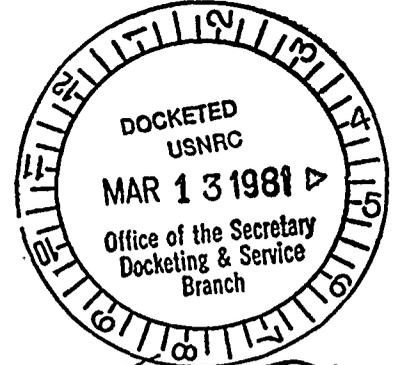


BEFORE THE COMMISSION

3/9/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY)
)
(Diablo Canyon Nuclear Power)
Plant, Unit Nos. 1 and 2)

Docket Nos. 50-275 O.L.
50-323 O.L.

RESPONSE OF GOVERNOR EDMUND G. BROWN, JR.
TO NRC STAFF AND PACIFIC GAS AND ELECTRIC
COMPANY REQUESTS FOR DIRECTED CERTIFICATION AND
REQUEST FOR CERTIFICATION OF ENVIRONMENTAL
ISSUE

The NRC Staff, on February 23, 1981, and Pacific Gas and Electric Company ("PG&E"), on February 26, 1981, requested the Commission to direct certification of various Diablo Canyon issues. Governor Brown hereby responds that the Staff request should be granted, and that the PG&E request should be denied.

Governor Brown also submits in this filing an additional low power test issue for directed certification -- whether NRC regulations requiring preparation of an environmental impact appraisal or impact statement on PG&E's low power test program must be complied with by the NRC Staff. This issue, contested by the parties before the Licensing Board, should be resolved by the Commission promptly so that the delays which would inevitably result from reversible error can be avoided.

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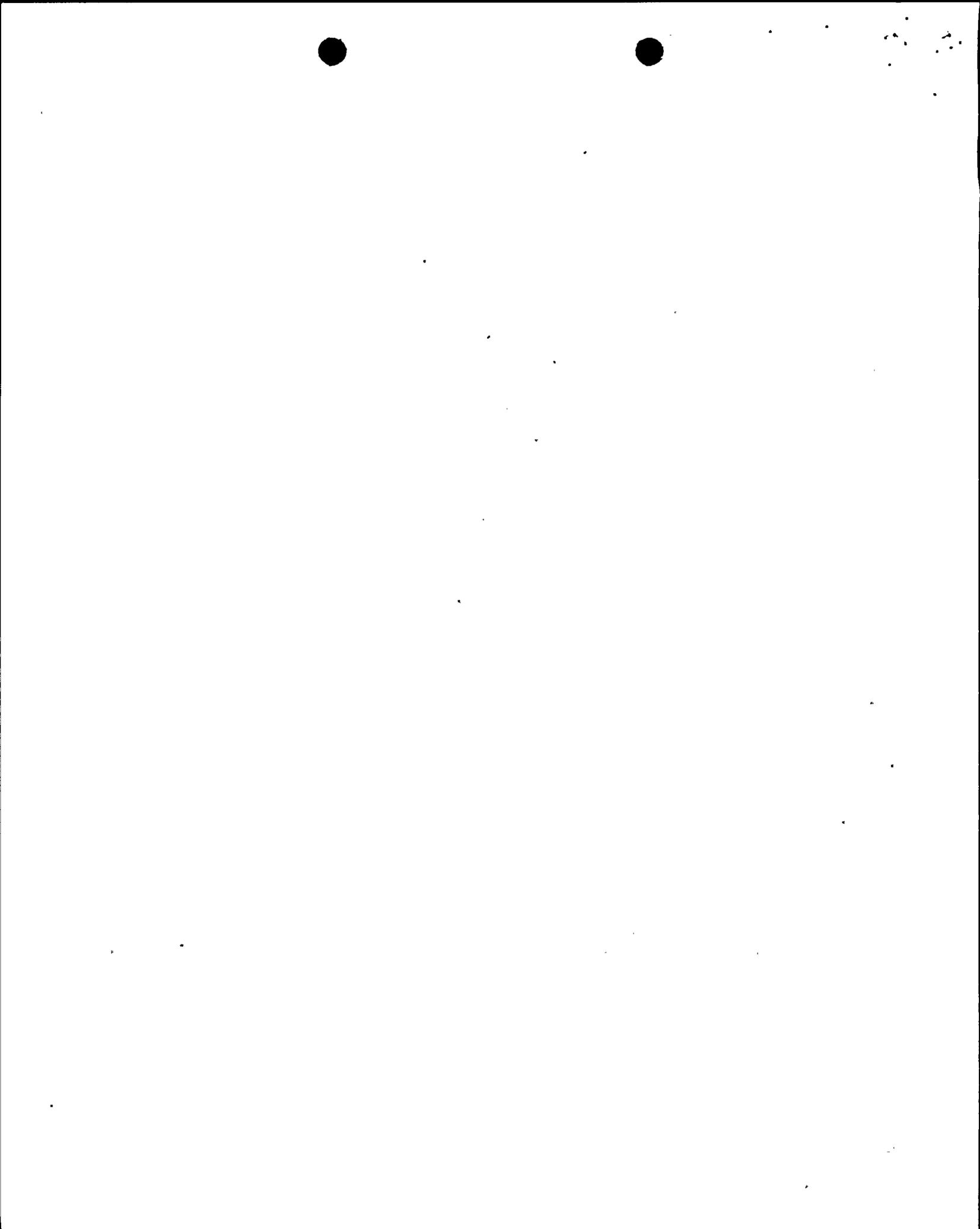


If the Commission grants some or all of the certification requests, it should establish a briefing schedule for submission of legal arguments on the substantive issues accepted for review. The Governor is not submitting such legal arguments at this time, because the Commission has not ruled procedurally whether it will direct certification of the issues for substantive review.

I. The NRC Staff Certification Request

On February 23, 1981, the NRC Staff requested the Commission to direct certification of the question whether the Licensing Board in the Diablo Canyon low power test proceeding had correctly interpreted the Commission's December 18, 1980 Revised Policy Statement. This request was prompted by the Licensing Board's February 13, 1981 Prehearing Conference Order (the "Order"), which represents the first interpretation of that Revised Policy Statement by a Licensing Board. The Staff contends that the Licensing Board erred in the Board's interpretation and that efficient resolution of this question can best be accomplished by prompt Commission review.

