

June 27, 2022

As corrected June 28, 2022

Jennifer Granholm, Secretary
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Dr. Kathryn Huff, Assistant Secretary
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SUBJECT: *Response to Proposed Amendment to Guidance for Civil Nuclear Credit Program*

Dear Secretary Granholm and Assistant Secretary Huff:

On behalf of San Luis Obispo Mothers for Peace (“SLOMFP”), a non-profit organization concerned with the dangers posed by Diablo Canyon and other nuclear reactors, nuclear weapons, and radioactive waste, I am submitting comments on the U.S. Department of Energy’s (“DOE’s”) proposed amendment to the DOE’s initial Guidance for the Civil Nuclear Credit Program (“CNC Program”).¹ The sole purpose of these proposed changes appears to be to grant a request by the Governor of California to allow the Diablo Canyon Nuclear Power Plant to participate in the CNC Program, for which it is completely unqualified, and which would be inconsistent with the plain language and purposes of the bipartisan Infrastructure Investment and Jobs Act (“IIJA”).²

Indeed, admission of Diablo Canyon to the CNC Program would undermine the purposes of the IIJA, by upending a settlement agreement by which Diablo Canyon’s life has been extended for several years beyond the time when the need for substantial capital investments would have raised California electric rates to intolerable levels, even as the plant’s inflexible operating characteristics impeded California’s ongoing transition to a low carbon electric sector based on other more efficient technologies. Further, admitting Diablo Canyon to the CNC Program would

¹ U.S. Department of Energy, Proposed Guidance Amendment for the Civil Nuclear Credit Program (June 17, 2022). (“Proposed CNC Program Guidance Amendment”). The Proposed CNC Guidance Amendment was posted at <https://www.energy.gov/ne/proposed-guidance-amendment-civil-nuclear-credit-program>.

The Proposed CNC Guidance Amendment would make changes to U.S. Department of Energy, Guidance for the Civil Nuclear Credit Program (April 19, 2022) (“CNC Program Guidance”). Notice of the availability of the CNC Program Guidance was published at 87 Fed. Reg. 24,291 (Apr. 25, 2022).

² See letter from Ana Matosantos, Cabinet Secretary to Governor Gavin Newsom, re: Request for clarification to the Guidance issued by DOE for the first round of the Civil Nuclear Credit Program application (May 23, 2022) (“Matosantos Letter”).

undo or undercut a range of State legislative and regulatory decisions facilitating the orderly retirement of Diablo Canyon and transition to much lower cost, cleaner and safer resources. Finally, DOE violated the Administrative Procedure Act and basic principles of fairness and transparency embraced by the Biden administration by failing to publish notice of the proposed Guidance Amendment in the Federal Register, and by providing an absurdly short comment period of seven days to those members of the public who happened to get an email about it or see it on DOE's website.

These comments are being submitted directly to you, Secretary Granholm and Assistant Secretary Huff, because of the gravity of the concerns raised by the proposed Guidance Amendment regarding your agency's commitment to transparency and fairness, compliance with the rule of law, and rational policy-making to address climate change. We urge you not to allow the CNC Program to be weakened or mis-directed to serve the unreasonable and unsupported demands of a single supplicant in ways that will undercut rather than further cost-effective climate impact mitigation.

Our concerns are set forth below, and in the attached letter to Secretary Granholm from Timothy Judson, Executive Director of Nuclear Information and Resource Service, on behalf of SLOMFP and 178 other organizations (June 21, 2022) ("Judson Letter") (Attachment A). We also refer you to the attached letter to Secretary Granholm from Natural Resources Defense Council and Friends of the Earth, urging her to reject Governor Newsom's request.³ In addition, we adopt the comments of Natural Resources Defense Council and Friends of the Earth on the proposed Guidance Amendment, filed today.

Given DOE's failure to comply with the APA or basic principles of fairness and transparency in notice-and-comment rulemaking in proposing the Guidance Amendment, we submit these comments under protest.

³ Letter to Hon. Jennifer Granholm from Ralph Cavanagh, Energy Co-Director of the Climate and Clean Energy Program of Natural Resources Defense Council and Erich Pica, Executive Director of Friends of the Earth re: Diablo Canyon Power Plant: Letter from California Governor's Office Dated May 23, 2022 (May 27, 2022) ("NRDC/FOE Letter") (Attachment B). Both the Judson Letter and the NRDC/FOE Letter set forth detailed reasons why the Secretary should decline Governor Newsom's request to misuse the Civil Nuclear Credit Program to dismantle the fossil-free phaseout and just transition plan for the Diablo Canyon nuclear power plant. For the same reasons, the proposed Guidance Amendment should be dropped and the DOE should maintain its guidance of April 19, 2022.

Our comments are as follows:

The Proposed Guidance Amendment is inconsistent with the IIJA, and therefore unauthorized.

It is well-established that federal agencies and reviewing courts “must follow [the] language” of federal statutes and “give it effect.” *Ind. Mich. Power Co. v. DOE*, 88 F.3d 1272, 1274 (D.C. Cir. 1996) (citing *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and quoting *Wisconsin Elect. Power Co. v. DOE*, 778 F.2d 1, 4 (D.C. Cir. 1985)). Thus, DOE’s proposed guidance may not deviate from the plain language and intent of the IIJA.

As DOE recognizes, the IIJA implements “congressional intent of preserving economically distressed nuclear reactors while protecting taxpayer dollars.” Proposed Guidance Amendment at 3. Thus, as correctly observed by DOE in proposing the CNC Program, the IIJA requires that: “[t]o be eligible for certification, section 40323(a) of the [IIJA] requires that a nuclear reactor “competes in a competitive electricity market.” 87 Fed. Reg. at 8,572 (citing 42 U.S.C. § 18753(a)(1)(A)). This language establishes a clear and unequivocal threshold requirement for participation in the CNC Program.

Consistent with the plain language and intent of the IIJA, DOE’s current Guidance for the Civil Nuclear Program requires that an applicant demonstrate that it competes in a competitive electricity market by “showing that the Nuclear Reactor will receive 50 percent or more of total revenue from sources that are exposed to electricity market competition.” CNC Program Guidance, § V.2.

