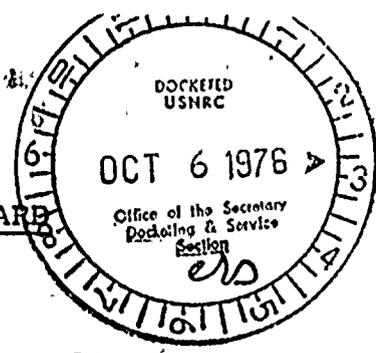


Sept. 23, 1976

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



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

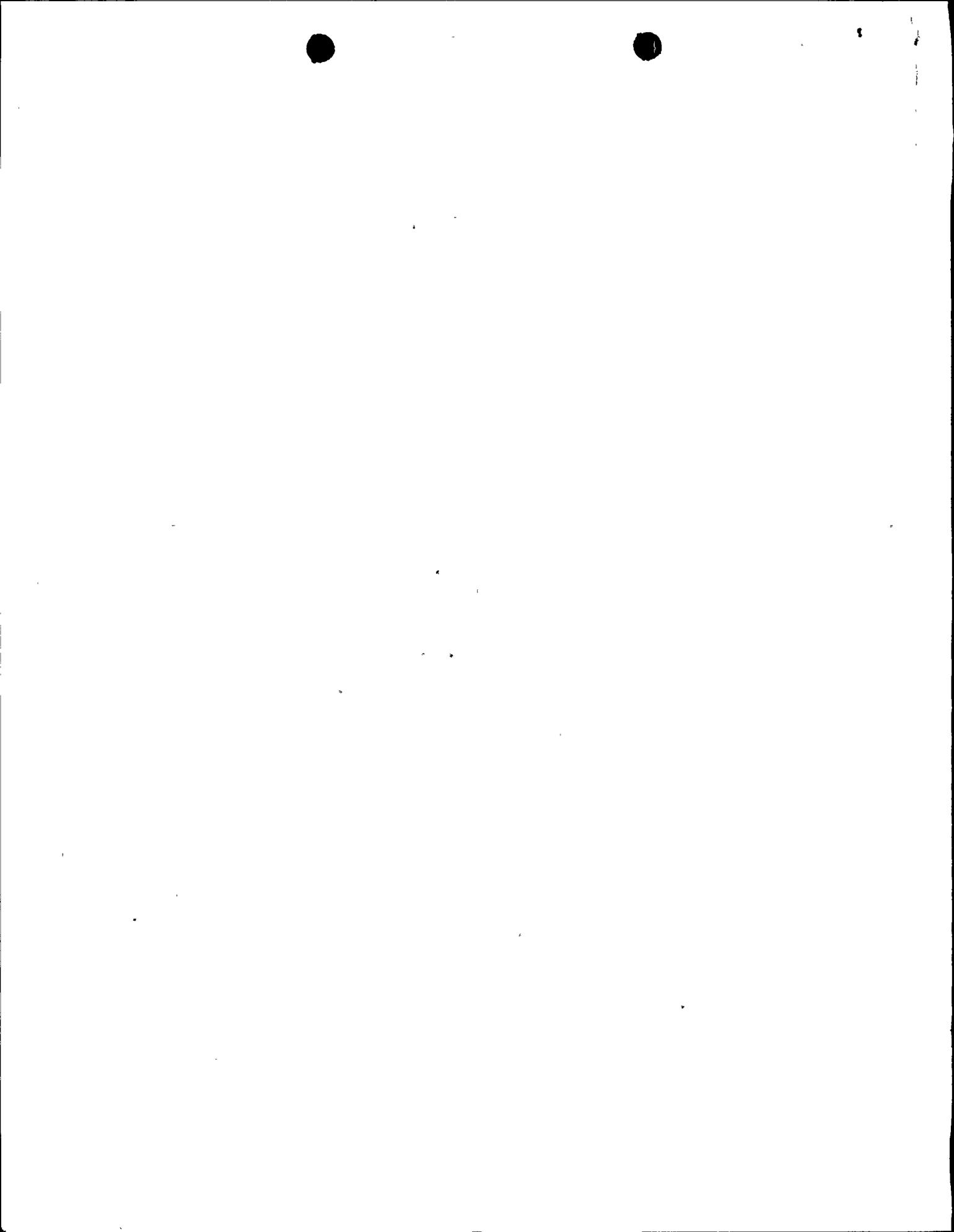
Docket Nos. 50-275 O.L.
50-323 O.L.

INTERVENORS' ANSWER TO PLAINTIFFS' MOTION
FOR SUMMARY DISPOSITION BY
PACIFIC GAS AND ELECTRIC COMPANY

By its motion of September 7, the applicant in these proceedings, Pacific Gas and Electric Company (P.G. & E.), seeks to have this Board, pursuant to 10 C.F.R. §2.749, summarily dispose of several environmental issues relating to adverse impacts on marine biota. These environmental issues which the applicant seeks to dismiss encompass several important problems relating to thermal pollution and other environmental phenomena that have been vigorously debated in the scientific community.

The applicant did not support its motion with any legal argument whatsoever. However, the applicant did provide two affidavits from P.G. & E. technical consultants explaining why summary disposition is justified. These technical consultants occasionally refer to intervenor responses filed this summer to NRC Staff interrogatories to support their claims that intervenors

