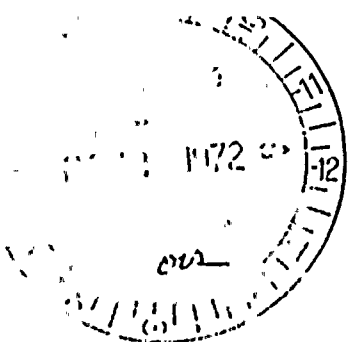


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FED. REG. FAC. 50-410



UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

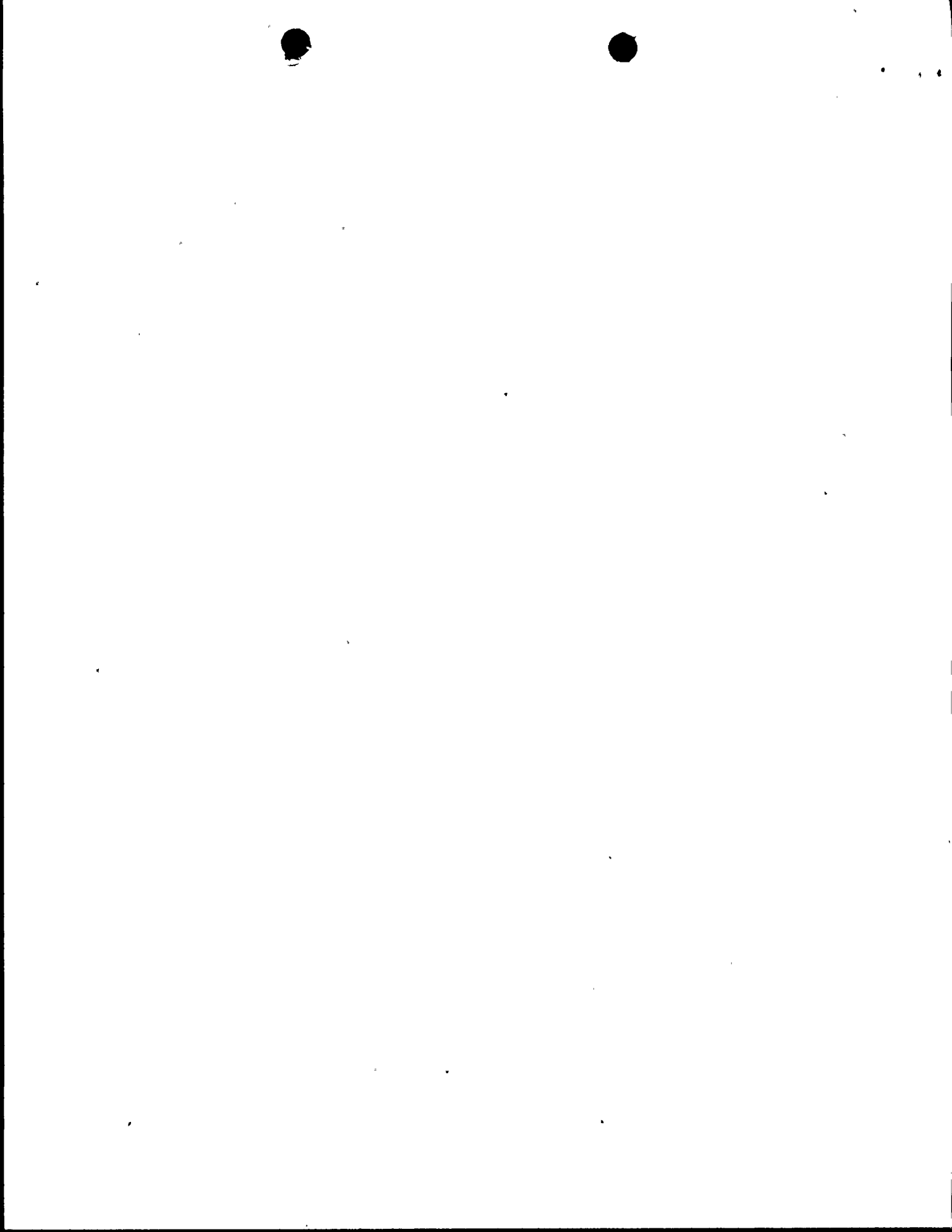
In the matter of
NIAGARA MOHAWK POWER CORP.
(Nine Mile Point, Unit No. 2)

