Case No. 23-852

IN THE 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,

PACIFIC GAS & ELECTRIC COMPANY,
Intervenor

Petition for Review of Final Administrative Action of the
United States Nuclear Regulatory Commission

PETITION FOR REHEARING AND/OR REHEARING EN BANC

June 27, 2024

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Judicial Decisions

Statutes

Federal Rules of Procedure

Regulations

Administrative Decisions

Federal Register Notices

Miscellaneous

I. STATEMENT IN SUPPORT OF EN BANC REVIEW

Pursuant to Fed. R. App. P. 40(a)(2), Circuit Rule 40-1, Fed. R. App. P. 35(b)(1), and Circuit Rule 35-1, Petitioners San Luis Obispo Mothers for Peace, Friends of the Earth, and Environmental Working Group seek rehearing and/or rehearing en banc of the Court panel's opinion in *San Luis Obispo Mothers for Peace v. NRC,* No. 23-852 ("the Opinion") (attached).

Petitioners seek rehearing en banc because the Opinion conflicts with the U.S. Supreme Court decision *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers,* 367 U.S. 396 (1961). Consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions.

In addition, Petitioners respectfully submit that the panel's decision in this case raises the following question of exceptional importance:

> *In determining whether a proposed action will be consistent with the Atomic Energy Act and NRC implementing regulations requiring that all NRC licensing and enforcement decisions must provide a reasonable assurance of adequate protection of public health and safety, does the NRC have discretion to consider extraneous factors unrelated to public health and safety, such as "changing energy needs"?*

The panel's Opinion on this question conflicts with the D.C. Circuit's opinion on the same question in *Union of Concerned Scientists v. NRC,* 824 F.2d 108, 117-20 (D.C Cir. 1987).

Finally, pursuant to Fed. R. App. P. 40, Petitioners request a panel rehearing to address a related material legal error in the Opinion.

II. INTRODUCTION

Petitioners seek rehearing and/or rehearing en banc of the panel's Opinion denying review of the U.S. Nuclear Regulatory Commission's ("NRC's") Exemption Decision for the twin Diablo Canyon nuclear reactors, 1-ER-003. Under the NRC's standard for exemptions (10 C.F.R. § 50.12(a)), the Exemption Decision had excused the licensee, Pacific Gas and Electric Co. ("PG&E"), from a deadline in the NRC's Timely Renewal Rule (10 C.F.R. § 2.109(b)). While the Timely Renewal Rule requires that a licensee seeking the protection of the "timely renewal doctrine" (5 U.S.C. § 558(c)) must apply for license renewal at least five years in advance of the operating license expiration date, the Exemption Decision radically shortened the time to eleven months for Unit 1 and 22 months for Unit 2. This drastic curtailment of the deadline for a "timely" license renewal application was inconsistent with the Timely Renewal Rule's safety rationale that the deadline should provide a lengthy enough period for the agency to complete a safety and environmental review and hearing process before the license expires. Prior to the

Exemption Decision, the NRC had never granted an exemption from the Timely Renewal Rule that allowed submission of a license renewal application less than three years before the license expiration date, *i.e.,* the minimum amount of time considered necessary to complete these processes.

Under 10 C.F.R. § 50.12(a)(1) an exemption to the five-year minimum application requirement must be found not to pose "undue risk" to public health and safety. In the Exemption Decision, however, the NRC abandoned its longstanding safety-based policy of treating license renewal applications as "timely" only if filed at least three years before license expiration. On review, the panel did not address the question of whether the NRC's abandonment of its policy satisfied the "no undue risk" standard of 10 C.F.R. § 50.12(a)(1). Instead, the panel substituted the impermissible discretionary cost-related consideration of "California's changing energy needs" under 10 C.F.R. § 50.12(a)(2)(vi). Opinion, slip op. at 36. While such discretionary factors may be considered under subsection (a)(2) of 10 C.F.R. § 50.12, they may not affect the threshold non-discretionary safety determination required by subsection (a)(1). *Ohio Citizens for Responsible Energy,* 28 N.R.C. 411, 415 (1998) (citing preamble to 10 C.F.R. § 50.12 proposed rulemaking, 50 Fed. Reg. 16,506, 16,510 (Apr. 26, 1985)). Because the panel's application of these impermissible discretionary factors to its review of an Atomic Energy Act-based safety determination is both legally erroneous and inconsistent

with holdings by the Supreme Court and the D.C. Circuit, Petitioners seek rehearing and/or rehearing en banc.

III. PROCEDURAL BACKGROUND

A. NRC's Timely Renewal Rule

This proceeding concerns a decision by the NRC to exempt PG&E from the requirements of the NRC's Timely Renewal Rule, 10 C.F.R. § 2.109(b), which implements the APA's timely renewal doctrine, 5 U.S.C. §558(c).[1] When it promulgated the Timely Renewal Rule in 1991, the NRC carefully balanced the APA's purpose of protecting licensees from undue agency delays in processing license renewal applications against the Atomic Energy Act's purpose of providing "adequate protection" of public health and safety in its licensing decisions. *See* 42 U.S.C. § 2232(a).[2] *See* Pet. Br. at 25-28, Pet. Reply Br. at 13-17.

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[1] For license renewal applicants who submit their applications in a "timely" manner as determined by the agency, the APA's timely renewal doctrine allows them to continue operating for an indefinite period past their license expiration dates while the agency decides whether to approve renewal. The timely renewal doctrine protects federal license holders "'from harm associated with delays in agency action on requests for license renewal.'" Opinion, slip op. at 8 (quoting *Comm. for Open Media v. FCC,* 543 F.2d 861, 867 (D.C. Cir. 1976)).

[2] *See also* 42 U.S.C. § 2133(d), requiring protection against "undue risk." The courts and NRC interpret the terms "adequate protection" and "no undue risk" to be equivalent under the Atomic Energy Act. *Union of Concerned Scientists,* 824 F.2d at 109 (citing *Long Island Lighting Co.,*18 N.R.C. 445, 464-65 (1983)).

In balancing the APA's concern with applicants' economic interests against the agency's grave responsibility for public health and safety under the AEA, the NRC took into account the "unique" safety risks of license renewal caused by aging of safety equipment after reactors pass the 40-year operating limit set by 42 U.S.C. § 2133(c):

> 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, the NRC set a deadline for submitting a license renewal application to give the NRC a reasonable opportunity to complete the safety review, environmental review, and hearing processes before the license expired. Having determined that these processes would likely take three years at a minimum, the NRC set the deadline at five years prior to operating license expiration. 2-ER-049.

Since adopting the Timely Renewal Rule in 1991, the NRC has granted six exemptions. *See* Pet. Br. at 39 and n. 9. In none of these cases, however, has the NRC granted an exemption to the Timely Renewal Rule for an application

submitted less than three years before the license expiration date, meeting the minimum timeframe NRC previously determined necessary to complete its reviews and processes. *Id.*

B. PG&E's License Renewal Application and NRC's Exemption Decision

PG&E initially submitted a license renewal application in 2009, well in advance of the expiration dates for the Diablo Canyon reactor operating licenses (November 2024 for Unit 1 and August 2025 for Unit 2) and the five-year deadline to qualify for coverage by the NRC's Timely Renewal Rule. But PG&E withdrew that application in 2018, due to its planned retirement of Units 1 and 2 beginning in late 2024. Opinion, slip op. at 11.

In 2022, the California Legislature passed Senate Bill ("SB") 846. In response to perceived uncertainty about the sufficiency of the future electricity supply in the State, the Legislature directed PG&E to seek renewal of the Diablo Canyon operating licenses once again. *Id.,* slip op. at 11. Thus, in the fall of 2022, PG&E wrote to the NRC, asking the agency to resume review of its 2009 license renewal application.

In the alternative, PG&E asked the NRC to grant it an exemption from the NRC's Timely Renewal Rule's five-year deadline for submission of reactor license renewal applications in 10 C.F.R. § 2.109(b). The requested exemption would allow PG&E to apply for license renewal less than a year before expiration of the

Unit 1 operating license and less than two years before expiration of the Unit 2 operating license. In effect, PG&E asked the NRC to abandon, for Units 1 and 2, the prudent safety-based approach to timely renewal it had taken in the 1991 Timely Renewal Rule. Petitioners opposed both of PG&E's requests. 3-ER-394, 3-ER-438, 3-ER-499.

The NRC denied PG&E's request to resume review of its 2009 license renewal application, but granted PG&E's alternative request for an exemption from the Timely Renewal Rule. 1-ER003. The NRC found that PG&E's exemption request satisfied the requirement of 10 C.F.R. § 50.12(a)(1) that the exemption was "authorized by law" because, in the NRC's view, the change was "administrative in nature" and did not change the current operating license. 1-ER-005.

