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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

THE WORLD BUSINESS ACADEMY, A TAX-EXEMPT 501(c)(3) PUBLIC CHARITY, AND THE IMMACULATE HEART COMMUNITY, A TAX-EXEMPT 501(c)(3) PUBLIC CHARITY,

Petitioner and Plaintiff,

v.

CALIFORNIA STATE LANDS COMMISSION, AN AGENCY OF THE STATE OF CALIFORNIA,

Respondent and Defendant.

PACIFIC GAS & ELECTRIC COMPANY, DOES 1-10,

Real Parties in Interest.

Case No. BS163811

[PROPOSED] JUDGMENT

Dept. 82

Judge: Hon. Mary H. Strobel
Trial Date: July 11, 2017
Action Filed: August 2, 2016

This action regularly came before Superior Court Judge, the Honorable Mary H. Strobel, for hearing on the Petition for Writ of Mandate on July 11, 2017. Laurence Chaset, Christina Humphrey, J. Kirk Boyd and Gretchen Dumas appeared for Petitioners, The World Business Academy and The Immaculate Heart Community. John Saurenman appeared for the Respondent California State Lands Commission ("SLC"). Damon Mamalakis appeared on behalf of Real Party In Interest Pacific Gas & Electric Company ("PG&E").

Having received the evidence, considered the parties' briefs, and heard arguments of counsel and for the reasons set forth in the Minute Order dated July 11, 2017, and attached hereto as Exhibit A,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Petition for Writ of Mandate filed by Petitioners is denied, with judgment in favor of the Respondent California State Lands Commission and Real Party in Interest Pacific Gas & Electric Company; and
2. All DOE real parties in interest are dismissed with prejudice.

Dated: July __, 2017

Mary H. Strobel, Superior Court Judge

Exhibit A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
HONORABLE MARY H. STROBEL	JUDGE	N. DIGIAMBATTISTA	DEPUTY CLERK
HONORABLE 9	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
B. HALL C/A	Deputy Sheriff	J HOLLIFIELD/CSR 12564	Reporter

9:30 am	BS163811	Plaintiff Counsel	KIRK BOYD (X) GRETCHEN DUMAS (X) LAURENCE G. CHASET (X)
	THE WORLD BUSINESS ACADEMY ET A VS CALIFORNIA STATE LANDS COMMISSI	Defendant Counsel	CHRISTINA HUMPHREY (X) JOHN A. SAURENMAN (x) DAMON P. MAMALAKIS (X)
	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

HEARING ON PETITION FOR WRIT OF MANDATE

Matter comes on for hearing and is argued.

Petitioner's exhibit 1 (administrative record) is admitted into evidence.

Petitioner's oral request to file a supplemental brief is made, argued and denied.

The court adopts its tentative ruling as the order of the court and is set forth in this minute order.

Petitioners World Business Academy and the Immaculate Heart Community ("Petitioners") seek a writ of mandate compelling Respondent California State Lands Commission ("Respondent" or "Commission") to set aside its final decision dated June 28, 2016 approving a new lease requested by Real Party in Interest Pacific Gas & Electric Company ("PG&E") for water cooling facilities associated with the Diablo Canyon Nuclear Power Plant.

Petitioners' Requests for Judicial Notice; Respondent's and PG&E's Motions to Strike

Petitioners have requested judicial notice of various documents from outside of the administrative

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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NATURE OF PROCEEDINGS:

record. Petitioners have also cited to extra-record evidence in their opening brief, and submitted additional extra-record evidence with their reply. Respondent and PG&E have filed two motions to strike related to Petitioners' extra-record evidence, requests for judicial notice, and new reply arguments.

In general, "a hearing on a writ of administrative mandamus is conducted solely on the record of the proceedings before the administrative agency." (Toyota of Visalia, Inc. v. New Motor Vehicle Bd. (1987) 188 Cal.App.3d 872, 881.) However, extra-record evidence may be admitted if, in the exercise of reasonable diligence, the relevant evidence could not have been produced or was improperly excluded at the hearing. (CCP § 1094.5(e); Pomona Valley Hosp. Med. Ctr. v. Superior Court (1997) 55 Cal.App.4th 93, 100.) The requirements to submit extra-record evidence under section 1094.5(e) are "stringent." (Pomona Valley Hosp. Med. Ctr. v. Superior Court (1997) 55 Cal.App.4th 93, 102.) In CEQA cases, "extra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative [or quasi-adjudicatory] decision or to raise a question regarding the wisdom of that decision." 1 (Western States Petroleum Assn. v. Sup. Ct. (1995) 9 Cal.4th 559, 579; see Eureka Citizens for Responsible Government v. City

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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	CEQA 170.6 TORRIBIO - PETITIONER		DAMON P. MAMALAKIS (X)

NATURE OF PROCEEDINGS:

of Eureka (2007) 147 Cal.App.4th 357, 367.)

Petitioners' RJN Exhibit 1, and Supplemental RJN Exhibits A-F.

These documents are part of the administrative history of Title 14, California Code of Regulations, section 15301. (See Humphrey Decl. filed 5/22/17.) As discussed further in the analysis of the Petition, while Petitioners did not submit the legislative history of section 15301 below, the Commission's findings under section 15301 imply an interpretation of the regulation to include nuclear power plants. Petitioners argued during the administrative proceedings that section 15301 did not apply. However, in their opening and reply briefs, Petitioners argue a new legal theory why that is so. A sound argument can be made that Petitioners did not exhaust on the issue of whether the legislative history supports a conclusion section 15301 does not include nuclear power generating facilities. However, as an alternative analysis, assuming Petitioners did exhaust as to this argument, the court considers the legislative history and associated legal theory to determine the proper interpretation of section 15301. Petitioners' request for judicial notice as to Exhibit 1, and their supplemental request as to Exhibits A to F are GRANTED.

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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NATURE OF PROCEEDINGS:

Petitioners' RJN Exhibits 2-6.

These documents are not contained in the administrative record, and predate the June 28, 2016 hearing. Petitioners fail to show that they could not have submitted these documents with the exercise of reasonable diligence at the administrative hearing. That some of these documents may have been referred to in the record does not excuse Petitioners' failure to submit these documents into evidence. Petitioners' reliance on Cadiz Land Co., Inc. v. Rail Cycle, LP (2000) 83 Cal.App.4th 74, 118, is misplaced. Cadiz does not permit a petitioner to contradict the agency's findings with extra-record evidence that could have been submitted with the exercise of reasonable diligence.

Petitioners' request for judicial notice as to Exhibits 2-6 is DENIED.

Respondent's and PG&E's Joint RJN Exhibits A and B

Respondent's request for judicial notice is GRANTED. (Evid. Code § 452(c), (h).)

Respondent's and PG&E's First Motion to Strike

Page 4, footnote 10; page 10, footnote 25; page 17, footnote 50; and page 21, footnote 64 - the motion to strike is GRANTED. Petitioners do not oppose the

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/11/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

motion to strike. (Oppo. to First Motion to Strike 1.)

Page 24, footnote 76 - the motion to strike is GRANTED. Petitioners fail to show that this report, dated August 9, 2016 and after the administrative hearing, is admissible under section 1094.5(e). Petitioners have not opposed the motion to strike as to this footnote or the extra-record evidence cited therein.

Page 8, footnote 17: Christopher Busby article - the motion to strike is GRANTED. See analysis below under second motion to strike.

Respondent's and PG&E's Second Motion to Strike

New Reply Arguments

Respondent and PG&E contend Petitioners first raised in reply the argument that the word "provide" in the existing facilities exemption should be interpreted as synonymous with "convey and distribute." They also contend that Petitioners first raised in reply an argument about the brittleness of the Diablo Canyon Power Plant.

