Nos. 19-72915 & 19-73079

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL PARKS CONSERVATION ASSOCIATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

EAGLE CREST ENERGY COMPANY,
Respondent-Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION, AND
ON PETITION FOR WRIT OF MANDAMUS

PETITIONER'S REPLY BRIEF

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INTRODUCTION

When the last available extension for the Eagle Mountain Pumped-Storage Hydroelectric Project ("Eagle Mountain Project" or "Project") expired, the Federal Energy Regulatory Commission ("Commission") had the opportunity to thoughtfully consider what to do in an open, public process. The National Parks Conservation Association ("NPCA"), concerned that the Project's license could not be further extended and that new information and regulatory changes required further environmental review, sought to intervene to protect its interests and help the Commission reach an informed decision. The Commission declined, claiming that categorical policies of its own making precluded NPCA—indeed, any non-licensee—from participating in that license-extension proceeding.

Before this Court the Commission could have admitted error or at least modulated its unyielding position. Instead, with licensee Eagle Crest Energy Company ("Eagle Crest") cheering from the sidelines, the Commission digs in its heels, defending its decisions below despite the serious legal questions and environmental consequences at stake. The Commission even goes so far as to argue that NPCA, which has fought tooth-and-nail to protect the Eagle Mountain area from development for more than 30 years, lacks standing to bring these petitions.

Bad process begets bad results. The Commission's decisions to deny NPCA a seat at the table and extend Eagle Crest's license violated the Federal Power Act, the Commission's own regulations, and the National Environmental Policy Act. The Commission's and Eagle Crest's answering briefs do not show otherwise. Worse yet, in asking the Court to sanction these legal violations, the Commission and Eagle Crest seek to firmly sequester the Commission's administrative processes from the public and push aside the transparency and fairness that underlie good government. Even the Commission's modest suggestion of a limited remand, offered in the guise of reasonableness, is an effort to shield its decisions from any real scrutiny.

The Court should grant NPCA's petition for review and issue a writ of mandamus reopening the license-extension proceeding, granting NPCA intervention in those proceedings, and setting aside the 2019 extension as unlawful.

ARGUMENT

I. NPCA has Article III standing.

NPCA has labored to protect Joshua Tree National Park and the lands that surround it for over 30 years. The area that the Commission and Eagle Crest argue has been ceded, until 2064, to the Eagle Mountain Project might today be the Los Angeles region's largest garbage dump were it not for NPCA's successful efforts to stop it. *See NPCA v. Bureau of Land Mgmt.*, 606 F.3d 1058 (9th Cir. 2010)

(final judgment entered in 2014). NPCA has worked tirelessly with the National Park Service and other governmental agencies to protect this area's groundwater, wildlife, and other natural resources, and to return the area to Joshua Tree National Park so that it, and the Park, can be restored. NPCA's campaign has included opposing the Eagle Mountain Project over many years and on multiple fronts.

Despite this record, the Commission argues in its answering brief that NPCA lacks standing to challenge its decisions, in 2019, to extend the Eagle Mountain Project's license to operate after the license had expired ("2019 extension") and deny NPCA intervention in that license-extension proceeding. In particular, the Commission asserts that NPCA has not alleged concrete injury-in-fact caused by the extension, and that any injury is traceable not to the extension but to the Commission's initial decision to issue the Project's license in 2014, which NPCA did not challenge. Commission Answering Brief ("FERC Br.") 22-26 & n.4. As a result, the Commission claims, NPCA's challenge is just an impermissible collateral attack on the 2014 license. *Id.* 26-33.

The Commission's argument is a clever distraction from the merits of NPCA's arguments and, in any event, is incorrect. First, based on the record and the declarations submitted with this brief,[1] NPCA has suffered concrete injuries-in-

[1] The Court may properly consider these declarations because it has original jurisdiction in these consolidated cases and the Commission never questioned NPCA's standing below. *See* ER 1-29; *Nw. Envtl. Def. Ctr. v. Bonneville Power*

fact sufficient for both organizational and representational standing. *See La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010); *Smith v. Pac. Properties & Dev. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004). Second, these injuries are "fairly traceable" to the Commission's 2019 license extension. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Third, NPCA does not collaterally attack the 2014 license because NPCA's legal claims—including that the Commission lacked authority to revive and extend the license, and that the Commission was required to conduct supplemental environmental review before granting the extension—arise from the Commission's 2019 extension.

A. NPCA and its members suffered concrete injuries-in-fact when the Commission revived and extended the Project's license.

1. NPCA has suffered injuries sufficient for organizational standing.

The Commission's 2019 decision to revive and extend the Eagle Mountain Project license inflicted injury on NPCA and its members that is "concrete, particularized, and actual or imminent." *Monsanto Co. v. Geertson Seed Farms*,

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Admin., 117 F.3d 1520, 1528 (9th Cir. 1997) (in original jurisdiction case, "[b]ecause standing was not at issue in earlier proceedings, we hold that petitioners in this case were entitled to establish standing anytime during the briefing phase," including through new declarations); *Del. Dep't of Natural Res. & Envtl. Control v. EPA*, 785 F.3d 1, 8 (D.C. Cir. 2015) (proper to review standing declarations submitted with reply brief where party previously thought its standing was "self-evident").

561 U.S. 139, 149 (2010). As an organization, NPCA can establish injury by showing that it "suffered 'both a diversion of its resources and a frustration of its mission.'" *Trabajadores*, 624 F.3d at 1088 (quoting *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). In *Fair Housing*, this Court held that a nonprofit had organizational standing to sue where discovering and challenging a landlord's discriminatory housing practices diverted resources away from the nonprofit's other efforts, thereby frustrating its mission. 285 F.3d at 902, 905.

