

**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 1)

Docket No. 50-275

September 25, 2023

**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**

Timothy P. Matthews, Esq.
Paul M. Bessette, Esq.
Ryan K. Lighty, Esq.
MORGAN, LEWIS & BOCKIUS LLP

Counsel for Pacific Gas and Electric Company

CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 4

 A. Brief Technical Background..... 4

 B. The Shutdown Request 7

III. THE COMMISSION SHOULD DENY THE SHUTDOWN REQUEST ON
PROCEDURAL GROUNDS..... 8

 A. The Shutdown Request Is Procedurally Improper 8

 B. Viewed as a Motion, the Shutdown Request Fails to Comply with Multiple
 Procedural Requirements on Consultation and Timeliness 9

IV. THE COMMISSION SHOULD DENY THE SHUTDOWN REQUEST
BECAUSE IT LACKS SUFFICIENT JUSTIFICATION..... 10

 A. The Shutdown Request Identifies No Extraordinary Circumstances
 Warranting Supervisory Intervention 10

 B. The Request Fails to Justify the “Drastic” Action of Shutting Down Unit 1 13

V. CONCLUSION..... 15

TABLE OF AUTHORITIES

NRC Cases

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 & 3),
CLI-11-14, 74 NRC 801 (2011)..... 8

Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant),
CLI-15-22, 82 NRC 310 (2015)..... 4

*In the Matter of Licensees Authorized to Possess or Transport Strategic Quantities of
Special Nuclear Material*,
CLI-77-3, 5 NRC 16 (1977)..... 13

NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1),
CLI-19-7, 90 NRC 1 (2019)..... 1, 8, 9, 10

Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2),
CLI-15-14, 81 NRC 729 (2015)..... 13

Union Electric Co. d/b/a Ameren Missouri (Callaway Plant, Unit 2),
CLI-11-5, 74 NRC 141 (2011)..... 10

Yankee Atomic Elec. Co. (Yankee Rowe Nuclear Power Station),
CLI-91-11, 34 NRC 3 (1991)..... 11

Federal Court Cases

Nader v. NRC, 513 F.2d 1045 (D.C. Cir. 1975) 13

Regulations

10 C.F.R. § 2.206 passim

10 C.F.R. § 2.309 1, 8

10 C.F.R. § 2.323 2, 9, 10

10 C.F.R. § 2.345 1, 8

10 C.F.R. § 2.802 1, 8

10 C.F.R. § 50.61 5

10 C.F.R. § 50.61a 5

10 C.F.R. Part 2, Subpart H 3

10 C.F.R. Part 50 12

10 C.F.R. Part 50, Appendix H 4, 5, 6

Federal Register Notices

Final Rule: “Alternate Fracture Toughness Requirements for Protection Against Pressurized Thermal Shock Events,” 75 Fed. Reg. 13, 13 (Jan. 4, 2010) 5

Final Rule: “Analysis of Potential Pressurized Thermal Shock Events,” 50 Fed. Reg. 29,937 (July 23, 1985) 4

Final Rule: “Fracture Toughness and Surveillance Program Requirements,” 38 Fed. Reg. 19,012 (July 17, 1973) 4

Other Authorities

BLACK’S LAW DICTIONARY (11th ed. 2019) 9

NRC Regulatory Guide 1.99, Radiation Embrittlement of Reactor Vessel Materials (Rev. 2, May 1998) (ML003740284) 6, 7

I. INTRODUCTION

Pacific Gas and Electric Company (“PG&E”) hereby submits this response¹ to the document styled as a “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 Safety Resume Operation” (“Shutdown Request”²) filed on the above-captioned adjudicatory docket on September 14, 2023, by San Luis Obispo Mothers for Peace (“SLOMFP”) and Friends of the Earth (“FOE”) (collectively, the “Requesters”).³ The Shutdown Request asks the Commission to exercise its “discretionary supervisory jurisdiction” to “order the immediate closure of Diablo Canyon [Nuclear Power Plant, Unit 1 (“Unit 1”)] pending the completion of a series of remedial actions.”⁴

As a general matter, there is no procedural basis in the NRC’s Rules of Practice and Procedure that authorizes a request of this type. In fact, the Commission has long held that requests for exercise of supervisory authority such as this are “procedurally improper.”⁵ In

¹ In an abundance of caution, PG&E is responding to the Shutdown Request as a general motion brought under the procedural requirements of 10 C.F.R. § 2.323.

