

February 13, 2023

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U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
By email to: [Lauren.Gibson@nrc.gov](mailto:Lauren.Gibson@nrc.gov)

SUBJECT: *Opposition to Pacific Gas & Electric Co.'s Request for an Exemption from the NRC's Timely Renewal Regulation, 10 C.F.R. § 2.109(b), Docket Nos. 50-275, 50-323*

Dear Ms. Gibson:

We write on behalf of San Luis Obispo Mothers for Peace, Friends of the Earth, and the Environmental Working Group (“Organizations”), in formal opposition to Pacific Gas and Electric Company’s (“PG&E’s”) request for an exemption from the U.S. Nuclear Regulatory Commission’s (“NRC’s”) timely renewal regulation, 10 C.F.R. § 2.109(b).<sup>1</sup>

## INTRODUCTION

The requested exemption would excuse PG&E from not having submitted a complete license renewal application for the Diablo Canyon nuclear reactors at least five years before the expiration dates of November 2, 2024 for Unit 1 and August 26, 2025 for Unit 2, as required by 10 C.F.R. § 2.109(b). Instead, PG&E asks you to treat a new license renewal application for Diablo Canyon as “timely” if PG&E submits it by the end of 2023, *i.e.*, ten months before the expiration of the Unit 1 operating license and twenty months before expiration of the Unit 2 operating license.<sup>2</sup>

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<sup>1</sup> 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 (Oct. 31, 2022) (“Gerfen Letter”).

We note that NRC regulations provide no mechanism for public participation in exemption decisions, despite their potentially profound implications for the safety and environmental impacts of operating reactors. As organizations with longstanding and significant concerns about the safety and environmental impacts of continuing to operate the Diablo Canyon reactors past their license expiration dates, we ask you to consider this letter as a formal objection to PG&E’s exemption request.

<sup>2</sup> Gerfen Letter at 2. *See also* Pacific Gas and Electric Company Response to the January 10, 2023 Extraprocedural Filing by San Luis Obispo Mothers For Peace, Friends of the Earth, and Environmental Working Group at 19 (Jan. 20, 2023) (“PG&E Response to Petition”). As discussed below in Section A.3, the predicted submission date of late 2023 is aspirational, not

As you know, PG&E's exemption request was accompanied by an alternative request to review PG&E's original license renewal application which it submitted in 2009 and then withdrew in 2018.<sup>3</sup> We opposed both requests in letters to you and in a Petition to the NRC Commissioners.<sup>4</sup> While neither the Staff nor the Commissioners have responded to our Letters and Petition, the Staff recently and appropriately denied PG&E's request to resume review of its abandoned 2009 license renewal application.<sup>5</sup>

Thus, the only question that remains is whether PG&E's exemption request satisfies the two-pronged regulatory requirement that the exemption must be "authorized by law" and must not "present an undue risk to the public health and safety."<sup>6</sup> As discussed below, PG&E does not satisfy either prong of this standard because PG&E's untimely filing of a license renewal application would not leave the NRC enough time to make statutorily required safety and

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assured; and PG&E has already identified one significant area in which it cannot meet that deadline. Thus, the NRC may have even less time than the ten to twenty months predicted by PG&E for review of its application.

<sup>3</sup> Gerfen Letter at 1 and Enclosure 1.

<sup>4</sup> Letter from Jane Swanson, *et al.* to NRC Commissioners re: Objection to PG&E's Requests Related to Withdrawn License Renewal Application for Diablo Canyon Nuclear Power Plant (Nov. 17, 2022); Letter from Jane Swanson, *et al.* to NRC Commissioners re: 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 (Dec. 6, 2022) (collectively "Petitioners' Letters"); Petition by San Luis Obispo Mothers for Peace, Friends of the Earth and Environmental Working Group to Deny Pacific Gas & Electric Company's Request to Review Undocketed License Renewal Application for the Diablo Canyon Unit 1 and Unit 2 Reactors and Petition to Deny Pacific Gas & Electric Company's Request to Extend the Diablo Canyon Reactors' License Terms Without Renewing the Licenses (Jan. 10, 2023) ("Petition").

After the Staff failed to respond to the Organizations' two Letters, the Organizations sought supervisory review of the Gerfen Letter's demands from the Commission. Given that the Staff has now denied PG&E's extraordinary and extraprocedural request to resume review of its abandoned license application, and given that PG&E's submission of an exemption request is contemplated by NRC regulation 10 C.F.R. § 50.12, the Organizations redirect their opposition to the exemption to the Staff. The Organizations hereby adopt and incorporate their Petition by reference into this letter. In addition, this letter responds to arguments made in PG&E Response to Petition. The Organizations reserve the right to appeal any adverse decision by the Staff to the Commission.

<sup>5</sup> Letter from Lauren K. Gibson, NRC, to Paula Gerfen, PG&E, re: Diablo Canyon Power Plant, Units 1 and 2 – Staff Decision to Not Resume Review of Withdrawn License Renewal Application (Jan. 24, 2023) (ML22343A179) ("Gibson Letter").

<sup>6</sup> 10 C.F.R. § 50.12(a)(1).

environmental evaluations and findings and complete the hearing process before the expiration of the Diablo Canyon operating licenses in November of 2024 and April of 2025. Further, because PG&E has spent the past six years not in the routine operational and maintenance modes of normal reactors but in preparing to *cease* operating the Diablo Canyon reactors past their operating license expiration dates, it now lacks a basis for claiming that operating them past those dates will pose “no undue risk to the public health and safety.”

Under these circumstances, it is impossible for PG&E to satisfy the threshold safety and environmental requirements of 10 C.F.R. § 50.12(a)(1). And because PG&E cannot meet these mandatory tests, the Staff need not and should not take the next step of giving discretionary consideration to PG&E’s claim to the “special circumstances” of “undue hardship or other costs.”<sup>7</sup> Discretionary consideration of practical or economic hardship is superfluous and irrelevant where compliance with fundamental Atomic Energy Act and NEPA-based safety and environmental standards cannot be demonstrated.

Therefore, the Staff should deny PG&E’s request for an exemption. Further, in the very likely event that the review and hearing processes extend beyond the operating license termination dates for Diablo Canyon Units 1 and/or 2, the NRC must require PG&E to shut down the reactors unless and until the review and hearing processes are finished and the NRC approves the renewal of PG&E’s operating licenses.

**PG&E DOES NOT QUALIFY FOR AN EXEMPTION FROM THE TIMELY  
RENEWAL RULE BECAUSE THE EXEMPTION IS NOT AUTHORIZED BY LAW  
AND BECAUSE PG&E CANNOT DEMONSTRATE THAT IT WOULD POSE  
NO UNDUE RISK TO THE PUBLIC HEALTH AND SAFETY.**

The NRC’s regulation for “specific exemptions,” 10 C.F.R. § 51.12(a)(1), provides that the NRC may grant exemptions from NRC regulations if they are “[a]uthorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security.” As demonstrated below, PG&E does not satisfy either prong of this standard. Therefore, it is not necessary or appropriate for the NRC Staff to consider whether “special circumstances are present,” as provided by 10 C.F.R. § 51.12(a)(2).