The organizational injury to NPCA in this case is nearly identical, as shown by a review of NPCA's long-running efforts to protect the Project area, including from the Eagle Mountain Project. In their accompanying declarations, NPCA Senior Program Director Neal Desai and Southeast Regional Director David Lamfrom explain that NPCA's mission is to permanently protect and enhance the National Park System, including Joshua Tree National Park. *See* Declaration of Neal Desai, ¶ 3 (May 19, 2020); Declaration of David Lamfrom, ¶ 3 (May 19, 2020). They explain the Project area's history and importance, including its original inclusion in the Park, its use as an iron mine, its proposed use as a massive landfill, and NPCA's long and successful campaign to defeat the landfill and return the area to the Park. *See* Desai Decl. ¶¶ 7-16; Lamfrom Decl. ¶¶ 12-22.

Mr. Desai and Mr. Lamfrom also explain that, during the 25 years the landfill was under consideration, it was the primary viable project in the area.

Lamfrom Decl. ¶ 16; Desai Decl. ¶ 11. Accordingly, NPCA reasonably focused its resources on defeating the landfill. *See* Desai Decl. ¶¶ 11-12; Lamfrom Decl. ¶ 16. Nonetheless, NPCA also worked to oppose the Eagle Mountain Project, especially after the Project first died in the early 1990s and then resurfaced in 2008. NPCA submitted extensive comments regarding the Project's adverse effects on groundwater and other resources, including as part of the Commission's scoping in 2010 and the California State Water Resources Control Board's Clean Water Act certification proceedings in 2013. *See* Desai Decl. ¶ 14; ER 759. Kaiser, the longtime mining company, landfill proponent, and (still current) landowner joined NPCA in strenuously opposing the Project until as late as 2014. *See Eagle Crest Energy Co.*, 147 FERC ¶ 61,220, 62,233-34 (2014). Given this history, Eagle Crest's prior failure to secure a license, and NPCA's limited resources, NPCA calculated that the Project was a dead letter.

That calculation was reasonable even as late as 2016. The landfill project was dead. NPCA had prompted the National Park Service to undertake its 2016 Boundary Study, in which the Service evaluated the Project's area ecological significance and recommended that it be reincorporated into Joshua Tree National Park. Lamfrom Decl. ¶ 21; *see also* NPCA Opening Brief, at 10-12. And though Eagle Crest had secured its license in 2014, it was unable to meet its June, 2016, commencement-of-construction deadline, and had to seek an extension to 2018.

Nonetheless, NPCA worked to oppose the Eagle Mountain Project from 2014 on, including by challenging, in 2018, the right-of-way that Eagle Crest needed from the U.S. Bureau of Land Management. NPCA's administrative appeal in that process remains pending. *See* Lamfrom Decl. ¶¶ 17-19; Desai Decl. ¶ 14.

Which brings us to the last two years. When, in June, 2018, the extension for the Project license expired, NPCA promptly petitioned the Commission to terminate the license.[2] ER 319-21. When the Commission failed to act and Eagle Crest sought, five months later, another extension, NPCA moved to intervene and then sought rehearing after the Commission denied NPCA's motion. ER 20-21, 35-50, 350-72. NPCA was and is painfully aware that failing to terminate, and then reviving and extending, the Project license jeopardizes NPCA's and the Park Service's decades-long efforts to protect the Project area and reincorporate it into Joshua Tree National Park. The Commission's extension proceeding, and this challenge to the Commission's decision to revive and extend Eagle Crest's license, is accordingly a clear "diversion of [NPCA's] resources and a frustration of its

[2] The Commission and Eagle Crest contend that the license did not "expire" after the extension ran out. FERC Br. 68; Eagle Crest Answering Brief ("EC Br.") 13. The D.C. Circuit disagrees. *See, e.g.*, *Keating v. FERC*, 569 F.3d 427, 428 (D.C. Cir. 2009) ("[T]he Commission stayed the four-year statutory deadline for commencing construction on the project to allow Keating to obtain the necessary water rights. Over fifteen years after the license issued, the Commission lifted the stay and Keating's license expired."). In any event, Eagle Crest did not request a stay of its commencement-of-construction deadline, and its extension expired in June, 2018, thereby moving the license to the termination stage. *See infra*.

mission." *Fair Housing*, 285 F.3d at 905; *see also* Lamfrom Decl. ¶¶ 23-24. NPCA has alleged sufficient injury-in-fact to show organizational standing.

2. NPCA's members have suffered injuries sufficient for representational standing.

NPCA can also establish injury-in-fact to its members sufficient for representational standing. Harm to aesthetic and recreational interests is enough. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 182-83 (2000); *Lujan*, 504 U.S. at 562-63; *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). Moreover, a plaintiff "who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n.7.

The Commission's decision to revive and extend Eagle Crest's expired license poses concrete, imminent, and substantive injuries to NPCA's members. David Lamfrom, NPCA's Southeast Regional Director, and Chris Clarke, NPCA's California Desert Program Associate Director, have been NPCA members since 2010 and 2017. Both have deep aesthetic and recreational interests in Joshua Tree National Park and the surrounding area. *See* Lamfrom Decl. ¶¶ 27-31; Declaration of Chris Clarke, ¶¶ 11-20 (May 18, 2020). Mr. Lamfrom feels deeply connected to the Eagle Mountain region and has taken many trips there to enjoy its fauna and flora. Lamfrom Decl. ¶¶ 27, 29. Mr. Lamfrom derives well-being from the region's culture and history and has worked tirelessly to protect them. *See id.*

¶¶ 28-30. Meanwhile, Mr. Clarke has structured his life around the area, sacrificing economic and social opportunities to live near and enjoy the Park and the surrounding area. Clarke Decl. ¶¶ 15-20.

Following the Park Service's 2016 Boundary Study, NPCA was a hair's breadth from permanently protecting the Project area and restoring Joshua Tree's former boundaries. Lamfrom Decl. ¶ 31. In reviving and extending the Eagle Mountain Project license in 2019, the Commission renewed a major threat to the area and the Park. The Project will preclude restoring the lands it occupies, overdraft groundwater, and disrupt sensitive habitats—for decades. Such impacts will impair Mr. Lamfrom's and Mr. Clarke's ability to enjoy the desert surrounding Joshua Tree National Park. *Id.* ¶¶ 26, 31; Clarke Decl. ¶¶ 21-27.