DOE now proposes to change that criterion to provide that an applicant can qualify by “showing that the Nuclear Reactor will receive a material amount of its total revenue from sources that are exposed to electricity market competition.” Proposed CNC Program Guidance Amendment at 3. To establish what is a “material amount,” the applicant will have “the opportunity to demonstrate that it has operating losses notwithstanding the percentage of cost-of-services revenues and market revenues.” *Id.* at 3.

In judging what is a “material amount,” and what constitute “operating losses” therefore, DOE now proposes to engage in a balancing test, using subjective judgment despite DOE’s oft-demonstrated lack of expertise in assessing the real costs of operating and building nuclear power plants. Such a balancing test is inconsistent with the IIJA, which sets a threshold eligibility requirement. The guidance should not give DOE flexibility to evade the threshold eligibility requirement of the IIJA.

This is especially important, given that review of applications apparently will be done behind closed doors, without public disclosure and analysis that otherwise would provide some measure of accountability and verification of the complex economic claims that go into determining whether real operating losses have occurred. In order to ensure compliance with the statute and fairness to the public and to competing applicants, the eligibility requirement should be a clear

threshold test, not a balancing test. The existing requirement to show that at least 50 percent of an applicant's income comes from sources that are exposed to electricity market competition satisfies that requirement, and thus should be retained.

Changing the existing guidance for Diablo Canyon is not justified.

We disagree strenuously with the California Governor's claim, cited in the Proposed Guidance Amendment at page 3, that Diablo Canyon presents "circumstances not contemplated in the Guidance" that justify relaxing the eligibility requirements for Diablo Canyon, *i.e.*, "where a Nuclear Reactor both receives cost-of-service rate recovery and also sells into an organized wholesale market, but nevertheless could still incur operating losses that threaten the ability of the Nuclear Reactor to continue operations." As stated in the NRDC/FOE Letter:

Although Diablo Canyon bids its output into the competitive wholesale market administered by the CAISO, the revenues it receives are netted against its authorized operating costs, and any negative balance is recovered through a dedicated charge paid by all PG&E customers. As a result, PG&E [Pacific Gas & Electric Co.] faces no competitive wholesale market risk with respect to the power generated by Diablo Canyon. And while the Governor's letter correctly indicates that PG&E has historically recovered less than Diablo Canyon's authorized operating costs from the wholesale market, at the elevated wholesale electricity prices of recent months the situation has reversed.⁴

Furthermore, Diablo Canyon has been the property of a regulated utility in the State of California since the 1980s, and PG&E has consistently recovered the costs of the reactors from California ratepayers. While it is selling part of its resources into the wholesale market it is not exposed to market risks for recovery of its costs.

Finally, it is important to recognize that the amended Guidance requested by the Governor of California is being requested for the purpose of revoking a decision of the CPUC to close Diablo Canyon by 2025 at the end of its current NRC operating licenses. In its 2016 filing to the CPUC, PG&E stated that: "As result of the rapidly changing California energy landscape, Diablo Canyon will not be needed at the end of the license period."⁵ PG&E also cited four specific circumstances why Diablo Canyon will not be needed. First, PG&E's cited declining retail sales due to increasing impacts from "the expansion of energy efficiency, increase in distributed generation especially privately-owned solar resources, and the growth of alternative energy

⁴ *Id.* at 2.

⁵ Application of Pacific Gas & Electric Co. for approval of the Retirement of Diablo Canyon Power Plant, Implementation of the Joint Proposal, and Recovery of Associated Costs Through Proposed Ratemaking Mechanisms at 5 (Aug. 11, 2016).

<https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M166/K001/166001245.PDF>

supplies, such as Community Choice Aggregation (CCAs).”⁶ According to PG&E, this “downward pressure on bundled electric sales reduces the need for electricity from Diablo Canyon.”⁷ Second, PG&E noted “a decreasing need for baseload generation” due to California’s increasing reliance on renewables, then required to reach at least 50% by 2030.⁸ Third, PG&E cited “[t]he challenge of renewable resource overgeneration caused by excess renewable energy supply in certain times of the day.”⁹ Finally, PG&E asserted that “the cost to operate Diablo Canyon may significantly increase after 2025 due to state and federal requirements.”¹⁰

Admission of Diablo Canyon to the CNC Program would also upend multiple additional decisions related to the CPUC’s decision to close Diablo Canyon at the end of its current operating license term:

- 2018 State legislation providing \$85 million to replace losses of local tax revenue, \$350 million for employee retention at the power plant and a requirement that greenhouse gas emissions would not increase as a result of Diablo’s closure;¹¹
- A subsequent 2018 CPUC decision to implement that legislation;¹²
- Forbearance of a 2010 California State Water Resources Control Board policy that would have required PG&E to install cooling towers or other significant measures to reduce marine impacts by at least 85% if the plant extends operation beyond 2025;¹³
- A decision by the California Lands Commission (of which then-Lt.Gov. Newsom was a board member) to end Diablo’s permit to use state coastal lands beyond 2025; and
- Multiple Integrated Resource Plan (“IRP”) proceedings at the CPUC that would ensure the reduction of greenhouse gases and the replacement of Diablo Canyon many times over with greenhouse gas-free resources.¹⁴

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.*

¹¹ California Senate Bill 1090, enacted September 18, 2018.
https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1090

¹² CPUC Decision 18-01-022 (January 11, 2018).
<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M205/K423/205423920.PDF>

CPUC Decision 18-11-024 (November 29, 2018).
<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M246/K081/246081285.PDF>

¹³ See https://www.pgecorp.com/corp_responsibility/reports/2021/pl04_water.html.

¹⁴ CPUC. “Status Update on Procurement in Compliance with D.19-11-016 (IRP Procurement Order).” August 2021. <https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/energy->

A potential decision by the Department of Energy to extend the life of Diablo Canyon beyond 2025 would not only upend the commitments cited above, but would continue and expand the onerous financial burden of paying for the exorbitant cost of this power plant – which is over \$1 billion a year. The imposition of these costs is particularly unjustified in light of the fact that the State is already in the process of transitioning to much lower cost, cleaner and safer resources.