**A. The Requested Exemption is Not Authorized by Law Because it Would Not Allow  
the NRC Enough Time to Make Statutorily Required Evaluations and Findings and  
Conduct a Hearing Before Expiration of the Diablo Canyon Operating Licenses.**

The Organizations respectfully submit that issuance of an exemption to 10 C.F.R. § 2.109(b) is not “authorized” by either the Atomic Energy Act or the National Environmental Policy Act (“NEPA”) because PG&E’s untimely filing of a license renewal application would not leave the NRC enough time to make two sets of statutorily required safety and environmental evaluations and findings before the expiration of the Diablo Canyon operating licenses in November of 2024

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<sup>7</sup> Gerfen Letter, Enclosure 2 at 5-7 (citing 10 C.F.R. § 50.12(a)(2)(iii)).

and April of 2025. These evaluations and findings consist of: (a) a safety evaluation and finding that issuance of the exemption would not be “inimical” to “the health and safety of the public;”<sup>8</sup> and (b) an evaluation of the environmental impacts of extended operation.<sup>9</sup> In addition, the NRC must offer the public an opportunity for a hearing and complete the hearing before allowing extended operation.<sup>10</sup>

Because the slim review periods of ten months for Unit 1 and twenty months for Unit 2 are patently inadequate to make these statutorily required findings or complete the hearing process, PG&E’s application is not “authorized” by either the Atomic Energy Act or NEPA.<sup>11</sup> Therefore, PG&E fails to satisfy the first prong of 10 C.F.R. § 50.12(a)(1). This failure alone calls for denial of PG&E’s exemption request.

**1. The Atomic Energy Act requires the NRC to conduct a safety evaluation, make safety findings and offer an opportunity for a hearing before issuing an exemption that would extend the time for operation of the Diablo Canyon reactors beyond their 40-year term limits.**

**a. Atomic Energy Act safety standards for NRC licensing decisions**

Section 182(a) of the Atomic Energy Act, 42 U.S.C. §§ 2232(a), establishes “the primary statutory standard relating to the [NRC’s] mandate to ensure the safe operation of nuclear power plants.”<sup>12</sup> That provision requires the Commission to ensure that “the utilization or production of special nuclear material will . . . provide adequate protection to the health and safety of the public.” Section 103(d), 42 U.S.C. § 2133(d), further provides that “no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.” In the NRC’s adjudicatory proceeding for PG&E to “recover” or “recapture” the period of construction of Diablo Canyon by adding it into the 40-year operating

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<sup>8</sup> 42 U.S.C. § 2232(a). *See also* 42 U.S.C. § 2133(d).

<sup>9</sup> 42 U.S.C. § 4332(2)(C). *See also Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983) (“where an agency action significantly affects the quality of the human environment, the agency must evaluate the ‘environmental impact’ and any unavoidable adverse environmental effects of its proposal.”).

<sup>10</sup> 42 U.S.C. § 2239(a). In addition, as discussed below in Section A.2, NEPA requires the provision of an opportunity for notice and comment on the environmental impact statement (“EIS”) that must accompany a license renewal decision.

<sup>11</sup> 10 C.F.R. §§ 50.12(a)(1). PG&E claims to be entitled to a categorical exclusion from NEPA compliance under 10 C.F.R. § 51.22(c)(25). Gerfen Letter, Enclosure 2 at 7-9. As discussed below in Section A.2.b, however, this claim has no merit.

<sup>12</sup> *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 109 (D.C. Cir. 1987) (“*Union of Concerned Scientists I*”).

license term for each reactor, the Atomic Safety and Licensing Board (“ASLB”) used slightly different but equivalent terminology to find that the proposed license extension met the NRC’s statutory and regulatory safety standards:

With respect to the matters placed in controversy by these two contentions, and subject to the limited conditions set forth with respect to [one of the Intervenor’s contentions], there is reasonable assurance that: (a) the Diablo Canyon Nuclear Power Plant can and will be operated without endangering the public health and safety for the requested 40-year operating life; (b) such activities will be conducted in compliance with the Commission’s regulations; and (c) such activities will not be inimical to the common defense and security.<sup>13</sup>

The NRC’s licensing regulations, including 10 C.F.R. § 50.12(a)(1), incorporate the bedrock safety standard embodied by the phrases “adequate protection,” “no undue risk,” “not inimical,” and “without endangering.”<sup>14</sup> The standard must be satisfied for any NRC decision changing the license terms for a nuclear reactor and may not be affected by convenience or cost considerations.<sup>15</sup>

#### **b. Requirements of Atomic Energy Act Section 103(c)**

Section 103(c) of the Atomic Energy Act, 42 U.S.C. § 2133(c), limits the term for any commercial reactor operating license to 40 years and prohibits extension of such a license by any means other than renewal. The 40-year limit is expressly incorporated into each NRC program for regulation of Diablo Canyon and other nuclear reactors, including regulations, guidance, and license provisions.

First, the 40-year deadline is incorporated into the NRC’s safety regulations for initial licensing of nuclear reactors.<sup>16</sup> With respect to license renewal, the NRC’s regulations also recognize a fundamental demarcation between the regulatory demands of the initial license term and the license renewal term: “safety questions” raised by “age-related degradation of plant systems, structures and components” have “limited relevance to safety under the initial operating licenses”

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<sup>13</sup> *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-35, 40 N.R.C. 180, 281 (1994) (“*Diablo Canyon*, LBP-94-35”).

<sup>14</sup> *Union of Concerned Scientists I*, 824 F.2d at 109 (citing *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 N.R.C. 445, 464-65 (1983)).

<sup>15</sup> *Union of Concerned Scientists I*, 824 F.2d at 117.

<sup>16</sup> *See, e.g.*, 10 C.F.R. § 50.51(a) (limiting reactor license terms to 40 years); 10 C.F.R. § 50.33(e) (requiring an operating license applicant to specify “the period of time for which the license is sought”); and 10 C.F.R. § 50.33(f)(2) (requiring an operating license applicant to demonstrate that it “possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license.”).

but are “unique” to the license renewal term.<sup>17</sup>

The demarcation between the safety issues arising during the initial license term and the age-related issues arising during the renewal term is also recognized in the NRC’s Generic Aging Lessons Learned (“GALL”) Report, the NRC’s primary license renewal guidance document:

The GALL Report contains an evaluation of a large number of structures and components that may be in the scope of a typical LRA. The evaluation results documented in the GALL Report indicate that many existing, typical generic aging management programs are adequate to manage aging effects for particular structures or components for license renewal without change. *The GALL Report also contains recommendations on specific areas for which existing generic programs should be augmented (require further evaluation) for license renewal and documents the technical basis for each such determination.* In addition, the GALL Report identifies certain SSCs that may or may not be subject to particular aging effects, and those for which industry groups are developing generic aging management programs or investigating whether aging management is warranted.<sup>18</sup>

Further, the 40-year limit is incorporated into PG&E’s commitments and the NRC’s 1994 licensing decision to allow operation of the Diablo Canyon reactors for 40 years starting with the issuance of the Unit 1 and Unit 2 operating licenses and lasting until 2024 and 2025. In 1992, in applying for “recapture” of the time spent on construction of Diablo Canyon by adding those years to the operating license term, PG&E committed to ensuring safe operation of the reactors for “at least” 40 years.<sup>19</sup> While the phrase “at least” communicated an unspecified additional

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<sup>17</sup> Final Rule, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943 (Dec. 13, 1991) (“License Renewal Rule”). The full text of the statement reads as follows:

The Commission’s ongoing processes have not, quite logically, addressed safety questions which, by their nature, become important principally during the period of extended operation beyond the initial 40-year license term. By their nature, these questions have limited relevance to safety under the initial operating licenses. This leads the Commission to conclude ... that age-related degradation of plant systems, structures, and components that is unique for the extended period of operation must be elevated [sic] before a renewed license is issued. This is a new safety issue that has not been treated in a comprehensive fashion in the Commission’s ongoing oversight of operating reactors. However, age-related degradation will be critical to safety during the term of the renewed license.