In addition to these substantive injuries, the Commission caused Mr. Lamfrom, Mr. Clarke, NPCA's other members, and NPCA itself procedural injury when it (1) extended Eagle Crest's license without conducting the supplemental environmental review required by the National Environmental Policy Act ("NEPA"), and (2) denied NPCA intervention in the 2019 license-extension proceeding.

Regarding the Commission's failure to undertake supplemental environmental review, and to support the Commission's "collateral attack" claim, the Commission and Eagle Crest focus in their briefs on the environmental impacts

that were raised, and that the Commission purportedly addressed, in its 2012 Environmental Impact Statement for the Project. FERC Br. 6-7, 31-32; EC. Br. 4, 24. However, the concerns that NPCA raised during the license-extension proceeding were based on information and regulatory changes that came about *after* that review. When an agency makes a second discretionary decision for a project—like deciding whether to extend a hydropower project's operating license—NEPA specifically requires agencies to engage in supplemental review if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(ii); *see also Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 782-83 (9th Cir. 2006) (discretionary federal decision to extend federal lease triggered NEPA review).

For example, after the Commission published its Environmental Impact Statement for the Project in 2012, scientists published new, peer-reviewed studies indicating that the Project's impacts on groundwater resources would be much worse than the Commission had anticipated, potentially imperiling the Joshua Tree National Park ecosystem. *See* ER 362 (discussing 2012, 2013, and 2017 studies). To protect sensitive wildlife in the area, in 2016 the Desert Renewable Energy Conservation Plan imposed new conservation designations that the Commission did not contemplate or study. *See* ER 34. Also in 2016, the Park Service prepared

its Boundary Study to address, for the first time, the interconnectedness of the Project area and surrounding ecosystems. *See* ER 401. And, throughout this period, multiple government agencies warned the Commission about unresolved issues associated with the Project. *See* NPCA Opening Br. 17-18 (citing post-Environmental-Impact-Statement concerns).

NEPA review is driven in large part by a project's purpose and need. *See* 40 C.F.R. § 1502.13; *NPCA v. Bureau of Land Mgmt.*, 606 F.3d at 1070-72. Even that has come into question since 2014. Eagle Crest claims that the Eagle Mountain Project will help California meet its renewable-energy mandate by providing storage for solar and wind projects. EC Br. 4-5. However, pumped-storage projects are ineligible to meet California's energy-storage-procurement targets for the state's investor-owned utilities, ER 275, 361, and the record shows no regulatory or legislative support for the Eagle Mountain Project in particular. Utilities therefore lack any incentive to buy the Project's energy, which explains why Eagle Crest still has no signed power-purchase agreement. The Commission's failure in 2019 to consider these post-license environmental, regulatory, and technological changes have caused NPCA and its members procedural injury. *See* Lamfrom Decl. ¶¶ 25 (new hydrological studies); *id.* ¶ 31 (Park Service's 2016 Boundary Study); Clarke Decl. ¶ 26 (wildlife impacts).

The Commission also caused NPCA and its members procedural injury when it unlawfully denied NPCA intervention in the 2019 license-extension proceeding. By prohibiting NPCA from taking part in that proceeding, the Commission denied NPCA the opportunity to fully present its arguments regarding why reviving and extending Eagle Crest's license was unlawful and unwise. This procedural-injury showing is not "belated," FERC Br. 24 n.5, given that NPCA is responding to the Commission's new argument that NPCA lacks standing, and it is "tied to [the] substantive, concrete harm[s]," *id.*, discussed above.

In short, Mr. Lamfrom and Mr. Clarke would "have standing to sue in their own right," their interests "are germane to [NPCA's] purpose," and "neither the claim asserted nor the relief requested requires" their individual participation in this case. *Friends of the Earth*, 528 U.S. at 181.

B. NPCA's and its members' injuries are "fairly traceable" to the 2019 extension.

To satisfy the causality element of Article III standing, NPCA's injuries must be "fairly traceable" to the Commission's 2019 extension, and "not the result of misconduct of some third party not before the court." *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1141 (9th Cir. 2013). The extension need not be the injuries' "sole source." *Id.* at 1142.

NPCA easily meets this test. The Commission's 2019 extension, not its 2014 license, revived and extended the license in violation of the Federal Power

Act and without the review required by NEPA. The Commission asserts that the extension was permitted by a Federal Power Act amendment in the America's Water Infrastructure Act, which was enacted four years *after* the Commission issued the Project license. Similarly, the information and regulatory changes that NPCA alleges required further environmental review arose in the six years *after* the Commission evaluated the Project's environmental effects. The Commission's 2019 extension, not the 2014 license, caused these legal violations, frustrated NPCA's near-complete mission to protect and restore the Project area, and renewed the threat to NPCA's members' interests. Indeed, but for the Commission's 2019 extension, the risks that the Project poses to Joshua Tree and the injuries accruing to NPCA and its members would no longer exist. It is irrelevant that the 2014 license was an underlying source of related injuries.

These facts put this case on all fours with *American Rivers v. FERC*, 895 F.3d 32, 41 (D.C. Cir. 2018). In *American Rivers*, the Commission relicensed a hydroelectric project on a river but "declined to factor in the decades of environmental damage." *Id.* at 37. When conservation groups challenged the relicensing, the project's owner challenged the groups' standing to sue, claiming they could not show injury distinct from the original licensing. *Id.* The court disagreed, holding that the groups had standing because the relicensing directly threatened their interest in preserving the river's biodiversity. *Id*. at 41.