In addition, the agency issued a 10 C.F.R. § 50.12(a)(1) finding that the requested exemption would not pose an "undue risk" to public health and safety. 1-ER-005. PG&E's requested exemption would give the NRC only eleven months to review the Unit 1 license renewal application and twenty-two months to review the Unit 2 application – far less than either the five-year regulatory deadline or the three-year alternative deadlines allowed by the NRC's rare exemptions. *See* Pet. Br. at 29 and n. 9. Abandoning the position the NRC took when it adopted its timely renewal regulations, the agency contended that "adequate protection of the public health and safety" would be provided by the agency's general "oversight" of

the reactors, by a commitment to "conduct a focused, efficient review," and by its general authority to "take whatever action may be necessary." 1-ER-005.

The NRC then went on to apply the discretionary standard in 10 C.F.R. § 50.12(a)(2), concluding that the exemption request presented "special circumstances" that were not considered when the Timely Renewal Rule was promulgated: SB 846 and its purpose of keeping the Diablo Canyon reactors open to address perceived changes in California's energy demands. 1-ER-006.

Thus, without concluding that it would likely have sufficient time before the operating license termination dates of November 2024 (Unit 1) and August 2025 (Unit 2) to complete the safety and environmental reviews and hearing process for PG&E's license renewal application, the Exemption Decision nevertheless granted PG&E the protection of the Timely Renewal Rule. With no reasonable expectation that the NRC can first address the "unique" safety challenges posed by operating the aging Diablo Canyon reactors past their 40-year limits, 2-ER-049, the Exemption Decision allows PG&E to operate the reactors for an indefinite period until such time as the NRC rules on the company's license renewal application.

C. Petitioners' Appeal and The Opinion

Petitioners sought review by this Court of the NRC's Exemption Decision, arguing, *inter alia,* that the Exemption Decision had erroneously treated the five-year deadline for license renewal applications as a discretionary deadline that could

be reduced from five years to a matter of months without violating the Atomic Energy Act. Pet. Br. at 39-40. As the panel summarized Petitioners' argument:

> Petitioners . . . argue the Exemption Decision violates or implicitly revokes NRC's timely renewal rule (10 C.F.R. § 2.109(b)) thereby rendering the Decision unlawful, as well as arbitrary and capricious. More specifically, Petitioners argue that the purpose of the rule is to provide a reasonable amount of time to complete review of renewal applications before the license expiration date, which the rulemaking history and past exemption decisions have shown to be a minimum of three years. Yet here, argue Petitioners, NRC did not commit in any way to completion of either environmental review or a hearing process before Diablo Canyon's licenses expire. Additionally, insist Petitioners, the rationale that NRC oversight will ensure adequate health and safety measures is inconsistent with NRC's previously adopted statements that nuclear reactors operating beyond the 40-year license term raise unique safety concerns. Petitioners argue that by its action here NRC has implicitly repudiated that rationale.

Opinion, slip op. at 30-31.

While the panel rejected Petitioners' argument that the NRC had unlawfully repudiated the safety requirements of the Timely Renewal Rule and subsequent exemption decisions, *id.*, it did not address Petitioners' argument that the NRC had violated the nondiscretionary threshold requirement of 10 C.F.R. § 50.12(a)(1). That provision requires that an exemption to the Timely Renewal rule must pose no "undue risk" to public health and safety. Pet. Br. at 49. Instead, the panel found that the timeliness of PG&E's license renewal application and all previous NRC exemption decisions was a discretionary consideration related to the "special circumstances" of the case under 10 C.F.R. § 50.12(a)(2). Opinion, slip op. at 30-31.

The panel then distinguished the "special circumstances" as they were considered in the previous exemption decisions from the "special circumstances" at play in the Diablo Canyon Exemption Decision. According to the panel, the matter of whether issuance of the previous exemptions would provide "adequate time for agency review prior to the expiration of the license at issue" was a discretionary question requiring the NRC to "explain why a shortened review would still serve the purpose of the rule." *Id.* (quoting 10 C.F.R. § 50.12(a)(2)(ii)). In contrast, in the case of Diablo Canyon, the panel found that the Exemption Decision "relies on a different special circumstance – that there are 'other material circumstance[s] not considered when the regulation was adopted for which it would be in the public interest to grant an exemption.'" *Id.* (quoting 10 C.F.R. § 50.12(a)(2)(vi)).[3] In so ruling, the panel failed to recognize that each of the prior three-year exemptions, *see* Pet. Br. at 39 and n.9, was explicitly based on non-discretionary *safety* considerations under 10 C.F.R. § 50.12(a)(1).[4]

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[3] These "special circumstances" consisted of a finding by the California Legislature that "'seeking to extend the Diablo Canyon powerplant's operations for a renewed license term is prudent, cost effective, and in the best interests of all California electricity customers.'" *Id.,* slip op. at 11 (quoting Senate Bill No. 846 ("SB 846"), Cal. Pub. Res. Code § 25548(b)). *See also id.* at 36 (finding that "California's changing energy needs constitute a special circumstance.").

[4] *See* 2-ER-13 (Clinton exemption); 2-ER-237 (Dresden exemption); 2-ER-229 (Ginna exemption); 2-ER-226 (Nine Mile Point exemption); 2-ER-071 (Oyster Creek exemption); 2-ER-221 (Perry exemption).

Thus, in dismissing the safety concerns raised by Petitioners under 10 C.F.R. § 50.12(a)(1), the panel substituted the secondary and discretionary "special circumstances" factors of 10 C.F.R. § 50.12(a)(2) for the threshold and non-discretionary safety-based determinations that must be made under Section 50.12(a)(1). Instead of addressing the safety significance of the amount of time that the NRC would have to conduct a formal license renew process for Diablo Canyon before the expiration of the operating licenses, the panel treated the timing of the application as a discretionary consideration that could be governed by the special circumstance of California's energy needs under 10 C.F.R. § 50.12(a)(2)(vi).[5]

Further, the panel swept aside NRC safety findings, made in the preamble to the Timely Renewal Rule, that operation of nuclear reactors after 40 years will raise "unique" safety issues related to the aging of reactor equipment that were not considered in the original licensing of reactors, are not adequately addressed by ongoing oversight, and therefore must be addressed in advance through formal licensing hearings in order to provide the necessary minimal level of protection to public health and safety. Opinion, slip op. at 32. According to the panel, these safety findings amounted only to "somewhat contradictory . . . prior statements the

[5] The panel also disregarded Petitioners' argument that it should never reach the applicability of 10 C.F.R. § 50.12(a)(2) at all -- because the NRC had not first satisfied the mandatory safety-based standard in 10 C.F.R. § 50.12(a)(1). Pet. Reply Br. at 21-22.

agency made regarding the general concerns with age-related degradation in periods of extended operation beyond the initial 40-year licensing term." *Id.*

IV. THE OPINION CONFLICTS WITH A DECISION OF THE U.S. SUPREME COURT AND INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE.

Rehearing en banc is necessary and appropriate under both prongs of the standard for en banc review set forth in Fed. R. App. P. 35(b)(1).

A. Conflict with Supreme Court Precedent

As provided by Fed. R. App. P. 35(b)(1)(A), rehearing is necessary and appropriate to address a conflict between the Opinion and U.S. Supreme Court precedent provided in *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers,* 367 U.S. 396 (1961). Consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions.

In *Power Reactor Development,* the Supreme Court held that while the NRC could include cost considerations in deciding whether to authorize construction of a nuclear plant, it could not include cost considerations in deciding whether to authorize operation of a nuclear plant under the Atomic Energy Act's adequate protection standard. 367 U.S. at 415-16 (citing 42 U.S.C. § 2232(a)).[6]

[6] Section 182(a) of the Atomic Energy Act, 42 U.S.C. § 2232(a), provides that nuclear facility license applications must provide sufficient information to enable the NRC to "find that the utilization or production of special nuclear material will

Exemption decisions are also subject to the adequate protection standard, as demonstrated by the language of 10 C.F.R. § 50.12(a)(1), which requires a threshold determination that an exemption must be "authorized by law" and may not "present an undue risk to the public health or safety." Only after satisfying these Atomic Energy Act-based mandatory requirements may the NRC consider discretionary factors related to costs and feasibility. 10 C.F.R. § 50.12(a)(2). *See also Ohio Citizens for Responsible Energy,* 28 N.R.C. at 415 (1998) (citing 50 Fed. at 16,510).