<sup>18</sup> Generic Aging Lessons Learned (GALL) Report (NUREG-1801, Dec. 2010) (emphasis added) (“GALL Report”).

<sup>19</sup> Letter from Gregory M. Rueger, PG&E, to Document Control Desk, NRC, re: License Amendment Request 92-04, 40-Year Operating License Application, Attachment A at 2 (July 9, 1992 (ML17083C429)). PG&E asserted that:

temporal margin of safe operation, the maximum specific time period for which PG&E committed to safe operation was 40 years. In the ASLB's 1994 decision resolving contested issues regarding PG&E's application to extend the Diablo Canyon operating license terms, the Board relied on PG&E's representations to conclude that the Diablo Canyon reactors "can and will be operated without endangering the public health and safety for the requested 40-year operating life."<sup>20</sup>

Finally, in the Environmental Assessment issued by the NRC pursuant to NEPA, the NRC addressed the environmental impacts of operating Diablo Canyon for only a 40-year period.<sup>21</sup>

Thus, the 40-year limit imposed by Section 103(c) of the Atomic Energy Act is incorporated into NRC regulations, NRC regulatory guidance, PG&E's operating license, and the NRC's most current NEPA review document addressing environmental impacts of operating Diablo Canyon during the initial licensing term. The NRC Staff should not knowingly exceed or violate those standards in considering whether to grant PG&E's request for an exemption from the timely renewal rule.<sup>22</sup>

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PG&E has assessed the safety aspects of plant design and operation of each [Diablo Canyon] unit for the proposed 40-year operation. Based on this assessment, as provided in Section 4.0 of this attachment, PG&E concludes that plant safety will be maintained during the 40-year operation. This conclusion is supported by the following factors: (1) the [Diablo Canyon] facility has been designed and analyzed for at least 40 years of operation; (2) the equipment, structures, and materials were purchased or constructed based on operation of at least 40 years; and (3) inspection and maintenance programs were developed to be applicable for at least 40 years of plant operation.

*Id.*

<sup>20</sup> *Diablo Canyon*, LBP-94-35, 40 N.R.C. at 281.

<sup>21</sup> Environmental Assessment and Finding of No Significant Impact, Diablo Canyon Units 1 and 2) at 2 (Feb. 3, 1993) (ML022340575). *See also* Petition at 13.

<sup>22</sup> PG&E argues that the granting of an exemption to the timely renewal rule "is firmly within the NRC's discretion," as granted to it by Congress in the Administrative Procedure Act. PG&E Response to Petition at 18 (citing 5 U.S.C. § 558(c)). According to PG&E, this Congressionally-conferred discretion allows the NRC to set the threshold for a timely license renewal application at any point it chooses by issuing a regulatory exemption to PG&E, including down to a "default" threshold of 30 days as provided in the NRC's original timely renewal rule. *Id.* at 19-20 and n.7 (citing Atomic Energy Commission; Rules of Practice; Revision of Rules, 27 Fed. Reg. 377, 379 (Jan. 13, 1962)).

But PG&E ignores the distinction made by the Atomic Energy Act between commercial reactor licenses and all other types of NRC licenses. For a commercial reactor license, the Act sets a strict term limit of 40 years unless the license is renewed. 42 U.S.C. § 2133(c). The Act gives the NRC no discretion to alter that limit by any other means. *See* Petition at 29-30 (citing Proposed Rule, Nuclear Plant License Renewal, 55 Fed. Reg. 29,044, 29,050 (July 17, 1991); License

**c. Requirements of Atomic Energy Act Section 189(a)**

Section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a), provides that:

In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

The right to a hearing applies to license renewal decisions for nuclear reactors.<sup>23</sup>

In reactor licensing and license renewal proceedings, the hearing must be completed prior to the taking of a licensing decision.<sup>24</sup> There is only one exception to the requirement for a prior public hearing, and it does not apply here. The Atomic Energy Act allows the NRC to amend reactor licenses before completion of the hearing process in cases involving “no significant hazards considerations.”<sup>25</sup> The “no significant hazards considerations” exception to the prior hearing requirement for license amendments does not apply to Diablo Canyon because the Atomic Energy Act does not allow the NRC to use license amendments to extend reactor licenses beyond 40 years.<sup>26</sup> A 40-year license may only be extended by renewing it.<sup>27</sup> The NRC Staff should not violate Section 189(a) in considering whether to grant PG&E’s request for an exemption from the timely renewal rule.

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Renewal Rule, 56 Fed. Reg. at 64,962). In contrast, the Act sets no term limits for any other type of NRC license. For those other types of licenses — including the research reactor license cited by PG&E in its Response — the NRC does indeed have the broad discretion claimed by PG&E. See PG&E Response to Petition at 20 and note 76 (citing NRC correspondence approving exemptions from the 30-day requirement for timely renewal applications for the University of Utah Research Reactor). These exemptions are simply irrelevant to Diablo Canyon, a commercial reactor.

<sup>23</sup> *New Jersey Env. Federation, et al. v. NRC*, 645 F.3d 220, 224 (3rd Cir. 2011).

<sup>24</sup> 10 C.F.R. § 2.340(a)(2)(i); *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984) (“*Union of Concerned Scientists II*”).

<sup>25</sup> 42 U.S.C. § 2239(a)(2)(A).

<sup>26</sup> License Renewal Rule, 56 Fed. Reg. at 64,961-62. See also Petition at 30-32.

<sup>27</sup> *Id.*; 42 U.S.C. § 2133(c).



**2. NEPA requires the NRC to evaluate the environmental impacts of continuing to operate the Diablo Canyon reactors before allowing extended operation.**

**a. Requirement for EIS prior to extension of operating licenses**

NEPA is the country's "basic national charter" for environmental protection.<sup>28</sup> It serves two goals: (a) fostering informed decision making by federal agencies, and (b) promoting informed public participation in government decisions.<sup>29</sup> To meet those goals, NEPA requires that agencies "consider every significant aspect of the environmental impact of a proposed action" and inform the public of the environmental impacts of agency proposals.<sup>30</sup> The primary tool for this analysis is an EIS, a "detailed statement" explaining "the environmental impact of the proposed action."<sup>31</sup> An EIS is required if a proposed action "might" significantly affect the environment.<sup>32</sup> As long as "there are 'substantial questions' as to whether an agency's actions will have a significant effect on the environment, then failure to prepare an EIS is a violation of NEPA."<sup>33</sup> Consistent with this standard, NRC regulations require preparation of an EIS for both initial reactor licensing and license renewal.<sup>34</sup>

Agencies must comply with NEPA *before* making decisions with a potentially significant environmental impact.<sup>35</sup> By requiring reactor license renewal applicants to submit their applications well in advance of their operating license expiration dates, the NRC has consciously built in a reasonable amount of time to complete the environmental analysis required by NEPA.<sup>36</sup>

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<sup>28</sup> *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1177 (9th Cir. 2011) (internal citation omitted).

<sup>29</sup> *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

<sup>30</sup> *Id.* (internal citation omitted).

<sup>31</sup> 42 U.S.C. § 4332(2)(C).

<sup>32</sup> *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1039 (D.C. Cir. 2021) (quoting *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 340 (D.C. Cir. 2002)).

<sup>33</sup> *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 232 (D.D.C. 2003); see also *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982) ("A determination that significant effects on the human environment will in fact occur is not essential. If substantial questions are raised whether a project may have a significant effect upon the human environment, an EIS must be prepared." (internal citation omitted)).

<sup>34</sup> 10 C.F.R. § 51.20(b)(2).

<sup>35</sup> *Robertson v. Methow Valley Citizens Association*, 490 U.S. 332, 349 (1989).