² “Petition” is an established and defined term in the NRC’s Rules of Practice and Procedure. *See, e.g.*, 10 C.F.R. §§ 2.309 (petitions to intervene), 2.345 (petition for reconsideration), 2.802 (petition for rulemaking). None of those apply here. Because Requesters use the term in a manner that may lead to confusion, PG&E uses the term “request” used by Requesters in the caption to their filing.

³ 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 Safety Resume Operation (Sept. 14, 2023) (ML23257A302) (“Shutdown Request”). The document also contains a hearing request and two proposed contentions, to which PG&E will respond separately pursuant to 10 C.F.R. § 2.309.

⁴ Shutdown Request at 3; *see id.*, attach. 1, Declaration Of Digby Macdonald, Ph.D in support of Hearing Request And Request For Emergency Order By San Luis Obispo Others For Peace And Friends Of The Earth (“Macdonald Decl.”).

⁵ *See, e.g., NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-19-7, 90 NRC 1, 8 (2019). Counsel for Requesters also represented the filers in the *Seabrook* proceeding.

essence, the Shutdown Request is simply a “request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper.” If anything, such requests are governed by the requirements of 10 C.F.R. § 2.206, and “must be addressed to the Executive Director for Operations”—not submitted as adjudicatory filings.

Even if such requests were permissible (they are not), they would be considered general motions, governed by the requirements of 10 C.F.R. § 2.323 of the NRC’s Rules of Practice and Procedure. Counsel for Requesters is experienced in NRC adjudicatory proceedings, having submitted multiple extra-procedural requests and general motions with the Commission in the past,⁶ and is certainly aware that 10 C.F.R. § 2.323 imposes strict requirements for timeliness and consultation with other parties. None of those requirements were satisfied here. Accordingly, if the Commission considers the Shutdown Request as a matter of discretion, it should deny that motion for failure to comply with the NRC’s codified timeliness and consultation requirements.

Beyond these multiple and overlapping procedural defects, the Commission should deny the Shutdown Request because it provides no substantive basis to justify an extraordinary exercise of supervisory discretion, much less the drastic action of shutting down an operating reactor. First, Requesters do not justify their demand to deviate from the NRC’s normal process of evaluating documents that present demands such as those in the Shutdown Request. For example, demands for orders to “suspend” a license (essentially what Requesters seek here) are appropriately dispositioned in the § 2.206 process. As another example, suggestions to modify

⁶ See Petition by San Luis Obispo Mothers for Peace, Friends of the Earth and Environmental Working Group to Deny Pacific Gas & Electric Company’s Request to Review Undocketed license Renewal Application for the Diablo Canyon Unit 1 and Unit 2 Reactors and Petition to Deny Pacific Gas & Electric Company’s Request to Extend the Diablo Canyon Reactors’ License Terms Without Renewing the Licenses (Jan. 10, 2023) (ML23052A192); see Letter from J. Swanson, et al. to NRC Commissioners, “Objection to PG&E’s Requests Related to Withdrawn License Renewal Application for Diablo Canyon Nuclear Power Plant” (Nov. 17, 2022); Letter from J. Swanson, et al. to NRC Commissioners, “PG&E Must be Required to Submit a New License *see also* Renewal Application for Diablo Canyon Units 1 and 2 and NRC Must Comply With All Safety and Environmental Requirements in Conducting its Review” (Dec. 6, 2022) (ML22342B239).

NRC regulations (such as those presented in the Macdonald Declaration) are appropriately routed through the Petition for Rulemaking process under 10 C.F.R. Part 2, Subpart H. Disagreement with licensee actions and NRC Staff oversight that were conducted in full compliance with NRC requirements (which is the case here) because Requesters prefer different non-NRC approved methodologies (as presented in the Macdonald Declaration) is not a sufficient basis to discard the NRC's long-established processes and invoke supervisory review. The Commission has rarely exercised such discretion; and Requesters identify no reason to do so here.