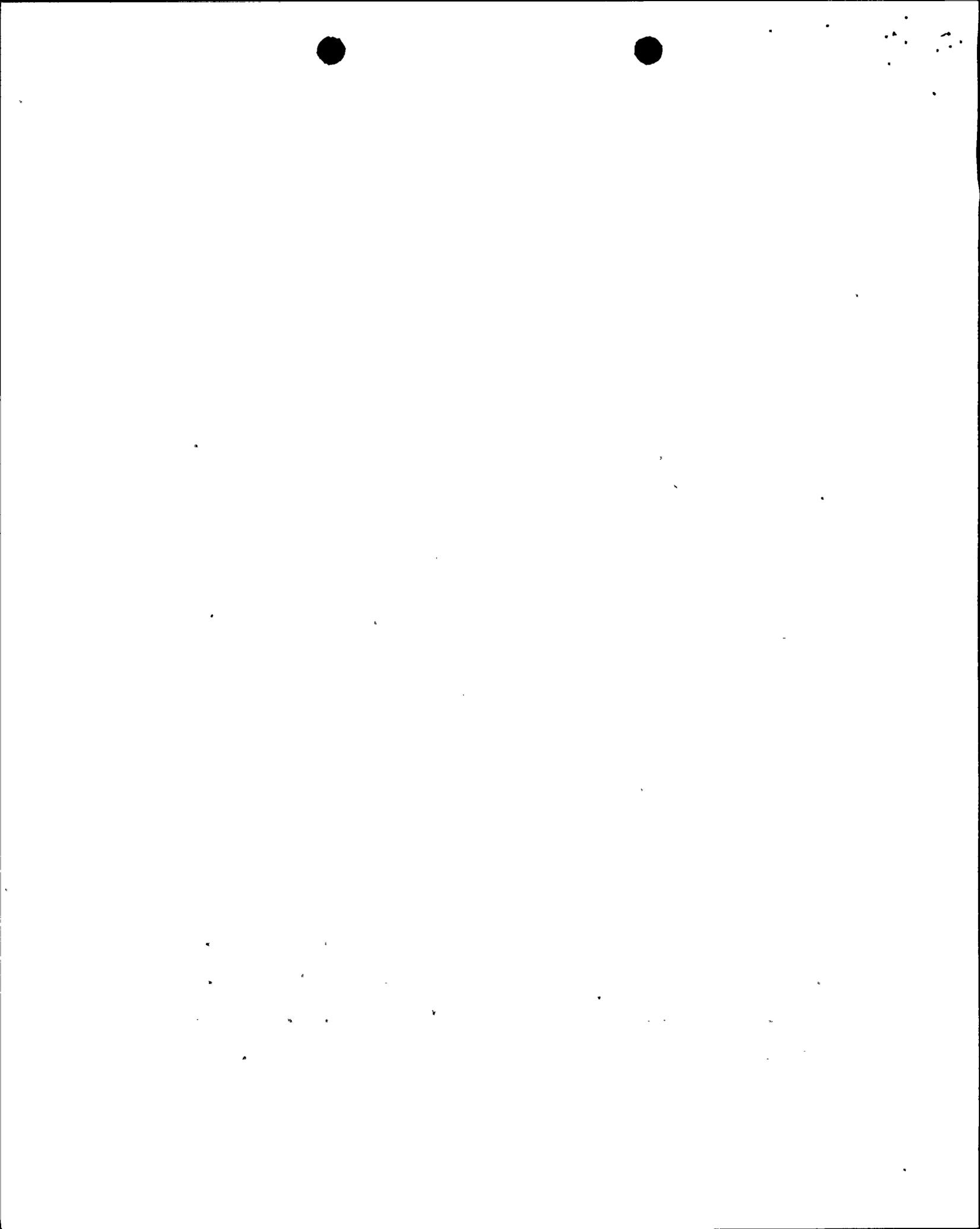
While we differ with the Staff on the proper interpretation of the Revised Policy Statement, we agree that the Policy Statement issue merits careful Commission review. Accordingly, the Governor supports the Staff's request.



II. The PG&E Certification Request

On February 26, 1981, PG&E filed its request for directed certification. PG&E's request should be denied. Unlike the requests of the Staff and Governor Brown, the PG&E request is not limited to issues germane to the low power test proceeding. Rather, in an unprecedented departure from normal licensing procedures, PG&E requests the NRC to exercise immediate jurisdiction over every aspect of the Diablo Canyon proceeding, except for the seismic and security issues pending before the Appeal Board. This brazen attempt to circumvent fair and established procedures should be rejected outright by the Commission.

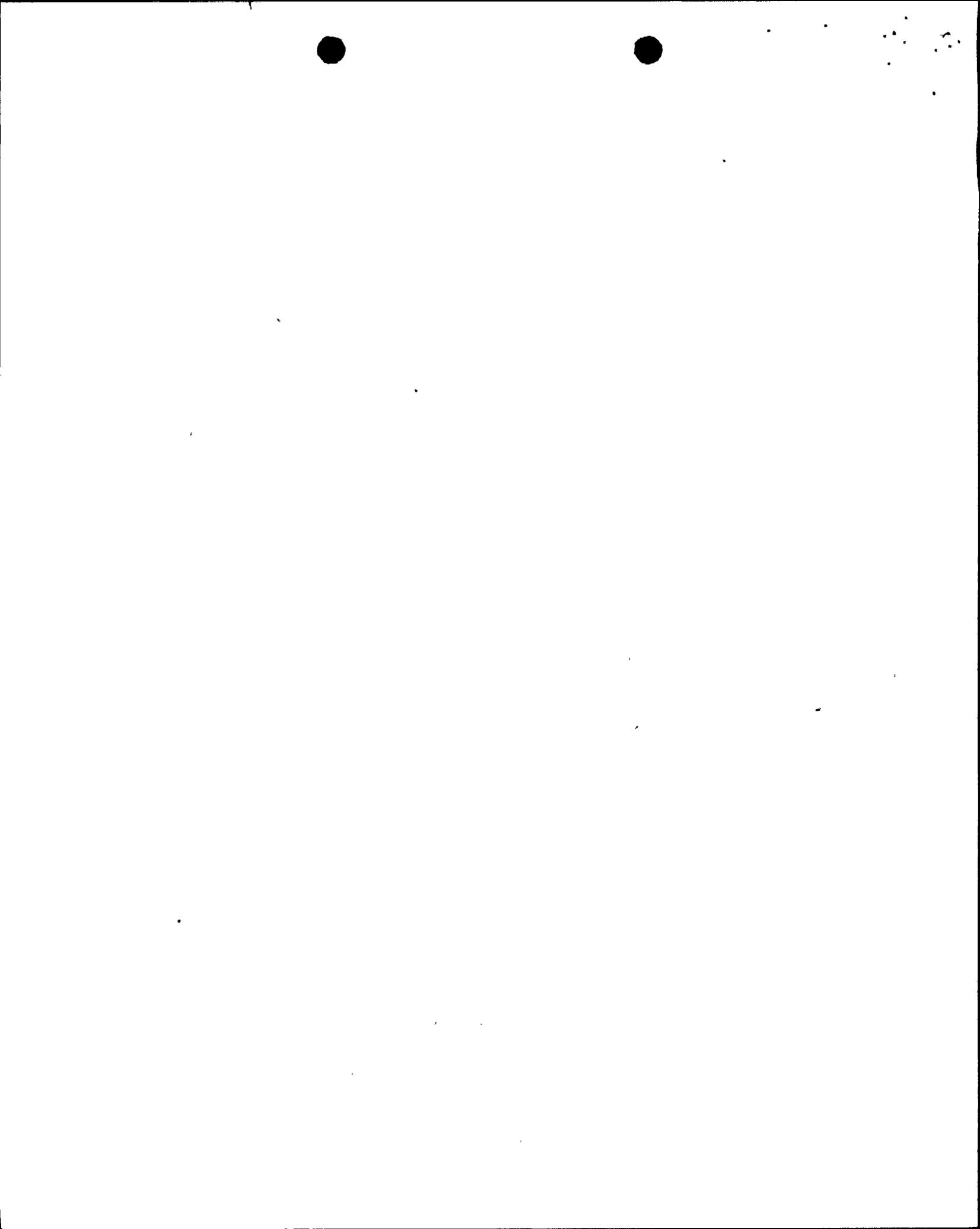
For instance, PG&E states that the Commission should determine the merits of the low power issues because they "raise only legal and policy questions whose resolution will not require discovery and hearings..." PG&E Request, pg. 29. The Governor disagrees strongly with this statement. Indeed, discovery is currently underway on low power test issues by PG&E as well as by other parties. PG&E's certification request is certainly not the proper means to resolve the factual disputes which exist. Rather, as contemplated by the NRC's regulations, the Licensing Board is the



