IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WORLD BUSINESS ACADEMY Petitioner and Appellant, v. CALIFORNIA STATE LANDS COMMISSION, Defendant and Respondent, PACIFIC GAS & ELECTRIC COMPANY, Real Party in Interest and Respondent	Supreme Court No. Court of Appeal No. B284300 Superior Court No. BS163811

APPEAL FROM THE SUPERIOR COURT OF
LOS ANGELES COUNTY

Honorable Mary H. Strobel, Judge

PETITION FOR REVIEW

After the Published Decision of the Court of Appeal, Second Appellate District, Division Four, Affirming Judgement

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TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA.

Petitioner World Business Academy (Petitioner and Appellant) respectfully Petitions for Review of the published decision of the Court of Appeal (CA), Second Appellate District, Division Four, filed June 13, 2018. Petitioner sought rehearing. The CA modified its opinion, but did not modify the judgment, and denied rehearing on July 10, 2018. A copy of the Opinion is attached hereto as Exhibit A and the Order Denying Rehearing and Modifying the Opinion is attached hereto as Exhibit B. Petitioner respectfully submits that the CA's opinion undermines the California Environmental Quality Act ("CEQA") and this Court's interpretation of CEQA set forth in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal. 4th 1086. The CA's decision does so in the context of the Diablo Canyon nuclear power plant, thereby suggesting that all existing facilities with *continuing operations* will get a free pass on environmental review, no matter how consequential or dire the existing or future environmental risks of continuing operations might be. This is an important question of statewide magnitude, and both the legal issues and safety questions at stake merit this Court's attention. This Petition for Review should therefore be granted.

I

ISSUES PRESENTED FOR REVIEW

1. In a CEQA (California Environmental Quality Act) case, once the two-prong test established by this court in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal. 4th 1086, 1114-16 for "unusual circumstances" and a reasonable possibility of a significant environmental effect due to those unusual circumstances has been met, does a "baseline" showing of unchanging operations by the project proponent negate the satisfaction of the *Berkeley Hillside* test?
2. Does the Secretary of the Natural Resources Agency have the authority to create categorical exemptions from CEQA for projects like the Diablo Canyon Nuclear Power Plant ("Diablo") that have had, and will continue to have, a significant effect on the environment?
3. Must categorical exemptions from CEQA, such as the "existing facilities" exemption, be construed narrowly "in order to afford the fullest possible environmental protection," as stated by the Court of Appeal in *Save Our Carmel River v. Monterey Peninsula Water District* (2006) 141 Cal. App. 4th 677, 697, or should courts defer to "implied findings" of agencies even when they do not explicitly

consider whether a project will have a significant impact on the environment, as the agency did here (slip opn. at 28)?

4. Did the State Lands Commission ("SLC") and lower courts err when they concluded that Diablo is categorically exempt as an "Existing Facility?"

II.
WHY REVIEW SHOULD BE GRANTED

The Court of Appeal's decision creates a need for this Court to settle important questions of law *and* establish uniformity of conflicting appellate court opinions. This case presents vital issues under the CEQA for this Court's review, and it does so in a very consequential setting, the continued operation of the Diablo Canyon nuclear power plant in San Luis Obispo County (a project which, when constructed, never underwent an environmental impact report).

The CA's published decision undermines CEQA, and largely negates environmental review for existing facilities even when unusual circumstances exist and a fair argument for significant environmental effects clearly calls for such review. The CA's decision is inconsistent with the governing statutes, with this Court's *Berkeley Hillside* decision, and with the narrow construction of categorical exemptions set forth in *Save Our Carmel River, supra,* 141 Cal. App. 4th at 697. The legal issues raised

here merit this Court's attention, as do the factual stakes involving a large nuclear power facility operating with large safety risks. For these reasons, and those set forth below, this Court should grant review.

The Court of Appeal (CA) adopted a "baseline" analysis when examining a categorical exemption pursuant to CEQA that largely negates this Court's decision in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086. *Berkeley Hillside* set up a framework for analyzing CEQA exemptions that adheres to the purpose of CEQA. The *Berkeley Hillside* test first inquires whether there are unusual circumstances, and if so, whether there is a reasonable possibility of a significant environmental effect due to those unusual circumstances. (*Id*. at 1115.)

The CA opinion here states that a "proposal to continue existing operations without change would generally have no cognizable impact under CEQA." *World Business Academy v. State Lands Commission* (2018) 234 Cal.Rptr.3d 277, 301. The practical application of this holding is that even if the *Berkeley Hillside* test is met, the satisfaction of *Berkeley Hillside* can be entirely negated through a "baseline" showing of no change in operations by the project opponent, no matter how severe the current or future environmental impacts might be. The CA's decision, by making it difficult, if not impossible, to establish a "fair argument" of significant environmental effects in an existing facility, ignores both the law and the time-honored maxim "better safe than sorry."

Review is needed so that the test carefully established in *Berkeley Hillside* is not negated. Unless this Court steps in, the CA's opinion will invite departure from *Berkeley Hillside* in many CEQA cases pending throughout the state and result in a body of case law that undermines *Berkeley Hillside*.