Docket No. 50-410

REPLY OF PETITIONERS SUZANNE WEBER AND
ECOLOGY ACTION TO ANSWERS TO THEIR
PETITION FILED BY THE AEC REGULATORY
STAFF AND THE APPLICANT

1. The Staff and the Applicant have taken the position that most of the allegations contained in the Affidavit in Support of Petition to Intervene (hereinafter, the Affidavit) do not set forth petitioners' contentions with the degree of "particularity" purportedly required by 10 CFR 2.714(a). While we disagree, our disagreement is not -- as the Applicant suggests (Applicant's Answer, par. 1(a)) -- a "challenge" to the validity" of 10 CFR 2.758(a). In our view, 10 CFR 2.714(a) was not intended to condition intervention at the construction permit stage on an unrealistic pleading requirement and should not be so applied.

Furthermore, we contend that any such application here -- where petitioners have a personal interest affected by the proceeding and where intervention is requested at the earliest stages of the application for a construction permit and in no way threatens to delay the proposed facility -- would be inconsistent with the objectives of the restructured rules, in



violation of section 189 of the Atomic Energy Act and sections 5 and 6 of the Administrative Procedure Act, and a denial of due process.¹

On any event, we offer the following in amplification of those paragraphs of the Affidavit which the Staff's and Applicant's objections on the ground of "vagueness" have focused upon.

2. With respect to the allegations of paragraph 4(a) of the Affidavit-- The emergency plan fails substantially to meet the requirements of Appendix E to part 50 of the Commission's Rules and Regulations, as amplified in the "Guide to the Preparation of Emergency Plans for Production and Utilization Facilities" (USAEC December 1970):

"When immediate protective measures for the public are required predetermined measures...should be specified for implementation at pre-established protection action levels." (Guide, Section IV)

¹We note that one of the purposes of the restructured rules is "to provide potential intervenors a better opportunity for more meaningful participation in the hearing process". (37 FR 15128). We do not see how this is accomplished by limiting intervention to those who can plead with the degree of particularity which the Staff and the Applicant would seem to require. If their position is accepted, the restructured rules will have diminished, not increased, the opportunity for "meaningful participation in the hearing process." We do not understand why the Commission would require greater particularization of contentions at this threshold, pleading stage than would a court require of a complaint. Under the Commission's Rules (as well as under the Federal Rules of Civil Procedure after which many of the restructured rules are patterned), the particularization of a pleading which is sufficiently specific to identify the issues should be left to the discovery stage. Petitioners' Affidavit here meets this test. Neither the Staff nor the Applicant has expressed any inability to identify the areas of Petitioners' concern.



The site emergency plan (i) fails to provide evidence that specific prior logistical arrangements have been made with appropriate groups should an offsite response become necessary (Section II of the Guide), and (ii) fails to consider the consequences of major releases of radioactivity which could affect members of the public in unrestricted areas (Section III of the Guide). For example, hospital arrangements have been made for only up to 6 contaminated victims, a number grossly inconsistent with the possible consequences of a major accident. [REDACTED]

3. With respect to the allegations of paragraph 4(b) of the Affidavit-- Gaseous radiation releases from the site currently exceed those permissible under the applicable standards and criteria. See Table Q.J.6.1 in Supplement 11 to the FSAR for the James A. FitzPatrick Nuclear Power Plant (Docket No. 50-333). Upon information and belief, nothing is being done to correct this violation.

4. With respect to the allegations of paragraph 4(d) of the Affidavit -- the "once through" cooling system proposed by the Applicant does not constitute either "the best practicable control technology" or "the best available control technology" which, pursuant to the Federal Water Pollution Control Act amendments of 1972 must be achieved by July 1, 1977 and July 1, 1983, respectively. What's more, the Applicant's Environmental Report reveals the insufficiency of studies and calculations of the compliance of this proposed cooling system with the water quality standards and criteria which are the subject of subparagraphs 4(d) (ii) and 4(d) (iii) of the Affidavit. More specifically, the Applicant has pro-



vided no baseline and post operational data to support its implicit conclusion in the Environmental Report (Section 5) that Nine Mile Point, Unit #1 has had no significant adverse effect on the lake ecosystem. No trophic diversity indices are provided to support the Applicant's conclusions. No specific studies on baseline and post operational fish egg and larvae abundance have been performed (see Environmental Report, Supplement 2). The Applicant has failed to show that the intake and discharge from one plant has^{had} an essentially neutral effect on the immediate lake ecosystem, and has also failed to show that two additional facilities at the site can be expected to produce no significant adverse effects.²

