

March 28, 2023

Hon. Christopher T. Hanson, Chair  
Hon. Jeff Baran, Commissioner  
Hon. David A. Wright, Commissioner  
Hon. Annie Caputo, Commissioner  
Hon. Bradley L. Crowe, Commissioner  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
By email c/o NRC Secretary Brooke Poole Clarke, [NRCExecSec@nrc.gov](mailto:NRCExecSec@nrc.gov)

SUBJECT: *Request for Reversal of Exemption from Timely Renewal Regulation  
10 C.F.R. § 2.109(b) to Allow Indefinite Extended Operation of Diablo  
Canyon Reactors Units 1 and 2, Docket Nos. 50-275, 50-323*

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

We write on behalf of San Luis Obispo Mothers for Peace, Friends of the Earth, and the Environmental Working Group (“Organizations”), to request you to review and reverse an unlawful and unprecedented decision by the NRC Staff to grant Pacific Gas & Electric (“PG&E”) an exemption from 10 C.F.R. § 2.109(b), the NRC’s timely renewal rule for reactor license renewal applications.<sup>1</sup> The exemption would allow PG&E to operate the two Diablo Canyon reactors past their license expiration dates of November 2, 2024 (Unit 1) and August 26, 2025 (Unit 2) for an indefinite period if, by December 31, 2023, PG&E files a license renewal application that the Staff deems “sufficient for docketing.”<sup>2</sup> Thus, the Staff has given itself an inadequate time period to conduct a completeness review of PG&E’s license renewal application, conduct safety and environmental reviews, and complete a public hearing process before expiration of the first Diablo Canyon license.

The purpose of this letter is two-fold. First, we urge you to correct the Staff’s action, because it flagrantly violates the Atomic Energy Act (“AEA”) and the National Environmental Policy Act (“NEPA”) and NRC precedents interpreting those statutes, compromises the integrity of NRC’s license extension review process, and jeopardizes public health and safety and the environment. Second, we write in pursuit of our full administrative remedies, as will be required if we must seek judicial review.

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<sup>1</sup> Notice of Exemption Issuance, 88 Fed. Reg. 14,395 (March 8, 2023) (“Exemption Decision”).

<sup>2</sup> *Id.*, 88 Fed. Reg. at 14,399.

## REQUEST TO REVERSE EXEMPTION DECISION

In finding that the Diablo Canyon exemption is “authorized by law” and “will not present an undue risk to the public health and safety” under 10 C.F.R. §§ 54.15 and 50.12<sup>3</sup>, the Staff has violated multiple provisions of the AEA and NEPA that are designed to protect public health and safety and the environment during an extended term of operation of Diablo Canyon. Under the exemption, PG&E may now operate the Diablo Canyon reactors for an indefinite period beyond their initial 40-year license terms, without the safety and environmental reviews specifically required by the AEA, NEPA and NRC implementing regulations to support extended operation of a nuclear reactor beyond its initial license term.<sup>4</sup> Permission to operate a power reactor beyond its forty year license life without completing some form of these safety and license reviews explicitly contravenes existing regulations and has never been granted before in any of the 80+ license extensions granted by the NRC.

In reaching this unlawful result, the Staff has bungled basic math and twisted NRC’s regulatory scheme for implementation of the AEA and NEPA statutes beyond recognition.

At the outset, the Staff overstates the amount of time available to review PG&E’s license renewal application before the reactor licenses expire. According to the Staff, if PG&E submits its license renewal application by December 31, 2023, the Staff will have “approximately 11 months” to review it.<sup>5</sup> But the time period elapsing between December 31, 2023 and November 4, 2024 is ten months plus one day. No amount of approximation can stretch a day to a month. Further, the Staff fails to subtract at least one additional month that it will need to determine whether the application is complete.<sup>6</sup> Thus, the Staff will have, at the most, *nine months* to

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<sup>3</sup> *Id.*

<sup>4</sup> *See* Letter from Diane Curran, *et al.* to Lauren K. Gibson re: 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 (Feb. 13, 2023) (“Opposition Letter”).

To a significant extent, the Exemption Decision parrots the arguments made by PG&E in support of its extension request. *See* 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”). Therefore, we will not repeat the legal and factual analyses in the Opposition Letter. Instead, we hereby adopt and incorporate the Opposition Letter into this letter. We also note that the Opposition Letter was copied to you when it was sent to Ms. Gibson.

<sup>5</sup> Exemption Decision, 88 Fed. Reg. at 14,397.