forum for initial resolution of factual disputes. Certification to the Commission should be reserved for purely legal issues, such as those presented in the Staff's request.

The only clearly articulated basis for PG&E's certification request is PG&E's desire to avoid purportedly unnecessary "delay" caused by the intervenors. However, the purported "delay" which has affected Diablo Canyon cannot be so casually laid to the intervenors. The serious seismic issues are still outstanding, and the time spent by the Appeal Board properly addressing the implications of the 1979 Imperial Valley earthquake data on the Diablo Canyon plant is not "delay"; it is exercise of responsible regulatory concern. "Delay" in the resolution of this and other important seismic issues, if laid to anyone, must lie fundamentally in PG&E's own failure to conduct adequate investigation of off-shore faults when PG&E chose the Diablo Canyon site. Indeed, every regulatory event related to seismic issues can legitimately be found the product of PG&E overlooking the presence of the major Hosgri Fault approximately three miles from the plant. It is disingenuous for PG&E now to complain of the very delay for which PG&E is solely responsible.

The security proceeding is also still outstanding, a "delay" which again must be laid to the inadequate security record compiled by PG&E and the Staff at the first security hearing. This led the Appeal Board in ALAB-580 to "vacate" the Licensing Board's decision and to rule that a de novo proceeding was necessary. The Appeal



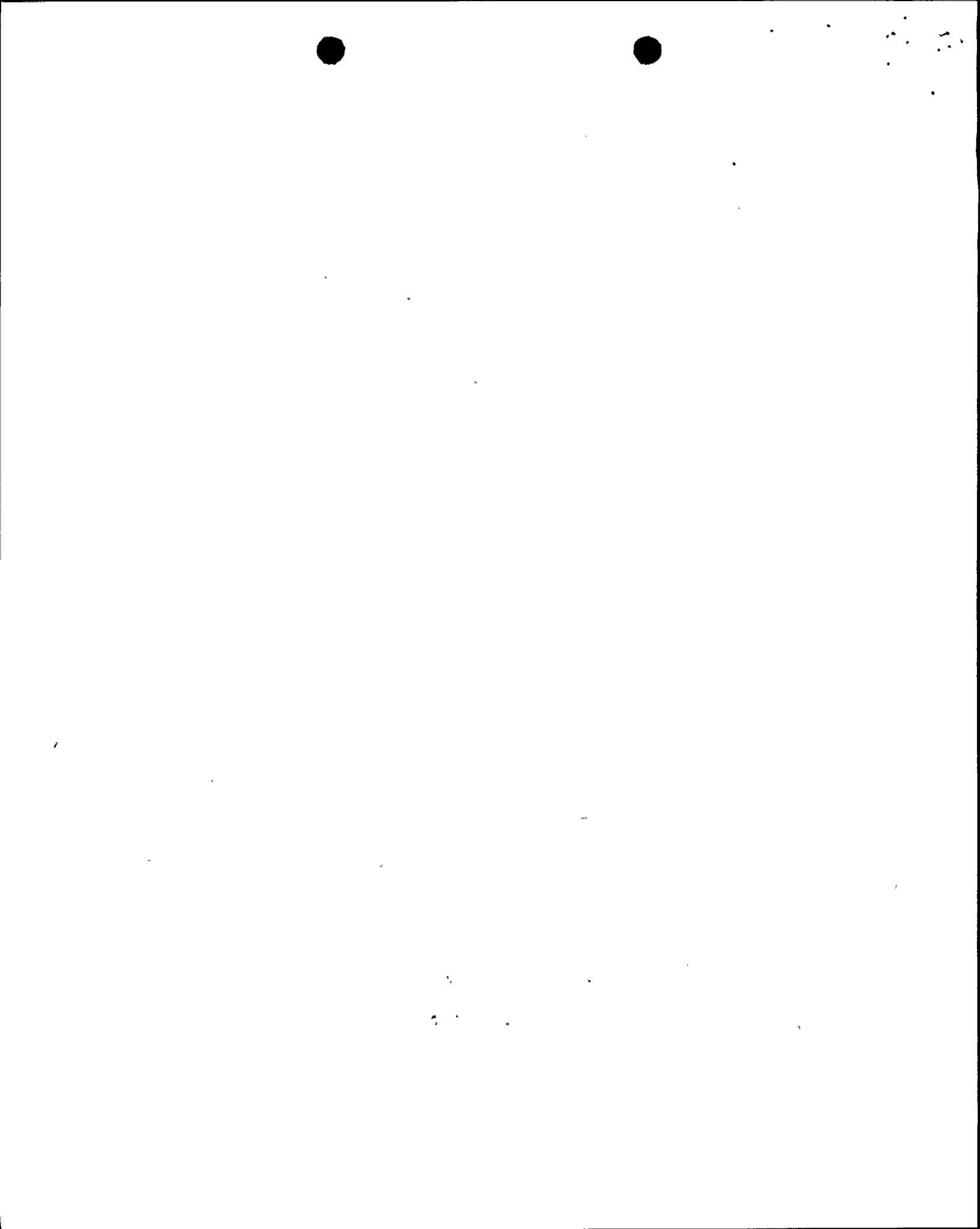
Board had no choice in the matter, and PG&E now only complains of the time devoted to hearings for which PG&E itself is responsible.