The CA concluded that Diablo's nuclear generating facilities are exempt from CEQA review under the "Existing Facilities" exemption because the baseline subsumed all environmental damage and future risks associated with the project.

As discussed in more detail below, the administrative record in this case is replete with evidence and discussion of potentially severe forms of environmental harm and safety risks. This includes increased cancer and infant mortality rates in the vicinity of the plant, as well as embrittlement of the reactors. Embrittlement makes the reactors more vulnerable to even a moderate earthquake from four active earthquake faults near Diablo, one of which is only 2,000 feet from the reactors and travels directly beneath the reactors. (See fault map, AR 008218, attached as Ex. C)

If the CA's broad reading of the "baseline" is allowed to stand, lower courts will get the message from the decision below that if a massive facility like Diablo Canyon does not present "unusual circumstances," nothing does, no matter how consequential the safety risks may be. That is not a message which should be sent in a state with many unsafe buildings

and many active earthquake faults. A simple environmental review should not have to await the next Sylmar, Northridge or Loma Prieta quake, when it will be too late.

"The main purpose of environmental review under CEQA is to 'identify the significant effects on the environment of a project' and to identify project alternatives and feasible mitigation measures." (*Berkeley Hillside*, *supra,* 60 Cal. 4th. at 1124, Liu, J., concurring.) This purpose provides the fullest protection of the environment and informs the public of the environmental risks associated with a project.

Review is needed to protect this "main purpose." Under the CA's opinion, even if a major problem is identified with an existing facility, the project proponent can allege no change in operations, and escape any environmental study. That is not what the Legislature intended when it enacted an "unusual circumstances" carveout to the "existing facilities" exemption.

This Court should protect public participation statewide and ensure that the intent of CEQA to encourage the public to identify problems as part of the decision-making process is not undermined.

Review is also needed to ensure that future risks and newly discovered knowledge about previous risks cannot be ignored. Conceivably, following the CA's logic, General Electric could still dump PCBs (polychlorinated biphenyls) into the Hudson River because it is

business as usual, despite the fact that PCB's harmful effects subsequently became well known. Offshore oil rigs in California coastal waters have *never* been given an exemption because of their future risks, even though they are existing structures. [1]

The CA here assumed that the continued operation of Diablo Canyon for seven more years (the so-called "lease replacement project") "presents one or more unusual circumstances." (Slip opn. at 29.) It initially conceded that it is not supposed to weigh the evidence when determining whether there is a "fair argument" of a significant effect on the environment, the second prong of the *Berkeley Hillside* test (CA slip opn. at 27), but in fact it did improperly weigh the evidence to decide whether there is a "fair argument" under the second-prong of *Berkeley Hillside*, *supra*, 60 Cal. 4th at 1116. The CA's "weighing" process is inconsistent with the "fair argument" standard set forth by this Court in *Berkeley Hillside*, and it supplants CEQA's second step of conducting an initial study.

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[1] John White, counsel for Friends of the Earth, testified, "for example, with oil facilities that have been operating for a century, you have required CEQA review because, for example, the risk of future impact, an oil spill for example, or here the risk of a seismic event or tsunami or flooding event, these are future impacts. They are not part of the existing baseline. Every year this plant continues to operate, that risk goes up. That is an impact under CEQA significant. So therefore, (sic) cannot rely on this categorical exemption. (AR 000261.)

This Court observed in *Berkeley Hillside*, *supra*, 60 Cal. 4th at 1116, that when "unusual circumstances" exist – as the Court of Appeal assumed in this case -- "the Secretary's findings as to the typical environmental effects of projects in an exempt category no longer control," because there has been no prior review of the effects of unusual circumstances. In this setting, "An agency must evaluate potential environmental effects under the fair argument standard, and judicial review is limited to determining whether the agency applied the standard 'in [the] manner required by law.'" The instant case illustrates this point: while the continued operation of "existing facilities" might often cause no significant environmental effect, "unusual circumstances" like Diablo Canyon call for a rigorous examination of environmental effects.

The CA reasoned that Petitioner did not present "substantial evidence" to meet the unusual circumstances exception, yet the Administrative Record in this case is replete with testimony from experts and studies from *both sides* discussing a plethora of potentially dangerous environmental conditions and potential catastrophic risks associated with continued operation of the plant. (e.g., AR 017731-017732, report explaining heath issues; AR 2226-2239 report denying health issues.) The record demonstrated a "fair argument" could be made for significant environmental effects, and as this Court held in *Berkeley Hillside*, *supra*, 60 Cal. 4th at 1116, "requiring an agency to apply the fair argument standard to

determine whether unusual circumstances give rise to 'a reasonable possibility that the activity will have a significant effect on the environment'…is fully consistent with CEQA's framework and the Legislature's intent to provide categorical exemptions." (Citation omitted.)