<sup>6</sup> For instance, the Staff’s docketing review for PG&E’s 2009 license renewal application took approximately two months. *See* Notice of Acceptance for Docketing of the Application, Etc., 75 Fed. Reg. 3,493 (Jan. 21, 2010). Given the fact that PG&E’s 20223 application will need to address the reversal of six years’ worth of work to reverse its preparations for license renewal, the upcoming completeness review easily could take more than a month.

review the Unit 1 license renewal application before the reactor reaches its expiration date. By the same token, the Staff will have, at the most, nineteen months – not twenty – to review the Unit 2 license renewal application.

Most egregiously, the Staff's interpretation of the 1991 License Renewal Rule<sup>7</sup> effectively eliminates the five-year requirement in 10 C.F.R. § 2.109(b), leaving no standard at all for time at which applicants must submit license renewal applications. For instance, the Staff makes the astounding assertion that:

There is nothing in the preamble supporting the proposed [License Renewal Rule] or [Final License Renewal Rule] revising 10 CFR 2.109(b) that suggests that applying the timely renewal doctrine to license renewal applications submitted 30 days before the expiration of the license was not authorized by law.<sup>8</sup>

The Staff could only make this assertion by completely disregarding the regulatory context of the 1991 License Renewal Rule. At that point in time, reactor operation had only just reached the point where licensees were considering applications for renewal. Thus, the NRC had never before considered whether application of the timely renewal rule to reactor license renewal applications submitted thirty days before the expiration of a reactor license was authorized by law. The Commission put in place a license extension regimen designed to assure that their duty to protect the public health and safety and the environment was discharged. Adequate time to complete safety and environmental reviews does this. The NRC decided on three years, not ten months or 30 days. As required by the Administrative Procedure Act and principles of fundamental fairness, the agency staff may not invalidate that requirement without notice and comment.

The Staff also completely disregards the fact that the requirement to submit a license renewal application three years before license expiration was not purely discretionary, but designed to satisfy Section 103(c) of the AEA, which limits the term of a reactor license to 40 years, and provides that it may only be extended by renewal.<sup>9</sup> This unique feature of the AEA informed the Commission's determination that reactor license renewal applications should be submitted at least three years in advance in order to ensure that the safety and environmental reviews and the hearing process could be completed before reaching the license expiration date.<sup>10</sup> The Staff's assumption that timely renewal of reactor licenses is equivalent to renewal for any other type of license issued by the NRC for purposes of establishing a "reasonable amount of time to review a license renewal application"<sup>11</sup> is grossly inconsistent with the AEA and NRC's regulatory

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<sup>7</sup> Final Rule, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943 (Dec. 13, 1991) ("License Renewal Rule").

<sup>8</sup> Exemption Decision, 88 Fed. Reg. at 14,397.

<sup>9</sup> License Renewal Rule, 56 Fed. Reg. at 64,961-62 (citing 42 U.S.C. § 2133(c)).

<sup>10</sup> *Id.*, 56 Fed. Reg. at 64,962.

<sup>11</sup> Exemption Decision, 88 Fed. Reg. at 14,397.

interpretation of it.

The Staff's Exemption Decision also disregards all previous reactor exemption decisions by this agency, and thus completely fails to explain its inconsistency with those decisions.<sup>12</sup> While all previous NRC exemption decisions for reactor license renewal applications have explicitly stated that the Staff requires reactor license renewal applicants to submit their applications at least three years before the date of license expiration in order to ensure the timely completion of the NRC's safety and environmental reviews and the hearing process, the Diablo Canyon Exemption Decision completely ignores those precedents. Instead, the Staff cites an irrelevant 18-month "milestone" for completion of license renewal reviews that the Staff developed in response to the Nuclear Energy Innovation and Modernization Act ("NEIMA").<sup>13</sup> Of course, the Diablo Canyon Unit 1 exemption allows only nine months (not the eleven months claimed by the NRC staff) and certainly not the 18-month milestone. Furthermore, these "milestones" were established by the Staff, not the Commission. And the Staff gives no indication that they were established through notice-and-comment rulemaking, as was the License Renewal Rule.

The Staff acknowledges that it cannot complete the safety and environmental review and hearing process in such a short time, instead asserting that all it needs is "sufficient time . . . to determine if any immediate actions need to be taken prior to the licensee entering the period of timely renewal."<sup>14</sup> This newly invented standard smacks of convenience and need to reach an affirmative result, not the systematic safety and environmental review required for reactor license renewal by the AEA, NEPA and NRC regulations. And the Staff completely fails to address how an evaluation of the need for "immediate action" can satisfy the statutory requirement for a public hearing opportunity. The Commission should not allow this unlawfully watered-down standard to stand.

