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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FRIENDS OF THE EARTH, Plaintiff, v. UNITED STATES DEPARTMENT OF ENERGY; JENNIFER GRANHOLM, in her official capacity as Secretary of the Department of Energy, Defendants.	Case No. 2:24-cv-02678-GW-SKx **PLAINTIFF'S FILING IN RESPONSE TO PG&E's SUBMISSION**

Pursuant to the Court's direction at the December 19, 2024 oral argument, Plaintiff Friends of the Earth respectfully responds to the recent submission filed by Intervenor Pacific Gas and Electric Company ("PG&E"), *see* ECF No. 76.

In its submission, PG&E describes new events that had not yet occurred when Plaintiff filed this case on April 2, 2024, *see* ECF No. 1, or when the parties (excluding PG&E, which was a proposed intervenor at the time) briefed Federal Defendants' motion to dismiss. *See* ECF Nos. 47-1, 56, 63. Specifically, PG&E states that after Plaintiff filed this case, the State of California transferred to PG&E "the remaining $400 million" of a loan authorized by S.B. 846, with the "last disbursement" occurring "on or about August 23, 2024." ECF No. 76 at 3. PG&E also states that those and other "loan funds . . . have now been committed or incurred by PG&E . . . . to [retain] vendors, third parties, employees, or contractors, and [those] committed funds include progress payments, purchases, and other dedicated expenditures that will be made by PG&E to support operations" at Diablo Canyon Nuclear Power Plant ("Diablo Canyon"). *Id.* at 4. Hence, under the loan agreement between California and PG&E, the now-committed loan funds—which exceed the $1.1 billion in federal funding PG&E sought through the Department of Energy's ("DOE") Civil Nuclear Credit ("CNC") program—will "be deemed forgiven" by California if PG&E never receives the $1.1 billion CNC grant due to a judicial remedy in this case or for any other reason. ECF No. 47-3, Exhibit 2-C, page 12; *see also id.* (clarifying that only "*unspent or uncommitted*" disbursements under the loan agreement "shall be repaid" to California if the CNC award is not available to repay the loan, but spent or committed funds will be forgiven (emphasis added)).

In light of these recent developments, Plaintiff has concluded that although it had Article III standing when it filed this case, *see* ECF No. 56 at 12-29, the

recent events set forth in PG&E's submission very likely moot this case and divest the Court of Article III jurisdiction. *See, e.g.*, *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) ("The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)."). As a result, Plaintiff will today separately file a notice of voluntary dismissal, pursuant to Rule 41(a)(1)(A)(i), which will have the effect of dismissing this case without prejudice. *See* FED. R. CIV. P. 41(a)(1)(B).[1]

Plaintiff maintains that DOE failed to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347, by issuing the CNC award to PG&E based only on the adoption of piecemeal, inadequate, and outdated reviews conducted decades earlier by other agencies. Because Plaintiff's forthcoming dismissal notice will end this important lawsuit without any judicial scrutiny or resolution of the merits, Plaintiff will take this opportunity to make a few critical observations regarding the actions at issue in this case, and the CNC program at large.

First, despite the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015), PG&E—in conjunction with California—was able to unilaterally moot this case

[1] *See, e.g.*, *Concha v. London*, 62 F.3d 1493, 1506 (9th Cir. 1995) ("Under Rule 41(a)(1), a plaintiff has an absolute right voluntarily to dismiss his action prior to service by the defendant of an answer or a motion for summary judgment. . . . Even if the defendant has filed a motion to dismiss, the plaintiff may terminate his action voluntarily by filing a notice of dismissal under Rule 41(a)(1). . . . The dismissal is effective on filing and no court order is required. . . . Such a dismissal leaves the parties as though no action had been brought." (citations omitted)); Wright and Miller, FED. PRACTICE AND PRO.: Civil Third, § 2363 ("[U]nless formally converted into a motion for summary judgment under Rule 56, a significant number of [court] decisions make . . . . it clear that a motion to dismiss under Rule 12 does not terminate the right of dismissal by notice.").

through contractual loopholes, and thereby assist DOE in undermining the safeguards Congress enacted in NEPA to ensure informed decisionmaking for federal funding decisions *before* "resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). By rapidly disbursing and committing hundreds of millions of dollars in loan funds after the filing of this lawsuit, it appears that California and PG&E have effectively foreclosed judicial review of DOE's decision to spend $1.1 billion of taxpayer dollars to prop up the aging and unkempt Diablo Canyon Power Plant. Not only is Diablo Canyon operating pursuant to an expired nuclear license, but it also has received no lawful NEPA scrutiny by DOE or any other agency addressing its continued operation beyond the now-expired license.

