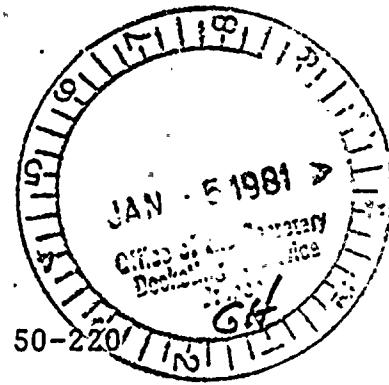


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of
Niagara Mohawk Power Corporation
(Nine Mile Point Nuclear Station))

Docket No. 50-220



ANSWER AND PROTEST ON BEHALF OF
NIAGARA MOHAWK POWER CORPORATION
TO ORDER FOR MODIFICATION OF LICENSE
(EFFECTIVE IMMEDIATELY) AND
ORDER TO SHOW CAUSE

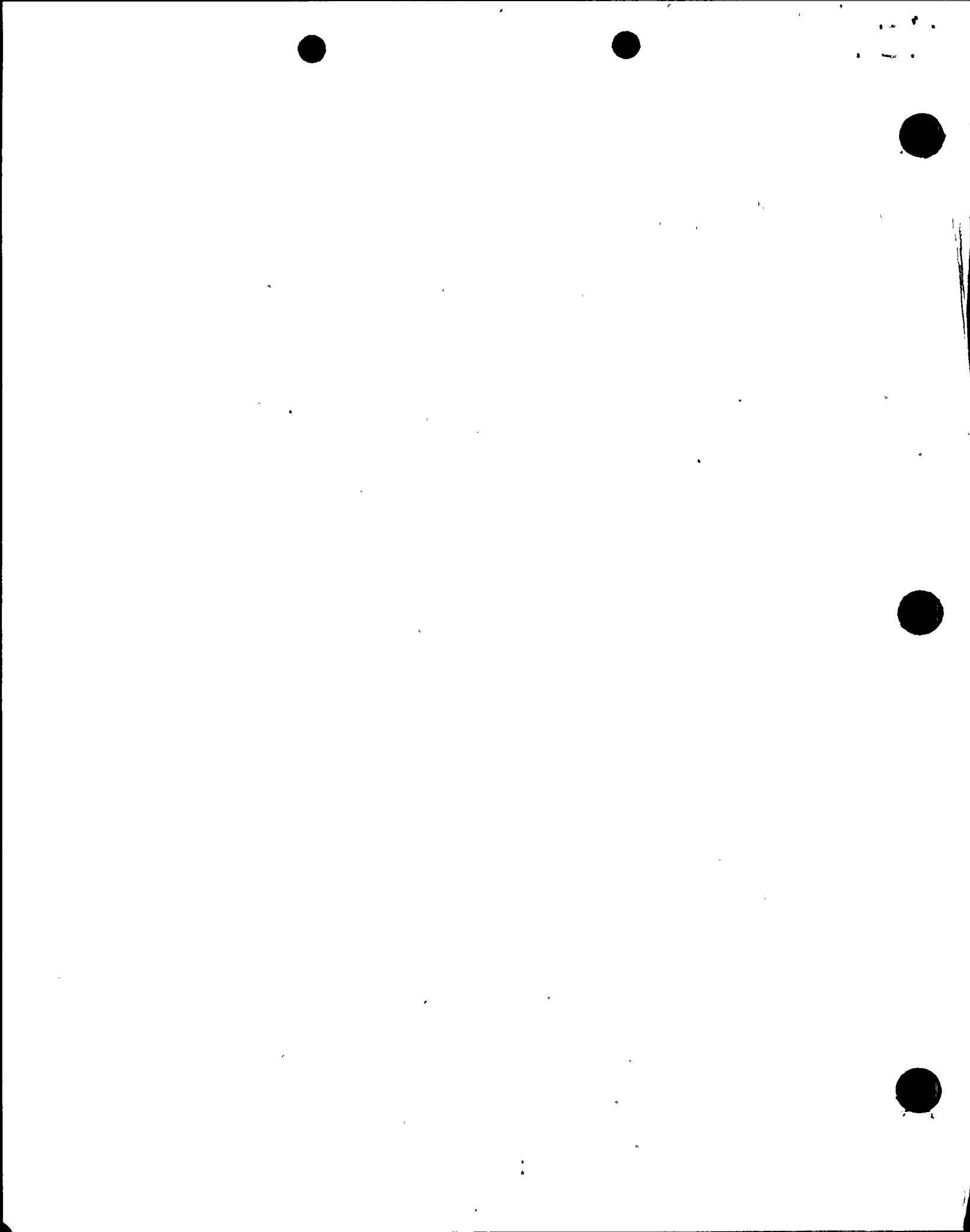
Pursuant to the provisions of Section 2.202 (b)(c) of the Nuclear Regulatory Commission's (NRC) "Rules of Practice," Part 2, Title 10, Code of Federal Regulations (CFR), Niagara Mohawk Power Corporation (NM) hereby submits its Answer and Protest to the Order For Modification Of License (Effective Immediately) and Order To Show Cause, dated November 26, 1980 issued for the NRC by Victor Stello, Jr., Director, Office of Inspection and Enforcement (November 26, 1980 Order).