Contrary to *Power Reactor Development,* the panel in this case applied discretionary cost-related considerations to a safety determination under 10 C.F.R. § 50.12(a)(1). Without addressing the "no undue risk" standard in 10 C.F.R. § 50.12(a)(1), the panel held that the Exemption Decision satisfied the discretionary "public interest" considerations set forth in 10 C.F.R. § 50.12(a)(2)(vi)). *Id.,* slip op. at 31. Again without addressing the "no undue risk" standard in 10 C.F.R. § 50.12(a)(1), the panel held that the NRC "adequately explained why California's changing energy needs constitute a special circumstance." *Id.,* slip op. at 36. In

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. . . provide adequate protection to the health and safety of the public." Throughout the license term, the NRC may require licensees to submit additional information to determine whether a license should be "modified or revoked." *Id.* Thus, as recognized in *Union of Concerned Scientists,* Section 182(a) generally "commands the NRC to ensure that any use or production of nuclear materials 'provide[s] adequate protection to the health or safety of the public." 842 F.3d at 114.

violation of *Power Reactor Development,* the panel thereby included cost considerations in reviewing an NRC safety decision.

B. Question of Exceptional Importance

Rehearing is also necessary and appropriate under Fed. R. App. P. 35(b)(1)(B) because the Opinion presents the following "question of exceptional importance:"

> *In determining whether a proposed action will be consistent with the Atomic Energy Act and NRC implementing regulations requiring that all NRC licensing and enforcement decisions must provide a reasonable assurance of adequate protection of public health and safety, does the NRC have discretion to consider extraneous factors unrelated to public health and safety, such as "changing energy needs"?*

This exceptionally important question is raised by the conflict between the Opinion and the D.C. Circuit's seminal decision in *Union of Concerned Scientists v. NRC,* 824 F.2d at 116-20. In *Union of Concerned Scientists,* the D.C. Circuit unequivocally answered "no" to this question, but the panel Opinion answered "yes" by explicitly considering extraneous "public interest" factors in determining whether the Exemption satisfied NRC safety standards. *Id.,* slip op. at 31, 36.

In *Union of Concerned Scientists,* the D.C. Circuit held that the Atomic Energy Act precludes the NRC from considering costs in applying the adequate

protection standard in Section 182(a), 42 U.S.C. § 2232(a). 824 F.2d at 116-17 (citing *Power Reactor Development,* 367 U.S. at 415-16). The court also found that the NRC must apply the adequate protection standard without cost considerations to *all* of its decisions regarding compliance with the Atomic Energy Act, including both licensing and enforcement. 842 F.2d at 114 and note 1, *supra.* Here, in contrast to *Union of Concerned Scientists,* the panel impermissibly substituted discretionary cost-related considerations permissible in the second prong of 10 C.F.R. § 50.12(a) for mandatory Atomic Energy Act-based safety findings required by the first prong of 10 C.F.R. § 50.12(a).

Petitioners respectfully submit that *Union of Concerned Scientists* meets the standard of Circuit Rule 35-1 for a "rule of national application in which there is an overriding need for national uniformity."[7] By relying on cost and feasibility considerations to excuse the NRC's failure to consistently interpret or apply a safety-based standard, the Opinion would substantially weaken the broadly applied ruling of *Union of Concerned Scientists* that equitable factors such as costs and feasibility may not be considered in determining minimum safety requirements under the Atomic Energy Act. If relied on by the NRC and/or by federal courts in

[7] *See, e.g.,* the following decisions citing *Union of Concerned Scientists: See, e.g., Massachusetts v. United States,* 856 F.2d 378, 384 (1st Cir. 1988); *Public Service Co. of New Hampshire,* 31 N.R.C. 197, 210-13 (1990); *Safety Light Corp., et al.,* 35 N.R.C. 156, 159 (1992); *Ohio Citizens for Responsible Energy,* 28 N.R.C. at 415.

the future, the Opinion would inevitably cause a reduction in the level of physical protection from nuclear accidents and emissions guaranteed to the public by the Atomic Energy Act. Such a weakening of the Atomic Energy Act would raise serious concerns for public health and safety, given that "[n]uclear power was at the time of [Section 182(a)'s] enactment and remains today fraught with the potential for great danger to human life." *Union of Concerned Scientists,* 824 F.2d at 120.

V. THE OPINION IS BASED ON A MATERIAL LEGAL ERROR.

Pursuant to Fed. R. App. P. 40, Petitioners also request a panel rehearing to address a related material legal error in the Opinion: the panel mis-applied the NRC's two-pronged standard for granting an exemption in 10 C.F.R. § 50.12(a).

Under the first prong, 10 C.F.R. § 50.12(a)(1), the NRC must determine whether a proposed exemption is "authorized by law" and whether it would pose an "undue risk" to public health and safety. This determination is mandatory under the Atomic Energy Act. The NRC may take additional equitable considerations into account under 10 C.F.R. § 50.12(a)(2), but only after the non-discretionary factors of § 50.12(a)(1) have been satisfied. *Ohio Citizens for Responsible Energy,* 28 N.R.C. at 415.

In the Opinion, the panel violated its regulatory mandate by injecting discretionary considerations into the first prong's threshold non-discretionary

question regarding public safety. That is, in considering whether the NRC had reasonably found that granting an exemption to the NRC's Timely Renewal Rule would cause "undue risk" to public health and safety the panel weighed the impermissible cost-related discretionary consideration of "California's changing energy needs." Opinion, slip op. at 36.

As a result of this legal error, the panel erroneously elevated the significance of secondary discretionary considerations over the primacy of safety findings made under the first prong of 10 C.F.R. § 50.12(a). In so doing, the Opinion effectively approved the NRC's unexplained and unsupported abandonment of its previous safety-based policy to balance the competing requirements of the APA and the Atomic Energy Act: on the one hand, the APA-based "timely renewal" protection of a licensee's interest in uninterrupted operation pending license renewal approval; and on the other hand, the Atomic Energy Act-based protection of the public's interest in a prior agency review and hearing opportunity regarding the "unique" safety risks posed by operating aging safety equipment past a reactor's operating license expiration date. Petitioners respectfully request the panel to restore that balance by only considering such discretionary factors *after* fulfilling the first prong of the standard, which will protect the public's right to the safety protections of the Atomic Energy Act.

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to grant Petitioners' request for rehearing by the panel and/or en banc review.

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PETITIONERS' 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 4,188 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.

Respectfully submitted,

/s/ Diane Curran
Diane Curran

June 27, 2024

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION; UNITED STATES OF AMERICA,

Respondents,

PACIFIC GAS & ELECTRIC COMPANY,

Intervenor.

No. 23-852

NRC-2023-0043
Nuclear Regulatory Commission

OPINION

On Petition for Review of an Order of the Nuclear Regulatory Commission

Argued and Submitted January 10, 2024
Pasadena, California

Filed April 29, 2024

Before: Consuelo M. Callahan and Mark J. Bennett, Circuit Judges, and Gary S. Katzmann, Judge.[*]

Opinion by Judge Callahan

SUMMARY[**]

Nuclear Regulatory Commission

The panel denied a petition for review of the U.S. Nuclear Regulatory Commission ("NRC")'s decision granting Pacific Gas & Electric ("PG&E")'s request for an exemption to the deadline for a federal license renewal application for the continued operation of the Diablo Canyon Nuclear Power Plant.

In 2022, the California Legislature directed PG&E to pursue any actions needed to extend operations at Diablo Canyon. Prior to that point, PG&E had been working to cease operations at Diablo Canyon's two nuclear power units, and the deadline to qualify for continued operation during the NRC's review of a license renewal application had passed. In granting PG&E's requested exemption to the renewal deadline, the NRC found that the exemption was authorized by law, there would be no undue risk to public

[*] The Honorable Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

health and safety, and special circumstances were present. The NRC also concluded that the exemption met the eligibility criteria for a categorical exclusion, and no additional environmental review under the National Environmental Policy Act ("NEPA") was required.

The panel first addressed whether the Hobbs Act granted the court jurisdiction to hear a direct appeal from an NRC exemption decision. Applying a case-by-case approach, the panel held that where, as here, the substance of the exemption is ancillary or incidental to a licensing proceeding, there is jurisdiction.

The panel further concluded that petitioners, three non-profit organizations concerned with the dangers posed by nuclear power, had Article III standing to bring this case. Petitioners alleged a non-speculative potential harm from age-related safety and environmental risks; demonstrated that under the Exemption Decision, Diablo Canyon will in all likelihood continue operations beyond its initial 40-year license term; and alleged members' proximity to the facility.

The panel held that NRC's decision to grant the exemption was not arbitrary, capricious, or contrary to law. Nor did the NRC act arbitrarily or capriciously in invoking the NEPA categorical exclusion when issuing the Exemption Decision. The NRC was not required to provide a hearing or meet other procedural requirements before issuing the Exemption Decision because the Exemption was not a licensing proceeding. NRC adequately explained why California's changing energy needs constituted a special circumstance, and why the record supported its findings of no undue risk to the public health and safety.