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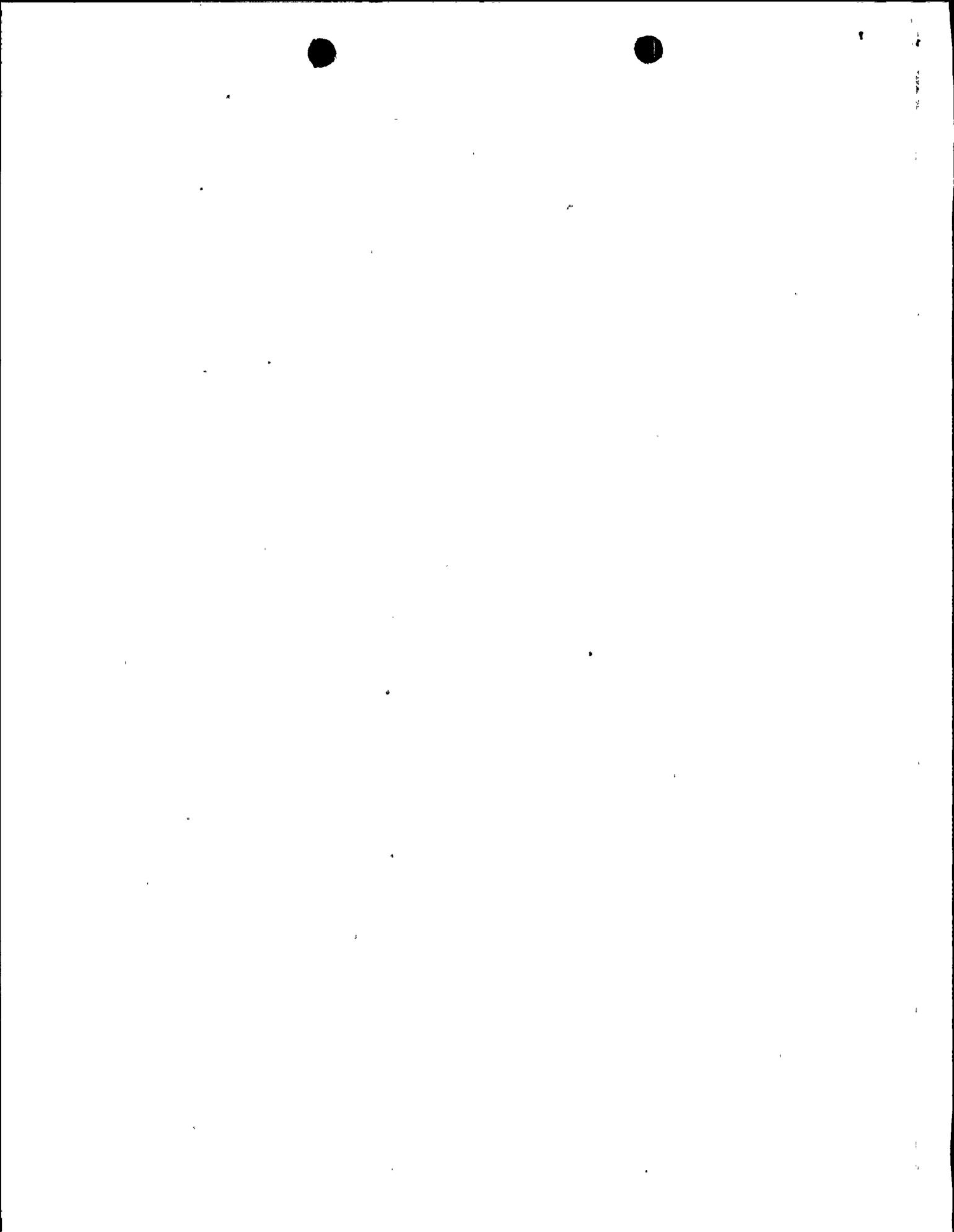


have no valid factual disputes with relevant materials found in the Staff Final Environmental Statement.

Apparently, the Staff would have the Board believe that because citizen intervenors could not adequately answer interrogatories this summer regarding the marine biota issues, summary disposition is in order, even though the citizen intervenors did not have the assistance of any technical consultants in responding to those interrogatories. Since those responses were filed, the intervenors have retained counsel and have obtained commitments of help from some technical consultants.

Despite its knowledge of the rapidly evolving state of the intervenors' case, the applicant insists on moving for summary disposition at this time. Apparently, the applicant seeks to cut these issues off from consideration before responsible scientists acting in intervenors' behalf have the time to review the voluminous technical evidence relevant to this case and before they can bring informed scientific opinion favoring their positions to the attention of this Board. (As several intervenors stated in their Motion for Extension of Time for the Commencement of the Environmental Hearings dated September 13, 1976, this process of technical review and building a scientific case for intervenors' positions on the environmental issues will take at least until December 1, 1976.)

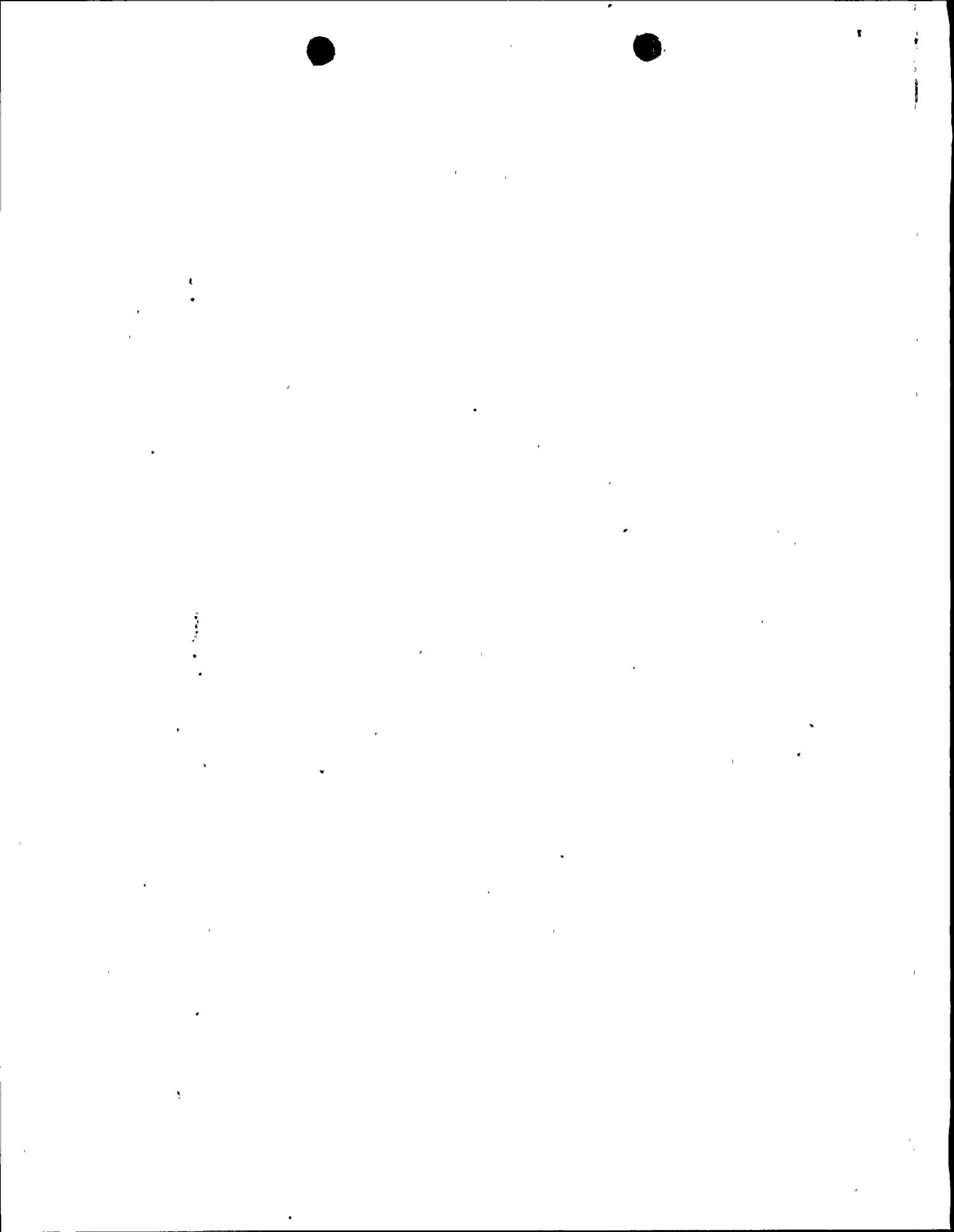
Our first answer to the Staff's motion for summary disposition, then, is that intervenors have not yet had an opportunity for a full technical review of all technical evidence