5. The Staff has taken the position that paragraphs 4(e) and 4(f) of the Affidavit will not support intervention with respect to the issues raised therein. According to the Staff, those specifications are "obviously intended" simply to particularize the petitioners' contention that "the Commission will not comply with NEPA" and, the Staff further argues, such a contention "is clearly

²The Staff is silent with respect to the Applicant's assertion that section 511(c)(2) of the Federal Water Pollution Control Act Amendments of 1972 "removes any authority which the Commission might otherwise have had to consider" the water quality aspects of the within application. (Applicant's Answer, par. 1(f)). If the Staff's silence reflects its disagreement with this contention, then we concur. The Commission retains jurisdiction over water quality considerations. It cannot license a facility which does not comply with applicable water quality standards. (See section 401(a) of the FWPCA of 1972). What's more, the impact of the proposed facility upon water quality must still be evaluated by the Commission in assessing the balance mandated by NEPA. (See CEQ, third Annual Report at p. 229).

We would also note our disagreement with the bold assertion that the Applicant is nowhere required to demonstrate its compliance with applicable water quality standards (Applicant's Answer, par 1(f)). Such a showing by the Applicant is required by paragraph 4(A)(4) of Appendix D to 10 CFR part 50.



premature" (Staff's Answer, pp. 3-4). We take issue with the Staff's mischaracterization of the thrust of petitioners' allegations, as well as with the Staff's argument that the NEPA issue is "premature."

Firstly, while the allegations of paragraphs 4(e) and 4(f) of the Affidavit do relate to petitioners' contention that an affirmative finding on Issue 5 specified in the Notice of Hearing cannot be made, these allegations also relate to petitioners' contention that an affirmative finding cannot be made on Issue 1 specified in that Notice. The allegations of each subparagraph of paragraph 4(e) of the Affidavit concern the impact upon the environment of the radiation releases incident to certain activities and risks associated with the proposed plant. These allegations clearly bear upon Issue 1 as well as Issue 5.³ Similarly relevant to both Issues 1 and 5 are the allegations of each subparagraph of paragraph 4(f) of the Affidavit which, collectively, challenge the asserted need for the power from the proposed facility.

Secondly, even assuming (as the Staff erroneously does) that the allegations of paragraphs 4(e) and 4(f) relate only to Issue 5 (the NEPA issue), petitioners' contentions as therein specified

³We are aware of a recent decision by an Atomic Safety and Licensing Appeal Board which it is here argued by both the Staff and the Applicant requires a ruling that the allegations of paragraphs 4(e)(i) and 4(e)(ii) of the Affidavit relate to matters beyond the scope of this proceeding. See In the Matter of Vermont Yankee Nuclear Power Corp., Docket No. 50-271 (Oct. 11, 1972). We believe that this decision is not applicable here since it was made in a proceeding on an application for a license under section 192 of the Atomic Energy Act. In any event, we respectfully disagree with that decision and urge, as more soundly reasoned, decisions such as Lathan v Volpe, 4 ERC 1487 (D. Wash., August 4, 1972), holding that NEPA requires consideration of a project's off-site impacts.



are not "premature". Appendix D to part 50 requires the Applicant's Environmental Report to discuss "the environmental impact of the proposed action" and "alternatives to the proposed action" (10 CFR Part 50, App. D, par.4(A)(1)(a) and (c)). Paragraphs 4(c) and 4(f) of the Affidavit allege non-compliance with these directives. This issue is ripe for determination now.⁴

Thirdly, it is difficult for us to comprehend how it could be "premature" to raise the NEPA issues now, when any later attempt to do so would surely be met by the contention that intervention was time-barred under 10 CFR 2.714(a). While such a time-barred petitioner could obtain review of the adequacy of the Commission's environmental impact statement in a plenary lawsuit, such a lawsuit is hardly a desirable substitute for determination of the NEPA issues within the licensing process by an Atomic Safety and Licensing Board. Indeed, a rule which removed jurisdiction to determine the NEPA issues from the Licensing Board--the practical effect of the "prematurity" argument here urged by the Staff -- would be in flat contradiction