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OPINION

CALLAHAN, Circuit Judge:

In 2022, the State of California determined that it faces significant uncertainty in the stability and reliability of its electricity grid as it transitions to renewable energy generation. To hedge against possible insufficient energy supply in the face of climate-related incidents impacting energy production such as drought, wildfire, and heat waves, the California Legislature directed Pacific Gas & Electric Co. ("PG&E") to pursue any actions needed to extend operations at the Diablo Canyon Nuclear Power Plant ("Diablo Canyon").

Prior to that point, PG&E, which holds the federal licenses to operate Diablo Canyon, had been working to cease operations at Diablo Canyon's two nuclear power units. California's directive forced PG&E to change course and seek renewal of its operating license. At that point, the deadline to qualify for continued operation during the United States Nuclear Regulatory Commission ("NRC")'s review of a license renewal application had passed. PG&E asked for an exemption to this timely renewal deadline, and NRC granted PG&E's request.

Petitioners San Luis Obispo Mothers for Peace, Friends of the Earth, and the Environmental Working Group (collectively, "Petitioners"), three non-profit organizations concerned with the dangers posed by nuclear power,[1] object

[1] Mothers for Peace is "a non-profit membership organization concerned with the dangers posed by Diablo Canyon and other nuclear reactors, nuclear weapons, and radioactive waste" and it "has participated in NRC

to the NRC's decision and PG&E's continued operation of the power plant. They petition the Ninth Circuit for review of NRC's grant of an exemption and NRC's issuance of a categorical exclusion under the National Environmental Policy Act ("NEPA"), arguing that under the Administrative Procedure Act ("APA"), NRC's decisions are not authorized by law and not supported by the record.

This case requires us to first address whether the Hobbs Act, 28 U.S.C. § 2324 grants this court jurisdiction to hear a direct appeal from an NRC exemption decision. We determine that where, as here, the substance of the exemption is ancillary or incidental to a licensing proceeding, we have jurisdiction. *See Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 743 (1985); *General Atomics v. U.S. Nuclear Regul. Comm'n*, 75 F.3d 536, 539 (9th Cir. 1996). Assured of our jurisdiction, we further conclude that Petitioners have Article III standing to bring this case, and that NRC's decision to grant the exemption was not arbitrary, capricious, or contrary to law. We deny the petition.

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licensing cases involving the Diablo Canyon reactors since 1973." Friends of the Earth is a "nonprofit environmental advocacy organization dedicated to improving the environment and creating a more healthy and just world." Environmental Working Group is a "non-profit, non-partisan organization that works to empower people to live healthier lives in a healthier environment." Like Mothers for Peace, it has a strong presence in California, has participated in utility commission proceedings in the state, and is highly concerned about safety and environmental hazards of Diablo Canyon.

I.

A.

Under the Atomic Energy Act of 1954, the Atomic Energy Commission was made responsible for licensing and regulating use of radioactive material, including the construction and operation of commercial nuclear power plants. 42 U.S.C. §§ 2201, 2131–33. In 1974, Congress passed the Energy Reorganization Act, creating the NRC and transferring to it "all the licensing and related regulatory functions of the Atomic Energy Commission" and tasking it with regulating use of radioactive materials to promote the common defense and security and public health and safety. 42 U.S.C. § 5841(f); *see also id.* §§ 5841(a)(1), 2201(b). The NRC has in turn promulgated extensive regulations governing the issuance of licenses to operate nuclear power plants. *See* 10 C.F.R. parts 50, 52.

The Atomic Energy Act specifies that the term of an original license must not exceed forty years. 42 U.S.C. § 2133(c). A license can, however, be renewed for a subsequent term not to exceed twenty years beyond the license's original expiration date. *Id.*; 10 C.F.R. § 54.31(b). Alternatively, an operator of a nuclear power plant may choose to terminate operations and enter a decommissioning process by which a facility is removed from service and nuclear materials are safely stored or disposed of. *See generally,* 10 C.F.R part 20, subpart E; 10 C.F.R. § 30.36. These different licensing-related "proceedings" typically require a public notice and hearing process, *see* 42 U.S.C. § 2239, and more generally, "any person whose interest may be affected by a proceeding and who desires to participate as a party" can file a written request for a hearing, 10 C.F.R.

§ 2.309(a); *see also id.* § 54.27 (hearing notice requirements for license renewals).

NRC regulations addressing license renewals include what is colloquially referred to as the "timely renewal rule." *See* 10 C.F.R. § 2.109. Under the APA, which applies to NRC actions taken pursuant to the Atomic Energy Act, *see* 42 U.S.C. § 2231, "[w]hen a licensee has made timely and sufficient application for a renewal . . . 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). This provision protects federal license holders (like PG&E) "from harm associated with delays in agency action on requests for license renewals." *Comm. for Open Media v. FCC*, 543 F.2d 861, 867 (D.C. Cir. 1976). NRC regulations implementing this provision of the APA require a licensee of a nuclear power plant to file an application for license renewal at least five years before the expiration of the existing license in order to qualify for timely renewal protection. 10 C.F.R. § 2.109(b)[2]; *see also* 10 C.F.R. § 54.17(a).

NRC regulations also authorize exemptions from certain regulatory requirements if NRC finds that (1) the exemption is authorized by law; (2) the exemption will not present an undue risk to the public health and safety; (3) the exemption

[2] The text of NRC's timely renewal rule states:

> "If the licensee of a nuclear power plant . . . 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."

10 C.F.R. § 2.109(b).

is consistent with the common defense and security; and (4) that special circumstances are present. 10 C.F.R. § 50.12(a). NRC regulations identify six categories of special circumstances:

> (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.

Id. § 50.12(a)(2), *see id.* § 54.15 (applying exemptions to license renewals). NRC has previously issued exemptions to the timely renewal rule, allowing licensees to file renewal applications less than five years in advance of license expiration dates and still qualify for timely renewal protection. *See, e.g.*, Oyster Creek Nuclear Generating Station; Exemption, 69 Fed. Reg. 78054 (Dec. 22, 2004); Perry Nuclear Power Plant Unit No. 1; Exemption, 85 Fed. Reg. 43609 (July 17, 2020); Clinton Power Station Unit 1; Exemption, 84 Fed. Reg. 34410 (July 18, 2019).

B.

Diablo Canyon is located in coastal San Luis Obispo County and contains two units licensed by NRC—Unit 1 has been in operation since 1985 and Unit 2 has been in operation since 1986. The current licenses (granted for the statutorily allowed maximum of forty years) will expire on November 2, 2024, and August 26, 2025, respectively. Consistent with NRC's timely renewal rule, *see* 10 C.F.R. § 2.109(b), PG&E submitted a license renewal application for Units 1 and 2 in November 2009. NRC docketed[3] the applications thereby commencing its review of the renewal application and conferring timely renewal status on PG&E. However, PG&E changed course in 2018. PG&E submitted an initial request to NRC to delay the decision on PG&E's pending renewal application, made a follow up request to suspend review of the application, and submitted a third

[3] Docketing is the formal acceptance by NRC of an application that is sufficiently complete. *See* 10 C.F.R. § 2.101(a); *see also* § 2.303. The public can access docketed materials at regulations.gov.

request on March 7, 2018, to withdraw the application. NRC granted PG&E's request to withdraw, terminated review, and closed the docket. At that point, PG&E began decommissioning efforts with the intent to suspend operation of Units 1 and 2 at the end of their current operating licenses.

In September 2022, California enacted Senate Bill No. 846 ("SB 846"). The bill invalidated the prior approval by the state utilities commission of PG&E's plans to retire Diablo Canyon and directed PG&E (in coordination with the relevant state agencies) to take actions necessary to extend operation of Diablo Canyon until the new target retirement dates specified in the legislation. The Legislature declared that "seeking to extend the Diablo Canyon powerplant's operations for a renewed license term is prudent, cost effective, and in the best interests of all California electricity customers." Cal. Pub. Res. Code § 25548(b). It explained:

> [T]he 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.

Cal. Pub. Util. Code § 712.8(q). SB 846 directed state agencies and PG&E to "act quickly and in coordination to

take all actions necessary and prudent to extend Diablo Canyon powerplant operations." Cal. Pub. Res. Code § 25548(f). SB 846 was passed as an "urgency statute," effective immediately upon signing because it was "necessary for the immediate preservation of the public peace, health, or safety." S.B. 846 § 18, 2021-2022 Leg., Reg. Sess. (Cal. 2022).

In response, PG&E submitted a letter to NRC on October 31, 2022. The letter requested that NRC either resume review of PG&E's previously submitted and withdrawn renewal application or grant an exemption from the five-year timely renewal submission deadline in 10 C.F.R. § 2.109(b). In other words, PG&E requested an exemption that would allow it to operate Diablo Canyon's nuclear power units beyond November 2024 and August 2025 until NRC issues a final order on its license renewal application.

C.