The same was true in *Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016), where the Commission approved a natural gas facility to export gas and then, two years later, the operator's request to expand. The Sierra Club challenged the expansion but not the initial approval. The court held that the Sierra Club's injury—aesthetic and recreational harm to its members due to increased shipping traffic—was fairly traceable to the expansion. This conclusion held even though the Commission's initial approval had produced similar harm. *Id.* at 63-65, 67.

So too here. The Commission's decision to revive and extend Eagle Crest's license was akin to relicensing the Project. Thus, though the extension implicates harms to NPCA and its members that were relevant during the initial licensing, it inflicted new, distinct harms that establish standing to challenge the extension.

The Commission's best authority only underscores NPCA's standing. In *National Commission for New River, Inc. v. FERC*, 433 F.3d 830, 832 (D.C. Cir. 2005) (FERC Br. 25), the D.C. Circuit held that the petitioners lacked standing because they failed to allege injuries traceable to a gas pipeline realignment. The reason?: The petitioners resubmitted affidavits detailing the harms that would flow from the initial order approving the pipeline's *construction*. Thus, their alleged injuries had nothing to do with the subsequent realignment. *See id.* Here, NPCA's and its members' injuries stem directly from the 2019 extension, and most of them are new and distinct—they would not occur but for that extension.

C. This case is not a collateral attack on the 2014 license.

The Commission, in a final attempt to keep the Court from reaching the merits of NPCA's arguments, asserts that NPCA's challenge is a collateral attack on the Eagle Mountain Project's 2014 license. FERC Br. 26-27. Once again the Commission is incorrect.

A petition for review is an impermissible collateral attack only where "the order upon which the petition is based 'was merely a clarification' of a prior order," rather than a "modification." *Pac. Gas & Elec. Co. v. FERC*, 464 F.3d 861, 868 (9th Cir. 2006) (quotation marks omitted). Here, NPCA argues that the 2019 extension modified, rather than clarified, the 2014 license order. Specifically, NPCA argues that the Commission's extension revived and extended an expired license, in violation of the Federal Power Act and without the supplemental review required by NEPA. That is, the extension did not merely change the dates by which Eagle Crest must commence and complete construction. Rather, it revived a license the Commission was required to terminate, and did so while ignoring the Commission's duty to evaluate significant new information and regulatory changes.

"[I]n some cases, issues that might have been raised in a prior appeal are so inextricably linked to a subsequent agency decision that these issues may be raised in a timely appeal from the second decision." *Covelo Indian Cmty. v. FERC*, 895

F.2d 581, 585 (9th Cir. 1990). Thus, a plaintiff or petitioner does not collaterally attack an initial agency decision merely by challenging the agency's related actions at a later point. For example, in *Center for Biological Diversity v. EPA*, 847 F.3d 1075, 1092 (9th Cir. 2017), EPA issued a Reregistration Eligibility Decision ("RED") for a pesticide ingredient. *Id.* at 1081. EPA later reregistered certain pesticides with the ingredient. *Id*. The plaintiff challenged the reregistration, arguing that EPA had failed to complete Endangered Species Act consultation. *Id*. This Court held that the challenge was not a collateral attack on the initial RED because "a product reregistration incorporates data not available during the process for issuing a RED, and necessarily involves a determination distinct from those made during the RED process." *Id.* at 1093.

The same is true here. True, NPCA's challenge to the 2019 extension raises issues that were relevant to the original licensing, such as the concrete aesthetic and recreational harms that flow from the Project's adverse environmental effects. However, due to new information and changed circumstances, the 2019 extension has injured NPCA and its members in ways the 2014 license did not. For example, reviving and extending the Project license worked to prevent the National Park Service from incorporating the Project area into Joshua Tree National Park, and it will allow the Project to proceed despite post-licensing concerns about the Project's impacts and utility.

The Commission likens this case to *Covelo Indian Community*, 895 F.2d 581. FERC Br. 28. However, *Covelo* concerned issues that arose entirely out of the original relicensing order, which had not been timely challenged. 895 F.2d at 585. Here, in contrast, NPCA challenges the Commission's statutory authority to revive and extend the Eagle Crest Project license and its failure to undertake supplemental environmental review. These issues are specific to the 2019 extension, and, apart from raising overlapping issues about the Project's effects, do not concern the 2014 license.

II. The Commission was required to grant NPCA intervention in the license-extension proceeding.

A. The Commission's legal errors do not deserve deference.

The parties agree that the Administrative Procedure Act's "arbitrary and capricious" standard governs review of the Commission's orders denying NPCA intervention and rehearing. *See* NPCA Opening Br. 27; FERC Br. 20; EC Br. 9; 5 U.S.C. § 706(2)(A). Unsurprisingly, the Commission and Eagle Crest seize upon the highly deferential "abuse of discretion" portion of this standard and speed past the rest of it, which provides that the Commission's decision will be overturned if it is "otherwise not in accordance with law, or if it was taken without observance of procedure required by law." *Rainsong Co. v. FERC*, 106 F.3d 269, 272 (9th Cir. 1997).

These two yardsticks give the Commission far less deference. In fact, they require that a reviewing court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706; *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2433 (2019) (Gorsuch, J., concurring) ("[C]ommentators in administrative law have generally acknowledged that Section 706 seems to require de novo review on questions of law.") (quotation marks omitted). And in *Kisor*, the Supreme Court held that an agency's interpretation of its own regulation deserves deference only where the regulation is "genuinely ambiguous" and the interpretation is "reasonable," implicates the agency's "substantive expertise," and reflects a "fair and considered judgment." *Kisor*, 139 S. Ct. at 2415-18. An agency's interpretation gets no deference where it is "plainly erroneous or inconsistent" with controlling law. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (quotation marks omitted).