<sup>36</sup> License Renewal Rule, 56 Fed. Reg. at 64,962. The License Renewal Rule estimated that three years is sufficient to complete safety and environmental reviews, and added two more for consistency with the decommissioning rule. See also Petition at 31.

There is no doubt that NEPA applies to the fullest extent to the NRC's eventual decision on permit extension in this instance. This is a crucial step that cannot be skipped or streamlined. The NRC Staff should not knowingly exceed or violate NEPA in considering whether to grant PG&E's request for an exemption from the timely renewal rule.

**b. Inapplicability of categorical exclusions from NEPA compliance**

NRC regulation 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).” PG&E claims to be entitled to a categorical exclusion from NEPA compliance under 10 C.F.R. § 51.22(c)(25), which allows the NRC to categorically exclude from NEPA nine specified categories of regulatory exemptions:

- (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.<sup>37</sup>

PG&E argues that the timely renewal regulation, 10 C.F.R. § 2.109, relates to “scheduling requirements” and “[o]ther requirements of an administrative, managerial or organizational nature,” and therefore is covered by 10 C.F.R. §§ 51.22(c)(25)(G) and (I).<sup>38</sup> Therefore, according to PG&E, an exemption from § 2.109 is subject to a categorical exclusion if it otherwise satisfies 10 C.F.R. § 51.22(c)(25).<sup>39</sup>

But PG&E's claim is without merit. By its own terms, Section 51.22(c)(25)(vi) covers only minor and administrative actions – not the safety significant extension of the time period for operating a two-unit nuclear plant. As the ASLB held in the license amendment proceeding to “recover” or “recapture” the 13-year (Unit 1) and 15-year (Unit 2) periods of construction and add them to the Diablo Canyon operating license terms, extension of an operating license term is

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<sup>37</sup> Gerfen Letter, Enclosure 2 at 7-9 and PG&E Response to Petition at 25-26.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

not “administrative” in nature because it poses a “risk of accident with offsite consequences” for the “recaptured” periods.<sup>40</sup>

Nor is PG&E’s request for a categorical exclusion supported by any precedent. To Petitioners’ knowledge, the Staff has never before applied 10 C.F.R. § 51.22(c)(25) to allow the extension of a reactor license term beyond its expiration date. And none of the five NRC Staff exemption decisions cited by PG&E in support of its claim to a categorical exclusion<sup>41</sup> supports the issuance of an exemption to PG&E. In each case, the NRC Staff based the issuance of the exemptions on the assumption that the entire license renewal review, including the environmental review and any related hearings, could be completed before the operating license terms expired.<sup>42</sup>

**3. PG&E has failed to demonstrate that the Staff’s safety and environmental review and the hearing process can be completed before expiration of the Diablo Canyon operating licenses.**

The NRC Staff must deny PG&E’s exemption request because PG&E has failed to demonstrate that the Staff’s safety and environmental review and the hearing process can be completed before expiration of the Diablo Canyon operating licenses. At the outset, it is important to recognize that the hurdles to a prompt NRC review and hearing process have been created by PG&E’s own actions over the past six years. As noted in the Gerfen Letter, the last year that PG&E maintained an up-to-date license renewal application was 2016.<sup>43</sup> PG&E has spent the last six years preparing for shutdown and decommissioning. To reverse the many decisions and measures taken in preparation for closure is an enormous undertaking.

It is impossible to determine how much time it will take for the NRC to review PG&E’s completed license renewal application once it is submitted. But the significant range of topics and amount of information specified by the Gibson Letter as essential to a complete application strongly indicates that the review process will be time-consuming:

NRC regulations require an applicant or licensee to provide sufficient information in its application to support the requested action. As you [PG&E] acknowledge in your October 31, 2022, letter requesting that the NRC Staff “resume its review of the application as it existed” in 2016, “including all associated correspondence and commitments,” additional information is needed to bring the withdrawn application up to

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<sup>40</sup> *Diablo Canyon*, LBP-94-35, 40 N.R.C. at 188 (citing *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 N.R.C. 5, 10-11 (1993)).

<sup>41</sup> See PG&E Response to Petition at 27 and n.96 (citing exemptions for the Clinton, Dresden, Ginna, Perry, and Nine Mile Point reactors).

<sup>42</sup> See discussion in Section C below.

<sup>43</sup> Gibson Letter at 1 (noting that PG&E has proposed that the NRC Staff “‘resume review of the application as if it existed’ when the review ceased in 2016, including all associated correspondence and commitments.”)

date. That information includes new information that would have been required in annual updates in accordance with 10 CFR 54.21(b) if the application had not been withdrawn and remained under NRC staff review. The last such update was submitted in December 2015. (ML16004A149). The additional information that is needed also includes addressing material new information and guidance updates since the cessation of the Staff's review for both the safety and environmental reviews.<sup>44</sup>

In addition, as also noted in the Gibson Letter, PG&E must submit:

an amendment to the withdrawn application that identifies material changes to the current licensing basis and “supplemental information relevant to both the safety and environmental reviews to account for any material new information and guidance updates.”<sup>45</sup>

The “material changes to the current licensing basis” that PG&E must provide include documentation of the multiple regulatory exemptions PG&E has obtained from the NRC on the ground that PG&E was planning to shut down the reactors in 2024/25 and could be excused from requirements relevant to a license renewal term. For instance, in 2016, the NRC exempted PG&E from the requirement of 10 C.F.R. § 54.21(b) for annual updates regarding changes to the current licensing basis that materially affect the contents of the license renewal application.<sup>46</sup> The NRC also exempted PG&E from limits on its withdrawals from the decommissioning fund.<sup>47</sup> There may be other relevant exemptions or comparable regulatory actions, but PG&E has provided no accounting of them. And PG&E has failed to address the question of whether it will seek any exemptions based on the fact that the Legislature foresees that Diablo Canyon operations will be permitted for only a five-year period, not twenty years as anticipated by NRC license renewal regulation 10 C.F.R. § 54.31(b).

Another example of a change that PG&E must address in a new license renewal application is PG&E's apparently recent decision to change the schedule for withdrawing “Coupon B” from the Unit 1 pressure vessel for purposes of evaluating the potential for pressure vessel embrittlement during the license renewal term. In the 2011 Safety Evaluation Report for PG&E's 2009 license renewal application, the NRC Staff approved a surveillance program that

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<sup>44</sup> Gibson Letter at 2.

<sup>45</sup> See PG&E Response at 4 (“After withdrawal of the [license renewal application], PG&E began working on decommissioning planning efforts to support the transition to active decommissioning upon shutdown” of the Diablo Canyon reactors.

<sup>46</sup> Notice of Exemption Issuance, Pacific Gas and Electric Company; Diablo Canyon Power Plant, Units 1 and 2; Annual Updates to License Renewal Application, 81 Fed. Reg. 57,942 (Aug. 24, 2016).

