

December 6, 2022

Christopher T. Hanson, Chairman
Jeff Baran, Commissioner
David A. Wright, Commissioner
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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
By email to Brooke P. Clark, NRC Secretary
(NRCExecSec@nrc.gov)



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SUBJECT: *PG&E Must Be Required to Submit a New License Renewal Application for Diablo Canyon Units 1 and 2 and NRC Must Comply With All Safety and Environmental Requirements in Conducting its Review*

Dear Commissioners of the U.S. Nuclear Regulatory Commission (“NRC”):

More than two weeks ago, on November 17, 2022, we wrote to oppose Pacific Gas and Electric Company’s (“PG&E’s”) request that you, as the highest officials of the NRC, unlawfully reinstate a license renewal proceeding that you had terminated at PG&E’s request.¹ We have received no response to our letter, nor has it even been posted on the NRC’s Agencywide Data Management and Access System (“ADAMS”).² Thus, we write to reassert and supplement our objections.

The Commission Should Reject PG&E’s Unlawful Request to Review its 2009 Application.

We continue to demand that you reject PG&E’s request to pretend that the license renewal proceeding that began in 2009 was not terminated, or that the grossly outdated 2009 application could at this point be considered “sufficient” under 10 C.F.R. § 2.109(b) and therefore subject to the timely renewal rule. Indeed, as PG&E itself has admitted, preparing a complete license

¹ Letter from Jane Swanson (San Luis Obispo Mothers for Peace), Ken Cook (Environmental Working Group), Daniel Hirsch (Committee to Bridge the Gap), and Hallie Templeton (Friends of the Earth) to NRC Commissioners re: Objections to PG&E’s Requests Related to Withdrawn License Renewal Application for Diablo Canyon Nuclear Power Plant (Nov. 17, 2022).

Our November 17 letter responds to a letter from Paula Gerfen, Senior Vice President and Chief Nuclear Officer, PG&E, to NRC, re: Request to Resume Review of the Diablo Canyon Power Plant License Renewal Application or, Alternatively, for an Exemption from 10 CFR 2.109(b), Concerning a Timely Renewal Application, Enclosure 2 at 9 (Oct. 31, 2022) (ADAMS Accession No. ML22304A691) (“Gerfen Letter”).

² In contrast, the Gerfen Letter was posted on ADAMS the day after it was received.

renewal application now requires so much work that it cannot be presented for another year, until late 2023.³ As your regulations provide, PG&E should be required to file a new license renewal application if it wishes to operate Diablo Canyon past its operating license expiration dates of 2024 and 2025.

The Commission Should Reject PG&E’s Unlawful Exemption Request.

We also continue to demand that you reject PG&E’s application for an exemption from the timely renewal rule, which would amount to an exemption from the license renewal process itself. Given that PG&E does not expect to be able to submit a complete license renewal application until late 2023, the NRC would be forced to conduct a significant portion of the review for potentially years after termination of the original operating licenses. Thus, to grant such an exemption would allow PG&E to continue to operate for years based on outdated licenses and environmental analyses that are more than thirty years old.

Under these circumstances, we respectfully submit that issuance of an exemption that would allow PG&E to substantially extend the Diablo Canyon operating license terms without renewing their licenses would violate your regulations and constitute arbitrary and capricious decision-making.

The NRC’s License Renewal Review Must Comply with NEPA Procedural Requirements.

Even assuming for purposes of argument that you could lawfully issue the exemption requested by PG&E under the Atomic Energy Act and your safety regulations, your decision to issue the exemption would be subject to the procedural requirements of the National Environmental Policy Act (“NEPA”) and your NEPA implementing regulations. In particular, we urge you to reject PG&E’s meritless claim that NRC regulation 10 C.F.R. § 51.22(c)(25)(vi)(G) and (I) permit you to approve an exemption to the timely renewal rule without first preparing an Environmental Assessment.⁴ PG&E argues that your timely renewal regulation in 10 C.F.R. § 2.109 relates to “scheduling requirements” and “[o]ther requirements of an administrative, managerial or organizational nature,” and therefore an exemption from § 2.109 is subject to a categorical exclusion if it otherwise satisfies 10 C.F.R. § 51.22(c)(25).⁵

On its face, as a matter of law, the requested exemption from the timely renewal requirement does not meet NRC’s requirements for a categorical exclusion from the preparation of an Environmental Assessment, as required by NEPA and your implementing regulations. An

³ Gerfen Letter, Enclosure 1 at 6.

⁴ Gerfen Letter, Enclosure 2 at 9.

