

Case No. 23-852

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SAN LUIS OBISPO MOTHERS
FOR PEACE, FRIENDS OF THE EARTH,
AND ENVIRONMENTAL WORKING GROUP

Petitioners,

v.

UNITED STATES NUCLEAR
REGULATORY COMMISSION AND THE
UNITED STATES OF AMERICA,

Respondents,

and

PACIFIC GAS & ELECTRIC COMPANY,

Intervenor.

On Appeal from the Nuclear Regulatory Commission's
Final Agency Decision

PETITIONERS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, Petitioners certify that they are nonprofit organizations that have no parent or subsidiary entities. No Petitioners have stock, and therefore, no publicly held company owns 10 percent or more of its stock.

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JURISDICTIONAL STATEMENT

This case is an appeal from the Nuclear Regulatory Commission’s (“NRC’s”) final agency decision exempting Pacific Gas and Electric (“PG&E”) from compliance with the agency’s timely renewal rule for nuclear reactors. (“Exemption Decision”) 1-ER-003. This appeal was timely filed pursuant to 28 U.S.C. § 2342 because it was docketed on April 28, 2023, within 60 days of the publication of the Exemption Decision on March 8, 2023. 1-ER-003.

This Court has jurisdiction to consider this petition pursuant to the Hobbs Act, 28 U.S.C. § 2342. Under the Hobbs Act, this Court has “exclusive jurisdiction” over “all final orders” issued by the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) that are “made reviewable by section 2239 of title 42.” *General Atomics v. United States Nuclear Regulatory Comm’n*, 75 F.3d 536, 538–39 (9th Cir. 1996) (quoting 28 U.S.C. § 2342(4)). Section 2239 provides for Hobbs Act review of “[a]ny final order entered in any proceeding for the granting, suspending, revoking, or amending of any license . . . , and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees.” 42 U.S.C. §§ 2239(a)(1)(A) & 2239(b)(1).

The Hobbs Act must be “read broadly to encompass all final [NRC] decisions that are preliminary or incidental to licensing.” *General Atomics*, 75 F.3d at 539 (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 736, 745, 746

(1985)). *See also Public Watchdogs v. S. Cal. Edison Co.*, 984 F.3d 744, 761, 767 (9th Cir. 2020) (citing *General Atomics*, 75 F.3d at 539) (explaining that the Hobbs Act encompasses NRC decisions that are “preliminary, ancillary or incidental” to licensing proceedings are reviewable under 42 U.S.C. § 2239(b) and 28 U.S.C. § 2342(4), even if 42 U.S.C. § 2239(a)(1) does not explicitly list them as reviewable actions).

Whether or not the Exemption Decision is labeled as licensing decision, it is reviewable if the decision constitutes an action that is preliminary or incidental to licensing. *See General Atomics*, 75 F.3d at 539 (rejecting the NRC’s argument that the Hobbs Act can only apply to hearings regarding “the granting, suspending, revoking, or amending of any license”).

The Exemption Decision provides PG&E an exemption to the NRC’s Reactor Timely Renewal Rule, which provides that if a nuclear power plant licensee files a sufficient license renewal application “at least 5 years before the expiration of the existing license, the existing license will not be deemed to have expired until the application has been finally determined.” 10 CFR 2.109(b).¹ Per

¹ The text of the Reactor License Renewal Rule provides that:

If the licensee of a nuclear power plant . . . files a sufficient application for renewal of an operating license at least 5 years prior to the expiration of the existing license, the existing license will not be deemed to have expired until the application has been finally determined.

the clear language of the regulation, this decision unambiguously impacts a license because absent an exemption to the Reactor Timely Renewal Rule, PG&E would be unable to continue operating beyond the expiration of its license because it did not make a timely and sufficient application to renew its license five years before its expiration. *See Public Watchdogs*, 984 F.3d at n.7; compare *Brodsky v. NRC*, 578 F.3d 175 (2d Cir. 2009).²

Accordingly, granting an exemption to the Reactor Timely Renewal Rule that allows PG&E to file a license renewal application constitutes a preliminary and incidental decision to licensing that is reviewable by this Court. *See General Atomics*, 75 F.3d at 539.

STATEMENT OF ISSUES

- I. Is the Exemption Decision unauthorized by law because it violates Section 103(a) of the Atomic Energy Act (“AEA”) by extending the Diablo Canyon operating licenses without renewing them or providing assurance that the NRC can and will complete its review before the operating licenses expire?
- II. Is the Exemption Decision unauthorized by law and poses an undue risk to the public health and safety because it violates Sections 182(a) and 103(d) of the AEA by extending the operating terms of the Diablo Canyon reactors

² In *Brodsky*, the Second Circuit Court of Appeals held it did not have Hobbs Act jurisdiction over the review of an Exemption Decision. However, *Brodsky* is distinguishable as it involved the exemption of a fire safety requirement, not an exemption that allows continued operation of reactors past their statutory expiration dates without required licensing action like this case. *Brodsky* also did not cite or otherwise rely on *General Atomics* or *Florida Power & Light Co.*, which are controlling law in this jurisdiction.

without making required safety findings or providing any assurance that they can be made before license expiration?

- III. Is the Exemption Decision unauthorized by law because it violates Section 189(a)(1) of the AEA by depriving petitioners of the opportunity for a license renewal hearing before extended operation begins?
- IV. Is the Exemption Decision unauthorized by law because it violates National Environmental Policy Act (“NEPA”) by allowing Diablo Canyon to operate past the 40-year period evaluated in the environmental impact statement (“EIS”) for initial licensing without a new environmental analysis?
- V. Is the Exemption Decision arbitrary and capricious?

STATUTORY ADDENDUM

In accordance with Ninth Circuit Rule 28-2.7, pertinent statutes and regulations are included in the Addendum to this Brief beginning on Page A-1.

STATEMENT OF THE CASE

1. Introduction

Petitioners seek review of an NRC decision to allow PG&E to continue to operate both Diablo Canyon reactors after their 40-year licenses have expired, despite PG&E’s failure to apply for a license exemption until less than a year before one unit’s license expires and less than two years before the second unit’s license expires. 1-ER-007.

Over the past three decades, the NRC has followed a well-established and reasonable regulatory scheme to ensure that nuclear reactors do not operate past the 40-year operating license terms imposed by Section 103(c) of the AEA without

first undergoing the rigorous safety and environmental review and hearing process required by the Atomic Energy Act (“AEA”) and the National Environmental Policy Act (“NEPA”) for renewal of nuclear reactor operating licenses. 42 U.S.C. § 2133(c); *see* 1991 License Renewal Rule, 2-ER-30, 2-ER-049-50, 2-ER-012. Key to this scheme, the Reactor Timely Renewal Rule requires that applicants seeking protection from being shut down by drawn-out regulatory agency action must apply for renewal of their license at least five years in advance of license expiration. *See* 10 C.F.R. § 2.109(b).

The purpose of the rule is to “provide the NRC reasonable time to review an application for a renewed operating license for a nuclear plant,” 2-ER-049, while protecting applicants from dilatory agency action. Licensees who submit a “sufficient” license renewal application by the five-year deadline receive the protection of the “Timely Renewal Doctrine” in the APA that allows licensees to continue operating beyond the expiration of their license if the NRC has not completed consideration of their license extension application. *See* 5 U.S.C. § 558(c). In some cases, the NRC has extended the protection to applicants who sought license renewal as late as three years before license expiration, but never less.

Here, the time between submission of PG&E’s license renewal application and the license expiration dates is so short that the NRC is unable to provide any

assurance that it can complete its safety and environmental reviews and the hearing process before the licenses expire. As a result, PG&E will be allowed to continue to operate the Diablo Canyon reactors past their statutory 40-year expiration dates without any time limit and without the reviews and hearings designed by Congress under the AEA and NEPA to protect public safety and the environment.

The Exemption Decision thereby fails to satisfy the threshold requirement for an exemption in 10 C.F.R. § 50.12(a)(1) that the exemption is “authorized by law” and does not “present an undue risk to the public health or safety.” To the contrary, the Exemption Decision violates the AEA and NEPA, is arbitrary and capricious under the APA, and unlawfully eviscerates the Reactor Timely Renewal Rule without notice or opportunity to comment.

2. Statement of the Facts

a. Licensing and Environmental Reviews for Diablo Canyon Operations

i. Initial licensing

As required by the AEA, PG&E holds 40-year operating licenses for the Diablo Canyon reactors.³ See 42 U.S.C. § 2133(c). PG&E’s operating license for

³ The NRC originally licensed the Diablo Canyon reactors to operate for forty years beyond the issuance dates of their construction permits. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), 36 N.R.C. 196, 197 (1992). 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

Unit 1 will expire on November 2, 2024; and PG&E’s operating license for Unit 2 will expire on August 26, 2025. 1-ER-005.

ii. 2009 License Renewal Application

As permitted by NRC regulation 10 C.F.R. § 54.17(c), PG&E applied for renewal of the Diablo Canyon licenses in 2009, fifteen years prior to the expiration of the Diablo Canyon Unit 1 operating license. 2-ER-080. The NRC docketed the application, offered an opportunity for a hearing, and described its statutory obligations for review of the application:

Before issuance of the requested renewed licenses, the NRC will have made the findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission’s rules and regulations. In accordance with 10 CFR 54.29, the NRC may issue a renewed license on the basis of its review if it finds that actions have been identified and have been or will be taken with respect to: (1) Managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified as requiring aging management review, and (2) time-limited aging analyses that have been identified as requiring review, such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the current licensing basis (CLB) and that any changes made to the plant’s CLB will comply with the Act and the Commission’s regulations.

Additionally, in accordance with 10 CFR 51.95(c), the NRC will

1970, was licensed to operate until December 9, 2010. *Id.*

PG&E later received NRC approval 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. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), 40 N.R.C. 180 (1994).

prepare an environmental impact statement that is a supplement to the Commission's NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants," dated May 1996.

2-ER-084.

Both San Luis Obispo Mothers for Peace and Friends of the Earth requested hearings on the PG&E application, but NRC denied their requests. *Pacific Gas & Electric Co.* 83 N.R.C. 524 (2016); *Pacific Gas & Electric Co.* 82 N.R.C. 295 (2015).

Upon docketing of PG&E's application, the NRC Staff (NRC) began its license renewal review. But in the spring of 2011, PG&E asked the NRC to suspend further action on its license renewal application pending completion of a seismic study. 2-ER-099.

Two months later, the NRC issued a Safety Evaluation Report ("SER"), "documenting its safety review of the [license renewal] application up to that point." 1-ER-004, 2-ER-101. The SER analyzed only safety information PG&E submitted prior to March 25, 2011. SER at iii, 1-1. 2-ER-103, 2-ER-121. The NRC did not issue any document evaluating the environmental impacts of operating the Diablo Canyon reactors during the proposed license renewal term.

b. Withdrawal of License Renewal Application

On June 21, 2016, PG&E again requested the NRC to suspend its review of

PG&E’s license renewal application. 2-ER-123. On August 11, 2016, based on a settlement agreement between PG&E and an array of environmental organizations and labor unions, PG&E applied to the California Public Utilities Commission (“CPUC”) to retire the Diablo Canyon reactors on their operating license expiration dates. The CPUC approved PG&E’s request in 2018. 2-ER-125. The CPUC later approved the settlement agreement between PG&E and the environmental organizations and labor unions. 3-ER-297.

In 2018, after the CPUC had approved the retirement of the Diablo Canyon reactors, PG&E wrote again to the NRC, this time requesting the NRC to approve PG&E’s withdrawal of its license renewal application “and all associated correspondence and commitments.” 2-ER-206. The NRC approved PG&E’s request and issued a Federal Register notice. 2-ER-208. 2-ER-210.

Between 2016 and 2019, the NRC issued regulatory exemptions to PG&E to relax its requirements for license renewal in light of PG&E’s new plan to close the reactors. *See* 2-ER-203 (exemption from requirement for annual updates to license renewal application), 2-ER-215 (exemption from decommissioning funding regulations).

c. Passage of California Senate Bill 846 and PG&E Request to Review License Renewal Application

In September 2022, at the behest of California Gov. Gavin Newsom, the

California Legislature passed S.B. 846, revoking the CPUC’s approval of the settlement agreement to close Diablo Canyon on its license expiration dates, directing PG&E to request NRC approval of continued operation of the reactors, and granting PG&E a \$1.4 billion loan for that purpose. 2-ER-240.

The Legislature passed S.B. 846 hastily as an “urgency statute,” 2-ER-270, and reserved the right to cancel the loan if safety upgrades imposed by the NRC during the license renewal process proved too costly. Cal. Pub. Util. Code § 712.8(c)(2)(B), 2-ER-261. The Legislature also left itself room to change its decision if the CPUC determines that the State’s forecasts for calendar years 2024 and 2025 “do not show reliability deficiencies if the Diablo Canyon power plant is retired by 2025, or that extending the Diablo Canyon power plant to at least 2030 is not necessary for meeting any potential supply deficiency.” Cal. Pub. Resources Code § 25548.3(c)(5)(D), 2-ER-252. The Legislature also limited the extended operating period to five years. *Id.*, § 25548(b), 2-ER-247.

d. PG&E’s Requests for Resumed Review of Abandoned 2009 License Renewal Application or Exemption From Five-Year Deadline for Submittal of New Application

i. Gerfen Letter

On October 31, 2022, PG&E wrote to the NRC Commissioners and Staff, asking them to “resume review” of PG&E’s withdrawn 2009 license renewal application. 2-ER-271. In the alternative, if the NRC required PG&E to submit a

new license renewal application, PG&E requested an exemption from the timely renewal regulation in 10 C.F.R. 2.109(b). 2-ER-272.

PG&E stated that if the NRC insisted on PG&E submitting a new license renewal application, PG&E would submit, 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].” 2-ER-280. PG&E also asserted that the requested exemption met the six-pronged test for a categorical exclusion from the NEPA requirement for an environmental assessment, including that it posed no significant increase in environmental impacts and involved only “scheduling requirements which are administrative.” 2-ER-290-92.

ii. NRC Staff Meeting with PG&E Regarding License Renewal

On December 8, 2022, the Staff held a meeting with PG&E to discuss the topic of license renewal. PG&E presented a set of viewgraphs seeking to justify NRC’s resumed renewal of PG&E’s 2009 license renewal application, or in the alternative, an exemption from the timely renewal regulation in 10 C.F.R. § 2.109(b). 3-ER-415.

PG&E’s viewgraphs significantly altered one key representation that PG&E had made in the Gerfen Letter. 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].” 2-ER-280 (emphasis added). In contrast, the viewgraphs asserted that by December 2023 PG&E would submit “an update” to the license renewal application – not a complete update, as previously promised. 3-ER-421. PG&E also clarified that it could not even *obtain*, let alone evaluate, one key piece of relevant data – a “coupon” from the Unit 1 reactor vessel necessary to evaluate its integrity to hold the reactor core during the license renewal term – until “Fall 2023.” 3-ER-434.

e. Petitioners’ Objections and NRC Decisions.

The NRC did not provide any notice or opportunity to comment or seek a hearing on the requests made by PG&E in the Gerfen Letter. Nor did the NRC give any indication of how long it would take to review PG&E’s request. Thus, Petitioners responded immediately with two letters to the Staff challenging the lawfulness of PG&E’s requests. 3-ER-394. After the Staff failed to respond, Petitioners followed up with a formal petition to the NRC Commissioners. 3-ER-438.

f. NRC Denial of PG&E’s Request to Resume Review of 2009 Application

By letter dated January 24, 2023, the NRC denied PG&E’s request to resume review of PG&E’s withdrawn license renewal application on the grounds

that “resuming this review would not be consistent with our regulations or the [NRC’s] Principles of Good Regulation and that there is no compelling precedent to support your request to resume the review of your withdrawn application.” 3-ER-494, 3-ER-495. The letter also stated that the Staff was continuing to evaluate PG&E’s exemption request and planned to respond in March. 3-ER496.

g. Petitioners’ February 2023 Letter

By letter dated February 13, 2023, Petitioners renewed their objection to PG&E’s exemption request. Letter from Petitioners to NRC 3-ER-499. Petitioners demonstrated that PG&E did not satisfy the NRC’s standard for issuance of an exemption in 10 C.F.R. § 50.12(a)(1) because the requested exemption was not “authorized” by either the AEA or NEPA. 3-ER-500. Petitioners also demonstrated that PG&E did not satisfy 10 C.F.R. § 50.12(a)(1)’s requirement to show that the proposed extension would not “present an undue risk to the public health and safety.” 3-ER-515.

Petitioners asserted that the requested exemption violated both the AEA and NEPA because the short time period between PG&E’s promised submission of a new license renewal application (Fall 2023) and the expiration dates of the Diablo Canyon reactor licenses (November 2024 and August 2025) was inconsistent with the preamble to the License Renewal Rule and NRC precedents for exemptions from the 5-year deadline for license renewal applications. 3-ER-509-14. Petitioners

also demonstrated that the proposed filing date of December 31, 2023 gave the NRC a grossly inadequate amount of time to evaluate the safety and environmental impacts of license renewal and complete any necessary hearing process, especially given that PG&E had spent the last six years preparing to shut down the reactors rather than continue to operate them. Additionally, Petitioners relied on the Staff's own summary of the significant amount of safety-related and environmental information that PG&E must submit to the NRC to satisfy the regulatory requirement for a license renewal application that is "sufficient" to undergo license renewal review. 3-ER-509-10 (citing 3-ER-271).

In addition, Petitioners charged that PG&E's environmental documents are outdated with respect to significant environmental impacts, including earthquake risks in the fault-laced region where the Diablo Canyon reactors are sited. 3-ER-512-13. Further, Petitioners highlighted PG&E's mandate to address the environmental impacts of the antiquated once-through cooling system for the twin reactors – which PG&E had yet to replace despite an order to do so by the State Water Board. 3-ER-512-13. Given these undeniably significant environmental impacts, Petitioners also objected to PG&E's characterization of the requested exemption as merely "administrative" in nature and therefore qualifying it for a categorical exclusion from NEPA compliance under 10 C.F.R. § 51.21. 3-ER-508-09.