Further, extending the life of Diablo Canyon beyond 2025 when the plant would need to make substantial capital investments to comply with the once-through-cooling system regulations, would increase the cost of operating Diablo Canyon by around \$400 million a year, starting in 2025, according to PG&E's testimony to the CPUC in the Diablo Canyon retirement proceeding in 2017.¹⁵ This cost would be in addition to the approximately half billion dollars per year in existing above-market stranded costs which already are being imposed on PG&E ratepayers.¹⁶

Amending the Criteria would be pointless because Diablo Canyon does not qualify for participation in the CNC Program under any of the other criteria.

In addition to Diablo Canyon's ineligibility to participate in the CNC Program, it fails to satisfy other important criteria for participation in the CNC Program.

First, an applicant to the CNC Program must show that the nuclear reactor "is projected to cease operations due to economic factors." 87 Fed. Reg. at 8,572, 8,573. But Diablo Canyon is not closing because it is unprofitable – one of Congress' key reasons for providing the CNC subsidy. Diablo Canyon's owner, PG&E, operates Diablo as part of its regulated utility and recovers all of its costs plus a regulated rate of return on investment through its regulated electricity rates.

Second, the IIJA is designed to help only economically-distressed reactors, the retirement of which would demonstrably lead to increases in greenhouse gas emissions. 87 Fed. Reg. at 8,570. But operation of Diablo Canyon is not necessary to avoid carbon emissions. As discussed in the Judson Letter at page 1, California state law requires the California Public Utilities Commission

[division/documents/integrated-resource-plan-and-long-term-procurement-plan-irp-ltp-2021-staff-review-of-feb2021-data-in-compliance-with-d1911016.pdf](https://www.cpuc.ca.gov/division/documents/integrated-resource-plan-and-long-term-procurement-plan-irp-ltp-2021-staff-review-of-feb2021-data-in-compliance-with-d1911016.pdf)

CPUC Decision 19-11-016 (November 7, 2019).

<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M319/K825/319825388.PDF>

CPUC Decision 21-06-035 (June 24, 2021).

<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M389/K603/389603637.PDF>

¹⁵ Response to Questions from Assigned Commissioner and Assigned Administrative Law Judge Ruling Confirming Scooping Memo Issues Date 11/22/2017, Exhibit number IOU-5 PDF p. 140, Pacific Gas and Electric Co., Southern California Edison Co. and San Diego Gas and Electric Co., Ruling Making R.17-06-026.

¹⁶ *Id.*

(“CPUC”) and PG&E to ensure that there will be no emissions increases due to Diablo Canyon’s closure.¹⁷

Third, the IIJA requires that the subsidy only be awarded to reactors that show they are able to operate with lower or no subsidies after CNC expires. 87 Fed. Reg. at 8,572, 8,574-75. In the case of Diablo Canyon, the costs that PG&E would incur to continue operating Diablo Canyon are estimated to amount to billions of dollars in capital projects and regulatory and licensing approvals. At meetings of the Diablo Canyon Independent Safety Committee, significant concern has been raised about the amount of inspections and maintenance that PG&E has suspended due to the expectation that the two reactors would close in the near future. *See* You-tube video of June 22, 2022 meeting, You-tube video; You-tube video of discussion of May 18-19 Fact-Finding Report, <https://www.youtube.com/watch?v=g93Un6DnRuI&t=77s>. Those expenses would normally be spread out over 20 years or more, not incurred in just the 4-year period of the CNC program. If taxpayers are forced to bear all of those costs, it would unjustly enrich PG&E shareholders and violate the express intent of the law.

Further, allocating credits to cover the potentially enormous costs suggested by California Governor Newsom would violate the intent of the IIJA, which requires that: “To the maximum extent practicable, the Secretary shall use the amounts made available for credits under this section to allocate credits to as many certified nuclear reactors as possible.” 42 U.S.C. § 18753(e)(3). The “transition” costs for Diablo would consume such a large share of the program’s resources for just two reactors (neither of which are certified nuclear reactors) that it would deplete the CNC Program of funds that could be applied in the phase 2 solicitation.

DOE violated the Administrative Procedure Act and basic principles of transparency and fairness by failing to publish the Proposed Guidance Amendment in the Federal Register and by failing to provide an adequate comment period.

While DOE had previously promulgated guidance by publishing a Federal Register notice and seeking public comment¹⁸, the proposed Guidance Amendment was not published in the Federal Register, and the online notice provided the absurdly short comment period of seven days. DOE now appears poised to substantially weaken the duly promulgated guidance, based on an impermissible interpretation of the IIJA. We protest DOE’s proposal to take action that so seriously departs from the plain language and purpose of the IIJA, without satisfying the basic requirements of the Administrative Procedure Act for publication in the Federal Register and a bare minimum of a ten-day comment period in “rare cases.”¹⁹

¹⁷ *See* Manning 2018, SB 1090.

¹⁸ *See* Notice of Intent and Request for Information Regarding Establishment of a Civil Nuclear Credit Program, 87 Fed. Reg. 8,570 (Feb. 15, 2022); Notice of Availability of Guidance for the First Award Period of the Civil Nuclear Credit Program, 87 Fed. Reg. 24,291 (Apr. 25, 2022).

¹⁹ *N.C. Growers’ Ass’n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012).

Conclusion

Secretary Granholm and Assistant Secretary Huff, we urge you to drop the Proposed Guidance Amendment for the CNC Program because it violates the law and would undermine the credibility and integrity of your agency's important work. Further, the record shows that Diablo Canyon's closure will do much more for California's climate goals, local communities, and economic and environmental justice than would be provided by including Diablo Canyon in the CNC Program. In fact, the phaseout plan which California is implementing is a model DOE should promote rather than seek to preempt. We urge you to abide by the plain language and intent of the IJIA, and refuse to award illegal credits to Diablo Canyon Nuclear Plant.

