

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

INTERVENORS' SUPPLEMENTARY ANSWER TO
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, moved this Board to summarily dispose of several environmental issues relating to adverse impacts on marine biota. Intervenors answered Applicant's motion on September 23 based on the affidavit of a technical consultant, Dr. Leslie Grimm, who had only begun work for Intervenors and their recently retained counsel a few days before Intervenors filed their answer.

While the original answer and supporting affidavit raised many disputed issues of fact regarding the contentions for which the Applicant sought summary disposition, Dr. Grimm did not have sufficient time to review the voluminous technical records relevant to the contentions at issue or to conduct an

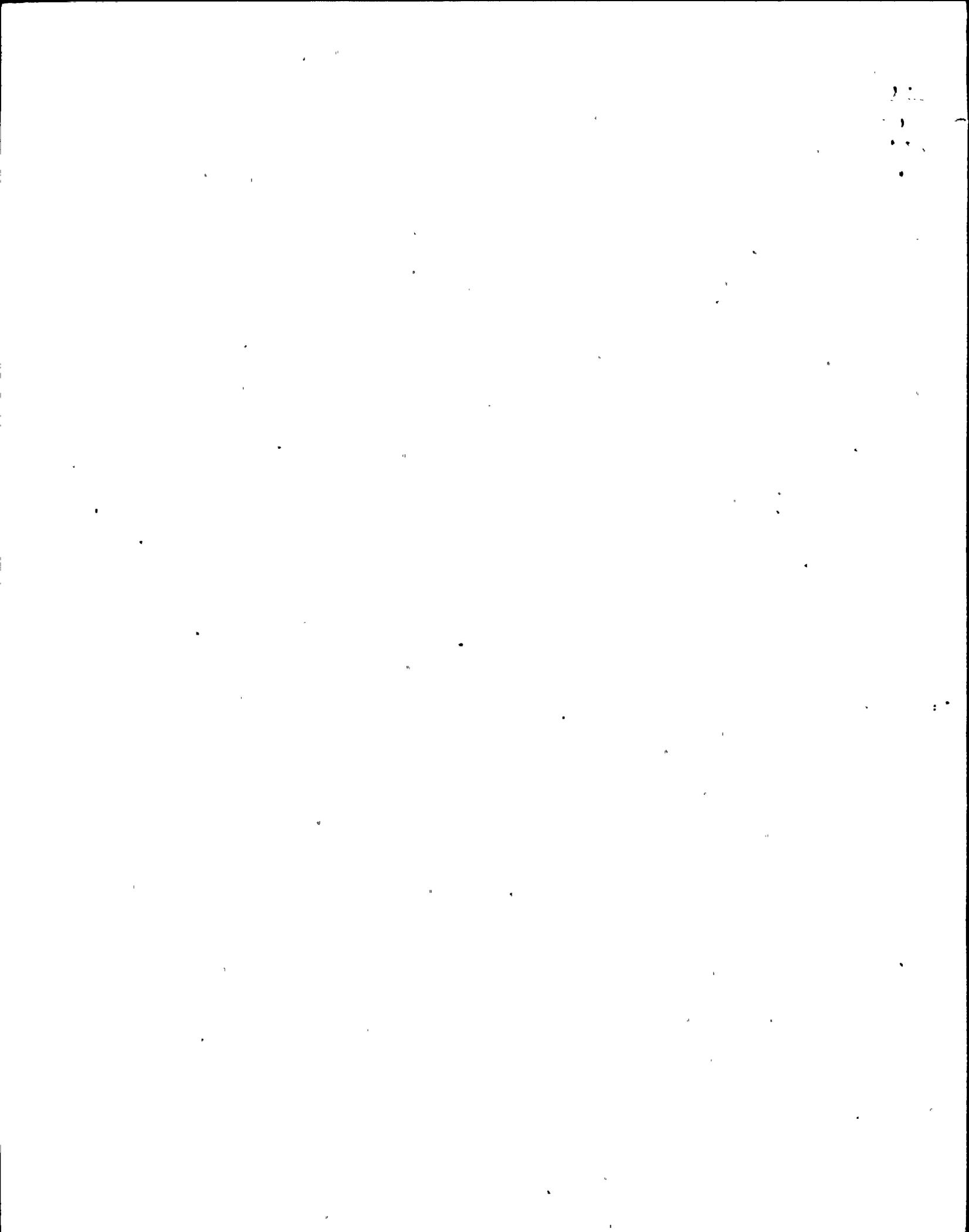


adequate search for relevant literature. As a result, her affidavit of September 23 was, of necessity, an incomplete presentation of Intervenor's case against summary disposition.