<sup>47</sup> Notice of Exemption Issuance, Pacific Gas and Electric Company; Diablo Canyon Nuclear Power Plant Units 1 and 2, 84 Fed. Reg. 48,955 (Sept. 17, 2019).

called for removal of Coupon B before expiration of the Unit 1 operating license.<sup>48</sup> While PG&E originally planned to remove the coupon in 2017, the NRC Staff later approved a schedule change by which PG&E would remove the coupon in May 2022.<sup>49</sup> But PG&E did not withdraw Coupon B in 2022, because at that time it still intended to close Unit 1 in 2024 and therefore removal of the coupon to support license renewal was no longer thought necessary. Now that it has decided to seek license renewal once again, PG&E proposes to withdraw the coupon in the fall of 2023.<sup>50</sup> However, the Staff does not appear to have issued any Safety Evaluation for that change in the schedule. Thus, the issue must be addressed in a new license renewal application. The license renewal application will need to address the questions of whether the new withdrawal schedule satisfies the GALL Report, as specified in the 2012 Safety Evaluation.<sup>51</sup> As also specified in the 2012 Safety Evaluation, PG&E must also explain how it satisfies the data requirements of the Electric Power Research Institute's ("EPRI's") Materials Reliability Program's Coordinated Pressurized Water Reactor (PWR) Reactor Vessel Surveillance

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<sup>48</sup> The 2011 Safety Evaluation Report for PG&E's 2009 license renewal application relied on PG&E's commitment to remove Coupon B and provide the Staff with an analysis of its results in support of its license renewal application. Safety Evaluation Report Related to the License Renewal of Diablo Canyon Nuclear Power Plant, Units 1 and 2 at 4-12 (June 2, 2011) (ML11153A103) ("2011 SER"). As stated in the SER:

The staff finds that for Unit 1, the applicant will adequately manage the effects of neutron embrittlement for the period of extended operation in accordance with 10 CFR 54.21(c)(1)(iii). This finding is based on the fact that the applicant is monitoring reactor pressure vessel fluence via the Reactor Vessel Surveillance Program and because the applicant has proposed to use 10 CFR 50.61a as an alternative means to demonstrate adequate fracture toughness of the RV.

*Id.*

<sup>49</sup> Safety Evaluation by the Office of Nuclear Reactor Regulation, Request to Revise the Reactor Vessel Material Surveillance Program Withdrawal Schedule, Diablo Canyon Power Plant, Unit 1, Docket No. 50-275 (March 2, 2012) ("2012 Safety Evaluation") (ML120330497).

<sup>50</sup> Viewgraphs, DCPD License Renewal Pre-Submittal Presentation, Presented by Phillippe Soenen, PG&E Director of Strategic Initiatives (Dec. 8, 2022) (ML22339A10) ("PG&E Viewgraphs").

<sup>51</sup> 2012 Safety Evaluation at 2. The Gall Report provides in relevant part that:

The plant-specific or integrated surveillance program shall have at least one capsule with a projected neutron fluence equal to or exceeding the 60-year peak reactor vessel wall neutron fluence prior to the end of the period of extended operation. The program withdraws one capsule at an outage in which the capsule receives a neutron fluence of between one and two times the peak reactor vessel wall neutron fluence at the end of the period of extended operation and tests the capsule in accordance with the requirements of ASTM E 185-82.

*Id.* at XI M31-2.

Program.<sup>52</sup>

PG&E also has failed to provide any information on maintenance activities that it may have stopped or relaxed based on the imminent closure of the Diablo Canyon reactors. At meetings of the Diablo Canyon Independent Safety Committee (“DCISC”), for instance, significant concern has been raised about the number and nature of inspections and the amount of maintenance that PG&E has suspended due to the expectation that the two reactors would close in the near future.<sup>53</sup>

Further, NEPA mandates that the NRC must conduct a thorough and complete environmental review process that includes putting a draft supplemental EIS out for comment, reviewing and responding to those comments, potentially holding an adjudicatory hearing, and issuing a final EIS – all prior to reaching a determination on PG&E’s forthcoming license renewal application.<sup>54</sup>

Re-licensing of Diablo Canyon poses significant environmental concerns, and therefore the environmental review is likely to be complex. For instance, the significant environmental impacts of Diablo Canyon’s once-through cooling system on marine organisms constitute a major environmental issue that previously was resolved by the decision to close Diablo Canyon in 2024 and 2025 and that has now arisen once more. In 2010, when PG&E was still planning on operating during a renewed 20-year term, the California State Water Resources Control Board established a policy for implementation of the Clean Water Act that required PG&E to install cooling towers or other significant measures to reduce marine impacts by at least 85% before

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<sup>52</sup> 2012 Safety Evaluation at 1. The Materials Reliability Program’s Coordinated PWR Reactor Vessel Surveillance Program (CRVSP) Guidelines (MRP-326) (2011 Technical Report) provides with specific reference to Diablo Canyon Unit 1 as follows:

For the purpose of developing the CRVSP, the projected 2x60-year peak RPV fluence and year of withdrawal were estimated as follows: The removal fluence value of  $4.12 \times 10^{19}$  n/cm<sup>2</sup> is twice the 60-year (54 EFPY) RPV peak fluence of  $2.06 \times 10^{19}$  n/cm<sup>2</sup> [49]. Using the capsule lead factor and linear relationship between the reported peak RPV fluences and their corresponding EFPY values, the EFPY required for capsule B to go from  $3.23 \times 10^{19}$  n/cm<sup>2</sup> to  $4.12 \times 10^{19}$  n/cm<sup>2</sup> was calculated to be 7 EFPY. *Assuming a 0.95 capacity factor starting in 2002 and the projected removal EFPY of 30.2, the capsule will reach the specified fluence in about 2018.* The projections resulting from these estimations are shown in the table below. The plant is responsible for formal determination of the planned withdrawal year, based on the latest RPV fluence data.

*Id.* at 6-23.

<sup>53</sup> See You-tube video of June 22, 2022 DCISC meeting to discuss May 18-19, 2022 Fact-Finding Report, <https://www.youtube.com/watch?v=g93Un6DnRul&t=77s>.

<sup>54</sup> See discussion in Section A.2.a above and Petition at 21.

commencing renewed operations.<sup>55</sup> PG&E did not install the cooling towers because it planned to close the reactors.<sup>56</sup> Now PG&E is seeking to operate the reactors past the Water Board's deadline for installing cooling towers, in violation of the Clean Water Act. Both PG&E and the NRC should address this issue in their environmental analyses.<sup>57</sup>

The accident risk posed by an earthquake in the fault-laced region where the Diablo Canyon reactors are sited raises additional significant environmental concerns. Indeed, these seismic safety concerns were a key issue raised by Friends of the Earth in the NRC's proceeding for review of PG&E's 2009 application to relicense Diablo Canyon and remain unresolved. Friends of the Earth dropped its legal challenge in exchange for the 2016 settlement with PG&E to close Diablo Canyon in 2024/25<sup>58</sup>, but PG&E's renewed attempt to re-license Diablo Canyon has now revived the organization's concerns. While the NRC purports to address the seismic risks of operating Diablo Canyon for a renewed license term in its recently-issued draft revised Generic Environmental Impact Statement ("GEIS") for License Renewal, that analysis is in draft form and has not been commented on or finalized.<sup>59</sup> Nor is the GEIS a substitute for NEPA's specific application to the licensing decision with which NRC may soon be faced.

Finally, when PG&E eventually submits its updated license renewal application, the NRC must offer the public an opportunity for a hearing.<sup>60</sup> It is reasonable to expect that members of the public will request a hearing on any number of safety and environmental issues, including the safety of the Diablo Canyon pressure vessels, the environmental impacts of earthquake-caused accidents, and the impacts of Diablo Canyon's once-through cooling system on the marine environment. And that hearing must be completed before the NRC issues any renewed licenses for Diablo Canyon.<sup>61</sup>

Given the enormity of the amount of information that PG&E must submit and that must be reviewed by the NRC and offered to the public for a hearing, it is inconceivable that the Staff

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<sup>55</sup> See [https://www.pgecorp.com/corp\\_responsibility/reports/2021/pl04\\_water.html](https://www.pgecorp.com/corp_responsibility/reports/2021/pl04_water.html).