relevant to the contentions at issue. We base this response on the arguments, authorities and affidavits supporting Intervenors' Motion for Extension of Time for the Environmental Hearings dated September 13, 1976, and upon the affidavits of Dr. Leslie Grimm and James A. Geocaris accompanying this answer, and urge again that the Board grant that motion. However, in the interest of demonstrating to the Board that we are proceeding diligently and in good faith in assembling intervenors' substantive scientific case, we present a response based on the limited review which one of intervenors' recently retained technical consultants has been able to perform to date.^{1/}

Addressing the contents of the applicant's Motion for Summary Disposition, then, intervenors find two fatal flaws. First, we find no explanation of the law of summary disposition in the applicant's motion. Perhaps P.G. & E. avoided such legal discussion because the law governing summary judgment and summary disposition clearly places a heavy burden on the applicant as the moving party. In fact, the law holds that the papers of the party moving for summary disposition alone can be insufficient

^{1/} This answer does not oppose the applicant's motion on all points. Based on the advice of their technical consultant who now has reviewed many of the Staff and applicant submissions, the intervenors do not oppose the applicant's motion for summary disposition of Contentions 1A and 1B.

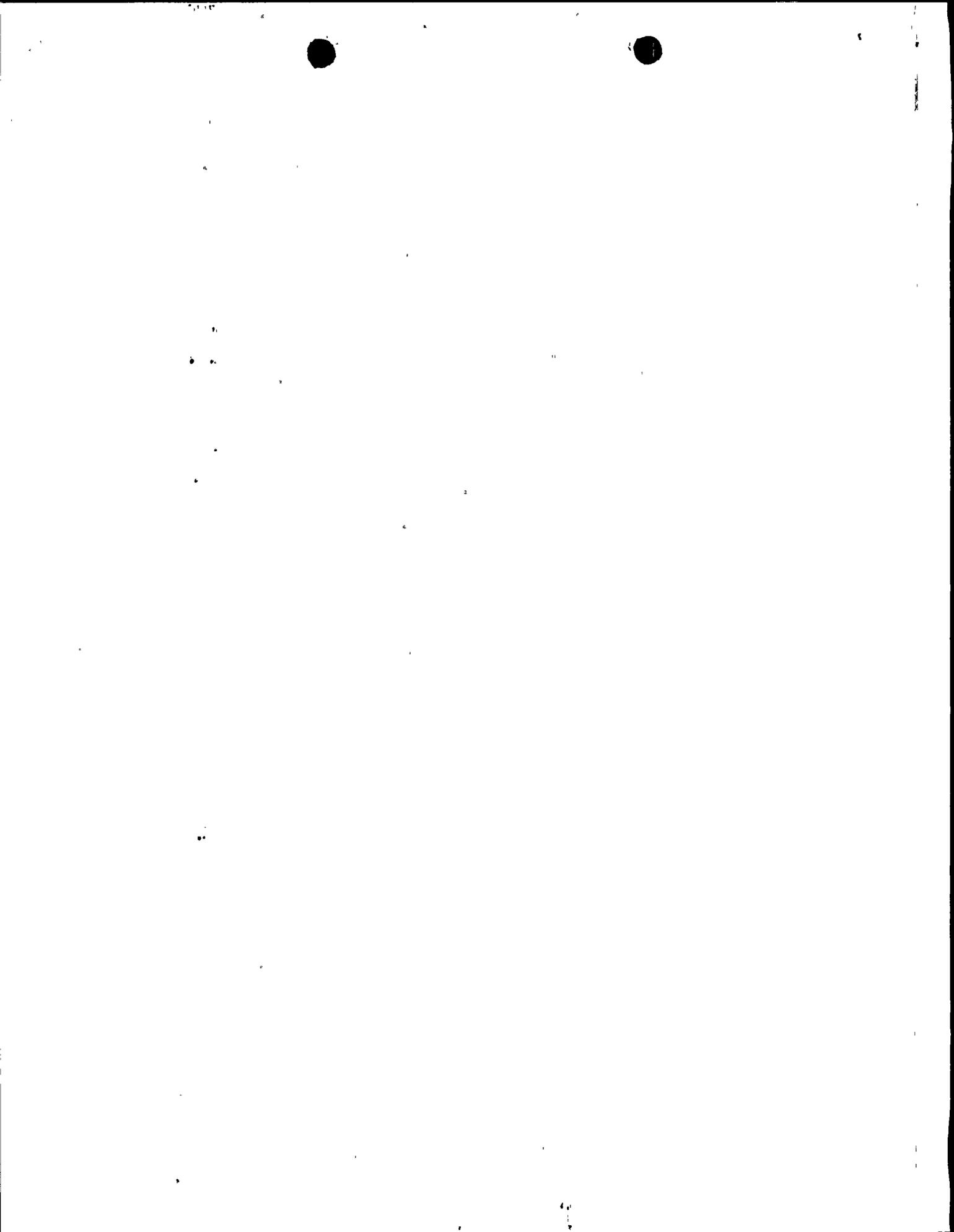


to justify summary disposition, even if the party opposing the motion presents no response.

Second, the applicant rests its motion for summary disposition in part upon intervenors' responses to interrogatories of last July and August. Intervenors have retained technical consultants for Contention 1 since August. Consequently, their case in support of that contention has progressed considerably in the intervening few weeks. The supporting affidavit of Dr. Grimm and this answer represent the initial fruits of the first-competent technical review of evidence relevant to Contentions 1A.-J. ever conducted in intervenors' behalf. The Board must look to the affidavit and the rest of intervenors' case in its present state to decide whether summary disposition is appropriate, not to the intervenors' case as it stood in its virtually undeveloped state one month ago.

The first point of this answer presents legal argument establishing the heavy burden the applicant carries in moving for summary disposition. The second point demonstrates how the intervenors' case as it exists today creates sufficient material issues of fact to withstand summary disposition.