With this Supplementary Answer, Intervenor's add considerable technical evidence supporting their opposition to PG&E's motion for summary disposition. Dr. Grimm submits another affidavit which presents new analysis of the inadequacies of the Applicant's motion and cites several additional technical studies that support Intervenor's case. In addition, Dr. James Enright of the Scripps Institute has submitted an affidavit in Intervenor's behalf presenting further expert analysis of the inadequacies of the Staff's presentation.

Taken together, the affidavits submitted with this supplementary answer and the analysis in the answer itself demonstrate that many genuine issues of fact exist between Intervenor and Applicant over environmental issues relating to marine biota. These materials show that facts and informed technical opinion exist which cast grave doubts upon the adequacy of the assessment of adverse environmental impacts appearing in the Final Environmental Statement.

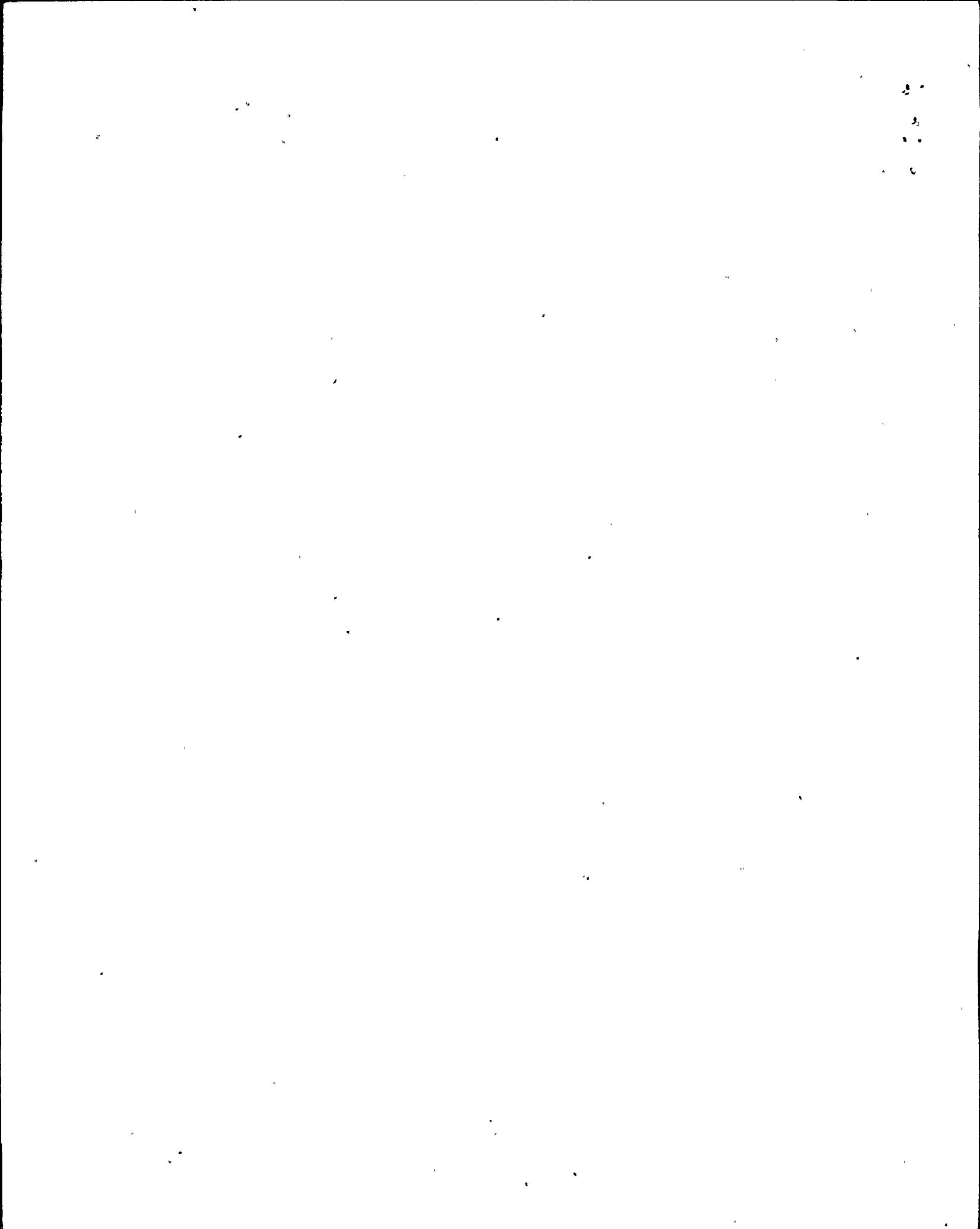
We wish to remind this Board that the law of summary disposition places a heavy burden on Applicants as the moving party here. While PG&E presented no legal argument regarding the law of summary disposition in its motion, Intervenor presented a lengthy legal argument in their original answer which demonstrated that the party moving for summary



disposition must demonstrate clearly and convincingly that no material issues of fact exist between the parties. Furthermore, because this motion involves factual issues relating to the adequacy of a NEPA evaluation, and summary disposition of any environmental issues may jeopardize the legal sufficiency of that environmental evaluation under the National Environmental Policy Act by excluding from consideration responsible scientific opinion questioning the adequacy of the FES, this Board should not grant the summary disposition motion lightly.