The CA decision here parted ways from a Court of Appeal decision holding that weighing is improper. *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 820 remarked that "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." The CA opinion here, contrary to *Walters*, weighs the evidence to reach its own conclusion, rather than merely looking to see if there is a fair argument. A fair argument does not require a conclusive, winning argument, but one that presents genuine issues. This "weighing" process is inconsistent with the "fair argument" standard set forth by this Court in *Berkeley Hillside*, and it supplants CEQA's second step of conducting an initial study.

If the CA opinion is allowed to stand, members of the public who seek to challenge categorical exemptions will be at a severe procedural disadvantage, essentially being forced to conclusively prove their claims when this was not the intent of CEQA, and what *Berkeley Hillside* sought to prevent.

Finally, there is another issue with far-reaching, statewide ramifications that needs resolution by this Court. The general rule is that categorical exemptions must be construed narrowly in order to afford the fullest possible environmental protection. (*Save Our Carmel River, supra,* 141 Cal.App.4th at 697.) The CA departed from that rule here.

The CA opinion here *broadens* the authority of the Secretary beyond what the Legislature intended. This Court made it clear in *Berkeley Hillside* that the legislature limited the authority of the Secretary by requiring the Secretary "to make a finding that the projects they comprise 'do not have a significant effect on the environment.'" (*Berkeley Hillside, supra,* 60 Cal. 4th at 1001.) Moreover, *Berkeley Hillside* was clear that the Secretary of Resources can only create categorical exemptions for classes of projects "that have been determined not to have a significant effect on the environment." (*Id*. at 1101.) Here, a nuclear power generation facility cannot be included within such a class; it is inherent in its operation that it will have a significant effect on the environment.

The scope of the Secretary's authority to create categorical exemptions is an important legal question for all courts reviewing exemptions and can be resolved with an opinion that a nuclear power generation facility, or some other large project that will have a significant

effect on the environment, cannot be included within an existing structures exemption.

There are multiple reasons for review here, as set forth above and below. This Petition should be granted.

III.
STATEMENT OF FACTS AND PROCEDURAL HISTORY

Two state land leases enabling operation of the cooling water discharge channel, water intake structure, breakwaters, a desalinization plant and associated infrastructure at the Diablo Canyon Nuclear Plant (Diablo) are at the heart of this case. These leases are a prerequisite for the continued operation of Diablo, and without them, Diablo cannot function. The last remaining nuclear plant in California, Diablo is located along the Central Coast shoreline, upwind from San Luis Obispo and Santa Barbara, and in direct proximity to at least four active earthquake faults, one of which was recently discovered to be only 2,000 feet away from the Diablo reactors. (AR 008218)

As these two existing leases were scheduled to expire, respectively, on August 27, 2018, and May 31, 2019, Pacific Gas & Electric Company ("PG&E") sought new 7-year lease extensions until November 24, 2024 (Unit 1) and August 26, 2025 (Unit 2).[2]

[2] See, Administrative Record (hereafter, "AR"), pp. 000264-000265.

The issue before the Commission was whether PG&E, whose initial leases were granted more than a decade prior to the enactment of the California Environmental Quality Act ("CEQA"),[3] was entitled to an exemption from CEQA environmental impact reporting requirements in relation to the Commission's issuance of the new leases. Remarkably, an Environmental Impact Report has never been prepared for Diablo, despite numerous changing circumstances calling its environmental security into question.

Originally, during public hearings in December, 2015, and February, 2016, Commission staff and members indicated that there is **no** exemption from CEQA for Diablo, likening Diablo to offshore oil derricks that are subject to CEQA reporting requirements when their leases are renewed. (AR 000264-000265)(AR 000011-000016).

Despite this assessment, on June 21, 2016, just one week prior to the Commission's scheduled final hearing on the lease application, PG&E announced a proposal under which it would agree to retire the Diablo plant in 2025, if certain non-profit groups agreed to forego challenges to its application for renewal of the state land leases. In essence, PG&E requested an exemption from CEQA in exchange for an agreement to close Diablo in 2025. Petitioner World Business Academy was part of these

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[3] California Health and Safety Code, Section 21000, *et seq*.

negotiations, but did not believe, and still does not believe, that an exemption unsupported by law can be traded for a seven-year operating period without environmental review.

Thereafter, on June 28, 2016, the Commission reversed course from its previously stated inclination to apply CEQA, and officially approved Calendar Item 96, granting Diablo a new lease until 2025 without any environmental review, on grounds that the project was exempt from CEQA as an "existing" facility.[4]

In its revised report, Commission staff prepared incomplete and cursory findings. Indeed, the CA opinion acknowledged, “neither the staff report the Commission adopted nor the single-page notice of exemption the Commission prepared includes findings as to whether the lease replacement project presented an unusual circumstance because of some characteristic that distinguished it from projects in the exempt class. Nor did the Commission explicitly consider whether the project would, in fact, have a significant impact on the environment.” (Slip opinion at 28.) For example, the findings did not even mention, much less address, evidence in the record that cancer rates and infant mortality are increasing in relation to proximity and downwind location to the plant, or that after 30 years of radiation exposure the reactors have become embrittled, weakened and

[4] See, AR, p. 000037, 000714-000716, 000920.

susceptible to failure even in a moderate earthquake. The report's summary findings merely concluded that an exemption as an existing structure applied, negating application of CEQA, with only a single boilerplate paragraph as an explanation for this decision. In contrast, Petitioners and others submitted a broad range of substantial supporting evidence to the Commission. (AR 008218 earthquake), (AR 16450 embrittlement), (AR 017669-017734 health issues), (AR 000835-000837 marine life), (AR 003617-005034 nuclear waste).