<sup>56</sup> *Id.*

<sup>57</sup> *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 N.R.C. 43, 150-53 (2008).

<sup>58</sup> See Joint Proposal by Pacific Gas and Electric Company, Friends of the Earth, Natural Resources Defense Council, *et al.* to Retire Diablo Canyon Nuclear Power Plant at Expiration of the current Operating Licenses and Replace it With a Portfolio of GHG Free Resources at 16 (filed before the California Public Utilities Commission ("CPUC") June 20, 2016).

<sup>59</sup> See NRC News Release, NRC Proposing Revision to Generic Environmental Impact Statement for Renewing Reactor Licenses (Jan. 24, 2023), <https://www.nrc.gov/cdn/doc-collection-news/2023/23-004.pdf>.

<sup>60</sup> See Gibson Letter at 2-3.

<sup>61</sup> 10 C.F.R. § 2.340(a)(2)(i); *Union of Concerned Scientists II*.

could complete these processes in the ten and twenty-month period that will be afforded if PG&E submits a revised license application by the end of 2023.<sup>62</sup>

In fact, the period for review of the application and public hearings may be even shorter than predicted in the Gerfen Letter. PG&E has already pulled back on its commitment to submit a complete license renewal application in late 2023. In the Gerfen Letter, PG&E committed to submitting, by the end of 2023, “supplemental information relevant to both the safety and environmental reviews to account *for any material new information and guidance* since the cessation of the [original license renewal review].”<sup>63</sup> But in the viewgraphs presented by PG&E during its meeting with the Staff, PG&E vaguely asserted that by December 2023, it would submit “an update” to the license renewal application – not a complete update, as previously promised.<sup>64</sup> PG&E also revealed that it could not even *obtain*, let alone evaluate, one key piece of relevant data – a coupon from the Unit 1 reactor vessel – until “Fall 2023.”<sup>65</sup> During the meeting, a PG&E representative stated that PG&E would not be able to complete and submit an analysis of the coupon until sometime in 2024.<sup>66</sup>

Therefore, because it is so highly unlikely that the NRC Staff can timely make the statutorily-required safety and environmental findings required for license renewal, or to complete the hearing process, the NRC Staff must deny PG&E’s exemption request. To grant the exemption would constitute an abdication of the NRC’s statutorily mandated duties under the Atomic Energy Act and NEPA.

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<sup>62</sup> PG&E attempts to minimize the obstacles to a prompt environmental review by asserting that its exemption request “complies with all parts of Part 51 and NEPA.” PG&E Response to Petition at 25. But the bases for PG&E’s claim are legally invalid. First, PG&E asserts that its license renewal application “will entail a full environmental review.” *Id.* But that review will not be NEPA-compliant if it is completed *after* PG&E begins to operate the reactors under an extended license renewal term. The NEPA review – including preparation of PG&E’s updated Environmental Report, issuance of a draft supplemental EIS for comment, publication of a final EIS, and hearings on the EIS – cannot possibly be completed within ten or even twenty months of receiving PG&E’s updated license renewal application.

Second, PG&E asserts that “[m]ultiple pages” of its exemption request “address environmental considerations to the full extent required by Part 51 and NEPA.” PG&E Response to Petition at 25. In fact, however, the Gerfen Letter contains virtually no discussion of substantive environmental considerations. Instead, PG&E claims to qualify for a “categorical exclusion” from the requirement to prepare even an environmental assessment. Gerfen Letter, Enclosure 2 at 7-8. As discussed above in Section A.2.b., this claim is entirely without merit.

<sup>63</sup> Gerfen Letter, Enclosure 1 at 6 (emphasis added).

<sup>64</sup> PG&E Viewgraphs at 7.

<sup>65</sup> *Id.* at 20.

<sup>66</sup> *See* Petition at 21.



**B. PG&E Has No Basis to Assert That Continued Operation of the Diablo Canyon Reactors Will Not Pose an Undue Risk to Public Health and Safety.**

PG&E has no basis for its assertion that “the continued operation of [the Diablo Canyon reactors] will not present an undue risk to public health and safety.”<sup>67</sup> And therefore it cannot satisfy the second prong of 10 C.F.R. § 50.12(a)(1). As discussed above in Section A.3, PG&E has spent the past six years preparing to close the Diablo Canyon reactors by 2024 and 2025. These preparations have included obtaining exemptions which allowed PG&E to forego investments in the safe future operation of Diablo Canyon. In 2022, PG&E also failed to carry out the removal of a coupon from the Unit 1 pressure vessel that would have provided timely and essential information regarding the potential for reactor vessel embrittlement.<sup>68</sup> PG&E has now scheduled the removal of the coupon for late 2023, without obtaining approval from the NRC Staff for this alteration in measures the NRC Staff has deemed necessary for safe operation during the license renewal term.

The Gerfen Letter does not address any of these changes to Diablo Canyon’s licensing basis or matters that the NRC previously approved in the 2011 SER for license renewal; nor does the Gerfen Letter describe how they will be resolved before the Diablo Canyon reactors begin their terms of extended operation in 2024 and 2025. Instead, PG&E simply observes that “PG&E will need to satisfy applicable regulatory requirements in connection with the preparation and submittal of a sufficient [license renewal application].”<sup>69</sup> PG&E’s empty assurances are utterly inadequate to satisfy the Atomic Energy Act or NEPA. As discussed below in Section D, they are also inconsistent with NRC precedents.

While the second prong of Section 50.12(a)(1) does not explicitly mention environmental impacts, the Organizations respectfully submit that it is appropriate to consider whether continued operation of Diablo Canyon would pose environmental risks. As discussed above, for example, extended operation of the Diablo Canyon reactors is not covered by a valid Clean Water Act permit, and therefore PG&E and the NRC must evaluate the environmental impacts of the once-through cooling water system on the marine environment. In the absence of such an evaluation, the NRC has no basis for concluding that the environmental impacts to marine organisms of continuing to operate Diablo Canyon are insignificant.

Similarly, the risk of an earthquake-caused accident and radiological release is a potentially significant adverse environmental impact that is currently unresolved. The NRC’s evaluation of earthquake impacts is presented in an appendix to the draft revised License Renewal GEIS, on which the NRC has neither taken public comment nor published a final analysis.<sup>70</sup>

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<sup>67</sup> Gerfen Letter, Enclosure 2 at 4.

<sup>68</sup> See discussion in Section A.3 above.

<sup>69</sup> *Id.*

<sup>70</sup> See discussion above in Section A.3.

The Gerfen Letter does not address these major environmental issues, and therefore it does not demonstrate that the Diablo Canyon licenses can be extended without significant adverse impacts to the environment.

Accordingly, PG&E has failed to satisfy the second prong of 10 C.F.R. § 50.12(a)(1). This alone constitutes sufficient grounds for denial of PG&E's exemption application.

### **C. PG&E'S Exemption Request Conflicts with Established NRC Precedents.**

Through its license renewal regulations, and through the consistently careful and conservative review of requests for exemptions from the timely renewal rule, the NRC has generally ensured compliance with Section 103(d)'s requirement for safety and environmental findings and completion of hearings prior to the expiration of operating licenses. And for the most part, the NRC has avoided conflicts between the timely renewal rule and Section 103(c)'s requirement that 40-year operating licenses may be extended only by renewing them.