Before turning to these two important points, we note that much of the legal and factual discussion presented in the Intervenors' Answer to NRC Staff's Motion for Summary Disposition dated September 23, 1976 is relevant to this answer to P.G. & E.'s summary disposition motion. Consequently, the remainder of this



answer will refer often to appropriate portions of the answer to the Staff motion. In addition, we note that the affidavit of Dr. Leslie Grimm supports intervenors' answers to both the Staff's and the applicant's motions for summary disposition.

I

THE PARTY MOVING FOR SUMMARY DISPOSITION BEARS A HEAVY BURDEN, WITH ALL DOUBTS RESOLVED AND FACTUAL INFERENCES MADE IN FAVOR OF THE OPPOSING PARTY ESPECIALLY IN MOVING FOR SUMMARY DISPOSITION OF NATIONAL ENVIRONMENTAL POLICY ACT ISSUES.

Nuclear Regulatory Commission Appeals and Licensing Boards have applied the principles governing summary judgment in the Federal Courts under the Federal Rules of Civil Procedure to summary disposition under 10 C.F.R. §2.749. Alabama Power Company (Joseph M. Farley Plant Units 1 and 2), ALAB-182, 7 AEC 210, 217 (March 7, 1974); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 78 (May 17, 1974); Gulf States Utilities Company (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRCI 246, 247 (March 20, 1975).

The legal principles established by the federal courts make summary judgment, and therefore summary disposition here, most difficult to obtain. These legal principles hold that the party seeking summary judgment or disposition must clearly and convincingly establish that no genuine issues of fact exist between the parties in the proceedings. In demonstrating the non-existence of such issues, the moving party bears a heavy burden with all



doubts as to the existence of factual issues being resolved in favor of the party opposing the motion. Furthermore, all plausible inferences drawn from undisputed facts that might themselves create a factual controversy must be viewed in the light most favorable to the party opposing the motion. Finally, a lenient standard favoring summary disposition is especially inappropriate here where the legal issue is whether the Staff FES complies as a matter of law with the Act's mandate to fully consider all adverse environmental impacts.

A full discussion of the authority for the above legal principles appears at pp. 4-25 of Intervenors' Answer to NRC Staff Motion for Summary Disposition dated September 23, 1976. We incorporate this discussion by reference into this answer as it clearly applies here to demonstrate the considerable burden the applicant bears in making this motion for summary disposition.

II

THE INTERVENORS' CASE AS IT PRESENTLY STANDS DEMONSTRATES THE EXISTENCE OF GENUINE FACT ISSUES AS TO CONTENTION 1.

The papers intervenors file today elucidate numerous issues of fact between the intervenors and the applicant. The affidavits from intervenors' technical expert, Dr. Leslie Grimm, directly contradicts P.G. & E.'s position that facts sufficient to show the adequacy of the Final Environmental Statement are undisputed. In addition, the several technical studies and reports cited in Dr. Grimm's affidavit and in the remainder of



this answer also show that factual controversies exist between intervenors and applicant. Finally, numerous issues of fact also arise from reasonable inferences that can be drawn from the Staff's own papers, as the remainder of this answer also explains.

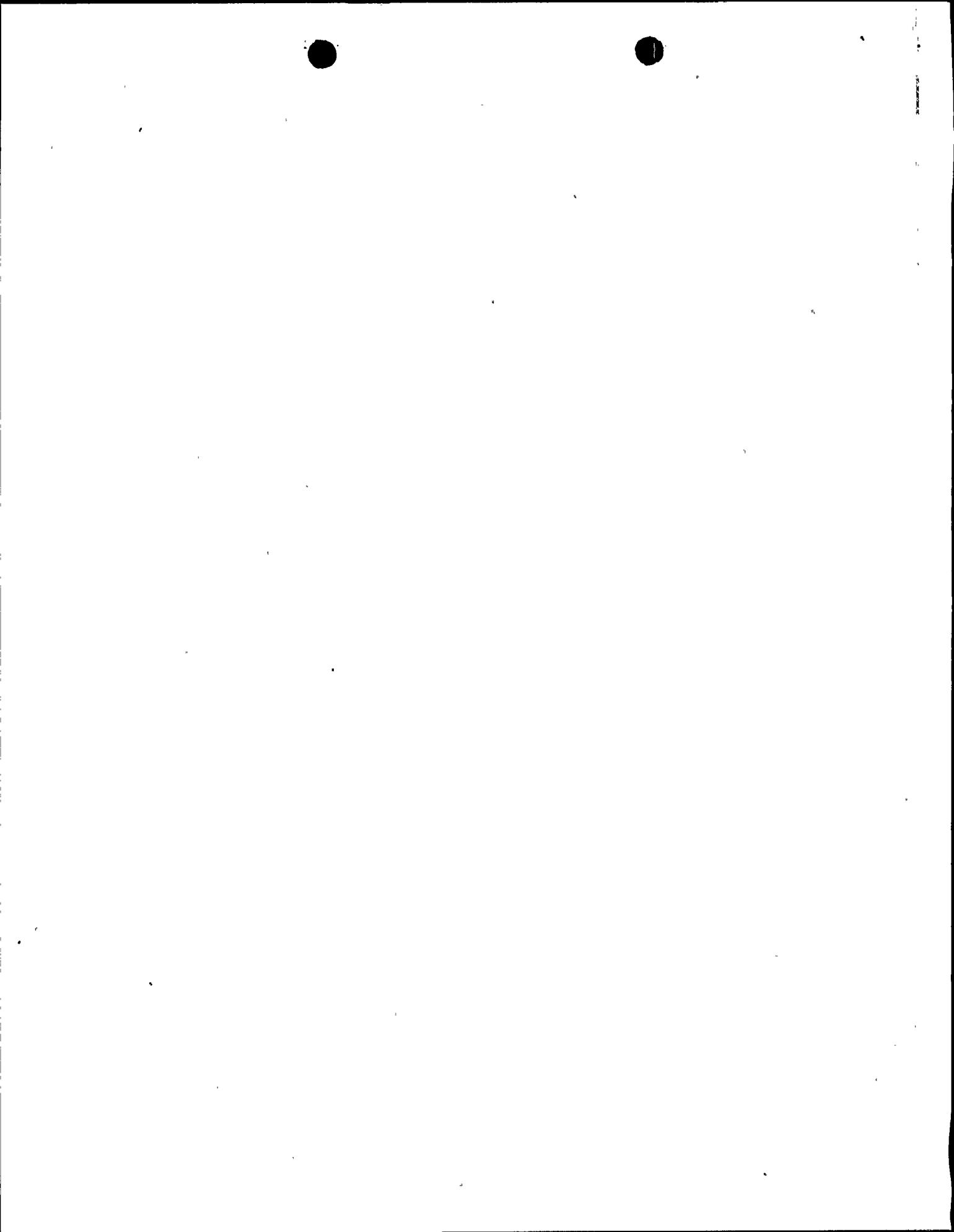
In light of the law of summary disposition which places the burden of convincingly showing a clear absence of factual controversies on the moving party and which requires that all plausible factual inferences be drawn in favor of the opposing party, the affidavits, studies and factual inferences that, by intervenors' submissions today, become part of intervenors' case clearly demonstrate that genuine factual controversies exist as to environmental Contention 1. The remainder of this answer explains in detail how intervenors' case as it now stands convincingly defeats the applicant's motion for summary disposition as to each contention at issue.