Finally, Petitioners asserted that it is “reasonable to expect that members of the public will request a hearing on any number of safety and environmental issues” regarding PG&E’s license renewal application, “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.” 3-ER-513-14. Under the circumstances, Petitioners charged that “it is inconceivable that the [NRC] Staff 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.” 3-ER-513-14.

h. Exemption Decision

On March 2, 2023, the NRC issued the Exemption Decision, approving PG&E’s exemption request for “protection” from the timely renewal rule if PG&E submitted its license renewal application by December 31, 2023. 1-ER-007.

First, the NRC addressed the question of whether the issuance of the exemption was “authorized by law” under 10 C.F.R § 50.12(a)(1). The agency asserted that because the exemption “constitutes a change to the schedule by which the licensee must submit its application for license renewal,” it is “administrative in nature” and “does not involve any change to the current operating license.” 1-ER-005.

Second, the NRC averred that the exemption would not present an “undue

risk to public health and safety” under 10 C.F.R. § 50.12(a)(1). Assuming that PG&E would file its license renewal application by December 31, 2023, the Staff asserted that it would have approximately eleven months before expiration of the Unit 1 license to conduct a docketing review, post a hearing notice, and “conduct the necessary safety and environmental reviews.” 1-ER-005.

The NRC also asserted that eleven months is “less than the 18-month generic milestone schedule for the staff’s review of a license renewal application,” 1-ER-005 (citing ER-232), as if the Staff had shaved off only seven months from the time deemed necessary to complete a license renewal review. But the Staff failed to note that (a) the NRC established the “generic milestone” of 18 months in a 2021 policy document unrelated to the License Renewal Rule and that (b) the NRC had determined in the notice-and-comment rulemaking for the License Renewal Rule that it requires at least three years to complete safety and environmental reviews and the hearing process for license renewal. *See* 2-ER-018, 2-ER-049.⁴

Moreover, the Exemption Decision conspicuously failed to state that the agency could or would complete *any* of these steps needed for license renewal before the expiration dates of either Unit 1 or Unit 2, other than to review the

⁴ The Staff also failed to note that the amount of time that will expire between December 31, 2023 and the Unit 1 operating license expiration date of November 2, 2024 is ten months, not eleven months.

application for sufficiency and docket it. Instead, the NRC claimed that it would have “sufficient time” before expiration of the Units 1 and 2 licenses to “determine if any immediate actions need to be taken prior to the licensee entering the time of timely renewal.” 1-ER-005. Further, the Staff found that it “will be able to leverage insights from its partial review of the previously submitted and subsequently withdrawn Units 1 and 2 applications to conduct a focused, efficient review of the application.” *Id.*

Thus, the only prediction the Staff made in the Exemption Decision was that it could make the docketing decision that would *commence* the license renewal process. And the only commitment the Staff would make to ensure safety and environmental protection during the extended term of operation was to maintain oversight of the Diablo Canyon reactors under the terms of its original operating license for an indefinite period until the agency could finish its license renewal review and hearing process at some indeterminate time in the future.

i. Petitioners’ Request for Commission Reversal

By letter dated March 23, 2023, Petitioners requested the NRC Commissioners reverse the Staff’s Exemption Decision. 3-ER-499. The Commissioners denied Petitioners’ request by letter dated April 6, 2023. 3-ER-530.

j. Petition for Review

On April 28, 2023, Petitioners petitioned this court for review of the Exemption

Decision, charging that it violates the AEA, NEPA, and the APA. 3-ER-533.

STANDARD OF REVIEW

Under the APA, agency decisions may be set aside if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Public Citizen v. NRC*, 573 F.3d 916, 923 (9th Cir. 2009); 5 U.S.C. § 706(2)(A). In NEPA and AEA cases, in reviewing “primarily legal questions” under the APA, this Court applies a standard of reasonableness. See *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1028 (9th Cir. 2006) (citing *Alaska Wilderness Recreation and Tourism Ass’n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995)); *Ka Makani’o Kohala Ohana, Inc. v. Water Supply*, 295 F.3d 955, 959 n.3 (9th Cir. 2002)).

When reviewing an agency’s application of its own regulation, the agency's interpretation of its regulation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. *Alaska Ctr. for the Env’t v. United States Forest Serv.*, 189 F.3d 851, 857 (9th Cir. 1999).

To determine whether agency action is arbitrary or capricious, a court must consider “whether the decision was based on a consideration of the relevant factors and whether there has been clear error of judgment.” *Id.* at 859 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989)). This Court will reverse the NRC under the arbitrary and capricious standard if:

[T]he agency has relied on factors that Congress has not intended it to consider, has entirely failed to consider an important aspect of the problem, or has offered an explanation for that decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Public Citizen, 573 F.3d at 923.

SUMMARY OF THE ARGUMENT

Petitioners challenge the lawfulness of the NRC's effective abandonment of a long-established AEA-based regulation for the safe and orderly renewal of reactor licenses for the sole purpose of accommodating a last-minute change in plans by a single reactor licensee, PG&E.

Six years ago, reasoning that long-term operation of the Diablo Canyon reactors was not economically viable, PG&E decided to retire them on their operating license expiration dates of November 2, 2024 and August 26, 2025. PG&E obtained approval for retirement of the reactors from the CPUC and then dropped its application to the NRC for renewal of the operating licenses, which had been pending since 2009. Thus, PG&E stopped the arduous and expensive process of preparing the reactors for license renewal.

As a result, both the government and the public dropped their vigilance over the process of seeking license renewal. To assist PG&E in changing its course, the NRC granted PG&E multiple exemptions allowing the relaxation of previous

commitment and measures to prepare for extended operation. Petitioners, long-concerned about the safety of operating the reactors in an earthquake fault-laced region on the California coast, likewise relaxed their constant vigilance and stopped using the NRC hearing process to raise concerns about the safety of the reactors. Thus, PG&E, the NRC, and the public prepared for closure of the reactors.

Unexpectedly, in September 2022, PG&E's plans to retire the Diablo Canyon changed abruptly when the California Legislature passed S.B. 846, revoking the CPUC's approval of the Diablo Canyon reactors' retirement, directing PG&E to seek renewal of its operating licenses for another five years and providing a \$1.4 billion loan for that purpose. Thereby impelled by the Legislature, PG&E implored the NRC to either revive its review of PG&E's abandoned 2009 license renewal application or allow PG&E to file a new one by the end of 2023. When the NRC rejected PG&E's attempt to reanimate its 2009 application, the company moved to begin the relicensing process again.

However, PG&E was too late with filing a new license renewal application to obtain the protection of the NRC's Reactor Timely Renewal Rule, which provides timely renewal protection to licensees who file their license renewal applications more than five years before their operating licenses expire. At the end of 2023, PG&E will be less than a year from the expiration of the Unit 1 license

and less than two years from the expiration of the Unit 2 license.

When the NRC issued its Reactor Timely Renewal Rule, however, the agency determined that it needed at least three years before expiration of reactor operating license terms to complete the safety and environmental reviews and hearing process needed for license renewal. This requirement is not discretionary; rather, it was the result of the AEA's limitation of initial operating licenses to 40-year terms, as well as its requirement that extension of a 40-year reactor operating license could be accomplished by renewal.

The NRC thus had no lawful grounds for exempting PG&E from the Reactor Timely Renewal Rule. By operation of the AEA and NEPA, if the NRC fails to reach a decision on license renewal in the period before the expiration of the licenses for the Diablo reactors, PG&E is bound to shut down the reactors on their operating license expiration dates and wait for agency action.

Notwithstanding, the NRC disregarded the law and issued the exemption. In so doing, the NRC bypassed the AEA and NEPA and gutted the Reactor Timely Renewal Rule without explanation or justification, in violation of both statutes and the APA.

Thus, the NRC upended the careful balance the Reactor Timely Renewal Rule had struck between a licensee's interest in an expeditious and orderly license renewal process protected by the APA's Timely Renewal Doctrine, and the

public's interest in a safe and healthful environment that the AEA and NEPA were adopted to protect. Having reasonably balanced those interests for decades through the Reactor Timely Renewal Rule's five-year deadline for license renewal applications and limited exemptions to the rule that nevertheless provided sufficient time to conduct a license renewal rule and a hearing before license expiration, the NRC had no lawful justification to revoke the regulatory policy achieving that balance.

Finally, while the NRC claimed to serve the interest of the State of California by issuing the Exemption Decision, nothing in S.B. 846 suggests that the State wishes to elevate the convenience of uninterrupted operation of Diablo Canyon over its interest in the protection of its citizens afforded by the NRC's compliance with the AEA and NEPA. While the passage of S.B. 846 was done hastily, as an "urgency statute," 2-ER-270, the Legislature never encouraged PG&E to bypass the NRC's normal regulatory processes. Instead, the State assumed that the NRC would conduct a thorough license renewal review. The State also left open the option of canceling the loan to PG&E if continued operation turned out to be imprudent or too expensive.

The State's reliance on the NRC's regulatory process proved to be misplaced because the Exemption Decision allows PG&E to operate indefinitely past its operating license expiration dates without a safety or environmental review or

hearing, violating AEA and NEPA requirements for protection of the State's citizens.

Petitioners now ask this Court to correct the NRC's legal errors and restore public confidence in the NRC's regulatory integrity by vacating and reversing the Exemption Decision.

ARGUMENT

I. THE EXEMPTION DECISION IS UNAUTHORIZED BY LAW BECAUSE IT VIOLATES SECTION 103(a) OF THE ATOMIC ENERGY ACT BY EXTENDING THE DIABLO CANYON OPERATING LICENSES WITHOUT RENEWING THEM OR PROVIDING ASSURANCE THAT THE NRC CAN AND WILL COMPLETE ITS REVIEW BEFORE THE OPERATING LICENSES EXPIRE.

a. The Atomic Energy Act Prohibits Extension of Reactor Operating Licenses by Any Means Other Than Renewal.

Section 103(a) of the AEA unambiguously limits the term for any commercial reactor operating license to 40 years:

(c) License period. Each such license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, but not exceeding forty years from the authorization to commence operations, and may be renewed upon the expiration of such period.

42 U.S.C. § 2133(c). The 40-year limit is unique to commercial reactors; no other type of NRC license (including research reactors) has a statutory limit. 2-ER-049.

The AEA also prohibits extension of a reactor license by any means other than

renewal. *Id.* (“Congress intended a [reactor] license to have a life of no more than 40 years.”).

b. The Exemption Decision Unlawfully Extends the Terms of the Diablo Canyon Operating Licenses Without Renewing Them or Finding That They Can Be Renewed Before They Expire.

In violation of Section 103(a), the Exemption Decision provides that if by December 31, 2023, PG&E submits an updated license renewal application the Staff finds “acceptable for docketing,” the operating licenses for the Diablo Canyon reactors “will not be deemed to have expired until the NRC has made a final determination on whether to approve the license renewal application.” 1-ER-004. The Exemption Decision thereby authorizes PG&E to continue operating the Diablo Canyon reactors past their 40-year term limits with no assurance that the NRC can or will complete the license renewal review before the reactor licenses expire.⁵ Accordingly, the Exemption Decision is unlawful.

c. The APA Timely Renewal Doctrine May Not Be Applied to Effectively Repeal Section 103(a) of the AEA.

The NRC claims that the APA’s Timely Renewal Doctrine in 5 U.S.C. § 558(c) gives it discretion to allow extended operation of the Diablo Canyon

⁵ The Exemption Decision imposes a condition on continued operation of the reactors that the Staff must find the application is “sufficient for docketing.” 1-ER-007. Importantly, this condition relates to the commencement of a license renewal review, not its completion.

reactors past their 40-year license terms if PG&E files a license renewal application as little as 30 days before expiration of its operating licenses. (1-ER-005). Section 558(c) contains a provision governing the renewal of licenses granted by administrative agencies. Under Section 558(c), “[w]hen the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.” 5 U.S.C. § 558(c).

While the APA gives the NRC discretion to set the deadlines for reactor license renewal applications, its exercise of discretion may not be used to “repeal by implication” the protection of the AEA against unreviewed operation nuclear reactors past their 40-year license terms. *See Watt v. Alaska*, 451 U.S. 259, 267 (1981) (quoting *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974) (“repeals by implication are disfavored.”)). As the Supreme Court held in *Watt*, “[w]e must read the statutes to give effect to each if we can do so while preserving their sense and purpose.” 451 U.S. at 267 (citing *Mancari*, 417 at 551); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940). The NRC’s Reactor Timely Renewal Rule “gives effect” to both Section 103(a) of the AEA and the Timely Renewal Doctrine by establishing five-years as a “reasonable” deadline for submission of commercial reactor license renewal applications that will allow the agency to complete license

renewal reviews for commercial reactors before expiration of their operating licenses, while protecting license applicants from dilatory NRC action. 2-ER-049. The Exemption Decision would deprive Section 103(a) of its “effect” and effectively repeal it by allowing the Diablo Canyon reactors to operate past their expiration dates with no assurance that the NRC can complete its safety and environmental license renewal reviews and public hearings before the operating licenses expire.

Further, the Exemption Decision is inconsistent with the purpose of the Timely Renewal Doctrine, which is to protect licensees from dilatory agency conduct in reviewing license renewal applications:

[The Timely Renewal Doctrine is] necessary because of the very severe consequences of the conferring of licensing authority upon administrative agencies. The burden is upon private parties to apply for licenses or renewals. If agencies are dilatory in either kind of application, parties are subjected to irreparable injuries unless safeguards are provided. The purpose of this section is to remove the threat of disastrous, arbitrary, and irremediable administrative action.

92 Cong. Rec. 2149 (1946), *reprinted in* Administrative Procedure Act, 79th Cong., Legislative History 1944–46 at 298 (1946) (comments of Sen. Pat McCarran).⁶

⁶ The NRC also recognizes that the purpose of the Timely Renewal Doctrine is to avoid penalizing licensees for tardy NRC reviews. As stated in the exemption decision for the Clinton nuclear plant:

The underlying purpose of this “timely renewal” provision in the APA is to protect a licensee who is engaged in an ongoing licensed activity and who has complied with agency rules in applying for a renewed or new license from facing license expiration as the result of delays in

For example, in the license renewal proceeding for the Indian Point nuclear reactors, the licensee availed itself of the Reactor Timely Renewal Rule by applying for license renewal more than five years before its operating licenses were due to expire. *Entergy Nuclear Operations, Inc.*, 81 N.R.C. 340, 342 n.2 (2015). At the time the licenses expired, the NRC was still engaged in a hearing process with multiple parties, including the State of New York, that involved an “enormous effort.” *Id.* at 343. Therefore, two years later, the Staff was still in the process of supplementing its safety and environmental review documents. *Id.* The reactors remained in operation despite the NRC’s delay in completing the hearing process and the safety and environmental reviews. *Id.*

Here, in contrast to Indian Point, the licensee’s own vacillations have created the risk of injury to itself. When PG&E first filed its license renewal application in 2009, the company obviously qualified for the protection of Reactor Timely Renewal Rule. The NRC timely commenced its review. Then, at PG&E’s request, the NRC twice suspended its review. Finally, upon PG&E’s independent decision to close the reactors for financial reasons, the NRC approved the complete and final withdrawal of PG&E’s license renewal application. 2-ER-210. Only after

the administrative process. adopts the same reasoning in its exemption decisions.

2-ER-213.

passage of S.B. 846, close upon the expiration dates of the Diablo Canyon operating licenses, did PG&E ask the NRC for the exemption that would allow it to keep operating the reactors while it filed a new application for license renewals.

Nothing in the Timely Renewal Doctrine can be interpreted to allow the subversion of the AEA for PG&E's convenience. Certainly, the State of California, whose interests the NRC claims to be serving in the Exemption Decision (1-ER-006), has made it clear that it does not seek to elevate expediency over safety. Indeed, in passing S.B. 846, the State provided that continued operation would depend in part on the outcome of the NRC's license renewal review. As NRC recognized in the preamble to the License Renewal Rule, timely renewal protection is a "benefit" designed to ensure that the process of license renewal is orderly and fair to regulated businesses. 2-ER-049. The NRC may not lawfully rely on License Renewal Rule to subvert the laws designed to protect the public and the environment from significant health risks and impacts. As required by the AEA, the PG&E reactors must close on their expiration dates, to be reopened only if and when the NRC approves license renewal and completes the public hearing process.

II. THE EXEMPTION DECISION IS UNAUTHORIZED BY LAW AND POSES AN UNDUE RISK TO THE PUBLIC HEALTH AND SAFETY BECAUSE IT VIOLATES SECTIONS 182(a) AND 103(d) OF THE ATOMIC ENERGY ACT BY EXTENDING THE OPERATING TERMS OF THE DIABLO CANYON REACTORS WITHOUT MAKING REQUIRED SAFETY FINDINGS OR PROVIDING ANY

ASSURANCE THAT THEY CAN BE MADE BEFORE LICENSE EXPIRATION.

- a. Because Section 103(c) Prohibits Extension of the Diablo Canyon Operating Licenses by Any Means Other Than Renewal, the NRC May Not Approve Operation of the Reactors Beyond their Operating License Expiration Dates Unless the Agency Has Made Safety Findings for License Renewal or Finds it Has a Reasonable Opportunity to Make Them Before License Expiration.**

As discussed above in Section I, the only way the NRC may extend the operating license terms for the Diablo Canyon reactors is to renew them. Before the NRC may renew those licenses, Section 182(a) of the AEA requires that it must find that the continued operation of the reactors will provide “adequate protection to the health and safety of the public.” 42 U.S.C. § 2232(a). Similarly, Section 103(d) prohibits the NRC from renewing the Diablo Canyon licenses if it would be “inimical” to “the public health and safety.”⁷ At the time of license renewal, the NRC requires “a formal review of age-related degradation unique to license renewal . . . to ensure that operation during the period of extended operation will not be inimical to the public health and safety.” 2-ER-033.

- b. The Exemption Decision Violates the AEA and Poses an Undue Risk to Public Health and Safety Because It Permits Extended Operation of the Diablo Canyon Reactors Without Completing a License Renewal Safety Review or Finding the Agency Has Sufficient Time to Complete the Review Prior to the Expiration of the Diablo Canyon Operating Licenses.**

⁷ These standards are equivalent. *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 109 (D.C. Cir. 1987).

The Exemption Decision is unsupported by any findings regarding the safety of operating the Diablo Canyon reactors during the license renewal term; nor would that be possible, given that PG&E has yet to submit its license renewal application. The NRC also fails to represent that it will have sufficient time prior to expiration of the operating licenses to perform the safety review required to support any such findings prior to expiration of the operating licenses.