The NRC's primary tool for ensuring statutory compliance has been to conservatively establish a requirement to file reactor license renewal applications five years in advance of license expiration in order to gain the protection of the timely renewal doctrine.<sup>71</sup> As a result, the NRC has needed to invoke the timely renewal doctrine to allow post-license-expiration of reactors in only one proceeding: Indian Point.<sup>72</sup> Even in that case, however, the licensee had applied for renewal in 2007, more than five years in advance of either reactor's expiration date.<sup>73</sup> And because the license renewal application was filed so far in advance, the NRC was able to issue the Safety Evaluation Report ("SER") and Supplemental Environmental Impact Statement ("SEIS") before the operating licenses for the Units 2 and 3 reactors expired.<sup>74</sup> Completion of these major reviews for Diablo Canyon Units 1 and 2 in the ten months PG&E proposes for Unit 1 and twenty months for Unit 2 cannot be reconciled with thorough safety and environmental reviews.

Thus, PG&E's exemption application proposes NRC action that would put it far afield of its

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<sup>71</sup> Final Rule, Nuclear Power Plant License Renewal, 64,943 (Dec. 13, 1991) ("License Renewal Rule").

<sup>72</sup> See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-15-6, 81 N.R.C. 340, 343 n.2 (2015) ("*Indian Point*").

<sup>73</sup> *Id.*; <https://www.nrc.gov/reactors/operating/licensing/renewal/applications/indian-point.html#schedule>.

<sup>74</sup> See <https://www.nrc.gov/reactors/operating/licensing/renewal/applications/indian-point.html#schedule> (demonstrating that the NRC issued the SER and SEIS before the operating license dates). The licensee also committed to address all outstanding items in the SER before the extended term of operation began. See, e.g., Note from Reginald W. Mitchell, NRC Assistant for Operations, OEDO, to Commissioners' Assistants re: Timely Renewal for Indian Point Nuclear Generating Unit No. 2 (Apr. 30, 2013) (ML13120A256).

conservative approach to the timing of license renewal applications.

PG&E's exemption request is also grossly inconsistent with all other NRC exemption decisions for reactor license renewal applications. To the Organizations' knowledge, the NRC has never granted an exemption to the timely renewal rule that would allow it less than three years to complete its safety and environmental reviews and adjudicatory hearings for a license renewal application. In each of five NRC Staff decisions cited by PG&E in support of its exemption request, the Staff approved a new application deadline of *at least three years* prior to the license expiration date.<sup>75</sup> Each decision rested on the same conclusion: three years "provides sufficient time for the NRC to perform a full and adequate safety and environmental review, and for the completion of the hearing process."<sup>76</sup> In other words, the Staff based each decision in each case on the expectation that the NRC would complete the essential elements of the license renewal review -- the safety evaluation, the NEPA review, and the adjudicatory hearing process -- *before* the operating licenses expired. Not a single one of these decisions anticipated or raised a concern that the exemption would lead to the extension of a commercial reactor operating license beyond the operating license termination date.

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<sup>75</sup> NRC Exemption Notice for Clinton Power Station, Unit 1 (July 11, 2019) (ML19193A015) ("Clinton Exemption Notice"); NRC Exemption Notice for Dresden Nuclear Power Station (March 15, 2022) (ML21305A018) ("Dresden Exemption Notice"); NRC Exemption Notice for R.E. Ginna Nuclear Power Plant (Apr. 14, 2021) (ML21063A015) ("Ginna Exemption Notice"); NRC Exemption Notice for Nine Mile Point Nuclear Station, Unit 1 (Apr. 9, 2021) (ML21061A068) ("Nine Mile Point Exemption Notice"); NRC Exemption Notice for Perry Nuclear Power Plant, Unit No. 1 (July 13, 2020) (ML20171A292) ("Perry Exemption Notice"). *See also* PG&E Response at 23 n. 85.

PG&E's other example of exemptions for a research reactor is inapplicable because the Atomic Energy Act imposes no operating license term limits on research reactors. *See* discussion above at 3 and note 11.

<sup>76</sup> Clinton Exemption Notice at 6, Dresden Exemption Notice at 6, Ginna Exemption Notice at 6, Nine Mile Point Exemption Notice at 6, Perry Exemption Notice at 7.

Moreover, in each of these five cases, the licensee applied for an extension *before* the operating license had entered the five-year period in which the application would be untimely.<sup>77</sup> Here, in contrast, PG&E applied for an exemption only two years before the operating license for Unit 1 expires; and furthermore has stated that it would be impossible to submit a complete license renewal application until at the earliest late 2023, less than 10 months before the Unit 1 operating license expires.

The Oyster Creek Exemption Notice provides an instructive example of an exemption decision-making process in which (a) the applicant filed an exemption application after the timely renewal deadline had passed and (b) both the applicant and the NRC Staff were careful to ensure that all safety and environmental reviews and the hearing process would be complete prior to the date when the operating license was due to expire.<sup>78</sup> There, AmerGen Energy Company, LLC (“AmerGen”) applied for an exemption four months after passing the NRC’s deadline for filing a timely renewal application, stating that it had not been in a sound financial position at the time its license renewal application was due, but that it had subsequently “determined that it would seek renewal of its operating license.”<sup>79</sup> AmerGen committed to submitting a license renewal application by July 2005, 44 months (almost four years) before the expiration of its operating license application.<sup>80</sup>

Mindful that this filing date permitted a shorter time than provided by 10 C.F.R. § 2.109(b) for

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<sup>77</sup> The following table illustrates how far in advance of the timely renewal deadline the licensees filed their exemption requests in the cases cited by PG&E:

Reactor Name	License Expiration Date	Deadline for Timely Renewal Application	Date of Exemption Application
Clinton	2027	2022	2018
Dresden	2029/2031	2024/2026	2021
Ginna	2029	2024	2020
Nine Mile Point	2029	2024	2020
Perry	2026	2021	2020

<sup>78</sup> NRC Exemption Notice for Oyster Creek Nuclear Generating Station (Aug. 10, 2004) (“Oyster Creek Exemption Notice”) (ML042960164) (“Oyster Creek Exemption Notice”). Despite the applicability of the Oyster Creek Exemption Notice to PG&E’s circumstances, PG&E failed to cite it in either the Gerfen Letter or the Response to Petition.

<sup>79</sup> *Id.* at 1.

<sup>80</sup> *Id.* at 4.

the NRC Staff's safety and environmental reviews, AmerGen further requested that the NRC issue the exemption:

subject to the condition that it becomes effective only if, 6 months prior to expiration of the existing facility operating license, the license renewal proceeding is ongoing and a renewed operating license for OCNGS has not been issued by the NRC and, only if by that time, the NRC staff has issued both an OCNGS draft supplemental environmental impact statement (SEIS) and an OCNGS safety evaluation report (SER) with open items.<sup>81</sup>

The NRC Staff granted AmerGen's exemption request, stating that 44 months would provide "ample time" for a "full and adequate review."<sup>82</sup>

Ultimately, the NRC completed its safety and environmental reviews of the Oyster Creek license renewal and the hearing process before the operating license for the reactor expired.<sup>83</sup> The hearing was completed only a day before the original license period expired.<sup>84</sup> Thus, the NRC ensured that Oyster Creek would not operate for even one day after the expiration date of its operating license until the NRC had completed its safety and environmental reviews and completed the hearing process.

Finally, in the case of Oyster Creek and each of the other five exemption decisions cited by PG&E, the Staff found that the licensee had demonstrated the existence of "special circumstances" related to practical and economic hardship.<sup>85</sup> But in no case did the Staff find that the hardship to the licensee could justify an exemption that would extend an operating license past its termination date, as requested here by PG&E. Instead, the Staff made a separate safety-based determination that it could complete the license renewal review process before expiration of the operating license. As required by the Atomic Energy Act, costs or practical hardship to the

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<sup>81</sup> *Id.* at 2.