New issues raised for the first time in a reply brief are not properly presented to a trial court and may be disregarded. (Regency Outdoor Advertising

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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NATURE OF PROCEEDINGS:

v. Carolina Lances, Inc. (1995) 31 Cal.App.4th 1323, 1333.)

The court agrees that Petitioners did not raise in the opening brief any textual argument about the use of the word "provide" in CEQA Guidelines section 15301. (Opening Brief (OB) 4-11.) However, Petitioners did raise other arguments about their interpretation of section 15301 in the opening brief, and Respondent and PG&E have responded at length to the merits of this reply argument in their motion to strike. Petitioners raised the brittleness argument in the opening brief. (OB 12:18-21.) The court exercises its discretion to consider these reply arguments.

Reply Declaration of Jerald B. Brown

The reply declaration of Jerald B. Brown is extra-record evidence, and Petitioners have not shown that this evidence could not have been submitted with the exercise of reasonable diligence in the administrative proceedings. (CCP § 1094.5(e).) To the extent Brown participated in the administrative proceedings and submitted letters or testimony, such statements are part of the record and will be considered. However, contrary to Petitioners' argument, the declaration itself is not found in the administrative record. (See Oppo. to 2nd Motion to Strike 12.) Insufficient explanation

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

is provided as to why Brown could not have submitted the statements made in his declaration in the administrative proceedings. (See Brown Decl. filed 5/22/17.)

The motion to strike the reply declaration of Jerald Brown is GRANTED.

Reply Declaration of Christopher Busby

The reply declaration of Christopher Busby is extra-record evidence, and Petitioners have not shown that this evidence could not have been submitted with the exercise of reasonable diligence in the administrative proceedings. (CCP § 1094.5(e).)

Busby submits his C.V. with his declaration, and a brief description of his research on infant mortality rates in the ZIP code areas near the Diablo Canyon Nuclear Power Plant. Busby's research started in February 2016. Petitioners could have submitted this evidence with the exercise of reasonable diligence in the administrative proceedings. (Busby Decl. ¶¶ 2-3 and Exh. 1.)

Busby also submits his research article titled "Is There Evidence of Adverse Health Effects Near US Nuclear Installations? Infant Mortality in Coast Communities near the Diablo Canyon Nuclear Power

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/11/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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NATURE OF PROCEEDINGS:

Station in California, 1989-2012." He submitted this article to Jacobs Journal of Epidemiology and Preventative Medicine on July 13, 2016, and the article was published by the Jacobs Journal on September 19, 2016.

This article was published after the June 28, 2016 hearing and is not part of the record. Petitioners argue that Busby's peer-reviewed article should be admitted as extra-record evidence because Petitioners told Commission staff in a March 2016 meeting and again at the June 28 hearing that Busby's article would soon be completed. (Reply 15-16.) Petitioners have failed to show why in the exercise of reasonable diligence they could not have submitted more detailed evidence and results related to Busby's study, which started in February 2016, during the administrative proceedings. Petitioners in fact cite to an email and testimony in the record that informed the Commission of alleged increased rates of infant mortality near DCPP. (Reply 13-16; see AR 1777-78 [March 31, 2016 email]; 811-812 [June 28, 2016 testimony that Busby's "study is just being completed now"].) Petitioners do not claim that submission of Dr. Busby's article to a peer-reviewed journal precluded them from submitting this evidence in the administrative proceedings. (See Busby Decl. ¶¶ 2-4.)

The fact that the article was subsequently submitted

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

to and published in a peer-reviewed journal does not justify remand under section 1094.5(e). 2 Whether or not scientific data and findings are peer-reviewed is not determinative of whether such evidence can support a fair argument of a significant environmental effect. Also, augmenting the record on the grounds that a scientific article was subsequently published or peer-reviewed would inevitably require remand in CEQA cases. The stringent requirements of section 1094.5(e) are not satisfied for the reply Busby declaration and exhibits. (See Western States Petroleum Assn. v. Sup. Ct. (1995) 9 Cal.4th 559, 579; see Eureka Citizens for Responsible Government v. City of Eureka (2007) 147 Cal.App.4th 357, 367; Sacramento Old City Assn. v. City Council (1991) 229 Cal.App.3d 1011, 1032, fn. 13 [supplemental EIR not admissible because it was not before decision-makers prior to time of their decision].)

The motion to strike the reply declaration of Christopher Busby, including exhibits, is GRANTED.

Statement of the Case

The Diablo Canyon Nuclear Power Plant

The Diablo Canyon Nuclear Power Plant ("DCPP") is a two-unit nuclear power plant located in San Luis Obispo County (Administrative Record ("AR") 11,

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

25.) The facility includes a once-through cooling system that uses offshore seawater. (AR 11, 25.) A portion of the cooling facilities are located on state public trust land. (AR 26.) On August 28, 1969, the Commission authorized a 49-year lease (expiring August 27, 2018) to PG&E for a portion of the cooling facilities located on state land (Lease No. PRC 4307.1) and another 49-year lease on May 28, 1970, for the other portion of the cooling facilities on state land that expires on May 31, 2019 (Lease No. PRC 4449.1). (Ibid.) PG&E completed construction of DCPP in 1973. (AR 25.) The NRC issued licenses for the two units, which expire on November 2, 2024, and August 26, 2025. (AR 11.) DCPP commenced operations in 1985. (AR at 25.)

PG&E's Lease Replacement Proposal

In the administrative proceedings, the Commission considered PG&E's proposal to replace the leases for the water cooling facilities associated with DCPP that are located on state public trust land, which expire in 2018 and 2019. 3 (AR 26.) PG&E originally submitted its application to the Commission for the Lease Replacement on September 5, 2013. (AR 1008.) The application at that time requested a lease term to 2040. (Ibid.) PG&E submitted an amended application on January 16, 2015, which revised the lease term to 2025, coterminous with the expiration of its NRC licenses.

MINUTES ENTERED
07/11/17
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

(Id. at 1010-1257 [Amended Application].) PG&E did not ask for, and the Lease Replacement prohibits, any physical or operational changes to DCPP. (AR 26.)

Joint Proposal

On June 21, 2016, PG&E, Friends of the Earth, Natural Resources Defense Council, Environment California, International Brotherhood of Electrical Workers Local 1245, Coalition of California Utility Employees, and Alliance for Nuclear Responsibility announced a Joint Proposal that calls for closure of the DCPP at the expiration of its existing Nuclear Regulatory Commission (NRC) operating licenses in 2024-2025, and the orderly replacement of the DCPP with a portfolio of greenhouse gas-free energy resources ("Joint Proposal"). (AR 32.) PG&E agreed to withdraw its operating license renewal application to the NRC upon approval by the California Public Utilities Commission of the Joint Proposal. (AR 32.)

Commission Approval of Lease Replacement

The State Lands Commission was scheduled to hear the Lease Replacement application at its December 18, 2015 public meeting, but it deferred acting and instead directed staff to analyze the level of CEQA and public trust doctrine review required. (AR 26, 268.) The Commission heard informational reports on

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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NATURE OF PROCEEDINGS:

the Lease Replacement application at its February 9, 2016 and April 5, 2016 public meetings. (Ibid.) The Commission heard the Lease Replacement application at its June 28, 2016 public meeting as Item 96. (AR 25.)

After consideration of extensive testimony and documentary evidence, the Commission unanimously voted to adopt staff's recommendation to approve the Lease Replacement application, to find the Lease Replacement exempt from CEQA under the existing facilities exemption, and to adopt the public trust findings. (AR at 920 [June 28, 2016 Transcript]; AR 37-38 [adopted staff report recommendations]; AR 629 [June 28, 2016 Meeting Minutes, Record of Action].) In its Notice of Exemption from CEQA, the Commission found that the project was categorically exempt under the Class 1 exemption for existing facilities. The Commission found: "There is no reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. Therefore, the project will not have a significant effect on the environment and the above categorical exemption(s) apply(ies)." (AR 1.)