On January 24, 2023, NRC staff responded to PG&E, stating NRC would not resume review of the withdrawn application and that the agency was still evaluating the exemption request. On March 8, 2023, NRC granted PG&E the requested exemption (the "Exemption Decision"), determining that "pursuant to 10 C.F.R. [§] 54.15 and 10 C.F.R. [§] 50.12, the requested exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security" and that "special circumstances as defined in 10 C.F.R. [§] 50.12(a)(2), are present." NRC conditioned the grant of PG&E's timely renewal status on PG&E's submission of a license renewal application by December 31, 2023, and on NRC's determination that the application

was sufficient for docketing.[4] 88 Fed. Reg. 14395 (Mar. 8, 2023). NRC also issued a categorical exclusion under the NEPA.

In the Exemption Decision, NRC first found that the requested exemption was "authorized by law," noting that nothing in the Atomic Energy Act or the APA prohibited granting an exemption or required renewal applications be submitted in the five-year period specified in 10 CFR § 2.109(b). Rather, the five-year period adopted in regulation was a discretionary choice by the agency designed to provide a reasonable amount of time to review a renewal application prior to expiration of the license. Additionally, because the exemption requested by PG&E was, at base, a scheduling change and administrative in nature, and because NRC has authority to grant an exemption from regulatory requirements, NRC determined that granting PG&E's requested exemption was not in violation of any law or regulation.

NRC next addressed the requirement that there be no "undue risk to the public health and safety." 10 C.F.R. § 50.12(a)(1). NRC noted the exemption would not change the manner in which Diablo Canyon operates or otherwise cause a change to the facility. 88 Fed. Reg. at 14397. Furthermore, NRC would "continue to conduct all regulatory activities associated with licensing, inspection, and oversight" and "take whatever action may be necessary to ensure adequate protection of the public health and safety." *Id.* Additionally, NRC stated it would undertake a "focused, efficient review," building on work already done

[4] PG&E met this deadline, submitting its renewal application on November 7, 2023. NRC docketed the application on December 19, 2023.

on PG&E's previously withdrawn application, to determine if any immediate safety measures were needed. *Id.* NRC also found that, because the exemption did not alter the design, function, or operation of Diablo Canyon in any way, the exemption was "consistent with the common defense and security." *Id.*

Next, NRC determined that "special circumstances were present," specifically that other material circumstances existed which were not considered when the regulation was adopted (*see* 10 C.F.R. § 50.12(a)(2)(vi)). NRC found that the adoption of SB 846 and California's policy directive to keep Diablo Canyon operating "based, in part, on climate change impacts and serious electricity reliability challenges" constituted "other material circumstances" under 10 C.F.R. § 2.109(b)(vi). 88 Fed. Reg. at 14398. Overall, NRC found the information PG&E provided was "compelling and demonstrate[d] that the special circumstances . . . are present and that it would be in the public interest to grant this exemption." *Id.*

Finally, NRC addressed environmental considerations under NEPA. NRC evaluated whether the Exemption Decision qualified for a categorical exclusion under NRC regulation, which outlines six factors to consider. *See* 10 C.F.R. § 51.22(c)(25). Specifically, NRC found (1) the Exemption Decision did not involve a significant hazard (i.e., a significant increase in the probability or consequences of an accident, a possibility of a new or different kind of accident, or a significant reduction in margin of safety); (2) there were no significant changes in the types or amount of any effluents released offsite; (3) there was no significant increase in public or occupational radiation exposure; (4) the exempted regulation did not deal with construction so there was no significant construction impact; (5) the exemption

was administrative in nature and did not impact the probability or consequences of accidents; and (6) the exemption involved scheduling requirements because it modified a filing deadline. 88 Fed. Reg. at 14398. NRC "conclude[d] that the proposed exemption meets the eligibility criteria for a categorical exclusion set forth in 10 C.F.R. [§] 55.22(c)(25)" and no additional environmental review under NEPA was required. *Id.*

Petitioners filed multiple letters with NRC opposing PG&E's requests. After NRC issued the Exemption Decision, Petitioners submitted a request for the NRC to reverse the decision. On April 28, 2023, Petitioners filed the petition for review currently before us, challenging both the Exemption Decision and the NEPA categorical exclusion. PG&E intervened, and the State of California filed an amicus brief.

II.

We first consider our jurisdiction to hear this case on direct appeal from NRC. Judicial review of NRC decisions is governed by the Hobbs Act, 28 U.S.C. § 2342, which gives "[t]he court of appeals . . . exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of [the NRC] made reviewable by [42 U.S.C. § 2239]." Under 42 U.S.C. § 2239(a)(1)(A), the court of appeals has direct jurisdiction over a final order in "any proceeding . . . for the granting, suspending, revoking, or amending of any license." Challenges to NRC actions that do not fit within this grant of jurisdiction may still be brought in federal district court.

The parties dispute whether NRC's grant of an exemption to the timely renewal rule is a proceeding granting, suspending, revoking, or amending a license such

that it is directly appealable to the courts of appeals. All agree that a decision related to a license renewal or amendment are within Hobbs Act jurisdiction. Petitioners argue that the Hobbs Act must be read broadly to encompass any NRC decision that is preliminary or incidental to licensing, citing *General Atomics v. U.S. Nuclear Regulatory Commission*, 75 F.3d 536, 538–39 (9th Cir. 1996). According to Petitioners, the Exemption Decision fits into that category because, without the exemption, PG&E would be unable to continue operations beyond the expiration of Diablo Canyon's current licenses and it is therefore a decision that acts as an amendment to PG&E's license. NRC responds that issuance of an exemption is not a license proceeding and therefore this court lacks jurisdiction to hear the case.

A.

The existing case law discussing Hobbs Act jurisdiction is instructive. The Supreme Court in *Florida Power & Light Co. v. Lorion* considered the reviewability of NRC's denial of a citizen petition under 10 C.F.R. § 2.206 requesting that the NRC institute a proceeding to modify, suspend, or revoke the license of a nuclear reactor. 470 U.S. 729, 731 (1985). The Court's primary concern was whether a hearing—rather than the mere denial thereof—was necessary to trigger the court of appeals' initial review jurisdiction under the Hobbs Act. *Id.* at 737. In holding that a formal hearing was not a prerequisite to Hobbs Act jurisdiction, the Court determined that "Congress decided on the scope of judicial review . . . solely by reference to the subject matter of the [NRC] action and not by reference to the procedural particulars of the [NRC] action." *Id.* at 739. The Court ultimately held that § 2239 vests initial subject-

matter jurisdiction in the federal courts of appeals over NRC orders denying § 2.206 petitions. *Id.* at 746.

In arriving at that conclusion, the *Lorion* Court explained the consequences of a different outcome. Cases outside of Hobbs Act jurisdiction would be within the jurisdiction of the federal district courts. If direct appellate review of NRC decisions depended on a hearing having occurred, different decisions related to the same license proceedings might be heard in either the court of appeals or the district courts—"a seemingly irrational bifurcated system" whereby some decisions received two layers of judicial review and some received only one. *Id.* at 742 (quoting *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 197 (1980)). The Court further noted that the fact-finding function of a district court was typically unnecessary in judicial review of agency decisions, which are considered based on the record before the agency. *Id.* at 743–44. The Court observed that "[o]ne purpose of the Hobbs Act [was] to avoid the duplication of effort involved in creation of a separate record before the agency and before the district court." *Id.* at 740. Such duplication and associated delays "would defeat the very purpose of summary or informal procedures before the agency—saving time and effort in cases not worth detailed formal consideration or not requiring a hearing on the record." *Id.* at 742–43. Therefore, "[a]bsent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, [the Court] will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals." *Id.* at 745. In light of these considerations, the Court held that "review of orders resolving issues preliminary or ancillary to the core issue in a proceeding should be reviewed in the same forum as the final order resolving the core issue." *Id.* at 743.

This court has also considered the scope of Hobbs Act jurisdiction over NRC decisions. In *General Atomics*, we attributed to the *Lorion* Court the proposition that "the Hobbs Act is to be read broadly to encompass all final N[RC] decisions that are preliminary or incidental to licensing" and that § 2239 should be "read liberally." 75 F.3d at 539. Based on those principles, we concluded that a challenge to an NRC order holding a parent company jointly and severally liable for cleanup costs that were the responsibility of its subsidiary (the actual licensee) was within the scope of our jurisdiction under the Hobbs Act. *Id.* at 538–39. We explained that a determination of whether the parent company was in fact a licensee "would directly involve the granting and possible amending" of the plant's license. *Id.* at 539.