Furthermore, even if the Commission were to do so, it would find that the Shutdown Request fails to provide a legitimate basis for the drastic relief that Requesters demand. Requesters advocate that Unit 1 be shutdown—not because the applicant and Staff failed to evaluate the underlying technical information in accordance with NRC requirements (which they did)—but because Requesters would prefer the NRC discard its codified analysis methodologies and underlying consensus codes and, instead, adopt an experimental and untested methodology developed by Dr. Macdonald. Such demands do not justify the extraordinary act of “immediately” shutting down a plant, particularly in light of the extensive analyses that have been conducted over the course of many decades on these exact matters.

Ultimately, the Request provides no basis for the Commission to order the “immediate shutdown” of Unit 1. Accordingly, the Commission should deny the Request and refer the underlying information to other appropriate processes.

II. BACKGROUND

A. Brief Technical Background

For the reasons discussed below, a detailed recitation of the technical requirements and Unit 1 licensing history is not essential to resolving the Shutdown Request. However, a brief recitation of key facts and concepts may provide some helpful context for the discussion.

The reactor pressure vessel (“RPV”) in an operating pressurized water reactor (“PWR”), such as Unit 1, is continuously exposed to neutron radiation from the fission reaction occurring inside the vessel.⁷ Over the life of the reactor, this can cause embrittlement of the RPV walls and, in turn, decrease its fracture toughness.⁸ Fracture toughness is a measurement of an RPV’s ability to withstand a pressurized thermal shock (“PTS”) event — a low probability event where “rapid cooling of the reactor vessel internal surface causes . . . thermal stress on the reactor vessel,” potentially leading to a fracture in the RPV wall.⁹

Recognizing the need to monitor fracture toughness, the NRC long-ago adopted detailed regulatory requirements for PWR licensees to implement programs to monitor the embrittlement of RPVs.¹⁰ These surveillance programs provide material property data (including “Reference Temperatures” and “Upper Shelf Energy” values) necessary to implement a regulatory scheme to protect RPVs from failure due to PTS.¹¹ The NRC established screening criteria for these data (beyond which certain actions or analyses may be required).¹²

⁷ *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-22, 82 NRC 310, 311 (2015).

⁸ *Id.* (citing Final Rule: “Analysis of Potential Pressurized Thermal Shock Events,” 50 Fed. Reg. 29,937 (July 23, 1985) (“1985 PTS Rule”)).

⁹ *Id.* at 311-12 (quoting 1985 PTS Rule, 50 Fed. Reg. at 29,938).

¹⁰ *Id.* at 312 (citing Final Rule: “Fracture Toughness and Surveillance Program Requirements,” 38 Fed. Reg. 19,012 (July 17, 1973) (establishing the program to monitor reactor pressure vessels in 10 C.F.R. Part 50, App. H, “Reactor Vessel Material Surveillance Program Requirements”)).

¹¹ *Id.*

¹² *Id.*

However, since the establishment of these screening criteria in 1985, the state of science and engineering knowledge has increased dramatically and NRC has responding accordingly. As a result, the NRC has determined that “the risk of through-wall cracking due to a PTS event is *much lower than previously estimated.*”¹³ In fact, the Commission concluded in 2010 that “the [Reference Temperature] screening criteria in [10 C.F.R.] § 50.61 are *unnecessarily conservative* and may impose unnecessary burden on some licensees.”¹⁴ Accordingly, the NRC codified a different, alternative methodology at 10 C.F.R. § 50.61a that licensees could elect to use to evaluate fracture toughness.¹⁵ Notably, PG&E did not elect to use the 50.61a methodology. For Unit 1, the ability to withstand a PTS event is still evaluated against the “unnecessarily conservative” 1985 screening limits codified in § 50.61.

Some of the material data relevant to these requirements is obtained pursuant to monitoring program requirements in 10 C.F.R. Part 50, Appendix H, which requires licensees to monitor steel coupons placed in surveillance capsules within the RPV. These coupons are made from the same materials as the RPV, but are placed closer to the core in order to accumulate irradiation effects faster and provide forward-looking information that predicts ductility at 60, 80, and 100 year intervals.