Writ Proceedings

On August 2, 2016, Petitioners World Business Academy and the Immaculate Heart Community ("Petitioners") filed a verified petition for writ

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

of mandate. The petition alleges two causes of action: (1) violation of CEQA; and (2) violations of California Public Trust Doctrine, Pub. Res. Code § 6900. The court has received Petitioners' opening brief, Respondent's and PG&E's oppositions, and Petitioners' reply. The court has also received Respondent's and PG&E's two motions to strike, and Petitioners' oppositions.

Standard of Review

CEQA

In an action challenging an agency's decision under CEQA, the trial court reviews the agency's decision for a prejudicial abuse of discretion. (Pub. Res. Code, § 21168.5.) "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Ibid.; see also Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 435.)

Substantial evidence is defined as "enough relevant evidence and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Title 14 Cal. Code Regs. ("CEQA Guidelines") § 15384(a).) An agency is

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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NATURE OF PROCEEDINGS:

presumed to have regularly performed its official duties. (Evidence Code § 664.) "The reviewing court must resolve reasonable doubts in favor of the administrative finding and decision." (Laurel Heights Improvement Association v. Regents of the University of California (1988) 47 Cal.3d 376, 393.)

"An agency's determination that the project falls within a categorical exemption includes an implied finding that none of the exceptions identified in the Guidelines is applicable. The burden then shifts to the challenging party to produce evidence showing that one of the exceptions applies to take the project out of the exempt category." (Save Our Carmel River v. Monterey Peninsula Water Management Dist. (2006) 141 Cal.App.4th 677, 694 [citations omitted]; see also North Coast Rivers Alliance v. Westlands Water District (2014) 227 Cal.App.4th 832, 851-852.) The analysis that applies to the unusual circumstances exception to the category 1 exemption is set forth in detail below.

Petitioners' Burden of Proof

Under CCP section 1094.5, Petitioner must demonstrate, by citation to the administrative record, that the evidence supports his position. (See Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 32; Bixby v. Pierno (1971) 4 Cal. 3d 130, 143; CCP § 1094; CRC

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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HONORABLE 9	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
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9:30 am	BS163811	Plaintiff Counsel	KIRK BOYD (X) GRETCHEN DUMAS (X)
	THE WORLD BUSINESS ACADEMY ET A VS CALIFORNIA STATE LANDS COMMISSI		LAURENCE G. CHASET (X)
		Defendant Counsel	CHRISTINA HUMPHREY (X) JOHN A. SAURENMAN (x) DAMON P. MAMALAKIS (X)
	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

3.1113(a); Local Rule 3.231(i) [opening brief must cite to administrative record].) The court is not required to search the record to ascertain whether it supports an appellant's contentions, nor make the parties' arguments for them. (Inyo Citizens for Better Planning v. Inyo County Board of Supervisors (2009) 180 Cal.App.4th 1, 14; see also Elizabeth D. v. Zolin (1993) 21 Cal.App.4th 347, 354.)

ANALYSIS

CEQA Categorical Exemption for Existing Facilities

CEQA provides a categorical exemption for certain activities involving an existing facility:

> Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of an

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

existing use.

Examples include but are not limited to: ...

(b) Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services;

(CEQA Guidelines § 15301.)

In its Notice of Exemption from CEQA, the Commission found that the project was categorically exempt under the Class 1 exemption for existing facilities. (AR 1.) Petitioners contend that the Secretary of the Natural Resources Agency did not intend to include nuclear power plants within the exemption for "existing structures" because a nuclear power plant inherently has a significant effect on the environment. For this same reason, Petitioners contend that the Secretary lacked authority to include nuclear power plants within this class 1 categorical exemption. In reply, Petitioners contend that the word "provide" in the exemption for existing electric power facilities should be interpreted as synonymous with "convey and distribute," thereby excluding existing facilities that generate power.

Respondent and PG&E contend that Petitioners did not

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

exhaust administrative remedies as to these arguments about the proper interpretation of section 15301. Respondent and PG&E also contend that Petitioners' interpretation of section 15301 is wrong.

Exhaustion of Administrative Remedies

"Under the doctrine of exhaustion of administrative remedies, 'where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.' This rule 'is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis and binding upon all courts'.... Its rationale is the prevention of interference with the jurisdiction of administrative tribunals by the courts, which are only authorized to review final administrative determinations." (Park Area Neighbors v. Town of Fairfax (1994) 29 Cal.App.4th 1442, 1447.)

In its Notice of Exemption from CEQA, the Commission found that the project was categorically exempt under the Class 1 exemption for existing facilities. (AR 1.) That finding necessarily implied a determination by the Commission that the Class 1 exemption applied generally to existing facilities that generate electric power, and specifically to

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

nuclear power plants. Petitioners have not cited to places in the record where they made this specific textual or administrative history argument regarding the proper interpretation of the regulation. However, Petitioners point out that concerned citizens argued that the exemption does not apply. (Reply 7, fn. 8.)

Petitioners cite authority in reply that "where the issue turns only on an interpretation of the language of the Guidelines or the scope of a particular CEQA exemption, this presents 'a question of law, subject to de novo review by this court.'" (Save Our Carmel River v. Monterey Peninsula Water Management Dist. (2006) 141 Cal.App.4th 677, 694.) This authority does not address whether the legal arguments regarding interpretation of a regulation must be exhausted in the administrative proceedings.

Based on the Commission's finding that the Class 1 exemption does apply, the proper interpretation of the regulation was at issue in the administrative proceedings. Petitioners exhausted administrative remedies as to their textual arguments about section 15301. (See California Native Plant Soc. v. City of Rancho Cordova (2009) 172 Cal.App.4th 603, 616 ["less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding"].)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

It is a closer issue as to Petitioners' arguments regarding the administrative history of section 15301. Petitioners apparently did not present or request judicial notice of the administrative history of section 15301 in the administrative proceedings. A sound argument can be made that Petitioners did not exhaust remedies as to any argument based on the administrative history of section 15301. See, e.g., Banker's Hill v. City of San Diego (2006) 139 Cal. App.4th 249, 282 (Failure to raise piece-mealing as objection to application of categorical exemption bars legal challenge on that basis). However, even assuming Petitioners exhausted administrative remedies as to this argument, the administrative history Petitioners submit does not change the court's interpretation of the regulation, as analyzed below.

Statutory Construction of Section 15301

"The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (Nolan v. City of Anaheim (2004) 33 Cal.4th 335, 340.) This same analysis applies to the interpretation of an administrative regulation.

"Where the decision involves the interpretation and application of existing regulations, [the court] must determine whether the administrative agency applied the proper legal standard. Since the interpretation of a regulation is a question of law, while the administrative agency's interpretation is entitled to great weight, the ultimate resolution of the legal question rests with the courts." (Rick's Elec., Inc. v. California Occupational Safety and Health Appeals Bd. (2000) 80 Cal.App.4th 1023, 1033-34.)

In both their opening brief and reply, Petitioners incorrectly apply the standard for interpreting a statute or regulation. While the Secretary's intent must be determined, the court must look first to the words of the regulation. Only if there is ambiguity does the court consider administrative history and other extrinsic aids. The court does not review administrative history first to determine if the regulation is ambiguous, or to

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

determine the Secretary's intent.

Section 15301 broadly exempts the "leasing ... of existing public or private structures, facilities, ... involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." As an example, section 15301 includes "Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services." This language is reasonably interpreted to encompass leases for all existing facilities of investor-owned utilities used to provide electric power, including nuclear power plants, as long as the lease does not expand use of the facility.