We confirmed this interpretation in *Public Watchdogs v. Southern California Edison Co.*, 984 F.3d 744 (9th Cir. 2020). There, we noted that "in view of *Lorion* and *General Atomics*, it is clear we must read the Hobbs Act broadly to encompass not only all final NRC actions in licensing proceedings, but also all decisions that are preliminary, ancillary, or incidental to those licensing proceedings." *Id.* at 757–58. In that case, a nuclear facility had begun the decommissioning process, and NRC had granted related license amendments and approved use of a certain system for storing spent nuclear rods. *Id.* at 751–52. Petitioners brought suit in federal district court seeking to enjoin the allegedly deficient decommissioning activities and storage system. *Id.* at 753–54. The district court dismissed for lack of jurisdiction, finding the NRC decision fell within the scope of the Hobbs Act and thus must be challenged before the Ninth Circuit. *Id.* at 755. We affirmed. Despite arguments that certain of the challenged decisions were

exemptions that fell outside the Hobbs Act, we held that the challenged actions were properly characterized as related and incidental to implementation of the license amendment and therefore within our Hobbs Act jurisdiction. *Id.* at 757–61.

Because we found the challenged actions in *Public Watchdogs* were not properly considered to be exemptions, we had no occasion to address the Second Circuit's decision in *Brodsky v. U.S. Nuclear Regulatory Commission*, 578 F.3d 175 (2d Cir. 2009). Here, NRC urges us to adopt the Second Circuit's approach. In *Brodsky*, petitioners challenged NRC's issuance to a nuclear power plant of an exemption from a fire safety regulation without providing a hearing. *Id.* at 177. The Second Circuit held that the Hobbs Act did not grant the circuit court initial review jurisdiction over exemptions, noting that "[t]he plain text of § 2239(a) does not confer appellate jurisdiction over final orders issued in proceedings involving exemptions." *Id.* at 180. The Second Circuit deferred to NRC's view that an exemption was distinct from "the granting, suspending, revoking, or amending" of a license under § 2239(a). *Id.* at 180–81. While recognizing policy advantages such as judicial efficiencies, the Second Circuit found those policy arguments insufficient to overcome what it viewed as the plain intent of Congress. *Id.* at 181. Reviewing the legislative history, the Second Circuit pointed out that Congress did not choose to include exemptions within the review provision despite the existence of the exemption regulations prior to Congress' amending § 2239(a). *Id.* Therefore, the *Brodsky* court held that it "lack[ed] jurisdiction under the Hobbs Act to review an NRC exemption." *Id.* at 182.

The Second Circuit then turned to consider whether the challenged order was in fact an exemption or more properly regarded as a license amendment. *Id.* at 182–83. The Second Circuit determined that NRC had reasonably applied its regulations when it classified the order as an exemption and not an amendment. *Id.* (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Noting that NRC could likely have also treated the order as an amendment, and that "under the NRC regulations, little appears to distinguish an exemption from an amendment," the Second Circuit nonetheless held that it must defer to NRC's reasonable application of its own regulations. *Id.* at 183. Finding that it therefore lacked jurisdiction, the *Brodsky* court dismissed the petition. *Id.* at 184.

No other circuits have considered the question of Hobbs Act jurisdiction over exemptions in as much detail as the Second Circuit. However, many have reached the merits of exemption decisions without pausing for jurisdictional questions. *See Massachusetts v. U.S. Nuclear Regul. Comm'n*, 878 F.2d 1516 (1st Cir. 1989); *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995); *Commonwealth Edison Co. v. U.S. Nuclear Regul. Comm'n*, 830 F.2d 610 (7th Cir. 1987); *Shoreham-Wading River Cent. Sch. Dist. v. Nuclear Regul. Comm'n*, 931 F.2d 102 (D.C. Cir. 1991); *see also Honeywell Int'l, Inc. v. U.S. Nuclear Regul. Comm'n*, 628 F.3d 568, 575–76 (D.C. Cir. 2010) (finding the challenged exemptions were more properly considered license amendments, and therefore fell within the ambit of the Hobbs Act).

Consistent with these cases, we decline to announce a *per se* rule whereby exemptions categorically escape Hobbs

Act review.[5] None of our precedent suggests such a bright line rule, and the NRC's classification of an action cannot be dispositive of our jurisdiction. [6] Exemptions "relieve[] an NRC licensee of the duty to comply with certain regulatory requirements," and can vary as much as the regulations they exempt. *Public Watchdogs*, 984 F.3d at 760 (citing *Brodsky*, 578 F.3d at 182). Many exemptions bear no direct relationship to another license-related proceeding. *See, e.g.*, *Brodsky*, 578 F.3d at 178 (exemption from enforcement of a fire safety regulation that would have otherwise forbidden use of a particular brand of fire barrier). Other regulations, however, may relate directly to licensing proceedings. For example, the § 2.206 petition at issue in *Lorion* resolved "issues preliminary or ancillary to the core issue in a [Hobbs Act-enumerated] proceeding." *Lorion*, 470 U.S. at 743.

We therefore hold, consistent with *Lorion*, *General Atomics*, and *Public Watchdog*, that NRC exemption decisions must be examined on a case-by-case basis to determine whether they fall within the broad and liberally interpreted grant of jurisdiction over proceedings that are

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[5] *Brodsky* is not to the contrary. The Second Circuit in *Brodsky* rejected the proposition that an exemption order *is* an order for "the granting, suspending, revoking, or amending of any license." *See* 578 F.3d at 180 (quoting *Lorion*, 470 U.S. at 743). As discussed below, Hobbs Act jurisdiction exists here because the Exemption Decision resolves an issue that is ancillary or incidental to the "core issue" of a license proceeding.

[6] All courts agree that we should not take NRC's labels at face value. *See Brodsky*, 578 F.3d at 182 ("Whether the challenged order is an exemption, as the NRC has labeled it . . . or is properly regarded as an amendment . . . is itself an issue that is within our jurisdiction."); *Honeywell*, 628 F.3d at 575–76 (noting the exemption was memorialized as an amendment to a license condition); *Public Watchdogs*, 984 F.3d at 760–61 (analyzing the challenged action to determine that claimed exemption decisions were actually related to a prior license amendment).

preliminary, ancillary, or incidental to the "core issue" of a license proceeding. *Lorion*, 470 U.S. at 743.

B.

Applying our case-by-case approach here, we note the highly unusual circumstances of this case. PG&E apparently had every intent to decommission the Diablo Canyon facility and had even taken steps to do so. But for the California Legislature's determination of a material change in the electrical needs of its citizens, by all accounts PG&E would have terminated operations at Diablo Canyon. The high demands on electricity faced by Californians were caused by unexpected harms to power transmission capabilities by wildfires, the impacts of drought on hydropower, and increasingly frequent extreme heat events. In response to these changing needs, California found that the continued operation of Diablo Canyon was necessary. However, that determination came too late for PG&E to qualify for timely renewal status under NRC's five-year filing deadline. Indeed, it came at a date when there was almost certainly insufficient time for NRC to review a renewal application before the expiration of Diablo Canyon's current licenses. These are unique circumstances.

The practical impact of the Exemption Decision undermines NRC's arguments that the decision is simply an administrative scheduling change, one that merely provides an alternative deadline to file a license renewal application and does not impact the term of Diablo Canyon's existing licenses. Prior to the Exemption Decision, Diablo Canyon was scheduled to terminate operations for Units 1 and 2 by November 2, 2024, and August 26, 2025, respectively. After the Exemption Decision and the grant of timely renewal status, Diablo Canyon will operate until some indefinite

future date. Based on NRC's own guidance documents indicating an average 18-month application review period, that indefinite future date is almost guaranteed to be after the current expiration date of least one of the licenses. In that way, the Exemption Decision has modified the terms of the licenses. An NRC decision that has the almost certain effect of allowing for operation of a facility beyond its license period must be considered ancillary or incidental to "the core issue" of a license.

Nevertheless, NRC argues that unlike the denial of a hearing in *Lorion*, the Exemption Decision is not "the first step in a process that will . . . culminate in full formal proceedings under [§ 2239(a)(1)]" as it does not require PG&E to submit a license renewal application or impact the availability of a formal proceeding should such an application be submitted. *See* 470 U.S. at 729. However, while the Exemption Decision does not legally trigger the renewal proceeding in the way a citizen petition could have triggered a proceeding in *Lorion*, the practical consequence of the Decision was to facilitate PG&E's license renewal process and it is therefore incidental the renewal proceeding. We do not read *Lorion*'s application of "basic principles respecting the allocation of judicial review of agency action" to turn on the formal legal relationship between two proceedings. 470 U.S. at 746. Additionally, NRC's argument focuses on *Lorion*'s forward-looking analysis regarding a future proceeding while ignoring the impact on the license that already exists. *See General Atomics*, 75 F.3d at 539 (finding jurisdiction over an NRC action that would impact the existing license by determining if a company was a *de facto* licensee); *Public Watchdogs*, 984 F.3d at 758–59 (determining there was jurisdiction over an NRC decision

related to implementation of an existing license and related amendment).

