

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

SAN LUIS OBISPO MOTHERS)	
FOR PEACE and)	
FRIENDS OF THE EARTH)	
)	
Petitioners,)	Case No. _____
)	
v.)	
)	
UNITED STATES NUCLEAR)	
REGULATORY COMMISSION and the)	
UNITED STATES OF AMERICA,)	
)	
Respondents.)	
)	

PETITION FOR REVIEW

Pursuant to 42 U.S.C. § 2239(a)(1)(a), 28 U.S.C. § 2344, 5 U.S.C. § 702, and Fed. R. App. P. 15(a), Petitioners San Luis Obispo Mothers for Peace, Inc. and Friends of the Earth, Inc., through their undersigned counsel, hereby petition for review of an Order entered on October 2, 2023 by the United States Nuclear Regulatory Commission (the “NRC” or “Commission”) regarding the operating license held by Pacific Gas and Electric Co. (“PG&E”) for Unit 1 of the Diablo Canyon nuclear power plant. A copy of the Order is attached.

Petitioners seek review of the portion of the Order denying Petitioners’ request for a hearing in violation of the Atomic Energy Act, 42 U.S.C. §

2239(a)(1)(A). *See* Order at 2-3.¹ The Order also violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (C), because the NRC’s denial of Petitioners’ hearing request was erroneous and arbitrary and capricious.

Accordingly, Petitioners respectfully request this Court review, reverse, and vacate the Order and grant any other remedies that may be appropriate.

This filing is timely because it is made within the 60-day period established by the Hobbs Act, 28 U.S.C. § 2344, and the Atomic Energy Act, 42 U.S.C. § 2239(a)(1), for bringing a petition for judicial review of a final decision in an NRC proceeding. The Order constitutes the final agency action in the proceeding below.

Venue is appropriate within the Ninth Circuit pursuant to 28 U.S.C. § 2343.

¹ Petitioners reserve the right to seek future review of the remainder of the Order, which refuses to take immediate enforcement action against PG&E for regulatory violations that cause unsafe conditions at Unit 1. Because this issue was referred to the NRC Staff, it is not a final decision, and therefore is not yet ripe for this Court’s review. *See* Order, slip op. at 3.

Respectfully Submitted,

____/signed electronically by/____

Diane Curran

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

1725 DeSales Street N.W., Suite 500

Washington, D.C. 20036

240-393-9285

dcurran@harmoncurran.com

Counsel to Petitioner San Luis Obispo Mothers for Peace

____/signed electronically by/____

Richard Ayres

2923 Foxhall Road, N.W.

Washington, D.C. 20016

202-744-6930

ayresr@ayreslawgroup.com

Counsel to Petitioner Friends of the Earth

November 30, 2023

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
PACIFIC GAS & ELECTRIC COMPANY

(Diablo Canyon Nuclear Power Plant,
Unit 1)

Docket No. 50-275

ORDER

The San Luis Obispo Mothers for Peace and Friends of the Earth (together, Petitioners) have requested that the Commission hold a hearing on the NRC Staff's approval of a revision to the reactor vessel material surveillance capsule withdrawal schedule for the Diablo Canyon Nuclear Power Plant, Unit 1.¹ The Petitioners also request that the Commission "exercise [its] discretionary supervisory jurisdiction to order the immediate closure of Diablo Canyon" pending certain actions, including testing and inspection of the reactor; release of test results to the NRC, the Advisory Committee on Reactor Safeguards, and the public; and a public hearing.²

¹ *Request to the NRC Commissioners by San Luis Obispo Mothers for Peace and Friends of the Earth for a Hearing on NRC Staff Decision Effectively Amending Diablo Canyon Unit 1 Operating License to Extend the Schedule for Surveillance of the Unit 1 Pressure Vessel and Request for Emergency Order Requiring Immediate Shutdown of Unit 1 Pending Completion of Tests and Inspections of Pressure Vessel, Public Disclosure of Results, Public Hearing, and Determination by the Commission That Unit 1 Can Safely Resume Operation* (Sept. 14, 2023) (Petition); see Letter from Jennifer L. Dixon-Herrity, Branch Chief, NRC, to Paula Gerfen, Senior Vice President and Chief Nuclear Officer, Pacific Gas & Electric Company (July 20, 2023) (ADAMS Accession No. ML23199A312) (Extension Approval).

