

April 18, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PACIFIC GAS AND ELECTRIC COMPANY)	Docket No. 72-26-ISFSI
)	
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation))	ASLBP No. 08-860-01-ISFSI-BD01

NRC STAFF'S MOTION FOR SUMMARY DISPOSITION OF
SAN LUIS OBISPO MOTHERS FOR PEACE'S CONTENTION 1(b)

INTRODUCTION

Pursuant to 10 C.F.R. § 2.710, the NRC Staff ("Staff") herein moves for summary disposition of San Luis Obispo Mothers for Peace's ("SLOMFP's") Contention 1(b), "Scientific Source Document Identification" admitted by the Commission on January 15, 2008, "to the extent that it alleges that the Staff failed to provide source documents or information underlying its analysis, and failed to identify appropriate FOIA exemptions for its withholding decisions." For the reasons set forth below and in the affidavits of James Randall Hall, Shana R. Helton, and Paul Kelley, Jr. and Bernard Stapleton, the Staff submits that there is no genuine dispute of material fact concerning Contention 1(b).¹ Accordingly, the Staff is entitled to a decision in its favor as a matter of law, and this motion should be granted.

¹ In preparing this motion and its accompanying affidavits, the Staff realized that it had inadvertently omitted a document from the *Vaughn* Index filed on February 13, 2008. Att. 1 at ¶13. Although the "Memorandum from Daniel H. Dorman to Wayne Hodges, Results of NSIR Screening of Nuclear Facility Security Scenarios for Remote and Speculative Nature Prior To Use In Decision-Making Framework," March 9, 2005 ("Dorman Memo"), was listed in the Addendum to the Supplemental EA, the Staff overlooked it when conducting its redaction of the documents for the purpose of creating the *Vaughn* index. Att. 1 at ¶13 Today the Staff is correcting this oversight and releasing a redacted version of the Dorman Memo, along with a detailed addendum to the *Vaughn* index. While the Staff recognizes that SLOMFP may challenge the redactions in the Dorman Memo, the present filing concerns only the admitted contention before the Presiding Officer. However, the Staff certifies that the redactions are proper, as described and justified in its accompanying *Vaughn* index.

BACKGROUND

In December 2001, Pacific Gas & Electric Company ("PG&E") filed an application for a materials license authorizing construction and operation of an Independent Spent Fuel Storage Installation ("ISFSI") for dry cask storage of spent nuclear fuel at the Diablo Canyon Nuclear Power Plant site. The Staff conducted an environmental review of the application, issuing an Environmental Assessment ("EA") in October 2003.² In response to a notice of opportunity for hearing, numerous petitioners, including SLOMFP, filed petitions to intervene. The Licensing Board presiding over the proceeding referred to the Commission its decision to deny SLOMFP contentions alleging that the Staff's environmental review was inadequate in that it did not include consideration of the impacts of terrorism. The Commission accepted the referral and affirmed the Board's decision to reject SLOMFP's contentions.³

On appeal, the Ninth Circuit Court of Appeals ruled that the NRC's refusal to consider the environmental effects of a terrorist attack was unreasonable under NEPA and remanded this issue to the Commission for further proceedings.⁴ Pursuant to the Court's remand, the Commission directed the Staff to prepare a revised environmental assessment addressing the likelihood of a terrorist attack on the Diablo Canyon ISFSI and the potential consequences of such an attack.⁵ The Commission expressed the expectation that the Staff would base its analysis on information already available in agency records, including information on the ISFSI design, mitigative, and security arrangements bearing on likely consequences. *Id.* at 150.

² "Environmental Assessment Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation" ("EA").

³ *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1 (2003).

⁴ *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1028, 1035 (9th Cir. 2006).

⁵ *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-07-11, 65 NRC 148, 149 (2007).

Pursuant to the Commission's direction, the Staff issued a draft supplement to the EA⁶ and published it for public comment. This was followed by issuance of the final supplement in August 2007, including an appendix addressing public comments.⁷ The Staff subsequently published an addendum to the Supplemental EA, augmenting the list of references.⁸

SLOMFP filed five contentions challenging the Staff's Supplemental EA,⁹ two of which were admitted by the Commission, in part.¹⁰ The Commission admitted the portion of Contention 1(b) which alleged that the Staff had failed to identify the scientific sources used in developing the Supplemental EA. In admitting Contention 1(b), the Commission ordered the Staff to produce:

... a complete list of the documents it relied on in the preparation of its [EA], (Reference Document List), together with a *Vaughn* index (or its equivalent) for any documents for which the Staff claims a FOIA exemption, with the Commission (and with the presiding officer . . .), and make available to other parties any documents (or portions thereof) not covered by a FOIA exemption . . .

CLI-08-01, 66 NRC ___, slip op. at 30. In response, the Staff filed its reference list and *Vaughn* Index on February 13, 2008, with the Commission, the presiding officer, and the parties,¹¹ and placed all of the previously non-public documents into ADAMS in their

⁶ "Supplement to the Environmental Assessment and Draft Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation," May 2007 (ADAMS Accession No. ML071500033).

⁷ "Supplement to the Environmental Assessment and Final Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation," Aug. 2007 ("Supplemental EA") (ADAMS Accession No. ML072400511).

⁸ "Addendum to Supplement to the Environmental Assessment Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation," Nov. 7, 2007 ("Supplemental EA Addendum") (ADAMS Accession No. ML073040434).

⁹ "San Luis Obispo Mothers for Peace's Contentions and Request for a Hearing Regarding Diablo Canyon Environmental Assessment Supplement," June 28, 2007 ("SLOMFP Hearing Request").

¹⁰ *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 66 NRC ___, slip op. at 29 (Jan. 15, 2008). Contention 2, which was also admitted, is currently before the Commission.

¹¹ "NRC Staff's Response to Commission Order to Provide Reference List and *Vaughn* Index," Feb. 13, 2008 ("Reference List" and/or "*Vaughn* index") (ADAMS Accession No. ML080450260).

redacted form.¹² Each individual redaction was marked on the document, and a corresponding justification for withholding the information was listed in the *Vaughn* Index. The Staff filed an addendum to the *Vaughn* Index on February 15, 2008, listing a Department of Homeland Security (DHS) document which it had inadvertently omitted to justify withholding.¹³ The Staff could not redact or make that document public because DHS was the originator; however, the Staff provided a website for obtaining the document directly from DHS. *Id.*

SLOMFP filed a challenge to the Staff's *Vaughn* Index on February 20, 2008 alleging that the *Vaughn* Index "is both incomplete and inaccurate," that the Staff is unlawfully withholding "secret law" with respect to unredacted documents under a protective order, and that SLOMFP should be given the opportunity to make additional discovery requests to the Staff based on information provided in the redacted documents. SLOMFP Response at 1-2.

Subsequently, the Commission reaffirmed its rejection of SLOMFP's request for access to unredacted information, and directed the Presiding Officer to resolve SLOMFP's allegations of the inadequacy and inaccuracy of the *Vaughn* Index.¹⁴ The Commission authorized the presiding officer to use all appropriate adjudicatory tools to resolve the issues, including calling for summary disposition motions. *Id.* The presiding officer set a procedural schedule for SLOMFP to submit a motion for leave to conduct discovery, and for the Staff and SLOMFP to file motions for summary judgment.¹⁵ On April 16, 2008, the presiding officer further directed the

¹² The documents were entered into ADAMS as a "package," available at ADAMS Accession No. ML080440141.

¹³ "Addendum to the NRC Staff's Response to Commission Order to Provide Reference List and *Vaughn* Index," Feb. 15, 2008.

¹⁴ *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-05, 66 NRC ____, slip op. at 4 (Mar. 27, 2008).

¹⁵ Scheduling and Case Management Order for Adjudication of Contention 1(b), Apr. 4, 2008 ("Scheduling Order").

Staff to provide a statement regarding *in camera* review of the documents at issue.¹⁶ Pursuant to those orders, the Staff hereby moves for summary judgment of SLOMFP's Contention 1(b).

DISCUSSION

A. Legal Standards

1. Standards Governing the Disclosure of Sources used in the Development of an Environmental Assessment

An environmental assessment must include, *inter alia*, "[a] list of agencies and persons consulted, and the identification of sources used." 10 C.F.R. § 51.30(a)(2). NRC guidance instructs the Staff to list in an EA:

all references (i.e. sources used) used in the preparation of the EA . . . including those cited in the text of the EA and those that were not specifically cited but served as useful guidance during document development . . . Additionally, it is helpful to provide ADAMS Accession numbers, if applicable, to assist the public in finding relevant documents.¹⁷

• The disclosure of the sources and information used in developing an EA is governed by the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA").¹⁸ The Commission has adopted the holding in *Weinberger v. Catholic Action of Hawaii*, "that in a given situation a federal agency might have to include environmental considerations in its decision[-]making process, yet withhold public disclosure of any NEPA documents, in whole or in part, under the authority of an FOIA exemption."¹⁹ "Ordinarily," when access to documents is disputed in FOIA litigation, "the government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the

¹⁶ Order (Directing Staff to Provide Statement Regarding In Camera Review), Apr. 16, 2008.

¹⁷ NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs," at § 3.4.12 (Aug. 2003).

¹⁸ NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C); CLI-08-01, 66 NRC ___, slip op. at 16.

¹⁹ CLI-08-01, 66 NRC ___, slip op. at 16-17, quoting *Weinberger*, 454 U.S. 139, 143 (1981) (internal quotation marks omitted).

claimed exemption.”²⁰ In this case, as is common in similar cases, the Commission directed the Staff to meet that obligation by preparing a *Vaughn* index, or its equivalent,²¹ and instructed that, “[w]here a *Vaughn* index is required, it must be sufficiently detailed to support *de novo* assessment of the validity of the claimed exemption should the matter go to court.”²²

2. Standards Governing Motions for Summary Disposition

Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved.²³ Generally, FOIA appeals are decided in district court, and Rule 56 of the Federal Rules of Civil Procedure applies. Fed. R. Civ. P. 56 (c). In NRC proceedings, 10 C.F.R. § 2.710 governs summary disposition motions. A moving party is entitled to summary disposition of a contention as a matter of law if the filings in the proceeding, together with the statements of the parties and the affidavits, demonstrate that there is no genuine issue as to any material fact.²⁴ The Commission’s summary disposition procedures have been analogized to Rule 56 of the Federal Rules of Civil Procedure.²⁵ As such, the party seeking summary disposition bears the burden of demonstrating the lack of a genuine issue of material fact, and the evidence submitted must be construed in favor of the non-moving party.²⁶

²⁰ *Id.*, slip op. at 17, quoting *Lion Raisins, Inc. v. United States Dep’t of Agric.*, 354 F.3d 1072, 1082 (9th Cir. 2004).

²¹ *Id.*, slip op. at 18; see also *Vaughn v. Rosen*, 484 F.2d 820, 823-25 (D.C. Cir. 1973).

²² *Id.*, slip op. at 17, citing *Lion Raisins, Inc.*, 354 F.3d at 1082.

²³ See, e.g. *Wickwire Gavin, P.C. v. U.S. Postal Service*, 356 F.3d 588, 591 (4th Cir. 2004); *Cooper Cameron Corp. v. U.S. Dep’t of Labor*, 280 F.3d 539, 543 (5th Cir. 2002); *Harrison v. Executive Office for U.S. Attorneys*, 377 F.Supp. 2d 141, 145 (D.D.C. 2005).

²⁴ See 10 C.F.R. §§ 2.1205 and 2.710(d)(2); see also *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 384 (2001); *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102-03 (1993).

²⁵ See *Advanced Medical Systems*, CLI-93-22, 38 NRC at 102; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 NRC 71, 79 (2005).

²⁶ See *Sequoyah Fuels Corp. & General Atomics Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361 (1994), *aff’d*, CLI-94-11, 40 NRC 55 (1994).

For a finding that there is a genuine issue of material fact, “the factual record, considered in its entirety, must be enough in doubt so that there is a reason to hold a hearing to resolve the issue.”²⁷ Thus, to avoid summary disposition of Contention 1(b), any affidavit filed by SLOMFP in opposition to the Staff’s motion must establish that a genuine issue of material fact remains in dispute regarding Contention 1(b).²⁸ Moreover, the Commission has stated that bare assertions or general denials are not sufficient to preclude a grant of summary disposition where it has been properly plead.²⁹

In a proceeding challenging an agency’s withholding of documents under FOIA, “an agency is entitled to summary judgment if no material facts are in dispute and if it *demonstrates that each document that falls within the class requested either has been produced...or is wholly exempt from [FOIA’s] inspection requirements.*”³⁰ “The agency bears the burden of sustaining its decision to claim an exemption from disclosure,” and it must sustain its burden by submitting detailed affidavits. *Id.* Summary judgment is warranted based on those detailed affidavits which must “describe the justifications for nondisclosure” and “demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary

²⁷ *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-46, 18 NRC 218, 223 (1983).

²⁸ See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-950, 33 NRC 492, 496-99 (1991) (affirming licensing board’s grant of motion for summary disposition despite difference of opinion between intervenor’s expert supporting motion and the licensee); see also *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-03-21, 58 NRC 338, 342-43 (2003), quoting *Perry*, LBP-83-46, 18 NRC at 223 (“It is not enough that the nonmoving party merely allege an ‘issue of fact;’ rather, the issue of fact must be ‘genuine.’ In order to be ‘genuine,’ the factual record, in its entirety, must ‘be enough in doubt so that there is reason to hold a hearing to resolve the issue.’”).

²⁹ See *Advanced Medical Systems*, CLI-93-22, 38 NRC at 102; see also *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 78 (1981); *Virginia Elec. Power Co.* (North Anna Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 455 (1980).

³⁰ *Wheeler v. CIA*, 271 F.Supp. 2d 132, 136 (D.D.C.2003), citing *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 833 (D.C. Cir. 2001) (emphasis added) (internal quotation marks omitted).

evidence in the record nor by evidence of agency bad faith.” *Id.*, citing *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984) (internal quotation marks omitted).

As observed by the Presiding Officer, issues raised in FOIA proceedings are appropriately resolved by summary disposition based on affidavits which identify the redacted information, the applicable exemption, and provide an explanation of why the information falls within the exemption.³¹ Agency affidavits that are “relatively detailed and non-conclusory” are presumed to be made in good faith, and “cannot be rebutted by ‘purely speculative claims about the existence and discoverability of other documents.’” *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (citations omitted).

As more fully set forth below, the Staff submits that it has met the burden of demonstrating that summary disposition of Contention 1(b) is appropriate.

B. The NRC Staff is entitled to Summary Disposition of Contention 1(b)

The Staff is entitled to summary disposition of Contention 1(b) because it has met its burden of proof that there is no genuine issue of material fact regarding the identification of scientific sources used in developing the Supplemental EA. More specifically, the Staff has provided all sources relied upon or used as guidance in the development of the Supplemental EA, and for those documents, or portions thereof, which it withheld, the Staff provided detailed justifications which satisfy the standards of FOIA, and therefore, NEPA. The Staff has met its burden by submitting its Reference List, detailed *Vaughn* Index, and the detailed affidavits accompanying this summary disposition motion.

First, regarding SLOMFP’s challenge to the completeness of the reference list, and the *Vaughn* index, the Staff certifies that it has disclosed all of the sources of information it relied upon or used as guidance for the Supplemental EA. Att. 1 at ¶ 5. The only real dispute

³¹ Scheduling Order at 2, citing *Lion Raisins, Inc.*, 354 F.3d at 1082; accord, e.g., *Citizens Comm’n on Human Rights v. FDA*, 45 F.3d 1325, 1328-29 (9th Cir. 1995); *Keys v. United States Dep’t of Justice* 830 F.2d 337, 349(D.C. Cir. 1987); *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982); *Abbotts v. NRC*, 766 F.2d 604, 606 (D.C. Cir. 1985).

identified by SLOMFP is that it does not understand how the Staff used various documents related to the NRC's security framework assessment for the Supplemental EA, and therefore believes the Staff did not include other relevant documents in its Reference List. SLOMFP Response at 2-5. In compiling its reference list, the Staff erred on the side of over-inclusion of documents it considered "guidance" for the Supplemental EA. Att. 1 at ¶ 6. The Staff explains in considerable detail - more than what is required for a *Vaughn* index - how it used the references which address the NRC's security assessment framework methodology. Att. 1 at ¶¶ 5-12.

The affidavit meets the level of detail required in FOIA litigation. The Staff does not make "barren" or "conclusory" statements, but rather delves into the specific ways in which the Staff used the security framework assessment documents for the Supplemental EA.³² Att. 1 at ¶¶ 5-12. No documents other than those identified were used by the Staff to develop the Supplemental EA, and SLOMFP's speculative assertions to the contrary do not change that fact.³³ Based on the Staff's affidavit, SLOMFP cannot reasonably dispute that all of the documents relied upon or used as guidance for the development of the Supplemental EA have been disclosed.

The second issue raised by SLOMFP in its challenge to the *Vaughn* index is that the Staff improperly withheld information which in SLOMFP's opinion, constitutes "secret law." SLOMFP Response at 7. SLOMFP's challenges to the Staff's redactions were limited to SECY-04-0222, which was listed as "Document 8" in the reference list, and is attached hereto. The Staff, after a line-by-line review of all of the unclassified information, identified the applicable FOIA exemption for each redaction and an explanation of the reason for each exemption. See

³² See *Simmons*, 796 F.2d at 712; *Wheeler*, 271 F.Supp. 2d at 136.

³³ See *Mace v. EEOC*, 197 F.3d 329, 330 (8th Cir. 1999) ("[S]peculative claims about [the] existence of other documents cannot rebut [the] presumption of good faith afforded [to] agency affidavits."); see also *SafeCard Servs.*, 926 F.2d at 1200.

Vaughn index. Further explanation of the specific redactions challenged by SLOMFP is contained in the Affidavit of Bernard Stapleton, which accompanies this motion for summary disposition. Att. 2 at ¶¶ 5-6.

Mr. Stapleton's affidavit meets the standards for FOIA, as set forth by the Presiding Officer in its April 16, 2008 Order. The Affidavit of Bernard Stapleton is "(1) executed by an individual with the requisite experience and expertise, (2) identifies the redacted information, (3) identifies the applicable FOIA exemption, and (4) provides a detailed and particularized explanation of why the redacted information falls within the claimed exemption." Order (Directing the Staff to Provide Statement Regarding *In Camera* Review) at 2. First, Mr. Stapleton has extensive knowledge of and experience with the NRC's classification of security information. Att. 2 at ¶ 1. Second, the affidavit clearly identifies the redacted information which is being disputed by SLOMFP. Att. 2 at ¶¶ 5-6. Third, Mr. Stapleton explains in the affidavit that the first disputed redaction, two short phrases on page 5 of SECY-04-0222, upon further review, are not of such a sensitive nature that they cannot be disclosed at this time. Att. at ¶ 5. The Staff is hereto attaching the redacted version of SECY-04-0222 with an unredacted page 5. Att. 3.