NPCA's petition for review presents a square question of law: whether the Commission violated the Federal Power Act and its regulations in denying NPCA intervention in the 2019 license-extension proceeding. Accordingly, this case is not like *California Trout v. FERC*, where the Commission deserved deference because it mechanically decided whether an untimely motion met the regulatory criteria for intervention. 572 F.3d 1003, 1012, 1014-15 (9th Cir. 2009). Instead,

here the Commission interpreted its regulations to categorically bar NPCA from intervening in license-extension proceedings like this one. NPCA's claim is that the Commission made this legal interpretation "not in accordance with law" and "without observance of procedure required by law," and that it is an unreasonable and unfair interpretation of the controlling law. That claim gets de novo review (even if it doesn't, it still fails as an abuse of the Commission's discretion).

B. The Commission's decision to categorically bar NPCA from intervening in the license-extension proceeding was unlawful.

Under the Federal Power Act, the Commission "may admit as a party" to a proceeding "any . . . person whose participation in the proceeding may be in the public interest." 16 U.S.C. § 825g(a). The word "may" gives the Commission reasonable discretion to decide who may intervene. *Alston Coal Co. v. Fed. Power Comm'n*, 137 F.2d 740, 742 (10th Cir. 1943).

The Commission made that decision when it promulgated Rule 214. Under that rule, any person who wishes to participate in a proceeding must move to intervene and "state, to the extent known, the position taken by the movant and the basis in fact and law for that position." 18 C.F.R. § 385.214(a)(3),(b)(1). The movant must also state in "sufficient factual detail" that either (1) it "has or represents an interest that may be directly affected by the outcome of the proceeding," or (2) its "participation is in the public interest." *Id.* § 385.214(b)(2)(ii),(iii). If a movant satisfies these criteria, and if no one opposes

within 15 days, the movant automatically becomes a party without further Commission action. *Id.* § 385.214(c)(1).

NPCA met these criteria, and no one opposed. This case should have then moved to the merits. Instead, the Commission denied NPCA's motion, not because it failed to meet Rule 214's criteria—the Commission didn't even evaluate those criteria—but because the Commission interpreted Rule 214 and other authorities to categorically bar NPCA and other parties from intervening in license-extension proceedings. The Commission relied on two blanket policies: (1) Rule 214 does not apply in "post-licensing proceedings" unless the decision in question would be a "material" change to the license or would "adversely affect the would-be intervenor's rights in a manner not contemplated by the license," and (2) license extensions are never "material" changes.

To defend this unbending position before this Court, the Commission weaves innumerable statutory provisions, regulations, cases, and administrative decisions into a complicated and alluring web. Stripped to its essence, the Commission's argument is that Rule 214 prescribes "who" may intervene and "how," but not "whether a proceeding is the type in which the Commission allows intervention in the first place." FERC Br. 35. Instead, other legal provisions do that. Rule 210 provides for intervention where the Commission "gives notice" of "applications," and Federal Power Act section 6 requires notice where a licensee

seeks to "alter" a license. *Id.* 36 (citing 18 C.F.R. § 385.210; 16 U.S.C. § 799). And 18 C.F.R. § 4.202(a), in Subpart L (concerning license amendments), requires public notice where "approval of the application for amendment of license would constitute a significant alteration of license pursuant to section 6." *Id.* 37.

These threads are flimsy and easily disentangled. Rule 214 in no way distinguishes between pre- and post-licensing proceedings, licenses and amendments to licenses, or "significant" and insignificant alterations to licenses. *See* 18 C.F.R. § 385.214(a)(1),(b)(1) (referring to "any proceeding" and "[a]ny motion to intervene"); *id.* § 385.101(a) (explaining that the Commission's procedural rules apply to "[a]ny filing or proceeding under this chapter"). Meanwhile, Federal Power Act section 6 requires public notice where a license "may be altered"; Rule 210 applies that notice requirement to "applications" to "establish the dates for filing interventions and protests"; and Subpart L "applies to any application for amendment of a license," which puts on equal ground applications for "a change in the physical features of the project" and applications to "[e]xtend the time fixed in the license for commencement or completion of project works." 16 U.S.C. § 799; 18 C.F.R. § 385.210(a)-(b); *id.* § 4.200(a),(c). The fact that 18 C.F.R. § 4.202(a) specifically requires Rule 210 notice for applications for any "significant alteration" to a license does not alter the broader regulatory scheme, which requires, or at least is most reasonably and fairly read to

require, such notice for other types of post-license applications, including extensions of deadlines to commence construction.

Let's assume, however, that the Commission is correct that its regulations require notice, and thus allow intervention, only in post-licensing proceedings that involve a "significant alteration" of a license. That limit still would not justify the Commission's decision to deny NPCA intervention. The Commission unreasonably interprets the "significant alteration" test to require some sort of "physical change" to a project, which leads the Commission to unreasonably interpret the "significant alteration" test to categorically exclude extensions of deadlines to commence and complete construction.

Regarding the need for "physical changes," the Commission admits that its regulations do not define "significant alteration" and so diverts the Court to 18 C.F.R. § 4.35(f), which states that "a material amendment to plans of development proposed in an application for a license or exemption from licensing means any fundamental and significant change." FERC Br. 46. Section 4.35(f) lists examples of "material amendments," "including but not limited to," for example, a "change in installed capacity," a "material change" in the location or layout of a dam or reservoir, or a "change" in the number of development units. 18 C.F.R. § 4.35(f)(1)(i)-(iii). The Commission declares that because these examples

"describe *physical* changes to a project," a "material amendment" must always include "some *physical* change to the project itself." FERC Br. 46-47.

Preliminarily, it is not clear that *statutory* commencement- and completion-of-construction deadlines are part of the "plans of development proposed in an application for a license," the only thing to which section 4.35(f)'s "material amendment" standard applies. Even if they are, neither section 4.35(f) nor the Commission's authorities limit "material amendments" to "physical changes."

First, section 4.35(f)'s list of examples are non-exhaustive illustrations of "any fundamental and significant change[s]" that constitute "material amendment[s]." There is no more "fundamental and significant change" to a project than reviving and extending its expired license. (Indeed, this change surely meets the Commission's "physical change" test: The 2019 extension permits a project that could not otherwise be constructed to now be built.)