The capsules are periodically removed from the RPV, and the coupons are then subjected to “Charpy” impact testing, which determines the amount of energy absorbed by a material during fracture. NRC Regulatory Guide 1.99 describes the method for calculating the Reference Temperature and Upper Shelf Energy values based on this testing, including the criteria for

¹³ *Id.* at 312-13 (citing Final Rule: “Alternate Fracture Toughness Requirements for Protection Against Pressurized Thermal Shock Events,” 75 Fed. Reg. 13, 13 (Jan. 4, 2010) (emphasis added) (“2010 PTS Rule”)).

¹⁴ *Id.* at 313 n.11 (quoting 2010 PTS Rule, 75 Fed. Reg. at 13 (emphasis added)).

¹⁵ *Id.* at 313 (citing 2010 PTS Rule, 75 Fed. Reg. at 13).

which testing data may be considered “credible” for regulatory compliance purposes.¹⁶

10 C.F.R. Part 50, Appendix H specifies that the periodicity of capsule withdrawals “must meet the requirements of the edition of the ASTM E 185 that is current on the issue date of the ASME code to which the reactor vessel was purchased.” For Unit 1, the applicable code is ASTM E 185-70.¹⁷ The regulations also provide that a licensee’s proposed capsule withdrawal schedule must be approved by the NRC prior to implementation.¹⁸

Over the operating life of a plant, as contemplated in the regulations, licensees request and the NRC typically approves several adjustments to the withdrawal schedules for the RPV capsules. Unit 1 is no exception. Each time PG&E has requested such an adjustment, the NRC has concluded that the requirements of 10 C.F.R. Part 50, Appendix H, and ASTM E 185-70 have been satisfied.¹⁹ The NRC has also reviewed the results of Charpy testing from the Unit 1 capsules that have been withdrawn to date, and corresponding analyses conducted pursuant to the

¹⁶ NRC Regulatory Guide 1.99, Radiation Embrittlement of Reactor Vessel Materials (Rev. 2, May 1998) (ML003740284).

¹⁷ See e.g., Letter from G. Rueger, PG&E, to NRC Document Control Desk, “Supplemental Reactor Vessel Radiation Surveillance Program” at 1 (Mar. 31, 1992) (ML16341G505).

¹⁸ 10 C.F.R. Part 50, App. H § III.B.3.

¹⁹ Letter from H. Rood, NRC, to G. Rueger, PG&E, “Evaluation of Diablo Canyon Unit 1 Supplemental Reactor Vessel Radiation Surveillance Program (TAC No. M83285)” (Sept. 4, 1992) (ML16341G685) (“concluding PG&E’s March 31, 1992 request, which was submitted per the provisions of 10 C.F.R. [Part] 50, Appendix H, ASTM E 185-82, the draft edition of ASTM E 185-92, and ASTM E 185-70 was “acceptable”); Letter from A. Wang, NRC, to J. Conway, PG&E, “Diablo Canyon Power Plant, Unit No. 1 - Approval of Proposed Reactor Vessel Material Surveillance Capsule Withdrawal Schedule (TAC No. MD8371)” at 1 (Sept. 24, 2008) (ML082380306); Letter from C. Lyon, NRC, to J. Conway, PG&E, “Diablo Canyon Power Plant, Unit No. 1 - Approval of Proposed Reactor Vessel Material Surveillance Capsule Withdrawal Schedule (TAC No. ME4924)” at encl. (Oct. 29, 2010) (ML103010159); Letter from J. Sebrosky, NRC, to J. Conway, PG&E, “Diablo Canyon Power Plant, Unit No. 1: Safety Evaluation for Request to Revise the Reactor Vessel Material Surveillance Program Withdrawal Schedule (TAC ME7615)” at 1 (Mar. 2, 2012) (ML120330497); Letter from J. Dixon-Herrity, NRC to P. Gerfen, PG&E, Diablo Canyon Nuclear Power Plant, Unit 1 – Revision To The Reactor Vessel Material Surveillance Capsule Withdrawal Schedule at encl. § 4 (July 20, 2023) (ML23199A312) (“2023 Schedule Change Approval”).

methodology in Regulatory Guide 1.99, demonstrating that the applicable Reference Temperature and Upper Shelf Energy screening criteria are satisfied.²⁰