<sup>82</sup> *Id.* at 4. *See also id.* (the 44-month review period "is expected to provide sufficient time for performance of a full and adequate safety and environmental review, and completion of the hearing process.").

<sup>83</sup> *See AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235 (2009).

<sup>84</sup> *Id.* at 1. The Commission's decision is dated April 8, 2004, a day before the expiration of the Oyster Creek operating license.

<sup>85</sup> Oyster Creek Exemption Notice at Clinton Exemption Notice at 1-2, 6-7; Dresden Exemption Notice at 6-7; Ginna Exemption Notice at 6-7; Nine Mile Point Exemption Notice at 6-7; Perry Exemption Notice at 7-8. In each case, the Staff concluded that "[c]ompliance with § 2.109(b) would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted."

licensee did not enter into that determination.<sup>86</sup>

Thus, in no case has the Commission issued an exemption to the timely renewal rule for a reactor license renewal application without completing the safety and environmental findings required by the Atomic Energy Act and NEPA. By ensuring that safety findings could be made in a timely way, the NRC also provided a legal basis to conclude that the requested exemption would not pose an unreasonable risk to public health and safety, as required by 10 C.F.R. § 50.12(a)(1).

**D. Because PG&E Has Failed to Satisfy the Two Atomic Energy Act-Based Threshold Requirements of 10 C.F.R. § 50.12(a)(1), the “Special Circumstances” Claimed by PG&E Are Irrelevant and May Not Be Considered.**

As discussed above, PG&E cannot satisfy these threshold safety and environmental requirements for issuance of an exemption under 10 C.F.R. § 50.12(a)(1). Therefore, the Staff need not go any farther than to make that determination. Given that PG&E cannot satisfy the NRC’s non-discretionary statutory and regulatory standards for issuance of an exemption, there is no need for an exercise of discretion to consider PG&E’s additional claim to the “special circumstances” of “undue hardship or other costs.”<sup>87</sup> Therefore, the Staff should deny PG&E’s request for an exemption.

Even assuming for purposes of argument that the NRC Staff could or should consider the “special circumstances” proffered by PG&E<sup>88</sup>, the proposed exemption is not justified. As PG&E explains, the “special circumstances” leading to its exemption request were created by the California Legislature in passing S.B. 846 which “reversed the prior CPUC decision approving the retirement of [Diablo Canyon] Units 1 and 2 by the expiration of the operating licenses.” But nothing in S.B. 846 encourages PG&E to cut corners on safety or environmental protection or to seek special treatment by the NRC. To the contrary, S.B. 846 requires PG&E to “conduct an updated seismic assessment” as a loan condition.<sup>89</sup> S.B. 846 also contemplates that as a result, PG&E may be ordered to make “seismic safety upgrades” that are too expensive to justify the loan.<sup>90</sup>

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<sup>86</sup> *Union of Concerned Scientists*, 824 F.2d at 114 (D.C. Cir. 1987) (“In setting or enforcing the standard of ‘adequate protection’ [required by Section 182(a) of the Atomic Energy Act], the Commission may not consider the economic cost of safety measures.”)

<sup>87</sup> See Gerfen Letter, Enclosure 2 at 5-7 (citing 10 C.F.R. § 50.12(a)(2)(iii)).

<sup>88</sup> Gerfen Letter, Enclosure 2 at 5.

<sup>89</sup> Cal. Pub. Resources Code § 25548.3(c)(13), for example, requires PG&E to “conduct an updated seismic assessment” as a loan condition. Section 25548.3(c)(9) also contemplates that the NRC may order “seismic safety upgrades” that are too expensive to justify the loan. And Section 712.8(c)(2)(B) also allows the California Public Utilities Commission (“CPUC”) to disallow extended operation if seismic upgrades or “deferred maintenance” are too expensive.

<sup>90</sup> Cal. Pub. Resources Code § 25548.3(c)(9).

S.B. 846 also assumes that the NRC will not cut corners, but rather will engage in the comprehensive license renewal review process required by the Atomic Energy Act and its regulations. The State law even goes so far as to anticipate that safety upgrades ordered by the NRC may make Diablo Canyon too expensive to warrant operation for another five years beyond 2024 and 2025.<sup>91</sup>

Finally, S.B. 846 does not count on the NRC's issuance of a renewed license to PG&E, or even commit to the necessity of Diablo Canyon's extended operation. The statute specifically contemplates the potential that the NRC will deny PG&E's application.<sup>92</sup> It also retains the option of restoring the current retirement dates of 2024 and 2025 for the Diablo Canyon reactors if the CPUC determines that adequate "new renewable energy and zero-carbon resources" are already installed and available.<sup>93</sup> Finally, S.B. 846 limits the "option" of state-authorized continued operation of Diablo Canyon to five years, based on the expectation that the urgent need perceived by the legislature will have been addressed by an increased supply of renewable energy by then.<sup>94</sup>

Accordingly, S.B. 846 itself – whose passage is PG&E's only justification for its exemption request – establishes unequivocally that the State has no desire to override or short-circuit the conduct or the outcome of the NRC's safety and environmental review, whether or not it prevents uninterrupted operation of Diablo Canyon after its operating license expiration dates. The State of California has not yet even decided whether continued operation of the reactors is needed, and in any event it rejects the proposition that the plants are safer because they might be needed. The NRC should do the same.

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<sup>91</sup> Cal. Pub. Resources Code § 712.8(c)(2)(B) (allowing the CPUC to disallow extended operation if seismic upgrades or "deferred maintenance" are too expensive).

<sup>92</sup> Cal. Pub. Resources Code § 712(c)(2)(E).

<sup>93</sup> Cal. Pub. Resources Code § 712(c)(2)(D). The CPUC has begun the process of making that determination. *See* CPUC Order Instituting Rulemaking to Consider Potential Extension of Diablo Canyon Power Plant Operations in Accordance with Senate Bill 846 (January 20, 2023).

<sup>94</sup> Cal. Pub. Resources Code § 25548(b).

## **CONCLUSION: THE NRC MUST DENY PG&E'S EXEMPTION REQUEST**

PG&E has used the past six years to take an array of actions that now preclude it from obtaining an exemption from the timely renewal deadline of five years, or even the three years considered by the Staff as sufficient to complete the steps necessary for license renewal prior to the expiration of an operating license:

- PG&E sought and received NRC approval to withdraw its license renewal application.
- For six years, PG&E stopped investing its time and resources in the license renewal process because it had decided on closure and decommissioning on the operating license expiration dates.
- PG&E sought exemptions from NRC requirements that would have prepared it for license renewal.

In addition, the NRC took action at PG&E's request:

- The NRC dropped Diablo Canyon from its license renewal docket.
- The NRC issued exemptions to PG&E to allow it to forego financial investments in a license renewal period it had no intention of entering.
- The NRC Staff ended the environmental review that it had barely begun.

Based on PG&E's own representations to the NRC in the Gerfen Letter and in its December 8 presentation to the NRC Staff, it is now clear that these momentous steps by PG&E and the NRC cannot be reversed in time to allow a timely or lawful license renewal decision by the NRC. Therefore, the NRC Staff must reject PG&E's exemption request.

If PG&E submits a license renewal application in late 2023 as it currently proposes, the NRC Staff should review it in accordance with its procedures for safety and environmental reviews. The Staff must also offer the public a hearing opportunity as it deliberates. In the very likely event that the review and hearing processes extend beyond the operating license termination dates for Diablo Canyon Units 1 and/or 2, the NRC must require PG&E to shut down the reactors unless and until the review and hearing processes are finished and the NRC approves the renewal of PG&E's operating licenses.



Sincerely,

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