⁴At page 4 of the Staff's Answer, there appears an invitation to petitioners to cite to "the provisions of Appendix D" which require the Applicant to include in its Environmental Report a discussion of the matters to which reference is made in subdivisions f(i), f(ii) and f(iv) of paragraph 4 of the Affidavit. The requested citation is Appendix D, paragraphs 4(a)(1)(c) and 4(A)(2). See also Guidelines 1 and 9.1 of the "Guide to the Preparation of Environmental Reports for Nuclear Power Plants" issued for comment by the Commission in August, 1972.



of NEPA's directive that the environmental impact statement produced by the Commission pursuant to section 102(2)(c) of the Act "shall accompany the proposal through the existing agency review process."⁵

6. The Staff has taken the position that Ecology Action should not be permitted to intervene because the Petition and Affidavit "(1) do not allege or establish that Ecology Action is authorized to act on behalf of its members or that Suzanne Weber is authorized to act on behalf of Ecology Action and (2) they [the Petition and Affidavit] do not identify by name or address any member of Ecology Action other than Suzanne Weber."

This second alleged deficiency is cured, we assume, by attaching hereto and making part hereof a current membership list of Ecology Action. As is evident from this list, the vast majority of Ecology Action's members reside close enough to the plant site to be at risk of serious, if not fatal, injury in the event of a major accident.

⁵The Staff's Answer suggests that the allegations of paragraphs 4(e) and 4(f) of the Affidavit are too "vague" as well as "premature". We have already addressed ourselves to this "vagueness" contention in general. See supra at par 1. We would add here that the "vagueness" argument is even less appropriate when it is addressed to contentions with respect to the NEPA issues, such as paragraphs 4(e) and 4(f) of the Affidavit. We think that to read 10 CFR 2.714(a) to condition intervention upon greater particularization of the NEPA contentions would violate NEPA's mandate to interpret and administer all the "policies, regulation, and public laws of the United States in accordance with the policies of that Act" to the fullest extent possible." See Greene County Planning Board v FPC 455 F 2d 412(2d Cir 1972); Calvert Cliffs' Coordinating Committee v AEC, 449 F2d 1109,1117-19(D.C.Cir.1971).



Insofar as the first alleged deficiency is concerned, the short answer to the Staff's contention is that the supposedly "missing" allegations are supplied as a matter of law by 10 CFR 2.708 which provides: "The signature of a person signing in a representative capacity is a representation that the document has been subscribed in the capacity identified with full authority...."

In any event, the undersigned states that Ecology Action has been duly authorized by its members to intervene in their behalf (and in its own behalf) in this proceeding and that Suzanne Weber has been duly authorized to act for Ecology Action.