The Commission approved the exemption, despite testimony from numerous attendees commenting at the June 28, 2016 meeting that the exemption did not apply to cases, such as this one, where there is a reasonable possibility that the activity will have a significant adverse effect on the environment due to unusual circumstances. (AR 1918b)

Appellant World Business Academy thereafter sought a Writ of Mandate to require the Commission to make a finding, as it was inclined to do earlier, that CEQA does apply and must be followed. The trial court denied the Writ of Mandate, concluding that although unusual circumstances *do exist* in this case (Slip Opinion p. 12), as long as PG&E can show that it is not changing its operations as part of a "baseline," then it does not matter that unusual circumstances exist, because, if operations do not change, then there is not a reasonable possibility of a significant

effect and an exemption applies. The Court of Appeal affirmed using similar reasoning.

IV.

ARGUMENT

A. REVIEW IS NEEDED TO CLARIFY THAT A BASELINE OF NO CHANGE IN OPERATIONS DOES NOT NEGATE SATISFACTION OF THE TWO-PRONG TEST FOR UNUSUAL CIRCUMSTANCES SET FORTH BY THE COURT IN *BERKELEY HILLSIDE*

i. Review is Needed to Guide Trial Courts that a Showing of Unchanging Operations does not Negate *Berkeley Hillside*

Berkeley Hillside was decided in 2015 – just three years ago. The Court explained that it was giving the courts in California a specific process to follow, stating that the CEQA statute and its implementing regulations, the CEQA Guidelines, "prescribes review procedures a public agency must follow before approving or carrying out certain projects." (*Berkeley Hillside, supra,* 60 Cal.App.4th at 1092.)

The *Berkeley Hillside* test works, because when there are unusual circumstances, and there is a reasonable possibility of a significant effect due to those unusual circumstances, then it is clear an exemption does not apply. (*Id.* at 1115-16.) The CA decision, however, would supplant *Berkeley Hillside* with a new standard built upon a baseline analysis (slip opn. at 30-34), holding that even if the two-prong standard in *Berkeley Hillside* is met, that if there is no change in operations, then an exemption

still applies, no matter the degree of existing or potential harm and future risks associated with continued use.

The error of this analysis is clear from the "Reasons for Exemption" filed by the Commission to explain its application of the exemption. The Commission's assessment of the impacts of the seven-year project on the environment was cursory and inaccurate. The Reasons stated the following:

> "Issuance of a General Lease—Industrial Use for the above-mentioned structure(s) will not cause a physical change in the environment and will not change existing activities in the area. 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)." (Slip Opinion p. 11)

It is implausible that running Diablo for seven more years "will not cause a physical change in the environment." Stated another way, in the framework of the Guidelines, there is a fair argument that the plant's operation for seven more years *will* significantly affect the environment. The marine evidence alone shows that Diablo has already created a "dead zone," and operating at the same level for seven more years will cause a chain effect negatively impacting protected fisheries off the coast of California. [5]

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[5] Jencks, Michael, attorney, Biodiversity First, Transcript, Meeting, State Lands Commission, Biodiversity, June 28, 2016, pp. 167-169 [AR 000835-000837].

The Commission's conclusion states the project "will not cause a physical change in the environment *and* will not change existing activities in the area." At the very least, there is a fair argument to the contrary.

PG&E states that seven years of operations will remain the same, but this claim is questionable. PG&E has plans to expand the desalination plant during the seven-year period. According to the testimony of one of PG&E's own employees, PG&E "is moving forward to expand the operating desalination plant at Diablo Canyon." (AR 000515) This testimony shows that PG&E cannot even claim that it is maintaining its operations at the same level as it has in the past – it is "expanding" them. Given this fact, the linchpin of the baseline argument has been pulled.

The CA relies upon *North Coast Rivers Alliance v. Westlands Water District* (2014) 227 Cal.App.4th 832. *North Coast Rivers* was decided in 2014, a year *prior* to *Berkeley Hillside.* No other Court of Appeal decision has applied *North Coast Rivers* in the manner the CA has in this case. In effect, the CA's application of *North Coast Rivers* in this case *broadens* the exemption because it narrows the unusual circumstances exception to the exemption. This broad construction of the exemption conflicts with *Save Our Carmel River*, which correctly concludes that "we must construe the [CEQA] exemptions narrowly in order to afford the fullest possible

environmental protection." *Save Our Carmel River*, *supra*, 141 Cal. App. 4th at 697.