B. The Shutdown Request

Requesters submitted the Shutdown Request on September 14, 2023, asking the Commission to order the “immediate shutdown” of Unit 1. The Shutdown Request was accompanied by a Declaration from Dr. Digby Macdonald. The Shutdown Request references certain portions of the Macdonald Declaration for the proposition that the Unit 1 RPV may reach an “unacceptable degree of embrittlement” in “late 2023.”²¹ What the Shutdown Request does not disclose, however, is the fact that this conclusion rests on novel and nascent analysis methodologies that are not approved by the NRC. In fact, had they been used, it would have violated NRC regulations, consensus codes and standards, and the Unit 1 operating license.

For example, Dr. Macdonald advocates the use of a wholly different methodology that would “replace the Charpy Impact Test”²² that has long been a staple of the NRC’s codified procedures for evaluating fracture toughness and the various consensus codes and standards endorsed by the NRC. According to Dr. Macdonald, “nothing short” of the NRC’s adoption of this “completely new methodology,” developed by him and his colleague, is sufficient to reach a finding of reasonable assurance.²³ However, as explained below, this Shutdown Request is certainly not the appropriate forum to lobby for changes to NRC regulations. Moreover, the

²⁰ See 2023 Schedule Change Approval at encl. § 3.2 (“Based on a review of the surveillance capsules that have already been withdrawn and tested for Diablo Canyon, Unit 1, the NRC staff 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 (i.e., 40 years).”).

²¹ Shutdown Request at 2.

²² Macdonald Decl. at 27.

²³ Macdonald Decl. at 33, 17.

allegation that these new methodologies reveal “unacceptable” embrittlement is based on methodologies that have not been reviewed—or even considered—by the NRC.

III. THE COMMISSION SHOULD DENY THE SHUTDOWN REQUEST ON PROCEDURAL GROUNDS

The Shutdown Request is notable for its failure to identify any procedural basis in the Commission’s rules. It is captioned as a “Request.”²⁴ But the Commission’s adjudicatory rules do not provide for the filing of any such request. And Requesters refer to their pleading as a “Petition” and themselves as “Petitioners.”²⁵ But a “Petition” is an established and defined adjudicatory term in the NRC’s Rules of Practice and Procedure, and it does not apply here.²⁶ In short, there is no reference, anywhere in the document, to any regulation that purportedly authorizes this type of submission as an adjudicatory filing. Nor does any such regulation exist. And the Commission has plainly held that adjudicatory submissions of this type are “procedurally improper.”²⁷ Moreover, the Shutdown Request here is procedurally non-compliant in multiple other respects. Accordingly, it should be summarily rejected.

A. The Shutdown Request Is Procedurally Improper

Affirmative requests for exercise of “supervisory authority,” such as the one presented here, are disfavored and improper. The Commission has emphatically rejected similar requests in the past, ordering that “[t]he parties should limit their requests for our review to those set forth in our rules.”²⁸ More directly, the Commission recently confirmed—in a unanimous decision—

²⁴ See Shutdown Request (providing the full captioned title).

²⁵ See, e.g., *id.* at 3.

²⁶ See, e.g., 10 C.F.R. §§ 2.309 (petitions to intervene), 2.345 (petition for reconsideration), 2.802 (petition for rulemaking).

²⁷ *Seabrook*, CLI-19-7, 90 NRC at 8.

²⁸ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-11-14, 74 NRC 801, 813 n.67 (2011).

that such requests are “procedurally improper.”²⁹ Accordingly, the Shutdown Request should be summarily denied.

B. Viewed as a Motion, the Shutdown Request Fails to Comply with Multiple Procedural Requirements on Consultation and Timeliness

Even if requests for exercise of “supervisory authority” were permissible (they are not), they would be considered general motions, governed by the requirements of 10 C.F.R. § 2.323 of the NRC’s Rules of Practice and Procedure.³⁰ Counsel for Requesters is experienced in NRC adjudicatory proceedings and is certainly aware that 10 C.F.R. § 2.323 imposes strict requirements for timeliness and consultation with other parties. Nevertheless, none of those requirements were satisfied (or even mentioned) here.