Contention 1C.

Questions of fact as to Contention 1C raised by applicant in its Motion for Summary Decision (see applicant's affidavit of James R. Adams, pp. 1-2) are substantially the same as those raised by the Staff in its Motion for Summary Disposition and supporting affidavits. Therefore, intervenors hereby incorporate by reference their answer to Staff's Motion for Summary Disposition as to Contention 1C here as their answer to the applicant's motion for summary disposition of Contention 1C.

Contention 1D.

Contention 1D reads: "Whether information developed subsequent to the Commission hearing in September 1973 demonstrates



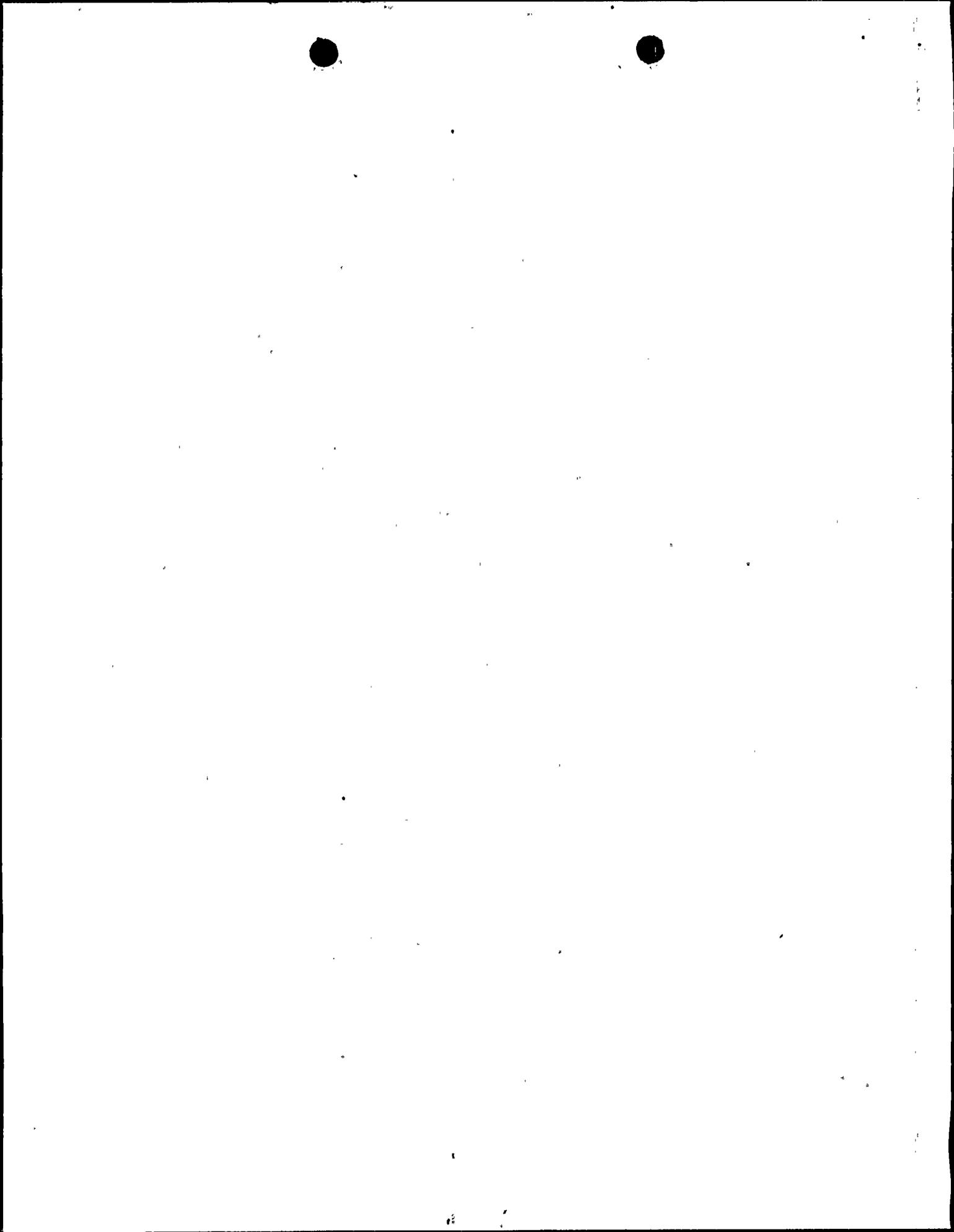
that the Staff's Final Environmental Statement (FES) adequately considers the extent or effect of the facilities' thermal plume on the environment, as to:

D. Quantitative data on sublethal thermal effects.

The Final Environmental Statement is inadequate in that conclusions as to sublethal effects are based upon insufficient studies. Sublethal effects include any long-term effect which reduces the animal's ability to survive and reproduce viable offspring. Intervenors contend that loss of organisms due to sublethal effects will have a serious detrimental impact on the marine environment of Diablo Cove and the surrounding nearshore area. The attached affidavit by Dr. Leslie Grimm (pp. 3-4) lists and disses several sublethal effects which were not addressed by the FES and which must be considered before the full impact of the cooling system on the marine environment can be assessed.

Because of inadequate consideration of sublethal effects on marine organisms due to the once-through cooling system, a material factual dispute exists between Staff and Intervenors. Therefore, summary disposition of Contention 1D. should be denied. Contention 1E.

Questions of fact as to Contention 1E raised by applicant in its Motion for Summary Decision (see applicant's affidavit of John T. Wells, p. 4) are substantially the same as those raised by the Staff in its Motion for Summary Disposition. Therefore, intervenors incorporate by reference their answer to



Staff's Motion for Summary Disposition of Contention 1E as their answer to applicant's motion for summary disposition as to Contention 1E.

Contention 1F.