Finally, Mr. Stapleton gives a very detailed explanation of the redaction on page 3 of SECY-04-0222, Attachment 2, which is a full-page security framework assessment matrix containing specific parameters placed into the matrix, which, if disclosed, would provide adversaries with information to aid them in forming sabotage strategies. Att. 2 at ¶ 6. The title of this table was within the outline of the matrix, and, as such, was inadvertently cut out of the document along with the rest of the table, which was properly withheld. *Id.* No information was actually withheld from SLOMFP in this redaction, however, as the title of the matrix was listed and described on the page preceding it. Mr. Stapleton recertifies that this information was properly withheld under FOIA exemption 2 because it is "NRC Staff guidance for using the

framework methodology to estimate total consequences" and would harm the public if disclosed because it could aid adversaries in sabotage attempts. Att. 2 at ¶ 6.

In its initial challenge to the *Vaughn* index, SLOMFP challenged what appeared to be redacted information absent a FOIA exemption or justification on page 1 of Attachment 2 of SECY-04-0222. What appeared to be a redaction was actually caused by the scanning of the document into ADAMS. The Staff, in its responses to SLOMFP's discovery requests, corrected the problem by providing the parties with a color copy of that page of SECY-04-0222. SLOMFP did not address this "redaction" in its April 10, 2008 filing. The Staff contacted counsel for SLOMFP on April 17, 2008, who agreed that this particular dispute has been resolved.

In summary, the Staff has provided a *Vaughn* index and detailed affidavits certifying the completeness of its Reference List, and the propriety of its redactions. SLOMFP's assertion that other documents should have been listed has no basis. Because the affidavits meet the requirements discussed above, the Presiding Officer should accord the affidavits substantial weight.³⁴ As such, there is no genuine dispute of material fact regarding Contention 1(b).

C. The Staff does not Recommend *In Camera* Review of the Document at Issue

The Staff does not believe that *in camera* inspection of SECY-04-0222 or sealed declarations is necessary to dispose of the issues in this proceeding. Courts have the discretion to employ *in camera* review of documents withheld under FOIA, but generally they exercise their discretionary authority only in exceptional cases where the issues cannot be resolved in a public forum.³⁵

³⁴ See, e.g., *In re Wade*, 969 F.2d 241, 246 (7th Cir. 1992) ("Without evidence of bad faith, the veracity of the government's submissions regarding reasons for withholding the documents should not be questioned."); *Simmons v. U.S. Dep't of Justice*, 796 F.2d 709, 711 (4th Cir. 1986) (The "courts have given substantial weight to the expertise of the agencies charged with determining what information the government may properly release" in judging "agency decisions and affidavits in the area of national security.").

³⁵ See, e.g., *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) (explaining that *in camera* review "is designed to be invoked when the issue before the District Court could not otherwise be resolved"); *Elec. Privacy Info. Ctr. v. DHS*, 384 F.Supp. 2d 100, 119 (D.D.C. 2005).

As directed by the Presiding Officer, the Staff is providing a public affidavit that "explains with detail and particularity why the redacted information falls within the claimed FOIA exemption." April 16, 2008 Order, slip op. at 2-3. The affidavit meets the four standards outlined by the Presiding Officer. *Id.* at 2. Currently there is only one redaction in dispute, page 3 of Attachment 2 to SECY-04-0222, and the Presiding Officer can resolve that dispute based on the public Affidavit of Bernard Stapleton, attached hereto. As explained above, Mr. Stapleton's statement makes it very clear that the information was properly withheld. Att. 2 at ¶6. Therefore, *in camera* review should not be necessary for resolution of this one disputed redaction, and it need not be employed by the Presiding Officer.

CONCLUSION

For the reasons set forth above, the Staff submits that its motion for summary disposition of Contention 1(b) should be granted as a matter of law.

Respectfully submitted,



Lisa B. Clark
Molly L. Barkman
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of April, 2008.

April 18, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
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PACIFIC GAS AND ELECTRIC COMPANY)	Docket No. 72-26-ISFSI
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(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation))	ASLBP No. 08-860-01-ISFSI-BD01

STATEMENT OF MATERIAL FACTS
UPON WHICH NO GENUINE DISPUTE EXISTS

The Staff submits, in support of its motion for summary disposition of Contention 1(b), this statement of material facts as to which the Staff contends there exists no genuine dispute to be heard.

1. On June 28, 2007, San Luis Obispo Mothers for Peace filed Contention 1(b) as part of, *San Luis Obispo Mothers for Peace's Contentions and Request for a Hearing Regarding Diablo Canyon Environmental Assessment Supplement*.
2. In its Memorandum and Order of January 15, 2008, CLI-08-01, the Commission admitted Contention 1(b) "to the extent that it alleges that the Staff failed to provide source documents or information underlying its analysis, and failed to identify appropriate FOIA exemptions for its withholding decisions."
3. On February 13, 2008, the Staff filed *NRC Staff's Response to Commission Order to Provide Reference List and Vaughn Index*, which was supplemented on February 15, 2008 and April 18, 2008.
4. The Staff has disclosed all documents on which it relied or which it used as guidance in developing the Supplemental EA. The Staff erred on the side of over-inclusion, such that some of the documents apply to facilities other than just ISFSIs.
5. What appeared to be a redaction without a justification on page 1 of Attachment 2 of SECY-04-0222, was due to the scanning of the page into ADAMS. The Staff provided the parties with a color copy of the page, which corrected the problem. Therefore there is no longer a dispute as to the withholding of that information.
6. The two short phrases on page 5 of SECY-04-0222 have been disclosed. Therefore there is no longer a dispute as to the withholding of that information.

7. The challenged redaction on page 3 of Attachment 2 of SECY-04-0222 has been explained in sufficient detail to justify the withholding because disclosing it would aid adversaries in forming sabotage strategies.

INDEX TO THE ATTACHMENTS

ATTACHMENT 1.

AFFIDAVIT OF JAMES RANDALL HALL, SHANA HELTON, AND PAUL KELLEY, JR.

ATTACHMENT 2.

AFFIDAVIT OF BERNARD STAPLETON

ATTACHMENT 3.

SECY-04-0222, "DECISION-MAKING FRAMEWORK FOR MATERIALS AND RESEARCH AND TEST REACTOR BULNERABILITY ASSESSMENTS."

ATTACHMENT 1

April 18, 2008

UNITED STATES OF AMERICA
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AFFIDAVIT OF JAMES RANDALL HALL, SHANA HELTON, AND PAUL KELLEY, JR.

James Randall Hall, Shana Helton, and Paul Kelley, Jr., do hereby state as follows:

1. I, James Randall Hall (JRH), have been employed by the U.S. Nuclear Regulatory Commission ("NRC") since 1981. My current position is Senior Project Manager, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards. I am the project manager for the Diablo Canyon ISFSI, and oversaw the preparation of the "Supplement to the Environmental Assessment and Final Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation (ISFSI)" ("Supplemental EA").
2. I, Shana R. Helton (SRH), have been employed by the NRC since 2002. My current position is Nuclear Engineer/Dose Assessment Specialist Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards. I participated in the preparation of the Supplemental EA.
3. I, Paul Kelley, Jr. (PK), have been employed by the NRC since 2003. My current position is Security Specialist with the Materials, Waste, and International Security Branch, Waste Security Team, in the Office of Nuclear Security and Incident Response. I participated in the preparation of the Supplemental EA.

4. (JRH, SRH, PK) The purpose of this affidavit is to respond to “San Luis Obispo Mothers for Peace’s (“SLOMFP’s”) Response to NRC Staff’s *Vaughn* Index, Request for Leave to Conduct Discovery Against the NRC Staff, Request for Access to Unredacted Reference Documents, and Request for Procedures to Protect Submission of Sensitive Information.” More specifically, the Staff herein responds to SLOMFP’s challenges to the completeness of the NRC Staff’s Reference List for the Diablo Canyon ISFSI Supplemental EA. (Ref. 1).
5. (JRH, SRH, PK) The Reference List includes all documents, including those which reference the NRC’s framework assessment methodology, which the Staff relied upon directly or used as guidance during the development of the Supplemental EA. In compiling its documents for the Reference List, the Staff included in the scope of what was “relied upon” and “guidance” those documents specifically considered by the Staff in developing the statements, characterizations, and determinations in the Supplemental EA.
6. (SRH) SLOMFP has questioned the reason for the Staff’s inclusion of SECY-04-0222, “Decision-Making Framework for Materials and Research and Test Reactor Vulnerability Assessments,” (“SECY-04-0222”) (Ref. 3), in the reference list for the Supplemental EA. At the outset, the Staff would like to note that in compiling the reference list, the Staff attempted to err on the side of being overly inclusive to ensure that the list was complete. Therefore, some of the reference documents are not specific only to ISFSIs but apply broadly to large categories of NRC licensees which include ISFSI licensees.
7. (SRH) The framework assessment methodology outlined in SECY-04-0222 was applied to various categories of NRC licensees and certificate holders, including ISFSIs. There are many aspects of this methodology that were not employed by the staff when developing the Supplemental EA. For instance, the Staff did not assess asset attractiveness for the Diablo Canyon ISFSI. However, the staff did refer to the

consequence evaluation criteria in SECY-04-0222 (and its enclosures) when developing the set of assumptions used to calculate the estimated dose to the nearest resident to the Diablo Canyon ISFSI. A detailed explanation of how the dose was calculated was provided in the Affidavit of Elizabeth Thompson, attached to "NRC Brief and Summary of Relevant Facts, Data and Arguments Upon Which the Staff Proposes to Rely at Oral Argument on San Luis Obispo Mothers for Peace's Contention 2."

8. (SRH) The Staff also relied in part on the Staff Requirements Memorandum, SRM-SECY-04-0222, (Ref. 3), which contains Commission guidance regarding application of the framework assessment methodology recommended by the Staff in SECY-04-0222.
9. (JRH, SRH, PK) ISFSIs having a site specific license under 10 C.F.R. Part 72, including the Diablo Canyon ISFSI, are subject to the physical protection requirements of Part 72, Subpart H, and are not required to protect the spent fuel against the Design Basis Threat ("DBT") for radiological sabotage, which is applied to nuclear power reactors. Even so, as directed by the Commission in CLI-07-011, the Staff also considered the DBT when developing the Supplemental EA, and therefore included the DBT rulemaking in the Reference List.
10. (SRH) Document 6 of the Reference List, "Memorandum from J. Strosnider to R. Zimmerman, "Framework Assessments of Spent Fuel Storage Casks and Radioactive Material Transportation Packages," December 9, 2005 ("Strosnider Memo") was a separate action from the development of the Supplemental EA. The Strosnider Memo documented the Staff's security assessments for spent fuel storage casks (which used the methodology in SECY-04-0222) and concluded that the ISFSI security measures, including those enacted since September 11, 2001, are adequate. The Staff reported these findings to the Commission in two memoranda from Luis Reyes. (Ref. 5, 6).
11. (JRH, SRH) All of the documents, including those which provided guidance, used by the Staff in developing the Supplemental EA were disclosed in the Reference List. The

reason for including SECY-04-0222, SRM-SECY-04-0222, and the Strosnider memo in the reference list is that the Staff relied on methods similar to those described in those documents in determining the dose to the nearest resident to the Diablo Canyon ISFSI. While other documents generated by the NRC and other agencies may be used by the NRC in various security activities, the Staff who developed the Supplemental EA relied only on the methods and guidance in the documents listed in the Reference List.

12. (JRH, SRH, PK) All input from other agencies which was relied upon or used as guidance in the development of the Supplemental EA is contained in the documents in the Reference list. Other documents, such as the RAMCAP methodology, referenced by SLOMFP, which informed the NRC's development of the framework assessment methodology in 2004, were not relied on by the Staff when developing the Supplemental EA for the Diablo Canyon ISFSI. As stated in SECY-04-0222, the Staff's framework assessment methodology (subsequently approved by the Commission in SRM-SECY-04-0222) was informed by the RAMCAP methodology; however, the Staff did not expressly adopt the RAMCAP or any other methodology. (Ref. 2 at 3). As such, these other methodologies cited in SLOMFP's April 10, 2008, filing were not listed as references to the Supplemental EA.
13. (JRH, SRH, PK) Upon reviewing the Reference List for this Response, the Staff realized that one document, listed in the November 7, 2007, Addendum to the Supplemental EA (Reference 3; Memorandum from Daniel H. Dorman to Wayne Hodges, "Results of NSIR Screening of Nuclear Facility Security Scenarios for Remote and Speculative Nature Prior To Use In Decision-Making Framework," March 9, 2005), was inadvertently omitted from the Reference List provided with the *Vaughn* Index and was not publicly released to the extent permissible under FOIA. (Ref. 1). We note that in citing this document as a reference, the Staff was overly inclusive, as the Staff did not directly use information from this memo in preparing the Supplemental EA. As discussed in Enclosure 2 to the

Strosnider Memo, the Staff considered this memorandum as an input to the generic spent fuel storage security assessments. A more thorough discussion of scenario selection is contained in the Strosnider Memo, a redacted version of which was included in the Staff's *Vaughn* index (Ref. 1). Nevertheless, the Staff is releasing a public version of this document in an addendum to the *Vaughn* Index.

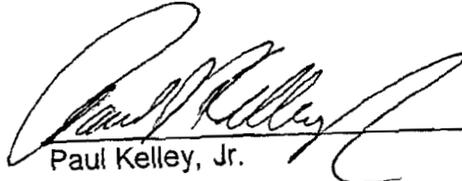
14. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

References

1. "NRC Staff's Response to Commission Order to Provide Reference List and *Vaughn* Index," February 13, 2008. (ADAMS Accession No. ML080450260).
2. SECY-04-0222, "Decision-Making Framework for Materials and Research and Test Reactor Vulnerability Assessments," (ADAMS Accession No. ML080440119). (Document 8 in the Staff's Reference List).
3. Staff Requirements-SECY-04-0222, "Decisionmaking Framework for Materials and Research Test Reactor Vulnerability Assessments," (ADAMS Accession No. ML080440118). (Document 7 in the Staff's Reference List).
4. "Memorandum from J. Strosnider to R. Zimmerman, "Framework Assessments of Spent Fuel Storage Casks and Radioactive Material Transportation Packages," December 9, 2005. (ADAMS Accession Nos. ML053290260, ML080440117). (Document 6 in the Staff's Reference List).
5. Memorandum from L. Reyes to the Commission, "Completion of Security Assessment of Spent Fuel Storage Casks for Land-Based Terrorist Threats," September 15, 2005. (ADAMS Accession Nos. ML052490378, ML080440115). (Document 4 in the Staff's Reference List).
6. Memorandum from L. Reyes to the Commission, "Completion of Security Assessment of the Crash of a Large Plane into Spent Fuel Storage Casks," September 15, 2005. (ADAMS Accession Nos. ML052490377, ML080440116). (Document 5 in the Staff's Reference List).
7. Design Basis Threat, Final Rule, 10 C.F.R. Part 73, U.S. Nuclear Regulatory Commission. (ADAMS Accession No. ML070520692). (Document 14 in the Staff's Reference List).


James Randall Hall


Shana R. Helton


Paul Kelley, Jr.

Dated at Rockville, Maryland
this 18th day of April, 2008

ATTACHMENT 2

April 18, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PACIFIC GAS AND ELECTRIC COMPANY)	Docket No. 72-26-ISFSI
)	
(Diablo Canyon Power Plant Independent)	ASLBP No. 08-860-01-ISFSI-BD01
Spent Fuel Storage Installation))	

AFFIDAVIT OF BERNARD STAPLETON

I, Bernard Stapleton, do hereby state as follows:

1. I am employed as the Senior Program Manager for the Safeguards Information program at the Nuclear Regulatory Commission (NRC). I have worked in this capacity for five years. I am also an authorized NRC classifier and have authored several guidance documents involving Safeguards Information and classified topics. Prior to joining the NRC, I worked as a National Security Advisor in the Department of Energy's classification office. I have also represented the NRC staff before several Atomic Safety Licensing Board hearings on information security and have spoken before the Federal Appeals Board on information protection on behalf of the Department of Justice.
2. This affidavit is written to respond to the issues regarding the propriety of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, redactions raised in "San Luis Obispo Mothers for Peace's (SLOMFP's) Response to NRC Staff's *Vaughn* Index, Request for Leave to Conduct Discovery Against the NRC Staff, Request for Access to Unredacted Reference Documents, and Request for Procedures to Protect Submission of Sensitive Information."
3. As part of their responsibilities in preparing the document disclosures for the "NRC Staff's Response to Commission Order to Provide Reference List and *Vaughn* Index," dated February 13, 2008, (Ref. 1), the NRC staff reviewed the unclassified portions of SECY-04-0222, "Decision-Making Framework for Materials and Research and Test Reactor Vulnerability

Assessments" ("SECY-04-0222") (Ref. 2), line-by-line and identified information which should be withheld from public disclosure pursuant to FOIA exemptions.

4. I personally reviewed SECY-04-0222 and certified that all of the information reasonably segregable from information exempt from disclosure was released, and that the FOIA exemptions invoked by the Staff were proper.

5. The *Vaughn* Index states that phrases on page 5 of SECY-04-0222 were withheld because they contain "internal NRC analysis of a specific security feature which would aid an adversary if disclosed." (Ref. 1 at 130). At the time they were redacted, the Staff believed that this information could aid an adversary if disclosed. Upon further review of those two redactions, I have determined that they are not of such a sensitive nature that they cannot be released.

6. Table 1, "Activity-Specific Attractiveness Category Ranking Matrix," appears on page 3 of Attachment 2 to SECY-04-0222. The title, which should not have been redacted, was inadvertently redacted when the table, which was properly withheld, was cut out of the document. However, as the title of the table is identified on page 2 of Attachment 2, no releasable information was withheld. The Staff withheld the information under FOIA exemption 2 because it is "NRC Staff guidance for using the framework methodology to estimate potential consequences." (Ref. 1 at 131). Specifically, the matrix is used by the Staff as part of its assessment of the attractiveness of certain scenarios to adversaries. The table contains specific parameters placed into the matrix including iconic value, complexity of planning, resources needed, execution risk, and public protection measures. Upon reviewing these redactions, I still believe that if the information in the table were disclosed, it would provide adversaries with additional information to form sabotage scenarios based on how the United States protects potential targets.

7. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

References

1. NRC Staff's Response to Commission Order to Provide Reference List and *Vaughn* Index," dated February 13, 2008. (ADAMS Accession No. ML080450260).
2. SECY-04-0222, "Decision-Making Framework for Materials and Research and Test Reactor Vulnerability Assessments," (ADAMS Accession No. ML080440119). (Document 8 in the Staff's Reference List).



Bernard Stapleton

Dated at Rockville, Maryland
this 18th day of April, 2008.

ATTACHMENT 3

SECRET

POLICY ISSUE
NOTATION VOTE

November 24, 2004

SECY-04-0222

FOR: The Commissioners

FROM: Luis A. Reyes
Executive Director for Operations

SUBJECT: DECISION-MAKING FRAMEWORK FOR MATERIALS AND
RESEARCH AND TEST REACTOR VULNERABILITY
ASSESSMENTS

PURPOSE:

To gain Commission approval of the proposed vulnerability assessment (VA) decision-making framework and Commission direction on the associated policy issues.

SUMMARY:

The attached decision-making framework embodies the process and criteria the staff will use to evaluate and incorporate the results of VAs into future security measures for materials and research and test reactor (RTR) licensees. It includes criteria to screen out unrealistic

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<p>OFFICIAL USE ONLY</p> <p>May be exempt from public release under Freedom of Information Act (5 U.S.C 552)</p> <p>Exemption number <u>2, 5</u></p> <p>Nuclear Regulatory Commission review required before public release.</p> <p><u>M. Weber, NSIR</u></p> <p>Name and organization of person making determination</p> <p>Date of Determination <u>11/18/04</u></p>

Upon separation of Attachments 1, 5, and 6, this document is OFFICIAL USE ONLY

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The Commissioners

scenarios and consequences and a process to identify scenarios that warrant further consideration. It has been informed by several independent comprehensive VA methodologies including but not limited to the Risk Analysis and Management for Critical Assets Protection (RAMCAP) methodology developed by the American Society of Mechanical Engineers (ASME), for the U.S. Department of Homeland Security (DHS).

The current framework would employ the consequence criteria of prompt fatalities from radiation exposure and chemical effects associated with radioactive material processes (i.e., UF_6). However, the staff recognizes that including additional consequence criteria such as latent fatalities, land contamination, and non-process chemical risks in the framework may be warranted. The staff recommends that the Commission approve the proposed VA decision-making framework and requests a Commission policy decision on the need for consideration of additional consequence criteria.

With respect to engaging the regulated industry, the staff recommends that the Commission approve the staff engaging the Nuclear Energy Institute (NEI) as well as the fuel cycle and RTR licensees subsequent to screening the VAs through the framework and requests a Commission policy decision on the timing and extent of those interactions.

BACKGROUND:

On July 29, 2004, the Commission was briefed by the staff on the status of VAs for certain materials licensees and RTRs. The Commission provided guidance in a subsequent Staff Requirements Memorandum (SRM), SRM-040729B (ML042430412), dated August 30, 2004, that required, in part, development of a simple, clear decision-making framework for Commission approval. The Commission directed that this decision-making framework contain the process and the criteria that the staff will use to evaluate and incorporate the results of the VAs into any future security measures for materials and RTR licensees. Further, the Commission directed that the framework include criteria to screen out unrealistic and unreasonable scenarios and consequences and a process for the staff to independently identify scenarios that warrant further consideration. The staff was also directed to engage the regulated industry to validate scenarios and their significance, to obtain insights on reasonable mitigative strategies and to provide a realistic schedule to complete the VAs.

In response to the SRM, an NRC interoffice team was formed to collaboratively develop the required VA decision-making framework. The framework development team is composed of staff from the Offices of Nuclear Security and Incident Response (NSIR), Nuclear Reactor Regulation (NRR), Nuclear Material Safety and Safeguards (NMSS), and Nuclear Regulatory Research (RES).

Consistent with the Commission's direction, VA work was minimized, pending completion of the framework.

DISCUSSION

The decision-making framework has been developed as a tool for NRC use to determine the appropriate level of mitigative strategies required for a given threat scenario. Threat scenarios were generated by the appropriate program office, in collaboration with NSIR's Threat Assessment Section, to ensure scenario realism (Threat Assessment for Non-Power Reactors and Non-Category I Fuel Cycle Facilities, Attachment 1). Use of the decision-making framework will lead the staff to one of three results: red, yellow, or green.

A red result indicates that additional assessment of the scenario is warranted. A yellow result indicates that maintaining the existing security requirements are warranted, and that the staff should evaluate the continued need for the additional security measures (ASMs) implemented since September 11, 2001. A green result for the selected consequence criteria indicates that current security requirements are adequate, and that the scenario may be eliminated from further consideration. The staff plans to assess results of the physical security reviews to determine if easy to implement, low-cost measures can be made that would improve detection, assessment, delay, or response to a security event. The results of the assessments and recommended actions will be provided to the Commission for consideration.

The proposed decision-making framework does not include Category I fuel cycle facilities or nuclear power plants. These facilities are required to successfully protect against capabilities described in a design basis threat. Consequently, these facilities will not be subjected to the additional screening process called for in the decision-making framework.

Several methodologies for conducting and evaluating comprehensive VAs for different types of assets are currently under development. In particular, the ASME, in cooperation with numerous stakeholders, is funded by DHS to develop the RAMCAP methodology. This methodology is designed to inform the allocation of resources to protect infrastructure components. The methodology begins with consequence-only screening analysis for a specified asset category in consideration of an assumed threat. These consequences are quantified to the extent practicable to provide a basis for comparison of risks across industry sectors and to provide meaningful input to the decision-making process. The screening analysis offers the means to decide which assets should be further assessed using the detailed methodology contained in the RAMCAP guidance. In conjunction with this process, many industry sector organizations, including the American Petroleum Institute, the National Petrochemical and Refiners Association, and the American Institute of Chemical Engineers, are engaged in VA work.

Rather than adopting RAMCAP, the staff developed its own methodology that was informed by these methodologies. While the framework is not actually a risk assessment, as is the draft RAMCAP methodology, the overall methodology is consistent with the general considerations in the draft RAMCAP methodology with criteria established specifically for materials and RTR licensees. The framework is a three-step decision-making process summarized below.

The first step in the decision-making process is the determination of the asset attractiveness ranking. Five attractiveness factors, each valued one through five, are averaged to obtain the overall attractiveness ranking. The attractiveness factors are discussed in the Framework

Methodology, Attachment 2. The overall, numerical attractiveness ranking is converted to an alphabetical Attractiveness Category (A through E), shown in the attractiveness ranking matrix. Category A indicates greater asset attractiveness and category E indicates lesser asset attractiveness. Unrealistic and unreasonable scenarios would screen out whereas more attractive scenarios may warrant further consideration.

The second step in the decision-making process is the consequence category. The current process uses prompt fatalities as the sole consequence criteria, and in general, the prompt fatality consequences can be quantified for radiation and chemical effects for realistic threat scenarios. Security reviews and evaluations will be used to develop realistic activity-specific scenarios. Consequence evaluation criteria are discussed in Technical Basis for Acute Radiation Prompt Fatalities and Technical Basis for Chemical Related Prompt Fatalities, Attachments 3 and 4 respectively. The Consequence (Estimated Effect) Matrix in the framework is used to relate the number of prompt fatalities to a Consequence Category ranging from I to V. Category I relates to thousands of prompt fatalities, and category V relates to no prompt fatalities.

Note that the RAMCAP methodology highest consequence category is tens of thousands of prompt fatalities, while the staff highest category is in the thousands of prompt fatalities. Similarly the staff's proposed framework starts at one category lower than the RAMCAP methodology. Therefore, if NRC-licensed assets are to be directly compared with the RAMCAP generated results, adjustments would be needed. It should also be noted that consistent with the RAMCAP guidance, scenarios resulting in no prompt fatalities are screened out and are not put through the framework decision-making process.

The third step in the decision-making process uses the Attractiveness Category from the first step and the Consequence Category from the second step in a decision matrix to determine whether mitigative strategies are appropriate, as discussed in the framework. The decision matrix indicator (red, yellow or green) yields insights regarding the need for certain security requirements, beyond the established regulatory minimums, as well as where ASMs can be lessened, to allow for more efficient use of physical protection resources. Finally, the decision matrix may be used to prioritize NRC efforts on materials and RTR licensees.

The validity and value of the proposed VA decision-making framework can best be demonstrated through the application of the framework. Two example cases, Application of the Decision Making Framework to a Postulated Security Event Scenario at a Research Reactor and Application of the Decision Making Framework to a Postulated Security Event Scenario at a Fuel Cycle Facility are provided as Attachments 5 and 6, respectively. These diverse examples demonstrate the scope of application of the VA decision-making framework.

ASSOCIATED POLICY ISSUES:

Consequence Criteria

As discussed in this paper, the consequences considered are prompt fatalities from radiation exposure and those chemical effects associated with radioactive material processes (i.e., UF_6).

The Commissioners

Past Commission policy and practice has varied with respect to consideration of consequence criteria. The proposed VA decision-making framework uses only prompt fatalities as a consequence criterion.

It is also recognized that other guidance, such as the draft RAMCAP methodology, uses other consequence criteria. For example, RAMCAP uses criteria such as economic, environmental, national security, symbolic and sociopolitical impacts, and loss of output or production capability as metrics for national level screening.

Other related radiological consequence criteria that could be incorporated in the framework include latent fatalities, land contamination, and chemical risks due to plant conditions which affect the safety of radioactive materials (e.g., ammonia tanks). Including some of these consequence criteria may also be consistent with the goal, in the NRC's Strategic Plan, to ensure protection of public health and safety and the environment, and also with the section on commercial nuclear reactors in the National Infrastructure Protection Plan. There are various points of view within the staff on the need for additional criteria, e.g., land contamination.

The staff also recognizes that exposure to certain radioactive materials, (e.g., well logging sources) would not result in a prompt fatality or the need for additional measures. However, using other consequence criteria (e.g., land contamination) may require additional security measures.

Note, if the Commission decides to add other consequence criteria to the staff's VA decision-making framework, integration of any of these consequence measures and associated thresholds into this framework would require further developmental effort, time and additional resources. Consequence metrics for these measures would need to be developed for Categories I through V, similar to the framework's prompt fatality consequence ranges. Additionally, recommendations on modifying security measures would be made after considering any additional consequence measures.

Communications with Licensees

The August 30, 2004, SRM stated that the staff should engage the regulated industry to validate scenarios and their significance and obtain insights on reasonable mitigative strategies. The SRM also stated that the Contractor VA reports should not be shared with anyone outside of NRC without Commission approval. The staff has had initial discussions with NEI on their role in the review of fuel cycle facility VAs. NEI expressed a desire to interact with the staff on the framework methodology and the implementation of that methodology on a site-by-site basis, as well as, provide input on the information in the fuel cycle VA reports.

The staff could engage the fuel cycle licensees prior or subsequent to screening the scenarios through the Commission-approved framework criteria. This could include interactions on the framework criteria as desired by NEI. The staff believes that the most efficient and effective use of resources would be to interact with the fuel cycle licensees and NEI on scenarios that did not screen out using the framework.

The Commissioners

NEI's involvement would be limited to documents and discussions at the Safeguards Information level (SGI) based on their current security clearances and their "need to know". Discussions at higher classification levels would only take place with appropriately cleared fuel cycle licensee staff. Consistent with SECY-04-0093, "Sharing Vulnerability Assessment Information with Licensees and Certificate Holders Regulated by the Office of Nuclear Materials Safety and Safeguards", the staff will inform the Commission prior to sharing information with the industry.

The extent to which NRC interacts with NEI and the industry may impact both the resources needed to complete the VAs and the schedule. The staff also requests a Commission policy decision on the timing and extent of interactions with NEI, as well as, the fuel cycle and RTR licensees.

RESOURCES:

Implementation of the VA decision-making framework, as described in this paper and its attachments, for applicable licensees is expected to require approximately 5.8 FTE in FY 2005. These resources are not currently budgeted and would be expended in a coordinated effort as follows: NMSS (2.5 FTE), NRR (1.0 FTE), NSIR (2.2 FTE), and RES (0.1 FTE). These resource estimates include development of recommendation report for additions/reductions to security measures and interactions with NEI, licensees and other industry coordination. On the basis of framework approval as presented, the staff does not anticipate additional contractor funding.

Resources and associated impacts of the add/shed process to support these activities will be identified and sent to the Commission by December 3, 2004.

RECOMMENDATIONS:

The staff recommends that:

- A. the Commission approve the proposed VA decision-making framework using prompt fatalities. A realistic schedule for providing the VA recommendation reports is eight months after the Commission approves the framework.
- B. the Commission approve the process of conducting the screening, consulting with the Commission the results, and then engaging NEI as well as the fuel cycle and RTR licensees to validate scenarios, potential consequences and mitigative strategies, subsequent to screening the VAs through the framework.

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objection.

The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objection.

/M. Virgilio acting for/
Luis A. Reyes
Executive Director
for Operations

Attachments:

1. Threat Assessment for Non-Power Reactors and Non-Category I Fuel Cycle Facilities
2. Framework Methodology
3. Technical Basis for Acute Radiation Prompt Fatalities
4. Technical Basis for Chemical Related Prompt Fatalities
5. Application of the Decision Making Framework to a Postulated Security Event Scenario at a Research Reactor
6. Application of the Decision Making Framework to a Postulated Security Event Scenario at a Fuel Cycle Facility

COORDINATION

The Office of the General Counsel has reviewed this paper and has no legal objection

The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objection.

**/M. Virgilio acting for/
Luis A. Reyes
Executive Director
for Operations**

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Package Accession No. ML043080333
Commission Paper Accession No. ML043080303

Attachments Accession Nos:

- Attachment 2 ML042300720
- Attachment 3 ML043200729
- Attachment 4 ML043200761

* See previous Concurrence.

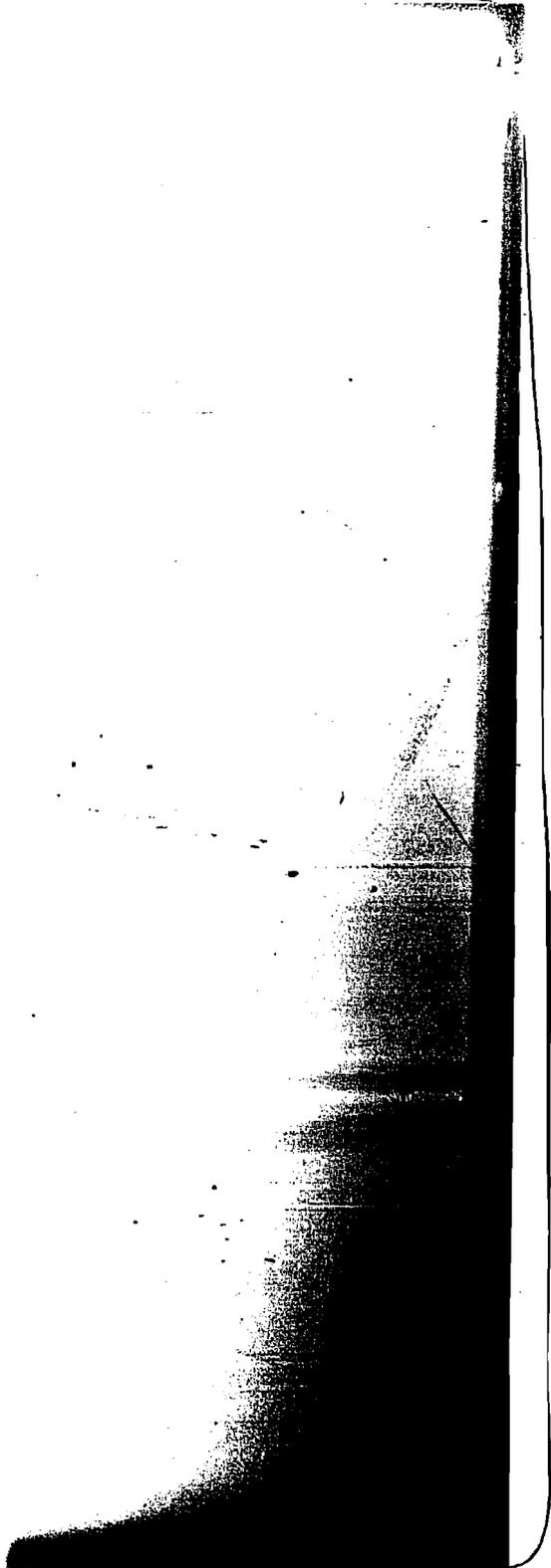
OFC	NSIR:VAIR	NMSS:TSG	NRR:	NMSS:	NSIR:
NAME	WOrders*	DTiktinsky*	PMadden*	BWhite*	GTracy
DATE	11/17/04	11/17/04	11/17/04	11/17/04	11/ /04
OFC	NRR:D	NMSS:D	RES:D	CFO:D	OGC
NAME	JDyer*	JStrosnider*	CPaperiello*	JFunches*	JGoldberg*
DATE	11/17/04	11/17/04	11/19/04	11/18/04	11/16/04
OFC	NSIR:D	DEDH	DEDMRS	EDO	
NAME	RZimmerman*	WKane	MJVirgilio	LReyes	
DATE	11/17/04	11/ /04	11/24/04	11/24/04	

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Threat Assessment for Non-Power Reactors and Non-Category I Fuel Cycle Facilities (U)

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Framework Methodology

The staff's framework to assess the need for mitigative strategies for potential vulnerabilities has been developed considering the assessment guidance proposed for the Department of Homeland Security (DHS).¹ The DHS ranking and assessment process uses estimates of potential consequence in conjunction with estimated likelihoods of attack. The staff's decision-making framework will utilize estimates of potential consequences, in terms of prompt fatalities for various security event scenarios, in conjunction with asset attractiveness, instead of estimated likelihood of attack.

Only the activities that passed an initial screening will be considered in the staff's decision-making framework. The asset attractiveness will be categorized using a qualitative assessment that considers several factors. The values of the asset attractiveness and estimated consequences are used in a decision matrix (see Figure 1, "Decision Matrix") to determine whether mitigative strategies are necessary.

Decision Matrix ²					
Consequence					
	V	IV	III	II	I
			YELLOW		

Figure 1

The scenarios that fall in the RED range will be assessed for activity-specific mitigative strategies and options. For scenarios in the GREEN range, current security requirements are adequate and no further action will be required. The activities in the GREEN for the selected

¹American Society of Mechanical Engineers in collaboration with: American Institute of Chemical Engineers, American Nuclear Society, American Petroleum Institute, American Society of Civil Engineers, American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc., Institute of Electrical and Electronics Engineers Nuclear Energy Institute, "Risk Analysis and Management for Critical Asset Protection: General Guidance," July 30, 2004, Draft, section 3.3.2. "Level 2: Quantitative Risk Analysis Screening"

²This matrix has fewer categories than those recommend in foot note 1, because it is not practical for most NRC-licensed facilities to reach the more severe consequence categories or the more likely categories noted by the reference. Consequence category of I is more severe than II and so forth, and attractiveness category of A is more probable than B and so forth.

consequence criteria will then be screened from further consideration. For activities that fall in the **YELLOW** range, the staff will evaluate the need to maintain compensatory measures and will consider adding those measures to relevant security requirements (e.g., incorporated into security plans).