Sincerely,



Diane Curran

Counsel to San Luis Obispo Mothers for Peace

Cc: Jane Swanson, San Luis Obispo Mothers for Peace

ATTACHMENT A

June 21, 2022

Secretary Jennifer Granholm
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585
The.Secretary@hq.doe.gov

Dear Secretary Granholm:

The one-hundred seventy-nine organizations signed below are extremely concerned about recent statements and media reports indicating that the Department of Energy (DOE) is negotiating with California Governor Gavin Newsom to misuse the Civil Nuclear Credit program (CNC) to dismantle the fossil-free phaseout and just transition plan for the Diablo Canyon Nuclear Power Plant.

The CNC was created by the bipartisan Infrastructure Investment and Jobs Act (IIJA) to mitigate potential greenhouse gas emissions (GHG) increases due to the closure of unprofitable nuclear reactors that operate in competitive electricity markets. Diablo Canyon is not eligible for funds under the CNC program because it does not meet the basic requirements of the IIJA, nor those of the CNC program guidance DOE published to implement the program less than three months ago:

- Diablo Canyon is not closing because it is unprofitable – its owner, Pacific Gas & Electric (PG&E) operates it as part of its regulated utility and recovers all of its costs plus a regulated rate of return on investment through its regulated electricity rates.
- Diablo Canyon is closing because PG&E determined in 2016 that doing so would enable it to meet California's renewable energy standard (RES) and emissions standards more rapidly and cost-effectively.
- There will be no emissions increases due to Diablo Canyon's closure because state law mandates the California Public Utilities Commission (CPUC) and, by extension, PG&E to ensure that outcome.
- As a result of CPUC orders and state legislation, PG&E and other utilities and load-serving entities in California must, between 2021 and 2026, procure over 22,000 MW of renewable energy and electricity storage. This is several times more generation and capacity than is needed to replace Diablo Canyon, as well as several fossil fuel power plants that are also retiring. The vast majority will be online before the reactors at Diablo Canyon retire in 2024 and 2025.

- President Biden’s June 6 executive order¹ lifting the embargo on solar panel imports from Southeast Asia while the US expands domestic supply chain manufacturing will enable solar installations in California to proceed as planned, to meet CPUC’s procurement targets and the state RES.

There is no legitimate basis for DOE to entertain Gov. Newsom’s request to modify the rules of the CNC program to subsidize Diablo Canyon and vacate its planned phaseout². Extending Diablo Canyon’s operation would require much more than modifying the CNC program guidelines and would, in fact, violate the express meaning and intent of the IJA.

Diablo Canyon’s closure will do much more for California’s climate goals, local communities, and economic and environmental justice than the CNC program. The phaseout plan which California is implementing is a model DOE should promote instead of seeking to preempt it. The basis for the plan points to how phasing out nuclear power plants along with fossil fuel generation can help accelerate emissions reductions, the growth of the renewable energy economy, and a just and equitable transition for workers and communities.

Diablo Canyon Phaseout Agreement

In 2016, PG&E published a report concluding that the continued operation of Diablo Canyon’s 2,200 MW of inflexible baseload generation would cause severe congestion on the high-voltage transmission system as solar generation in California grows under the state’s renewable energy standard and community choice aggregation programs.³ This would force PG&E to export or curtail solar generation because Diablo Canyon’s reactors cannot adjust their output quickly enough to relieve overloaded transmission lines. PG&E determined that retiring Diablo Canyon 1 and 2 when their licenses expire in 2024 and 2025 would mitigate the transmission bottleneck, lower consumer costs, and enable the utility to achieve 55% renewable energy by 2031, exceeding the then-existing state RES target.

Upon reaching this conclusion, PG&E entered into a settlement with IBEW Local 1245⁴ (which represents 500 Diablo Canyon workers) and several environmental organizations, including Friends of the Earth, Natural Resources Defense Council, Environment California, and the Alliance for Nuclear Responsibility. The settlement resolved years of expensive, protracted legal

¹<https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/06/fact-sheet-president-biden-takes-bold-executive-action-to-spur-domestic-clean-energy-manufacturing/>

²https://static.ewg.org/upload/pdf/calif_letter_to_DOE.pdf?_ga=2.66025198.19902243.1653860374-927036638.1653860374

³ LaCount, Robert. *Joint Proposal for the Orderly Replacement of Diablo Canyon Power Plant with Energy Efficiency and Renewables*. M. J. Bradley & Associates. June 21, 2016.

https://www.pge.com/includes/docs/pdfs/safety/dcpp/MJBA_Report.pdf

⁴ Dalzell, Tom. “Diablo Canyon: A Just Transition for Workers and the Environment.” UC Berkeley Labor Center. November 30, 2018.

<https://laborcenter.berkeley.edu/diablo-canyon-just-transition-workers-environment/>

and regulatory disputes over relicensing, seismic disaster risks, coastal ecosystem protection, and cooling system impacts.

Costs of Revoking the Settlement and Extending Diablo Canyon License Could Be Considerable

In order for Diablo Canyon to operate beyond the planned retirement dates, several things would need to take place:

- PG&E would either need to win the assent of the settlement parties or pay them compensatory damages.
- PG&E may be required to reimburse its ratepayers for substantial costs they have already borne for implementation of the phaseout and just transition plan.
- PG&E will need to submit a relicensing application and supplemental environmental impact statement to the U.S. Nuclear Regulatory Commission and endure a protracted administrative law process due to challenges by intervenors.
- PG&E will need to apply for water permits and approvals from the Coastal Commission and Water Resources Board, as well as a lease extension from the State Lands Commission.

The latter would entail large investments to convert Diablo Canyon's once-through-cooling (OTC) system to mechanical draft cooling towers, a capital cost likely to exceed \$1 billion. The Coastal Commission granted PG&E an exemption from that requirement in 2016 as a result of the phaseout agreement and PG&E's decision to retire the reactors in 2024 and 2025. A decision to continue operation of Diablo Canyon could also result in PG&E incurring financial liability for the incremental damage the plant's cooling system has caused to California's coastal waters over the intervening years.

In total, PG&E's up-front expenses to abandon the settlement agreement and continue operating Diablo Canyon would exceed \$1 billion and could approach \$2 billion or more.