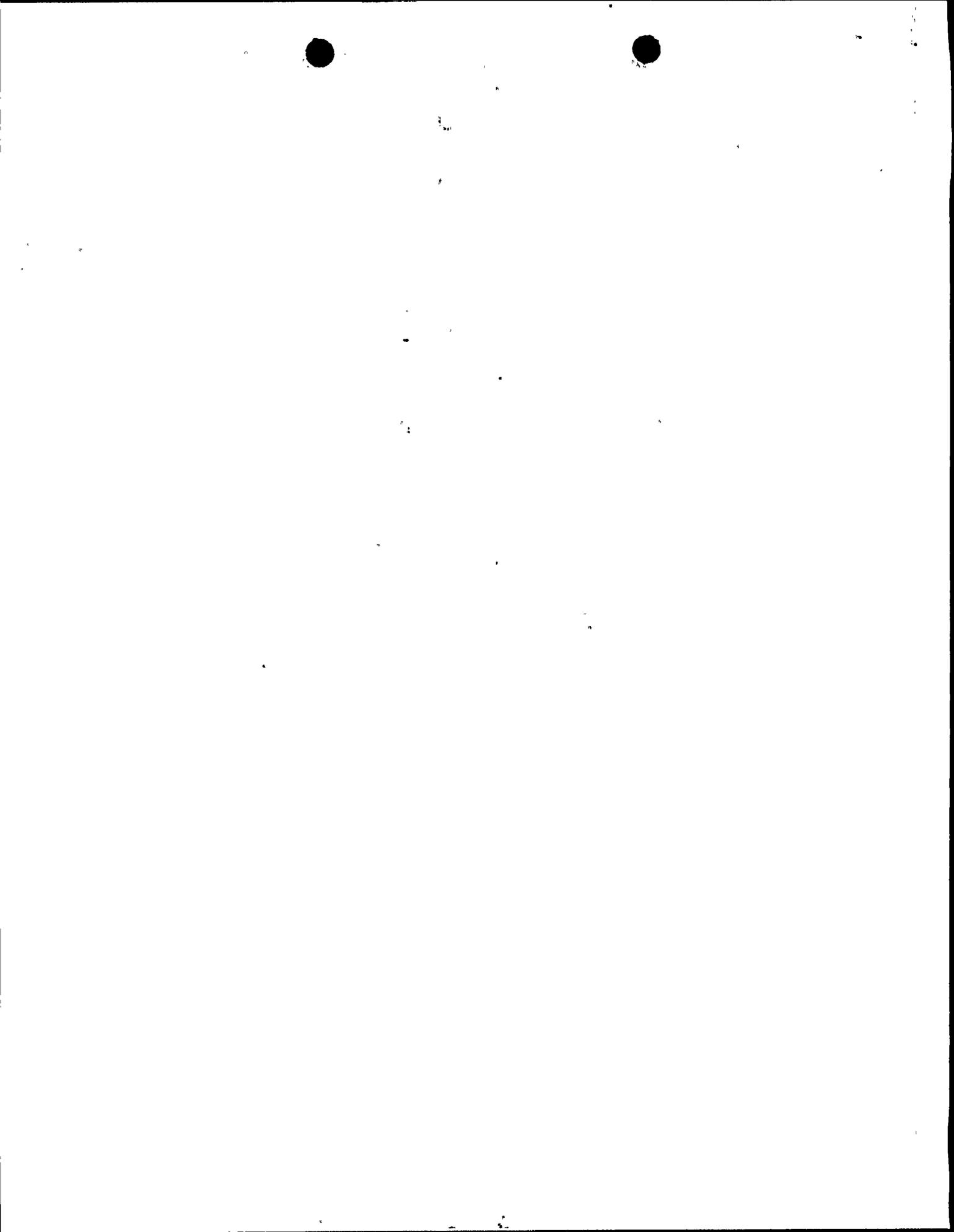
Questions of fact as to Contention 1F raised by applicant in its Motion for Summary Decision (see applicant's affidavit of James R. Adams, pp. 4-5) are substantially the same as those raised by the Staff in its Motion for Summary Disposition. Therefore, intervenors incorporate by reference their answer to Staff's Motion for Summary Disposition of Contention 1F here as their answer to applicant's motion for summary disposition as to Contention 1F.

Contention 1G.

Questions of fact as to Contention 1G raised by applicant in its Motion for Summary Decision (see applicant's affidavit of James R. Adams, pp. 7-11) are substantially the same as those raised by the Staff in its Motion for Summary Disposition. Therefore, intervenors incorporate by reference their answer to Staff's Motion for Summary Disposition of Contention 1G here as their answer to applicant's motion for summary disposition as to Contention 1G.

Contentions 1H and 1I

Questions of fact as to Contentions 1H and 1I raised by applicant in its Motion for Summary Decision (see applicant's affidavit of John T. Wells, pp. 5-6) are substantially the same as those raised by the Staff in its Motion for Summary Disposition.