The timeliness requirement in § 2.323(a)(2) requires that motions be filed within “ten (10) days after the occurrence or circumstance from which the motion arises.” It is unclear which “occurrence or circumstance” purportedly gives rise to the Shutdown Request; but, in any event, Requesters identify no PG&E filing, NRC approval, or any other event occurring within 10 days of September 14, 2023, when the Shutdown Request was filed.

Furthermore, 10 C.F.R. § 2.323(b) plainly specifies that “[a] motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been

²⁹ *Seabrook*, CLI-19-7, 90 NRC at 8.

³⁰ The most proximate procedural analog to the Shutdown Request is a “Motion.” *See Motion*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A written [] application requesting [] a specified ruling or order.”).

unsuccessful.”³¹ The Shutdown Request includes no such certification. Thus, the outcome here is nondiscretionary—the Shutdown Request “must be rejected.”³²

IV. THE COMMISSION SHOULD DENY THE SHUTDOWN REQUEST BECAUSE IT LACKS SUFFICIENT JUSTIFICATION

In addition to denying the Shutdown Request on procedural grounds, the Commission also should deny it because it fails to provide sufficient justification for the requested actions.

A. The Shutdown Request Identifies No Extraordinary Circumstances Warranting Supervisory Intervention

Notwithstanding the obvious procedural defects identified above, the Commission, of course, may exercise its discretion to invoke its inherent supervisory authority over agency proceedings if it finds a “compelling reason” to address a “novel or important issue.”³³ But the Commission rarely circumvents the normal processes contemplated in its regulations; and, historically, it has done so only in truly extraordinary circumstances.

For example, the Commission stepped-in to exercise supervisory authority following the September 11 terrorist attacks due to a corresponding “flurry of litigation” in dozens of NRC proceedings.³⁴ As another example, the Commission acted directly on a “series of petitions” following the Fukushima Dai-ichi accident.³⁵ Neither is comparable to the instant Shutdown Request.

In fact, the circumstances presented in the Shutdown Request stand in stark contrast to the truly exceptional and unprecedented situations in those examples. Simply put, the

³¹ Emphasis added.

³² 10 C.F.R. § 2.323(b).

³³ *Seabrook*, CLI-19-7, 90 NRC at 10.

³⁴ *See, e.g., Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141 (2011).

³⁵ *Id.* at 145-46.

Requesters have identified a declarant who disagrees with the technical conclusions of the applicant and the NRC Staff (some that are many decades old) on matters of strict and long-standing regulatory oversight and compliance. But that is not extraordinary in any way. Indeed, as mentioned above, the NRC’s regulations at 10 C.F.R. § 2.206 contemplate an entire process for resolving precisely this type of claim.³⁶ Requesters do not even mention that process, and certainly make no showing that anything here warrants discarding the NRC’s normal, codified procedure altogether.

Instead, Requesters point to the *Yankee Rowe* case as alleged justification for their demand.”³⁷ But, as explained below, that case provides no support. As a preliminary matter, it is important to note that the first step the Commission took upon receiving the request in *Yankee Rowe* was to refer it to the § 2.206 process.³⁸

Furthermore, the Commission invoked supervisory review in *Yankee Rowe* only after issuance of the Director’s Decision as part of that § 2.206 process.³⁹ And the Commission did not choose that course casually. As the Commission noted, “[t]his power is exercised sparingly,” and only when a “question of sufficient public importance” has been raised.⁴⁰ In that case, the Commission found it appropriate to intervene for two reasons—neither of which apply here.

³⁶ See also NRC, Management Directive 8.11, “Review Process for 10 C.F.R. § 2.206 Petitions” (Mar. 1, 2019) (ML18296A043); NRC, “Desktop Guide: Review Process for 10 C.F.R. § 2.206 Petitions” (Nov. 8, 2021) (ML21237A347).

³⁷ Shutdown Request at 3 n.11 (citing *Yankee Atomic Elec. Co.* (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 NRC 3, 12 (1991)).

³⁸ *Yankee Rowe*, CLI-91-11, 34 NRC at 5 (“In view of the request for emergency action, the Commission referred the Petition to the Staff for an immediate response to the request.”).

³⁹ *Id.* at 6.