This interpretation is bolstered by other language in the regulation that suggests a broad interpretation was intended. The regulation states that "The types of 'existing facilities' itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of an existing use."

The use of the word "provide" is consistent with Respondent's and PG&E's interpretation of the regulation. "Provide" is defined as "to make

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
HONORABLE MARY H. STROBEL	JUDGE	N. DIGIAMBATTISTA	DEPUTY CLERK
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	CEQA		DAMON P. MAMALAKIS (X)
	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

available; furnish", "to supply or equip," or "to afford or yield." (See Dictionary.com.) When read with the language of section 15301, the word "provide" is reasonably interpreted to include existing facilities that generate (and thereby provide) electric power, including nuclear power plants.

Had the Legislature wanted to exclude existing nuclear power plants from the CEQA exemptions, it could have directed the Secretary to do so, but it did not. In fact, section 21083.1 specifically provides: "It is the intent of the legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret this division or the state guidelines adopted pursuant to section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines." Similarly, the Secretary could have expressly excluded nuclear power plants from the definition of existing facilities, but did not.

Petitioners argue that the Secretary lacked authority to include nuclear power plants within the existing facilities exemption because nuclear power plants must always have a significant environmental effect. (OB 5-6.) As analyzed below, the baseline for assessing environmental effects of a new lease are the physical conditions existing at the time the

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

agency makes its CEQA determination or approves the project. Petitioners provide no persuasive argument, and cite no evidence in the record, that the extension of a lease for an existing nuclear power plant will always have a significant environmental effect.

In reply, Petitioners contend that the word "provide" in the exemption for existing electric power facilities should be interpreted as synonymous with "convey and distribute," thereby excluding existing facilities that generate power. (Reply 4-7.) However, as stated above, Petitioners' analysis is incorrect. The court does not consider the administrative history of section 15301 unless the regulation is ambiguous. Given the reasonable construction of the regulation outlined above, the court does not find the regulation to be ambiguous as to the inclusion of nuclear power plants as existing facilities under section 15301.

Even if the regulation were deemed ambiguous, the administrative history submitted by Petitioners does not support an intent to exclude nuclear power plants or other existing facilities that generate electric power from the ambit of section 15301. As originally worded, the regulation listed, as an example of the types of Class 1 facilities included, existing facilities used to "convey or distribute" electric power. (Pet. Suppl. RJN Exh. A.) The

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

amendment of the regulation in 1973 to use the word "provide" instead of "convey or distribute" is a change from a narrower category to a broader category, which is reasonably interpreted to include power generation. Petitioners' assertion that environmental community "silence" in response to the 1973 amendment means the change had no meaning is unsupported and speculative. Petitioners also ignore that section 15301 was further amended in 1998 to state that "the types of 'existing facilities' itemized below are not intended to be all-inclusive" and that the "key consideration is whether the project involves negligible or no expansion of an existing use." (Resp. RJN Exh. A, B.)

Based on the foregoing, Petitioners' interpretation of section 15301 is unpersuasive. The regulation is reasonably interpreted to apply to the approval of leases for existing facilities that generate electric power, including nuclear power facilities, if the leasing "involves negligible or no expansion of an existing use." In this case, it is undisputed that there are no operational or physical changes to the DCPP in connection with the lease replacement. (AR 28.) Accordingly, the existing facilities exemption applies unless there is an exception, as analyzed below.

Unusual Circumstances Exception

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
HONORABLE MARY H. STROBEL	JUDGE	N. DIGIAMBATTISTA	DEPUTY CLERK
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	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

"A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (CEQA Guidelines § 15300.2(c).) Petitioners contend that the Commission abused its discretion in finding that the exception for unusual circumstances does not apply. 4

Legal Framework

"A party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. In such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to that unusual circumstance. Alternatively, ... a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect." (Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal.4th 1086, 1105.)

The court in Walters v. City of Redondo Beach (2016) 1 Cal.App.5th 809, summarized the tests under Berkeley Hillside as follows:

In assessing whether the unusual

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

circumstances exception applies, we engage in two alternative analyses, as delineated by our Supreme Court in Berkeley Hillside Preservation .... "In the first alternative, ... a challenger must prove both unusual circumstances and a significant environmental effect that is due to those circumstances. In this method of proof, the unusual circumstances relate to some feature of the project that distinguishes the project from other features in the exempt class." "Once an unusual circumstance is proved under this method, then the 'party need only show a reasonable possibility of a significant effect due to that unusual circumstance.' "

Whether the project presents unusual circumstances under this alternative is a factual inquiry subject to the traditional substantial evidence standard of review. This standard requires that we "resolv[e] all evidentiary conflicts in the agency's favor and indulg[e] in all legitimate and reasonable inferences to uphold the agency's finding."

If unusual circumstances are found under this first alternative, "agencies ... apply the fair argument standard in determining whether 'there is a reasonable possibility of a significant effect on the environment due to

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

unusual circumstances.' " Under this standard, " 'an agency is merely supposed to look to see if the record shows substantial evidence of a fair argument that there may be a significant effect. [Citations.] In other words, the agency is not to weigh the evidence to come to its own conclusion about whether there will be a significant effect. It is merely supposed to inquire, as a matter of law, whether the record reveals a fair argument....' "

In the second alternative under Berkeley Hillside, a challenger "may establish an unusual circumstance with evidence that the project will have a significant environmental effect." "When it is shown 'that a project otherwise covered by a categorical exemption will have a significant environmental effect, it necessarily follows that the project presents unusual circumstances.' " "But a challenger must establish more than just a fair argument that the project will have a significant environmental effect. A party challenging the exemption, must show that the project will have a significant environmental impact." "In other words, a showing by substantial evidence that a project will have a significant effect on the environment satisfies both prongs of the unusual circumstances exception under the second

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

method of establishing the exception." (Walters v. City of Redondo Beach (2016) 1 Cal.App.5th 809, 819-820 [internal citations omitted].)

First Alternative, Element One - Substantial Evidence that Unusual Circumstances Exist

In the first alternative under Berkeley Hillside, the challenger can show unusual circumstances with substantial evidence "that the project has some feature that distinguishes it from others in the exempt class, such as its size or location." (Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal.4th 1086, 1105.) "Whether the project presents unusual circumstances under this alternative is a factual inquiry subject to the traditional substantial evidence standard of review." (Walters v. City of Redondo Beach (2016) 1 Cal.App.5th 809, 820.)

Pursuant to this authority, the relevant legal issue is whether the project - issuance of a replacement lease for DCPP's cooling facilities - has features that distinguish it from other projects in the exempt class. Logically, it seems most reasonable to compare this project to the issuances of new leases for other existing facilities that generate electric power and where no physical or operational changes are proposed. The project could

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

also be compared more generally to leases for existing facilities (not solely in power generation) that do not involve an expansion of existing use.

It is not clear from the Commission's Notice of Exemption whether it found no unusual circumstances existed, or whether it concluded that even if unusual circumstances existed there was no reasonable possibility of a significant environmental effect. (AR 1.) The June 26, 2016 staff report, which was adopted by the Commission, noted that the DCPP is located along the Pacific Coast, is the only active nuclear power plant in California, and is located "proximate to several earthquake fault lines." (AR 28.) While the staff report recommended that the Commission find the project exempt under Class 1, it did not expressly state there were no unusual circumstances. (AR 32.)