By negating the *Berkeley Hillside* two-prong test with a showing of unchanging circumstances, the CA has dramatically limited when a showing of a "fair argument," i.e. a reasonable possibility of a significant effect due to unusual circumstances, can be made. This expansion of the exemption is contrary to the general rule that categorical exemptions must be construed narrowly in order to afford the fullest possible environmental protection. (*Id.* at 697) ("Since a determination that a project falls within a categorical exemption excuses any further compliance with CEQA whatsoever, we must construe the exemptions narrowly in order to afford the fullest possible environmental protection.")

As the court further explained in *Save Our Carmel River*, this narrow construction is applied so "in all but the clearest cases of categorical exemptions, a project will be subject to some level of environmental review." (*Save Our Carmel River* (*supra*), 141 Cal.App.4th at 697.) By expanding the existing structures exemption rather than narrowly construing it as *Save Our Carmel River* requires, the CA in this case has created a spilt that this Court should address, and it has done so in a case which is by no means a "clear case of categorical exemption." Review is needed to ensure that the "baseline" is not used to

expand categorical exemptions by negating a showing of unusual circumstances.

The statewide implications of the CA opinion for CEQA cases with potentially dangerous activities can be seen in this case. Here, the former head of the Tennessee Valley Authority, David Freeman, gave testimony identifying a gravely dangerous condition at Diablo. Based upon his expertise in the nuclear field, he explained that "Diablo Canyon's reactors have been bombarded with radiation and intense heat for 30 years and now have an embrittlement problem – radiation has weakened the structure to the point that the NRC (Nuclear Regulatory Commission) has flagged the problem at Diablo Canyon" (AR 16450).

He was correct. Evidence was also presented to the Commission by way of the NRC's own document listing Diablo as the "3rd most embrittled plant in the United States." (AR 002278.) Of the three, moreover, Diablo is the only one sitting on four active earthquake faults in close proximity to the embrittled, "weakened," reactor. (AR 008218)

According to the CA baseline analysis, the identification of embrittlement does not matter as long as PG&E continues to bombard the reactor with the same amount of heat and radiation each day. This is not the law, and it is an undesirable precedent. The CA's decision, if followed, would mean that existing facilities could escape study until it is too late – in this case, perhaps, a nuclear event that could seriously endanger and expose

to radiation hundreds of thousands of people not just in San Luis Obispo, but in Santa Barbara and Los Angeles as the trade winds blow down the coast.

The dangers of this aberrant baseline standard have far- reaching implications across a broad spectrum of projects with significant environmental effects. For example, for decades the oil rigs off-shore of California have never been given exemptions. (AR 000261) It has been assumed that their operations have a cumulative effect and that the rigs will deteriorate over time, as is the case with Diablo, the Unit 1 reactor was built in 1973. Now, if the CA decision stands, oil companies could introduce evidence that their operations are unchanged – they are pumping the same - so it is their "baseline" and they are entitled to an exemption.

ii. Review is Needed so that Future Risks Will be Taken into Consideration

Ignoring future risks, the CA opinion states that a "'proposal to continue existing operations without change would generally have no cognizable impact under CEQA.'" (CA slip opinion at 31.) This one-size-fits-all statement ignores the degree of existing or potential harm and future risks associated with continued use. Ignoring future risks as long as operations remain unchanged has vast ramifications in all CEQA cases, because the CA in this case held that future risks *do not* need to be considered when deciding the application of CEQA. (CA slip opinion at

34.) This is error, and a misguided, published precedent for other courts. The application of baseline should be a comprehensive analysis including both ongoing operations and future risks. If there is a reasonable possibility that the continued operation of a facility will cause an explosion (as in San Bruno), a catastrophic fire (as in the North Bay wildfires last year), or a serious oil spill (as in the Deepwater Horizon spill), those future risks should be considered in the interests of public health and safety and environmental protection.

Testimony before the Commission stated that because of future risks, offshore oil rigs are *never* given an exemption as existing structures. (AR 000261 "for example, with oil facilities that have been operating for a century, you have required CEQA review because, for example, the risk of future impact, an oil spill for example"). Shortly after this testimony, a Commission member stated that Diablo should not be exempt because it is similar to an offshore oil rig. (AR 000264-000265). Then, just six months later, on June 28, 2016 the Commission voted to give Diablo an exemption.

In *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1196-1197, the court held that "nothing in the baseline concept excuses a lead agency from considering the potential environmental impacts of increases in the intensity or rate of use that may result from a project." Thus, one must consider whether there is a potential

that operations will increase the "intensity" of the "potential environmental impact."

Here, for example, the unusual circumstance of the killing of billions of fish, octopus, abalone and other marine life shows an intensification of significant environmental effects. The impact of the continued killing of marine life and the contamination of sea water is steadily impacting the fisheries along the California coast. (AR 001545.) This Court should not permit a standard where the existing facilities exemption is a blanket pass from considering such significant harm.

The record also showed increased cancer rates and high infant mortality rates. Future risks were shown with careful analysis of zip code information (AR 017731-017732) showing that elsewhere in the state infant mortality is *decreasing*, but in zip codes near the plant it is *increasing*. This type of future risk should not be ignored simply because people near the plant are exposed to the same amount of radioactive contaminants each day.

