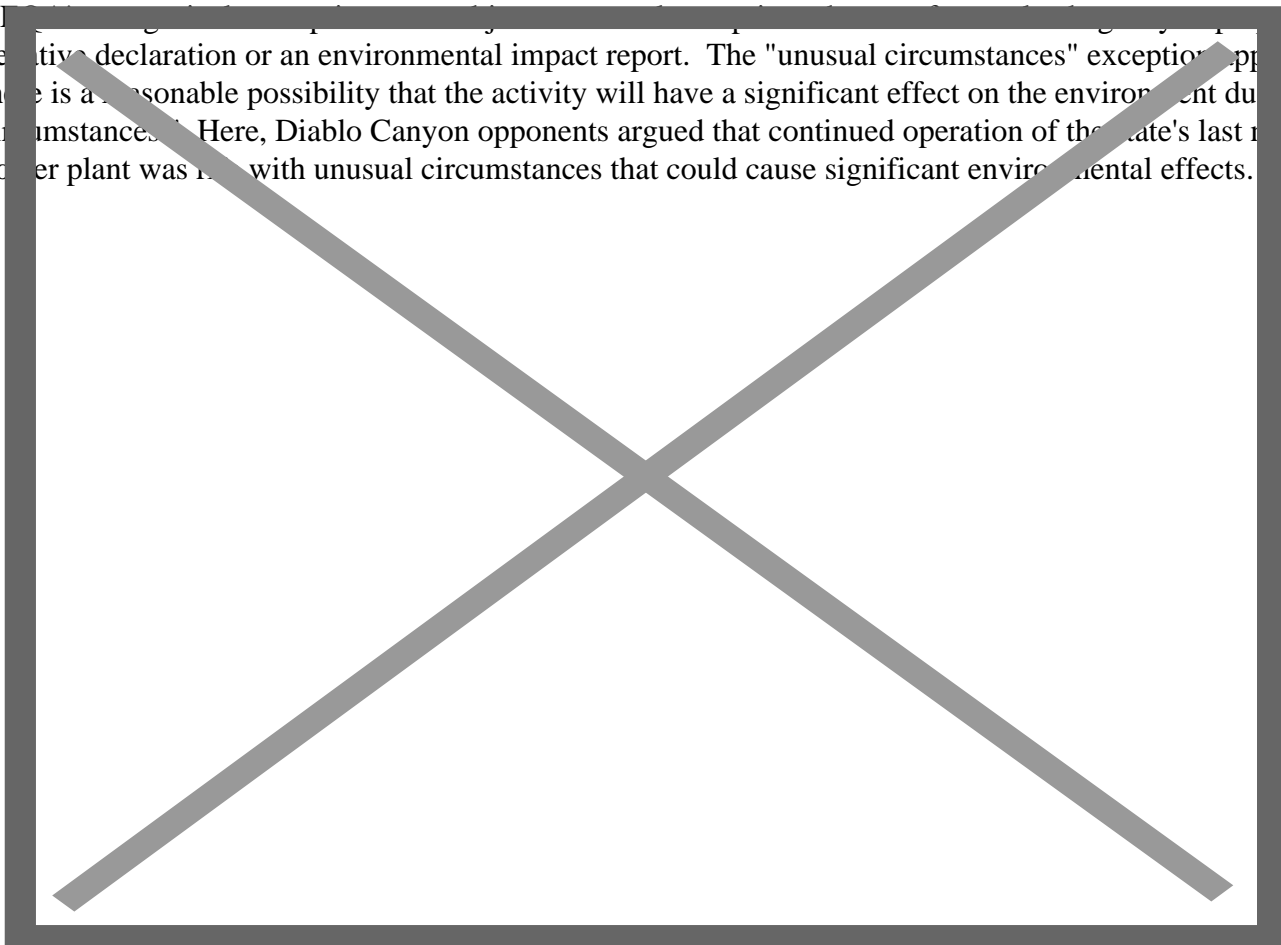


Seven-Year Extension of Diablo Canyon Lease Held Exempt from CEQA

A court of appeal has rejected CEQA and public trust challenges to a State Lands Commission lease extension allowing the Diablo Canyon nuclear power plant to continue operating through 2025. *World Business Academy v. California State Lands Commission*, 24 Cal. App. 4th 476 (2018). Pacific Gas & Electric Company plans to cease operating Diablo Canyon in 2025, when the plant's federal licenses will expire. The plant's cooling water intake and discharge structures are on state-owned submerged and tidal lands, for which the Commission had issued leases to PG&E expiring in 2018 and 2019. The Commission granted PG&E a consolidated lease extension through 2025, relying on CEQA's categorical exemption for continued operation of existing facilities.

CEQA requires a project to undergo a categorical exemption, a negative declaration or an environmental impact report. The "unusual circumstances" exception applies "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." Here, Diablo Canyon opponents argued that continued operation of the state's last nuclear power plant was not with unusual circumstances that could cause significant environmental effects.



To

show that the unusual circumstances exception applies, normally a challenger must show both: 1) unusual circumstances; and 2) a reasonable possibility of a significant environmental effect due to those unusual circumstances. Here, the Commission had made no finding regarding unusual circumstances. With no finding

before it, the court of appeal elected to assume unusual circumstances did exist, and then proceeded to the second half of the test: whether there was a fair argument that the lease extension would cause significant environmental impacts. The court began by holding that the baseline for its analysis consisted of existing operations under the lease. In so doing, the court followed an earlier case (*North Coast Rivers Alliance v. Westlands Water District*, 227 Cal. App. 4th 832 (2014)) that applied the same rule with respect to Central Valley Project water contract renewals. The court then reviewed each factor the challenger claimed raised a fair argument of significant environmental effects -- Diablo Canyon's size, location, impacts on human health and marine life, fuel rod storage, reactor embrittlement, risks from seismic events and terror attacks, and status as the state's last remaining nuclear plant -- and found that none of these conditions would be changed by the lease extension. Because there was no fair argument of significant environmental effects from the extension, the court held the Commission did not violate CEQA. Finally, the court rejected the challenger's claim that the lease renewal was inconsistent with the public trust, holding that the Commission's balancing "of the public trust rights to navigation, fisheries, and environmental protection against the public need for efficient electrical production" was not arbitrary, capricious, or procedurally irregular. The opinion in this case is instructive in two respects. First, it reinforces precedent holding that however damaging an existing environmental condition is alleged to be, that condition is still the baseline under CEQA, and only a project-caused worsening of that condition is a CEQA concern. Second, the case is a reminder that if the lead agency fails to make findings supporting the conclusion that a proposed project involves no unusual circumstances, the court may assume the project *does* involve unusual circumstances. The court will then proceed to ask whether project opponents have raised a fair argument that the project will cause significant environmental effects. Although project opponents often cannot meet even this low threshold, lead agencies relying on potentially controversial categorical exemptions should minimize this risk by making findings regarding unusual circumstances.

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