The February 9, 2016 staff report suggested that there were unusual circumstances in issuance of a new lease for the DCPP. This report stated in relevant part:

> The DCPP's nuclear fuel source and proximity to fault lines distinguish it from other power plants in California and, essential to the plant's operation, is the DCPP cooling water system, with many components authorized under the CSLC

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/11/2017

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DATE: 07/11/17			DEPT. 82
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HONORABLE 9	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
B. HALL C/A	Deputy Sheriff	J HOLLIFIELD/CSR 12564	Reporter

9:30 am	BS163811	Plaintiff Counsel	KIRK BOYD (X) GRETCHEN DUMAS (X)
	THE WORLD BUSINESS ACADEMY ET A VS CALIFORNIA STATE LANDS COMMISSI	Defendant Counsel	LAURENCE G. CHASET (X) CHRISTINA HUMPHREY (X) JOHN A. SAURENMAN (x) DAMON P. MAMALAKIS (X)
	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

leases. The DCPP is the only active nuclear power plant in California, supplying approximately 18,000 gigawatt-hours of electricity annually (nearly 10% of California's electricity generation). Power plants in the State with comparable production use natural gas fuel sources.

Seismologists discovered some of the fault lines after PG&E designed and constructed the DCPP. For example, a geologist from the United States Geological Survey (USGS) discovered the Shoreline fault in 2008, decades after PG&E constructed the plant. To date, there is substantial disagreement between the USGS and PG&E regarding the risks associated with the proximate faults. According to PG&E, the DCPP can withstand earthquakes up to a magnitude of 7.5 and the faults do not pose significant threats to the DCPP's integrity, but a USGS seismologist believes that a joint seismic event of the Hosgri and Shoreline faults could exceed DCPP's design capacity for safe operation, possibly reaching a magnitude of 7.7. (AR 13.) In the opening brief, Petitioners identify a number of circumstances that could distinguish DCPP from other existing electric power plants. (OB 11-23.)

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
HONORABLE MARY H. STROBEL	JUDGE	N. DIGIAMBATTISTA	DEPUTY CLERK
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

As examples, DCPP is massive and generates up to 10% of California's electric power. (AR 13.) DCPP is located in proximity to earthquake fault lines. (AR 2278-79 [Geesman letter]; 1554-1560, 3356-3368 [NRC letter; non-concurrence letter of NRC Senior Inspector].) DCPP uses nuclear fuel and accumulates spent fuel rods on site. (AR 743.) DCPP is the only nuclear power plant in California. That fact combined with others set forth above and in the opening brief are substantial evidence of unusual circumstances.

In opposition, Respondent and PG&E argue that "the unusual circumstances Petitioners identify are actually environmental effects that are part of the baseline for the Lease Replacement." (Oppo. 18.) For the first alternative under Berkeley Hillside, the analysis of the baseline primarily relates to the issue of whether there is a fair argument of a reasonable possibility of a significant environmental effect, not to whether unusual circumstances exist. (See North Coast Rivers Alliance v. Westlands Water District (2014) 227 Cal.App.4th 832, 871-872.) The unusual circumstances are determined by comparison to other Class 1 existing facilities. Presumably, other Class 1 existing facilities that have no expansion of existing use would have a similar baseline as DCPP (i.e. time of approval of new lease.) The opposition's discussion of the baseline is

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
HONORABLE MARY H. STROBEL	JUDGE	N. DIGIAMBATTISTA	DEPUTY CLERK
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	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

unpersuasive with respect to the issue of whether unusual circumstances exist.

The court assumes arguendo that the Commission impliedly made a finding of no unusual circumstances. Indulging all reasonable inferences in support of the Commission, the court concludes that there is no substantial evidence to support the finding that no unusual circumstances exist. (See Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal.4th 1086, 1114.) There is substantial evidence of unusual circumstances due to the fact DCPP is the only nuclear power plant in California, among other factors as stated above.

First Alternative, Element Two - Fair Argument of Reasonable Possibility of a Significant Effect on the Environment Due to Unusual Circumstances

"Whether a fair argument can be made ... is a legal question" on which the court does not defer to the agency's determination. (Pocket Protectors v. City of Sacramento (2004) 124 Cal.App.4th 903, 930.) "The standard to be employed by the agency is not whether any argument can be made that a project might have a significant environmental impact, but rather whether such an argument can fairly be made." (Friends of "B" Street v. City of Hayward (1980) 106 Cal.App.3d 988, 1003.)

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

The CEQA guidelines define "substantial evidence" in pertinent part as follows: "(a) ... Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence. (b) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts."

Petitioners argue that a number of unusual circumstances establish a reasonable possibility of significant environmental effect due to the issuance of the new lease. (OB 11-24.) Respondent and PG&E argue that, even if unusual circumstances could be assumed based on DCPP's use of nuclear fuel, there is no reasonable possibility of a significant environmental effect because the leases do not involve any changes to DCPP or its existing operations. (Oppo. 20.) As stated above, Petitioners have the burden on this issue. Using the fair argument standard of review, and the appropriate baseline, the court analyzes below each of the unusual circumstances and cited evidence set forth by Petitioners.

Appropriate Baseline

MINUTES ENTERED
07/11/17
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
HONORABLE MARY H. STROBEL	JUDGE	N. DIGIAMBATTISTA	DEPUTY CLERK
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

Preliminarily, the court considers the appropriate baseline from which environmental effects of the lease replacement should be measured. Petitioners ignore this issue in their moving papers. (OB 12-24.)

Section 15125(a) of the CEQA Guidelines provides: "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." (emphasis added.)

"In determining whether there is a potential for such an adverse change in the environment, the 'baseline' environmental conditions against which a project is to be compared are the physical conditions existing at the time the agency makes its CEQA determination and/or approves the project." (North Coast Rivers Alliance v. Westlands Water District (2014) 227 Cal.App.4th 832, 872.) "Where a project involves ongoing operations or a continuation of past activity, the established levels of a particular use and the physical impacts thereof are considered to be part of the existing

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

environmental baseline." (Ibid.) "This baseline principle means that a proposal to continue existing operations without change would generally have no cognizable impact under CEQA." (Ibid.)
CONTINUED IN NEXT MINUTE ORDER

MINUTES ENTERED
07/11/17
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

HEARING ON PETITION FOR WRIT OF MANDATE
CONTINUATION OF MINUTE ORDER

Significantly for this case, the baseline is not the nonrenewal or non-extension of the leases. (See North Coast, supra at 827, fn. 36.) "An inquiry as to what happens if the [leases] are not renewed would be a 'no project' analysis, which CEQA expressly provides is not the baseline." (Ibid.) Respondent and PG&E do not argue to the contrary. 5

"The baseline must include existing conditions, even when those conditions have never been reviewed and are unlawful." (Citizens for East Shore Parks v. California State Lands Com. (2011) 202 Cal.App.4th 549, 561 [baseline properly included uses of operating marine terminal].) "Established levels of a particular use have been considered to be part of an existing environmental setting." (San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App. 645, 658 [established levels of mining operation part of baseline].)

"While the physical impacts of established levels of a particular use have been considered part of the existing environmental baseline [citing cases with existing uses as part of baseline], nothing in the baseline concept excuses a lead agency from considering the potential environmental impacts of

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

increases in the intensity or rate of use that may result from a project." (Lighthouse Field Beach Rescue v. City of Santa Cruz (2005) 131 Cal.App.4th 1170, 1196-97.)

Here, the baseline is the physical conditions existing at the time the agency approved the lease replacement, which includes the operation of DCPP. (AR 1, 629.) Petitioners have not persuasively argued in their papers that a different baseline should apply, or cited evidence in the record to support a different baseline.

The court analyzes below whether there is substantial evidence of a fair argument that there is a reasonable possibility of significant environmental effects due to unusual circumstances.