⁵ *Id.*

exemption that would allow two nuclear reactors to operate beyond their license renewal expiration dates may not reasonably be characterized as merely schedular, administrative or organizational in nature. And indeed, the regulatory history of 10 C.F.R. § 51.22(c)(25) demonstrates that the NRC had no intention of excluding a decision with such potentially significant environmental impacts from the scope of a NEPA review. Therefore, if you should decide to undertake consideration of PG&E's exemption request, your review must be supported by an Environmental Assessment that evaluates the need for an environmental impact statement ("EIS").

Background. As you know, the NRC originally licensed the Diablo Canyon reactors to operate for forty years beyond the issuance dates of their construction permits.⁶ Unit 1, which received a construction permit in 1968, was licensed to operate until April 23, 2008; and Unit 2, which received a construction permit in 1970, was licensed to operate until December 9, 2010.⁷ In support of the construction permits and operating licenses, the NRC issued an EIS.⁸

In 1992, after the NRC amended its regulations to allow 40-year operating license terms to commence upon issuance of the operating licenses themselves, PG&E applied to the NRC for a license amendment to "recover" or "recapture" the periods of construction for each reactor, by extending the term of their operating licenses from the date the reactors had received their low-power operating licenses.⁹ PG&E proposed to extend the termination date for Unit 1 to September 22, 2021 and the termination date for Unit 2 to April 26, 2025.¹⁰

In the course of reviewing PG&E's license amendment application, the NRC issued an Environmental Assessment.¹¹ The Environmental Assessment confirmed that the 1973 Diablo Canyon EIS had evaluated 40-year operating license terms and concluded that extending the operating license terms did not "create any new or unreviewed environmental impacts," involve

⁶ See Letter from Gregory M. Rueger, PG&E to NRC re: License Amendment Request 92-04 40-Year Operating License Application (July 9, 1992) (ML17083C429) ("Rueger Letter").

⁷ *Id.* See also *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, LBP-92-27, 36 N.R.C. 196, 197 (1992).

⁸ Environmental Statement Related to the Nuclear Generating Station, Diablo Canyon Units 1 and 2 (May 1973) (ML15043A481) ("1973 Diablo Canyon EIS").

⁹ Rueger Letter at 1.

¹⁰ *Id.* Later, the termination date for Unit 1 was changed to November 2, 2024. We have found no documentation for the change.

¹¹ Environmental Assessment and Finding of No Significant Impact, Diablo Canyon Units 1 and 2 (Feb. 3, 1993) (ML022340575).

“any physical modifications,” or cause “new or unreviewed environmental impacts that were not considered” in the 1973 Diablo Canyon EIS.¹²

The 1993 Environmental Assessment constitutes the most recent environmental analysis prepared by the NRC for the operation of Diablo Canyon.¹³ Taken together with the 1973 EIS, these two documents evaluate *only* 40 years of operating Diablo Canyon Units 1 and 2. No NRC environmental document evaluates the site-specific environmental impacts of operating Diablo Canyon for any period of time beyond 40 years; and the NRC Diablo Canyon-specific environmental documents that do exist are now between 30 and 50 years out of date for that purpose.

Discussion. NRC regulation 10 C.F.R. § 51.22(c)(25)(vi) allows the NRC to categorically exclude nine categories of regulatory exemptions from the NRC’s requirement in 10 C.F.R. § 51.21 to prepare an Environmental Assessment.¹⁴ In the Gerfen Letter, PG&E asserts that “[t]he requirements from which this exemption is sought involve 10 CFR (c)(25)(vi)(G) (Scheduling

¹² *Id.* at 2. The NRC’s Atomic Safety and Licensing Board approved the license amendment in 1994, with a set of conditions imposed after an adjudicatory hearing. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-35, 40 N.R.C. 180 (1994).

¹³ While PG&E submitted an Environmental Report in support of its 2009 license renewal application, the NRC never completed its own review or issued a supplemental EIS for renewal of the Diablo Canyon licenses.

¹⁴ 10 C.F.R. § 51.21 requires an environmental assessment for “[a]ll [domestic] licensing and regulatory actions except those actions categorically requiring an EIS under § 51.20(b), actions subject to categorical exclusions under § 51.22(c), and actions exempt from environmental review under § 51.22(d)). Under Section 51.25(c)(25)(vi), the NRC may exclude exemptions involving:

- (A) Recordkeeping requirements;
- (B) Reporting requirements;
- (C) Inspection or surveillance requirements;
- (D) Equipment servicing or maintenance scheduling requirements;
- (E) Education, training, experience, qualification, requalification or other employment suitability requirements;
- (F) Safeguard plans, and materials control and accounting inventory scheduling requirements;
- (G) Scheduling requirements;
- (H) Surety, insurance or indemnity requirements; or
- (I) Other requirements of an administrative, managerial, or organizational nature.

requirements), and 10 CFR 51.22(c)(25)(vi)(I) (Other requirements of an administrative, managerial, or organizational nature).”¹⁵

On its face, however, an exemption from the timely renewal requirement would not qualify as merely schedular, administrative, managerial or organizational, because it would allow PG&E to change the legal status of the Diablo Canyon reactors from shutdown reactors to operating reactors – a drastic and significant change in the risks and impacts they pose.