The fact that all of this evidence of *worsening* environmental damage, and a potentially life-threatening situation for thousands of Californians, did not trigger an initial study, which would result in a limited environmental review leading to a negative declaration or an EIR, raises serious concerns regarding this "baseline" approach. Baseline is a valuable point of reference. It stands for the principle that the courts should look at conditions as they are at the time the project is being reviewed. But that

does not mean the courts should only consider whether *operations* are continuing the same. Future risks from those continued operations can and should be considered, especially in the "unusual circumstances" of a facility like Diablo Canyon.

iii. Review is Needed to Create Uniformity in the Lower Courts that Identification of Issues and Potential Mitigation Measures are not to be Weighed When Deciding Whether There is a Fair Argument

Berkeley Hillside creates two standards of review as part of the unusual circumstances analysis. First, for the question of whether there are unusual circumstances, "the agency must weigh the evidence of environmental effects along with all the other evidence relevant to the unusual circumstances determination, and make a finding of fact." (*Berkeley Hillside, supra,* 60 Cal.4th at 1115-1116.)

Second, once there is a finding of unusual circumstances, as *both* the trial and appellate courts assumed here (slip opn. at 29), then the question of whether there is a reasonable possibility of a significant effect on the environment due to those unusual circumstances (i.e. a "fair argument"), is *not weighed* by the reviewing court. Rather, "An agency must evaluate potential environmental effects under the fair argument standard, and judicial review is limited to determining whether the agency applied the standard 'in the manner required by law.'" (*Id.* at 1116.)

This means that the reviewing court simply looks to see whether there is substantial evidence in the record *to support a fair argument* of a reasonable possibility of a significant effect due to the unusual circumstances in the case. This is a low bar. Even if there is some conflicting evidence, as long as there is substantial evidence in the record to support a fair argument, that is enough. (*Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 820 ("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").)

Weighing evidence of a fair argument as the CA did here marginalizes public participation, both for the identification of problems and for identification of mitigation measures. This is one of the most troubling aspects of the CA opinion and given the steady stream of public comments that are being made daily in CEQA matters, it needs a swift resolution through an opinion by this court.

Often the public serves the purpose of a canary in the coal mine – to warn of unforeseen dangers, or to bring to light existing dangers that are being ignored by the project proponent. The public's role at the *exemption* stage is to identify issues, not necessarily prove them. It is part of the main purpose of CEQA for the public to "identify project alternatives and feasible mitigation measures." (*Berkeley Hillside*, 60 Cal. 4th. at 1124, Liu,

J., concurring.) The CA "baseline" discourages the hard work of figuring out "alternatives and feasible mitigation measures," because even if the public, and nonprofit organizations, spend the time to figure out new solutions, the project proponent can simply state it does not matter because ongoing operations remain unchanged.

Here, the CA stated, "Appellant has not pointed to any evidence before the Commission showing that the lease replacement would worsen any embrittlement or make related problems more likely." (CA slip opinion at 40.) This weighing was improper. The CA looked only at operations and concluded that since they were not changing, there was not any evidence that embrittlement or related problems would "worsen."

The testimony of David Freeman, however, showed that embrittlement is a problem that has gradually emerged "over 30 years." (AR 16450) This is confirmed by the NRC's conclusion that Diablo is the third most embrittled plant in the United States. (AR 002278). With continued operations, embrittlement continues to worsen, providing a fair argument of significant effects on the environment from continued operations.

This is not just an academic question, it lies at the very heart and purpose of CEQA. When the former head of the Tennessee Valley Authority tells the Commission that the reactors are in a "weakened" state due to embrittlement, that the NRC has recognized the problem, and the

solution is “annealing,” this evidence cannot be given little weight simply because operations remain unchanged.

Appellate courts should be told that they are not to weigh the evidence as part of the “fair argument” determination. This Court should grant review and explain that one reason not to weigh evidence is that the decisions regarding exemptions are early in the CEQA process. Weighing whether there is a reasonable possibility of a significant effect due to unusual circumstances can be done through an initial study. An initial study covers all phases of a project, including planning, implementation and operation. An initial study may rely upon expert opinion and technical studies, “however, an initial study is neither intended or required to include the level of detail included in an EIR.” (14 CRR §15063 (a)(3))

Most importantly, “the lead agency shall prepare a negative declaration if there is no substantial evidence that the project or any of its aspects may cause a significant effect on the environment.” (14 CRR §15063 (b)(2).) The CA erred by weighing evidence as part of its fair argument analysis, rather than applying an exception to the exemption and allowing the evidence to be weighed at the initial study phase.

The danger is that when appellate courts weigh the evidence, rather than just looking for substantial evidence of a fair argument and allowing for the next step, an initial study, the problems identified may

never be addressed because they are prematurely weighed and discarded, as was done in the case at hand.