Instead, the Exemption Decision generally asserts that the NRC will have “sufficient time” before expiration of the Units 1 and 2 licenses to “determine if any immediate actions need to be taken prior to the licensee entering the time of timely renewal” and that it “will be able to leverage insights from its partial review of the previously submitted and subsequently withdrawn Units 1 and 2 application to conduct a focused, efficient review of the application.” 1-ER-005. These assertions fall far short of the findings the AEA and NRC mandate, 2-ER-049, to allow operation beyond the terms of the operating licenses. Therefore, the Exemption Decision is unauthorized by the AEA and presents an undue risk to public health and safety.

III. THE EXEMPTION DECISION IS UNAUTHORIZED BY LAW BECAUSE IT VIOLATES SECTION 189(a)(1) OF THE AEA BY DEPRIVING PETITIONERS OF THE OPPORTUNITY FOR A LICENSE RENEWAL HEARING BEFORE EXTENDED OPERATION BEGINS.

The Exemption Decision violates the AEA by allowing PG&E to operate the Diablo Canyon reactors beyond the statutory 40-year terms of their operating licenses without completing a hearing on PG&E's license renewal application or providing any assurance that a hearing can be completed before the Diablo Canyon operating licenses expire. As required by Section 189(a)(1) of the AEA, the hearing is part of the license renewal process that must be conducted and completed before the Diablo Canyon operating licenses may be renewed. 42 U.S.C. § 2239(a)(1); *Brooks v Atomic Energy Comm'n*, 476 F.2d 924, 927 (D.C. Cir. 1973).

In violation of Section 189(a)(1), the Exemption Decision makes no representation that a hearing on PG&E's license renewal application can or will be completed before the Diablo Canyon operating licenses expire. The Exemption Decision states only that "should the application be docketed, the NRC will provide an opportunity for the public to seek a hearing and review the application using its normal license renewal review processes and standards to determine whether the application meets all applicable regulatory requirements." 1-ER-007. Thus, the Exemption Decision states only that it will *commence* the hearing

process once PG&E's license renewal application is docketed, whenever that may be.⁸

The NRC's failure to indicate that the license renewal proceeding can be completed before the Diablo Canyon reactors pass their operating license expiration dates is unsurprising in light of the underlying record. Even if the docketing review required by 10 C.F.R. § 2.101 takes only two months as it did for PG&E's 2009 license renewal application, *see* 2-ER-276 and n.2, the NRC is unlikely to issue a hearing notice until the beginning of March 2024 – only nine months from the expiration of the operating license for Diablo Canyon Unit 1. By operation of NRC regulations, the process for submitting hearing requests, responses and replies will take another three months (92 days). *See* 10 C.F.R. §§ 2.309(b)(3), 2.309(i), 2.309(i)(1), 2.309(i)(2). The Atomic Safety and Licensing Board may then take 45 additional days or more to rule on hearing requests. 10 C.F.R. § 2.309(j).

Thus, after PG&E files its license renewal application, over six months (197 days) may pass before the actual hearing process even begins, taking the license renewal proceeding to at least June 2024 for a ruling on whether a hearing will go forward – only five months before the expiration of Unit 1's license. Moreover,

⁸ The only apparent deadline for a docketing determination is November 2, 2024, the expiration date for the Unit 1 operating license. The NRC does not commit to even attempting a docketing decision any earlier.

given that the NRC will not begin a hearing until after the Safety Evaluation Report and Environmental Impact Statement are complete, it is highly unreasonable to expect that the NRC could complete the hearing process before the Unit 1 operating license expires in November 2024, and potentially not before the Unit 2 operating license expires in August 2025. *Statement of Policy on Conduct of Adjudicatory Proceedings*, 48 N.R.C. 18, 21 (1998). Indeed, the Exemption Decision makes no such representation and therefore violates Section 189(a)(1) of the AEA.

IV. THE EXEMPTION DECISION IS UNAUTHORIZED BY LAW BECAUSE IT VIOLATES NEPA BY ALLOWING DIABLO CANYON TO OPERATE PAST THE 40-YEAR PERIOD EVALUATED IN THE EIS FOR INITIAL LICENSING WITHOUT A NEW ENVIRONMENTAL ANALYSIS.

The Exemption Decision violates NEPA by allowing PG&E to operate past the statutory 40-year operating license term limit without completing the environmental review required for license renewal prior to the license expiration dates. The NRC must complete the Diablo Canyon-specific supplement to the GEIS for License Renewal required by 10 C.F.R. § 51.95(c) before the extended operation term begins.

a. NEPA Requires an Environmental Impact Statement for All Reactor Licensing Decisions, Including Renewal.

NEPA requires all federal agencies to document the environmental impacts

of proposed major federal actions to achieve two goals: (1) obligating the agency to “consider every significant aspect of the environmental impact of a proposed action;” (2) ensuring “that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *San Luis Obispo Mothers for Peace*, 449 F.3d at 1020 (quoting *Balt. Gas & Elec. Co. v. NRDC.*, 462 U.S. 87, 97 (1983)). For purposes of NEPA, “federal actions” include the “expansion or revision of ongoing programs.” *Andrus v. Sierra Club*, 442 U.S. 347, 362–63 (1979) (citing S. Rep. No. 91-296, p. 20 (1969)). Agencies must comply with NEPA *before* making decisions with a potentially significant environmental impact. *Robertson v. Methow Valley Citizens Association*, 490 U.S. 332, 347 (1989).

The primary tool for a NEPA analysis is an EIS, a “detailed statement” explaining “the environmental impact of the proposed action.” 42 U.S.C. § 4332(2)(C). An EIS is required if a proposed action “might” significantly affect the environment. *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)). 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.” *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 232 (D.D.C. 2003). Consistent with this

standard, NRC regulations require preparation of an EIS for both initial reactor licensing and license renewal. 10 C.F.R. §§ 51.20(b)(2), 51.95(b) & 51.95(c).

i. The Exemption Decision Violates NEPA Because it is Unsupported by an EIS That Evaluates the Environmental Impacts of Operating the Diablo Canyon Reactors Past Their Operating License Expiration Dates.

As discussed above in Section I, Section 103(a) of the AEA provides that the only way the NRC may extend an operating license past its expiration date is to renew it. 42 U.S.C. § 2133(c). Any NRC decision to renew the Diablo Canyon licenses must be supported by an EIS. 10 C.F.R. § 51.20(b)(2). The Exemption Decision cites no environmental analysis to support the renewal of the Diablo Canyon operating licenses, nor does it represent that such a review can be completed before expiration of the licenses. Therefore, the Exemption Decision violates NEPA.

ii. The Exemption Decision Does Not Qualify for a Categorical Exclusion from NEPA.

Instead of discussing how and when the NRC will comply with NEPA, the Exemption Decision claims that the exemption “meets the provisions of the categorical exclusion in 10 C.F.R. § 51.22(c)(25).” 1-ER-006. According to the NRC, the categorical exclusion should apply because the nature and risks of operating the Diablo Canyon reactors will not change between the initial license term and the extended operating term. *Id.* The NRC’s reasoning is erroneous in

several key respects.

First, the Exemption Decision authorizes operation of the Diablo Canyon reactors past the date when, by statute, they are required to terminate their operations. As a matter of law, the Diablo Canyon reactors may operate beyond the expiration of their initial 40-year licenses only if the licenses are extended through the license renewal process that is subject to NEPA requirements.

Second, the NRC itself has acknowledged that the safety and environmental risks operating nuclear reactors pose after their initial license terms are “unique” due to the deteriorating effects on safety equipment caused by aging, 2-ER-033, and these conditions call for a “formal” review and aging management measures. *Id.* Therefore, the NRC’s own License Renewal Rule precludes NRC from declaring that the environmental impacts of extended operation remain the same after 40 years as before.

Finally, the regulatory history of 10 C.F.R. § 51.22(c)(25) shows that the NRC intended the categorical exclusion from NEPA to apply only 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.

2-ER-072, 2-ER-075.

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. 2-ER-089, 2-ER093 (noting that “the term ‘procedural’ could be misconstrued in this context to include the requirement for licensees to implement procedures for substantive requirements”). 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 may be permitted to operate for an undetermined number of years beyond their statutory operating license expiration dates, constantly exposing the public and the environment to radiological accident risks that have not been evaluated for their significance and for which no alternatives have been evaluated. For the foregoing reasons, the Exemption Decision violates NEPA because it is unsupported by an EIS that evaluates the environmental impacts of the operating of Diablo Canyon reactors past their operating licenses.

V. THE EXEMPTION DECISION IS ARBITRARY AND CAPRICIOUS.

- a. The Exemption Decision is Arbitrary and Capricious Because, Without Justification, it Repudiates the Purposes of the Reactor Timely Renewal Rule.**

The Exemption Decision is arbitrary and capricious because it provides no rational basis for repudiating the purpose of the Reactor Timely Renewal Rule, which is to provide the NRC with a “reasonable” amount of time to complete the safety and environmental reviews and hearing process required for renewal of reactor licenses, prior to their expiration dates. 2-ER-049. As stated when the License Renewal Rule was adopted:

The Commission believes that the 30-day deadline for timely renewal currently contained in § 2.109 would not provide the NRC a reasonable time to review an application for a renewed license for a nuclear power plant. Because the review of a renewal application will involve a review of many complex technical issues, the NRC estimates that the technical review would take approximately 2 years. Any necessary hearing could likely add an additional year or more.

2-ER-049. Thus, in proposing the Reactor Timely Renewal Rule, the NRC established a reasonable basis for enforcing a three-year application deadline for a licensee to invoke the protection of the rule. 2-ER-018, 2-ER-049. In the Final Rule, the NRC changed the deadline to five years to make it consistent with other deadlines related to plant closure. 2-ER-049. Licensees who meet this deadline with a “sufficient” license renewal application will be given the “benefit” of timely renewal protection. *Id.*

While the NRC has granted some exemptions to the Reactor Timely Renewal Rule, in no case has it granted timely renewal protection for filing of a license renewal application less than three years before the operating license

expiration date. Additionally, in no case has NRC failed to support the exemption decision with a finding that 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.”⁹

The Exemption Decision repudiates the Reactor Timely Renewal Rule and NRC precedents in four key respects.

i. New and Unsupported Rationale for Breaching the Five-Year Application Deadline.

First, the decision states that there is “nothing in the preamble” to the License Renewal Rule suggesting that applying the minimum 30-day period in 5 U.S.C. § 558(c) was “not authorized by law” (1-ER-005), although the Exemption Decision admits that it appears the NRC intended the Reactor Timely Renewal Rule to provide that the “final determination on a license renewal application would typically be made before the current operating license expired.” *Id.*

With this revision of the rationale for the Reactor Timely Renewal Rule, the Exemption Decision erroneously treats the five-year deadline as a purely

⁹ See, e.g., NRC Exemption Notice for Clinton Power Station, 2-ER-212; NRC Exemption Notice for Dresden Nuclear Power Station, 2-ER-236; NRC Exemption Notice for R.E. Ginna Nuclear Power Plant, 2-ER-228; NRC Exemption Notice for Nine Mile Point Nuclear Station, Unit 1, 2-ER-224; NRC Exemption Notice for Oyster Creek Nuclear Generating Station, 2-ER-070; NRC Exemption Notice for Perry Nuclear Power Plant, Unit No. 1, 2-ER-220.

discretionary deadline that could be reduced to thirty days without causing any AEA violation. This new and unsupported rationale is inconsistent with the preamble to the License Renewal Rule, which explicitly acknowledged that reactor operating licenses are limited by Section 103(a) of the AEA to 40 years and may only be extended by renewal. 56 Fed. Reg. at 64,691-92.¹⁰ Moreover, as discussed above, in every single exemption decision extending the deadline for timely license renewal applications, the NRC has found that it has “sufficient time” to complete its license renewal review and hearing process. *See supra*, Fn. 9.

ii. Abandonment of Commitment to Timely Safety and Environmental Reviews.

Second, inconsistent with the License Renewal Rule and NRC precedents for issuing exemptions to the Reactor Timely Renewal Rule, the Exemption Decision contains no assurance that the NRC can complete its license renewal review and hearing process before the Diablo Canyon operating licenses expire. Instead, the NRC asserts that it will have “sufficient time” before expiration of the Units 1 and 2 licenses to “determine if any immediate actions need to be taken prior to the licensee entering the time of timely renewal” and that it “will be able to leverage insights from its partial review of the previously submitted and

¹⁰ While the preamble does not explicitly state that the NRC may not set a deadline for license renewal applications that provides an unreasonably short period of time to meet the statutory deadline for license renewal decisions, it is implicit.

subsequently withdrawn Units 1 and 2 application to conduct a focused, efficient review of the application.” 1-ER-005. However, the License Renewal Rule makes it clear that the license renewal review that must be completed before the operating license expiration dates is both “formal” and “complex.” 2-ER-033, 2-ER-049, respectively. Emergency or shorthand reviews would not suffice under the rationale of the License Renewal Rule.

iii. Disregard of “Unique” Safety Issues Posed by Extended Operation.

Third, the Exemption Decision’s reliance on ongoing “oversight” of Diablo Canyon to “ensure adequate protection” is inconsistent with the fundamental premise of the License Renewal Rule that operation of nuclear reactors after 40 years raises “unique” safety concerns that are not covered by initial operating licenses. As the Commission explained:

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. The Commission believes that the discipline of a formal integrated assessment of age-related degradation unique to license renewal is *necessary*.

2-ER-033 (emphasis added). Thus, to satisfy the AEA’s requirement for adequate protection of public health and safety, the Commission established mandatory requirements for “a formal review of age-related degradation unique to license renewal” to “ensure that operation during the period of extended operation will not be inimical to public health and safety.” *Id.* By relying on agency oversight of the Diablo Canyon reactors’ operation under their existing operating licenses, without ensuring that the “unique” and “critical” safety challenges posed by extended operation will be addressed by a “formal” license renewal review prior to the commencement of extended operation, the NRC implicitly repudiates the rationale of the License Renewal Rule and is arbitrary and capricious.

iv. Abandonment of Commitment to Complete Hearing Before License Expiration.

Finally, the Exemption Decision completely abandons the commitment made in the License Renewal Rule and all previous exemption decisions to provide adequate time for the completion of the hearing process before the expiration of the initial license terms of reactors. Instead, the Exemption Decision vaguely states that a hearing notice will be provided “[s]hould the application be docketed.” 1-ER-007. The NRC thus makes no commitment to even attempt to complete the hearing before the licenses expire. Indeed, the NRC does not even commit to *docket* the application before the licenses expire.

b. The Exemption Decision Unlawfully Revokes the Reactor Timely Renewal Rule Without Notice and Opportunity for Comment.

The NRC's Exemption Decision, allowing PG&E to operate beyond the expiration of its 40-year initial license without an amended license, effectively modifies its "Timely Renewal" rule and past practice respecting exemptions. Therefore, it is effectively a rulemaking subject to the procedural requirements of the APA and the AEA.

When an agency promulgates a rule, it will be set aside as "arbitrary and capricious" if there are "no findings and no analysis . . . to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962). While owing deference to the factual findings of expert agencies, the courts take a "hard look" at the agency's reasoning and rationale, to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

Likewise, when an agency rescinds a rule in favor of a contradictory policy, the Supreme Court has held that the rescission or modification is subject to the same "hard look" arbitrary and capricious review as when the agency first adopts a rule. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile*

Ins. Co., 463 U.S. 29, 41 (1983). An agency changing its course must supply a reasoned analysis, just as it does when adopting a rule. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

Section 189(a) of the AEA provides that the NRC shall grant a hearing when requested “in any proceeding for the issuance or modification or rules and regulations dealing with the activities of licensees.” The terms “proceeding,” “modification” and “dealing with the activities of licensees” have been construed broadly, so that the NRC cannot avoid its obligations by how it characterizes an action. For example, an “interim rule” that excised from all operating licenses the compliance deadline established by an earlier order “is plainly a ‘proceeding’ for the ‘amending of [a] license’ within the meaning of section 189(a), since it excised from all operating licenses the compliance deadline established by the 1980 Order.” *Union of Concerned Scientists v. Nuclear Regulatory Comm’n.*, 711 F.2d 370, 380 (D.C. Cir. 1983).

The Exemption Decision for Diablo Canyon in effect rescinds the NRC’s five-year requirement for obtaining protection against delayed renewal of a license, as well as its past practice with respect to all exemptions, while offering no reasoned explanation for its drastic abandonment of a duly adopted regulation and practice. Prior to the Exemption Decision, it was clear that to get the benefit of the agency’s Reactor Timely Renewal Rule, a licensee must apply for a license

renewal at least five years before expiration of its initial license and that even exemptions were unavailable unless the license renewal application was filed at least three years before expiration. Now, as a general matter, the agency claims – without offering a reasoned basis for such a change – that an application only 30 days before expiration would qualify any licensee for an exemption from the statutory 40-year limit on initial operating licenses. 1-ER-005.

By abandoning the rationale for the Reactor Timely Renewal Rule, the NRC has effectively rescinded 10 CFR § 2.109(b) and its associated exemption policy and asserted that it will henceforth grant Timely Renewal protection to applicants filing to renew their licenses as little as 30 days before the expiration of their licenses. By failing to provide support in the record, notice and comment rulemaking, or an opportunity for a hearing regarding its rescission and replacement of the Reactor Timely Renewal Rule, the Exemption Decision fails the tests of *Overton Park*, *Burlington Truck Lines*, and *Motor Vehicle Manufacturers Ass'n*. and is therefore arbitrary and capricious and violates the public participation requirements of Section 189(a)(1) of the AEA.

c. The Exemption Decision is Arbitrary and Capricious Because it Ignores the Record Before the Agency.

The Exemption Decision is arbitrary and capricious because it ignores information put before it by NRC Staff, PG&E, and Petitioners showing that it is

highly unlikely, if not impossible, for the NRC to complete its safety and environmental reviews and hearing process before the expiration of the Unit 1 and 2 operating licenses.

First, as recognized by the NRC Staff, PG&E's own actions and inactions over the past six years while it prepared to close the reactors permanently created hurdles to a prompt NRC review and hearing process. In denying PG&E's request to review its abandoned 2009 license renewal application, the NRC created a stark picture:

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 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.