Second, *Yates v. United States*, 574 U.S. 528, 543-44 (2015), held that a fish was not a "tangible object" under the Sarbanes Oxley Act, which was designed to promote financial accountability. *See* FERC Br. 47. In this case there is no such gulf between the language of the Commission's regulations and their intent.

Third, the Commission says that *Erie Boulevard Hydropower, L.P.*, 131 FERC ¶ 61,036 (2010), "construe[s] 'material amendment' in Section 4.35(f) to mean 'significant changes to . . . the project's physical features. FERC Br. 47.

Not true: *Erie* says that while "changes that do not concern a project's physical features would seldom, if ever, rise to the level of a fundamental and significant change," because "the rule states that a material amendment includes but is not limited to those examples, we examine all aspects of the [amendment] to determine whether they might constitute a fundamental and significant change." *Id.* at 61,226 (P 33). The Commission made no such inquiry of Eagle Crest's requested extension in this case, even though the Project license had expired and even though the Commission's own precedent says that "repeated extensions" may constitute a material change justifying intervention. *See City of Tacoma, Wash.*, 89 FERC ¶ 61,275, 61,800 (1999); *Central Maine Power Co.*, 53 FERC ¶ 61,089, 61,250 n.8 (1990). It is no accident that this precedent goes unmentioned in the Commission's answering brief.

The Commission's remaining authorities fall flat. The Commission cites the preamble to 18 C.F.R. § 4.202 (Order No. 184), claiming that it "describes the types of amendments triggering notice and intervention as those proposing 'fundamental' *physical* changes to the 'plan of development.'" FERC Br. 39 (citing 46 Fed. Reg. 55,926, 55,931 (1981)). But the preamble is not so categorical; it explicitly speaks only "as a general matter" because "[i]t would, in any case, be very difficult to prescribe universal criteria . . . . For example, an

increase of 1.5 megawatts of installed capacity may be incidental in one case and important in another." 46 Fed. Reg. at 55,931.

The Commission's decision in *Kings River Conservation District* is even less helpful; in fact, it supports NPCA, not the Commission. *Kings River* does not require a "physical change" to a project, but instead states that intervention is proper where (1) there are "material changes in the plan of project development or in the terms and conditions of the license," or (2) an amendment "could adversely affect the rights of property-holders in a manner not contemplated by the license." 36 FERC ¶ 61,365, 61,883 (1986). The Commission claims that extending the Project license "means property rights will be affected precisely as 'contemplated by the license,'" and that NPCA "asserts no *property* interest in the Project land." FERC Br. 52, 54. However, the 2019 extension served to revive an expired license; when the license expired and the Commission was required to terminate it, NPCA (and likely other parties) reasonably expected that the Project area could and would be put to other uses. As for property interests, the area withdrawn for the Project, the associated right-of-way, and the surrounding area are federal public lands; they are held by and for members of the public, not the Commission or Eagle Crest.[3]

[3] *Felt Mills Energy Partners, L.P.*, 87 FERC ¶ 61,094 (1999), is inapposite. In that case the license at issue was extant, had not yet been extended, and was entitled to extension under existing law. Moreover, the group seeking intervention

In short, the Commission erred in construing the Federal Power Act and its regulations to reflexively deny NPCA's motion to intervene. The "significant alteration" standard does not apply to that motion and, even if it did, that standard does not require "physical changes" to the Project. At most, it requires a "fundamental and significant change," a test that the revival and extension of the Project's expired license, in the face of significant new information and regulatory changes, handily satisfies.

We are left only with the Commission's and Eagle Crest's appeals to the "purposes" of the Federal Power Act, the "certainty" of hydropower licenses, and "administrative efficiency." FERC Br. 54-55; EC Br. 8, 10, 12, 19, 25-28. Yes, the Federal Power Act promotes development of the nation's waters, including by granting hydropower licenses 50-year terms. However, given the extraordinarily long time-horizons of these projects, the Act directs the Commission to "give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife . . ., the protection of recreational opportunities, and the preservation of other aspects of environmental quality."

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was concerned with the extension's effect only on parcels within the project boundary, to which the group did not hold title. *Id.* at 61,409-10. The Commission's other cited administrative decisions (FERC Br. 51) all involved mere extensions of extant licenses with no unlawful revival or failure to conduct required supplemental environmental review.

16 U.S.C. § 797(e). Accordingly, the Act balances equally "the competing interests of public participation and 'comprehensive development.'" FERC Br. 55.

The Commission and Eagle Crest suggest that this balance favors development in license-extension proceedings, citing only "administrative efficiency." But we, and even Commissioner Richard Glick, think the Commission can walk and chew gum at the same time; responding to NPCA's arguments is "hardly an oppressive administrative burden." ER 17 (¶ 4); *see also* ER 16-17 (¶¶ 3-4). And because "[d]eadlines to commence or complete construction are important measures for ensuring that a project is consistent with the public interest, . . . the Commission ought to consider the perspectives of all affected parties before modifying those deadlines." ER 16 (¶ 3).

Bureaucracy is not self-justifying. Rather than straightforwardly and fairly apply its own regulations and fully consider NPCA's arguments on their merits, the Commission chose instead to reflexively deny NPCA a seat at the table. The Commission heartily defends this approach before this Court, and now says that NPCA lacks standing to even question it. Sure, the Commission says that "a delay in construction . . . *generally* does not qualify for notice and intervention." FERC Br. 51 (emphasis added). The Court should not be fooled: The Commission and Eagle Crest ask the Court to hold that the public may never intervene in a proceeding to extend a hydropower project's construction deadlines. *See, e.g.*,

EC Br. 10, 16, 19-22. For if NPCA cannot intervene in the 2019 license-extension proceeding—in which the Commission retroactively revived and extended the expired license for a project facing significant environmental concerns and regulatory changes, and whose very reason for being is in question—no one will ever be able to scale the Commission's concrete wall. The Commission's decision to deny NPCA intervention was unlawful and must be reversed.