Suzanne Weber
Suzanne Weber

Ecology Action
by Suzanne Weber
Suzanne Weber, President



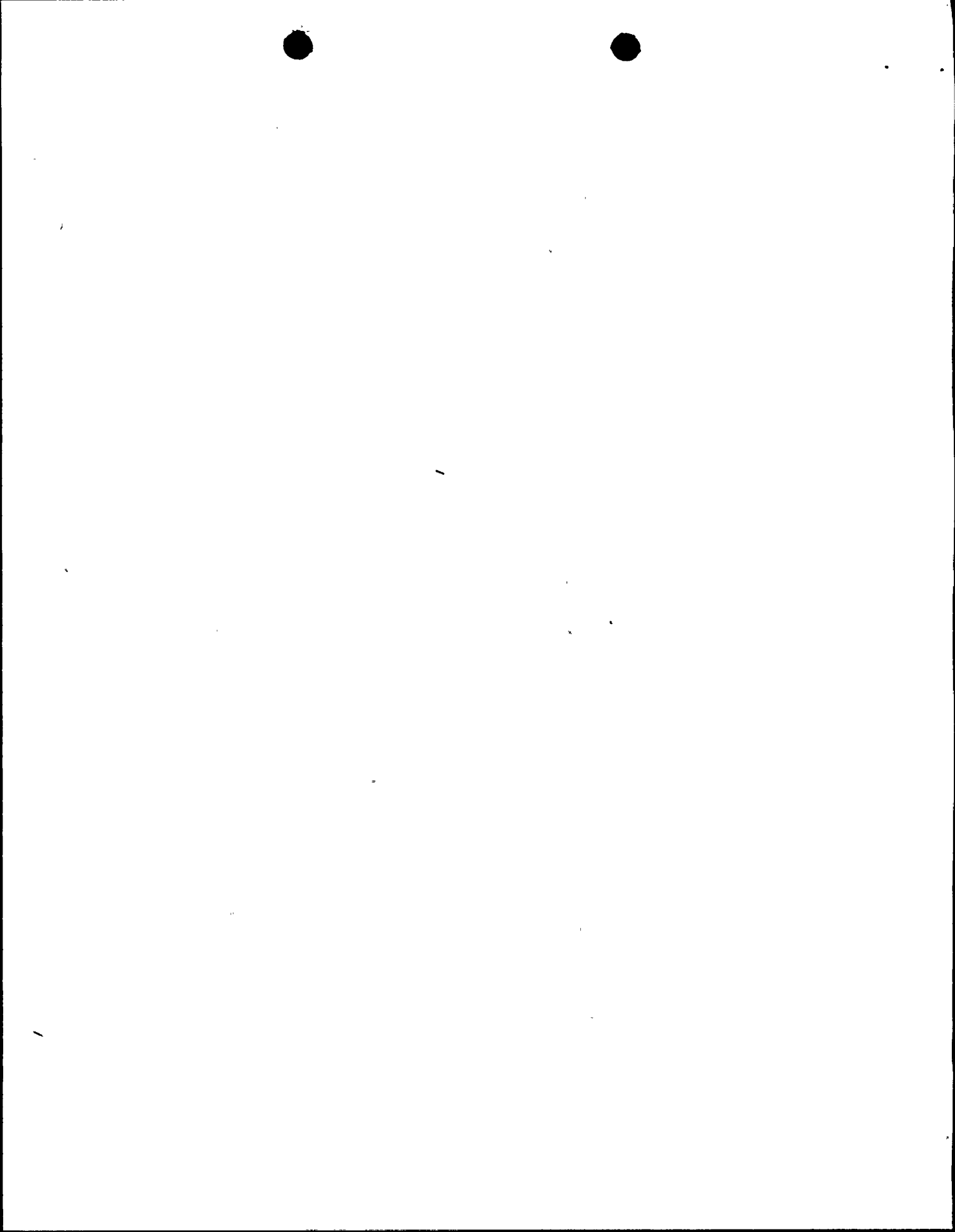
ECOLOGY ACTION

1972 - 1973

President: Suzanne Weber
Secretary: Leanne Magliveras
Newsletter: Ruth Caplan

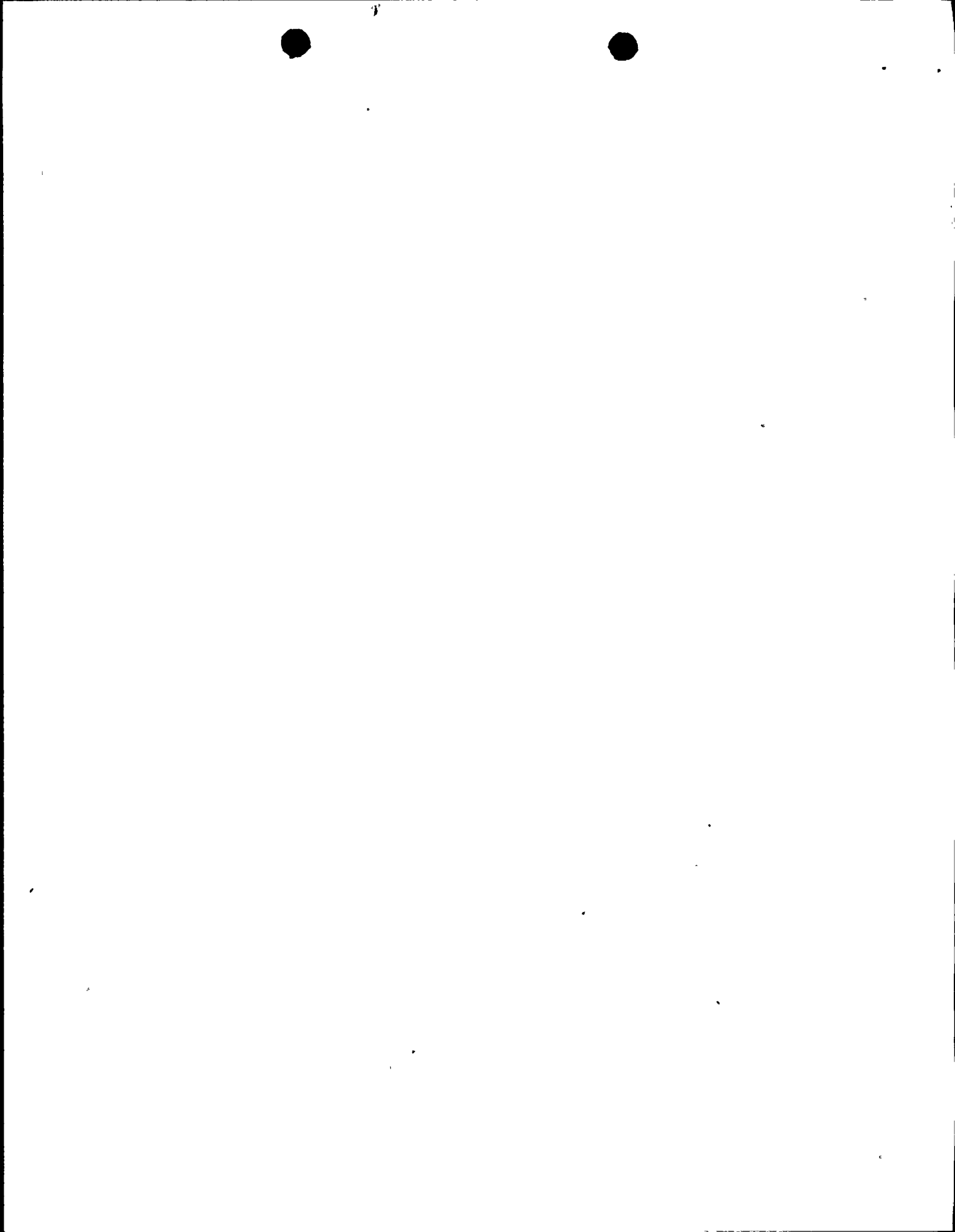
Treasurer: Julie Cicarelli
Program: Sally Dussere
Membership: Madeleine Peterson

Adams, Mignon	30 NW 9th St. Oswego	342-4358
*Allen, Dorothy	74 W. 5th St. Oswego	343-0963
*Bartle, Norma	Granby Rd., Minetto	342-0693
Benjamin, Pat	Sunrise Terrace Oswego	343-7323
*Besch, Rosemary	W. 5th St. Rd. Oswego	343-2810
Boyd, Lynn	RD 2, Sterling	(1)564-5449
Brown, Linda	RD 2, Sterling	(1)947-5732
Burling, James	RD 6, Oswego Center	343-8601
Caplan, Ruth	278 Washington Blvd. Oswego	343-2412
Carapetyan, Geraldine	41 W. Seneca St. Oswego	343-9410
Carapetyan, Leon	41 W. Seneca St. Oswego	343-9410
Cicarelli, James	Rt. 104A SW Oswego	343-8704
Cicarelli, Julie	Rt. 104A SW Oswego	343-8704
*Cummings, James	220 W. 4th St. Oswego	342-2115
*Cummings, Norma	220 W. 4th St.	342-2115
Daly, Helen	W. River Rd. Minetto	342-0582
DeCoster, Lee F.	Soper Mills Rd., Mexico	342-1020
Deming, Marcia	157 Ellen St. Oswego	342-0261