Under the NRC's approach, Petitioners would challenge the Exemption Decision in district court. NRC also suggests that Petitioners could file a citizen petition under 10 C.F.R. § 2.206 to challenge the legality or safety of operations during timely renewal. But these arguments support our determination that the Exemption Decision fits within our Hobbs Act jurisdiction. *See Public Watchdogs*, 984 F.3d at 761–63 (noting in support of its finding of Hobbs Act jurisdiction that the petitioners there could have brought (and later did bring) the same challenge under a § 2.206 petition). Requiring Petitioners to bring this current petition in district court but later allowing them to challenge a § 2.206 petition on the same issues in the Ninth Circuit would lead to the "'seemingly irrational bifurcated system' where the court of review would be determined by the 'procedural particulars of the [NRC] action' rather than the 'subject matter of the [NRC] action.'" *Id.* at 763 (alterations in original) (quoting *Lorion*, 470 U.S. at 739, 742). The additional policy rationale articulated in *Lorion* further bolsters our decision. District court proceedings could not aid us in evaluating the agency's action. *Lorion*, 470 U.S. at 743–44 ("The factfinding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking."). Rather, review in the district court would create duplication of judicial effort and delay resolution, defeating the purpose of informal proceedings before an agency. *Id.* at 742.

In the unique context of this case, where the timing of NRC's decision has the almost guaranteed practical impact of extending operations at Diablo Canyon—impacting both implementation of the existing license and the progress of the license renewal proceeding—we hold that the Exemption

Decision is fairly considered as ancillary or incidental to the "core issue" of the existing Diablo Canyon license under the required broad reading of our Hobbs Act jurisdiction.

III.

Having determined that we have jurisdiction to hear this petition on direct appeal, we next address NRC's arguments that Petitioners lack Article III standing to bring this suit.

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Article III standing is required at all stages of the litigation. *See United States v. Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997) ("[T]he jurisdictional issue of standing can be raised at any time . . . ."). To establish standing, the plaintiff or petitioner must show that an injury-in-fact was caused by the challenged conduct and can be redressed by a favorable judicial decision. *Phillips v. U.S. Customs & Border Protection*, 74 F.4th 986, 991 (9th Cir. 2023) (citing *Lujan*, 504 U.S. at 560–61). The party invoking federal jurisdiction (here, Petitioners) has the burden to establish standing. *Lujan*, 504 U.S. at 561. Each Petitioner can establish standing by showing at least one of its members would have standing. *See Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (standing of an organization is derivative of the standing of its members).

NRC argues that Petitioners have failed to show injury-in-fact.[7] Injury in fact requires a showing of harm that is

[7] In briefing before this court, NRC also originally argued the case was not ripe because timely renewal protection would not vest until (1) PG&E submitted a renewal application and (2) NRC approved the

actual and imminent. *Lujan*, 504 U.S. at 560. To show future harm, Petitioners must allege an injury that is "certainly impending, or there must be a substantial risk that the harm will occur." *Phillips*, 74 F.4th at 991 (cleaned up). According to NRC, Petitioners raise only the speculative possibility of future risks of natural disaster or operational accident at the Diablo Canyon facility as there will be no changes in the way Diablo Canyon operates. However, NRC recognized that age-related degradation of nuclear facilities may lead to safety and environmental risks beyond the initial 40-year license term that are different than those considered at the time in which the initial license was evaluated. Based on NRC's own guidance documents providing an average 18-month application review period and Diablo Canyon's current expiration dates, the likelihood of at least one of Diablo Canyon's nuclear power units continuing operations past its initial 40-year license term is almost guaranteed, not speculative. *See Nat. Res. Def. Council v. U.S. EPA*, 735 F.3d 873, 878 (9th Cir. 2013) (noting "probabilistic harm" may be considered "actual or imminent" when "there is a 'credible threat' that the probabilistic harm will materialize"). This is not a situation in which multiple steps are required before the alleged harm may come into being. *See e.g.*, *Munns v. Kerry*, 782 F.3d 402, 409–10 (9th Cir. 2015) (finding plaintiff's alleged harm was too speculative when it required him to be hired, sent to Iraq, have a government policy reinstated, and be kidnapped); *South Carolina v. United States*, 912 F.3d 720, 727–28 (4th Cir. 2019) (noting harm was too speculative given the multiple

application for docketing. However, NRC has acknowledged that both conditions have since been met and that the Diablo Canyon licenses are now in timely renewal status. Therefore, ripeness is not at issue.

steps that needed to happen before South Carolina became a repository for nuclear storage).

Additionally, NRC concedes that persons living within a 50-mile radius of a nuclear power facility face a realistic threat of harm should there be a release of radioactive materials from the facility. *See Calvert Cliffs 3 Nuclear Project, L.L.C. and Unistar Nuclear Operating Servs., L.L.C.*, 2009 WL 3297553 at *2–3 (Oct. 13, 2009 N.R.C.) (applying a "proximity presumption" to find injury-in-fact).[8] Mothers for Peace and Friends of the Earth have each alleged at least one of their respective members live, work, and own property within 50 miles of Diablo Canyon.[9] To summarize, Mothers for Peace and Friends of the Earth have (1) alleged a non-speculative potential harm from age-related safety and environmental risks, (2) shown that under the Exemption Decision, Diablo Canyon will in all likelihood continue operations beyond its initial 40-year license term while NRC completes review of a license renewal application, and (3) alleged members' proximity to the facility. The harm does not "lie[] at the end of a 'highly attenuated chain of possibilities,'" *South Carolina*, 912 F.3d

[8] At least two circuits have similarly recognized this potential injury from proximity to nuclear facilities. *See Shoreham-Wading*, 931 F.2d at 105 (noting the organization was suing on behalf of members that live in the area of the facility and finding standing to challenge an exemption decision); *Rockford League of Women Voters v. U.S. Nuclear Regul. Comm'n*, 679 F.2d 1218, 1221–22 (7th Cir. 1982) (noting members who live near enough to a facility to be endangered should the facility be unsafe had standing to pursue a proceeding).

[9] Because we find that Mothers for Peace and Friends of the Earth have standing based on the standing of their members, we have Article III jurisdiction to hear this case. No party specifically addressed the organizational standing of the Environmental Working Group, so we decline to address it here.

at 727 (citation omitted), but is rather a "credible threat" that qualifies as an actual and imminent harm, *Natural Resources Defense Council*, 735 F.3d at 878.

We easily find Petitioners meet the remaining requirements of standing, which NRC does not challenge. Petitioners' injury from the continued operation of Diablo Canyon is directly caused by NRC's approval of the Exemption Decision, and reversal of that Decision would redress the harm by eliminating Diablo Canyon's timely renewal status and thereby forcing operations to cease at the end of the license term. *See Lujan*, 504 U.S. at 560–61 (discussing causation and redressability requirements.).

IV.

Having established both our jurisdiction and Petitioners' Article III standing, we turn to the merits of Petitioners' challenge. Petitioners assert that both the Exemption Decision and the related NEPA categorical exclusion are unauthorized by law and not supported by substantial evidence.

A.

Review of agency action under the Hobbs Act is governed by the familiar APA standard—a court may set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *Public Citizen v. U.S. Nuclear Regul. Comm'n*, 573 F.3d 916, 923 (9th Cir. 2009). An agency action is arbitrary and capricious if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect

> of the problem, offered an explanation for its 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.

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The scope of review is narrow and does not allow a court to substitute its judgment for that of the agency. *Id.* The court should consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (citation omitted). "Where scientific and technical expertise is necessarily involved in agency decision-making . . . a reviewing court must be highly deferential to the judgment of the agency. *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1174 (9th Cir. 2004).

Petitioners argue the Exemption Decision is unauthorized by law because NRC made the decision without following statutory requirements for public hearings, safety findings, and NEPA compliance that attach to a license amendment or renewal. These arguments are premised on the assumption that the Exemption Decision should be considered a renewal or amendment of Diablo Canyon's existing licenses. However, such a characterization is incorrect. While we have found that the decision is ancillary or incidental to a licensing proceeding for the purposes of our jurisdiction, there is a difference between an *action that is ancillary* to a proceeding and the *actual proceeding*. As the Supreme Court noted in *Lorion*, NRC must sometimes undertake "summary or informal procedures" which do not require "detailed formal

consideration or . . . a hearing on the record." 470 U.S. at 742–43. We draw a distinction here between a decision that is ancillary and incidental to a proceeding (such that it confers jurisdiction under the mandated broad interpretation of the Hobbs Act) and the actual license proceeding itself (to which full procedural requirements attach).