III. The Court should grant NPCA's All Writs Act petition.

A. *Bauman*, not *Hodel*, governs NPCA's petition.

The Ninth Circuit recognizes two tests for mandamus petitions. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977); *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986). The *Bauman* test applies in cases, like this one, that are brought under the All Writs Act, 28 U.S.C. § 1651, *Confederated Tribes of Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 930 (9th Cir. 2003), and/or that challenge a decisionmaker's quasi-adjudicative legal interpretation and application, *see, e.g., United States v. Guerrero*, 693 F.3d 990, 999 (9th Cir. 2012); *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010).

In contrast, this Court typically applies the *Hodel* test in cases involving requests for injunction-like mandamus relief under 28 U.S.C. § 1361 and other authorities, not the All Writs Act, and for wide-ranging relief in non-adjudicative matters. *See, e.g.*, *In re Cal. Power. Exch.*, 245 F.3d 1110, 1120 (9th Cir. 2001);

Or. Natural Res. Council v. Harrell, 52 F.3d 1499, 1508 (9th Cir. 1995); FERC Br. 20-22 (citing cases). In any event, NPCA's writ petition succeeds under either test.

B. If the Court has the equitable power to reopen the 2019 license-extension proceeding, it should do so.

The Commission argues that this Court has inherent equitable power to order the Commission to reopen an administrative proceeding prejudiced by the denial of intervention. *See* FERC Br. 57-61 (citing Second and D.C. Circuit cases). For the reasons discussed above, that test is met here. Thus, if the Court agrees that it has equitable power to reopen the license-extension proceeding, NPCA is, of course, amenable to the Court granting that relief.

C. The Court should also set aside the 2019 extension on its merits.

Even if the Court has and exercises equitable power to reopen the 2019 license extension-proceeding and order the Commission to reach a new decision on Eagle Crest's extension request, the Court should still grant NPCA's All Writs Act petition.

In the Commission's framing, these consolidated cases are solely about whether the Commission was required to grant NPCA intervention in the license-extension proceeding. They aren't. For nearly two years, NPCA and the Commission have been litigating not just NPCA's right to participate in Commission proceedings, but also—and more fundamentally—whether the Commission had the legal authority to revive and extend Eagle Crest's expired

license under the Federal Power Act and NEPA. Both *Bauman* and *Hodel* require the Court to consider whether the Commission clearly erred with respect to that second, underlying set of issues. *Bauman*, 557 F.2d at 654-55; *Hodel*, 783 F.2d at 1345. Thus, a decision (1) holding that the Commission clearly erred in reviving and extending the license and (2) ordering the Commission to reconsider its decision, will inform the Commission's consideration of the core legal issues in the new license-extension proceeding and therefore provide NPCA complete relief (another factor under both tests). It is with this relief in mind that NPCA filed its writ petition, rather than merely a petition for review of the denial of intervention.

Compare such an order to one simply reopening the license-extension proceeding. That more limited order likely would not address the Commission's legal authority to revive and extend Eagle Crest's license. The Commission knows this, which is why it advocates for a limited equitable order and a corresponding, outright denial of NPCA's mandamus petition. True, NPCA could eventually appeal the Commission's decision, and in that appeal seek review of the merits of the Commission's decision. But that scenario promises only continued injury to NPCA while Eagle Crest pursues the Project, continued uncertainty for the Commission over its legal authority and for Eagle Crest over its license, and continued inefficiency for the parties and this Court. Only mandamus relief will short-circuit the Commission's thus-far successful attempt to insulate its 2019

extension from judicial review. And such relief is especially warranted given just how unlawful that decision is.

1. The Commission clearly erred in failing to timely terminate the Project license.

When Eagle Crest failed to commence construction by its extended June 19, 2018, deadline, NPCA submitted, that same day, a request to the Commission for an order terminating the license. The Commission took no action on NPCA's request and never terminated the license. Instead, five months later, on November 7, 2018, Eagle Crest applied for another extension of its deadlines to commence and complete construction, which the Commission granted on May 7, 2019. The Commission's actions violated the law.

The Federal Power Act unambiguously requires the Commission to terminate a license once the licensee exhausts all available extensions. 16 U.S.C. § 806; *Keating*, 569 F.3d at 431; *Pub. Util. Dist. No. 1 of Okanogan Cty., Wash.*, 168 FERC ¶ 62,084, 2019 WL 3815916, at *1 (2019). The Commission offers two reasons why it nonetheless decided not to terminate the Eagle Mountain Project license. First, the Commission argues that it must terminate a license only if it decides not to extend it. FERC Br. 64. While true, that point is irrelevant where, as here, the Commission has no authority to further extend a license. That is the rule set forth in *Fall Line Hydro Co., Inc.*, 114 FERC ¶ 61,034 (2006), and the other decisions cited in our writ petition, and the rule for which we cited them.

Second, the Commission argues that it was not required to terminate the Project license because Federal Power Act section 13 first mandates notice to the licensee, which the Commission's regulations set at 90 days. FERC Br. 64-65 (citing 16 U.S.C. § 806; 18 C.F.R. § 6.3). But that requirement does not explain or justify the Commission's inaction in this case. Eagle Crest's commencement-of-construction deadline expired on June 19, 2018. Ninety days' notice would have meant a September 17, 2018, termination. Even if the Commission gets a week or two or even four to first give Eagle Crest notice, the termination date still would have been no later than October 17, 2018. Yet Congress did not enact the law the Commission used to grant a further extension until October 23, 2018, and Eagle Crest did not request an extension under that law until November 7, 2018. Thus, although the notice requirement explains why the Commission did not immediately terminate the license in June, 2018, it does not explain why the Commission failed to notice termination or terminate the Eagle Mountain Project license at any time in the subsequent four months.[4]

[4] The Commission has consistently recognized its obligation to *timely* terminate expired licenses. *See, e.g.*, *Okanogan Cty., Wash.*, 2019 WL 3815916, at *1-2 (noticing license termination one day after expiration of stay of deadline); *Fall Line Hydro Co.*, 114 FERC ¶ at 61,087 (denying extension request and initiating termination two months after expiration); *City of Alton, Ill.*, 72 FERC ¶ 62,132, 64,249 (1995) (denying further extension and initiating termination two months before final deadline); *Jewett City Elec. Light Plant*, 65 FERC ¶ 62,227, 64,556 (1993) (denying extension request and initiating termination on last day of extension deadline).