In light of the law of summary disposition in the context of NEPA evaluations, Intervenor's submission today which presents facts and responsible technical opinion challenging the adequacy of the Staff's NEPA evaluation clearly defeats the Applicant's motion for summary disposition. The remainder of this answer details the issues of fact this supplementary answer raises as to several of the marine biota contentions.^{1/}

^{1/} We note here that much of the factual discussion on the marine biota contentions appearing in "Intervenors' Supplemental Answer to NRC Staff's Motion for Summary Disposition" dated October 22, 1976 is relevant to this supplemental answer to PR&E's summary disposition motion. Consequently, the remainder of this supplemental answer will refer to appropriate portions of Intervenor's supplemental answer to the Staff's motion. Also, we note that the affidavits of Drs. Grimm and Enright support Intervenor's supplemental answer to both the Staff's and the Applicant's motion for summary disposition.



I

INTERVENORS' SUPPLEMENTARY MATERIALS
FURTHER DEMONSTRATE THE EXISTENCE OF
MATERIAL ISSUES OF FACT BETWEEN
INTERVENORS AND APPLICANT

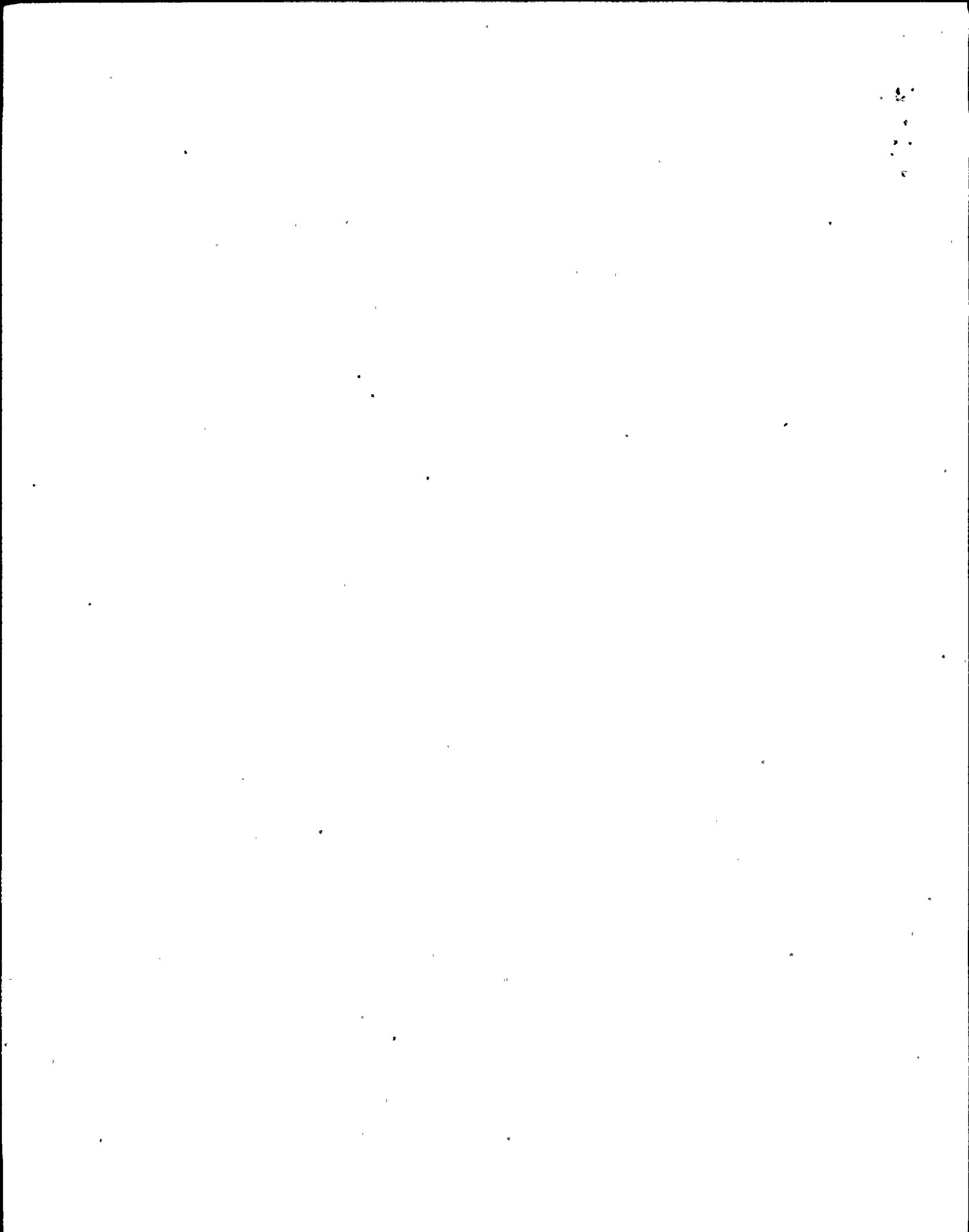
A. Contention 1D

In their original answer to P.G. and E.'s motion for summary disposition, Intervenor presented materials demonstrating the existence of many material factual issues between Intervenor and Applicants with regard to environmental contentions 1C-J. This supplementary answer further delineates factual issues relevant to environmental contentions 1D, 1F, and 1G.

Intervenor's supplementary materials delineate three issues of fact relevant to contention 1D which encompasses sublethal effects on marine biota. First, Applicant failed to evaluate and the Staff failed to consider true sublethal effects experienced by marine organisms due to thermal change. Such "sublethal" effects as the inability to swim, studied by Icanberry and Adams, are in fact early signs of death, while true sublethal effects, such as reduced feeding, loss of ability to reproduce, or other effects listed in the Affidavit of Leslie M. Grimm were not explored by the Applicant or the Staff.

(See Addendum to Affidavit of Leslie M. Grimm pp. 1-2)

Second, delayed mortality studies such as those reported in the FES, may be useful in detecting sublethal effects, but only when carried on for periods sufficient in length as related to the generation time of the organism studied. Tests by Applicant



were too short for most species involved. (See Addendum to Affidavit of Leslie M. Grimm, p. 5)

Third, neither maximum thermal tolerances nor optimum temperature regimes were presented for either juveniles or adults of most fish species found in Diablo Cove. John R. Clarke reports that temperature affects appetite, digestion, growth, activity, oxygen demand, longevity, and production of fish. None of these areas has been considered by the Staff.

In sum, because of inadequate information and conflicting technical literature, material factual disputes exist between Applicant and Intervenors on the above three points. Therefore, Applicant's Motion for Summary Decision as to Contention 1D should be denied.