Further, the Staff trivializes the Exemption in a manner that is grossly inconsistent with both the law and the facts. First, the Staff characterizes the Exemption as "administrative in nature" and states that it "does not involve any change to the current operating license."<sup>15</sup> But the Staff capriciously ignores binding precedent that extension of an operating license term is not "administrative" in nature because it poses a "risk of accident with offsite consequences" for the extended period of operation.<sup>16</sup>

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<sup>12</sup> The Staff's previous decisions are documented and discussed in the Opposition Letter at pages 18-22.

<sup>13</sup> Exemption Decision, 88 Fed. Reg. at 14,397(citing Generic Milestone Schedules of Requested Activities of the Commission, <https://www.nrc.gov/about-nrc/generic-schedules.html>7).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, 88 Fed. Reg. at 14,397, 14,398.

<sup>16</sup> Opposition Letter at 13 (citing *Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, LBP-94-35, 40 N.R.C. 180, 188 (1994)). See also *Deukmejian v. NRC*, 751 F.2d 1287, 1312, 1324 (D.C. Cir. 1984) (holding that an extension to the operating license for

Second, the Staff states that it can “leverage insights” from its review of PG&E’s first license renewal application, and thereby “conduct a focused, efficient review of the application.”<sup>17</sup> But the Staff completely fails to acknowledge the huge hurdles to a fast and efficient review that have been created by PG&E’s actions over the past six years. As the Staff has documented in other correspondence with PG&E, the last year that PG&E maintained an up-to-date license renewal application was 2016.<sup>18</sup> In light of its planned retirement of Diablo Canyon, PG&E has not undertaken necessary upgrades and safety updates to ensure reliable future operation. The Staff itself has recognized that to reverse the many decisions and measures taken in preparation for closure and now submit an application to continue operating for twenty more years is an enormous undertaking.<sup>19</sup>

The breadth, complexity and seriousness of safety and environmental issues raised by the proposed re-licensing of Diablo Canyon is notable, including a deteriorating pressure vessel, an existential threat to public health and safety and the environment posed by earthquake risks, and PG&E’s failure to comply with the Clean Water Act’s requirement to install cooling towers on the site. Yet, the Staff downplays the difficulty of addressing those issues in the Staff’s safety and environmental reviews. In fact, the Staff does not even mention that it has not yet begun the environmental review for Diablo Canyon.

Therefore, in addition to egregious factual errors and disregard for the factual circumstances of this case, the Staff’s Exemption Decision violates the AEA and NEPA, disregards agency precedents, and eviscerates the timely renewal regulation for reactor license renewal without notice and opportunity for comment. And as a result, the Exemption Decision also puts public health and safety and the environment at an unacceptable risk. Accordingly, to protect its regulatory integrity and credibility, the Commission must reverse the decision.

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Diablo Canyon, granted by the NRC to compensate for lost time during a period of license suspension, constituted a license amendment).

<sup>17</sup> Exemption Decision, 88 Fed. Reg. at 14,397.

<sup>18</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 at 1 (Jan. 24, 2023) (ML22343A179) (“Gibson Letter”) (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.”).

<sup>19</sup> Opposition Letter at 11-12 (citing Gibson Letter at 1-2).

**EXHAUSTION OF ADMINISTRATIVE REMEDIES  
AND NOTICE OF POTENTIAL FUTURE LEGAL ACTION**

Our second purpose in writing to you is to pursue our full administrative remedies, as may be required if we must seek judicial review. We are aware of no NRC procedures for public participation in exemption decisions, or any mechanism for Commission review of those decisions. Because the exemption decision was made by NRC Staff, we now place our claims directly before the Commission, including the discussion in this letter and the Opposition Letter.

We also hereby inform you of our intent to treat the Exemption Decision as a final decision of this agency, which is subject to challenge in federal court. Therefore, if you do not reverse the underlying decision in thirty days (*i.e.*, by April 27, 2023), we will assume that no changes will be made, and we will consider all available avenues, including litigation, to rectify the legal violations set forth above.

Sincerely,

*s/Diane Curran*

Harmon, Curran, Spielberg, & Eisenberg, L.L.P.

1725 DeSales Street N.W., Suite 500

Washington, D.C. 20036

240-393-9285

[dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

*Counsel to San Luis Obispo Mothers for Peace*

*s/Richard Ayres*

2923 Foxhall Road, N.W.

Washington, D.C. 20016

202-744-6930

[ayresr@ayreslawgroup.com](mailto:ayresr@ayreslawgroup.com)

*Counsel to Friends of the Earth*

*s/Caroline Leary*

Environmental Working Group

1250 I St N.W.

Washington, DC 20005

202-667-6982

[cleary@ewg.org](mailto:cleary@ewg.org)

*Counsel to Environmental Working Group*