Notwithstanding this regrettable legal result, the fact remains that DOE committed patently egregious NEPA violations in approving this immense expenditure of taxpayer dollars—without *any* meaningful public involvement—as described extensively in Plaintiff's Amended Complaint. *See* ECF No. 44 ¶¶ 55-77, 80-86 (summarizing DOE's failure to take a hard look at the effects of its funding decision—including new information arising after the severely outdated NEPA documents the agency instead adopted as its own—and DOE's failure to solicit public comment on any draft NEPA analysis before issuing its final funding decision). Especially in light of recently discovered seismic fault lines coupled with Diablo Canyon's aging infrastructure and potential embrittlement of critical components (such as the pressure vessel), a lawful NEPA review by DOE, subject to the extensive public participation mandated by NEPA and its implementing regulations, would have served a vitally important function by assessing serious risks to the environment, public health, and safety—including significant effects that had *never before been analyzed* by any other agency.

Second, we must weigh future considerations now that DOE "expects to issue up to $980 million in credits" under the CNC program to provide more support to aging nuclear facilities. *See* DOE, CNC Program, *What Is the CNC Program?*, https://www.energy.gov/gdo/civil-nuclear-credit-program. The experience in this lawsuit suggests DOE will again fail to take NEPA seriously for future CNC grants, without any opportunity for public participation or a meaningful check on its funding activities. There will likely be little, if anything, members of the public can do to ensure judicial review of DOE's NEPA compliance—or lack thereof—when facilitating the continued operation of aging nuclear facilities across the country. It is highly doubtful that Congress created the CNC program with the intention that DOE overlook the environmental and public safety risks associated with extending America's fleet of aging nuclear reactors. And it certainly cannot be what Congress contemplated when it enacted NEPA "to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process," 40 C.F.R. § 1500.1(a), and "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321.

Third, this lawsuit raises questions about the effectiveness and utility of the CNC program, and whether it is an efficient use of limited federal resources. Indeed, PG&E and California entered into an agreement containing loopholes that have effectively rendered meaningless a billion-dollar handout from the federal coffers that evidently was unnecessary for Diablo Canyon to remain open—despite "economic reasons" being a primary requirement for eligibility to receive a CNC award. For all future CNC disbursements, Plaintiff urges DOE to use its discretion to closely scrutinize whether federal taxpayer-funded awards are genuinely necessary to support the continued operations of an aging nuclear

facility, or whether other funding sources are available—including from States or municipalities advocating for the continued operation of these high-risk facilities.

While Plaintiff's separate notice concludes this litigation due to mootness based on recent events outside of Plaintiff's control, Plaintiff reminds DOE that its large-scale CNC funding decisions warrant detailed NEPA review and public involvement, as well as scrutiny to ensure any award satisfies the statutory criteria of the Infrastructure Investment and Jobs Act. At minimum, DOE must: (1) inform the public as to how the agency *proposes* to spend these massive sums of taxpayer dollars; (2) substantiate that an aging facility's continued operation actually requires federal funding to remain open and that the facility is thus eligible for a CNC award; and (3) comply with NEPA *before* making any final funding decision by evaluating the full array of environmental, health, and safety effects of any funding decision that will provide a lifeline to aging nuclear infrastructure. These obligations are all the more important for CNC awards, given the unique and significant risks that nuclear power plants pose to the American public, which are not present with other types of energy facilities.

Dated: January 15, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on January 15, 2025, I electronically filed this document with the Clerk of Court using the CM/ECF system, which will automatically send email notification to the attorneys of record.

Respectfully submitted on January 15, 2025,

/s/ Jessica Townsend
Jessica Townsend
Counsel for Plaintiff