Sole Nuclear Plant/ San Bruno Incident

Two of Petitioners' arguments are quickly addressed. Petitioners fail to show, with citation to record evidence, how the fact that DCPP is the sole operating nuclear power plant in California, in itself, supports a fair argument that the lease replacement could have a significant environmental effect from baseline conditions. (OB 22-23.) Further, even if PG&E actions regarding the unrelated San Bruno natural gas line was an unusual circumstance (which the court concludes it is not),

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
HONORABLE MARY H. STROBEL	JUDGE	N. DIGIAMBATTISTA	DEPUTY CLERK
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	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

Petitioners cite to no substantial evidence in the administrative record to establish a fair argument that such actions could have a significant environmental effect. (OB 24, see fn. 24 [inadmissible extra-record evidence].)

DCPP's Size and Effect

Petitioners argue that DCPP is "massive in size and effect." Generating nearly 10% of California's electricity generation, DCPP is undeniably large. (AR 13.) However, DCPP was the same size when the lease replacement was approved. Since the size will be the same as that in the baseline conditions, the large size in itself does not support a fair argument of the potential for a significant environment effect. Petitioners point to no evidence that there will be an increase in the intensity or rate of use of DCPP.

Petitioners argue that the extension of the lease to 2025, 6 or 7 years, will increase the public's exposure to "potential reactor core-damaging seismic risk at Diablo Canyon by [approximately] twenty-one percent (21%) of its operating history to date." (OB 12, citing John Geesman letter at AR 2277-79.) As conceded in the letter of attorney Geesman, cited by Petitioners, whether the 6-7 year lease extension shows a reasonable possibility of significant environmental effects requires evaluation of the seismic evidence.

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
HONORABLE MARY H. STROBEL	JUDGE	N. DIGIAMBATTISTA	DEPUTY CLERK
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	CEQA		DAMON P. MAMALAKIS (X)
	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

(AR 2278.) The court analyzes that issue below.

Risks from Seismic Events, Tsunamis, and Rising Sea Levels

Petitioners contend that risks associated with earthquakes, tsunamis, and rising sea levels are "unusual circumstances." What is less clear from Petitioners' legal briefs is why they believe these risks will change during the new lease, and create a reasonable possibility of significant impacts to the existing baseline conditions, which include the operation of DCPP. (See OB 12-17.)

Petitioners cite a letter from attorney John Geesman, a former appointee to the California Energy Commission. (OB 12.) Geesman points out that the new lease will extend the operation of DCPP from 32.9 years to 39.9 years, or approximately 21% beyond the August 2018 lease expiration date of Lease No. PRC 4307.1. Geesman contends that in 2013 the NRC identified DCPP's Unit 1 reactor as the "third-most embrittled reactor in the United States." (AR 2277-78.) Petitioners have not cited the court to the NRC source that Geesman quotes as to brittleness. (See also Reply 16-17.) Although the argument is not fully developed by Petitioners, in theory the age or "brittleness" of the DCPP reactors might be viewed as similar to "increases in the intensity or rate of use that may result from a

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
HONORABLE MARY H. STROBEL	JUDGE	N. DIGIAMBATTISTA	DEPUTY CLERK
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

project." (Lighthouse Field Beach Rescue v. City of Santa Cruz (2005) 131 Cal.App.4th 1170, 1196-97.) In other words, while the operations are not expanding, one might hypothesize that the age of a nuclear reactor might make it less efficient or less safe when compared to baseline conditions. However, this is clearly an issue that requires supporting evidence, such as expert testimony. A conclusory reference to the age or alleged "brittleness" of a facility, without any context related to nuclear power plants, supports only speculation.

Petitioners, and Geesman in his letter, criticize the discussion of seismic risks in the June 28, 2016 staff report. Petitioners contend that there is an ongoing controversy over whether DCPP is in current compliance with its licensed seismic design basis, the so-called Double Design Earthquake ("DDE"). Petitioners also contend that there is an ongoing dispute about the seismicity of the Shoreline and Hosgri faults near DCPP, whether the faults are capable of jointly rupturing, and the safety risk to DCPP. (OB 12-16.) In support, Petitioners cite inter alia a non-concurrence letter of Dr. Michael Peck, NRC Senior Resident Inspector (AR 3356-68), letters regarding seismic studies and design standards from NRC to PG&E (AR 1554-60, 9030-35), and a report of an Independent Peer Review Panel of state agencies assembled to review PG&E's seismic work (AR 3054-60.) In opposition,

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

Respondent and PG&E cite to evidence that NRC has evaluated these risks and found that DCPP can safely withstand earthquakes. (Oppo. 25-26; AR 2170-72; see also 1684 [plant could shut down safely even in event of strongest earthquake likely to occur in 10,000 years].)

Regardless of how these conflicting opinions would be reconciled, all of this evidence relates to seismic risks that are part of the baseline environmental conditions. Petitioners do not cite to evidence of a change in the facility's existing use or seismic risks that were not present and considered as part of the existing baseline conditions. They also do not cite to evidence that the risk of a seismic event that could cause a safety concern in the next seven years is materially different from that in baseline conditions.

As to tsunamis and rising sea levels, Petitioners argue that "a large body of scientific data and analysis has been gathered, establishing an accelerating rate in rising ocean levels that could directly impact breakwater functionality and the integrity of intake structures." (OB 16.) Petitioners cite, inter alia, a Sea Level Rise Policy Guidance from the California Coastal Commission. (AR 5602-05; see also AR 5656, 5363-5364.) Petitioners fail to explain how this evidence shows a change in risks from tsunamis and

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

rising sea levels at DCPP's operations from existing baseline conditions. The cited evidence does not show, for instance, that there is a reasonable possibility that the safety threshold for DCPP's vulnerability to tsunamis or rising sea levels would be met in the next seven years.

Based on the foregoing, Petitioners have not cited to substantial evidence supporting a fair argument that there is a reasonable possibility of significant environmental effects due to seismic events, tsunamis, or rising sea levels. 6

Adverse Health Impacts

Petitioners contend that a 2014 study of Joseph Mangano, MPH, MBA, prepared for Petitioner World Business Academy, showed that in the decades following the opening of DCPP in the mid-1980s, San Luis Obispo devolved from being a low-cancer county to a high-cancer county. The 2014 study also purportedly showed significant increases in infant mortality and low birth weights in the zip codes closest to and downwind from the reactors. (AR 17699-17734.) In addition to the 2014 study, Petitioners also informed Commission staff that Petitioners had commissioned a more recent study on infant mortality rates associated with DCPP by Dr. Christopher Busby. (AR 1777-1810.) As discussed in detail above, Dr. Busby's 2016 study was published

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

after the close of the administrative proceedings and is inadmissible extra-record evidence. (CCP § 1094.5(e).)

In opposition, Respondent and PG&E cite to a response to the 2014 study of the San Luis Obispo County Public Health Department. (Oppo. 27, AR 2226-2237.) As argued in opposition, the County response persuasively challenges the scientific methods used in the 2014 study. (Oppo. 27.) However, the court is unable to conclude that these criticisms of the methods used in the 2014 study would be sufficient, under the fair argument standard, to ignore Magnano's findings.

More significant is Petitioners' inability, in both the opening brief and reply, to connect the 2014 study to a reasonable possibility of significant effects when the existing baseline conditions are considered. (See Reply 11-16.) The 2014 study refers to data from 1988 to 2010 and 2011. (AR 17719, 17726.) The baseline conditions were those existing at the approval of the lease replacement in June 2016, including the ongoing operation of DCPP. Petitioners cite to no evidence that the lease replacement, which does not modify the operations of DCPP, will result in an increase in health risks from the baseline conditions. Petitioners also cite no substantial evidence from which a fair argument could be made that the length

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

of the lease extension, approximately seven years, could potentially increase the health risks associated with DCPP's operations that are not already part of baseline conditions.