And the regulatory history of 10 C.F.R. § 51.22(c)(25) shows that the NRC intended the categorical exclusion to apply to truly minor actions of an administrative nature, *i.e.*, those with no arguably significant environmental impacts. Examples of appropriate exemptions given by the NRC in promulgating the rule included:

- (1) Revising the schedule for the biennial exercise requirements for nuclear reactors in 10 CFR Part 50, Appendix E, Sections IV.F 2.b and c;
- (2) Applying updated NRC-approved ASME Codes; and
- (3) Training and experience requirements in 10 CFR Part 35, ‘Medical Use of Byproduct Material.’¹⁶

Such minor changes to schedules for exercises and training programs and updates to industry codes cannot reasonably be compared to a decision on whether two reactors must shut down on

¹⁵ *Id.*, Enclosure 2 at 9. PG&E also asserts that all of the other provisions of 10 C.F.R. § 51.22(c)(25) are satisfied by its exemption request. *Id.* These provisions include requirements to demonstrate:

- (i) There is no significant hazards consideration;
- (ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite;
- (iii) There is no significant increase in individual or cumulative public or occupational radiation exposure;
- (iv) There is no significant construction impact; and
- (v) There is no significant increase in the potential for or consequences from radiological accidents.

10 C.F.R. § 51.25(c)(25)(i)-(v). Given the inapplicability of the exclusion to the timely renewal regulation in subsections (vi)(G) and (I), PG&E’s claims to satisfy these criteria need not be considered. However, for completion of the record, we will address them in subsequent correspondence.

¹⁶ Proposed Rule, Categorical Exclusions from Environmental Review, 73 Fed. Reg. 59,540, 59,545 (Oct. 9, 2008).

schedule or be permitted to operate for an undetermined number of additional years. The NRC further demonstrated its intention that the exclusion should not apply to actions with substantive significance by removing the term “procedural” from the category of actions subject to the exclusion.¹⁷

Finally, as discussed above, there is no existing environmental analysis on which the NRC could rely to declare that the environmental impacts of extended operation have already been addressed. The only available environmental analyses are out of date by at least thirty years.

PG&E’s failure to satisfy the threshold test of 10 C.F.R. § 51.22(c)(25)(vi)(G) and (I) dooms all other aspects of its exemption request, because 10 C.F.R. § 51.22(c)(25) requires that all six tests set forth in subsections (i) through (vi) must be satisfied in order for an exemption to be granted. Therefore, because the timely renewal regulation does not fit into the categories of 10 C.F.R. § 51.22(c)(25)(vi)(G) or (I), it must be denied, regardless of whether PG&E can satisfy the other criteria.¹⁸

Conclusion.

As discussed above, PG&E’s two alternative requests of you -- (a) that you recommence the original license renewal review as if it were never terminated and (b) that you effectively exempt it from the license renewal process – seek action that is unlawful and arbitrary and capricious. PG&E’s request that you evade the procedural requirements of your NEPA implementing regulations are also unlawful. Therefore, all of these requests must be rejected.

We ask you to make your determination immediately and notify the general public. In the meantime, we must assume that you are giving serious consideration to PG&E’s requests, and therefore will continue to present you with our concerns and supporting evidence as they are developed.

¹⁷ Final Rule, Categorical Exclusions From Environmental Review, 74 Fed. Reg. 20,248, 20,252 (April 19, 2010) (noting that “the term ‘procedural’ could be misconstrued in this context to include the requirement for licensees to implement procedures for substantive requirements.”).

¹⁸ As discussed above, we will address PG&E’s failure to satisfy these other criteria in subsequent correspondence.

Sincerely,

/s/Jane Swanson, Board President
San Luis Obispo Mothers for Peace

/s/Ken Cook, President
Environmental Working Group

/s/Daniel Hirsch, President
Committee to Bridge the Gap

/s/Hallie Templeton, Legal Director
Friends of the Earth

Cc: Senator John Laird, California Legislature
Richard Stapler, Chief of Staff to Senator John Laird
Kara Woodruff, Senior Policy Advisor to Senator John Laird
California Governor Gavin Newsom
Jim Deboo, Executive Secretary to California Governor Newsom
Karen Douglas, Commissioner, California Energy Commission
Representative Salud Carbajal, U.S. Congressman (CA-24)
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Senator Dianne Feinstein, United States Senate
Senator Alex Padilla, United States Senate
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Paula Gerfen, Senior Vice President and Chief Nuclear Officer, PG&E
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