3-ER-495. In addition, 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.” *Id.*¹¹

There may be other relevant exemptions or comparable regulatory actions, but PG&E has provided no accounting of them. PG&E has also failed to address the question of whether it will seek any exemptions because 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).

The Exemption Decision also ignores information PG&E submitted itself indicating that PG&E may be delayed in submitting significant portions of its license renewal application. While PG&E initially promised the NRC it would “account for any material new information and guidance” since the cessation of the NRC’s license renewal review, 2-ER-28, more recently it reduced that commitment to a mere “update.” 3-ER-421. In addition, PG&E admitted that it could not obtain, let alone evaluate, a key test of the Unit 1 pressure vessel until the Fall of 2023. 3-ER-421.

¹¹ 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. 2-ER-203. The NRC also exempted PG&E from limits on its withdrawals from the decommissioning fund. 2-ER-215.

Finally, the Exemption Decision disregards substantial information the Petitioners submitted regarding the significant amount of information and issues that must be reviewed before the NRC can make a decision regarding renewal of PG&E's license, including:

- PG&E's failure to provide any information on maintenance activities that it may have stopped or relaxed based on the imminent closure of the Diablo Canyon reactors 3-ER-499 (3-ER-512); and
- Significant environmental concerns raised by the continued operation of the Diablo Canyon reactors, including the environmental impacts of Diablo Canyon's antiquated once-through cooling system, which PG&E was scheduled to replace with a closed-cycle system that was never installed after PG&E decided to close the reactors on their operating license expiration dates (3-ER-512-13).

Accordingly, the Exemption Decision is arbitrary and capricious because it does not address the question of how these multiple significant and complex safety and environmental issues, arising largely out of PG&E's 2016 decision to close the reactors and abandon its plans for renewed operation, now impede a timely license renewal review and hearing process by the NRC.

d. The Exemption Decision is Arbitrary and Capricious Because the Finding of Special Circumstances is Unsupported.

As discussed above, the Exemption Decision fails to satisfy the threshold statutory standards for an exemption in 10 C.F.R. § 50.12(a)(1). Therefore, the court need not review the question of whether granting the exemption was justified by “special circumstances” such as “undue hardship or other costs.” Yet, it is noteworthy that the principal factor the Exemption Decision cites – the California Legislature’s passage of S.B. 846 – does not support the granting of the exemption, for the simple reason that the Legislature assumed that the NRC would complete a license renewal review before the Diablo Canyon operating licenses expire, and that the results of the NRC’s review would inform the Legislature and State agencies whether the Diablo Canyon reactors can operate safely beyond their license renewal terms. Cal. Pub. Resources Code § 25548.3(c)(9) contemplates that the NRC may order “seismic safety upgrades” that are too expensive to justify the loan. 2-ER-253. Cal. Pub. Util. Code 712.8(c)(2)(B) also allows the California Public Utilities Commission (“CPUC”) to disallow extended operation if seismic upgrades or completion of “deferred maintenance” are too expensive. 2-ER-261.

Thus, S.B. 846 assumes that the NRC will not cut corners and engage in the comprehensive license renewal review process required by the AEA and the agency’s safety and environmental regulations. The State law even goes so far as to anticipate that safety upgrades the NRC orders may make Diablo Canyon too

expensive to warrant operation for another five years beyond 2024 and 2025. *See* Cal. Pub. Util. Code § 712.8(c)(2)(B) (2-ER-261) (allowing the CPUC to disallow extended operation if seismic upgrades or “deferred maintenance” are too expensive).

Further, 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. Cal. Pub. Util. Code § 712.8(c)(2)(E), 2-ER-262.

The Exemption Order also incorrectly relies on the assumption that “California’s projected energy demands have changed” since PG&E decided to close the Diablo Canyon reactors in 2016. In fact, the CPUC – which is responsible for making such forecasts – has not made any change to its 2018 acceptance of the retirement of the Diablo Canyon reactors based on PG&E’s assertion of a “significantly reduced need for electric generation from Diablo Canyon” due to “projected increases in energy efficiency, distributed generation, renewable generation, and customers moving to community choice aggregation (CCA) and direct access.” 3-ER-125, 3-ER-133.

The Legislature unilaterally made an emergency determination that continued operation of the Diablo Canyon reactors is needed but left it to the CPUC to verify whether that determination is supported by evidence. Cal. Pub.

Util. Code § 712.8(c)(2)(D), 2-ER-262. The Legislature also retained 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. *Id.*

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. Cal. Pub. Resources Code § 25548(b), 2-ER-247-48.

Accordingly, S.B. 846 itself – whose passage is the NRC’s principal 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 CPUC has not yet even decided whether continued operation of the reactors is needed and rejects the proposition that the plants are safer because they might be needed and the NRC should do the same. For the foregoing reasons, NRC’s decision is arbitrary and capricious because its finding of special circumstances is unsupported by the record.

CONCLUSION

For the foregoing reasons, the Court should reverse and vacate the Exemption Decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Rule 29(a)(f).

1. Exclusive of the exempted portion of the brief provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 11,984 words.
2. The brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

June 30, 2023

Respectfully submitted,

/s/ Diane Curran
Diane Curran

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

June 30, 2023

Respectfully submitted,

/s/ Diane Curran
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STATUTORY ADDENDUM

Administrative Procedure Act of 1946, 5 U.S.C. § 558	A-001
Atomic Energy Act of 1954, 42 U.S.C § 2133	A-002
Atomic Energy Act of 1954, 42 U.S.C § 2232	A-004
Atomic Energy Act of 1954, 42 U.S.C § 2239	A-006
Atomic Energy Act of 1954, 42 U.S.C § 4332	A-008
NRC Domestic Licensing of Production And Utilization Facilities Regulations, 10 C.F.R. § 2.109.....	A-010
NRC Domestic Licensing of Production And Utilization Facilities Regulations, 10 C.F.R. § 2.309(B)	A-011
NRC Domestic Licensing of Production and Utilization Facilities Regulations, 10 C.F.R. § 50.12.....	A-016
NRC Domestic Licensing of Production and Utilization Facilities Regulations, 10 C.F.R. § 51.20.....	A-018
NRC Domestic Licensing of Production and Utilization Facilities Regulations, 10 C.F.R. § 51.22.....	A-020
NRC Domestic Licensing of Production and Utilization Facilities Regulations, 10 C.F.R. § 51.95.....	A-025
NRC Domestic Licensing of Production and Utilization Facilities Regulations, 10 C.F.R. § 54.17.....	A-027
NRC Domestic Licensing of Production and Utilization Facilities Regulations, 10 C.F.R. § 54.31.....	A-028
California Public Resources Code, Cal. Pub. Res. Code § 25548.3.....	A-029
California Public Utilities Code, Cal. Pub. Util. Code § 712.8.....	A-032

5 USCS § 558

Current through Public Law 118-6, approved June 14, 2023.

United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 – 13146) > Part I. The Agencies Generally (Chs. 1 – 10) > CHAPTER 5. Administrative Procedure (Subchs. I – V) > Subchapter II. Administrative Procedure (§§ 551 – 559)

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

- (a) This section applies, according to the provisions thereof, to the exercise of a power or authority.
- (b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.
- (c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title [[5 USCS §§ 556](#) and [557](#)] or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—
- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
 - (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

History

HISTORY:

Sept. 6, 1966, [P. L. 89-554](#), § 1, [80 Stat. 388](#).

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Explanatory notes:

Prior law and revision:

[42 USCS § 2133](#)

Current through Public Law 118-6, approved June 14, 2023.

United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 – 164) > CHAPTER 23. DEVELOPMENT AND CONTROL OF ATOMIC ENERGY (§§ 2011 – 2297h-13) > ATOMIC ENERGY (§§ 2011 – 2296b-7) > ATOMIC ENERGY LICENSES (§§ 2131 – 2142)

§ 2133. Commercial licenses

(a) Conditions. The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to section 123 [[42 USCS § 2153](#)], utilization or production facilities for industrial or commercial purposes. Such licenses shall be issued in accordance with the provisions of chapter 16 [[42 USCS §§ 2231](#) et seq.] and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this Act [[42 USCS §§ 2011](#) et seq.].

(b) Nonexclusive basis. The Commission shall issue such licenses on a nonexclusive basis to persons applying therefor (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized; (2) who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public.

(c) License period. Each such license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, but not exceeding forty years from the authorization to commence operations, and may be renewed upon the expiration of such period.

(d) Limitations. No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 123 [[42 USCS § 2153](#)], or except under the provisions of section 109 [[42 USCS § 2139](#)]. No license may be issued to an alien or any [any] corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, 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.

(e) [Not enacted]

(f) Accident notification condition; license revocation; license amendment to include condition. Each license issued for a utilization facility under this section or section 104(b) [[42 USCS § 2134\(b\)](#)] shall require as a condition thereof that in case of any accident which could result in an unplanned release of quantities of fission products in excess of allowable limits for normal operation established by the Commission, the licensee shall immediately so notify the Commission. Violation of the condition prescribed by this subsection may, in the Commission's discretion, constitute grounds for license revocation. In accordance with section 187 of this Act [[42 USCS § 2237](#)], the Commission shall promptly amend each license for a utilization facility issued under this section or section 104(b) [[42 USCS § 2134\(b\)](#)] which is in

42 USCS § 2133

effect on the date of enactment of this subsection [enacted June 30, 1980] to include the provisions required under this subsection.

History

HISTORY:

Aug. 1, 1946, ch 724, Title I, Ch. 10, § 103, as added Aug. 30, 1954, ch 1073, § 1, [68 Stat. 936](#); Aug. 6, 1956, ch 1015, §§ 12, 13, [70 Stat. 1071](#); Dec. 19, 1970, [P. L. 91-560](#), § 4, [84 Stat. 1472](#); June 30, 1980, [P. L. 96-295](#), Title II, § 201, [94 Stat. 786](#); Oct. 24, 1992, [P. L. 102-486](#), Title IX, § 902(a)(8), [106 Stat. 2944](#); Aug. 8, 2005, [P. L. 109-58](#), Title VI, Subtitle B, § 621, [119 Stat. 782](#).

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

Explanatory notes:

Amendment Notes

1956.

1970.

1980.

2005.

Other provisions:

References in text:

The “Commission”, referred to in this section, was the Atomic Energy Commission, which was abolished by Act Oct. 11, 1974, [P.L. 93-438](#), Title I, § 104(a), [88 Stat. 1237](#), and its functions and personnel transferred (see [42 USCS § 2014](#) note).

Explanatory notes:

The word “any” has been enclosed in brackets in subsec. (d) to indicate the probable intent of Congress to delete it.

Act Oct. 24, 1992, [P. L. 102-486](#), Title IX, § 902(a)(8), [106 Stat. 2944](#), amended the Atomic Energy Act of 1954, which appears generally as [42 USCS §§ 2011](#) et seq., by inserting “TITLE I—ATOMIC ENERGY” before the Chapter 1 heading.

Amendment Notes

[42 USCS § 2232](#)

Current through Public Law 118-6, approved June 14, 2023.

United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 – 164) > CHAPTER 23. DEVELOPMENT AND CONTROL OF ATOMIC ENERGY (§§ 2011 – 2297h-13) > ATOMIC ENERGY (§§ 2011 – 2296b-7) > JUDICIAL REVIEW AND ADMINISTRATIVE PROCEDURE (§§ 2231 – 2243)

§ 2232. License applications

(a) Contents and form. Each application for a license hereunder shall be in writing and shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant, the character of the applicant, the citizenship of the applicant, or any other qualifications of the applicant as the Commission may deem appropriate for the license. In connection with applications for licenses to operate production or utilization facilities, the applicant shall state such technical specifications, including information of the amount, kind, and source of special nuclear material required, the place of the use, the specific characteristics of the facility, and such other information as the Commission may, by rule or regulation, deem necessary in order to enable it to find that the utilization or production of special nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public. Such technical specifications shall be a part of any license issued. The Commission may at any time after the filing of the original application, and before the expiration of the license, require further written statements in order to enable the Commission to determine whether the application should be granted or denied or whether a license should be modified or revoked. All applications and statements shall be signed by the applicant or licensee. Applications for, and statements made in connection with, licenses under sections 103 and 104 [[42 USCS §§ 2133](#) and [2134](#)] shall be made under oath or affirmation. The Commission may require any other applications or statements to be made under oath or affirmation.

(b) Review of applications by Advisory Committees on Reactor Safeguards; report. The Advisory Committee on Reactor Safeguards shall review each application under section 103 or section 104(b) [[42 USCS § 2133](#) or [2134\(b\)](#)] for a construction permit or an operating license for a facility, any application under section 104(c) [[42 USCS § 2134\(c\)](#)] for a construction permit or an operating license for a testing facility, any application under section 104(a) or (c) [[42 USCS § 2134\(a\)](#) or (c)] specifically referred to it by the Commission, and any application for an amendment to a construction permit or an amendment to an operating license under section 103 or 104(a), (b), or (c) [[42 USCS § 2133](#) or [2134\(a\)](#), (b), or (c)] specifically referred to it by the Commission, and shall submit a report thereon which shall be made part of the record of the application and available to the public except to the extent that security classification prevents disclosure.

(c) Commercial power; publication. The Commission shall not issue any license under section 103 [[42 USCS § 2133](#)] for a utilization or production facility for the generation of commercial power until it has given notice in writing to such regulatory agency as may have jurisdiction over the rates and services incident to the proposed activity; until it has published notice of the application in such trade or news publications as the Commission deems appropriate to give reasonable notice to municipalities, private utilities, public bodies, and cooperatives which might have a potential interest in such utilization or production facility; and until it has published notice of such application once each week for four consecutive weeks in the Federal Register, and until four weeks after the last notice.

(d) Preferred consideration. The Commission, in issuing any license for a utilization or production facility for the generation of commercial power under section 103 [[42 USCS § 2133](#)], shall give preferred

consideration to applications for such facilities which will be located in high cost power areas in the United States if there are conflicting applications for a limited opportunity for such license. Where such conflicting applications resulting from limited opportunity for such license include those submitted by public or cooperative bodies such applications shall be given preferred consideration.

History

HISTORY:

Aug. 1, 1946, ch 724, Title I, Ch. 16, § 182, as added Aug. 30, 1954, ch 1073, § 1, [68 Stat. 953](#); Aug. 6, 1956, ch 1015, § 5, [70 Stat. 1069](#); Sept. 2, 1957, [P. L. 85-256](#), § 6, [71 Stat. 579](#); Aug. 29, 1962, [P. L. 87-615](#), § 3, [76 Stat. 409](#); Dec. 19, 1970, [P. L. 91-560](#), § 9, [84 Stat. 1474](#); Oct. 24, 1992, [P. L. 102-486](#), Title IX, § 902(a)(8), [106 Stat. 2944](#).

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

Explanatory notes:

Amendment Notes

1956.

1957.

1962.

1970.

Other provisions:

References in text:

The "Commission", referred to in this section, was the Atomic Energy Commission, which was abolished by Act Oct. 11, 1974, [P.L. 93-438](#), Title I, § 104(a), [88 Stat. 1237](#), and its functions and personnel transferred (see [42 USCS § 2014](#) note).

Explanatory notes:

Act Oct. 24, 1992, [P. L. 102-486](#), Title IX, § 902(a)(8), [106 Stat. 2944](#), amended the Atomic Energy Act of 1954, which appears generally as [42 USCS §§ 2011](#) et seq., by inserting "TITLE I-ATOMIC ENERGY" before the Chapter 1 heading.

Amendment Notes

[42 USCS § 2239](#)

Current through Public Law 118-6, approved June 14, 2023.

United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 – 164) > CHAPTER 23. DEVELOPMENT AND CONTROL OF ATOMIC ENERGY (§§ 2011 – 2297h-13) > ATOMIC ENERGY (§§ 2011 – 2296b-7) > JUDICIAL REVIEW AND ADMINISTRATIVE PROCEDURE (§§ 2231 – 2243)

§ 2239. Hearings and judicial review

(a)

(1)

(A) In any proceeding under this Act [[42 USCS §§ 2011](#) et seq.], 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, and in any proceeding for the payment of compensation, an award or royalties under sections [section] 153, 157, 186(c), or 188 [[42 USCS § 2183](#), [2187](#), [2236\(c\)](#), or [2238](#)], 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 Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104(b) [[42 USCS § 2133](#) or [2134\(b\)](#)] for a construction permit for a facility, and on any application under section 104(c) [[42 USCS § 2134\(c\)](#)] for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(B)

(i) Not less than 180 days before the date scheduled for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under section 185(b) [[42 USCS § 2235\(b\)](#)], the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.

(ii) A request for hearing under clause (i) shall show, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

(iii) After receiving a request for a hearing under clause (i), the Commission expeditiously shall either deny or grant the request. If the request is granted, the Commission shall determine, after considering petitioners' prima facie showing and any answers thereto, whether during a

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period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. If the Commission determines that there is such reasonable assurance, it shall allow operation during an interim period under the combined license.

(iv) The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under clause (i), and shall state its reasons therefor.

(v) The Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within 180 days of the publication of the notice provided by clause (i) or the anticipated date for initial loading of fuel into the reactor, whichever is later.

Commencement of operation under a combined license is not subject to subparagraph (A).

(2)

(A) The Commission may issue and make immediately effective any amendment to an operating license or any amendment to a combined construction and operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this Act [[42 USCS §§ 2011](#) et seq.].

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license or any amendment to a combined construction and operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

(b) The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of title 28, United States Code [[28 USCS §§ 2341](#) et seq.], and chapter 7 of title 5, United States Code [[5 USCS §§ 701](#) et seq.]:

- (1)** Any final order entered in any proceeding of the kind specified in subsection (a).
- (2)** Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.
- (3)** Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium enrichment plants, including any such facilities leased to a corporation established under the USEC Privatization Act.
- (4)** Any final determination under section 1701(c) [[42 USCS § 2297f\(c\)](#)] relating to whether the gaseous diffusion plants, including any such facilities leased to a corporation established under the USEC Privatization Act, are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.

[42 USCS § 4332, Part 1 of 2](#)

Current through Public Law 118-6, approved June 14, 2023.