Attractiveness

Several factors will be qualitatively assessed to determine the attractiveness category for an activity. The factors, identified in Table 1, "Activity-Specific Attractiveness Category Ranking Matrix," are iconic value (ICON), complexity of planning (CP), resources needed (RN); execution risk (ER), and public protection measures (PM). (It should be noted that for threats with an immediate release of radioactive material, there is insufficient time in the scenario for public protection measures to have any impact on scenario completion, and this factor does not contribute to the attractiveness ranking. In this case, there are only four factors to determine the Activity Specific Attractiveness Category (see foot note for Table 2)). The documentation of this qualitative assessment will form the basis for selecting a numerical value (1 through 5) for each specific category. For example, if a value of 3 is assigned for the category resources needed (RN) the qualitative assessment will have to reasonably demonstrate that it would take several adversaries, heavily armed, with explosives, and combat tactical training to achieve their goal.

Once the individual numerical values for each attractiveness factor are determined, they are averaged to determine the overall attractiveness value. This value is converted to category A, B, C, D, or E using Table 2, "Alpha-numeric Conversion for Determining Attractiveness Category."

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Attractiveness Value Range	0 - 1.0	1.0-2.0	2.0-3.0	3.0-4.0	4.0 - 5.0
Category Conversion	A	B	C	D	E

Estimated Consequences

The radiological consequences caused by an event are estimated in terms of prompt fatalities caused by direct exposure to radiation, inhalation of radioactive material, or chemical exposure. The calculated consequence estimate can be used in Table 3, "Consequences" to determine the appropriate consequence category. For example, estimated fatalities, from a given scenario, in the single digits would be classified as a Level IV consequence event.

Prompt Fatalities	Consequence Category
Thousands	I
Hundreds	II
Tens	III
Single Digits	IV
None	V

Decision - Making

Upon determining the attractiveness category and the consequence level, Figure 1, "Decision Matrix" will be used to determine if a scenario falls into the red, yellow, or green areas. The color is then matched up with the mitigative strategy assessment actions in Table 4, "Need to Develop Mitigative Strategies." For example, if the activity specific attractiveness category was determined to be an "A" and the consequence was estimated to be "Level II", the overall attractiveness would be a **RED** condition. Table 4 would then direct the analyst to assess and develop activity specific mitigative strategy options, beyond existing security/general requirements, and recommendations for Commission consideration.

³Consequence evaluation of prompt fatalities related to radiological (or chemical) exposure resulting from facility sabotage, theft of material used as a radiological exposure device or radiological exposure, or transportation sabotage will be developed by the respective programs within NMSS and NRR.

Table 4 - Need to Develop Mitigative Strategies	
	Assess and develop activity specific mitigative strategy options, beyond existing security/general requirements, and recommendations for Commission consideration.
Yellow Conditions	Maintain existing security/general requirements. Evaluate the need to maintain Compensatory Measures. Add required Compensatory Measures to the relevant specific requirements.
	Acceptable - Screen from further consideration and maintain existing security requirements. Eliminate unnecessary compensatory measures.
Activity Specific Conditions	Assess results of the activity specific security enhancement assessments to determine if easy to implement low cost measures can be instituted that would improve detection, assessment, delay, or response to a security event.

TECHNICAL BASIS FOR CHEMICAL RELATED PROMPT FATALITIES

Chemical effects differ from radiation effects in several key characteristics:

- Chemical effects are deterministic and predispose towards certain conditions and mortality.
- Chemical effects are receptor dependent - healthy adult workers respond differently than the general population. The public includes an age spectrum, and susceptible and hyper-susceptible individuals (e.g., asthmatics) who experience adverse symptoms at much lower concentrations.
- Chemical concentrations and effects are inversely related to exposure times (i.e., in general, people can tolerate higher concentrations for shorter durations).
- Chemical exposure effects are nonlinear and chemical specific.
- A maximum chemical concentration limit usually exists; beyond this, the probability of fatality is very high.

The airborne chemical levels selected for the VA framework are called Acute Exposure Guideline Levels, or AEGLs for short. Derivation of AEGL values occurs through a Federal Advisory Committee process that includes participation from the National Academy of Sciences, the EPA, and stakeholders. AEGLs represent threshold exposure limits below which the stated adverse health effects are not likely to occur for most members of the general public. Three levels - AEGL-1, AEGL-2, and AEGL-3 - are developed for each of five exposure time periods (10 minutes, 30 minutes, 1 hour, 4 hours, and 8 hours). The VA framework uses the AEGL duration that was determined to best correspond to the timeframe of the specific scenario under consideration. Each AEGL level represents an increasing level of severity of the effects; AEGL-1 represents a level above which notable discomfort and/or irritation are experienced, AEGL-2 represents a level above which irreversible or long-lasting adverse effects are experienced, and AEGL-3 represents the level above which life-threatening effects or death are experienced. Final AEGL values have been published for uranium hexafluoride and hydrogen fluoride; interim values are available for other chemicals of interest at fuel cycle facilities.

Uranium uptake uses the value of 230 mg from NUREG-1391 for 50% lethality. The NRC/PNL document on uranium uptake identifies a range of 200-300 mg for lethality; 200 mg approximates the onset of lethality and 300 mg represents a high percentage of potential fatalities in the exposed population.

Chemical concentrations and effects are deterministic to individuals. However, for a simple rating scale based upon exposure observations, the following levels were used in the VA:

Level I: Likely fatalities, many may be prompt. The basis is the specific value from the AEGL Technical Support Document on the chemical of interest, adjusted to different times by the ratio of the AEGL-3s. For a 10 minute HF exposure, this is 260 ppm; for a 30 minute exposure, this is 95 ppm; and for a 60 minute exposure, this is 67 ppm. Uranium intake exceeds 300 mg.

- Level II: Probable fatalities - approximately the lethal level for 50% of the population. Some fatalities may be prompt. The basis is exceeding AEGL-3. For a 10 minute HF exposure, this is 170 ppm; for a 30 minute exposure, this is 62 ppm; and for a 60 minute exposure, this is 44 ppm. Uranium intake exceeds 230 mg.
- Level III: Onset of fatality range - increased risk/potential for a few offsite fatalities in large offsite populations. The basis is exceeding AEGL-2. For a 10 minute HF exposure, this is 95 ppm; for a 30 minute exposure, this is 34 ppm; and for a 60 minute exposure, this is 24 ppm. Uranium intake exceeds 200 mg.
- Level IV: No likely fatalities but potential for significant and/or disabling health impacts requiring hospitalization/treatment. The basis is exceeding AEGL-1. For a 10 minute HF exposure, this is 1 ppm; for a 30 minute exposure, this is also 1 ppm; and for a 60 minute exposure, this is also 1 ppm. Uranium intake exceeds 30 mg.
- Level V: Existing licensing/accident basis, no fatalities, minimal effects (< AEGL-1). Uranium intake is less than 30 mg.

The number of exposed individuals is based upon the specific threat scenario and site conditions. Reasonably conservative meteorological conditions and population densities for the specific site under evaluation will be assumed. Plume effects will consider population within a 90 degree arc (25% pie section) downwind from the facility, scenario location, and effect zones based upon the consequence levels and the distance from the release. If indicated by site considerations (e.g., a high percentage of wind direction variability), plume effects will be based upon the population in the worst case 90 degree arc. The framework will sum the potential fatality estimates from each zone for comparison to the consequence table.

Chemical events tend to be prompt (typically of 30-90 minute durations) and the analysis will only consider mitigation methods appropriate for the specific site, scenario, and release timeframe.

References:

www.epa.gov/oppt/aeql/process.htm

Stephen A. McGuire, "Chemical Toxicity of Uranium Hexafluoride Compared to Acute Effects of Radiation," NUREG-1391, February 1991.

D.R. Fisher et al, "Uranium Hexafluoride Public Risk," PNL-10065, August 1994.

TECHNICAL BASIS FOR ACUTE RADIATION PROMPT FATALITIES

WHOLE BODY RADIATION EXPOSURE

The staff has reviewed several technical sources of information and data to develop a technical basis for an average number of prompt fatalities from acute whole body radiation exposure. The United Nations Scientific Committee on the Effects of Atomic Radiation (UNSCEAR) 2000 Chernobyl accident summary report provides the number of emergency worker fatalities observed in various exposure ranges (see Table 1).¹ Other technical literature presents a range of doses associated with mortality (in percentages) of an exposed population. Table 2 compares the LD₁₀, LD₅₀, and LD₉₀ doses reported in the Textbook of Military Medicine,² an Armed Forces Radiobiology Research Institute (AFRRI) reference,³ and in NUREG/CR-4214.⁴ These references apply to high dose rate, whole body, acute, exposures only.

Table 1. Chernobyl emergency worker fatalities observed in different exposure ranges.

Range of Dose (rads)	Number of workers exposed in this dose range	Number of fatalities ⁵
80 - 210	41	0 (0%)
220 - 410	50	1 (2%)
420 - 640	22	7 (32%)
650 - 1600	21	20 (95%)

Table 2. Comparison of LD10, LD50, and LD90 values (dose in rads).

Lethal Dose (LD) at various percentages of population exposed	Military Reference- untreated	AFFRI without medical care	NUREG/CR-4214 with supportive care	AVERAGE
LD ₁₀	290	300	330	307
LD ₅₀	430	530	450	470
LD ₉₀	570	800	550	640

From these references, which showed close agreement, the staff estimated a range of fatalities for the potentially exposed population during a postulated accident.

¹ UNSCEAR, Volume II of the 2000 Report., ANNEX J, "Exposures and effects of the Chernobyl accident," Table 11, "Emergency workers with acute radiation sickness following the accident"

² "Textbook of Military Medicine: Medical Consequences of Nuclear Warfare," 1989, Figure 2-10, "Human mortality for high-dose-rate, low-LET radiation doses to bone marrow."

³ "Medical Management of Radiological Casualties, 2nd Ed.," Armed Forces Radiobiology Research Institute, Bethesda, MD, April 2003, pp. 89 and 91. *Note:* Lethal Doses (LD) at 10%, 50%, and 90% probability are estimated to be without medical care.

⁴ "Health Effects Models for Nuclear Power Plant Accident Consequence Analysis," NUREG/CR-4214, Rev. 2, Part I, ITRI-141, Published October 1993, Figure 3-1, "Risks of mortality from the hematopoietic syndrome for minimal, supportive, and mixed treatments: central estimates for exposure at a high dose rate."

⁵Percentage of treated patients in parenthesis

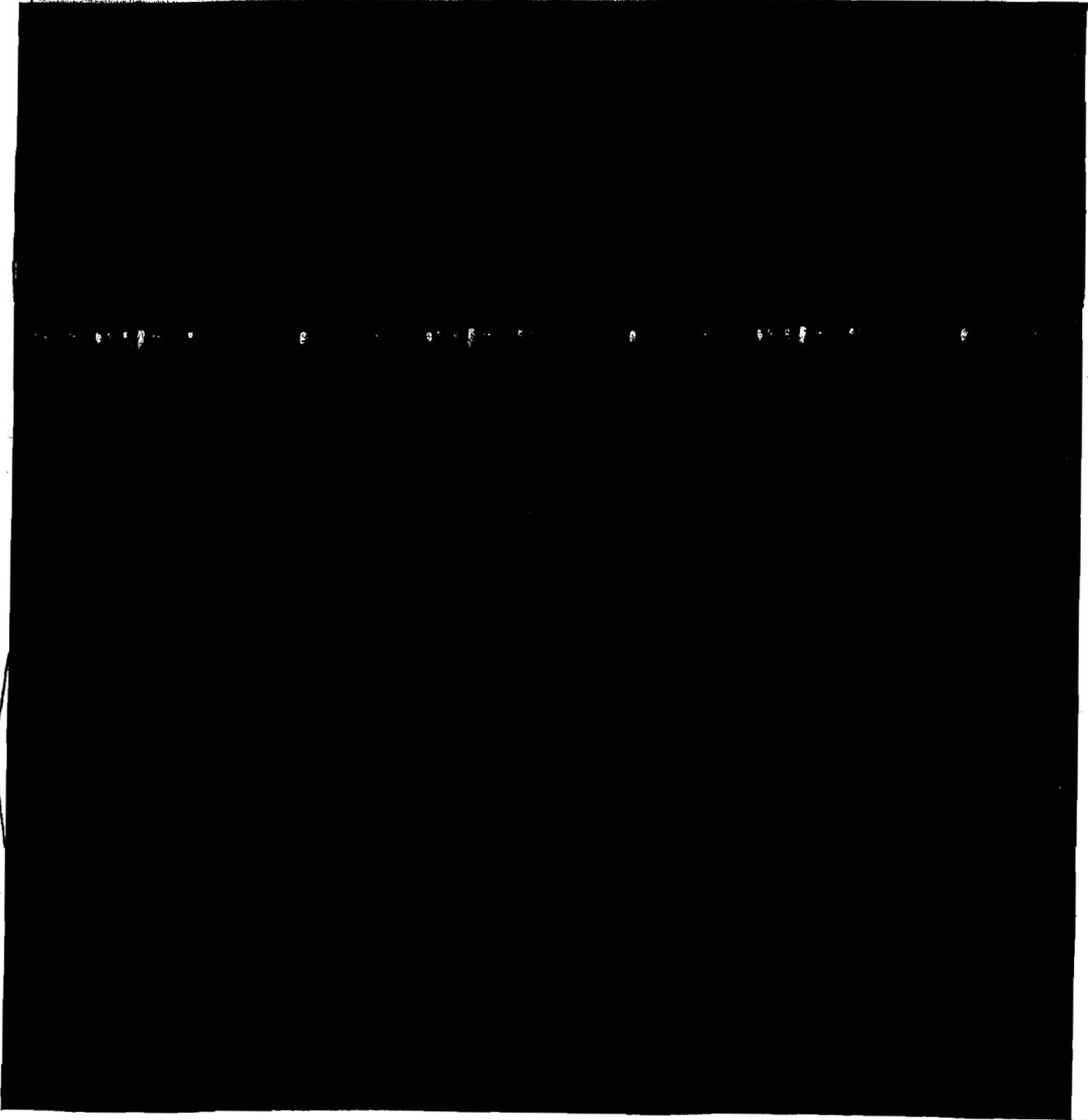
DETERMINATION OF EXPOSED POPULATION

Specific threat or site conditions determined the number of exposed individuals. A range of population densities will be assumed for off-site threats to simulate venues or locations where individuals could be exposed. For on-site threats, specific population estimates will be used, considering potential mitigating effects where applicable, e.g., evacuation and sheltering. Site-specific meteorological conditions will be assumed unless the threat relates to transportation, where nominal meteorology data will be assumed.

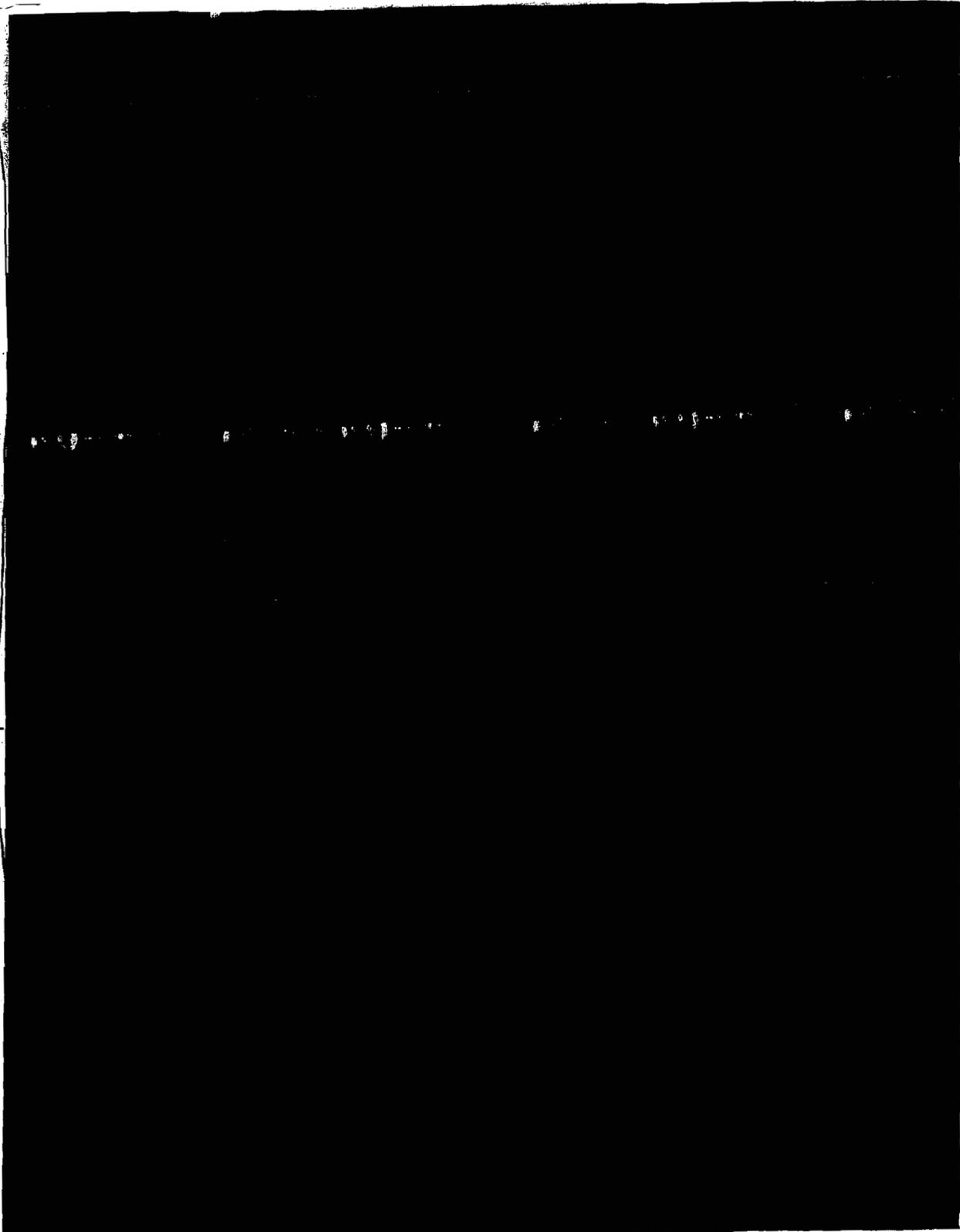
Rad* indicates the rad-equivalent which is calculated by multiplying the high linear energy transfer (LET) component of the absorbed dose by a relative biological effectiveness (RBE) factor. Specifically, when calculating the lung dose, the high LET component is multiplied by ten.