Therefore, we reject Petitioners' arguments. There is no violation of 42 U.S.C. § 2133(c) (limiting the license term to 40 years) because NRC's action was not in itself a license amendment proceeding (even though it was ancillary or incidental to licensing). For the same reason, NRC was not required to provide a public hearing under 42 U.S.C. § 2239(a)(1), make assurances that it would complete the license renewal review before the license expired, make findings related to public safety, or complete an environmental impact statement under 10 C.F.R. § 51.95(c).

Petitioners next argue the Exemption Decision violates or implicitly revokes NRC's timely renewal rule (10 C.F.R. § 2.109(b)) thereby rendering the Decision unlawful, as well as arbitrary and capricious. More specifically, Petitioners argue that the purpose of the rule is to provide a reasonable amount of time to complete review of renewal applications before the license expiration date, which the rulemaking history and past exemption decisions have shown to be a minimum of three years. Yet here, argue Petitioners, NRC did not commit in any way to completion of either environmental review or a hearing process before Diablo Canyon's licenses expire. Additionally, insist Petitioners, the rationale that NRC oversight will ensure adequate health and safety measures is inconsistent with NRC's previously adopted statements that nuclear reactors operating beyond the 40-year license term raise unique safety concerns.

Petitioners argue that by its action here NRC has implicitly repudiated that rationale.

These arguments are not persuasive. The prior NRC exemptions to the timely renewal rule referenced by Petitioners are inapposite as those exemptions were granted because of a different special circumstance—that "[a]pplication 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." 10 C.F.R. § 50.12(a)(2)(ii). To make the required special circumstances finding in those prior exemptions, NRC needed to explain why a shortened review period would still serve the purposes of the rule (i.e., providing adequate time for agency review prior to the expiration of the licenses at issue). Here, the Exemption Decision relies on a different special circumstance—that there are "other material circumstance[s] not considered when the regulation was adopted for which it would be in the public interest to grant an exemption." *Id.* § 50.12(a)(2)(vi). NRC is of course required to, and did, explain its decision, but deviation from the rationale supporting past decisions is not an implicit repudiation or repeal of the timely renewal rule; rather, it is a logical outcome when addressing the different circumstances presented by different exemption requests.

Additionally, to the extent Petitioners argue that the exemption ignores the unique environmental concerns of continued operations past the initial 40-year license term, they fail to present any specific evidence of concerns with Diablo Canyon. And as previously discussed, the Exemption Decision does not, in itself, commence a licensing renewal proceeding and therefore does not require the same level of environmental review or a hearing process.

Beyond these contentions of legal error, Petitioners also argue that the Exemption Decision is not supported by the record. First, regarding NRC's finding of no undue risk to the public health and safety, Petitioners argue PG&E failed to provide certain safety reports in the years following the withdrawal of the prior renewal application and therefore the record lacked information on maintenance activities and other environmental safeguards. This argument is insufficient to show the NRC decision is unsupported by the record. It is true that NRC's statements related to the continuing status quo of operation are somewhat contradictory to prior statements the agency made regarding the general concerns with age-related degradation in periods of extended operation beyond the initial 40-year licensing term. And the prompt review of safety issues promised by NRC may be hindered if PG&E has failed to provide certain safety reports in recent years when it was pursuing decommissioning. However, NRC's continuing oversight authority assuages safety concerns. *See, e.g.*, 42 U.S.C. § 2236(a); 10 C.F.R. § 50.100; 10 C.F.R. § 2.206(a). Furthermore, Petitioners do not identify any specific safety concerns with operations at Diablo Canyon. According to NRC, the process of review to implement any interim safety measures is consistent with its usual process upon submittal of renewal applications. *See* 10 C.F.R. § 54.30. In other words, while there are general concerns with the safety of aging nuclear plants, Petitioners offer no safety concerns specific to Diablo Canyon to be balanced against NRC's technical expertise in monitoring nuclear reactors, as well as its knowledge as to its staff's capabilities to review the renewal application. Given our deference to the technical expertise of the agency, *see Nat'l Wildlife Fed'n*, 384 F.3d

at 1174, we conclude the record is sufficient to support NRC's finding of no undue risk to public health and safety.

Arguments that NRC's finding of special circumstances is not supported by the record are similarly unavailing. PG&E's letter requesting the exemption fairly asserts that changes in California's needs for reliable electricity constitute circumstances not considered when NRC adopted the timely renewal rule. The California Legislature determined that extending Diablo Canyon's operations would be "prudent, cost effective, and in the best interests of all California electricity customers." While SB 846 does provide an off-ramp if costs become too expensive, it also directs PG&E to "take all actions that would be necessary to operate the powerplant beyond the current expiration dates." Even if Petitioners present alternative or contradictory interpretations of the legislation, NRC reasonably relied on the California Legislature's statements as to both the need for continued operation and the public interest.

Therefore, the Exemption Decision was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

B.

The same is true as to NRC's issuance of a NEPA categorical exclusion. Although NEPA generally requires an agency to prepare an environmental assessment or environmental impact statement for proposed actions that significantly affect the quality of the human environment, *see* 42 U.S.C. § 4332(C), actions that fit within a specified categorical exclusion do not require these steps. 40 C.F.R. § 1501.4. Categorical exclusions cover actions that the agency (through a rulemaking process) has determined do not have a significant effect on the human environment. 40

C.F.R. § 1507.3(e)(2)(ii). NRC has adopted certain categorical exclusions, *see* 10 C.F.R. § 51.22, one of which applies to exemption decisions assuming certain conditions are met.

"The [APA] sets the standards for our review of agency decisions under NEPA . . . . Under the APA, we set aside agency action only if we find it to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Mountain Communities for Fire Safety v. Elliot*, 25 F.4th 667, 674 (9th Cir. 2022) (quoting *Idaho Sporting Cong., Inc. v Rittenhouse*, 305 F.3d 957, 964 (9th Cir. 2022 (citing 5 U.S.C. § 706)). If an agency has reasonably determined that the activity in question falls within the scope of a categorical exclusion, its decision to invoke the exclusion is not arbitrary and capricious. *Id.* at 680; *see also Earth Island Inst. v. Muldoon*, 82 F.4th 624, 633 (9th Cir. 2023) (noting an agency satisfies NEPA with a categorical exclusion "so long as the application of the exclusions to the facts of the particular action is not arbitrary and capricious").

Pursuant to 10 C.F.R. § 51.22(c)(25), NRC found that the Exemption Decision qualified for a NEPA categorical exclusion. NRC explained why each criterion for exclusion was met (i.e., no significant hazards, no significant construction impacts or changes in the types or amounts of effluents, no significant increase in potential for radiological accidents, etc.), largely based on the fact that the Exemption did not alter the status quo at Diablo Canyon but simply allowed for a change in the schedule for submission of a renewal application. Petitioners argue NRC's reasoning is incorrect given (1) NRC's acknowledgment of unique safety and environmental risks from aging equipment, (2) this exemption was different from the types of exemptions mentioned as examples during the rulemaking for the NEPA

exclusion regulation, and (3) NRC incorrectly characterized the exemption as a procedural as opposed to a license extension that will expose the public to unevaluated accident risks. Petitioners insist that NRC must complete an environmental impact statement to renew or amend the license.

We conclude that NRC's issuance of the NEPA categorical exclusion is supported by the record. Despite Petitioners' arguments to the contrary, there is nothing in the language of the categorical exclusion that limits its use to certain types of exemptions. *See* 10 C.F.R. § 51.22(c)(25). Additionally, NRC historically has approved timely renewal exemption requests using the very same NEPA categorical exclusion. As previously discussed, the Exemption Decision was not a license proceeding, and therefore a full environmental impact statement was not required. Again, Petitioners do not present any arguments of specific safety concerns with Diablo Canyon but only reference NRC's general prior acknowledgement that operation after 40 years may present unique age-degradation concerns.

Therefore, NRC did not act arbitrarily or capriciously in invoking the NEPA categorical exclusion when issuing the Exemption Decision.

V.

This is a singular case. In circumstances like these where NRC's decision has the almost guaranteed practical effect of extending the operating timeframe of a license beyond its original expiration date, such a decision is directly reviewable in our court under our broad and liberal reading of the Hobbs Act. Additionally, we hold that at least two of the Petitioners have standing. We deny the petition, finding NRC's grant of the Exemption and issuance of the NEPA

categorical exclusion complied with the APA. NRC was not required to provide a hearing or meet other procedural requirements before issuing the Exemption Decision because the Exemption was not a licensing proceeding. NRC adequately explained why California's changing energy needs constitute a special circumstance, and why the record supported its findings of no undue risk to the public health and safety. Despite Petitioners' arguments to the contrary, there are no limitations on the types of exemptions that may be encompassed by a NEPA categorical exclusion, and NRC did not act arbitrarily and capriciously in its determination that this Exemption met the eligibility criteria in its categorical exclusion regulation.

The petition is **DENIED**.