B. Contention 1F

As stated in Intervenors' Answer to Applicant's Motion for Summary Decision, dated September 23, 1976, Applicant's Motion and Staff's Motion for Summary Disposition of Contention 1F raise substantially identical issues of fact. Intervenors therefore hereby incorporate by reference their Supplementary Answer to NRC Staff's Motion for Summary Disposition as to Contention 1F as their supplementary answer to Applicant's Motion for Summary Disposition of contention 1F.

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C. Contention 1G

As stated in Intervenor's Answer to Applicant's Motion for Summary Decision, dated September 23, 1976, Applicant's Motion and Staff's Motion for Summary Disposition of Contention 1F raise substantially identical issues of fact. Intervenor therefore hereby incorporate their Supplementary Answer to NRC Staff's Motion for Summary Disposition as to Contention 1G as their supplementary answer to Applicant's Motion for Summary Disposition of Contention 1F.

II

CONCLUSION

The affidavits, references to technical literature and analysis Intervenor submit as their supplementary answer clearly delineate many genuine issues of fact between Intervenor and the Applicant as to several of the environmental contentions relating to marine biota. These supplementary materials, taken together with Intervenor's original answer and its supporting affidavit, clearly demonstrate that if this Board fails to deny Applicant's motion, it will exclude from these proceedings responsible scientific opinion that it must consider pursuant to the National Environmental Policy Act. Therefore, under both the law of summary decision and the mandate of NEPA, Applicant's Motion for Summary Disposition should be denied.

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DATED: October 22, 1976

Respectfully submitted,

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INTERVENORS' SUPPLEMENTARY STATEMENT OF GENUINE
ISSUES OF FACT BETWEEN APPLICANT AND INTERVENORS
FOR ENVIRONMENTAL CONTENTIONS 1D, 1F, and 1G

Intervenors have the following additional factual disputes with the Applicant over its factual assertions regarding the effect that the once-through cooling system will have on the marine environment:

Contention 1D

1. The Applicant's contention that adequate studies of sublethal thermal effects on marine organisms were performed.
2. The Applicant's contention that delayed mortality studies performed by Applicant were adequate to assess sublethal thermal effects on marine organisms.

Contentions 1F and 1G

Because Applicant's Motion for Summary Decision raises substantially identical issues of fact as to Contentions 1F and 1G, to those raised by NRC Staff's Motion for Summary Disposition, Intervenors hereby incorporate their Supplementary Statement of Genuine Issues of Fact Between Staff and Intervenors for Environmental Contentions 1F and 1G.

Because Intervenors technical review of environmental impacts on marine biota is continuing, Intervenors reserve the right to supplement the above list of genuine issues of fact as their technical review progresses.