It would be nonsense for DOE to consider expending such a large share of the \$6 billion appropriation for the CNC program merely to extend the operation of one nuclear power plant for what has been suggested as only a short duration of a few years.⁵ Awarding CNC funds to PG&E for Diablo Canyon would be arbitrary, capricious, and wasteful in the extreme, especially due to the overwhelming evidence that Diablo Canyon does not meet the eligibility criteria in the plain language of the IJA and the guidance DOE issued for the CNC program.

⁵ Gov. Newsom's Cabinet Secretary, Ana Matosantos, in her May 23, 2022 letter to Secretary Granholm, says, "the state is evaluating a temporary delay of the planned retirement" of Diablo Canyon, implying a period of extended operation significantly shorter than the 20 years typically authorized through NRC's relicensing process. Even so, PG&E would have to submit a relicensing application for any continued operation because the current licenses expire, respectively, on November 2, 2024, and August 26, 2025.
https://static.ewg.org/upload/pdf/calif_letter_to_DOE.pdf?_ga=2.66025198.19902243.1653860374-927036638.1653860374.

CNC Funding for Diablo Canyon Would Violate Economic and Environmental Justice Principles

Misusing the CNC program to fund Diablo Canyon's extended operation would also betray the Biden administration's commitments to climate and environmental justice. CPUC orders and state law authorize implementation of the phaseout plan, which includes a just transition program for power plant workers and the host community that could and should be a model for the entire country.

Under the phaseout plan, as authorized by state law⁶ and approved by the CPUC,⁷ Diablo Canyon workers are being provided with economic support through the closure of the plant in 2025 and local governments are being provided transitional revenue payments to protect the tax base. PG&E ratepayers have already been paying for these programs since 2018. To ensure an adequate skilled workforce at Diablo Canyon until it closes, workers are being provided annual salary bonuses (averaging \$34,000 per employee per year), and those who serve until the reactors' retirement will receive severance payments of \$115,000 each. On average, workers will receive \$353,000 in bonuses and severance by 2025 to support themselves and their families through their employment transition. In addition, PG&E will offer its nuclear workers the option of retraining and continued employment in the 10- to 20-year radiological decommissioning project at Diablo Canyon, another expense for which ratepayers are paying. The phaseout plan also includes stable property tax payments to municipalities through 2025 despite the rapidly depreciating value of the power plant, amounting to \$50 million in transitional revenue for local governments over seven years.

In total, PG&E customers have already been charged upwards of \$200 million for these just transition costs. If DOE were to grant Diablo Canyon Civil Nuclear Credits, would the award also include reimbursing ratepayers for the costs they have incurred?

Unraveling such a model agreement would not only undermine the goal of building a just and equitable clean energy economy, it would also exacerbate environmental justice impacts. In its first report in May 2021, the White House Environmental Justice Advisory Council identified "procurement of nuclear power" in a list of "Types of Projects That Will Not Benefit" environmental justice communities.⁸ The operation of nuclear power plants, and the entire nuclear fuel chain from uranium mining to waste disposal, entails severe environmental justice impacts. Subsidizing the continued operation of Diablo Canyon would undermine the

⁶ California Senate Bill 1090, enacted September 18, 2018.

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1090

⁷ CPUC Decision 18-01-022 (January 11, 2018).

<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M205/K423/205423920.PDF>

CPUC Decision 18-11-024 (November 29, 2018).

<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M246/K081/246081285.PDF>

⁸ https://www.epa.gov/sites/default/files/2021-05/documents/whejac_interim_final_recommendations_0.pdf

Biden-Harris administration's entire case for advancing the transition to a clean energy economy and violate commitments to environmental justice.

Closing Diablo Canyon Meets California's Climate Goals

Subsidizing Diablo Canyon's continued operation would also undermine the very climate rationale for the CNC program: to mitigate GHG emissions. The criteria of the CNC funds requires that the closure of eligible nuclear power plants would result in a documented increase in GHG emissions. Diablo Canyon does not meet this requirement because the phaseout agreement includes a firm commitment by PG&E to meet California's GHG reduction targets and to exceed the state's RES. That commitment is reinforced by CPUC orders, as well as state legislation enacted in 2018 requiring that the retirement of Diablo Canyon not contribute to increases in GHG emissions:

(b) The commission shall ensure that integrated resource plans are designed to avoid any increase in emissions of greenhouse gases as a result of the retirement of the Diablo Canyon Units 1 and 2 powerplant.⁹ (emphasis added)

In order to meet that goal, the CPUC ordered PG&E to ensure the GHG-free phaseout of Diablo Canyon through comprehensive system planning. State legislation and CPUC orders will guarantee both adequate electricity supply and phaseouts of both Diablo Canyon and 3,700 MW of fossil fuel power plants. Between 2021 and 2026, California will bring online over 22,000 MW of new renewable energy and storage capacity, many times more electricity than the retiring nuclear reactors provide.

The CPUC has publicly attested to this in a recent op-ed by the agency's interim deputy executive director for Energy & Climate Policy, Peter Skala:

It is highly inaccurate to suggest that the State plans to replace Pacific Gas and Electric Company's (PG&E) Diablo Canyon Nuclear Power Plant mostly with Wyoming coal-fired generation. In fact, the State has ordered an unprecedented amount of new clean energy procurement—11.5 gigawatts—to replace the retirement of Diablo Canyon (along with other aging gas plants that are retiring). This includes wind, solar, batteries, geothermal, and long duration storage that will be online starting in 2023.¹⁰ (emphasis added)

⁹ Energy Storage Targets - Publicly Owned Utilities - AB 2514

<https://www.energy.ca.gov/data-reports/reports/energy-storage-targets-publicly-owned-utilities>

Assembly Bill 2514 (2010)

http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2501-2550/ab_2514_bill_20100820_amended_sen_v90.html

¹⁰

<https://capitolweekly.net/letter-to-the-editor-cpuc-responds-to-inaccurate-commentary/?fbclid=IwAR2hi6TqKPBUwrMnuVju5YJhsX1MWrbQRioc52os0XhaIvVRHH2xmCwawcl>

The CPUC stated this clearly when it issued the June 2021 order requiring utilities and load-serving entities to procure 11,500 MW of capacity by 2026—including 2,500 MW of firm renewable capacity¹¹ by 2025, specifically to account for the retirement of Diablo Canyon.¹²

The California Public Utilities Commission (CPUC) ... today approved a historic decision ordering utilities to procure 11,500 megawatts (MW) of new electricity resources to come online between the years 2023 and 2026, enough to power approximately 2.5 million homes, with all of the resources procured coming from preferred resources, such as distributed energy resources (including energy efficiency and demand response), renewables, and zero-emitting sources. This represents the largest capacity procurement ordered at a single time by the CPUC, and is the largest requiring only clean resources.