² Petition at 3; see *id.* at 4.

The Staff and Pacific Gas and Electric Company (PG&E) have filed responses to the Petitioners' request.³ And the Petitioners have filed a reply to the Staff's and PG&E's responses.⁴

The Petitioners argue that they are entitled to a hearing because the Extension Approval constitutes a license amendment.⁵ But the Extension Approval, by its own terms, does not amend or otherwise affect Diablo Canyon's current license. The Extension Approval does not "grant the licensee any 'greater operating authority,' or otherwise 'alter the original terms of the license,'" the relevant factors in determining whether a Staff action constitutes a license amendment.⁶ In its evaluation of the schedule revision, the Staff specifically notes that

additional capsules are not needed to satisfy the requirements of Appendix H to 10 CFR Part 50 and ASTM E 185-70 for the current operating license period ... the licensee's compliance with Appendix H to 10 CFR Part 50 and ASTM E 185-70 with respect to the current operating license period for Diablo Canyon, Unit 1 forms no part of the NRC staff's evaluation of the licensee's proposed revision to the withdrawal schedule for supplemental surveillance⁷

³ *NRC Staff Unopposed Motion Requesting Leave to Respond to the San Luis Obispo Mothers for Peace and Friends of the Earth Hearing Request and Request to Suspend Operations* (Sept. 25, 2023) (Staff Request to Respond); *NRC Staff Answer to San Luis Obispo Mothers for Peace and Friends of the Earth Request for Emergency Order Requiring Immediate Shutdown* (Sept. 25, 2023) (Staff Answer); *Pacific Gas and Electric Company Response to the Request of San Luis Obispo Mothers for Peace and Friends of the Earth for an Emergency Order Requiring Immediate Shutdown of Diablo Canyon Nuclear Power Plant, Unit 1* (Sept. 25, 2023) (PG&E Answer).

⁴ *Motion by San Luis Obispo Mothers for Peace and Friends of the Earth for Leave to Reply to Oppositions to Request for Emergency Order Requiring Immediate Shutdown of Unit 1 Pending Completion of Tests and Inspections of Pressure Vessel, Public Disclosure of Results, Public Hearing, and Determination by the Commission That Unit 1 Can Safely Resume Operation* (Sept. 29, 2023); *Reply by San Luis Obispo Mothers for Peace and Friends of the Earth to Oppositions to Request for Emergency Order Requiring Immediate Shutdown of Unit 1 Pending Completion of Tests and Inspections of Pressure Vessel, Public Disclosure of Results, Public Hearing, and Determination by the Commission That Unit 1 Can Safely Resume Operation* (Sept. 29, 2023) (Petitioners' Reply).

⁵ Petition at 20-21; see also *id.* at 3.

⁶ *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996).

⁷ Extension Approval, encl., "Safety Evaluation by the Office of Nuclear Reactor Regulation Request for Revision to Reactor Vessel Material Surveillance Program Withdrawal Schedule" at 3.

The Staff further clarifies that it “does not make any conclusion regarding the future use of the subject capsule in any potential future licensing applications or license periods.”⁸

Because the current license for Diablo Canyon, Unit 1, has not been amended, the Extension Approval does not trigger an opportunity to request a hearing.⁹ Therefore, pursuant to my authority under 10 C.F.R. § 2.346(h), I *deny* the Petitioners’ request for a hearing.

With respect to the Petitioners’ request for immediate closure of Diablo Canyon, Unit 1, pursuant to my authority under 10 C.F.R. § 2.346(j), I *refer* Petitioners’ underlying concerns to the Executive Director for Operations for consideration under 10 C.F.R. § 2.206.¹⁰ I likewise *refer* the Staff Answer and the PG&E Answer to the Staff for consideration with the Petitioners’ concerns to the extent the answers relate to the request for immediate closure.