EX-5
P1

Attachment 5
Application of the Decision Making Framework to a Postulated Security Event
Scenario at a Research Reactor



~~SAFEGUARDS INFORMATION~~

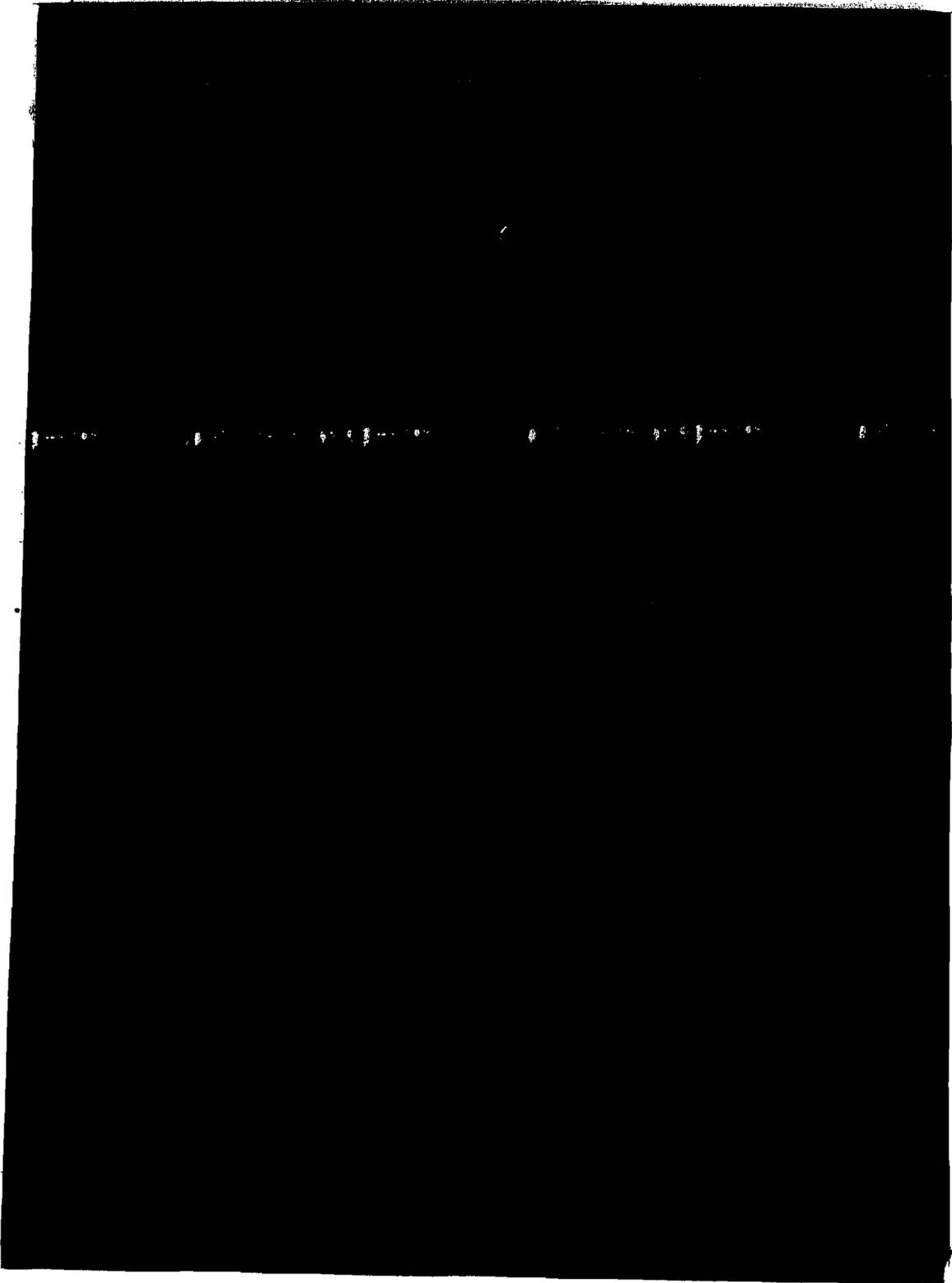


C#3
P2-a

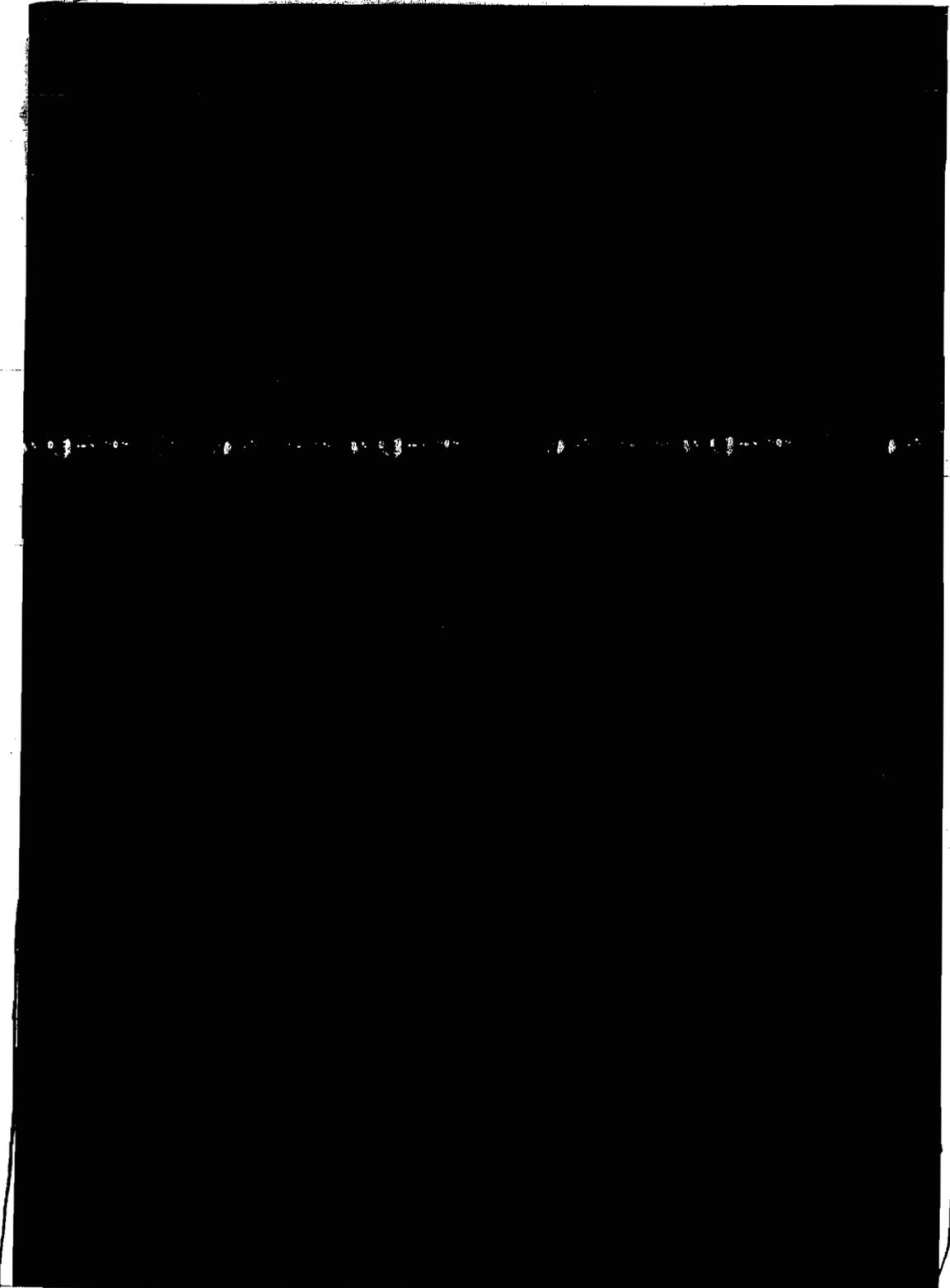
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81
P3-e



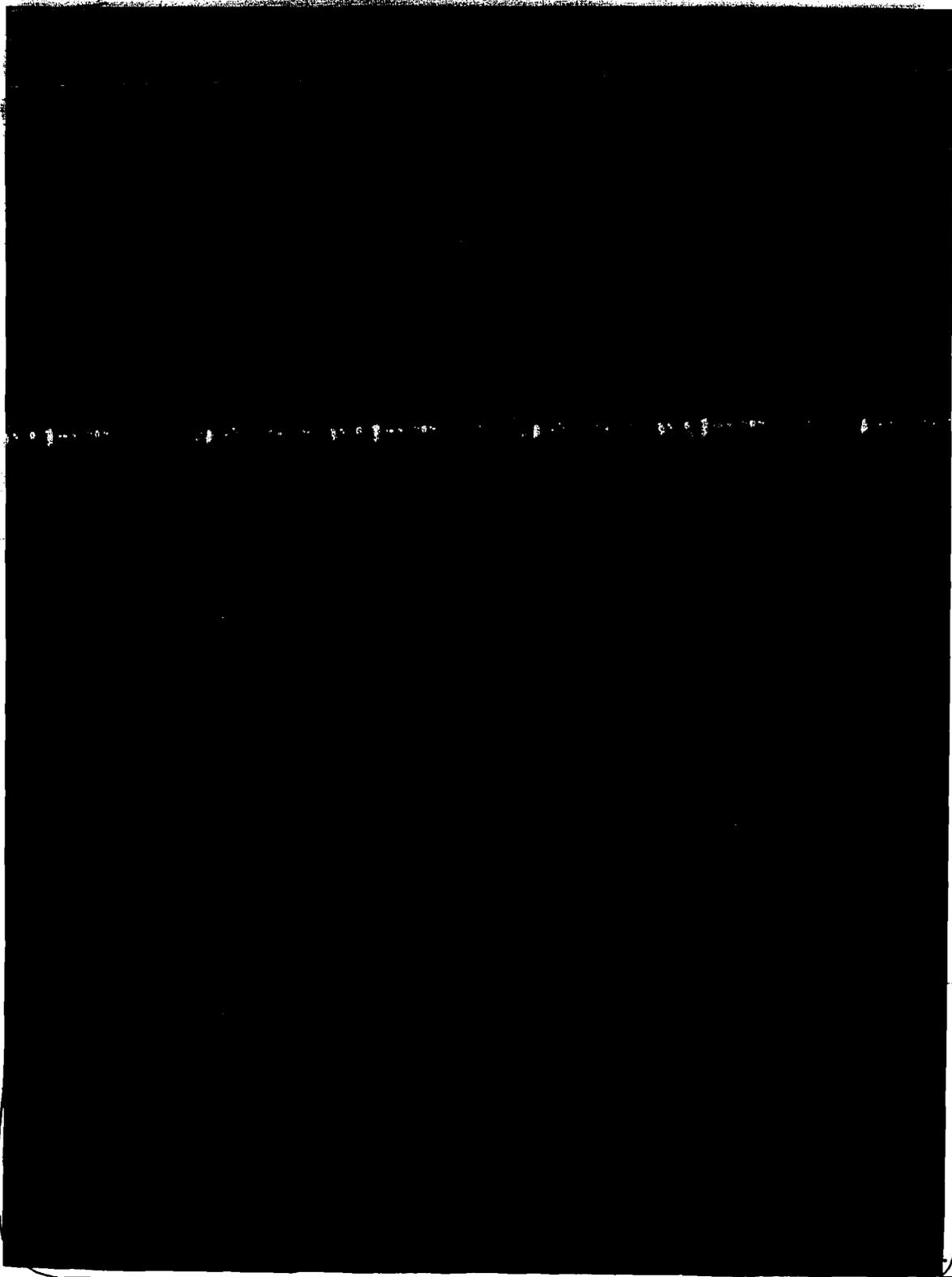
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P4-a



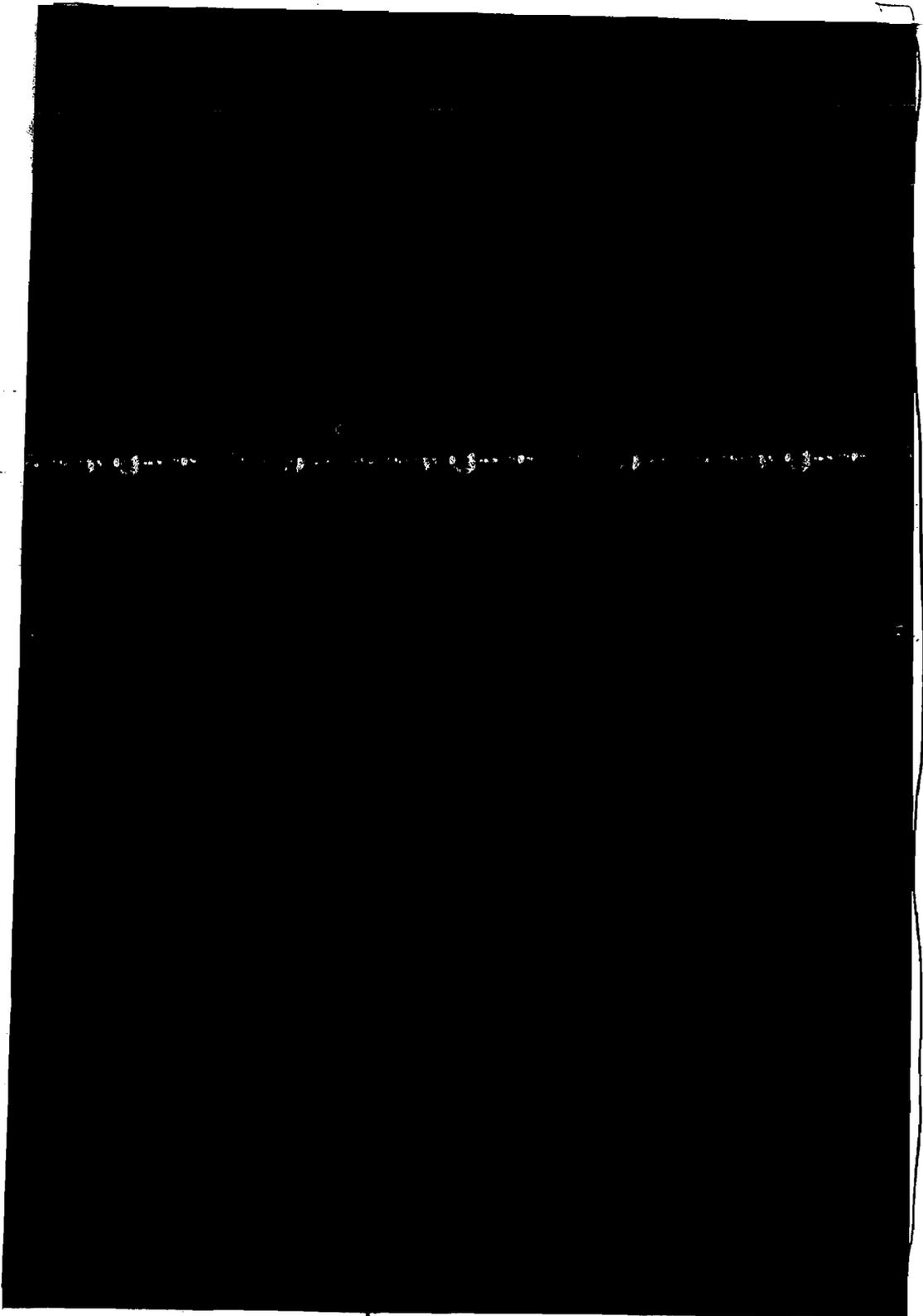
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PS
Ex