*D'Innocenzo, Nick	Rd 3, Edwards Circle, Oswego	343-3349
Downum, Marilyn	RD 6, Johnson Rd. Oswego	
*Dussere, Paul	RD 3 Oswego	342-0370
Dussere, Sally	RD 3, Oswego	342-0370
*Echelbarger, Marsha	64 W. 5th St. Oswego	342-1457
Wzell, Marie	516 W. 5th St. Oswego	343-7396
*Gallagher, Jane	97 W. 8th St. Oswego	342-3822
*Galvin, Jean	277 Syracuse Ave. Oswego	342-1613
*Garland, Ann	Box 478, Fair Haven.	(1)947-5732
*Golden, Forrest	8 Standart Ave., Auburn	(1)252-7755
*Hammill, Terrence	129 W. Cayuga St. Oswego	342-3074
Hammond, Judy	Washington Blvd. Oswego	342-0577
*Hanks, Ruth	63 Sunrise Terrace, Oswego	342-2771
LaSalle, Paula	Sylvan Glen Apts. Oswego	342-3242
LaSalle, Paula	Sylvan Glen Apts. Oswego	342-3242
*Leighninger, Leslie	48 W. 3rd. St. Oswego	343-4394
*Leighninger, Robert	48 W. 3rd St. Oswego	343-4394
Magliveras, Leanne	2 New St. Oswego	342-2437
*Magliveras, Spyros	2 New St. Oswego	342-2437
*Manale, Darrah	Golden Acres Minetto	343-4884
Maurer, Elaine	40 W. 6th St. Oswego	342-2259
*Mayer, Patsy	RD 3, Oswego	342-0855
*Mayer, Richard	RD 3, Oswego	342-0855
*Narayan, Marian	RD 6, Johnson Rd. Oswego	343-7747
*Orr, Carol	W. River Rd. Minetto	343-4628