Impacts on Marine Life

Petitioners contend that "continuing damage to marine life also constitutes unusual circumstances." (OB 17.) However, as with Petitioners' other arguments, it is unclear why Petitioners believe there could be a reasonable possibility of significant environmental effects compared to baseline conditions.

Petitioners contend that DCPP's once-through cooling system takes in 2.5 billion gallons of seawater per day and damages substantial marine life each year. Petitioners suggest there will be a "cumulative, potentially exponential" impact from seven more years of plant operations. While evidence of a "cumulative" or "exponential" impact over the next seven years might support a fair argument of potential impacts, none of the evidence cited by Petitioners shows a change in the use of DCPP or its marine life impacts from baseline conditions. (See e.g. AR 2349-51, 735, 796-98, 819-820, 835-837, 1539-40, 2277-78.) Petitioners rely on speculation, not substantial evidence, which is insufficient under the fair argument test.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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9:30 am	BS163811	Plaintiff Counsel	KIRK BOYD (X) GRETCHEN DUMAS (X) LAURENCE G. CHASET (X)
	THE WORLD BUSINESS ACADEMY ET A VS CALIFORNIA STATE LANDS COMMISSI	Defendant Counsel	CHRISTINA HUMPHREY (X) JOHN A. SAURENMAN (X) DAMON P. MAMALAKIS (X)
	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

Risks from Cyber and Physical Attacks

As with other purported unusual circumstances, the risks from a terrorist attack or cyber attack are part of the baseline conditions. Petitioners have not shown, by citation to the record, that there is a fair argument that this risk could change or accelerate from baseline conditions during seven years of additional operation. (OB 20-21.)

Accumulation and Leakage of Radioactive Waste

Petitioners contend that "accumulation and leakage of radioactive waste constitute unusual circumstances." (OB 21-22.) However, as with Petitioners' other arguments, Petitioners have not shown a fair argument of a reasonable possibility of significant environmental effects compared to baseline conditions.

Petitioners cite evidence that for up to seven years, the radioactive waste in the spent fuel rods at DCPP are stored in spent fuel pools. Thereafter, they are transferred to dry storage on site. (AR 743.) The cited testimony also indicates that DCPP "has sufficient capacity to be able to take on all of the spent fuel rods that have been used so far and that will be used between now and the end of '25 [2025]." (Ibid.) Respondent and PG&E cite to other

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
HONORABLE MARY H. STROBEL	JUDGE	N. DIGIAMBATTISTA	DEPUTY CLERK
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NATURE OF PROCEEDINGS:

substantial evidence that the spent fuel storage that would occur during the lease replacement can be safely accommodated on site. (AR 2212-2224.)

For purposes of argument, the court assumes that the indefinite accumulation of spent fuel rods on site could eventually result in a significant environmental effect compared to baseline conditions. However, whether a fair argument could be made requires substantial evidence, not speculation. Petitioners cite to no testimony, expert or otherwise, that presents a fair argument as to how the continuation of present operations for seven years could result in a significant environmental impact. 8 Petitioners provide no context, for instance, to infer that accumulation of 4,300 spent fuel assemblies by 2025 represents a significant change from baseline conditions in 2016. (OB 22.) Based on Petitioners' record citations, the court has no reasonable or non-speculative basis to infer that the continued accumulation of nuclear waste during the lease replacement could potentially have a significant environmental effect on the environment when baseline conditions are considered.

Summary - First Alternative, Element Two

The instant case is analogous to North Coast Rivers Alliance v. Westlands Water District (2014) 227 Cal.App.4th 832 as well as Bloom v. McGurk (1994) 26 Cal.App.4th 1307. In North Coast, the

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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		Counsel	GRETCHEN DUMAS (X)
	THE WORLD BUSINESS ACADEMY ET A		LAURENCE G. CHASET (X)
	VS	Defendant	CHRISTINA HUMPHREY (X)
	CALIFORNIA STATE LANDS COMMISSI	Counsel	
			JOHN A. SAURENMAN (X)
	CEQA		DAMON P. MAMALAKIS (X)
	170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

Court of Appeal provided the following relevant analysis:

> Petitioners cited studies in the record that referred to the annual pumping and diversion of Delta water by the CVP (and the state water project) as one of many factors negatively affecting certain fish species such as the smelt and salmon. Petitioners also pointed to evidence in the record that the continued use of irrigation water on the west side of the San Joaquin Valley contributed to salt and selenium levels in the soil and/or groundwater of that area due to a lack of adequate drainage. Although the matters raised by petitioners are genuine concerns, the evidence was inadequate to show that the particular project under consideration (i.e., the 2012 interim renewal contracts) had a potential to bring about a substantial adverse change to the environment. This conclusion follows from two observations. First, the particular activities challenged by petitioners-i.e., the large volume of CVP water distributed to Water Districts and used for irrigation purposes on lands within Water Districts' boundaries-were clearly part of the existing environmental baseline for Water Districts' ongoing operations. Therefore, proof of a potential for adverse change in the

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
HONORABLE MARY H. STROBEL	JUDGE	N. DIGIAMBATTISTA	DEPUTY CLERK
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

environment from the conditions under the existing baseline is lacking. (Id. at 873-74.)

Here, while Petitioners raise genuine concerns, the particular activities challenged by Petitioners are part of the baseline conditions. The court is not called to analyze, in the abstract, whether operation of a nuclear power plant has potentially significant adverse effects on the environment. Rather, the only inquiry before the court is whether the State Lands Commission properly found approval of the lease replacement, without any change in operation or intensity of use of the power plant, categorically exempt under CEQA.

Petitioners try to distinguish North Coast on the grounds that the Court of Appeal considered a two-year lease extension. 9 (Reply 19-20.) The court agrees that the length of the lease extension may, in certain circumstances, be a factor in whether there is a reasonable possibility of a significant environmental effect from environmental conditions. Here, however, while a 7-year extension is longer than the 2-year extension in North Coast, Petitioners have not cited to substantive evidence that it could be fairly argued that the length of the lease extension could potentially result in significant environmental effects. The fair argument standard requires substantial evidence, not speculation. 10

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

Based on the foregoing, Petitioners have not cited to substantial evidence supporting a fair argument that, compared to baseline existing conditions, there is a reasonable possibility that the lease replacement could have a significant environmental effect.

Second Alternative - Substantial Evidence that Project Will have Significant Environmental Effect

Petitioners' arguments under the second alternative of the Berkeley Hillside framework are derivative of those analyzed above. For the reasons stated, Petitioners have not shown that the project will have a significant environmental effect measured from existing baseline conditions.

Public Trust Doctrine

When making determinations regarding California's sovereign lands, the Commission is acting in a quasi-legislative capacity. (County of Orange v. Heim (1973) 30 Cal.App.3d 694, 718-719.) "It is established that in reviewing quasilegislative actions of administrative agencies the scope of judicial review is limited to an examination of the proceeding before the agency to determine whether its actions have been arbitrary, capricious or entirely lacking evidentiary support, or whether it has failed to follow the procedure or give the

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

notices required by law." (Ibid.) "A court may not reweigh the evidence and substitute its judgment for that of the agency nor may it inquire into the soundness of the reasoning by which the agency's conclusions were reached." (Id. at 721.)

Petitioners' second cause of action for alleged violation of the public trust doctrine is intertwined with their CEQA claim. Petitioners argue that the cumulative environmental impacts from the continued operation of DCPP interfere with both the express and implied responsibilities imposed on the Commission by the Public Trust Doctrine. Petitioners contend that the Commission's failure to prepare an EIR is itself a violation of the public trust doctrine. (See OB at 24-25 ("[a]bsent the completion of an EIR under CEQA, there can be no credible means of determining whether past or proposed measures concerning plant operations adequately protect the public interest as required by the Public Trust Doctrine."])