Finally, PG&E argues that there is needless delay due to the TMI accident. This ignores the seriousness of that accident and improperly asks the Commission to defer resolution of critical safety issues for the sake of getting the plant on line. Efficient and sound licensing, in the public interest, can be achieved only if the Commission commits its processes to resolution of safety issues before irretrievable commitments of resources are made. Such resolution is not "delay;" it is the NRC's duty under the Atomic Energy Act.

In short, PG&E's certification request is but a plea to the Commission for special favor. The request camouflages serious, contested issues in an effort to fabricate a facade of "delay" against which PG&E asks the Commission to join forces. The Commission should pierce the veil of PG&E's specious argument and prevent the circumvention of the NRC's established procedural safeguards. Accordingly, unlike the Staff's carefully articulated request for certification, PG&E's request must be denied.

III. Governor Brown Requests Directed Certification of the NEPA Issue

In the Licensing Board's Prehearing Conference Order, the Board ruled that the Staff is not required to prepare an environmental



impact appraisal on PG&E's proposed low power testing program. Order at 3-7. This is flatly contrary to the NRC's regulations, and thus constitutes reversible error which will preclude lawful issuance of a low power license. The Governor, therefore, requests the Commission to review the Licensing Board's erroneous NEPA ruling, and to order the Staff to prepare an environmental impact appraisal in accordance with the requirements of law.

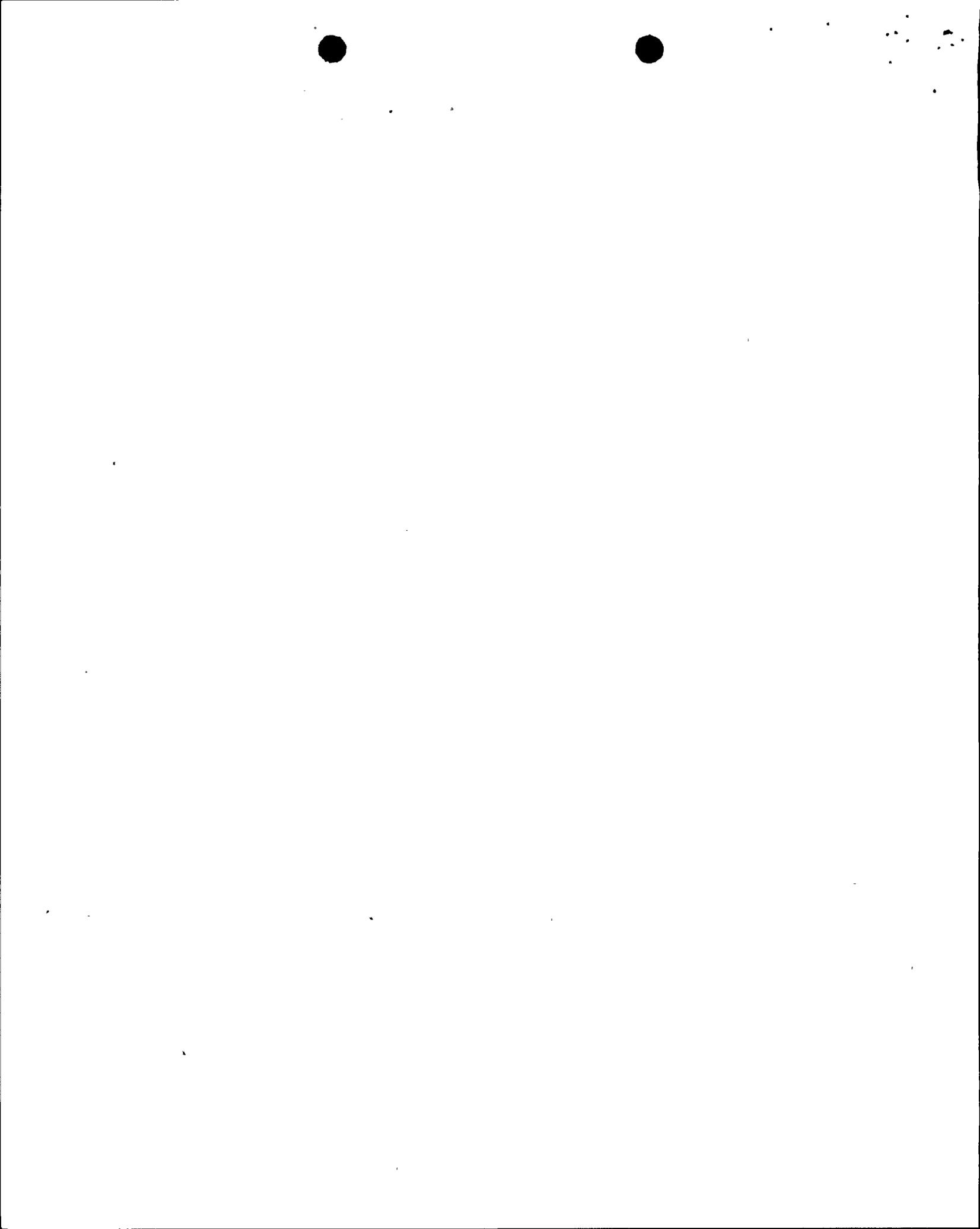
The NRC's regulations specifically require an environmental analysis of requests for licenses to load fuel and to perform low power tests. Thus, 10 C.F.R. §51.5(b) states:

Many licensing and regulatory actions of the Commission other than those listed in paragraph (a) may or may not require preparation of an environmental impact statement, depending upon the circumstances. In determining whether an environmental impact statement should or should not be prepared for such an action, the Commission shall be guided by the Council on Environmental Quality Guidelines, 40 C.F.R. 1500.6. Such other actions include:

(3) Issuance of a license to operate a power reactor ... at less than full power ...; (emphasis supplied.)

The NRC's regulations in Section 51.5(c)(i) further provide:

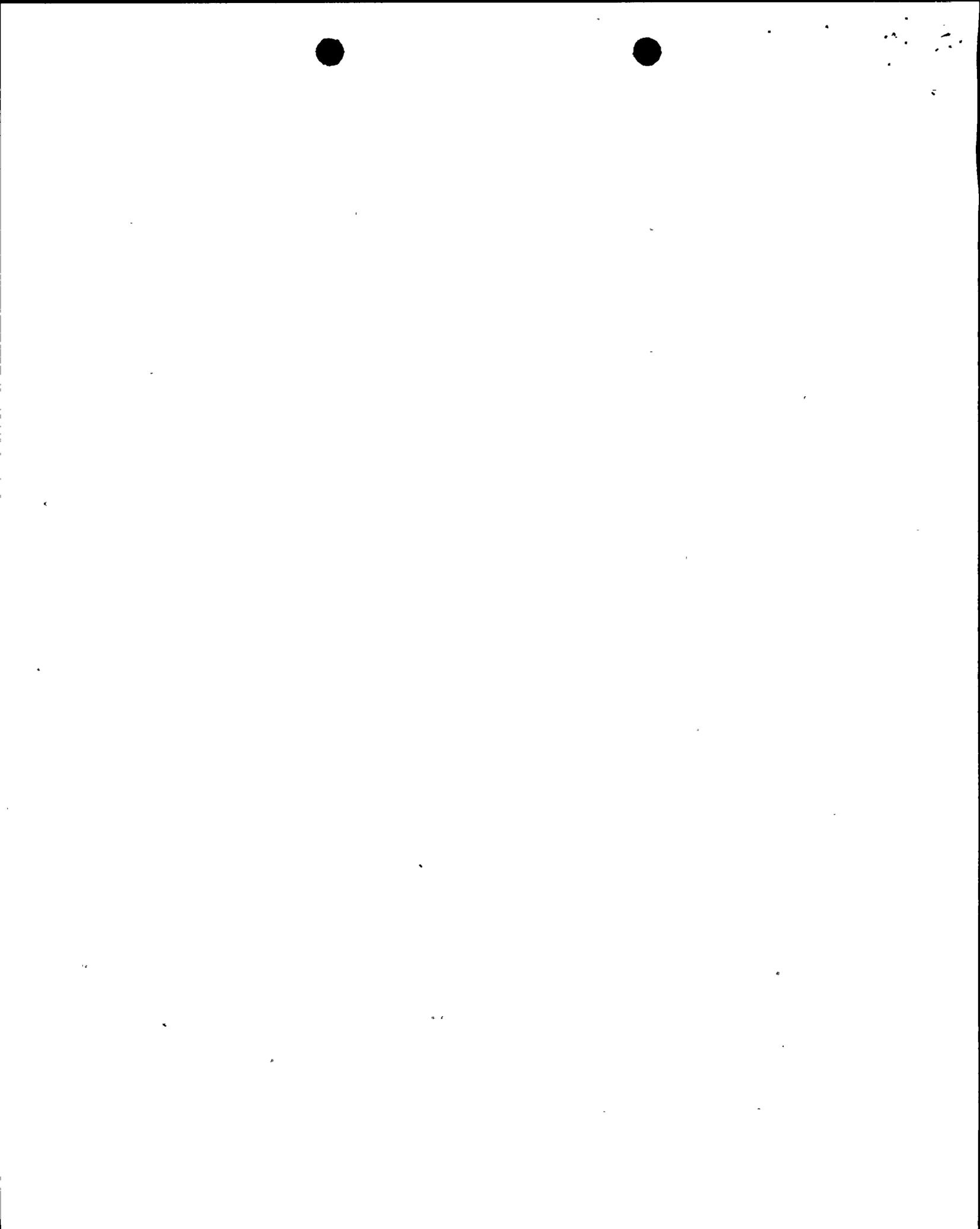
The environmental impact of proposed licensing and regulatory actions listed in paragraph (b) will be evaluated and if it is determined that an environmental impact statement should be prepared, a notice of intent will be published and distributed in accordance with §51.50(d) and draft and final environmental impact statements will be prepared. If it is determined that an environmental impact statement need not be prepared for an action listed in paragraph (b), a negative declaration and environmental impact appraisal will, unless otherwise determined by the Commission, be prepared in accordance with §51.50(d) (emphasis supplied).



Thus, prior to proceeding on PG&E's request to load fuel and conduct low power tests at Diablo Canyon, Sections 51.5(b) and 51.5(c) (i) require that: (1) the environmental impact of fuel loading and low power testing "will be evaluated," and (2) an environmental impact statement on low power test operations will be prepared or, if it is determined that an environmental impact statement is not required, an "environmental impact appraisal and negative declaration will be prepared and published.

The Licensing Board has ignored the forgoing regulatory requirements. The Board apparently believes that the existence of a full power EIS for Diablo Canyon obviates the need for an environmental appraisal of PG&E's low power testing program. However, the existence of the full power EIS, as a legal matter, is immaterial, because Section 51.5(b) of the regulation itself, after specifying that full power EISs must be prepared, further mandates the separate preparation of an environmental impact appraisal for a low power test application.

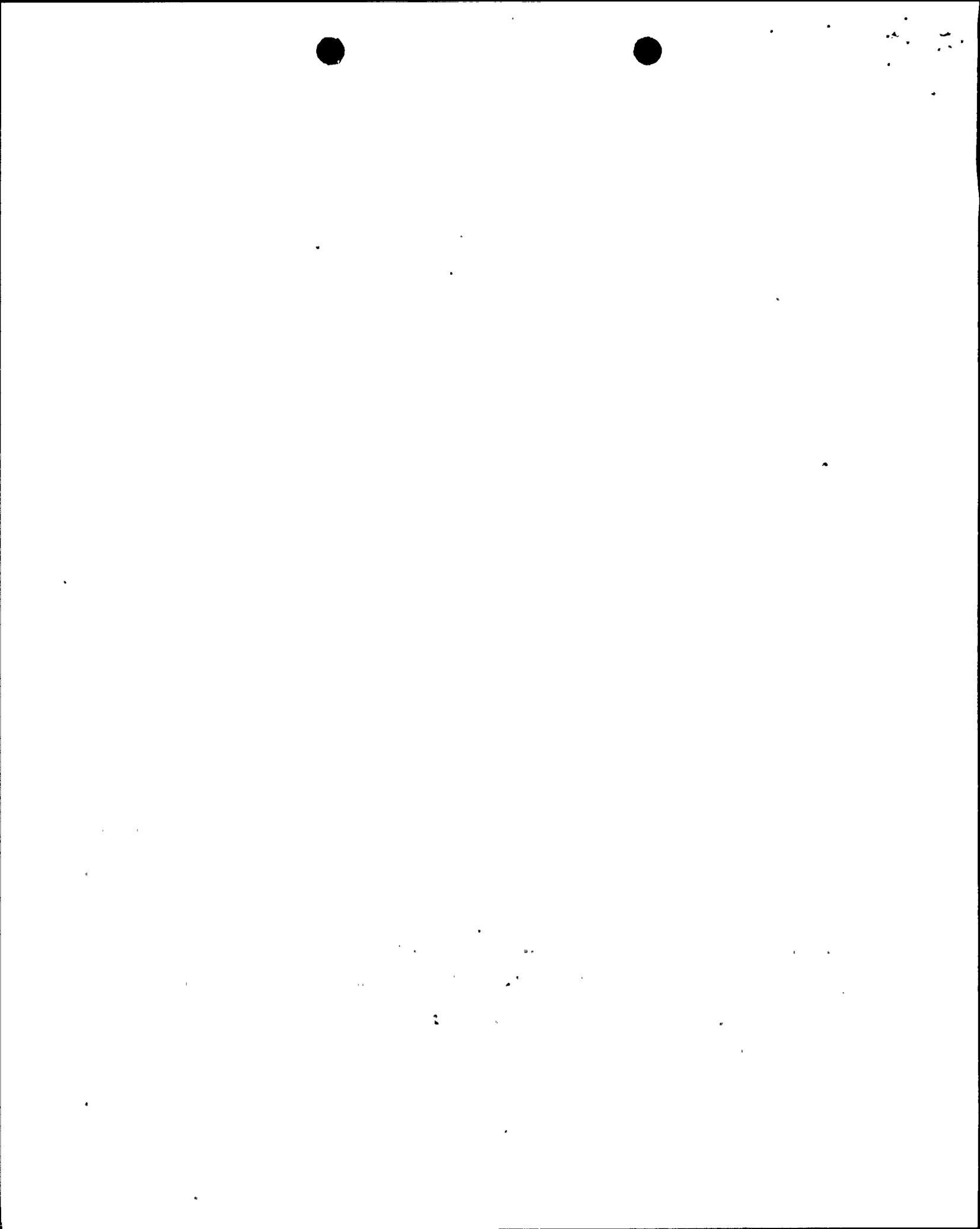
The environmental impact appraisal is required in this case not only because of the literal language of Section 51.5(b), but also because the full power EIS neither "subsumes" the factual issues relating to low power testing at Diablo Canyon nor considers the costs and benefits of proceeding prematurely with low power testing