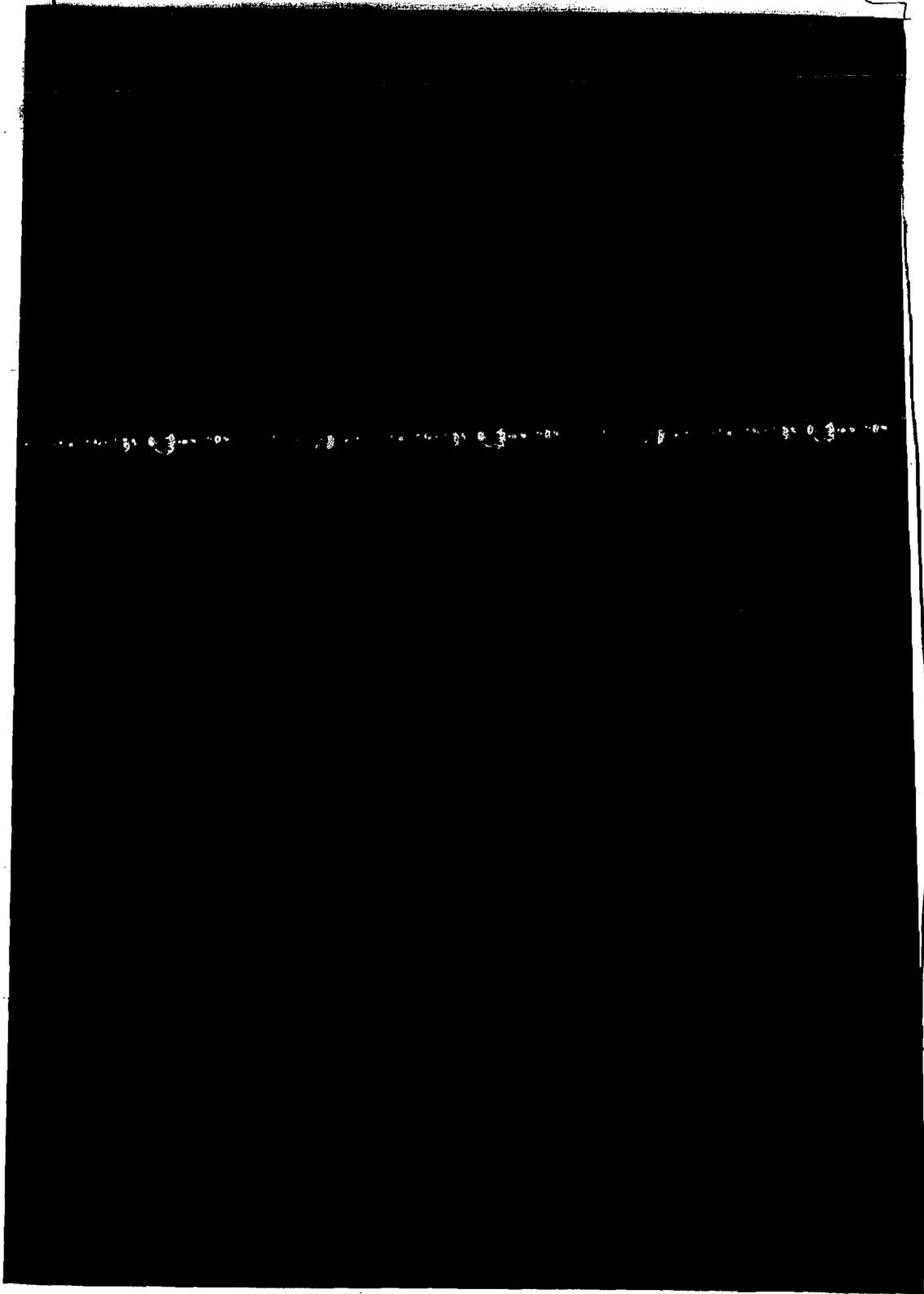
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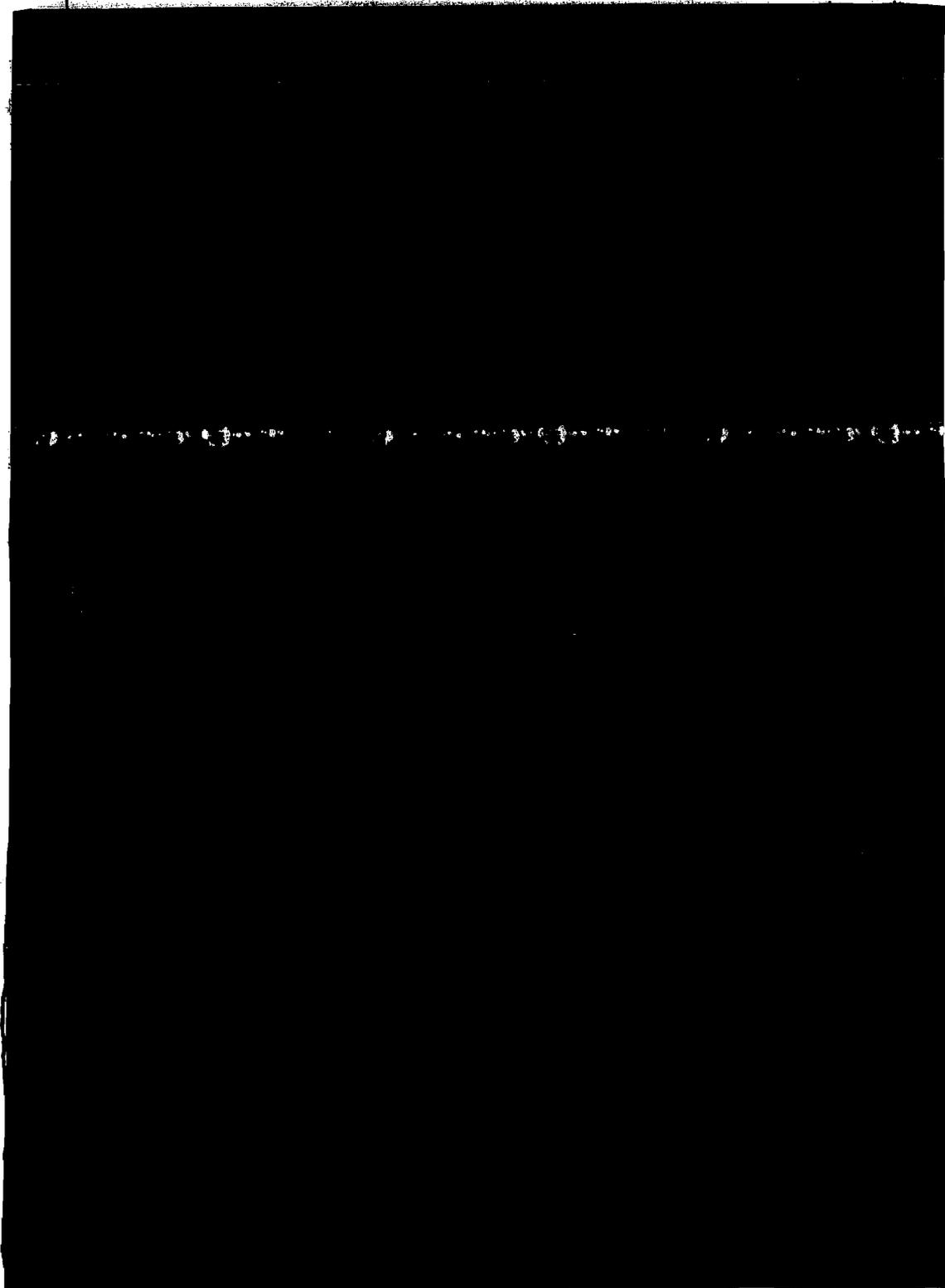
Σ 3
P6-a



EV#
p1-a

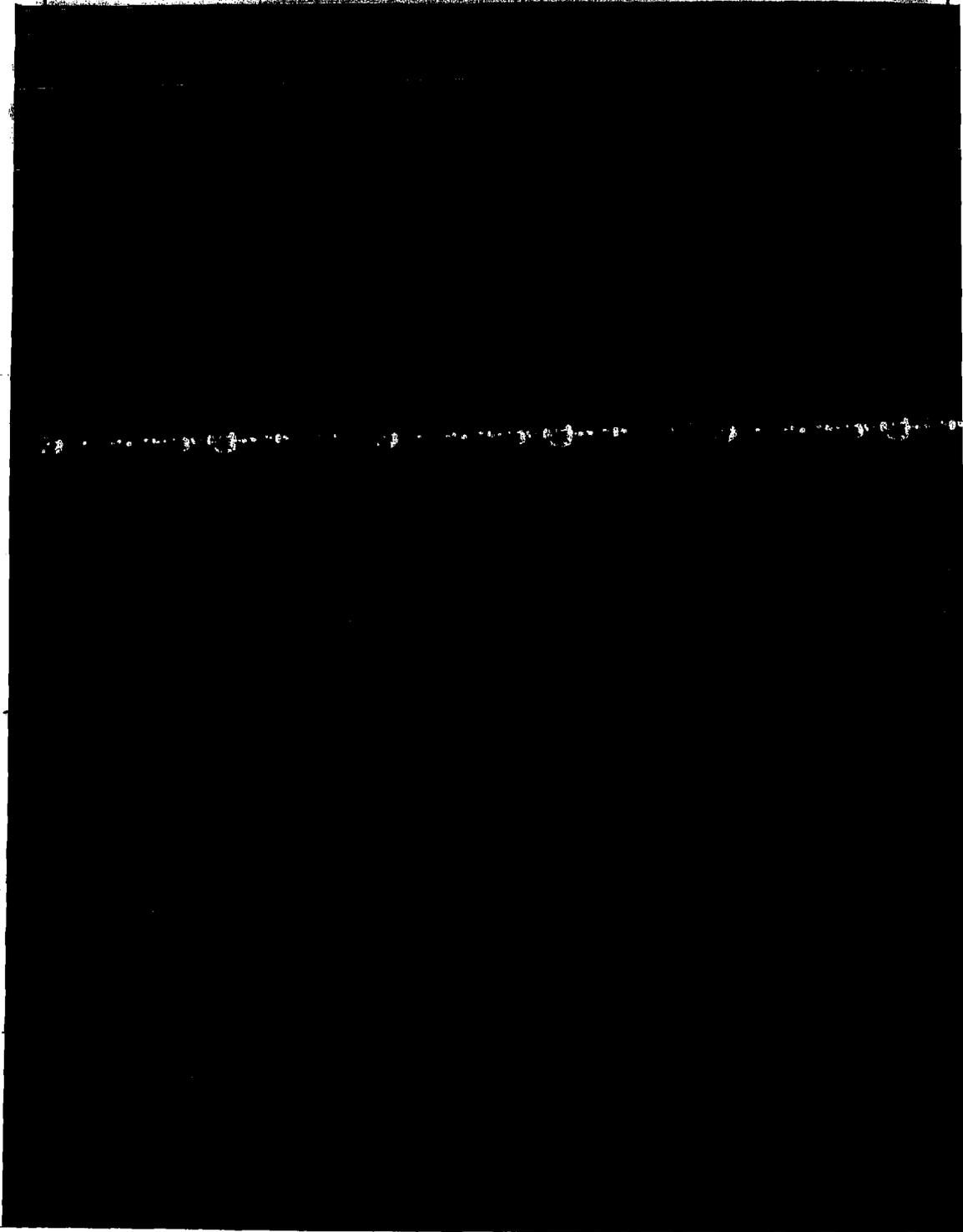


S-3
p. a



3.5

Ex #3
p9-a



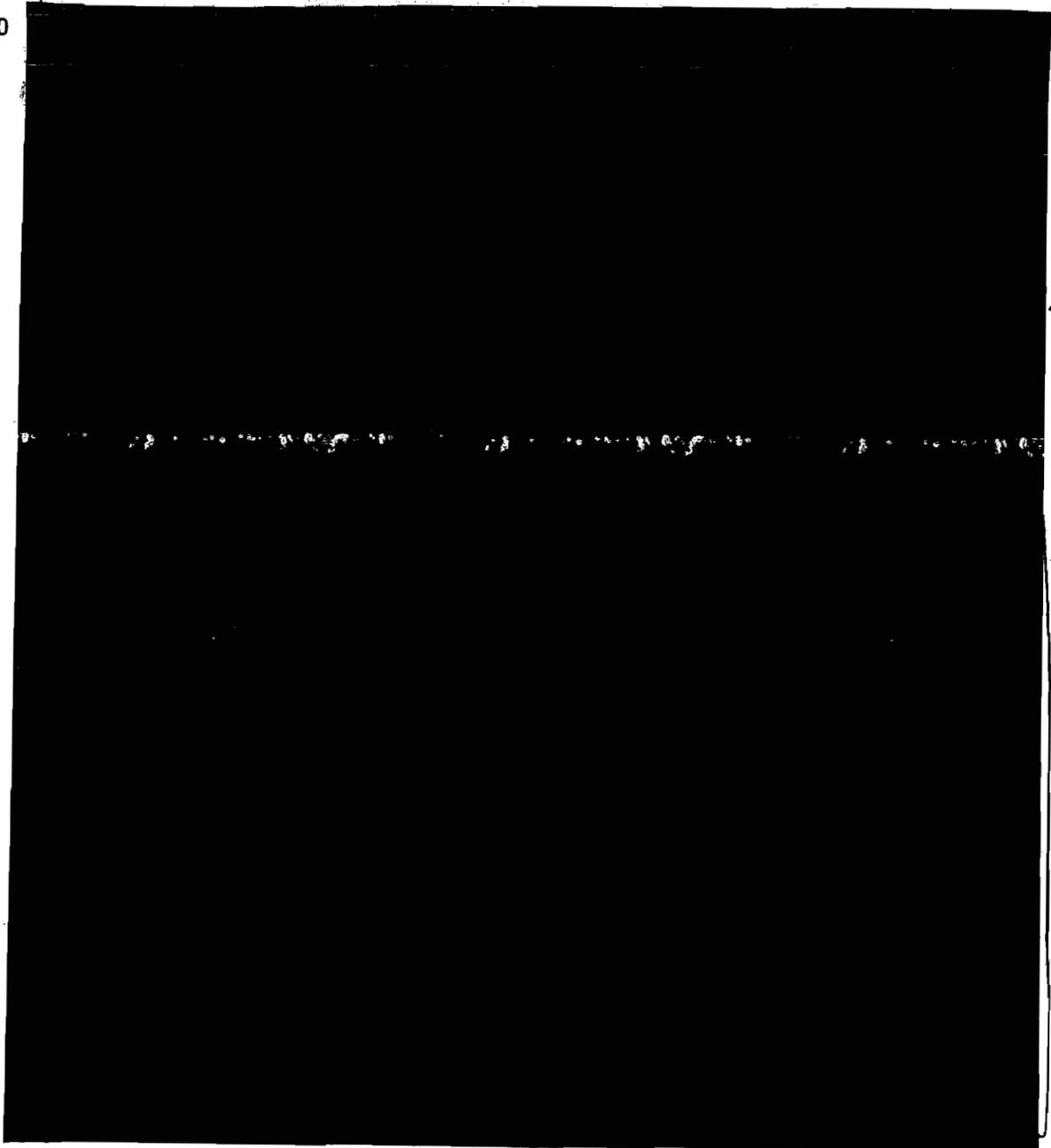
¹ "Identification and Analysis of Factors Affecting Emergency Evacuations Volume I: Main Report," Draft Report dated July 25, 2004.

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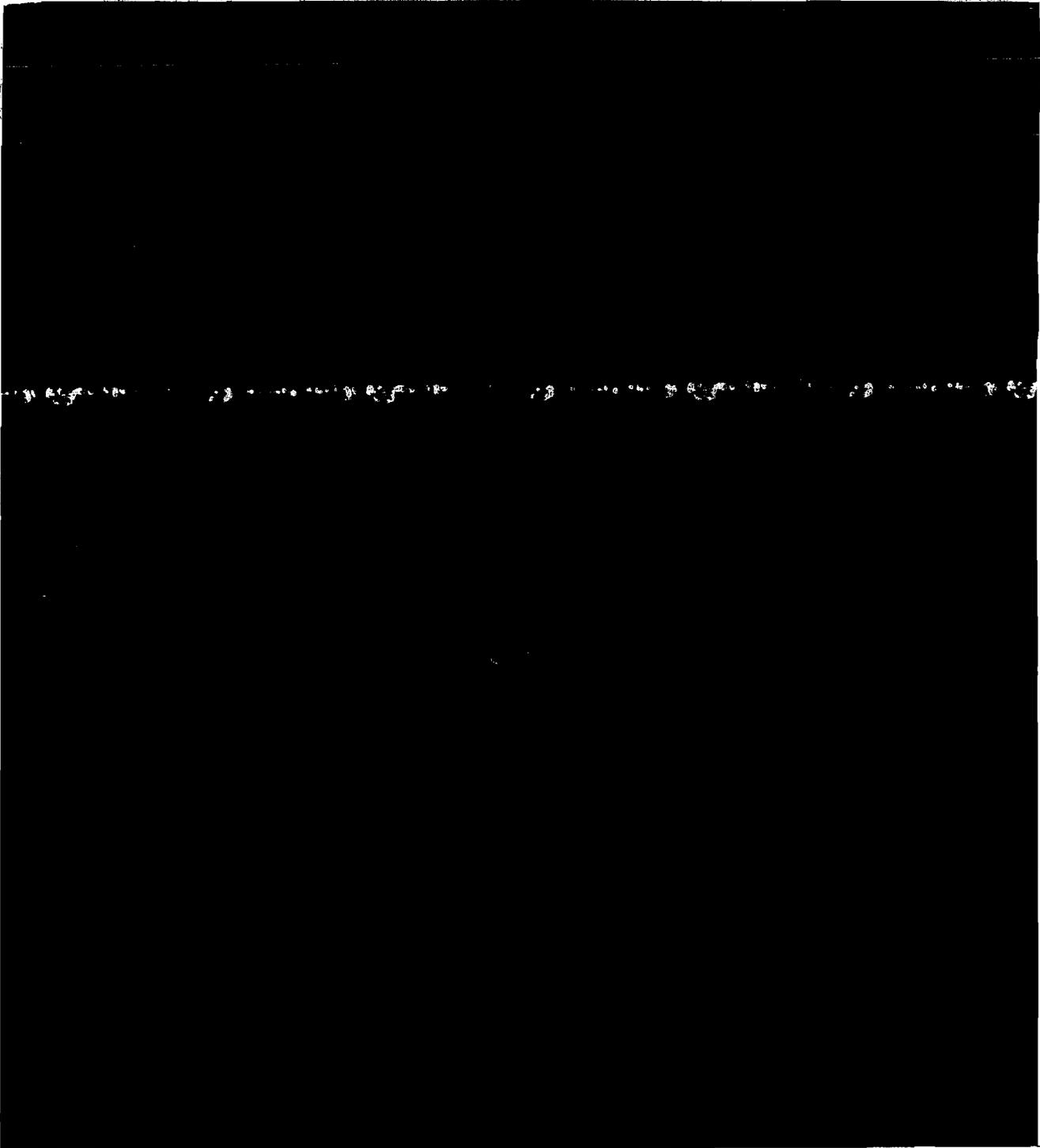
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Ex #3
P10-4