For instance, Mr. Freeman also said as part of his comments on embrittlement that "PG&E is ignoring the problem – again, problem denied, safety last." (AR 16450.) In so doing, he provided an important warning that PG&E is ignoring the problem of embrittlement, and he was correct.

Diablo Canyon has "coupons" inside the nuclear reactor: rectangular pieces of metal with the same metallic composition as the welds at the reactor core. A coupon can be removed when the reactor is being refueled, which occurs every 18 months, and tested to determine the extent of embrittlement.

PG&E has not pulled and tested a coupon for 15 years. The last time a coupon was pulled from the Unit 1 reactor, in 2003, the NRC looked at the testing of the coupon and concluded that Diablo is the third most embrittled plant in the United States. (AR 002278.) Even though Diablo sits on four active earthquake faults, PG&E is, as Mr. Freeman identified, ignoring the problem so that it will not have to do repairs. If embrittlement had not been improperly weighed at the exemption step, and discarded, important information such as the number of coupons and when they have been tested could be weighed at the initial study phase.

The “annealing” that Mr. Freeman testified about as a repair for embrittlement (AR 16450) is an example of how premature weighing cuts off a proper assessment in an initial study. Annealing would require the reactor core to be removed and the reactor vessel to be superheated, a process that would take almost a year and have considerable expense. There is a “reasonable possibility” that PG&E does not want to pay for these repairs, so it does not look at a coupon, even when there was a severe embrittlement problem 15 years ago. The CA opinion means that even when the embrittlement problem has been identified, PG&E is exempt from CEQA review, so it will never have to do inspections, or explain in an initial study why it is not doing them. The CA’s premature weighing of the evidence has stymied the CEQA process.

It is also possible for PG&E to inspect the damaged welds in the reactor due to embrittlement with an ultrasound device that can be attached outside the reactor vessel. Every weld can be tested this way, and, as with the coupons, the ultrasound can be done during a refueling. The last ultrasound was done in 2005. Another was supposed to be done in 2015, but PG&E asked the NRC for a 10-year waiver from testing until 2025 and was given the waiver. Again, the embrittlement problem was identified (AR 16450, AR 002278) but is being ignored as long as PG&E continues to bombard the reactor with the same amount of radiation each day.

There is another reason why this Court should give guidance to the trial courts not to weigh evidence when making a decision about a fair argument. Often there simply is not time for the public to submit sufficient evidence for there to be a proper weighing. This Diablo case illustrates that point. The Commission staff did not issue its report recommending an exemption until June 24, 2016 - only *four days* before the Commission was to meet and vote on the recommendation. To make matters worse, as nonprofit organizations Biodiversity First (AR 1887) and Mothers for Peace (AR 1918a, 1918b) pointed out in written comments submitted on June 27, 2016, in asking for an extension of time before a decision was made, "the Commission website was down all day on Sunday, June 26, 2016," preventing those who wanted to comment from accessing the documents they wanted to comment about.

A last-minute staff report that does not contain even one word about embrittlement or health issues, despite the gravity of these issues, does not provide a sufficient opportunity to make an Administrative Record with evidence sufficient for weighing. An initial study, however, allows time sufficient for a weighing to occur and for a determination of whether a negative declaration will be issued or an EIR prepared.

Finally, waiting to do the weighing until an initial study will ensure that the lower courts get the facts right. If they weigh too hastily, they may not. For example, the CA slip opinion states at page 6 that 10%

of California's energy comes from Diablo, but according to testimony before the Commission, based on information of the California Energy Commission, Diablo only provides ***6%*** of California's energy. The other nuclear power generated energy is coming from Palos Verdes Nuclear Power in Arizona. (AR 000395- AR 000396.) It is important that the courts wait to weigh and get the facts right, especially with facilities like Diablo Canyon.

Waiting to weigh also helps lower courts include *all* of the facts. Here, in an error of omission, the CA opinion does not even discuss the desalination plant, even though public testimony specifically criticized the Commission for not addressing the desalination plant. "There is no mention whatsoever in the staff report about the environmental effects of a desalination plant at Diablo Canyon. It is not even there." (Linda Seeley, Mothers for Peace, AR 000815) If the significant environmental effects of a desalinization plant producing one million gallons a day are ignored, so are the future risks of a plant's operation. The omission regarding the desalination plant is even more troubling because, according to the testimony of one of PG&E's own employees, PG&E "is moving forward to expand the operating desalination plant at Diablo Canyon." (AR 000515.)

iv. Review is Needed to Instruct Lower Courts that there Must be a Cumulative Assessment of Evidence of a "Fair Argument."

The facts showing an unusual circumstance are not be looked at in isolation. The task is not to just take one unusual circumstance at a time, but to consider them together. Then, looking at the unusual circumstances combined, it is a legal question whether a "fair argument" can be made, and neither the trial court nor the CA defers to the agency's determination. (See *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App. 4th 903, 930.)

The CA *did not* make a cumulative analysis, but rather looked at each fair argument in isolation. The Commission, trial court, and the CA all failed to make a cumulative analysis even though carefully drafted written testimony in the Administrative Record specifically *asked* for a cumulative analysis of unusual circumstances, stating, "these factors by themselves - *and certainly in combination*- distinguish this facility from every other example cited in the June 24 Staff Report." (AR 000815, emphasis supplied.)