*Pawlicki, Lynn	Highmore Terrace, SW Oswego	342-2908
*Peterson, John	54 W. 4th St. Oswego	342-0133
Peterson, Madeleine	54 W. 4th St. Oswego	342-0133
*Peterson, Patti	224 W. 3rd St. Oswego	342-1783
Pidgeon, Sheila	RT. 104W Oswego	342-2378
Ritson, Sadie	147 Hillside Ave. Oswego	342-0192
Sachidanandan, Ruth	Brown Drive, Oswego	343-4826
*Schneider, Molly	Maple Drive, Oswego	342-2245
*Schneider, Ray	Maple Ave. Oswego	342-2245
*Slobe, Joan	Rathburn Rd. Oswego	343-4353
*Slobe, Philip	Rathburn Rd. Oswego	343-4353
*Thomas, Laurie	Brackett Rd., Hannibal	(1) 564-5137
*Weber, Peter	78 W. Seneca St. Oswego	343-6754
Weber, Sue	78 W. Seneca St. Oswego	343-6754
Wernick, Carol	Edwards Circle, Oswego	343-1554
Wernick, Robert	Edwards Circle, Oswego	343-1554
Wiecha, Mary	55 W. 6th St. Oswego	343-8611

*indicates Associate Membership



STATE OF NEW YORK)
COUNTY OF OSWEGO) SS

SUZANNE WEBER, being duly sworn, deposes and says:
that she is one of the petitioners described in the within Reply;
that she has executed said Reply in her own behalf and in behalf
of petitioner Ecology Action; that she has read the within Reply
and knows the contents thereof; that the same is true of her own
knowledge, except as to matter therein alleged on information and
belief, and that as to such matters she believes it to be true.

Suzanne Weber
Suzanne Weber

Sworn to before me
this 17th day of November 1972

Cosimina J. Masucca

Notary Public

COSIMINA J. MASUICCA
Notary Public in the State of New York
Qualified in Oswego Co. No. 2578830
My Commission Expires March 30, 1973



STATE OF NEW YORK)
COUNTY OF OSWEGO)

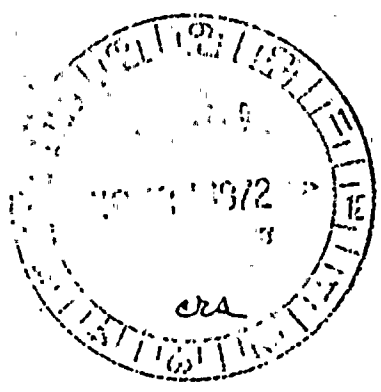
SS

AFFIDAVIT OF SERVICE

SUZANNE WEBER, being duly sworn, deposes and says:
that on the 22ND day of November, 1972, she served true copies
of the annexed Reply upon the parties designated hereinbelow
by depositing the same enclosed in post-paid, properly addressed
wrappers in an official depository under the exclusive care and
custody of the United States Post Office Department.

Suzanne Weber
Suzanne Weber

Sworn to before me this
22ND day of November, 1972



William A. Fisher
Notary Public

W. A. Fisher, Esq.
Regulatory Staff
Energy Commission
Washington, D. C. 20545

Chairman, Atomic Energy Commission
U. S. Atomic Energy Commission
Washington, D. C.



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