Rather, the Commission failed to terminate the license because the Commission (and Eagle Crest) were waiting for a congressional Hail Mary to extend it. Prospective legislation, however, does not provide relief from statutory deadlines. *Boise-Kuna Irrigation Dist.*, 87 FERC ¶ 61,138, 61,558 (1999) ("We have declined to grant such a stay where, as here, the licensee seeks time to pursue legislative relief from the deadline."). And, as we discuss below, no such legislation authorized the Commission's 2019 extension.

2. The Commission clearly erred in applying the Infrastructure Act to the expired license.

The America's Water Infrastructure Act amended Federal Power Act section 13 to extend deadlines to commence construction for up to eight years, rather than two. Pub. L. No. 115-270, § 3001(b), 132 Stat. 3765, 3862-70 (2018) ("Infrastructure Act"). Unlike prior amendments to section 13, the Infrastructure Act had no language allowing the Commission to reinstate expired licenses, no language applying the eight-year period to licenses that had already maxed out their available extensions, and no language authorizing the Commission to retroactively reinstate the expired Eagle Mountain Project license, unlike other specific licenses. *Compare* Pub. L. No. 115-270, §§ 3007(c), 3008(d)(2) (providing for two other projects that if their commencement-of-construction deadlines had expired "prior to the date of the enactment of this Act, the Commission may reinstate the license for such project, effective as of the date of

the expiration of the license"). Thus, the Infrastructure Act did not permit the Commission to revive and extend the Project license.

The Commission's chief response is that the Project license had not "expired"—i.e., the license was extant despite the expiration of Eagle Crest's prior extension and commencement-of-construction deadline, because the Commission never terminated it. FERC Br. 68. This circular response fails for the obvious reasons, discussed above, that (1) the Commission was required to terminate the expired license before the Infrastructure Act became law, and (2) the Infrastructure Act did not authorize the Commission to reinstate the expired license. For these reasons, *Urbina-Mauricio v. INS*, 989 F.2d 1085, 1088 n.4 (9th Cir. 1993), and *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943), are inapposite. Both cases involved applications submitted during or after the relevant statutes were amended. Moreover, Eagle Crest was required but failed to apply for an extension three months before the expiration of its commencement-of-construction deadline, as 18 C.F.R. § 4.202(b) required, and failed to do so before Congress enacted the Infrastructure Act. Had Eagle Crest done so, the Commission's lack of authority to extend the deadline under that then-nonexistent law would have been apparent.

The Commission's cited administrative decisions are similarly unavailing. In *City of Batesville*, 97 FERC ¶ 61,114, 61,566 (2001), the licensees applied for, and the Commission granted, stays of the relevant licenses *before* the

commencement-of-construction deadlines expired. Likewise, in *Independence Cty., Ark.*, 49 FERC ¶ 61,281, 62,062 (1989), the licensee sought a stay (and then rehearing of the Commission's stay denial), and Congress enacted legislation authorizing the extension, *before* the commencement-of-construction deadline expired.

3. NPCA cannot obtain adequate relief without a substantive ruling on the license extension.

Bauman prescribes "guidelines" for evaluating petitions for a writ of mandamus, all of which favor NPCA in this case. Besides clear agency error, the guidelines favor mandamus relief "where agency action has been delayed to such an extent as to frustrate the court's role of providing a forum for review." *In re Cal. Power Exch.*, 245 F.3d at 1124.

Unreasonable delay is at the core of the Commission's decision to resuscitate the Eagle Mountain Project, or is at least its side effect. The Commission, fully aware that it lacked authority to reinstate the license and then extend the commencement-of-construction deadline, never noticed termination of the Project's license and, as a result, never terminated the license. The Commission then did those exact two things almost a year later, despite Eagle Crest's tardy extension request and the lack of project-specific relief in the Infrastructure Act. To top it all off, the Commission denied NPCA intervention in the license-extension proceeding, exploiting NPCA's inability to challenge the

merits of the extension without first appealing the denial of intervention. *See California Trout*, 572 F.3d at 1013 & n.7.

Whether intentionally or by happy accident, the Commission's actions have for two years allowed it to avoid terminating Eagle Crest's license and precluded NPCA from seeking meaningful review. In the meantime, Eagle Crest is leveraging its license to secure other necessary Project approvals while NPCA, forced to sit on the sidelines, continues to be harmed. With a final extension order in hand and a record replete with the relevant facts and law, the Court should evaluate and set aside the 2019 extension on its merits. That is the only remedy that will timely prevent further injury to NPCA and Joshua Tree National Park and stop the Commission from violating the law to the public's detriment.

CONCLUSION

The Court should grant NPCA's petition for review and issue a writ of mandamus reopening the license-extension proceeding, granting NPCA intervention in that proceeding, and setting aside the 2019 extension as unlawful on its merits.

Dated: May 21, 2020

Respectfully submitted,

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STATEMENT OF RELATED CASES

NPCA included a statement of related cases in its opening brief, referring to the similar issues raised in *American Whitewater, et al. v. Federal Energy Regulatory Commission*, No. 18-70765. That case was mooted and dismissed when the Commission terminated the license at issue in August, 2019. *See Pub. Util. Dist. No. 1 of Okanogan Cty., Wash.*, 168 FERC ¶ 62,084 (Aug. 13, 2019).

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