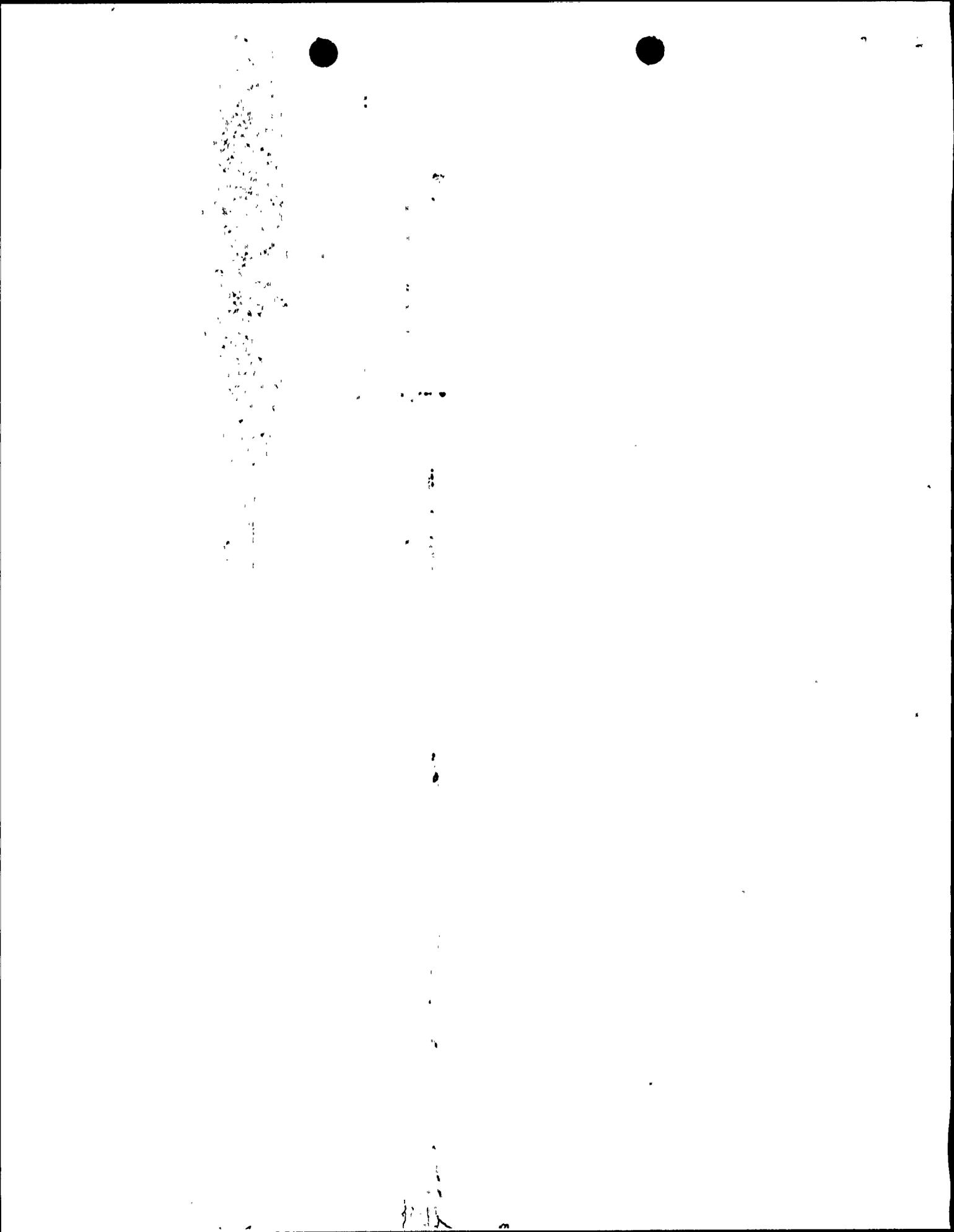
Therefore, intervenors incorporate by reference their answer to Staff's Motion for Summary Disposition of Contentions 1H and 1I here as their answer to applicant's motion for summary disposition of Contention 1H and 1I.

Contention 1J.

Questions of fact as to Contention 1J raised by applicant in its Motion for Summary Decision (see applicant's affidavit of James R. Adams, pp. 13-16) are substantially the same as those raised by the Staff in its Motion for Summary Disposition. Therefore, intervenors hereby incorporate by reference their answer to Staff's Motion for Summary Disposition of Contention 1J here as their answer to applicant's motion for summary disposition of Contention 1J.

Conclusion

Because of the well established legal principles which place a heavy burden on the party moving for summary disposition and because intervenors' case as it presently stands demonstrates, by way of affidavit, technical literature and plausible inferences, that many factual issues exist between intervenors and the applicant, the applicant's motion for summary disposition should be denied.



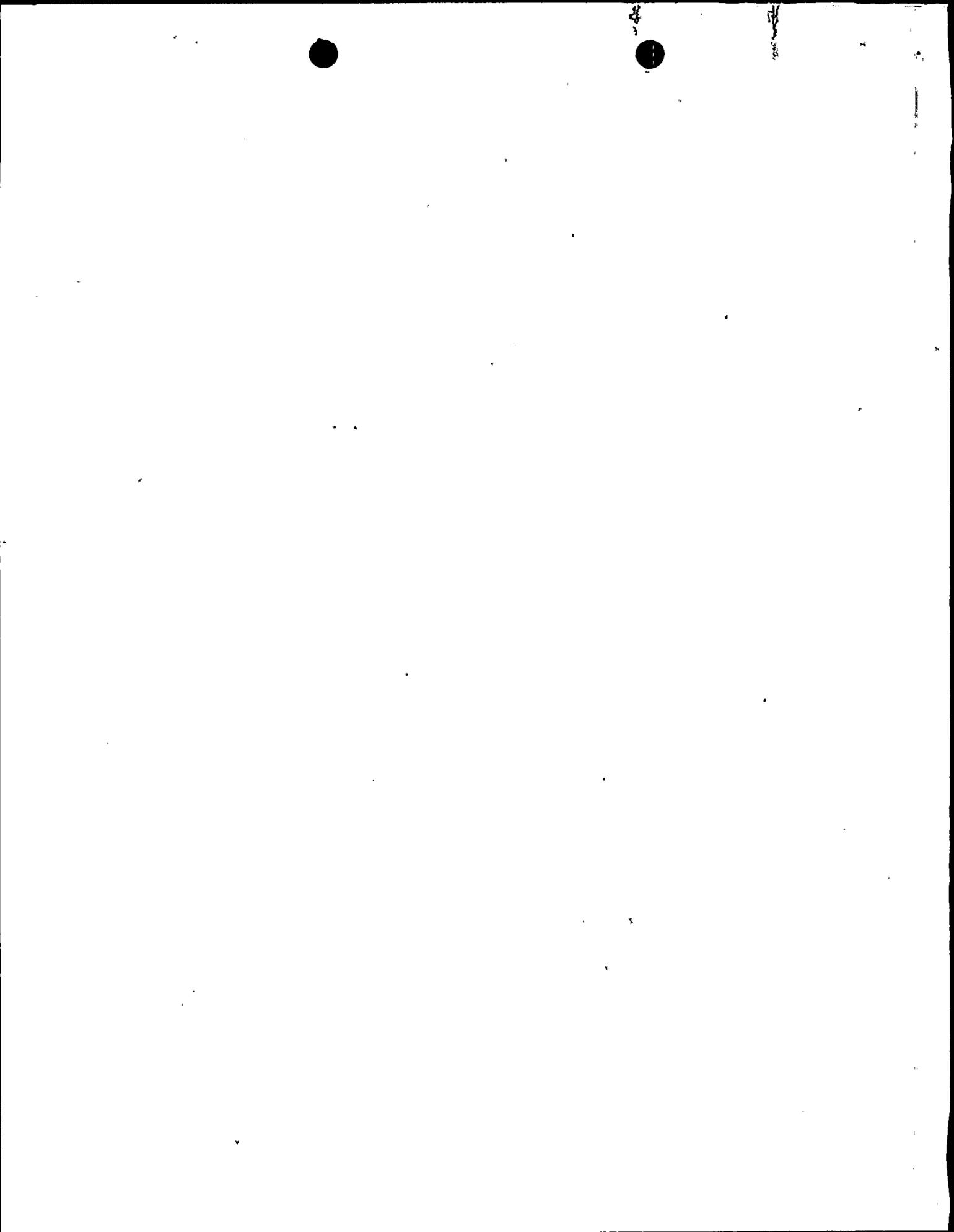
DATED: September 23, 1976

Respectfully submitted,

BRENT N. RUSHFORTH
JAMES GEOCARIS
Center for Law in the Public Interest
10203 Santa Monica Boulevard
Los Angeles, California 90067
(213) 879-5588