The Staff also filed an unopposed motion seeking leave to respond to the Petition, and PG&E states that it intends to respond separately to Petitioners’ hearing request.¹¹ This denial of the hearing request and the referral above moot the need for any further adjudicatory filings on these matters. Therefore, pursuant to my authority under 10 C.F.R. § 2.346(j), I *deny* the

⁸ Extension Approval at 1.

⁹ See 42 U.S.C. § 2238a.(1)(A).

¹⁰ This referral includes the Petition and Petitioners’ Reply.

¹¹ See Staff Request to Respond; PG&E Answer at 1 n.3.

Staff's request (made on behalf of itself and PG&E) to file answers to Petitioners' request for a hearing.

IT IS SO ORDERED.

For the Commission



Brooke P. Clark
Secretary of the Commission

Dated at Rockville, Maryland,
This 2nd day of October 2023.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)

PACIFIC GAS AND ELECTRIC COMPANY)

(Diablo Canyon Nuclear Power Plant, Unit 1))
)
)
)

Docket No. 50-275

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Denying Hearing Request and Referring Request for Immediate Action to the Executive Director for Operations for Consideration Under 10 C.F.R. § 2.206)** have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16B33
Washington, DC 20555-0001
E-mail: ocaamail.resource@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-16B33
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001
E. Roy Hawkens, Chief Administrative
Judge
E-mail: roy.hawkens@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-14A44
Washington, DC 20555-0001
David Roth
Reuben I. Siegman
Susan H. Vrahoretis
Jeremy L. Wachutka
E-mail: david.roth@nrc.gov
reuben.siegman@nrc.gov
susan.vrahoretis@nrc.gov
jeremy.wachutka@nrc.gov

Counsel for Pacific Gas and Electric
Company
Morgan, Lewis & Bockius, LLC
1111 Pennsylvania Ave NW
Washington, DC 20004
Ryan K. Lighty
Paul Bessette
Timothy Matthews
E-mail: ryan.lighty@morganlewis.com
paul.bessette@morganlewis.com
timothy.matthews@morganlewis.com

**Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Unit 1,
Docket No. 50-275)
ORDER (Denying Hearing Request and Referring Request for Immediate Action to the
Executive Director for Operations for Consideration Under 10 C.F.R. § 2.206)**

Counsel for San Luis Obispo Mothers for Peace
Harmon, Curran, Spielberg, & Eisenberg, LLP
1725 DeSales Street, N.W.
Suite 500
Washington, DC 20036
Diane Curran
E-mail: dcurran@harmoncurran.com

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 2nd day of October 2023

CERTIFICATE OF SERVICE

I, Diane Curran, hereby certify that on November 30, 2023, I posted Petitioners' Petition for Review on the Court's ECF website. I also sent copies to the following by first-class mail:

Merrick Garland, Attorney General (by registered mail, return receipt requested)
United States Department of Justice
Environment and Natural Resources Division
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530-001

Brooke P. Clark, General Counsel
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Carrie M. Safford, Secretary (by registered mail, return receipt requested)
U.S. Nuclear Regulatory Commission
Mail Stop O-16G4
Washington, D.C. 20555-0001

Paul M. Bessette, Esq.
Ryan K. Lighty, Esq.
Timothy P. Matthews, Esq.
Morgan, Lewis and Bockius, L.L.P.
1111 Pennsylvania Ave. N.W.
Washington, D.C. 20004
Counsel to Pacific Gas and Electric Co.

Respectfully Submitted,

_____/signed electronically by/____

Diane Curran
Harmon, Curran, Spielberg, & Eisenberg, L.L.P.
1725 DeSales Street N.W., Suite 500
Washington, D.C. 20036
240-393-9285
Email: dcurran@harmoncurran.com