United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 – 164) > CHAPTER 55. NATIONAL ENVIRONMENTAL POLICY (§§ 4321 – 4370m-12) > POLICIES AND GOALS (§§ 4331 – 4336e)

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [[42 USCS §§ 4321](#) et seq.], and (2) all agencies of the Federal Government shall—

- (A) utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;
- (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [[42 USCS §§ 4341](#) et seq.], which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;
- (C) consistent with the provisions of this Act and except where compliance would be inconsistent with other statutory requirements, include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
 - (i) reasonably foreseeable environmental effects of the proposed agency action;
 - (ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;
 - (iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal;
 - (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
 - (v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.

Prior to making any detailed statement, the head of the lead agency shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by [section 552 of title 5, United States Code](#), and shall accompany the proposal through the existing agency review processes;

- (D) ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document;

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- (E) make use of reliable data and resources in carrying out this Act;
- (F) consistent with the provisions of this Act, study, develop, and describe technically and economically feasible alternatives;
- (G) any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:
- (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
 - (ii) the responsible Federal official furnishes guidance and participates in such preparation,
 - (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
 - (iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act [[42 USCS §§ 4321](#) et seq.]; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [;]

- (H) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;
- (I) consistent with the provisions of this Act, recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;
- (J) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;
- (K) initiate and utilize ecological information in the planning and development of resource-oriented projects; and
- (L) assist the Council on Environmental Quality established by title II of this Act [[42 USCS §§ 4341](#) et seq.].

History

HISTORY:

Jan. 1, 1970, [P. L. 91-190](#), Title I, § 102, [83 Stat. 853](#); Aug. 9, 1975, [P. L. 94-83](#), [89 Stat. 424](#); June 3, 2023, [P.L. 118-5](#), Div C, Title III, § 321(a), [137 Stat. 38](#).

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

10 CFR 2.109

This document is current through the June 28, 2023 issue of the Federal Register, with the exception of the amendments appearing at 88 FR 41835 and 88 FR 41827.

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > Title 10 Energy > Chapter I – Nuclear Regulatory Commission > Part 2 – Agency Rules of Practice and Procedure > Subpart A – Procedure for Issuance, Amendment, Transfer, or Renewal of a License, and Standard Design Approval > Hearing on Application – How Initiated

§ 2.109 Effect of timely renewal application.

(a) Except for the renewal of licenses identified in paragraphs (b) through (e) of this section, if at least 30 days before the expiration of an existing license authorizing any activity of a continuing nature, the licensee files an application for a renewal or for a new license for the activity so authorized, the existing license will not be deemed to have expired until the application has been finally determined.

(b) If the licensee of a nuclear power plant licensed under [10 CFR 50.21\(b\)](#) or [50.22](#) files a sufficient application for renewal of either an operating license or a combined license at least 5 years before the expiration of the existing license, the existing license will not be deemed to have expired until the application has been finally determined.

(c) If the holder of an early site permit licensed under subpart A of part 52 of this chapter files a sufficient application for renewal under § 52.29 of this chapter at least 12 months before the expiration of the existing early site permit, the existing permit will not be deemed to have expired until the application has been finally determined.

(d) If the licensee of a manufacturing license under subpart F of part 52 of this chapter files a sufficient application for renewal under § 52.177 of this chapter at least 12 months before the expiration of the existing license, the existing license will not be deemed to have expired until the application has been finally determined.

(e) If the licensee of an Independent Spent Fuel Storage Installation (ISFSI) licensed under subpart C of part 72 of this chapter files a sufficient application for renewal under § 72.42 of this chapter at least 2 years before the expiration of the existing license, the existing license will not be deemed to have expired until the application has been finally determined.

Statutory Authority

[Authority Note Applicable to 10 CFR Ch. I, Pt. 2](#)

History

[56 FR 64975, Dec. 13, 1991; [72 FR 49352](#), 49473, Aug. 28, 2007; [85 FR 70435](#), 70437, Nov. 5, 2020, as confirmed at [86 FR 3744](#), Jan. 15, 2021]

Annotations

Notes

10 CFR 2.309

This document is current through the June 28, 2023 issue of the Federal Register, with the exception of the amendments appearing at 88 FR 41835 and 88 FR 41827.

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > Title 10 Energy > Chapter I – Nuclear Regulatory Commission > Part 2 – Agency Rules of Practice and Procedure > Subpart C – Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for Nrc Adjudicatory Hearings

§ 2.309 Hearing requests, petitions to intervene, requirements for standing, and contentions.

(a) General requirements. Any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing. In a proceeding under [10 CFR 52.103](#), the Commission, acting as the presiding officer, will grant the request if it determines that the requestor has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. For all other proceedings, except as provided in paragraph (e) of this section, the Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the HLW repository, the Commission, the presiding officer, or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under subpart J of this part in addition to the factors in paragraph (d) of this section. If a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party.

(b) Timing. Unless specified elsewhere in this chapter or otherwise provided by the Commission, the request or petition and the list of contentions must be filed as follows:

(1) In proceedings for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statute, or pursuant to a license condition, twenty (20) days from the date of publication of the notice in the Federal Register.

(2) In proceedings for the initial authorization to construct a high-level radioactive waste geologic repository, and the initial licensee to receive and process high level radioactive waste at a geological repository operations area, thirty (30) days from the date of publication of the notice in the Federal Register.

(3) In proceedings for which a Federal Register notice of agency action is published (other than a proceeding covered by paragraphs (b)(1) or (b)(2) of this section), not later than:

(i) The time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition, which may not be less than sixty (60) days from the date of publication of the notice in the Federal Register; or

(ii) If no period is specified, sixty (60) days from the date of publication of the notice.

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- (4)** In proceedings for which a Federal Register notice of agency action is not published, not later than the latest of:
- (i)** Sixty (60) days after publication of notice on the NRC Web site at <http://www.nrc.gov/public-involve/major-actions.html>, or
 - (ii)** Sixty (60) days after the requestor receives actual notice of a pending application, but not more than sixty (60) days after agency action on the application.
- (c)** Filings after the deadline; submission of hearing request, intervention petition, or motion for leave to file new or amended contentions —
- (1)** Determination by presiding officer. Hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that:
 - (i)** The information upon which the filing is based was not previously available;
 - (ii)** The information upon which the filing is based is materially different from information previously available; and
 - (iii)** The filing has been submitted in a timely fashion based on the availability of the subsequent information.
 - (2)** Applicability of §§ 2.307 and 2.323
 - (i)** Section 2.307 applies to requests to change a filing deadline (requested before or after that deadline has passed) based on reasons not related to the substance of the filing.
 - (ii)** Section 2.323 does not apply to hearing requests, intervention petitions, or motions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section.
 - (3)** New petitioner. A hearing request or intervention petition filed after the deadline in paragraph (b) of this section must include a specification of contentions if the petitioner seeks admission as a party, and must also demonstrate that the petitioner meets the applicable standing and contention admissibility requirements in paragraphs (d) and (f) of this section.
 - (4)** Party or participant. A new or amended contention filed by a party or participant to the proceeding must also meet the applicable contention admissibility requirements in paragraph (f) of this section. If the party or participant has already satisfied the requirements for standing under paragraph (d) of this section in the same proceeding in which the new or amended contentions are filed, it does not need to do so again.
- (d)** Standing. (1) General requirements. A request for hearing or petition for leave to intervene must state:
- (i)** The name, address and telephone number of the requestor or petitioner;
 - (ii)** The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
 - (iii)** The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
 - (iv)** The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.
- (2)** Rulings. In ruling on a request for hearing or petition for leave to intervene, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on such requests must determine, among other things, whether the petitioner has an interest affected by the proceeding considering the factors enumerated in paragraph (d)(1) of this section.

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(3) Standing in enforcement proceedings. In enforcement proceedings, the licensee or other person against whom the action is taken shall have standing.

(e) Discretionary Intervention. The presiding officer may consider a request for discretionary intervention when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held. A requestor/petitioner may request that his or her petition be granted as a matter of discretion in the event that the petitioner is determined to lack standing to intervene as a matter of right under paragraph (d)(1) of this section. Accordingly, in addition to addressing the factors in paragraph (d)(1) of this section, a petitioner who wishes to seek intervention as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance:

(1) Factors weighing in favor of allowing intervention —

- (i)** The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record;
- (ii)** The nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding; and
- (iii)** The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest;

(2) Factors weighing against allowing intervention —

- (i)** The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (ii)** The extent to which the requestor's/petitioner's interest will be represented by existing parties; and
- (iii)** The extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

- (i)** Provide a specific statement of the issue of law or fact to be raised or controverted, provided further, that the issue of law or fact to be raised in a request for hearing under [10 CFR 52.103\(b\)](#) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;
- (ii)** Provide a brief explanation of the basis for the contention;
- (iii)** Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv)** Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v)** Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi)** In a proceeding other than one under [10 CFR 52.103](#), provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and

(vii) In a proceeding under [10 CFR 52.103\(b\)](#), the information must be sufficient, and include supporting information showing, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must include the specific portion of the report required by [10 CFR 52.99\(c\)](#) which the requestor believes is inaccurate, incorrect, and/or incomplete (i.e., fails to contain the necessary information required by § 52.99(c)). If the requestor identifies a specific portion of the § 52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary prima facie showing, then the requestor must explain why this deficiency prevents the requestor from making the prima facie showing.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report. Participants may file new or amended environmental contentions after the deadline in paragraph (b) of this section (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in paragraph (c) of this section.

(3) If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

(g) Selection of hearing procedures. A request for hearing and/or petition for leave to intervene may, except in a proceeding under [10 CFR 52.103](#), also address the selection of hearing procedures, taking into account the provisions of § 2.310. If a request/petition relies upon § 2.310(d), the request/petition must demonstrate, by reference to the contention and the bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.

(h) Requirements applicable to States, local governmental bodies, and Federally-recognized Indian Tribes seeking party status.

(1) If a State, local governmental body (county, municipality or other subdivision), or Federally-recognized Indian Tribe seeks to participate as a party in a proceeding, it must submit a request for hearing or a petition to intervene containing at least one admissible contention, and must designate a single representative for the hearing. If a request for hearing or petition to intervene is granted, the Commission, the presiding officer or the Atomic Safety and Licensing Board ruling on the request will admit as a party to the proceeding a single designated representative of the State, a single designated representative for each local governmental body (county, municipality or other subdivision), and a single designated representative for each Federally-recognized Indian Tribe. Where a State's constitution provides that both the Governor and another State official or State governmental body may represent the interests of the State in a proceeding, the Governor and the other State official/government body will be considered separate participants.

(2) If the proceeding pertains to a production or utilization facility (as defined in § 50.2 of this chapter) located within the boundaries of the State, local governmental body, or Federally-recognized Indian Tribe seeking to participate as a party, no further demonstration of standing is required. If the production or utilization facility is not located within the boundaries of the State, local governmental body, or Federally-recognized Indian Tribe seeking to participate as a party, the State, local governmental body, or Federally-recognized Indian Tribe also must demonstrate standing.

(3) In any proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the Commission shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which such an area is located and by any affected Federally-recognized Indian Tribe as defined in parts 60 or 63 of this chapter if the requirements of paragraph (f) of this section are satisfied with respect to at least one contention. All other petitions for intervention in any such proceeding must be reviewed under the provisions of paragraphs (a) through (f) of this section.

(i) Answers to hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline. Unless otherwise specified by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request, petition, or motion—

(1) The applicant/licensee, the NRC staff, and other parties to a proceeding may file an answer to a hearing request, intervention petition, or motion for leave to file amended or new contentions filed after the deadline in § 2.309(b) within 25 days after service of the request, petition, or motion. Answers should address, at a minimum, the factors set forth in paragraphs (a) through (h) of this section insofar as these sections apply to the filing that is the subject of the answer.

(2) Except in a proceeding under § 52.103 of this chapter, the participant who filed the hearing request, intervention petition, or motion for leave to file new or amended contentions after the deadline may file a reply to any answer. The reply must be filed within 7 days after service of that answer.

(3) No other written answers or replies will be entertained.

(j) **Decision on request/petition.**

(1) In all proceedings other than a proceeding under § 52.103 of this chapter, the presiding officer shall issue a decision on each request for hearing or petition to intervene within 45 days of the conclusion of the initial pre-hearing conference or, if no pre-hearing conference is conducted, within 45 days after the filing of answers and replies under paragraph (i) of this section. With respect to a request to admit amended or new contentions, the presiding officer shall issue a decision on each such request within 45 days of the conclusion of any pre-hearing conference that may be conducted regarding the proposed amended or new contentions or, if no pre-hearing conference is conducted, within 45 days after the filing of answers and replies, if any. In the event the presiding officer cannot issue a decision within 45 days, the presiding officer shall issue a notice advising the Commission and the parties, and the notice shall include the expected date of when the decision will issue.

(2) The Commission, acting as the presiding officer, shall expeditiously grant or deny the request for hearing in a proceeding under § 52.103 of this chapter. The Commission's decision may not be the subject of any appeal under § 2.311.

Statutory Authority

[Authority Note Applicable to 10 CFR Ch. I, Pt. 2](#)

History

[[69 FR 2182](#), 2238, Jan. 14, 2004; [72 FR 49352](#), 49474, Aug. 28, 2007; [73 FR 44619](#), 44620, July 31, 2008; [77 FR 46562](#), 46591, Aug. 3, 2012]

Annotations

10 CFR 50.12

This document is current through the June 28, 2023 issue of the Federal Register, with the exception of the amendments appearing at 88 FR 41835 and 88 FR 41827.

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > Title 10 Energy > Chapter I – Nuclear Regulatory Commission > Part 50 – Domestic Licensing of Production and Utilization Facilities > Requirement of License, Exceptions

§ 50.12 Specific exemptions.

(a) The Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of the regulations of this part, which are—

- (1) Authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security.
- (2) The Commission will not consider granting an exemption unless special circumstances are present. Special circumstances are present whenever—
 - (i) Application of the regulation in the particular circumstances conflicts with other rules or requirements of the Commission; or
 - (ii) Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule; or
 - (iii) Compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated; or
 - (iv) The exemption would result in benefit to the public health and safety that compensates for any decrease in safety that may result from the grant of the exemption; or
 - (v) The exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation; or
 - (vi) There is present any other material circumstance not considered when the regulation was adopted for which it would be in the public interest to grant an exemption. If such condition is relied on exclusively for satisfying paragraph (a)(2) of this section, the exemption may not be granted until the Executive Director for Operations has consulted with the Commission.

(b) Any person may request an exemption permitting the conduct of activities prior to the issuance of a construction permit prohibited by § 50.10. The Commission may grant such an exemption upon considering and balancing the following factors:

- (1) Whether conduct of the proposed activities will give rise to a significant adverse impact on the environment and the nature and extent of such impact, if any;
- (2) Whether redress of any adverse environment impact from conduct of the proposed activities can reasonably be effected should such redress be necessary;
- (3) Whether conduct of the proposed activities would foreclose subsequent adoption of alternatives; and
- (4) The effect of delay in conducting such activities on the public interest, including the power needs to be used by the proposed facility, the availability of alternative sources, if any, to meet those needs on a timely basis and delay costs to the applicant and to consumers.

Issuance of such an exemption shall not be deemed to constitute a commitment to issue a construction permit. During the period of any exemption granted pursuant to this paragraph (b), any activities conducted shall be carried out in such a manner as will minimize or reduce their environmental impact.

Statutory Authority

[Authority Note Applicable to 10 CFR Ch. I, Pt. 50](#)

History

[37 FR 5748, Mar. 21, 1972, as amended at 40 FR 8789, Mar. 3, 1975; 50 FR 50777, Dec. 12, 1985]

Annotations

Notes to Decisions

Administrative Law: Judicial Review: Reviewability: Exhaustion of Remedies

Administrative Law: Judicial Review: Standards of Review: Rule Interpretation

Energy & Utilities Law: Nuclear Power Industry: Atomic Energy Act

Energy & Utilities Law: Nuclear Power Industry: Licenses & Permits

Energy & Utilities Law: Nuclear Power Industry: U.S. Nuclear Regulatory Commission

Governments: State & Territorial Governments: Licenses

Insurance Law: Industry Regulation: General Overview

Administrative Law: Judicial Review: Reviewability: Exhaustion of Remedies

[Shoreham-Wading River Cent. School Dist. v. U.S. Nuclear Regulatory Com., 931 F.2d 102, 289 U.S. App. D.C. 257, 1991 U.S. App. LEXIS 7594 \(D.C. Cir. 1991\).](#)

Overview: *In an action involving a nuclear plant, there was no standing to challenge U.S. Nuclear Regulatory Commission's order when the order was not final and there was no Article III standing when unissued insurance exemptions could not yet cause injury.*

- The four requirements that are specified in U.S. Nuclear Regulatory Commission (NRC) regulations on the granting of an exemption from the minimum property insurance requirements are that such an exemption must: (1) be “authorized by law,” (2) not present an undue risk to the public health and safety, (3) be consistent with the common defense and security, and (4) be justified by “special circumstances.” [10 C.F.R. § 50.12\(a\)\(1\)](#), (2) (1990). The term “authorized by law” is consistently interpreted by the NRC to require that the grant of the exemption not violate any law. [Go To Headnote](#)

Administrative Law: Judicial Review: Standards of Review: Rule Interpretation

[Brodsky v. United States NRC, 578 F.3d 175, 2009 U.S. App. LEXIS 19230 \(2d Cir. 2009\).](#)

10 CFR 51.20

This document is current through the June 28, 2023 issue of the Federal Register, with the exception of the amendments appearing at 88 FR 41835 and 88 FR 41827.

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > Title 10 Energy > Chapter I – Nuclear Regulatory Commission > Part 51 – Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions > Subpart A – National Environmental Policy Act – Regulations Implementing Section 102(2) > Preliminary Procedures > Classification of Licensing and Regulatory Actions

§ 51.20 Criteria for and identification of licensing and regulatory actions requiring environmental impact statements.

(a) Licensing and regulatory actions requiring an environmental impact statement shall meet at least one of the following criteria:

(1) The proposed action is a major Federal action significantly affecting the quality of the human environment.

(2) The proposed action involves a matter which the Commission, in the exercise of its discretion, has determined should be covered by an environmental impact statement.