⁴⁰ *Id.*

First, the issue in *Yankee Rowe* involved broad, crossover policy implications for other unrelated proceedings, including an ongoing rulemaking and future licensing applications.⁴¹ Requesters fail to identify or allege the existence of any such multi-proceeding implications here.

Second, the matter at issue in *Yankee Rowe* involved “a situation that was not directly contemplated” in NRC regulations.⁴² More specifically, that case involved the discovery of information that prevented the NRC from conducting its oversight activities “as contemplated” during the pendency of a rulemaking to amend the relevant regulation. That certainly is not the case here. Requesters identify nothing that prevents the NRC Staff from conducting oversight of capsule withdrawal schedules or fracture toughness analyses “as contemplated” under 10 C.F.R. Part 50. And, in fact, the Staff has performed such oversight as to Unit 1—without impediment (or any outstanding concerns)—for nearly four decades.

In short, Requesters simply disagree with the methodology used for that oversight, which was performed pursuant to codified NRC regulations, duly promulgated agency guidance, and technical specifications imposed in the Unit 1 license via agency order. But, without more, Requesters’ disagreement and desire to promote an alternative analysis methodology (one that deviates from those regulations, guidance, and orders) does not rise to the level of extraordinary circumstances warranting Commission interjection; and it is not at all analogous to the circumstances of the September 11 terrorist attacks, the Fukushima Dai-ichi accident, or the multi-proceeding, oversight-preventing circumstances presented in *Yankee Rowe*.

⁴¹ *Id.* at 12 (“the satisfactory resolution of this matter has implications in terms of age-related degradation considerations in the context of the ongoing reactor operating license renewal rulemaking and subsequent renewal applications.”).

⁴² *Id.*

For these many reasons, the Commission should deny the request for supervisory intervention.

B. The Request Fails to Justify the “Drastic” Action of Shutting Down Unit 1

Both the Commission and the United States Court of Appeals for the District of Columbia Circuit have long recognized that neither the Atomic Energy Act nor NRC regulations require the invocation of “drastic” emergency action, such as plant shutdown or suspension of licensee activities, merely because a third party *alleges* information adverse to the integrity of existing nuclear power safety systems.⁴³ The Commission has expressed a strong preference for deferring to “staff’s careful, though expeditious, review” of safety allegations (*e.g.*, through the § 2.206 process or formal rulemaking) in lieu of a hurried response that may impose “unwarranted and severe impact[s] on the operations of our licensees.”⁴⁴

In fact, in 2015, the Commission considered—and summarily rejected—a similar request filed by FOE seeking an order “to suspend operations pending a determination, following a public hearing, that Diablo Canyon can be safely operated.”⁴⁵ In that proceeding, just as here, FOE infused its filing with “assertions that challenge whether Diablo Canyon can be shut down safely in light of [safety] issues and whether continued operation should be allowed.”⁴⁶ As the Commission explained, “a request for a hearing on safety concerns and for a safe operation determination falls squarely within the purposes of a request for enforcement action.”⁴⁷ And the Commission concluded that FOE’s allegations were insufficient to warrant a departure from the

⁴³ *Nader v. NRC*, 513 F.2d 1045, 1054-55 (D.C. Cir. 1975); *In the Matter of Licensees Authorized to Possess or Transport Strategic Quantities of Special Nuclear Material*, CLI-77-3, 5 NRC 16, 21 (1977) (citing same).

⁴⁴ *SNM Licensees*, CLI-77-3, 5 NRC at 21.

⁴⁵ *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-15-14, 81 NRC 729, 736 (2015).

⁴⁶ *Id.* at 736 n.31.

⁴⁷ *Id.* at 736.

normal § 2.206 processes in light of the “extensive licensee and Staff review” of the precise issue raised by FOE.⁴⁸

So too here. Requesters proffer allegations related to embrittlement, fracture toughness, pressurized thermal shock, and the capsule withdrawal schedule for Unit 1 as a basis to seek the “immediate closure of Diablo Canyon” and insist that “a public hearing should be held before Unit 1 is allowed to resume operation.”⁴⁹ But, again, those demands fall “squarely within” the § 2.206 process. Moreover, PG&E and the NRC Staff have engaged in “extensive” review and analysis of embrittlement, fracture toughness, pressurized thermal shock, and the capsule withdrawal schedule for Unit 1, and there are no outstanding Staff concerns related to continued safe operation of Unit 1. Accordingly, the Commission should deny the Shutdown Request, just as it did under nearly identical circumstances in 2015.