as PG&E proposes to do.^{1/} The Governor is not raising matters that are speculative or remote. Rather, the Governor contends that (1) there is no need for the low power test license at this time, and that need itself is a matter under CEQ's Regulations and Part 51 which the environmental impact appraisal must address; and (2) the environmental impact and consequences of authorizing low power testing and subsequently denying full power operation is a specific reasonably identifiable alternative requiring analysis.

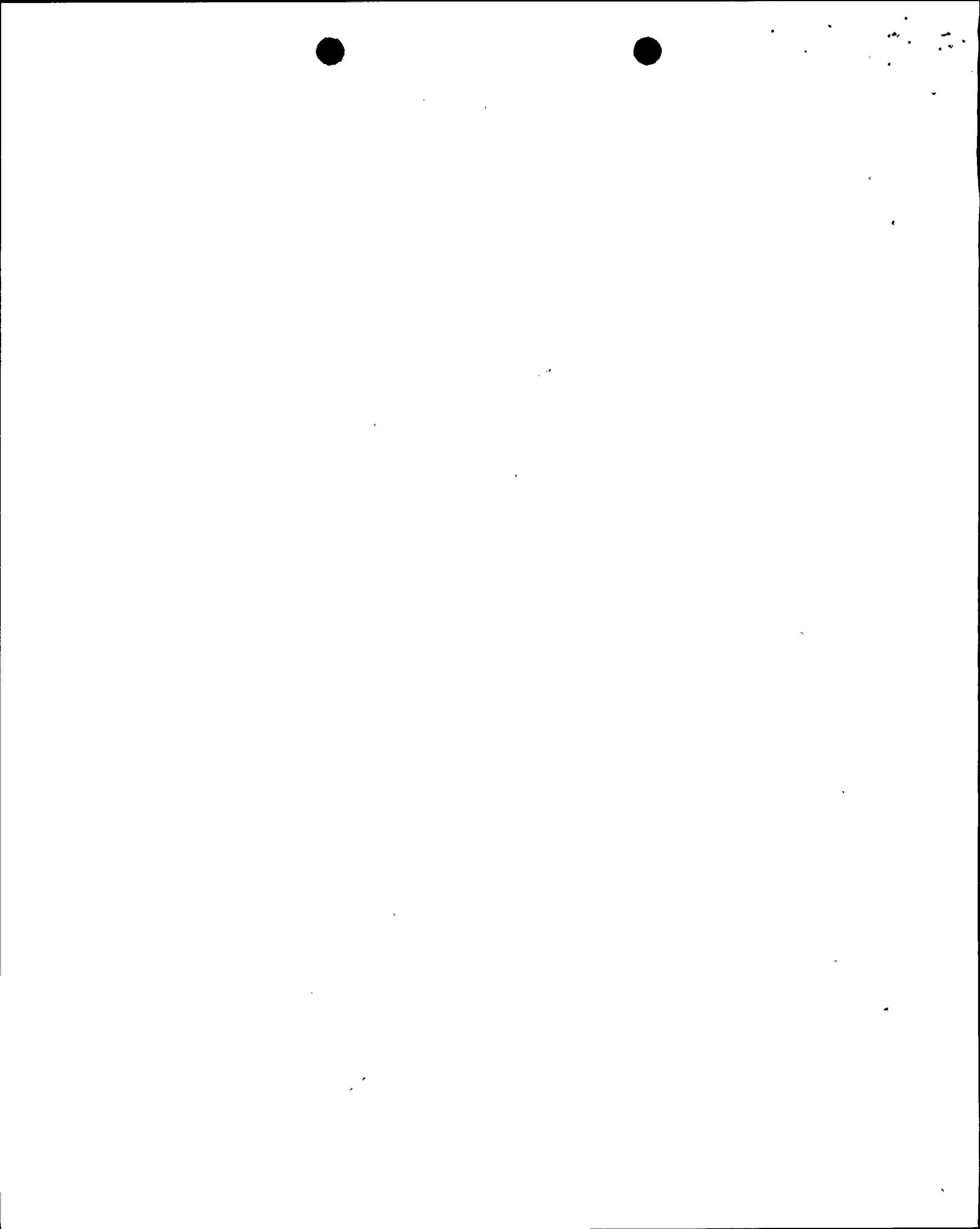
The contamination of the Diablo Canyon facility during low power test operations will significantly affect the character and status of the facility and its relationship to the surrounding communities. If a full power license is subsequently denied by the Commission -- a possibility which must be deemed significant, particularly due to the outstanding seismic issues -- the reactor will have to be treated both technically and legally under conditions that have not been considered by PG&E or the Staff in the

^{1/} The Licensing Board may have issued its erroneous ruling in the belief that the Governor failed to demonstrate that the impacts of low power testing will be different from the impacts of full power operation which have been analyzed. Order at 5-6. What this ignores, however, is that NEPA requires an analysis not only of impacts, but also of the costs and benefits associated with those impacts. The Staff has never prepared an analysis of the costs and benefits of low power testing and, therefore, has squarely violated NEPA, CEQ's Regulations, and the NRC's Regulations thereunder.



environmental documents and full power EIS previously prepared in this proceeding. Technically, the issue will be to specify the means through which the contaminated facility should be decontaminated and maintained without undue risk to the public. Legally, the issue will be to stipulate the terms and conditions under which to decommission the facility and ensure satisfactory safety and safeguards procedures for the future.

