impacts. (Motion, p. 7.) The facts presented in Moss Landing are clearly distinguishable from those at issue here, and the

differential treatment is justified. In Moss Landing there is no indication that the three concurrent activities are caused by, or somehow result from, construction and operation of the Moss Landing facility. There is no claim that the addition of SCR on existing Units 6 and 7 was set into motion by the construction or operation of the MLPPP or that somehow removal of the fuel storage tanks was likewise linked to the project being reviewed by the Energy Commission. And it would be quite a stretch to argue that maintenance activities on these units resulted from the proposed project. Therefore it was entirely appropriate to treat these as cumulative and not direct or indirect impacts of MLPPP. Staff does not here argue that anything that occurs on the site of a proposed project must be treated as a direct or indirect impact; only those activities that are causally related to a proposed project.

III. The Possible Existence of a Subsequent Permitting Proceeding Does Not Alleviate the Energy Commission of the Responsibility to Analyze Impacts to Units 1 and 2 and Identify Feasible Mitigation Measures.

The Energy Commission's regulations establish that the application proceeding shall be conducted in order to accomplish several objectives, including "to ensure that the applicant incorporates into the project all measures that can be shown to be feasible, reasonably necessary, and available to substantially lessen or avoid the project's significant adverse environmental effects..." (Cal. Code Regs., tit. 20, §1741(b).)

Ultimately, the "[energy] commission shall not certify any site and related facilities for which one or more significant adverse effects have been identified unless it makes both of the following findings: 1) with respect to matters within the authority of the [energy] commission, that changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant environmental effects identified in the proceeding;" and 2) "with respect to matters not within the [energy] commission's authority but within the authority of another agency, that changes or alterations required to mitigate such effects have been adopted by such other agency, or can and should be adopted by such other agency." (Cal. Code Regs., tit. 20, §1755(c).) Therefore, even though the demolition of Units 1 and 2 is outside the Energy Commission's permitting jurisdiction and the Coastal Commission may conduct further analysis, it would be improper for the Committee to strike any discussion of the matter. Instead, the Committee should fully evaluate the effects of the foreseeable demolition and make the finding described above under section 1755(c) of the regulations.

IV. Conclusion

Staff objects to PG&E's motion to strike staff's cultural resources testimony. As discussed above, staff believes the Energy Commission has authority to require mitigation for the reasonably foreseeable demolition of Units 1 and 2 and that evidentiary hearings should proceed on this issue to allow the Committee to determine whether there is substantial evidence in the record to make the necessary finding that such mitigation is necessary.

DATED: June 13, 2008

Respectfully submitted,

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June 13, 2008

Mr. John Kessler
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VIA FACSIMILE 916-654-3882

Dear Mr. Kessler and Ms. Bastian:

This letter responds to the questions in your June 3, 2008 message related to the Coastal Commission's review of cultural resources, and in particular what you described as the "historic-period cultural resources" that may be associated with the demolition of Humboldt Bay Power Plant Units 1 & 2 and their associated structures. You asked the following:

- Describe the Coastal Commission's statutory oversight of historic-period cultural resources, particularly those of the built environment:

  Coastal Act Section 30244 states:

  > *Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.*

  Coastal Act Section 30253 states, in relevant part:

  > *New development shall:*
  > *...(5) Where appropriate, protect special communities and neighborhoods which, because of their unique characteristics, are popular visitor destination points for recreational uses.*

  The Coastal Commission's review related to cultural resources is therefore focused on archaeological and paleontological resources identified by the State Historic Preservation Officer (SHPO) or on special communities and neighborhoods that may have characteristics associated with cultural resources. Please note that certain Local Coastal Programs (LCPs) may have additional policies or regulations related to these resources; however, the power plant units referenced above are within the Commission's retained jurisdiction and their demolition would be subject to Coastal Act policies rather than LCP policies. They would be subject to the above two policies only if they were considered "archaeological" resources by the SHPO or if they represented a "special community or neighborhood" with unique cultural resource-related characteristics.

- Describe the Coastal Commission's approach regarding formal consultation with the SHPO for identifying and evaluating the above resources during our review of a coastal development permit (CDP): When archaeological or paleontological resources are identified by the SHPO, the Commission may conduct formal or informal review with the SHPO, depending on the type and extent of those resources that may be affected by a proposed project. As a recent example, you may wish to review the Commission's decision on a proposed toll road in Orange County (available at http://documents.coastal.ca.gov/reports/2008/2/W8b-2-2008.pdf).

- Describe the relationship between the Coastal Commission and Humboldt County with respect to CEQA review for a coastal development permit and how that relationship affects identification and evaluation of historic period cultural resources during CDP application review: For a proposed project requiring permits from both a local government and the Coastal Commission, the local government would be the CEQA Lead Agency.[1] Our CDP application includes a "Local Agency Review Form", which requires an applicant to obtain from a local lead agency the description and status of any discretionary permits required of the proposed project and the description and status of any CEQA review conducted for the proposed project. For most projects requiring a CDP, cultural resources are most often first identified and evaluated during a project's CEQA review and we often rely on that review to help determine what measures may be needed to ensure Coastal Act conformity.

- Provide our view on whether the coastal development permit review process is appropriate for considering the historic significance of Humboldt Bay Power Plant Units 1 and 2 and their associated structures, and for determining whether their demolition would require mitigation: As stated above, if the units and associated structures were considered "archaeological" resources by the SHPO or if they were part of a community or neighborhood described in Section 30253(5), we would likely evaluate their historic significance as part of our CDP review and determine whether mitigation measures would be needed. If the units and associated structures did not meet those descriptions, our CDP would not consider such measures.

I hope this is of use to you. Please let me know if you have further questions.

Sincerely,

Tom Luster
Staff Environmental Scientist
Energy, Ocean Resources, and Federal Consistency Division

[1] See for example, Section 15051 of the CEQA Guidelines: "Where two or more public agencies will be involved with a project, the determination of which agency will be the Lead Agency shall be governed by the following criteria: ... The Lead Agency will normally be the agency with general governmental powers, such as a city or county, rather than an agency with a single or limited purpose..."

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 6/11/2008)

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:

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DECLARATION OF SERVICE

I, Scott McDonald, declare that on 6/13/08, I deposited copies of the attached "Energy Commission Staff's Response and Objection to PG&E'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.

Scott McDonald