The Commission's approval of the lease replacement contains an explicit analysis of the public trust doctrine. (AR 33-36.) As stated above, this court's review of the Commission's decision is limited to whether "its actions have been arbitrary, capricious or entirely lacking evidentiary support, or whether it has failed to follow the procedure or give the notices required by law." (Heim, supra, at 718-719.)

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/11/17			DEPT. 82
HONORABLE MARY H. STROBEL	JUDGE	N. DIGIAMBATTISTA	DEPUTY CLERK
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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

Among other things, the Commission recognized that it applies the principles of the Public Trust Doctrine in harmony with other legal requirements and policy objectives. (AR 33). Commission staff noted that a 2010 State Water Resources Control Board policy (OTC Policy) would require modification to DCPP for any operation after 2025. Further, Commission staff noted that while DCPP operations impact marine life, operation of the DCPP provides "an important public purpose by supplying nearly 10% of California's electricity generation." (AR 34). Commission staff also noted that the terms of the Joint Proposal, including that PG&E would not seek to operate the plant beyond 2025, and PG&E's commitment to provide 55% of its total retail sales from eligible renewable energy resources in the future, led to a conclusion that the limited term lease replacement would not substantially impair the public rights to navigation, fisheries, or other Public Trust needs and values. (AR 34 - 35). The Commission adopted the staff's findings.

"A court may not reweigh the evidence and substitute its judgment for that of the agency nor may it inquire into the soundness of the reasoning by which the agency's conclusions were reached." (Heim, supra, at 721.) Petitioners have not shown that the Commission failed to follow procedures required by law, or that its actions were arbitrary,

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

capricious or entirely lacking evidentiary support.

Conclusion

The petition is DENIED in its entirety.

1- While Western involved a traditional mandamus action challenging a quasi-legislative decision, the California Supreme Court's reasoning has been applied to administrative mandamus review of quasi-judicial decisions. (See Cadiz Land Co. v. Rail Cycle LP (2000) 83 Cal.App.4th 74, 120; Eureka Citizens for Responsible Government v. City of Eureka (2007) 147 Cal.App.4th 357, 367.)

2- Section 1094.5(e) provides in relevant part: "Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence."

3- The effect of the project could also be considered lease extensions, although technically the prior leases would be replaced with a new lease. (See Reply 1, fn. 2; AR 26.)

4- Petitioners do not contend that any other

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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	CEQA 170.6 TORRIBIO - PETITIONER		

NATURE OF PROCEEDINGS:

exceptions to the existing facilities exemption apply.

5- The opposition argues in a footnote that "arguably" the lease replacement is not a project. (Oppo. 15, fn. 23.) The Commission made no such finding. (See AR 1.) Based on how the argument was presented by Respondent and PG&E, and also based on the lack of a "no project" finding by the Commission, the court considers this argument waived.

6- As discussed above, the court does not consider the extra-record evidence cited by Petitioners. (CCP § 1094.5(e).)

7- Much of the reply discussion relates to the 2016 study, which is inadmissible.

8- While Geesman argues in his June 27, 2016 letter that "the extended period of the new lease will enable a 21% increase in the creation of spent nuclear fuel (aka radioactive waste) and a 21% increase in damage to marine organisms" (AR 2277), his opinion is based on nothing more than the fact the lease is extended 7 years.

9- Petitioners also point out that an assessment under the National Environmental Policy Act had been performed in North Coast, but they do not show that this was relevant to the analysis cited above on pages 873-874.

10- Petitioners cite to Citizens for East Shore Parks v. California State Lands Com.

MINUTES ENTERED
07/11/17
COUNTY CLERK

07/14/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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	CEQA 170.6 TORRIBIO - PETITIONER		DAMON P. MAMALAKIS (X)

NATURE OF PROCEEDINGS:

(2011) 202 Cal.App.4th 549, wherein the Lands Commission concluded that future oil spills from the 30-year renewal of a lease for Chevron's marine terminal was a potential environmental impact. (Reply 18-19; East Shore Parks at 555.) However, neither the Commission nor Chevron pursued the existing facilities exemption in that case, and the Court of Appeal did not analyze the exemption. (East Shore Parks, at 555, fn. 3.) "It is axiomatic that cases are not authority for propositions not considered." (In re Marriage of Cornejo (1996) 13 Cal.4th 381, 388.) Also, the lease in that case was for 30 years, not 7 years.

Respondent is to give notice and to prepare, serve and lodge the proposed judgment within ten days. The court will hold the proposed judgment ten days for objections.

07/14/2017

MINUTES ENTERED
07/11/17
COUNTY CLERK

PROOF OF SERVICE

I am a resident in the State of California. I am over the age of 18 and not a party to the within action. My business address is 12100 Wilshire Blvd., Suite 1600, Los Angeles, California 90025.

On July 21, 2017, I served the within Document:

JOINT REPLY IN SUPPORT OF JOINT MOTIONS TO STRIKE BY RESPONDENT CALIFORNIA STATE LANDS COMMISSION AND REAL PARTY IN INTEREST PACIFIC GAS & ELECTRIC COMPANY (BS163811)

[ ] By transmitting the document(s) listed above via facsimile from sending facsimile machine number 310.209.8801 to the fax number(s) set forth on the attached Service List on this date before 5:00 p.m. and receiving confirmed transmission reports indicating that the document(s) were successfully transmitted.

[X] By transmitting the document(s) listed above via email to the person(s) named on the attached Service List at the respective email addresses next to their names, on this date before 5:00 p.m. and receiving confirmed transmission reports indicating that the document(s) were successfully transmitted.

[X] By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth on the attached Service List, to each of the persons named on the attached Service List.

[ ] By causing overnight delivery by Federal Express of the document(s) listed above, addressed as set forth on the attached Service List, to each of the person(s) named on the attached Service List.

[ ] By causing personal delivery by messenger service of the document(s) listed above, addressed as set forth on the attached Service List, to each of the person(s) named on the attached Service List.

SEE ATTACHED SERVICE LIST

I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 21, 2017 at Los Angeles, California.

Laura M. Awad
(Type or print name)

(Signature)

SERVICE LIST	DOCUMENT SENT
Laurence G. Chaset Keyes, Fox & Wiedman LLP 463 14th Street, Suite 1305 Oakland, CA 94612 Tel: 510-314-8386 Fax: 510-225-3848 lchaset@kfwlaw.com Attorney for the Plaintiff/Petitioner	**[PROPOSED] JUDGMENT**
Gretchen Dumas 1749 Pleasant Valley Avenue Oakland, CA 94611 Tel: 510-435-6402 dumasgretchen@gmail.com Attorney for the Plaintiff/Petitioner	**[PROPOSED] JUDGEMENT**
Christina A. Humphrey Humphrey & Rist, LLP The Granada Building 1216 State Street, 4th Floor Santa Barbara, CA 93101 Tel: 304-574-0222 Fax: 304-574-0224 christina@humphreyrist.com Attorney for the Plaintiff/Petitioner	**[PROPOSED] JUDGMENT**
J. Kirk Boyd Boyd & Berkowitz, LLP 214 Grant Avenue, Suite 400 San Francisco, CA 94103 Tel: 415-440-2500 Fax: 415-813-6200 kboyd@boydberkowitz.com Attorneys for the Plaintiff/Petitioner	**[PROPOSED] JUDGMENT**
John A. Saurenman Senior Assistant Attorney General 300 South Spring Street, Suite 17 Los Angeles, CA 90013 Telephone: 213-897-2702 Fax: 213-897-2801 John.Saurenman@doj.ca.gov Attorney for Defendant/Respondent	**[PROPOSED] JUDGMENT**