(b) The following types of actions require an environmental impact statement or a supplement to an environmental impact statement:

(1) Issuance of a limited work authorization or a permit to construct a nuclear power reactor, testing facility, or fuel reprocessing plant under part 50 of this chapter, or issuance of an early site permit under part 52 of this chapter.

(2) Issuance or renewal of a full power or design capacity license to operate a nuclear power reactor, testing facility, or fuel reprocessing plant under part 50 of this chapter, or a combined license under part 52 of this chapter.

(3) Issuance of a permit to construct or a design capacity license to operate or renewal of a design capacity license to operate an isotopic enrichment plant pursuant to part 50 of this chapter.

(4) Conversion of a provisional operating license for a nuclear power reactor, testing facility or fuel reprocessing plant to a full term or design capacity license pursuant to part 50 of this chapter if a final environmental impact statement covering full term or design capacity operation has not been previously prepared.

(5) [Reserved]

(6) [Reserved]

(7) Issuance of a license to possess and use special nuclear material for processing and fuel fabrication, scrap recovery, or conversion of uranium hexafluoride pursuant to part 70 of this chapter.

(8) Issuance of a license to possess and use source material for uranium milling or production of uranium hexafluoride pursuant to part 40 of this chapter.

(9) Issuance of a license pursuant to part 72 of this chapter for the storage of spent fuel in an independent spent fuel storage installation (ISFSI) at a site not occupied by a nuclear power reactor, or for the storage of spent fuel or high-level radioactive waste in a monitored retrievable storage installation (MRS).

- (10) Issuance of a license for a uranium enrichment facility.
- (11) Issuance of renewal of a license authorizing receipt and disposal of radioactive waste from other persons pursuant to part 61 of this chapter.
- (12) Issuance of a license amendment pursuant to part 61 of this chapter authorizing (i) closure of a land disposal site, (ii) transfer of the license to the disposal site owner for the purpose of institutional control, or (iii) termination of the license at the end of the institutional control period.
- (13) Issuance of a construction authorization and license pursuant to part 60 or part 63 of this chapter.
- (14) Any other action which the Commission determines is a major Commission action significantly affecting the quality of the human environment. As provided in § 51.22(b), the Commission may, in special circumstances, prepare an environmental impact statement on an action covered by a categorical exclusion.

Statutory Authority

[Authority Note Applicable to 10 CFR Ch. I, Pt. 51](#)

History

[49 FR 9381, Mar. 12, 1984, as amended at 53 FR 31681, Aug. 19, 1988; 53 FR 24052, June 27, 1988; 54 FR 15398, Apr. 18, 1989; 54 FR 27870, July 3, 1989; 57 FR 18392, Apr. 30, 1992; [66 FR 55732](#), 55790, Nov. 2, 2001; [72 FR 49352](#), 49509, Aug. 28, 2007]

Annotations

Notes

[EFFECTIVE DATE NOTE:

[72 FR 49352](#), 49509, Aug. 28, 2007, amended paragraph (b), effective Sept. 27, 2007.]

Notes to Decisions

Energy & Utilities Law: Nuclear Power Industry: Atomic Energy Act

Energy & Utilities Law: Nuclear Power Industry: Licenses & Permits

Energy & Utilities Law: Nuclear Power Industry: U.S. Nuclear Regulatory Commission

Environmental Law: National Environmental Policy Act: Environmental Impact Statements

Energy & Utilities Law: Nuclear Power Industry: Atomic Energy Act

[Citizens Awareness Network v. United States Nuclear Regulatory Comm'n, 59 F.3d 284, 41 Env't Rep. Cas. \(BNA\) 1302, 25 Env'tl. L. Rep. 21564, 1995 U.S. App. LEXIS 19357 \(1st Cir. 1995\).](#)

Overview: Nuclear Regulatory Commission's unexplained decision to change its established, five-year policy to allow licensees to begin certain decommissioning activity before approval of decommissioning plans had been completed was arbitrary and capricious.

10 CFR 51.22

This document is current through the June 28, 2023 issue of the Federal Register, with the exception of the amendments appearing at 88 FR 41835 and 88 FR 41827.

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > Title 10 Energy > Chapter I – Nuclear Regulatory Commission > Part 51 – Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions > Subpart A – National Environmental Policy Act – Regulations Implementing Section 102(2) > Preliminary Procedures > Classification of Licensing and Regulatory Actions

§ 51.22 Criterion for categorical exclusion; identification of licensing and regulatory actions eligible for categorical exclusion or otherwise not requiring environmental review.

(a) Licensing, regulatory, and administrative actions eligible for categorical exclusion shall meet the following criterion: The action belongs to a category of actions which the Commission, by rule or regulation, has declared to be a categorical exclusion, after first finding that the category of actions does not individually or cumulatively have a significant effect on the human environment.

(b) Except in special circumstances, as determined by the Commission upon its own initiative or upon request of any interested person, an environmental assessment or an environmental impact statement is not required for any action within a category of actions included in the list of categorical exclusions set out in paragraph (c) of this section. Special circumstances include the circumstance where the proposed action involves unresolved conflicts concerning alternative uses of available resources within the meaning of section 102(2)(E) of NEPA.

(c) The following categories of actions are categorical exclusions:

(1) Amendments to Parts 1, 2, 4, 5, 7, 8, 9, 10, 11, 12, 13, 15, 16, 19, 21, 25, 26, 55, 75, 95, 110, 140, 150, 160, 170, or 171 of this chapter, and actions on petitions for rulemaking relating to Parts 1, 2, 4, 5, 7, 9, 10, 11, 12, 13, 14, 15, 16, 19, 21, 25, 26, 55, 75, 95, 110, 140, 150, 160, 170, or 171 of this chapter.

(2) Amendments to the regulations in this chapter which are corrective or of a minor or nonpolicy nature and do not substantially modify existing regulations, and actions on petitions for rulemaking relating to these amendments.

(3) Amendments to parts 20, 30, 31, 32, 33, 34, 35, 37, 39, 40, 50, 51, 52, 54, 60, 61, 63, 70, 71, 72, 73, 74, 81, and 100 of this chapter which relate to—

(i) Procedures for filing and reviewing applications for licenses or construction permits or early site permits or other forms of permission or for amendments to or renewals of licenses or construction permits or early site permits or other forms of permission;

(ii) Recordkeeping requirements;

(iii) Reporting requirements;

(iv) Education, training, experience, qualification or other employment suitability requirements or

(v) Actions on petitions for rulemaking relating to these amendments.

(4) Entrance into or amendment, suspension, or termination of all or part of an agreement with a State pursuant to section 274 of the Atomic Energy Act of 1954, as amended, providing for assumption by the State and discontinuance by the Commission of certain regulatory authority of the Commission.

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- (5) Procurement of general equipment and supplies.
- (6) Procurement of technical assistance, confirmatory research provided that the confirmatory research does not involve any significant construction impacts, and personal services relating to the safe operation and protection of commercial reactors, other facilities, and materials subject to NRC licensing and regulation.
- (7) Personnel actions.
- (8) Issuance, amendment, or renewal of operators' licenses pursuant to part 55 of this chapter.
- (9) Issuance of an amendment to a permit or license for a reactor under part 50 or part 52 of this chapter that changes a requirement or issuance of an exemption from a requirement, with respect to installation or use of a facility component located within the restricted area, as defined in part 20 of this chapter; or the issuance of an amendment to a permit or license for a reactor under part 50 or part 52 of this chapter that changes an inspection or a surveillance requirement; provided that:
- (i) The amendment or exemption involves 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; and
 - (iii) There is no significant increase in individual or cumulative occupational radiation exposure.
- (10) Issuance of an amendment to a permit or license issued under this chapter which—
- (i) Changes surety, insurance and/or indemnity requirements;
 - (ii) Changes recordkeeping, reporting, or administrative procedures or requirements;
 - (iii) Changes the licensee's or permit holder's name, phone number, business or e-mail address;
 - (iv) Changes the name, position, or title of an officer of the licensee or permit holder, including but not limited to, the radiation safety officer or quality assurance manager; or
 - (v) Changes the format of the license or permit or otherwise makes editorial, corrective or other minor revisions, including the updating of NRC approved references.
- (11) Issuance of amendments to licenses for fuel cycle plants and radioactive waste disposal sites and amendments to materials licenses identified in § 51.60(b)(1) which are administrative, organizational, or procedural in nature, or which result in a change in process operations or equipment, provided that (i) there is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite, (ii) there is no significant increase in individual or cumulative occupational radiation exposure, (iii) there is no significant construction impact, and (iv) there is no significant increase in the potential for or consequences from radiological accidents.
- (12) Issuance of an amendment to a license under parts 50, 52, 60, 61, 63, 70, 72, or 75 of this chapter relating solely to safeguards matters (i.e., protection against sabotage or loss or diversion of special nuclear material) or issuance of an approval of a safeguards plan submitted under parts 50, 52, 70, 72, and 73 of this chapter, provided that the amendment or approval does not involve any significant construction impacts. These amendments and approvals are confined to—
- (i) Organizational and procedural matters;
 - (ii) Modifications to systems used for security and/or materials accountability;
 - (iii) Administrative changes; and
 - (iv) Review and approval of transportation routes pursuant to [10 CFR 73.37](#).
- (13) Approval of package designs for packages to be used for the transportation of licensed materials.
- (14) Issuance, amendment, or renewal of materials licenses issued pursuant to 10 CFR Parts 30, 31, 32, 33, 34, [35](#), 36, 39, 40 or part 70 authorizing the following types of activities:

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- (i) Distribution of radioactive material and devices or products containing radioactive material to general licensees and to persons exempt from licensing.
 - (ii) Distribution of radiopharmaceuticals, generators, reagent kits and/or sealed sources to persons licensed pursuant to [10 CFR 35.18](#).
 - (iii) Nuclear pharmacies.
 - (iv) Medical and veterinary.
 - (v) Use of radioactive materials for research and development and for educational purposes.
 - (vi) Industrial radiography.
 - (vii) Irradiators.
 - (viii) Use of sealed sources and use of gauging devices, analytical instruments and other devices containing sealed sources.
 - (ix) Use of uranium as shielding material in containers or devices.
 - (x) Possession of radioactive material incident to performing services such as installation, maintenance, leak tests and calibration.
 - (xi) Use of sealed sources and/or radioactive tracers in well-logging procedures.
 - (xii) Acceptance of packaged radioactive wastes from others for transfer to licensed land burial facilities provided the interim storage period for any package does not exceed 180 days and the total possession limit for all packages held in interim storage at the same time does not exceed 50 curies.
 - (xiii) Manufacturing or processing of source, byproduct, or special nuclear materials for distribution to other licensees, except processing of source material for extraction of rare earth and other metals.
 - (xiv) Nuclear laundries.
 - (xv) Possession, manufacturing, processing, shipment, testing, or other use of depleted uranium military munitions.
 - (xvi) Any use of source, byproduct, or special nuclear material not listed above which involves quantities and forms of source, byproduct, or special nuclear material similar to those listed in paragraphs (c)(14) (i) through (xv) of this section.
- (15) Issuance, amendment or renewal of licenses for import of nuclear facilities and materials pursuant to part 110 of this chapter, except for import of spent power reactor fuel.
- (16) Issuance or amendment of guides for the implementation of regulations in this chapter, and issuance or amendment of other informational and procedural documents that do not impose any legal requirements.
- (17) Issuance of an amendment to a permit or license under parts 30, 40, 50, 52, or part 70 of this chapter which deletes any limiting condition of operation or monitoring requirement based on or applicable to any matter subject to the provisions of the Federal Water Pollution Control Act.
- (18) Issuance of amendments or orders authorizing licensees of production or utilization facilities to resume operation, provided the basis for the authorization rests solely on a determination or redetermination by the Commission that applicable emergency planning requirements are met.
- (19) Issuance, amendment, modification, or renewal of a certificate of compliance of gaseous diffusion enrichment facilities pursuant to 10 CFR part 76.
- (20) Decommissioning of sites where licensed operations have been limited to the use of—
- (i) Small quantities of short-lived radioactive materials;

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- (ii) Radioactive materials in sealed sources, provided there is no evidence of leakage of radioactive material from these sealed sources; or
 - (iii) Radioactive materials in such a manner that a decommissioning plan is not required by [10 CFR 30.36\(g\)\(1\)](#), [40.42\(g\)\(1\)](#), or [70.38\(g\)\(1\)](#), and the NRC has determined that the facility meets the radiological criteria for unrestricted use in [10 CFR 20.1402](#) without further remediation or analysis.
- (21) Approvals of direct or indirect transfers of any license issued by NRC and any associated amendments of license required to reflect the approval of a direct or indirect transfer of an NRC license.
- (22) Issuance of a standard design approval under part 52 of this chapter.
- (23) The Commission finding for a combined license under § 52.103(g) of this chapter.
- (24) Grants to institutions of higher education in the United States, to fund scholarships, fellowships, and stipends for the study of science, engineering, or another field of study that the NRC determines is in a critical skill area related to its regulatory mission, to support faculty and curricular development in such fields, and to support other domestic educational, technical assistance, or training programs (including those of trade schools) in such fields, except to the extent that such grants or programs include activities directly affecting the environment, such as:
- (i) The construction of facilities;
 - (ii) A major disturbance brought about by blasting, drilling, excavating or other means;
 - (iii) Field work, except that which only involves noninvasive or non-harmful techniques such as taking water or soil samples or collecting non-protected species of flora and fauna; or
 - (iv) The release of radioactive material.
- (25) Granting of an exemption from the requirements of any regulation of this chapter, provided that—
- (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;
 - (v) There is no significant increase in the potential for or consequences from radiological accidents; and
 - (vi) The requirements from which an exemption is sought involve:
 - (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.

(d) In accordance with section 121 of the Nuclear Waste Policy Act of 1982 ([42 U.S.C. 10141](#)), the promulgation of technical requirements and criteria that the Commission will apply in approving or disapproving applications under part 60 or 63 of this chapter shall not require an environmental impact statement, an environmental assessment, or any environmental review under subparagraph (E) or (F) of section 102(2) of NEPA.

Statutory Authority

[Authority Note Applicable to 10 CFR Ch. I, Pt. 51](#)

History

[49 FR 9381, Mar. 12, 1984, as amended at 51 FR 9766, Mar. 21, 1986; 51 FR 33231, Sept. 18, 1986; 52 FR 8241, Mar. 17, 1987; 54 FR 27870, July 3, 1989; [58 FR 7737](#), Feb. 9, 1993; 59 FR 48959, Sept. 23, 1994; 60 FR 22491, May 8, 1995; [61 FR 9901](#), 9902, March 12, 1996; [62 FR 39058](#), 39091, July 21, 1997; [63 FR 66721](#), 66735, Dec. 3, 1998; [65 FR 54948](#), 54950, Sept. 12, 2000; [66 FR 55732](#), 55790, Nov. 2, 2001; [67 FR 78130](#), 78141, Dec. 23, 2002; [72 FR 49352](#), 49509, Aug. 28, 2007; [75 FR 20248](#), 20256, Apr. 19, 2010; [78 FR 16922](#), 17021, Mar. 19, 2013; [78 FR 34245](#), 34249, June 7, 2013; [85 FR 65656](#), 65663, Oct. 16, 2020]

Annotations

Notes

[EFFECTIVE DATE NOTE:

[78 FR 16922](#), 17021, Mar. 19, 2013, revised the introductory text of paragraph (c)(3), effective May 20, 2013; [78 FR 34245](#), 34249, June 7, 2013, revised paragraph (c)(9) introductory text, effective July 8, 2013; [85 FR 65656](#), 65663, Oct. 16, 2020, amended paragraph (c)(14)(xvi), effective Nov. 16, 2020.]

Notes to Decisions

Environmental Law: Hazardous Wastes & Toxic Substances: Radioactive Substances: Federal & State Regulatory Authority

Environmental Law: National Environmental Policy Act: Environmental Impact Statements

Environmental Law: Hazardous Wastes & Toxic Substances: Radioactive Substances: Federal & State Regulatory Authority

[Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732, 18 Env't Rep. Cas. \(BNA\) 1401, 12 Env'tl. L. Rep. 21029, 1982 U.S. App. LEXIS 26074 \(3d Cir. 1982\).](#)

Overview: *The Nuclear Regulatory Commission's determination that a spent nuclear fuel storage expansion project would have no significant environmental impact was upheld where the township failed to meet its burden to provide evidence to the contrary.*

Former [10 CFR 51.5](#) was redesignated. See now [10 CFR 51.22](#).

10 CFR 51.95

This document is current through the June 28, 2023 issue of the Federal Register, with the exception of the amendments appearing at 88 FR 41835 and 88 FR 41827.

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > Title 10 Energy > Chapter I – Nuclear Regulatory Commission > Part 51 – Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions > Subpart A – National Environmental Policy Act – Regulations Implementing Section 102(2) > Environmental Impact Statements > Final Environmental Impact Statements – Production and Utilization Facilities

§ 51.95 Postconstruction environmental impact statements.

(a) General. Any supplement to a final environmental impact statement or any environmental assessment prepared under the provisions of this section may incorporate by reference any information contained in a final environmental document previously prepared by the NRC staff that relates to the same production or utilization facility. Documents that may be referenced include, but are not limited to, the final environmental impact statement; supplements to the final environmental impact statement, including supplements prepared at the operating license stage; NRC staff-prepared final generic environmental impact statements; environmental assessments and records of decisions prepared in connection with the construction permit, the operating license, the early site permit, or the combined license and any license amendment for that facility. A supplement to a final environmental impact statement will include a request for comments as provided in § 51.73.

(b) Initial operating license stage. In connection with the issuance of an operating license for a production or utilization facility, the NRC staff will prepare a supplement to the final environmental impact statement on the construction permit for that facility, which will update the prior environmental review. The supplement will only cover matters that differ from the final environmental impact statement or that reflect significant new information concerning matters discussed in the final environmental impact statement. Unless otherwise determined by the Commission, a supplement on the operation of a nuclear power plant will not include a discussion of need for power, or of alternative energy sources, or of alternative sites, and will only be prepared in connection with the first licensing action authorizing full-power operation. As stated in § 51.23, the generic impact determinations regarding the continued storage of spent fuel in NUREG-2157 shall be deemed incorporated into the environmental impact statement.