The cumulative analysis the public requested should have been made. For example, it would be an unusual circumstance for any plant in the United States to be designated the third most embrittled. When one couples that fact with the ranking by the NRC in 2011 of Diablo as "the nation's nuclear plant most vulnerable to earthquakes" (AR 001541), the embrittlement concerns are magnified.

A map in the AR (AR 008218, attached as Exhibit C to this Petition) highlights why a comprehensive approach should be taken. The map shows the lines of active earthquake faults right off the coast near the Diablo Canyon plant. There is testimony in the AR that two of them, the Hosgri and Shoreline faults, could combine, potentially generating a 7.7 quake that would exceed Diablo's maximum seismic capacity of 7.5. (AR 003054-003060.) Taken alone this is a "fair argument," and when considered cumulatively with the evidence of embrittlement, a fair argument is even more clear.

This Court should grant review and hold that comprehensive assessments should be done to determine whether a fair argument can be made of significant environmental effects.

A comprehensive assessment in this case might include a review of PG&E's past safety issues. (See, e.g., testimony of John Geesman, AR000731-000732; David Grace, AR 000777-000779; and Rinaldo Brutoco, AR 000812-000813.) Those issues include failure to properly inspect welds. PG&E's failure to pull "coupons" for inspection at Diablo Canyon raises the same issue that has surfaced in past incidents involving PG&E.

The CA stated that reference to PG&E's past safety issues was an "ad hominem" attack (slip opinion at 42), but it was a cracked weld that ruptured on a transmission pipeline in San Bruno, triggering the explosion

that destroyed a neighborhood. When safety inspections are at issue, a company's past record can at least be considered in assessing whether a "fair argument" can be made about whether there could be significant environmental effects from continued operations.

If PG&E participates in an initial study and shows that it has an inspection plan for testing coupons and performing ultrasounds over the seven years of continuing operations at the aging Diablo Canyon plant, it may be entitled to a negative declaration. That is how CEQA works. It should not, however, be able to completely avoid any environmental review whatsoever with a weighing at the exemption phase, or to get a pass when an issue of great risk to the public has been identified.

V REVIEW IS NEEDED TO CLARIFY WHAT TYPE OF PROJECTS THE SECRETARY OF RESOURCES CAN INCLUDE WITHIN A CATEGORICAL EXEMPTION

The CA opinion creates confusion in the law as to what type of projects can be included within a categorical exemption. As a starting point, the Commission *has the burden* of demonstrating that substantial evidence supports a factual finding that the project falls within the exemption. (See *Save Our Big Trees v. City of Santa Cruz*, 241 Cal.App.4th 694, 705, ("'[T]he agency invoking the [categorical] exemption has the burden of demonstrating' that substantial evidence supports its factual finding that the project fell within the exemption," citing *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 386).)

The Commission never showed that Diablo comes within an exemption. Section 21084 of the Public Resources Code empowers the Secretary to exempt only activities that do not have a significant effect on the environment. This Court, in *Berkeley Hillside* emphasized that the Secretary has limited authority to create exemptions. "No regulation is valid if its issuance exceeds the scope of the enabling statute. The Secretary is empowered to exempt only those activities which do not have a significant effect on the environment." (*Berkeley Hillside, supra,* 60 Cal.4th at 1107.)

The CA opinion gives the Secretary power beyond the enabling statute. It assumes that because there is no change in operations, then there is no significant effect on the environment, and, therefore, the Secretary can include a nuclear power generation facility within a categorical exemption.

By taking this broad approach to an exemption, the CA has created a *split* with other Court of Appeal opinions that this Court should resolve. The general rule is that categorical exemptions must be construed narrowly, in order to afford the fullest possible environmental protection. (*Save Our Carmel River* (*supra*) 141 Cal.App.4th at 697).

This Court made clear in *Berkeley Hillside* that the legislature limited the authority of the Secretary by requiring the Secretary to make a finding that the projects included within "classes of projects" exempt from CEQA "'do not have a significant effect on the environment.'"

(*Berkeley Hillside, supra,* 60 Cal.4th at 1101.) A nuclear power generation facility cannot logically be included within such a class; it is inherent in its operation that it will have a significant effect on the environment in a myriad of ways.

CONCLUSION

The Court of Appeal here took a broad approach to a CEQA exemption which, as the Court of Appeal had held in *Save Our Carmel River*, should be narrowly construed. It did not follow this Court's *Berkeley Hillside* opinion, and its decision will undermine CEQA. Petitioner respectfully requests that this Petition for Review be granted so that CEQA and this court's decision in *Berkeley Hillside* will be followed, rather than supplanted with an errant body of case law that leaves Californians, and the environment in which they live, at risk.

Dated: July 23, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the enclosed Petition for Review of produced using 13-point Roman type including footnotes and contains approximately 7850 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: July 23, 2018

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