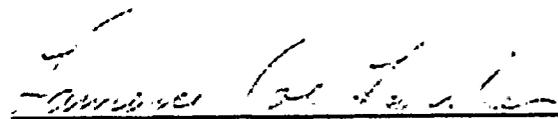
The Governor submits that the analysis of the environmental impacts of authorizing the low power testing of Diablo Canyon will support the following two conclusions: First, there is no public benefit to be gained from operating Diablo Canyon at low power prior to final resolution of the outstanding full power issues and thus prior to issuance of a full power operating license. Second, there is no need to grant PG&E a low power test license in this proceeding prior to resolution of the full power issues. The Governor emphasizes that CEQ's Regulations explicitly mandate that the "need" for PG&E's low power testing program be analyzed in the NRC's environmental impact appraisal. Thus, Section 1508.9(b) of CEQ's Regulations states that the impact appraisal, "Shall include brief discussions of the need for the proposal ..." Issuance of a low power test license would not only create adverse environmental effects that could otherwise be avoided, but would prejudice the posture of this proceeding by permitting PG&E to commence operation of its facility while the overriding seismic, security and emergency planning issues remain unanswered.



Accordingly, Governor Brown requests that the Commission direct certification of this critical NEPA issue. After such certification and pursuant to a NRC directed briefing schedule, we shall submit detailed legal arguments which demonstrate that the failure to prepare an environmental impact appraisal is a violation of NEPA, the CEQ Regulations, and the NRC's Regulations thereunder.

Respectfully submitted,

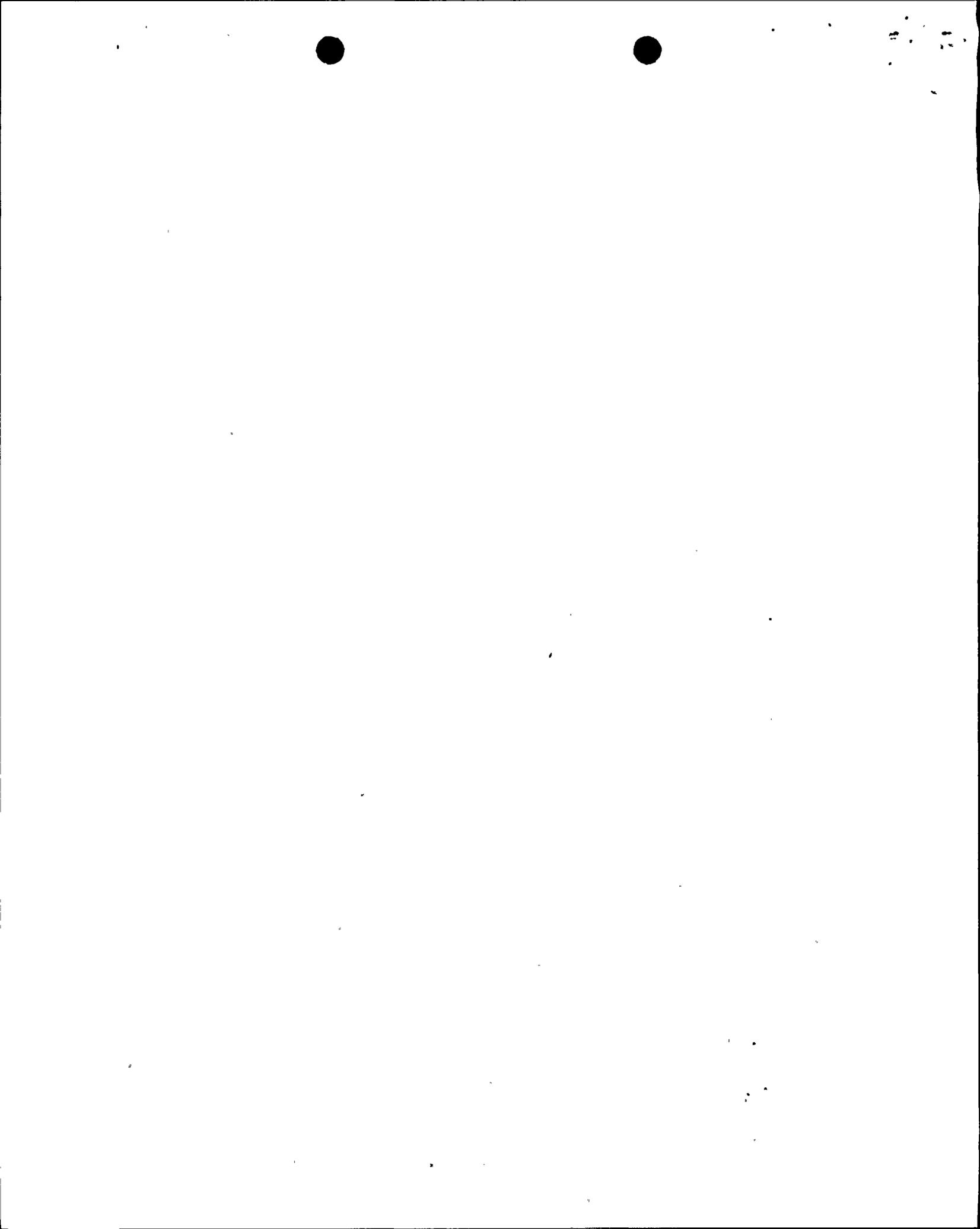
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March 9, 1981



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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PACIFIC GAS AND ELECTRIC COMPANY) Docket Nos. 50-275 O.L.
) 50-323 O.L.
(Diablo Canyon Nuclear Power Plant,)
Units 1 and 2)
_____)

CERTIFICATE OF SERVICE

I hereby certify that copies of the "RESPONSE OF GOVERNOR EDMUND G. BROWN, JR. TO NRC STAFF AND PACIFIC GAS AND ELECTRIC COMPANY REQUESTS FOR DIRECTED CERTIFICATION AND REQUEST FOR CERTIFICATION OF ENVIRONMENTAL ISSUE in the above-captioned proceeding have been served on the following by U.S. mail, first class, on March 9, 1981.