(c) Operating license renewal stage. In connection with the renewal of an operating license or combined license for a nuclear power plant under 10 CFR parts 52 or 54 of this chapter, the Commission shall prepare an environmental impact statement, which is a supplement to the Commission's NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (June 2013), which is available in the NRC's Public Document Room, 11555 Rockville Pike, Rockville, Maryland 20852.

(1) The supplemental environmental impact statement for the operating license renewal stage shall address those issues as required by § 51.71. In addition, the NRC staff must comply with [40 CFR 1506.6\(b\)\(3\)](#) in conducting the additional scoping process as required by § 51.71(a).

(2) The supplemental environmental impact statement for license renewal is not required to include discussion of need for power or the economic costs and economic benefits of the proposed action or of alternatives to the proposed action except insofar as such benefits and costs are either essential for a determination regarding the inclusion of an alternative in the range of alternatives considered or relevant to mitigation. In addition, the supplemental environmental impact statement prepared at the license renewal stage need not discuss other issues not related to the environmental effects of the proposed action and the alternatives. The analysis of alternatives in the supplemental environmental

impact statement should be limited to the environmental impacts of such alternatives and should otherwise be prepared in accordance with § 51.71 and appendix A to subpart A of this part. As stated in § 51.23, the generic impact determinations regarding the continued storage of spent fuel in NUREG-2157 shall be deemed incorporated into the supplemental environmental impact statement.

(3) The supplemental environmental impact statement shall be issued as a final impact statement in accordance with §§ 51.91 and 51.93 after considering any significant new information relevant to the proposed action contained in the supplement or incorporated by reference.

(4) The supplemental environmental impact statement must contain the NRC staff's recommendation regarding the environmental acceptability of the license renewal action. In order to make recommendations and reach a final decision on the proposed action, the NRC staff, adjudicatory officers, and Commission shall integrate the conclusions in the generic environmental impact statement for issues designated as Category 1 with information developed for those Category 2 issues applicable to the plant under § 51.53(c)(3)(ii) and any new and significant information. Given this information, the NRC staff, adjudicatory officers, and Commission shall determine whether or not the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decisionmakers would be unreasonable.

(d) Postoperating license stage. In connection with the amendment of an operating or combined license authorizing decommissioning activities at a production or utilization facility covered by § 51.20, either for unrestricted use or based on continuing use restrictions applicable to the site, or with the issuance, amendment or renewal of a license to store spent fuel at a nuclear power reactor after expiration of the operating or combined license for the nuclear power reactor, the NRC staff will prepare a supplemental environmental impact statement for the post operating or post combined license stage or an environmental assessment, as appropriate, which will update the prior environmental documentation prepared by the NRC for compliance with NEPA under the provisions of this part. The supplement or assessment may incorporate by reference any information contained in the final environmental impact statement — for the operating or combined license stage, as appropriate, or in the records of decision prepared in connection with the early site permit, construction permit, operating license, or combined license for that facility. The supplement will include a request for comments as provided in § 51.73. As stated in § 51.23, the generic impact determinations regarding the continued storage of spent fuel in NUREG-2157 shall be deemed incorporated into the supplemental environmental impact statement or shall be considered in the environmental assessment, if the impacts of continued storage of spent fuel are applicable to the proposed action.

Statutory Authority

[Authority Note Applicable to 10 CFR Ch. I, Pt. 51](#)

History

[49 FR 34695, Aug. 31, 1984, as amended at 53 FR 24052, June 27, 1988; [61 FR 28467](#), 28489, June 5, 1996, as corrected and clarified at [61 FR 66537](#), 66545, Dec. 18, 1996; [61 FR 39278](#), 39304, July 29, 1996; [61 FR 37351](#), July 18, 1996, as corrected at [61 FR 39555](#), July 30, 1996; [72 FR 49352](#), 49516, Aug. 28, 2007; [78 FR 37282](#), 37317, June 20, 2013; [79 FR 56238](#), 56262, Sept. 19, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

10 CFR 54.17

This document is current through the June 28, 2023 issue of the Federal Register, with the exception of the amendments appearing at 88 FR 41835 and 88 FR 41827.

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > Title 10 Energy > Chapter I – Nuclear Regulatory Commission > Part 54 – Requirements for Renewal of Operating Licenses for Nuclear Power Plants > General Provisions

§ 54.17 Filing of application.

- (a) The filing of an application for a renewed license must be in accordance with Subpart A of 10 CFR Part 2 and [10 CFR 50.4](#) and [50.30](#).
- (b) Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to know is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, is ineligible to apply for and obtain a renewed license.
- (c) An application for a renewed license may not be submitted to the Commission earlier than 20 years before the expiration of the operating license or combined license currently in effect.
- (d) An applicant may combine an application for a renewed license with applications for other kinds of licenses.
- (e) An application may incorporate by reference information contained in previous applications for licenses or license amendments, statements, correspondence, or reports filed with the Commission, provided that the references are clear and specific.
- (f) If the application contains Restricted Data or other defense information, it must be prepared in such a manner that all Restricted Data and other defense information are separated from unclassified information in accordance with [10 CFR 50.33\(j\)](#).
- (g) As part of its application, and in any event before the receipt of Restricted Data or classified National Security Information or the issuance of a renewed license, the applicant shall agree in writing that it will not permit any individual to have access to or any facility to possess Restricted Data or classified National Security Information until the individual and/or facility has been approved for such access under the provisions of 10 CFR Parts 25 and/or 95. The agreement of the applicant in this regard shall be deemed part of the renewed license, whether so stated therein or not.

Statutory Authority

[Authority Note Applicable to 10 CFR Ch. I, Pt. 54](#)

History

[56 FR 64976, Dec. 13, 1991; 60 FR 22493, May 8, 1995; [62 FR 17683](#), 17690, April 11, 1997; [72 FR 49352](#), 49560, Aug. 28, 2007]

Annotations

[10 CFR 54.31](#)

This document is current through the June 28, 2023 issue of the Federal Register, with the exception of the amendments appearing at 88 FR 41835 and 88 FR 41827.

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > Title 10 Energy > Chapter I – Nuclear Regulatory Commission > Part 54 – Requirements for Renewal of Operating Licenses for Nuclear Power Plants > General Provisions

§ 54.31 Issuance of a renewed license.

(a) A renewed license will be of the class for which the operating license or combined license currently in effect was issued.

(b) A renewed license will be issued for a fixed period of time, which is the sum of the additional amount of time beyond the expiration of the operating license or combined license (not to exceed 20 years) that is requested in a renewal application plus the remaining number of years on the operating license or combined license currently in effect. The term of any renewed license may not exceed 40 years.

(c) A renewed license will become effective immediately upon its issuance, thereby superseding the operating license or combined license previously in effect. If a renewed license is subsequently set aside upon further administrative or judicial appeal, the operating license or combined license previously in effect will be reinstated unless its term has expired and the renewal application was not filed in a timely manner.

(d) A renewed license may be subsequently renewed in accordance with all applicable requirements.

Statutory Authority

[Authority Note Applicable to 10 CFR Ch. I, Pt. 54](#)

History

[56 FR 64976, Dec. 13, 1991; 60 FR 22494, May 8, 1995; [72 FR 49352](#), 49560, Aug. 28, 2007]

Annotations

Notes

[EFFECTIVE DATE NOTE:

[72 FR 49352](#), 49560, Aug. 28, 2007, amended this section, effective Sept. 27, 2007.]

Notes to Decisions

Energy & Utilities Law: Nuclear Power Industry: General Overview

Energy & Utilities Law: Nuclear Power Industry: Licenses & Permits

[Cal Pub Resources Code § 25548.3](#)

Deering's California Codes are current through the 2023 Extra Session Ch 1, 2023 Regular Session Ch. 12.

Deering's California Codes Annotated > PUBLIC RESOURCES CODE (§§ 1 – 80173) > Division 15 Energy Conservation and Development (Chs. 1 – 15) > Chapter 6.3 Diablo Canyon Powerplant (§§ 25548 – 25548.7)

§ 25548.3. Funding extended operations of facility

(a) It is the intent of the Legislature to make available a one billion four hundred million dollar (\$1,400,000,000) loan from the General Fund to the Department of Water Resources for the purpose of being loaned to the borrower for extending operations of the Diablo Canyon powerplant facility, to dates that shall be no later than November 1, 2029, for Unit 1, and no later than November 1, 2030, for Unit 2. The Legislature intends to transfer an initial six hundred million dollars (\$600,000,000) from the General Fund to the department. It is the intent of the Legislature that the remaining eight hundred million dollars (\$800,000,000) shall require future legislative authorization before the transfer of funds.

(b)

(1) To facilitate the extension of the operating period, the department may make a loan or loans to the borrower out of any funds that the Legislature transfers to the Diablo Canyon Extension Fund established pursuant to [Section 25548.6](#), up to a total principal amount not to exceed one billion four hundred million dollars (\$1,400,000,000). Of this amount, up to three hundred fifty million dollars (\$350,000,000) may be paid out by the department upon the execution of, and according to the terms of, loan agreements described in subdivision (c). For any additional amount beyond that three hundred fifty million dollars (\$350,000,000), but not more than a total of six hundred million dollars (\$600,000,000), the department shall submit a written expenditure plan requesting the release of additional funding pursuant to this section to the Department of Finance and the Joint Legislative Budget Committee. The Department of Finance may provide funds not sooner than 30 days after notifying, in writing, the Joint Legislative Budget Committee, or any lesser time determined by the chairperson of the joint committee, or the chairperson's designee.

(2) The department shall not disburse the entire loan amount in one lump sum, but shall disburse the loan amount pursuant to a loan disbursement schedule established pursuant to paragraph (3) of subdivision (c).

(c) The department may enter into a loan agreement with the borrower. In addition to any terms and conditions determined necessary by the department, the loan agreement shall include all of the following:

(1)

(A) A covenant by the borrower that it shall take all steps necessary to secure a grant or other funds available for the operation of a nuclear powerplant from the United States Department of Energy, and any other potentially available federal funds, to repay the loan.

(B) If the operator is not deemed eligible by the United States Department of Energy for a federal funding program by March 1, 2023, or the earliest date set by the Department of Energy for determining eligibility pursuant to the Civil Nuclear Credit Program established by Section 18753 of Title 42 of the United States Code, the operator shall return all unexpended and uncommitted loan moneys and the department shall immediately terminate the loan.

(2) An interest rate that the department may charge, set at a rate less than the Pooled Money Investment Account rate.

Cal Pub Resources Code § 25548.3

(3) A provision that the loan shall be provided in tranches, with any disbursements following the initial disbursement made contingent upon the semiannual true-up review pursuant to [Section 25548.4](#), and which shall be based on milestones set forth in annual plans for the purpose of project costs, operations and maintenance, internal and external labor, capital improvement costs, fuel purchase, fuel storage, regulatory compliance costs, transition fees, and other expenses associated with the extension of the operating periods and current expiration dates, to cover incremental costs incurred by the borrower in its efforts to extend the operating period. Covered costs shall be limited to those necessary to preserve the option of extending the Diablo Canyon powerplant or to extend the Diablo Canyon powerplant's operation to maintain electrical reliability.

(4) Events that would trigger loan repayment obligations by the borrower, including, but not limited to, any of the following:

(A) Failure of the borrower to submit a timely and complete application for funding from the Department of Energy for determining eligibility pursuant to the Civil Nuclear Credit Program established by Section 18753 of Title 42 of the United States Code.

(B) Failure to disclose to the department any known safety risk, seismic risk, environmental hazard, or material defect that would disqualify the application of the borrower for grants or funds for the operation of a nuclear powerplant from a funding program of the United States Department of Energy or otherwise disallow or substantially delay any necessary permitting or approvals necessary for the extension of operating the Diablo Canyon powerplant.

(C) A change in ownership of the Diablo Canyon powerplant, as determined by the Public Utilities Commission pursuant to [Section 851 of the Public Utilities Code](#), before August 26, 2025.

(5) Events that would trigger a suspension or early termination of the loan agreement, including, but not limited to, any of the following:

(A) A determination by the department that the borrower has not obtained the necessary license renewal, permits, and approvals.

(B) A determination by the department that license renewal, permit, or approval conditions are too onerous, or will generate costs that exceed the maximum amount of loan authorized pursuant to paragraph (1) of subdivision (b).

(C) A determination by the Public Utilities Commission that an extension of the Diablo Canyon powerplant is not cost effective or imprudent, or both.

(D) A determination by the commission, pursuant to [Section 25233.2](#) and voted upon at a commission's business meeting, that the state's forecasts for the calendar years 2024 to 2030, inclusive, do not show reliability deficiencies if the Diablo Canyon powerplant is retired by 2025, or that extending the Diablo Canyon powerplant to at least 2030 is not necessary for meeting any potential supply deficiency.

(E) An unexpected early retirement of the Diablo Canyon powerplant.

(F) A determination by the department that permitted timeframes are not viable to accomplish the purposes of this chapter.

(G) A determination by the department that expenses are unexpected or too large, or that repayment is less likely than initially anticipated.

(H) A final determination by the United States Department of Energy that the Diablo Canyon powerplant is not eligible for the Civil Nuclear Credit Program established by Section 18753 of Title 42 of the United States Code.

(6) Conditions that would result in forgiveness, in whole or in part, of the loan by the department, provided that any amount forgiven is limited to amounts already committed or incurred and that any unspent or uncommitted remainder of the loan proceeds is required to be repaid.

Cal Pub Resources Code § 25548.3

- (7) No loan proceeds shall be treated as shareholder profits or be paid out as dividends.
- (8) A provision prohibiting shareholder dividends from being deemed eligible costs under the loan.
- (9) A covenant that, if the United States Nuclear Regulatory Commission or any state agency requires, during the process of relicensing the Diablo Canyon powerplant, seismic safety or other safety modifications to the powerplant that would exceed the loan amount specified in paragraph (1) of subdivision (a), any application or approval to extend the operation period the commission shall promptly evaluate whether the extension of the Diablo Canyon powerplant remains a cost-effective means to meet California's mid-term reliability needs, before any subsequent authorization and appropriation by the Legislature of an amount in excess of the loan amount.
- (10) A covenant that the operator shall allocate all revenues received as a result of federal or state tax credits or incentives, excluding funds specifically allocated by a federal program for the costs of extending power plant operations, on a cost-share basis of 10 and 90 percent between the operator corporation and ratepayers of a load-serving entity responsible for the costs of the continued operation, respectively.
- (11) A covenant addressing circumstances in which the operator must indemnify the department and the state for liability associated with the Diablo Canyon powerplant.
- (12) A covenant requiring the operator to comply with the conditions specified in [Section 25548.7](#).
- (13) A covenant that the operator shall conduct an updated seismic assessment.
- (14) A covenant that the operator shall commission a study by independent consultants to catalog and evaluate any deferred maintenance at the Diablo Canyon powerplant and to provide recommendations as to any risk posed by the deferred maintenance, potential remedies, and cost estimates of those remedies, and a timeline for undertaking those remedies.
- (15) A covenant that the operator shall report to the commission no later than March 1, 2023, on the available capacity of existing wet and dry spent fuel storage facilities and the forecasted amount of spent fuel that will be generated by powerplant operations through the retirement dates for both units as of August 1, 2022, and November 1, 2029, for Unit 1 and November 1, 2030, for Unit 2.
- (16) A monthly performance-based disbursement equal to seven dollars (\$7) for each megawatthour generated by the Diablo Canyon powerplant during the period before the start of extended operations. The disbursement is contingent upon the operator's ongoing pursuit of an extension of the operating period and continued safe and reliable Diablo Canyon powerplant operations.
- (d) Except for this section and the loan agreement provided for under subdivision (c), notwithstanding [Section 11019 of the Government Code](#) or any other law, the department may disburse the tranches of funds specified in paragraph (3) of subdivision (c) to the borrower in advance of the borrower having committed to, or incurred, eligible costs.

History

Added [Stats 2022 ch 239 § 5 \(SB 846\)](#), effective September 2, 2022.

Annotations

Notes

Note—

[Cal Pub Util Code § 712.8](#)

Deering's California Codes are current through the 2023 Extra Session Ch 1, 2023 Regular Session Ch. 12.