Notwithstanding the many alarmist characterizations, the Shutdown Request and Macdonald Declaration are conspicuously devoid of any detailed allegation that even a single NRC regulatory requirement is unmet for Unit 1. But that is not surprising, because PG&E and the NRC Staff have fully and strictly complied with all legal, regulatory, and license requirements related to embrittlement, fracture toughness, pressurized thermal shock, and the capsule withdrawal schedule for Unit 1.

Requesters’ assertion that a safety concern exists is rooted in the fundamental premise that the *requirements themselves* should be modified. Put another way, Requesters reach their extreme conclusion that continued operation of Unit 1 “poses an unreasonable risk to public health and safety” by discounting the rigorous testing and analytical methods adopted by

⁴⁸ *Id.* at 737.

⁴⁹ Shutdown Request at 3-4.

consensus standards organizations,⁵⁰ codified in NRC regulations, and imposed as technical specifications in the Unit 1 license following robust NRC staff review and public participation. Instead, they purport to conduct an *ad hoc* analysis of incomplete⁵¹ information using a “completely new methodology.”⁵² But that “completely new methodology” has not been adopted by any consensus organizations; it has not been codified in NRC regulations; and it certainly is not the methodology of public record imposed in the Unit 1 technical specifications.

Ultimately, Requesters identify no legitimate basis to grant the “Request for Shutdown Order and Remedial Measures.” Accordingly, the Commission should deny that request.

V. CONCLUSION

The Commission should summarily reject the Shutdown Request because it is “procedurally improper” or because it fails to satisfy the procedural mandates for general motions. If the Commission nevertheless considers the Filing, it should conclude that Requesters identify no basis to deviate from the NRC’s normal § 2.206 process and does not remotely provide justification for requiring an “immediate shutdown” of Unit 1.

⁵⁰ *Id.* at 1.

⁵¹ *Id.* at 28 (referencing the “impossibility of obtaining some documents that were key to understanding” PG&E’s and the Staff’s analyses of record).

⁵² McDonald Decl. at 17 § V.A.2 para. 1. Indeed, Requesters’ conclusion that the Unit 1 RPV may reach an “unacceptable degree of embrittlement” in “late 2023” rests on an opaque assertion that Dr. Macdonald’s “completely new methodology” requires a considerable 20-EFPY band of “uncertainty” (+/- 10 EFPY). Shutdown Request at 2. But, neither the Shutdown Request nor the Macdonald Decl. acknowledge or discuss the significant conservatisms or methods of accounting for uncertainty that are built-in to the *NRC-approved* methodologies that have been used in the extensive analyses of Unit 1 embrittlement to date.

Respectfully submitted,

Signed (electronically) by Ryan K. Lighty

RYAN K. LIGHTY, ESQ.

MORGAN, LEWIS & BOCKIUS LLP

1111 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

(202) 739-5274

Ryan.Lighty@morganlewis.com

Executed in Accord with 10 C.F.R. § 2.304(d)

TIMOTHY P. MATTHEWS, ESQ.

PAUL M. BESSETTE, ESQ.

MORGAN, LEWIS & BOCKIUS LLP

1111 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

(202) 739-5527

(202) 739-5796

Timothy.Matthews@morganlewis.com

Paul.Bessette@morganlewis.com

Counsel for Pacific Gas and Electric Company

Dated in Washington, D.C.

This 25th day of September 2023

**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 1)

Docket No. 50-275

September 25, 2023

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing “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” was served upon the Electronic information Exchange (the NRC’s E-Filing System) in the above-captioned docket.

Signed (electronically) by Ryan K. Lighty

RYAN K. LIGHTY, ESQ.

MORGAN, LEWIS & BOCKIUS LLP

1111 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

(202) 739-5274

Ryan.Lighty@morganlewis.com

Counsel for Pacific Gas and Electric Company