4.0



EX-13
P11-0



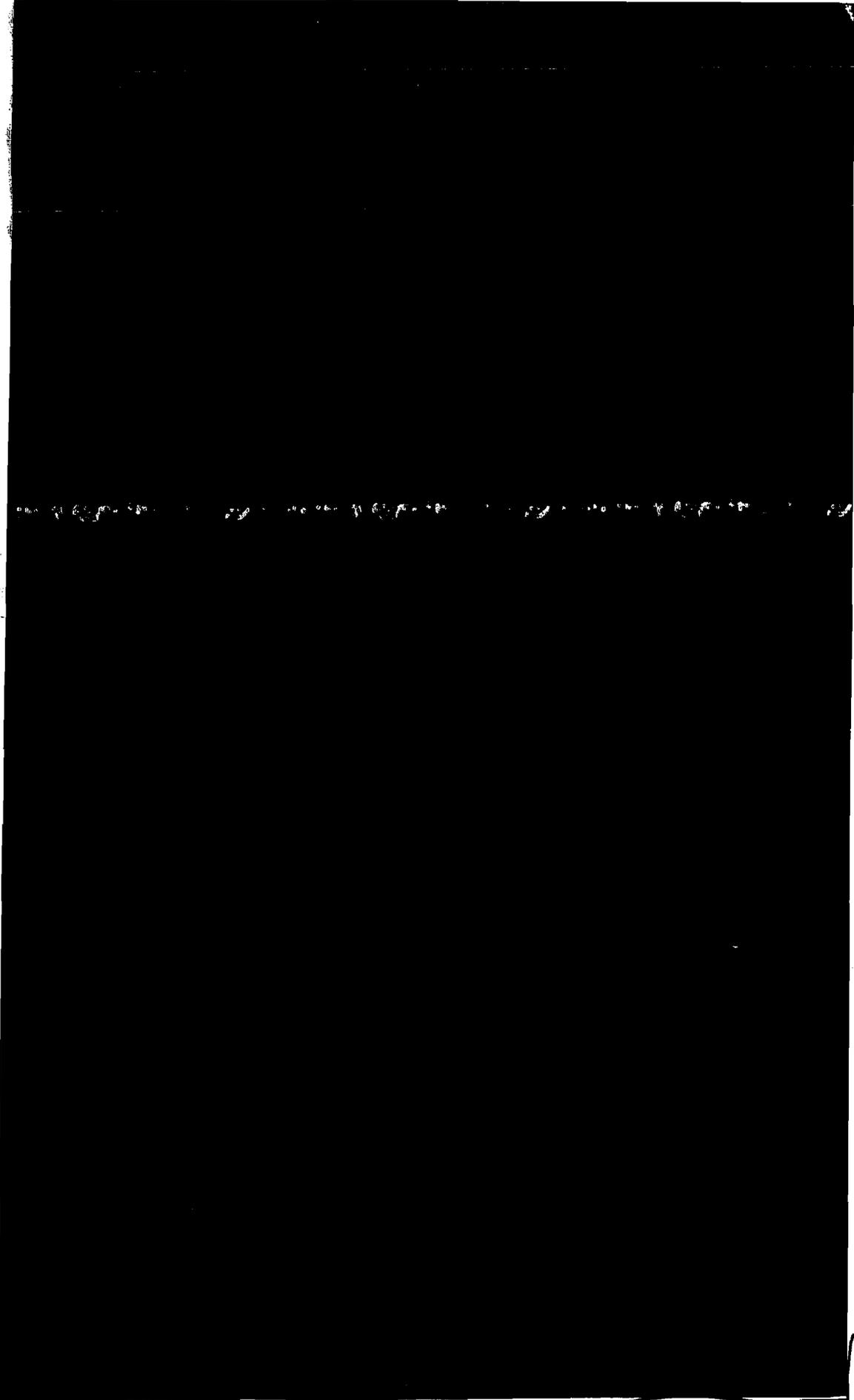
² "Health Effects Models for Nuclear Power Plant Accident Consequence Analysis," J. S. Evans, S. Abrahamson, M. A. Bender, B. B. Boecker, E. S. Gilbert, B. R. Scott, October 1993, NUREG/CR-4214, Rev. 2, Part I, ITRI-141

EP
P12



³ "Medical Management of Radiological Casualties," Armed Forces Radiobiology Research Institute, April 2003, pages 90

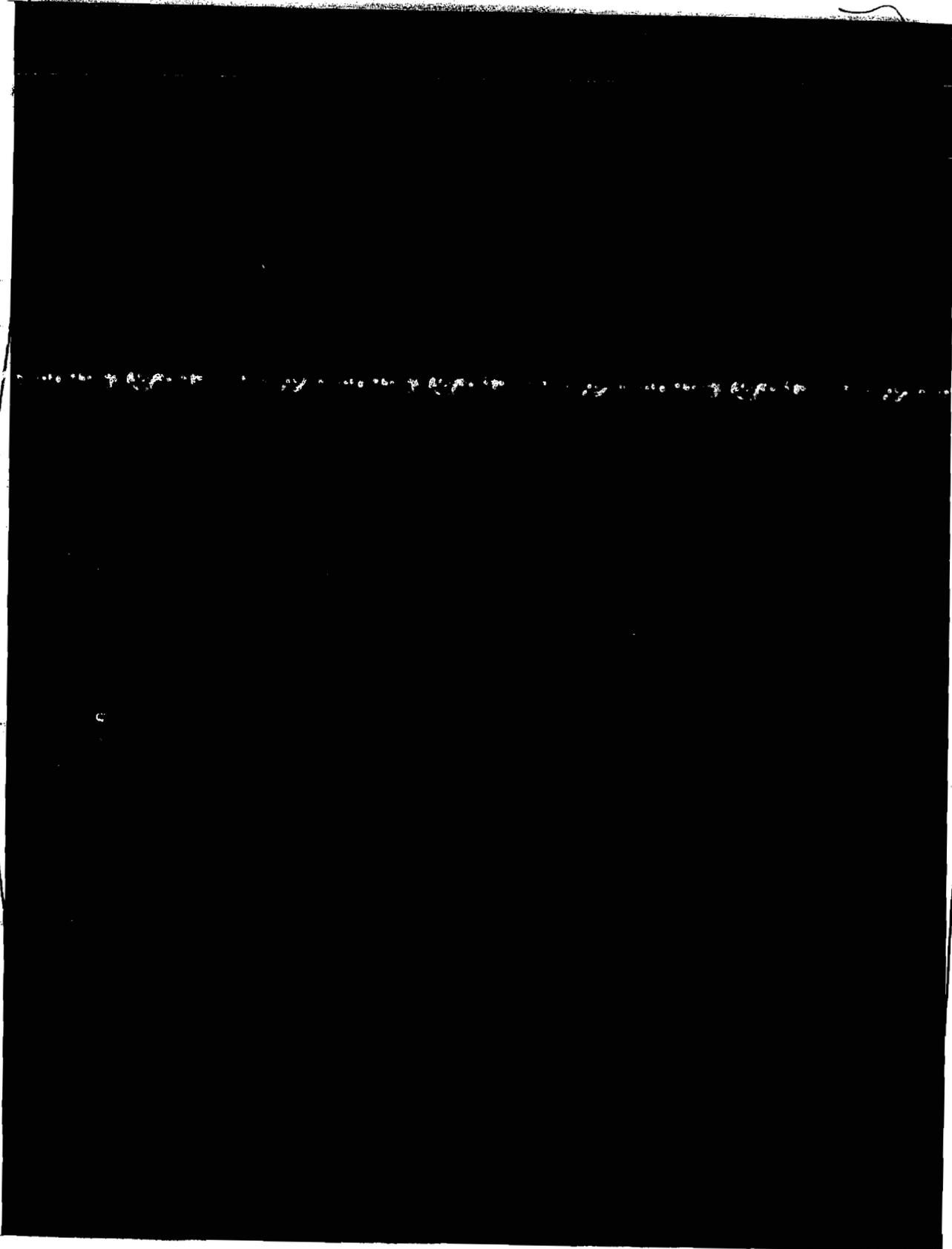
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EX 3
P13-a

Ex²
P14



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Ex #3
P15



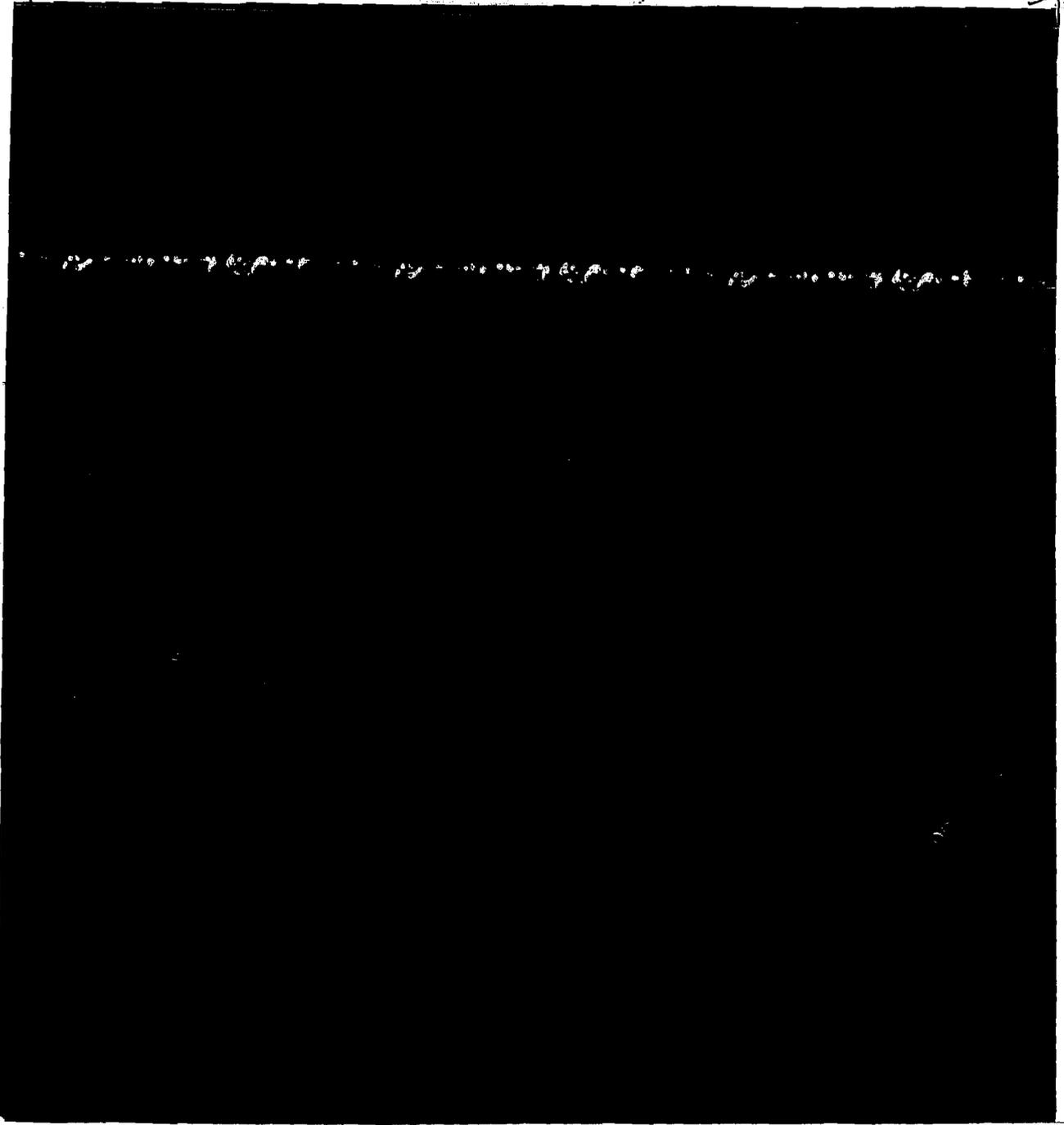
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Attachment 6

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EX 3
P1 a

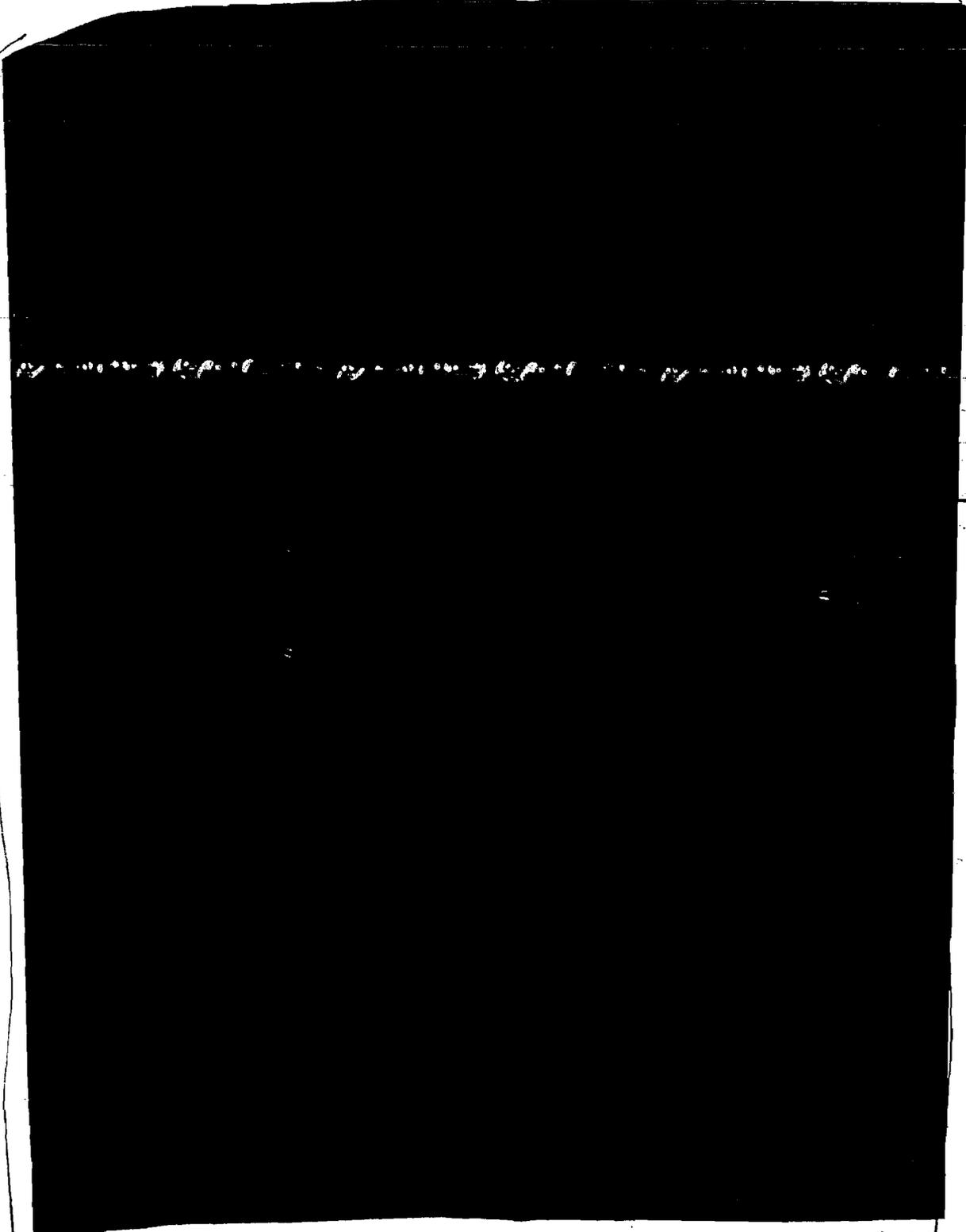
**Application of the Decision Making Framework to a Postulated Security Event Scenario
at a Fuel Cycle Facility**



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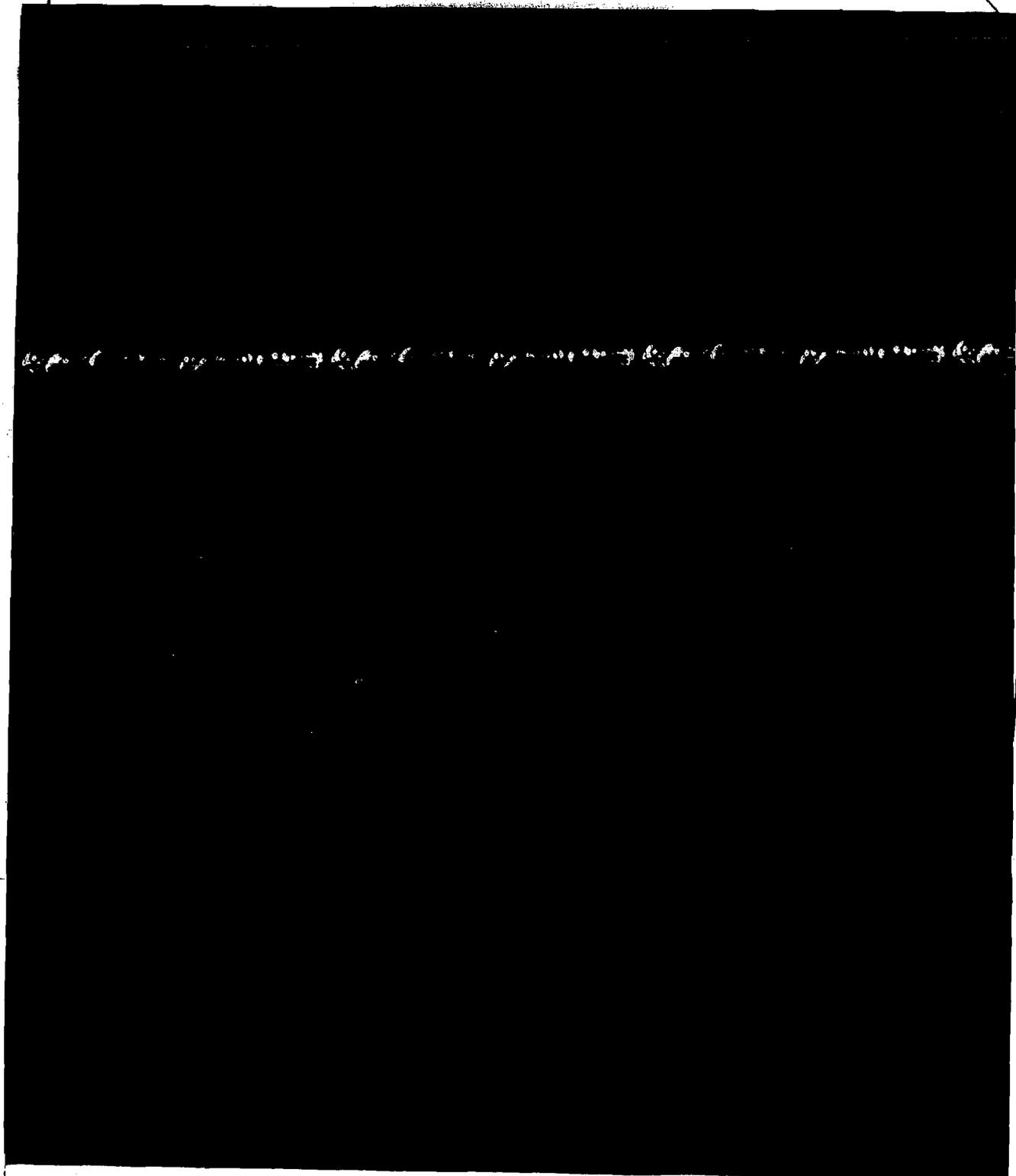
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Ex 1
P2-8