Deering's California Codes Annotated > PUBLIC UTILITIES CODE (§§ 1 – 240323) > Division 1 Regulation of Public Utilities (Pts. 1 – 6) > Part 1 Public Utilities Act (Chs. 1 – 11) > Chapter 4 Regulation of Public Utilities (Arts. 1 – 13) > Article 1 Generally (§§ 701 – 718)

§ 712.8. Facilitation of powerplant operation beyond current expiration dates

- (a) For purposes of this section, the following definitions apply:
- (1) “Current expiration dates” has the same meaning as defined in [Section 25548.1 of the Public Resources Code](#).
 - (2) “Diablo Canyon powerplant operations” has the same meaning as defined in [Section 25548.1 of the Public Resources Code](#).
 - (3) “Load-serving entity” has the same meaning as defined in [Section 380](#).
 - (4) “Operator” has the same meaning as defined in [Section 25548.1 of the Public Resources Code](#).
- (b)
- (1) Ordering paragraphs (1) and (14) of commission Decision 18-01-022 (January 11, 2018) Decision Approving Retirement of Diablo Canyon Nuclear Power Plant, are hereby invalidated.
 - (2) The commission shall reopen commission Application 16-08-006 and take other actions as are necessary to implement this section.
- (c)
- (1)
 - (A) Notwithstanding any other law, within 120 days of the effective date of this section, the commission shall direct and authorize the operator of the Diablo Canyon Units 1 and 2 to take all actions that would be necessary to operate the powerplant beyond the current expiration dates, so as to preserve the option of extended operations, until the following retirement dates, conditional upon continued authorization to operate by the United States Nuclear Regulatory Commission:
 - (i) For Unit 1, October 31, 2029.
 - (ii) For Unit 2, October 31, 2030.
 - (B) If the loan provided for by Chapter 6.3 (commencing with [Section 25548](#)) of [Division 15 of the Public Resources Code](#) is terminated under that chapter, the commission shall modify its order under this paragraph and direct an earlier retirement date.
 - (C) Actions taken by the operator pursuant to the commission’s actions under this paragraph, including in preparation for extended operations, shall not be funded by ratepayers of any load-serving entities, but may be funded by the loan provided for by Chapter 6.3 (commencing with [Section 25548](#)) of [Division 15 of the Public Resources Code](#) or other nonratepayer funds available to the operator. The commission shall not allow the recovery from ratepayers of costs incurred by the operator to prepare for, seek, or receive any extended license to operate by the United States Nuclear Regulatory Commission.
 - (2)

Cal Pub Util Code § 712.8

- (A)** No later than December 31, 2023, and notwithstanding the 180-day time limitation in subdivision (b) of [Section 25548.2 of the Public Resources Code](#), the commission shall direct and authorize extended operations at the Diablo Canyon powerplant until the new retirement dates specified in subparagraph (A) of paragraph (1) of subdivision (c).
- (B)** The commission shall review the reports and recommendations of the Independent Safety Committee for Diablo Canyon described in [Section 712.1](#). If the Independent Safety Committee for Diablo Canyon's reports or recommendations cause the commission to determine, in its discretion, that the costs of any upgrades necessary to address seismic safety or issues of deferred maintenance that may have arisen due to the expectation of the plant closing sooner are too high to justify incurring, or if the United States Nuclear Regulatory Commission's conditions of license renewal require expenditures that are too high to justify incurring, the commission may issue an order that reestablishes the current expiration dates as the retirement date, or that establishes new retirement dates that are earlier than provided in subparagraph (A) of paragraph (1), to the extent allowable under federal law, and shall provide sufficient time for orderly shutdown and authorize recovery of any outstanding uncollected costs and fees.
- (C)** If the loan provided for by Chapter 6.3 (commencing with [Section 25548](#)) of [Division 15 of the Public Resources Code](#) is terminated under that chapter, the commission may issue an order that reestablishes the current expiration dates as the retirement date, or that establishes new retirement dates that are earlier than provided in subparagraph (A) of paragraph (1), and shall provide sufficient time for orderly shutdown and authorize recovery of any outstanding uncollected costs and fees.
- (D)** If the commission determines that new renewable energy and zero-carbon resources that are adequate to substitute for the Diablo Canyon powerplant and that meet the state's planning standards for energy reliability have already been constructed and interconnected by the time of its decision, the commission may issue an order that reestablishes the current expiration dates as the retirement date, or that establishes new retirement dates that are earlier than provided in subparagraph (A) of paragraph (1), and shall provide sufficient time for orderly shutdown and authorize recovery of any outstanding uncollected costs and fees.
- (E)** Any retirement date established under this paragraph shall be conditioned upon continued authorization to operate by the United States Nuclear Regulatory Commission. If the United States Nuclear Regulatory Commission does not extend the current expiration dates or renews the licenses for Diablo Canyon Units 1 or 2 for a period shorter than the extended operations authorized by the commission, the commission shall modify any orders issued under this paragraph to direct a retirement date that is the same as the United States Nuclear Regulatory Commission license expiration date.
- (3)** The commission shall do all things necessary and appropriate to implement this section, including, but not limited to, allocating financial responsibility for the extended operations of the Diablo Canyon powerplant to customers of all load-serving entities and ensuring completion of funding of the community impacts mitigation settlement described in [Section 712.7](#). The commission shall not require any funds already disbursed or committed under the community impacts mitigation settlement described in [Section 712.7](#) to be returned because of extended operations of the Diablo Canyon powerplant.
- (4)** Except as authorized by this section, customers of load-serving entities shall have no other financial responsibility for the costs of the extended operations of the Diablo Canyon powerplant. In no event shall load-serving entities other than the operator and their customers have any liability for the operations of the Diablo Canyon powerplant.
- (5)** Consistent with [Section 25548.4 of the Public Resources Code](#), the commission shall collaborate with the Department of Water Resources to oversee the operator's actions that are funded by the loan provided for by Chapter 6.3 (commencing with [Section 25548](#)) of [Division 15 of the Public Resources Code](#).

(d) The commission shall not increase cost recovery from ratepayers for operations and maintenance expenses incurred by the operator during the period from August 1, 2022, to November 2, 2025, for Diablo Canyon Unit 1 and from August 1, 2022, to August 26, 2025, for Diablo Canyon Unit 2, above the amounts approved in the most recent general rate case for the operator pursuant to commission proceeding A.21-06-021 (June 30, 2021) Application of Pacific Gas and Electric Company for Authority, Among Other Things, to Increase Rates and Charges for Electric and Gas Service Effective on January 1, 2023.

(e) The commission shall order the operator to track all costs associated with continued and extended operations of Diablo Canyon Units 1 and 2. The commission shall authorize the operator to establish accounts as necessary to track all costs incurred under paragraph (1) of subdivision (c), all costs incurred under the loan provided for by Chapter 6.3 (commencing with [Section 25548](#)) of [Division 15 of the Public Resources Code](#), all costs to be borne only by the operator's ratepayers, all costs to be borne by ratepayers of all load-serving entities, consistent with this section, and any other costs as determined by the commission. Among these accounts shall be a Diablo Canyon Extended Operations liquidated damages balancing account, described in subdivisions (g) and (i).

(f)

(1) Notwithstanding any approval of extended operations, the commission shall continue to authorize the operator to recover in rates all of the reasonable costs incurred to prepare for the retirement of Diablo Canyon Units 1 and 2, including any reasonable additional costs associated with decommissioning planning resulting from the license renewal applications or license renewals. The reasonable costs incurred to prepare for the retirement of Diablo Canyon Power Plant Units 1 and 2 shall be recovered on a fully nonbypassable basis from customers of all load-serving entities subject to the commission's jurisdiction in the operator's service territory, as determined by the commission, except that the reasonable additional costs associated with decommissioning planning resulting from the license renewal applications or license renewals shall be recovered on a fully nonbypassable basis from customers of all load-serving entities subject to the commission's jurisdiction in the state.

(2) The commission shall continue to fund the employee retention program approved in Decision 18-11-024 (December 2, 2018) Decision Implementing Senate Bill 1090 and Modifying Decision 18-01-022, as modified to incorporate 2024, 2025, and additional years of extended operations, on an ongoing basis until the end of operations of both units with program costs tracked under subdivision (e) and fully recovered in rates. Any additional funding for the employee retention program beyond what was already approved in commission Decision 18-11-024 shall be submitted by the operator in an application for review by the commission.

(3) The commission shall determine the amount or allocation that the customers of all load-serving entities subject to the commission's jurisdiction shall contribute towards the reasonable additional costs of decommissioning planning resulting from the license renewal applications or license renewals and shall authorize the operator to recover in rates those costs through a nonbypassable charge applicable to the customers of all load-serving entities subject to the commission's jurisdiction in the state as set forth in paragraph (1) of subdivision (l).

(4) The commission shall authorize the operator to recover in rates all of the reasonable costs incurred to prepare for, respond to, provide information to, or otherwise participate in or engage the independent peer review panel under [Section 712](#).

(5) In lieu of a rate-based return on investment and in acknowledgment of the greater risk of outages in an older plant that the operator could be held liable for, the commission shall authorize the operator to recover in rates a volumetric payment equal to six dollars and fifty cents (\$6.50), in 2022 dollars, for each megawatt-hour generated by the Diablo Canyon powerplant during the period of extended operations beyond the current expiration dates, to be borne by customers of all load-serving entities, and an additional volumetric payment equal to six dollars and fifty cents (\$6.50), in 2022 dollars, to be borne by customers in the service territory of the operator. The amount of the operating risk payment shall be adjusted annually by the commission using commission-approved escalation methodologies and adjustment factors.

(6)

(A) In lieu of a rate-based return on investment and in acknowledgment of the greater risk of outages in an older plant that the operator could be held liable for, the commission shall authorize the operator to recover in rates a fixed payment of fifty million dollars (\$50,000,000), in 2022 dollars, for each unit for each year of extended operations, subject to adjustment in subparagraphs (B) to (D), inclusive. The amount of the fixed payment shall be adjusted annually by the commission using commission-approved escalation methodologies and adjustment factors.

(B) In the first year of extended operations for each unit, the operator shall continue to receive the full fixed payment during periods in which a unit is out of service due to an unplanned outage for nine months or less, and shall receive 50 percent of the payment for months in excess of nine months that a unit is down.

(C) In the second year of extended operations, the operator shall continue to receive the fixed payment during periods in which a unit is out of service due to an unplanned outage for eight months or less, and shall receive 50 percent of the payment for months in excess of eight months that a unit is down.

(D) In each subsequent year of extended operations, the period in which the full fixed payment is received during periods when a unit out is of service due to an unplanned outage shall decline by one additional month.

(g) The commission shall authorize and fund as part of the charge under paragraph (1) of subdivision (l), the Diablo Canyon Extended Operations liquidated damages balancing account in the amount of twelve million five hundred thousand dollars (\$12,500,000) each month for each unit until the liquidated damages balancing account has a balance of three hundred million dollars (\$300,000,000).

(h)

(1) The commission shall authorize the operator to recover all reasonable costs and expenses necessary to operate Diablo Canyon Units 1 and 2 beyond the current expiration dates, including those in subdivisions (f) and (g), net of market revenues for those operations and any production tax credits of the operator, on a forecast basis in a new proceeding structured similarly to its annual Energy Resource Recovery Account forecast proceeding with a subsequent true-up to actual costs and market revenues for the prior calendar year via an expedited Tier 3 advice letter process, provided that there shall be no further review of the reasonableness of costs incurred if actual costs are below 115 percent of the forecasted costs. All costs shall be recovered as an operating expense and shall not be eligible for inclusion in the operator's rate base.

(2) As the result of any significant one-time capital expenditures during the extended operation period, the commission may authorize, and the operator may propose, cost recovery of these expenditures as operating expenses amortized over more than one year for the purpose of reducing rate volatility, at an amortization interest rate determined by the commission. The commission shall allow cost recovery if the costs and expenses are just and reasonable. Those costs and expenses are just and reasonable if the operator's conduct is consistent with the actions that a reasonable utility would have undertaken in good faith under similar circumstances, at the relevant point in time and with information that the operator should have known at the relevant point in time.

(3) If, as a result of the annual true-up for extended operations in paragraph (1), the commission determines that market revenues for the prior year exceeded the annual costs and expenses, including those in subdivisions (f) and (g), the commission shall direct that any available surplus revenues in an account created under subdivision (e) be credited solely to customers in the operator's service territory. For customers outside the operator's service territory, market revenues may be credited up to, but not to exceed, their respective annual costs and expenses. If excess funds remain in an account created under subdivision (e) as a result of market revenues exceeding costs and expenses in the final year of the extended operating period, after truing up the final operating year's market revenues against costs and expenses, the remaining funds shall be the sole source of loan repayment per the requirements

provided under Chapter 6.3 (commencing with [Section 25548](#)) of [Division 15 of the Public Resources Code](#), except that any federal funds received as described in paragraph (2) of subdivision (b) of [Section 25548.3 of the Public Resources Code](#) shall also be used to repay the loan. Ratepayer funds shall not otherwise be used in any manner to repay the loan provided for under Chapter 6.3 (commencing with [Section 25548](#)) of [Division 15 of the Public Resources Code](#).

(i)

(1) During any unplanned outage periods, the commission shall authorize the operator to recover reasonable replacement power costs, if incurred, associated with Diablo Canyon powerplant operations. If the commission finds that replacement power costs incurred when a unit is out of service due to an unplanned outage are the result of a failure of the operator to meet the reasonable manager standard, then the commission shall authorize payment of the replacement power costs from the Diablo Canyon Extended Operations liquidated damages balancing account described in subdivision (g).

(2) After commencing payments from the Diablo Canyon Extended Operations liquidated damages balancing account under the conditions described in paragraph (1), the commission shall authorize the replenishment of the Diablo Canyon Extended Operations liquidated damages balancing account in the amount of twelve million five hundred thousand dollars (\$12,500,000) for each unit for each month up to a maximum account balance of three hundred million dollars (\$300,000,000).

(j) If the commission finds that the operator is requesting recovery of costs that were previously authorized by the commission or other state or federal agency or paid to the operator for cost recovery, the commission may fine the operator an amount up to three times the amount of the penalty provided in [Section 2107](#) for each violation.

(k) If at any point during the license renewal process or extended operations period the operator believes that, as a result of an unplanned outage, an emergent operating risk, or a new compliance requirement, the cost of performing upgrades needed to continue operations of one or both units exceed the benefits to ratepayers of the continued operation of doing so, the operator shall promptly notify the commission. The commission shall promptly review and determine whether expending funds to continue operations is reasonable, will remain beneficial to ratepayers, and is in the public interest or direct the operator to cease operations. The operator shall take all actions necessary to safely operate or maintain the Diablo Canyon powerplant pending the commission determination.

(l)

(1) Any costs the commission authorizes the operator to recover in rates under this section shall be recovered on a fully nonbypassable basis from customers of all load-serving entities subject to the commission's jurisdiction, as determined by the commission, except as otherwise provided in this section. The recovery of these nonbypassable costs by the load-serving entities shall be based on each customer's gross consumption of electricity regardless of a customer's net metering status or purchase of electric energy and service from an electric service provider, community choice aggregator, or other third-party source of electric energy or electricity service.

(2) The commission shall establish mechanisms, including authorizing balancing and memorandum accounts and, as needed, agreements with, or orders with respect to, electrical corporations, community choice aggregators, and electric service providers, to ensure that the revenues received to pay a charge or cost payable pursuant to this section are recovered in rates from those entities and promptly remitted to the entity entitled to those revenues.

(m) This section does not alter the recovery of costs, including those previously approved by the commission, to operate Diablo Canyon Units 1 and 2 until the current expiration dates.

(n) The commission shall halt disbursements from the Diablo Canyon Nuclear Decommissioning Non-Qualified Trust, excluding refunds to ratepayers.

(o) The commission, in consultation with the relevant federal and state agencies and appropriate California Native American tribes, shall, in a new or existing proceeding, determine the disposition of the Diablo

Canyon powerplant real property and its surrounding real properties owned by the applicable public utility or any legally related, affiliated, or associated companies, in a manner that best serves the interests of the local community, ratepayers, California Native America tribes, and the state. It is the intent of the Legislature that the existing efforts to transfer lands owned by the operator and Eureka Energy shall not be impeded by the extension of the Diablo Canyon powerplant.

(p) Except as otherwise provided in this section, this section does not alter or limit any proceeding of the commission relating to the decommissioning of the Diablo Canyon powerplant.

(q) The Legislature finds and declares that the purpose of the extension of the Diablo Canyon powerplant operations is to protect the state against significant uncertainty in future demand resulting from the state's greenhouse-gas-reduction efforts involving electrification of transportation and building energy end uses and regional climate-related weather phenomenon, and to address the risk that currently ordered procurement will be insufficient to meet this supply or that there may be delays in bringing the ordered resources online on schedule. Consequently, the continued operation of Diablo Canyon Units 1 and 2 beyond their current expiration dates shall not be factored into the analyses used by the commission or by load-serving entities not subject to the commission's jurisdiction when determining future generation and transmission needs to ensure electrical grid reliability and to meet the state's greenhouse-gas-emissions reduction goals. To the extent the commission decides to allocate any benefits or attributes from extended operations of the Diablo Canyon powerplant, the commission may consider the higher cost to customers in the operator's service area.

(r) Notwithstanding [Section 10231.5 of the Government Code](#), in coordination with the Energy Commission, the Independent System Operator, and the Department of Water Resources, the commission shall submit, in accordance with [Section 9795 of the Government Code](#), a report to the Legislature each year on the status of new resource additions and revisions to the state's electric demand forecast, and the impact of these updates on the need for keeping the Diablo Canyon powerplant online.

(s) Any sale, mortgage, transfer of operational control, or any other encumbrance of disposition of the Diablo Canyon powerplant shall continue to be subject to Article 6 (commencing with [Section 851](#)).

(t)

(1) The operator shall submit to the commission for its review, on an annual basis the amount of compensation earned under paragraph (5) of subdivision (f), how it was spent, and a plan for prioritizing the uses of such compensation the next year. Such compensation shall not be paid out to shareholders. Such compensation, to the extent it is not needed for Diablo Canyon, shall be spent to accelerate, or increase spending on, the following critical public purpose priorities:

- (A)** Accelerating customer and generator interconnections.
- (B)** Accelerating actions needed to bring renewable and zero-carbon energy online and modernize the electrical grid.
- (C)** Accelerating building decarbonization.
- (D)** Workforce and customer safety.
- (E)** Communications and education.
- (F)** Increasing resiliency and reducing operational and system risk.

(2) The operator shall not earn a rate of return for any of the expenditures described in paragraph (1) so that no profit shall be realized by the operator's shareholders. Neither the operator nor any of its affiliates or holding company may increase existing public earning per share guidance as a result of compensation provided under this section. The commission shall ensure no double recovery in rates.

(u) The commission shall verify at the conclusion of extended operations that the operator's sole compensation during the period of extended operations is limited to and in accordance with paragraphs (5) and (6) of subdivision (f) and shall be in lieu of a rate-based return on investment in the Diablo Canyon powerplant. Any excess funds remaining in an account created under subdivision (e) as a result of market

revenues exceeding costs and expenses across the extended operating period, after truing up the final operating year's market revenues against costs and expenses, following loan repayment under paragraph (3) of subdivision (h), shall not be paid out to shareholders. Instead, such excess funds shall be returned in full to customers in a manner to be determined by the commission, except that any funds remaining in the Diablo Canyon Extended Operations liquidated damages balancing account specified in subdivisions (g) and (i), shall be returned to customers in the operator's service territory in a manner to be determined by the commission.

(v) The efforts to transfer lands owned by the operator and Eureka Energy, including North Ranch, Parcel P, South Ranch, and Wild Cherry Canyon, shall not be impeded by the extension of the operation of the Diablo Canyon powerplant.

(w) In the event of a final determination by the United States Department of Energy that the Diablo Canyon powerplant is not eligible for the Civil Nuclear Credit Program established by Section 18753 of Title 42 of the United States Code, subdivisions (d) to (m), inclusive, (p), (q), (t), and (u) shall cease to be operative, and the commission shall instead undertake ordinary ratemaking with respect to the Diablo Canyon powerplant.

History

Added [Stats 2022 ch 239 § 9 \(SB 846\)](#), effective September 2, 2022.

Annotations

Notes

Notes—

[Stats 2022 ch 239](#) provides:

SEC. 14. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Research References & Practice Aids

Hierarchy Notes:

[Cal Pub Util Code Div. 1, Pt. 1, Ch. 4](#)

Deering's California Codes Annotated
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