Today's decision facilitates the integration of high amounts of renewables required to meet the state's renewable and clean energy goals and ensure reliability. The decision is a foundational investment in meeting the state's goal of 100 percent clean electricity by 2045.

The resources required to come online in the years 2023 through 2026 are needed to respond to more extreme weather events, while replacing electricity generation from more than 3,700 MW of retiring natural gas plants and 2,200 MW from Pacific Gas and Electric Company's retiring Diablo Canyon Power Plant. At least 2,500 MW of zero-emitting resources were ordered specifically to replace generation from Diablo Canyon, which is in addition to capacity already procured over the past several years for the same purpose. The CPUC has been planning to replace power from Diablo Canyon for many years through modeling, workshops, extensive public input, and earlier decisions. In 2019, the CPUC ordered significant amounts of new renewables and storage, which will result in a tenfold increase in batteries coming online this summer and next summer. (emphasis added)

The words of CPUC Commissioner Clifford Rechtschaffen demonstrate the commission's intent in issuing the order:

¹¹ Defined as renewable generation sources that can operate at an average annual capacity factor of at least 80%, such as geothermal power stations. This tranche of the procurement will entail projects with a total capacity greater than Diablo Canyon's, generating at least as much electricity on an annual basis.

¹²

<https://www.cpuc.ca.gov/news-and-updates/all-news/cpuc-orders-clean-energy-procurement-to-ensure-electric-grid-reliability>

The procurement we ordered is equal to output of four large nuclear power plants or 20 natural gas plants. Included is solar, wind, geothermal, and long duration storage—pumped hydro facilities or other emerging technologies that can store energy for eight hours or longer. Our actions today will ensure that we can keep the lights on during periods of greatest demand, even as we retire Diablo Canyon and other natural gas plants. (emphasis added)

The 11,500 MW procurement plan will be on top of more than 10,500 MW of renewable energy and storage capacity already mandated by previous CPUC orders, state legislation, and California's RES:

- A 2019 CPUC order resulting in 3,710 MW of renewable energy and storage between 2021 and 2023.¹³
- State legislation enacted in 2010 requiring 1,325 MW of battery storage by 2023.¹⁴
- CPUC orders requiring another 1,500 MW of storage capacity to mitigate wildfire risks.¹⁵
- 4,000 MW of renewables to comply with the 2024 RES target.

As a result of these measures, California will have added more than 18,500 MW of new renewable energy and storage capacity by the time Diablo Canyon unit 1 retires in 2024, and over 20,000 MW when Diablo Canyon unit 2 retires in 2025. Over 70% of that capacity will be in the form of renewable generation, including 2,500 MW of firm renewable capacity specifically to replace Diablo Canyon.

Furthermore, retirement of Diablo Canyon will enable further GHG reductions by freeing up existing pumped hydro storage capacity, which will displace additional fossil fuel generation. PG&E's 1,212 MW Helms pumped storage plant has been dedicated to providing "spinning reserve" backup capacity for Diablo Canyon since it was built in 1984. Doing so has enabled PG&E to reduce reliance on fossil fuel generation as the spinning reserve for the nuclear power plant, a secondary source of emissions resulting from reactor operation in many parts of the country. Once Diablo Canyon retires, most if not all of Helms' capacity will be available to provide zero-emissions peaking power, voltage support, and other grid reliability services.

¹³ CPUC. "Status Update on Procurement in Compliance with D.19-11-016 (IRP Procurement Order)." August 2021.

https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/energy-division/documents/integrated-resource-plan-and-long-term-procurement-plan-irp-ltp-ed_staff_review_of_feb2021_data_in_compliance_with_d1911016.pdf

¹⁴ Energy Storage Targets - Publicly Owned Utilities - AB 2514

<https://www.energy.ca.gov/data-reports/reports/energy-storage-targets-publicly-owned-utilities>

Assembly Bill 2514 (2010)

http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2501-2550/ab_2514_bill_20100820_amended_sen_v90.html

¹⁵

<https://www.cpuc.ca.gov/news-and-updates/all-news/cpuc-orders-clean-energy-procurement-to-ensure-electric-grid-reliability>

Despite this overwhelming record, some have argued that extending Diablo Canyon's operation is nevertheless necessary because California solar projects may be delayed by a U.S. Department of Commerce tariff embargo on imported solar panels. If there had been any basis for this concern, President Biden's June 6, 2022 executive order lifting the embargo and tariffs on imported solar panels has resolved it.¹⁶

In addition, the Bureau of Ocean Energy Management (BOEM) announced on May 26, 2022, that it will hold an auction for offshore wind leases in California, projected to result in 4,500 MW of renewable capacity—more than twice Diablo Canyon's capacity and generating approximately the same amount of electricity each year.¹⁷ Rather than expend billions of CNC dollars to unravel the Diablo Canyon phaseout plan, DOE should work with California and the Department of the Interior to accelerate the development of these offshore wind projects and California's industrial infrastructure and workforce development.

In conclusion, Diablo Canyon does not qualify for the CNC. Awarding CNC funds to Diablo Canyon would be a massive failure on all fronts and for all parties. It would damage the integrity and conflict with the purpose of DOE's CNC program. It would interfere with the policies and plans to enact California's climate and RES goals. Critically, it would undo a major success that is the just transition outlined in the joint proposal approved by the CPUC.