BY 
James Geocaris

Attorneys for Intervenors
Scenic Shoreline Preservation
Conference
San Luis Obispo Mothers for Peace
Sandra Silver
Gordon Silver
Ecology Action Club
John J. Forster



INTERVENORS' STATEMENT OF GENUINE ISSUES OF FACT
BETWEEN APPLICANT AND INTERVENOR FOR CONTENTIONS 1A THROUGH 1J

Contentions 1A, 1B, 1C, 1E, 1F, 1G, 1H, 1I, and 1J.

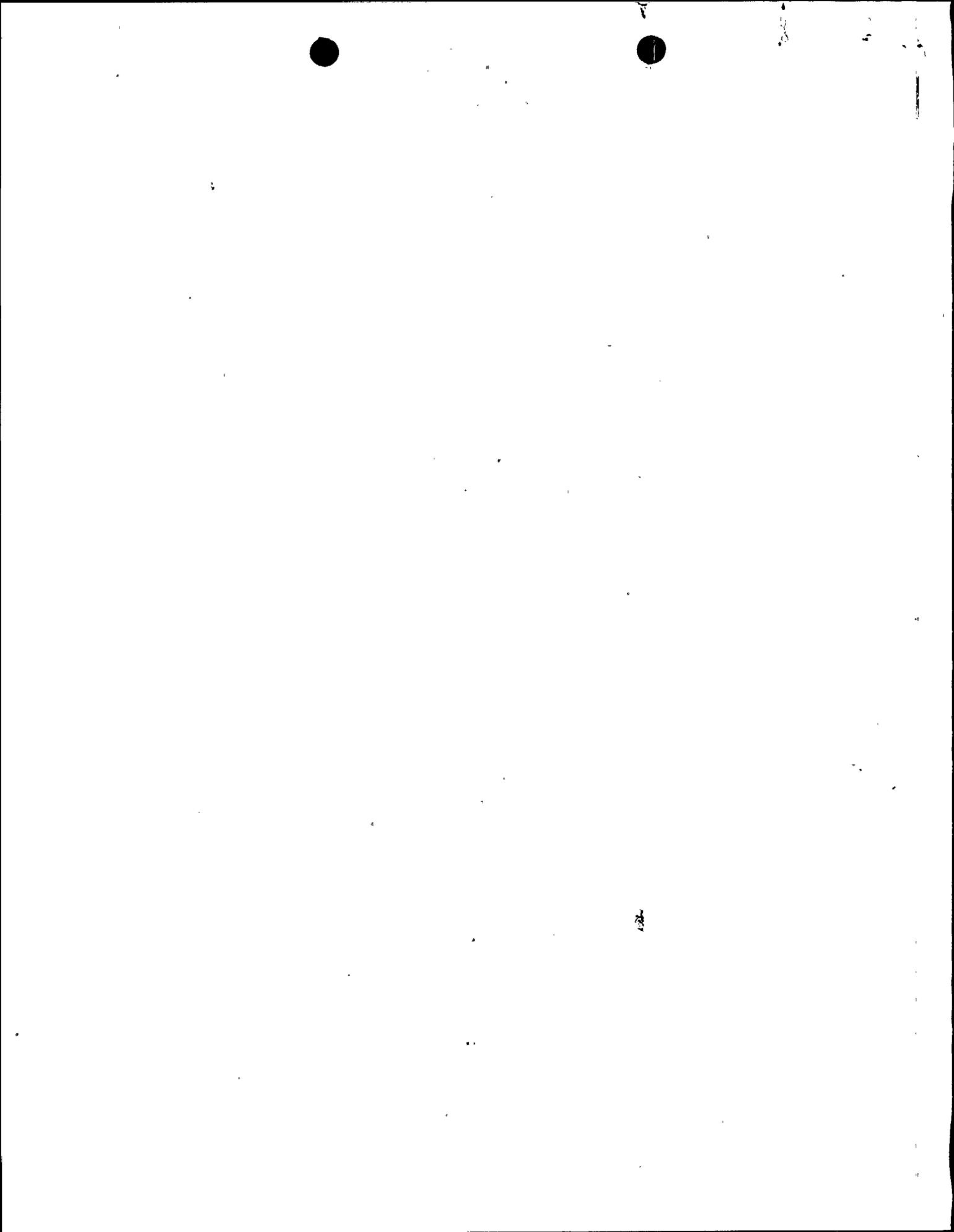
Because applicant's Motion for Summary Decision as to Contentions 1A, 1B, 1C, 1E, 1F, 1G, 1H, 1K, and 1J raises substantially the same issues of fact as the Staff's Motion for Summary Disposition as to Contentions 1A, 1B, 1C, 1E, 1F, 1G, 1H, 1I, and 1J, Intervenors hereby incorporate by reference their Statement of Genuine Issues of Fact between Staff and Intervenors as to Contentions 1A, 1B, 1C, 1E, 1F, 1G, 1H, 1I, and 1J as their statement of Genuine Issues of Fact between Applicant and Intervenors for those same contentions.

Contention 1D

Intervenors have the following factual disputes with Applicant over Applicant's assertions regarding sublethal thermal effects:

1. The Applicant's conclusion that all significant sublethal effects were adequately examined and assessed.
2. The Applicant's assertion that sublethal thermal effects on Diablo Cove organisms are minimal.
3. The Applicant's conclusion that sublethal effects on Diablo Cove organisms will have no significant effect on the marine environment of Diablo Cove and the surrounding area.

Intervenors' technical consultant on the biological impacts of the cooling system operation has not had sufficient



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opportunity to review literature relating to Intervenor's contentions and to consult with other experts in relevant fields, due to the fact that Intervenor only recently obtained the assistance of this technical consultant.

In addition, Intervenor has contacted three additional experts in fields relating to Contentions 1C through 1J only this week who may be able to provide considerable additional information to Intervenor regarding these contentions. However, if these experts can help Intervenor, they will need time for technical review and evaluation. Therefore, Intervenor would like to reserve the right to supplement the list of factual disputes relevant to Contentions 1C through 1J until technical consultants acting in their behalf have had sufficient time to assess available documents and relevant literature.



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