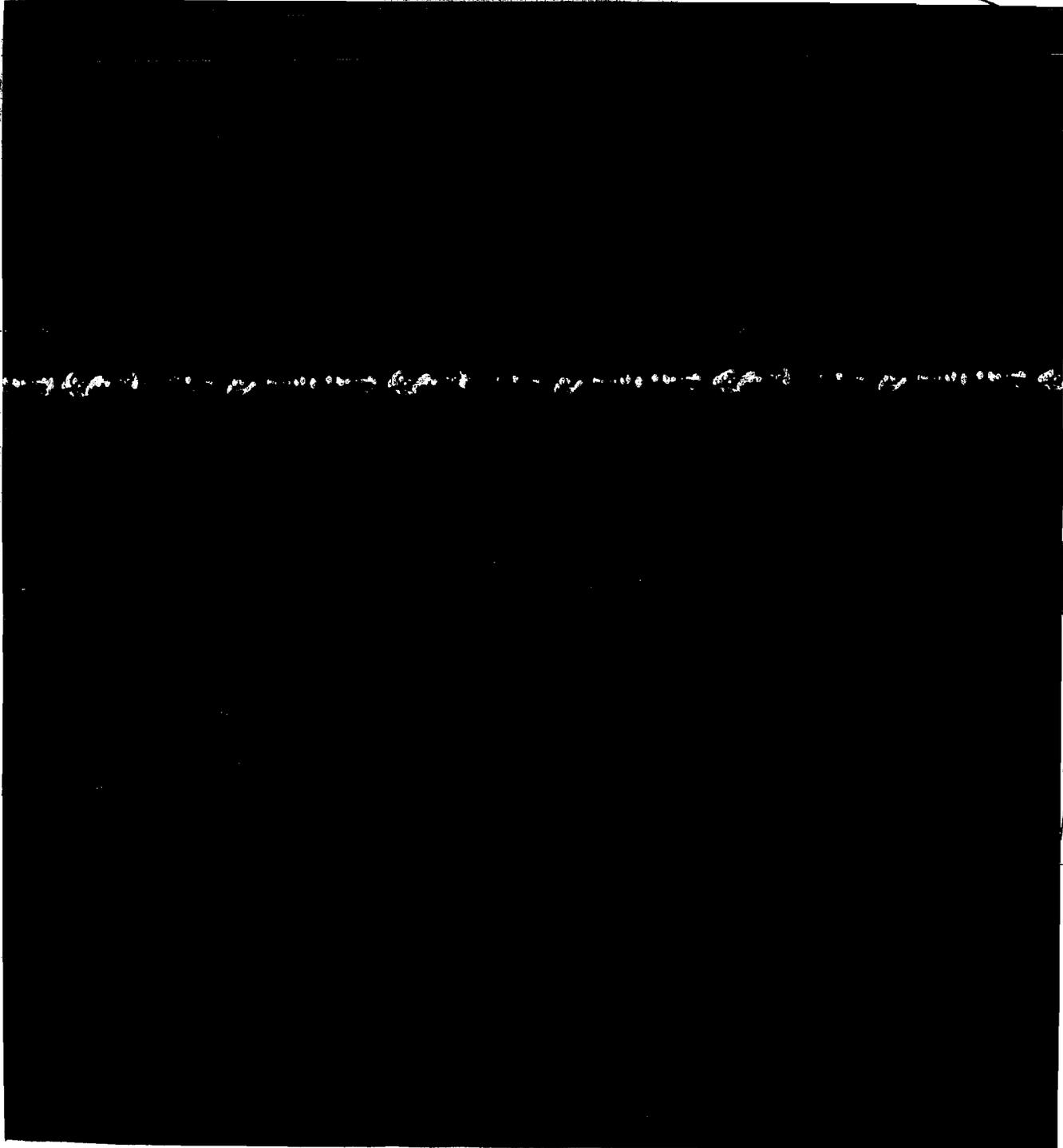


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E
P 3-2

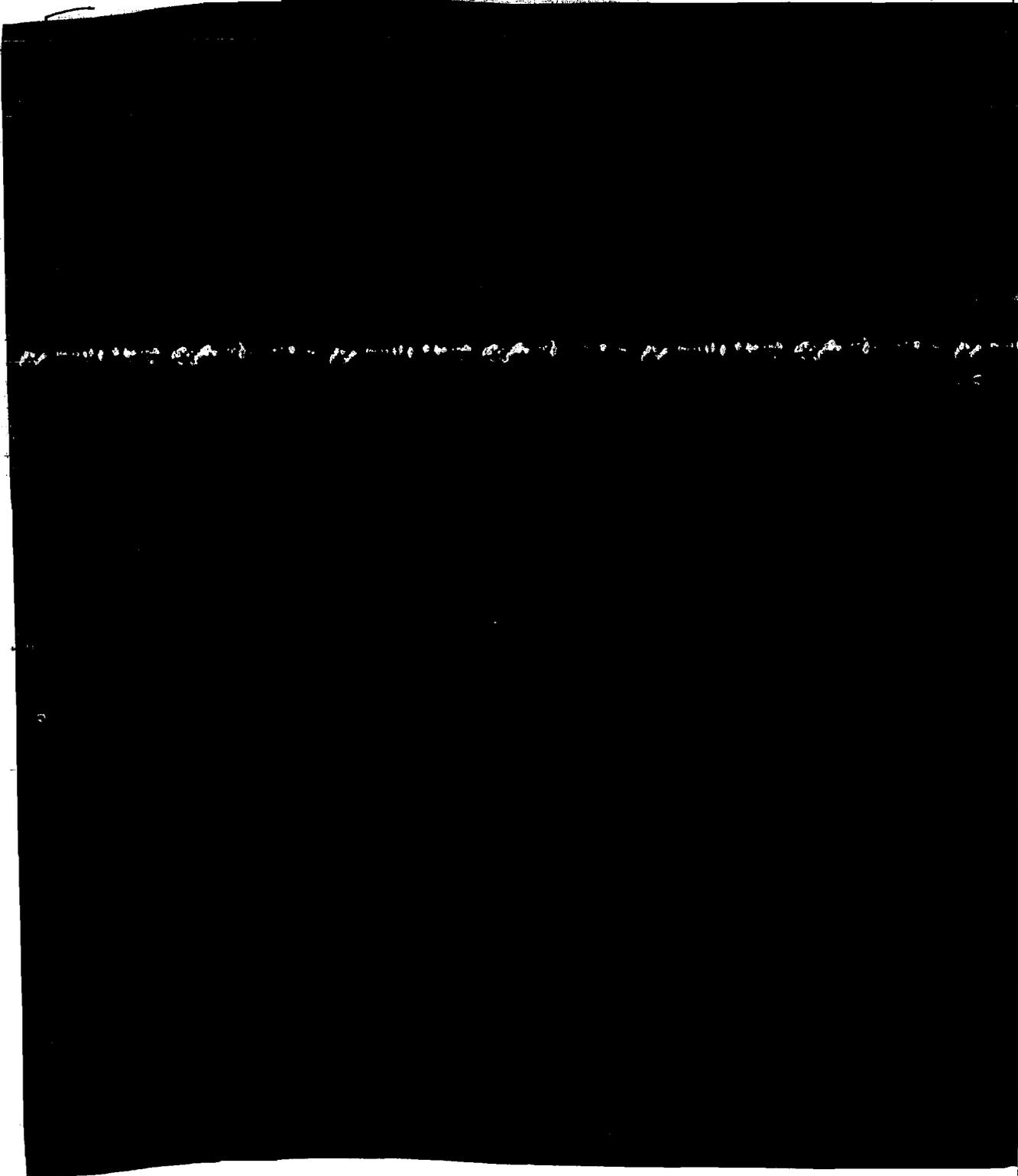


E-
P4

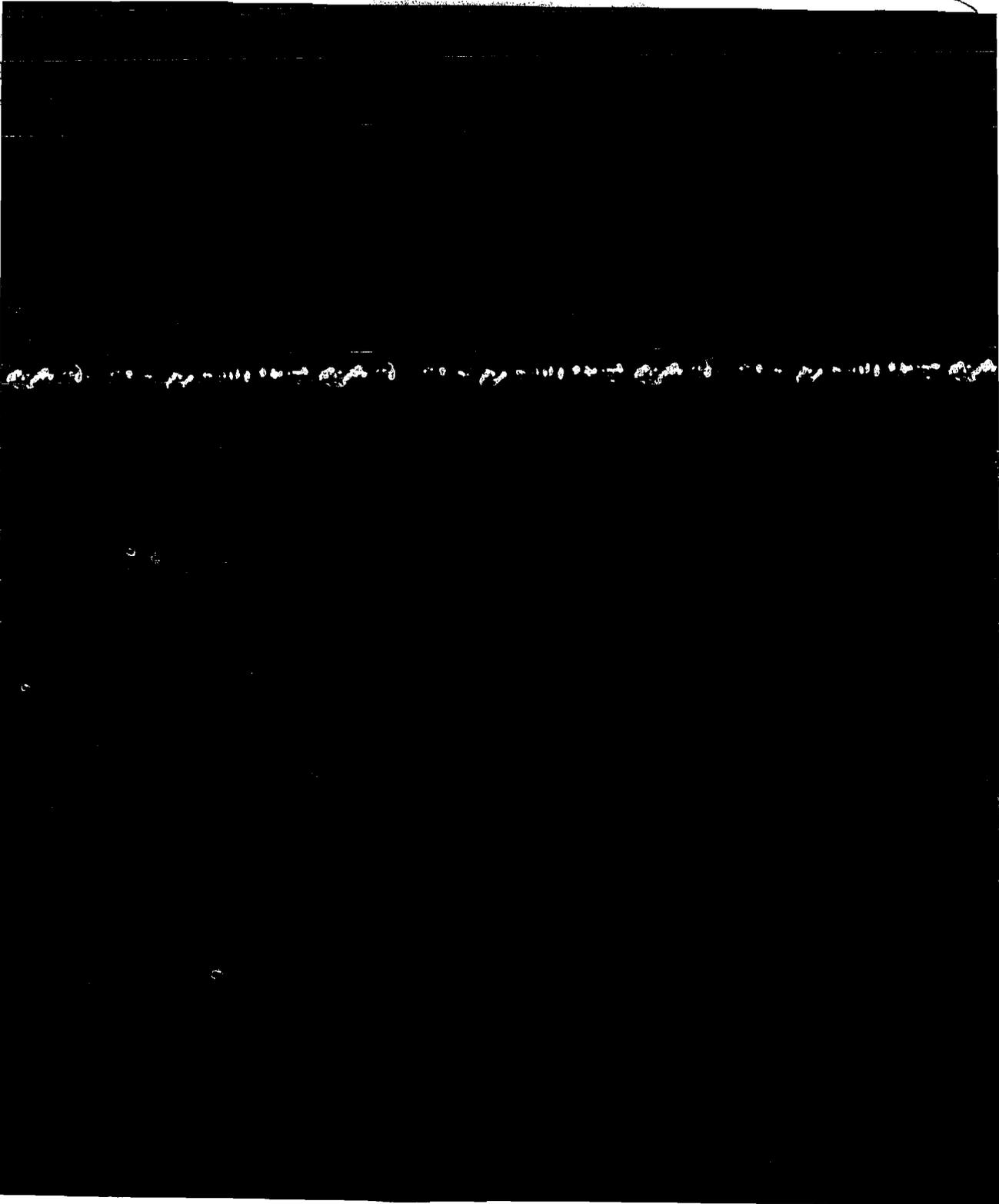


Attachment 6
~~SAFEGUARDS INFORMATION~~

EX-103
PSC



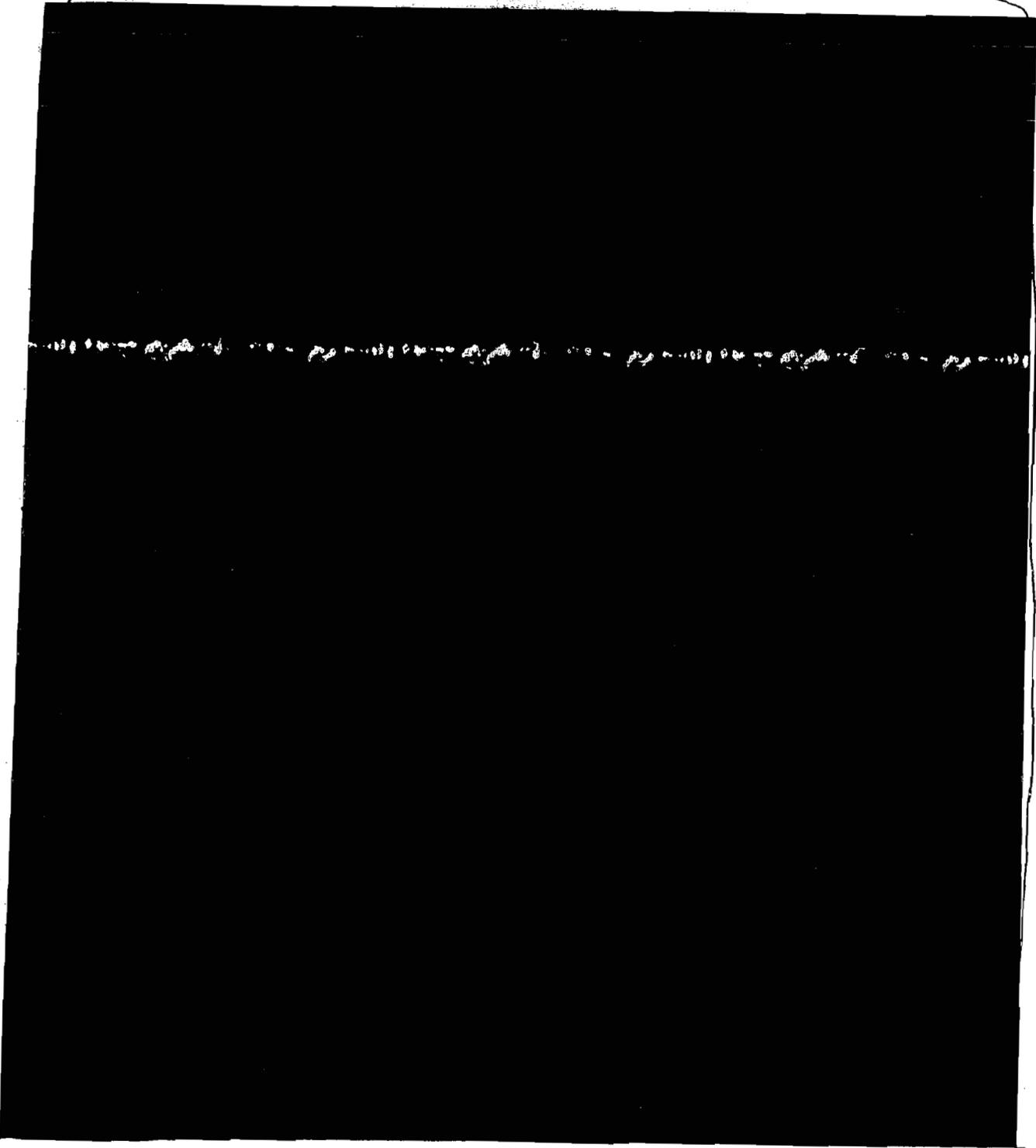
Ex 3
P6-C



Attachment 6

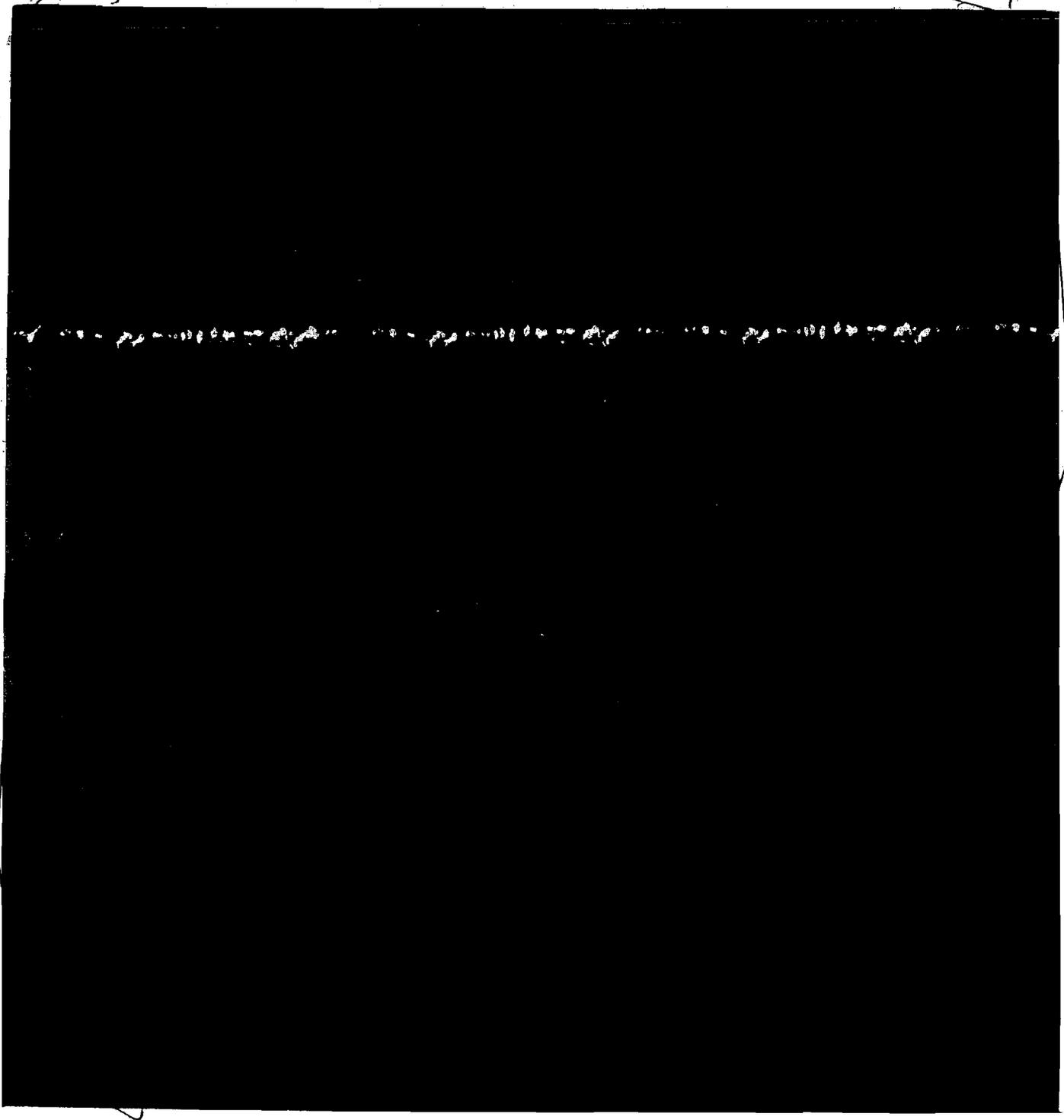
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Ex # 3
p 7-2



Attachment 6
~~SAFEGUARDS INFORMATION~~

Ex 3
p8-a



~~SAFEGUARDS INFORMATION~~

Ex #3
p9-a



April 18, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PACIFIC GAS & ELECTRIC CO.)	Docket No. 72-26-ISFSI
)	
(Diablo Canyon Power Plant Independent)	ASLBP No. 08-860-01-ISFSI-BD01
Spent Fuel Storage Installation))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION FOR SUMMARY DISPOSITION OF "SAN LUIS OBISPO MOTHERS FOR PEACE'S CONTENTION 1(b)" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 18th day of April, 2008.

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Chief Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
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Washington, D.C. 20555

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