We urge you to follow through with the Biden administration's commitment to environmental justice and climate action and honor the agreement to close Diablo Canyon. Bailing out old nuclear power plants is not the way to spark the energy transition we need to save the climate, create good jobs, build a strong economy, and advance environmental justice.

Sincerely,

Timothy Judson
Executive Director
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6930 Carroll Ave., Suite 340
Takoma Park, MD, 20912
timj@nirs.org
301-270-6477

¹⁶

<https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/06/memorandum-on-presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended-on-solar-photovoltaic-modules-and-module-components/>

¹⁷ Department of the Interior. "Biden-Harris Administration Proposes First-Ever California Offshore Wind Lease Sale" May 26, 2022.

<https://www.doi.gov/pressreleases/biden-harris-administration-proposes-first-ever-california-offshore-wind-lease-sale>

National Groups

Beyond Nuclear

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Center for Biological Diversity

Roger Lin, Senior Attorney, Energy Justice
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Clean Water Action

Janet Tauro, NJ Board Chair
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Food & Water Watch

Mitch Jones, Managing Director of
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Movement Rights

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North American Climate, Conservation and
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Protect All Children's Environment

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Samuel Lawrence Foundation
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San Clemente Green
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Don't Waste Arizona
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Going Beyond Sustainability
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NMEAC
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Save the Pine Bush
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Planet: Amazing Amy - Eccentric Yoga
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Three Mile Island Alert
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South Dakota

Black Hills Clean Water Alliance
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Tennessee

ECAN-Erwin Citizens Awareness Network,
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Jonesborough, TN

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Dallas Peace and Justice Center
Mavis Belisle, Co-Chair, Nuclear Free
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SEED Coalition
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Terra Advocati
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Uranium Watch
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Pollution, Inc.
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198 methods
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Chris Williams, President
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Vermont Yankee Decommissioning Alliance
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Parallax Perspectives
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Seattle Fellowship of Reconciliation
Mary Hanson, Chair of SFOR
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Build Back Better Fuels
John Alder, member
Spokane, WA

Waste Action Project
Greg Wingard, Executive Director
Seattle, WA

Wisconsin

Peace Action WI
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Physicians for Social Responsibility
Wisconsin
Hannah Mortensen, Executive Director
Madison, WI

Appendix: Planned Additions of Renewable Energy and Storage Capacity to Replace Diablo Canyon Units 1&2 and Reduce Power Sector GHG Emissions (2021-2026)

| Dates | Capacity (MW) | Sources/Eligible Sources | Authorization |
|-----------|--|--|---|
| 2021-2023 | 3,968 MW <ul style="list-style-type: none"> 2021: 1,771 MW 2022: 720 MW 2023: 1,477 MW | 93.5% Renewables + Storage <ul style="list-style-type: none"> 3,259 MW = Battery Storage and Hybrid Renewables/Storage¹⁸ 289 MW = Solar (289 MW) 162 MW = biomass(2 MW), geothermal (14 MW), wind (128 MW), and demand response (18 MW) 258 MW = Sutter Natural Gas Plant (existing plant, no long-term contracts) Imports limited to 20% of procured capacity | CPUC Decision 19-11-016 ¹⁹ |
| 2023 | 1,325 MW | Energy Storage | Assembly Bill 2514 (2010) ²⁰ |
| 2021-2023 | 1,500 MW | Energy Storage | CPUC orders ²¹ |
| 2024 | 4,000 MW | Renewable Energy | RES and other state policies |
| 2023-2026 | 11,500 MW <ul style="list-style-type: none"> 2023: 2,000 MW 2024: 6,000 MW 2025: 1,500 MW 2026: 2,000 MW | Renewable Energy and Storage, including <ul style="list-style-type: none"> 2,500 of firm renewable generation (80% capacity factor) 1,000 MW of | CPUC Decision 21-06-035 ²² |
| TOTAL | 22,293 MW | 98.8% Renewables + Storage 1.2% existing gas generation | |

¹⁸

https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/energy-division/documents/integrated-resource-plan-and-long-term-procurement-plan-irp-ltp/ed_staff_review_of_feb2021_data_in_compliance_with_d1911016.pdf

¹⁹ CPUC Decision 19-11-016 (November 7, 2019).

<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M319/K825/319825388.PDF>

²⁰ Energy Storage Targets - Publicly Owned Utilities - AB 2514

<https://www.energy.ca.gov/data-reports/reports/energy-storage-targets-publicly-owned-utilities>

Assembly Bill 2514 (2010)

http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2501-2550/ab_2514_bill_20100820_amended_sen_v90.html

²¹ <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M389/K478/389478892.PDF>

²² CPUC Decision 21-06-035 (June 24, 2021).

<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M389/K603/389603637.PDF>

Annual and Cumulative Additions of Capacity (2021-2026)

| Source | 2021 | 2022 | 2023 | 2024 ²³ | 2025 ²⁴ | 2026 | TOTAL |
|--|--------------|--------------|---------------------|---------------------|--------------------|---------------|---------------|
| Renewables | 179 | 117 | 136 | 5,000 ²⁵ | 1,500 | 1,000 | 7,932 |
| Storage | 745 | 302 | 2,422 | 1,500 | | 1,000 | 5,969 |
| Hybrid Renewables + Storage | 562 | 300 | 2,249 ²⁶ | 5,000 ²⁷ | | | 8,111 |
| Demand Response | 13 | 1 | 5 | | | | 18 |
| Fossil Fuel | 258 | | | | | | 258 |
| TOTAL Fossil-Free Capacity | 1,499 | 720 | 4,812 | 11,500 | 1,500 | 2,000 | 22,031 |
| Cumulative Fossil-Free Capacity | 1,499 | 2,219 | 7,031 | 18,531 | 20,031 | 22,031 | |

²³ Planned closure of Diablo Canyon unit 1 on November 2, 2024

<https://www.nrc.gov/info-finder/reactors/diabl1.html>

²⁴ Planned closure of Diablo Canyon unit 2 on August 26, 2025 <https://www.nrc.gov/info-finder/reactors/diab2.html>

²⁵ Includes 4,000 MW of aggregate renewable energy standard resources from 2021-2024, as well as 1,000 MW of the 2,500 of firm renewable energy sources the CPUC ordered by 2025 in Decision 21-06-035 (June 24, 2021).