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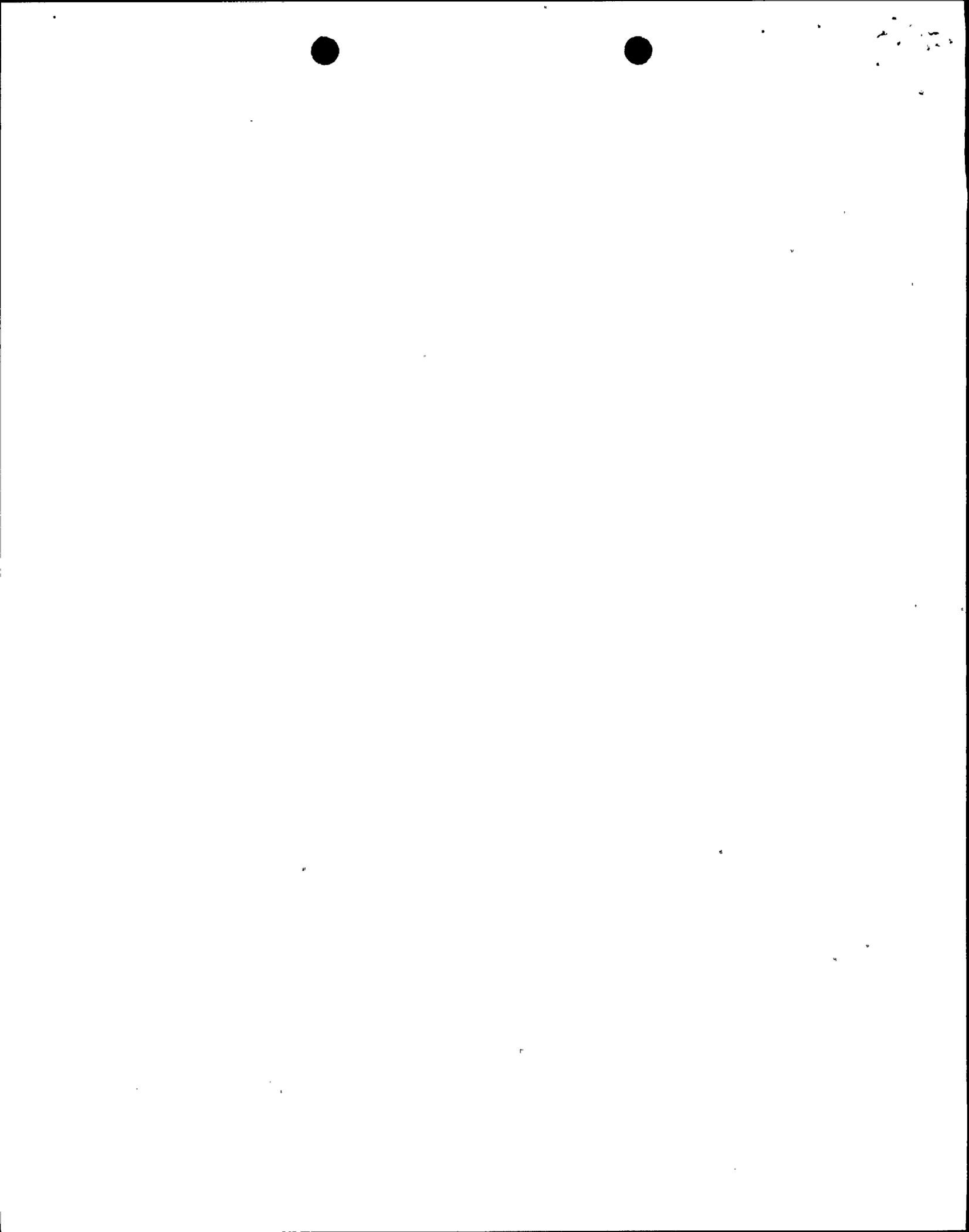
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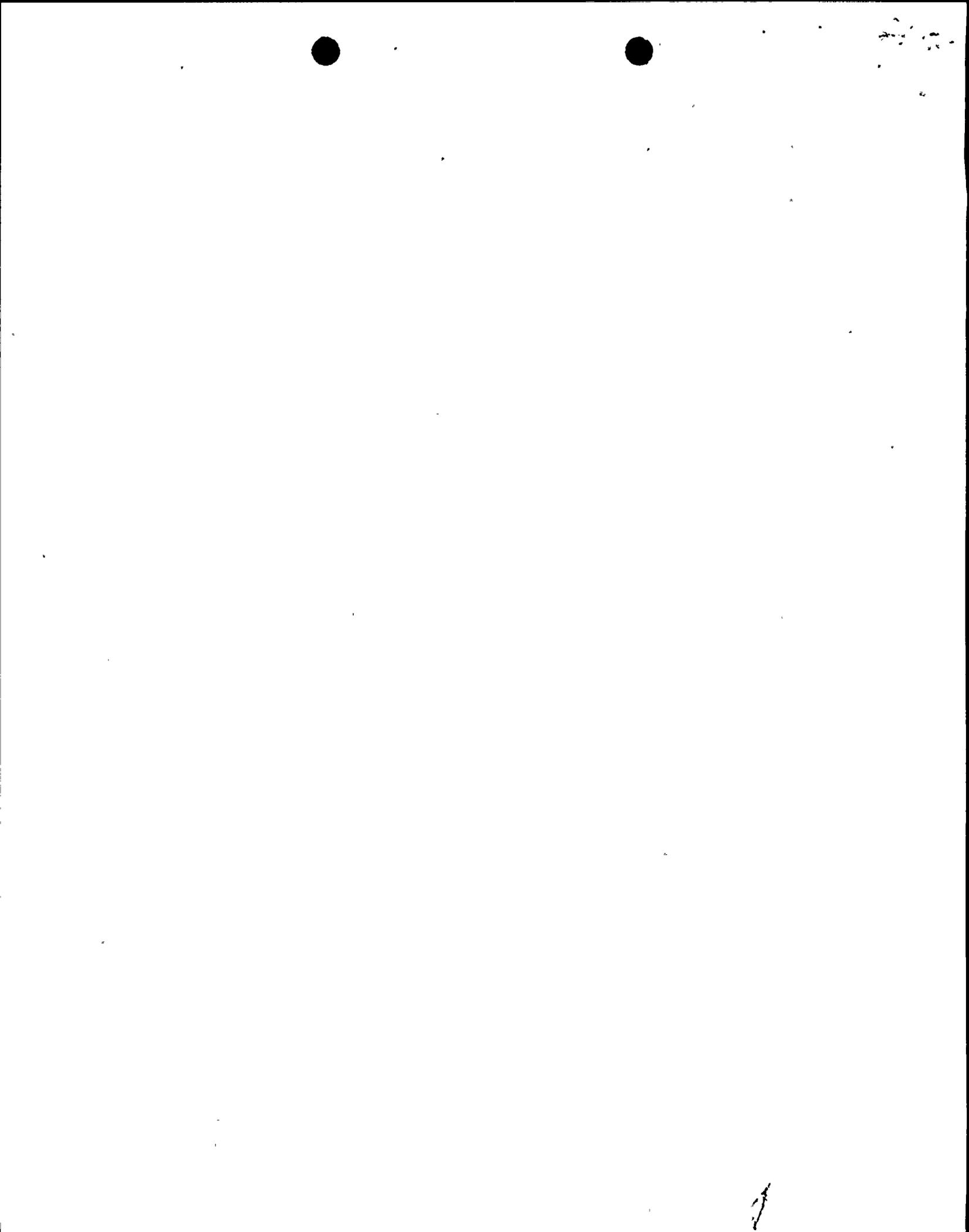
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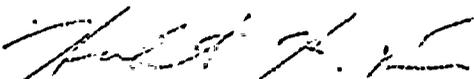
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