²⁶ Includes 2,000 MW of unspecified renewables, storage, and hybrid renewables+storage resources, per Decision 21-06-035.

²⁷ Includes 5,000 MW of unspecified renewables, storage, and hybrid renewables+storage resources, per Decision 21-06-035.

ATTACHMENT B



May 27, 2022

The Honorable Jennifer Granholm
Secretary of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Re: Diablo Canyon Power Plant: Letter from
California Governor's Office Dated May 23, 2022

Dear Secretary Granholm,

We write in response to the letter sent to you this week on behalf of California Governor Gavin Newsom, by the Governor's Cabinet Secretary, Ana Matosantos.

The Governor's letter requests what it characterizes as "a few minor adjustments" to the Department of Energy's April 2022 Guidance for prospective applicants under the Civil Nuclear Credit Program adopted by Congress in Section 40323 of the Infrastructure Investment and Jobs Act of 2021, Public Law 117-58, codified at 42 U.S.C. § 18753 (2022).

Respectfully, the submission by the Governor is not in the nature of "clarification," but rather a request that the Department disregard the statutory criteria for the Civil Nuclear Credit Program adopted by Congress in the Infrastructure Investment and Jobs Act.

Congress established the Civil Nuclear Credit Program to subsidize the operations of economically distressed nuclear power plants. The Diablo Canyon plant is not economically distressed. On the contrary, Pacific Gas and Electric Company (PG&E), the owner-operator of Diablo Canyon, recoups 100% of the plant's operating costs in the rates that PG&E is authorized by the California Public Utilities Commission to charge its retail customers. Moreover, given elevated prices in the wholesale power market administered by the California Independent System Operator (CAISO), Diablo Canyon currently is earning revenues that significantly exceed its operating costs,¹ and PG&E is (appropriately) passing the excess through to its customers in the form of reductions in dedicated charges on its utility bills. Awarding federal operating subsidies under such circumstances would be preposterous.

¹ See, e.g., California Energy Markets (May 20, 2022), p. 4.

For the reasons explained herein, the Department does not have legal authority to take the action requested by the Governor.

The statutory provisions establishing the Nuclear Credit Program, and setting forth the qualification requirements for prospective applicants, are contained in Section 40323 of the Infrastructure and Jobs Act, codified at 42 U.S.C. § 18753 (2022).

To begin, the definitions section for the Civil Nuclear Credit Program in the statute specifies that “[t]he term ‘certified nuclear reactor’ means a nuclear reactor that . . . competes in a competitive wholesale market[.]” (§ 18753(a)(1)(A).)

Although Diablo Canyon bids its output into the competitive wholesale market administered by the CAISO, the revenues it receives are netted against its authorized operating costs, and any negative balance is recovered through a dedicated charge paid by all PG&E customers. As a result, PG&E faces no competitive wholesale market risk with respect to the power generated by Diablo Canyon. And while the Governor’s letter correctly indicates that PG&E has historically recovered less than Diablo Canyon’s authorized operating costs from the wholesale market, at the elevated wholesale electricity prices of recent months the situation has reversed.

Moreover, the statute provides that “[t]he Secretary shall establish a civil nuclear credit program . . . to evaluate nuclear reactors *that are projected to cease operations due to economic factors* . . .” (§ 18753(b)(1) (emphasis added).) And the subsidy payments “shall not exceed the average projected annual operating loss.” *Id.* at (d)(1)(A).

Diablo Canyon conspicuously fails to meet these requirements. Although Diablo Canyon is scheduled to be retired at the end of its current operating licenses in November 2024 (Unit 1) and August 2025 (Unit 2), this is for sound policy reasons, not because of short-term “economic factors.” Nor could the plant show *any* projected annual operating losses, as explained above.

The affirmative rationale for retiring the Diablo Canyon plant can be found in the Decision of the California Public Utilities Commission authorizing the retirement (California PUC Decision No. 18-01-022, issued January 11, 2018), and in a statute codifying this mandate (Cal. Senate Bill 1090 [Monning], signed by then-Governor Jerry Brown on September 19, 2018). The California authorities found that continuing operation of Diablo Canyon beyond the expiration of its current operating licenses in 2024-2025 was neither necessary nor cost-effective for consumers. There was no suggestion that the plant itself was economically distressed, or that its owner, PG&E, was at risk of financial losses, and indeed it has incurred none.

The Governor’s letter acknowledges that Diablo Canyon operates under cost-of-service ratemaking principles that ensure cost recovery for PG&E, the plant’s owner.

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However, the Governor's letter argues that "[f]or [Diablo Canyon] to extend operations, it would incur significant transition costs over the next four years to perform necessary studies, invest in plant enhancements, and obtain licenses and permits." The letter reasons that such costs – if the plant's operations are extended – are not guaranteed recovery under the existing cost-of-service ratemaking that Diablo Canyon enjoys.

This rationale cannot withstand scrutiny, given the statutory criteria established by Congress for the Civil Nuclear Credit Program discussed above.

Essentially, the Governor's letter contends that a nuclear power plant that does not compete in a competitive market, and faces virtually no financial risk in its current operations, nevertheless should be shoehorned into the Civil Nuclear Credit Program, because the owner *might* face financial losses if the plant's operations were extended beyond the term of its existing operating licenses and the state utility commission denied recovery of associated costs. This is pure speculation and in the teeth of the law enacted by Congress.

Accordingly, we respectfully urge the Secretary to decline to adopt the "clarifications" requested by the Governor's letter, on the ground that doing so would exceed the Secretary's statutory authority under the Infrastructure Investment and Jobs Act.

Sincerely,



Ralph Cavanagh
Energy Co-Director
Climate & Clean Energy Program
Natural Resources Defense Council



Erich Pica
President
Friends of the Earth

cc: Samuel Walsh, General Counsel, DOE