Preliminary Statement

The November 26, 1980 Order was designated Appendix C to a letter from the Director of the Office of Inspection and Enforcement (I&E) to NM dated November 26, 1980. Appendices A and B to said letter were respectively entitled "Notice of Violation" and "Notice of Proposed Imposition of Civil Penalties." These Notices substantially alleged that a material false statement had been made in a sworn statement signed by NM's Executive Vice President, Mr. James Bartlett, concerning compliance with NUREG 0578, with particular reference to Category A, Item 2.1.8.b, evidenced by a document

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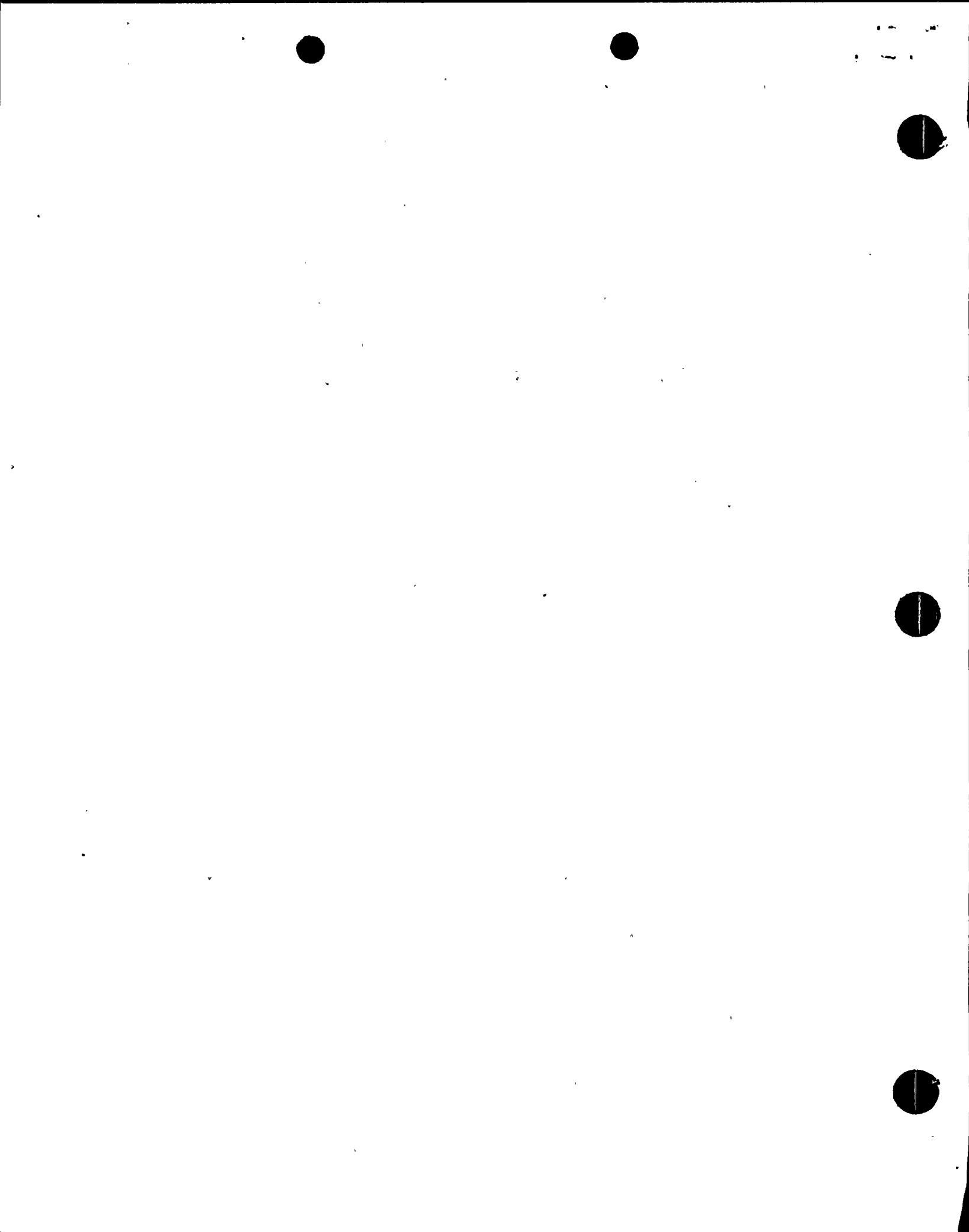
entitled "Answer to Show Cause" dated January 22, 1980 submitted in response to an NRC Order to Show Cause dated January 2, 1980 and proposed civil penalties by reason thereof in the amount of \$225,000. NM filed its answer to both the Notice of Violation and Notice of Proposed Imposition of Civil Penalties by response dated December 19, 1980 (filed December 22, 1980). A copy of the latter response which includes a background review of the events, directives and clarifications leading to the promulgation and implementation of Category A, Item 2.1.8.b (High Range Radiation Monitors) the NRC requirement here in issue, is annexed hereto and marked as Appendix A. To the extent that the matters contained in Appendix A are pertinent to this Answer and Protest, they are incorporated herein by reference.

By separate motion filed with the NRC December 29, 1980, NM seeks to dismiss the proceeding with respect to Allegation B contained in the Notice of Violation for the reasons set forth in said motion. A decision on the motion is pending..

The Ordering Clauses of the November 26, 1980 Order addressed below state as follows (Paragraph VI):

"A. effective immediately, License DPR-63 is amended by adding thereto the following conditions:

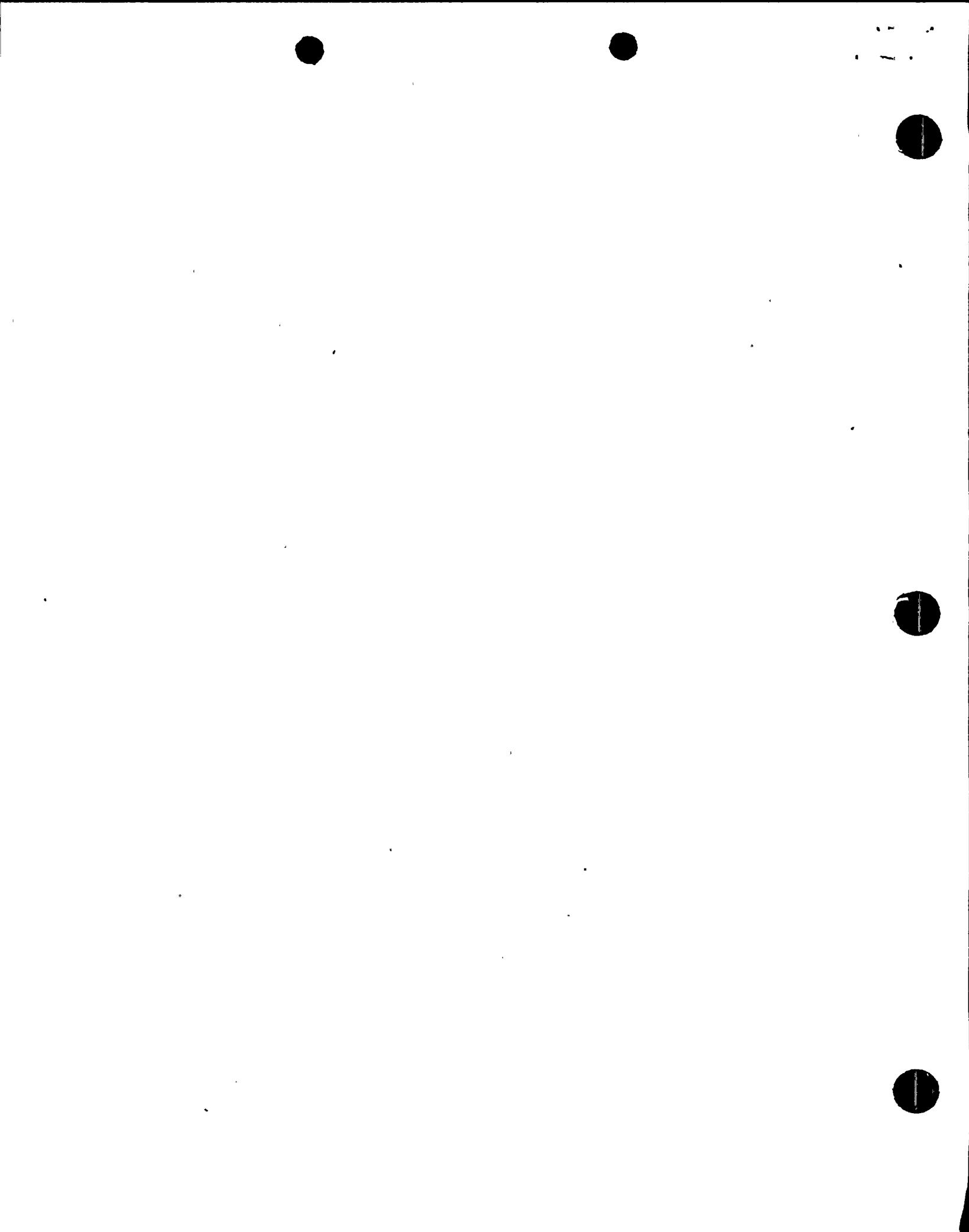
- (1) "Mr. T. J. Perkins, shall not be involved with nuclear matters for Niagara Mohawk Power Corporation";
- (2) "Procedures shall be implemented by January 5, 1981 to ensure that managers at all levels of the



Licensee's organization provide full, accurate and timely information to higher management and to the Nuclear Regulatory Commission, when such information is provided thereto. On or before January 5, 1981, a written report describing such procedures and steps taken to implement them shall be submitted to the Director, Office of Inspection and Enforcement."

- B. the Licensee Show Cause why Mr. James Bartlett, the Executive Vice President, who signed the January 22, 1980 letter, should not be similarly removed from involvement in nuclear matters."

While NM is not afforded an opportunity or requested to Show Cause as respects the limitations on Mr. T. J. Perkins' involvement "with nuclear matters" (not otherwise defined), it vigorously protests this portion of the Order [Paragraph VI A.(1)] for the reasons detailed below. The provisions of the November 26, 1980 Order are addressed below including the allegations of the other paragraphs purporting to support the ordering clauses embraced in paragraph VI quoted above, and further includes a demand for a hearing [10 CFR Section 2.202(b)] on all unresolved issues.



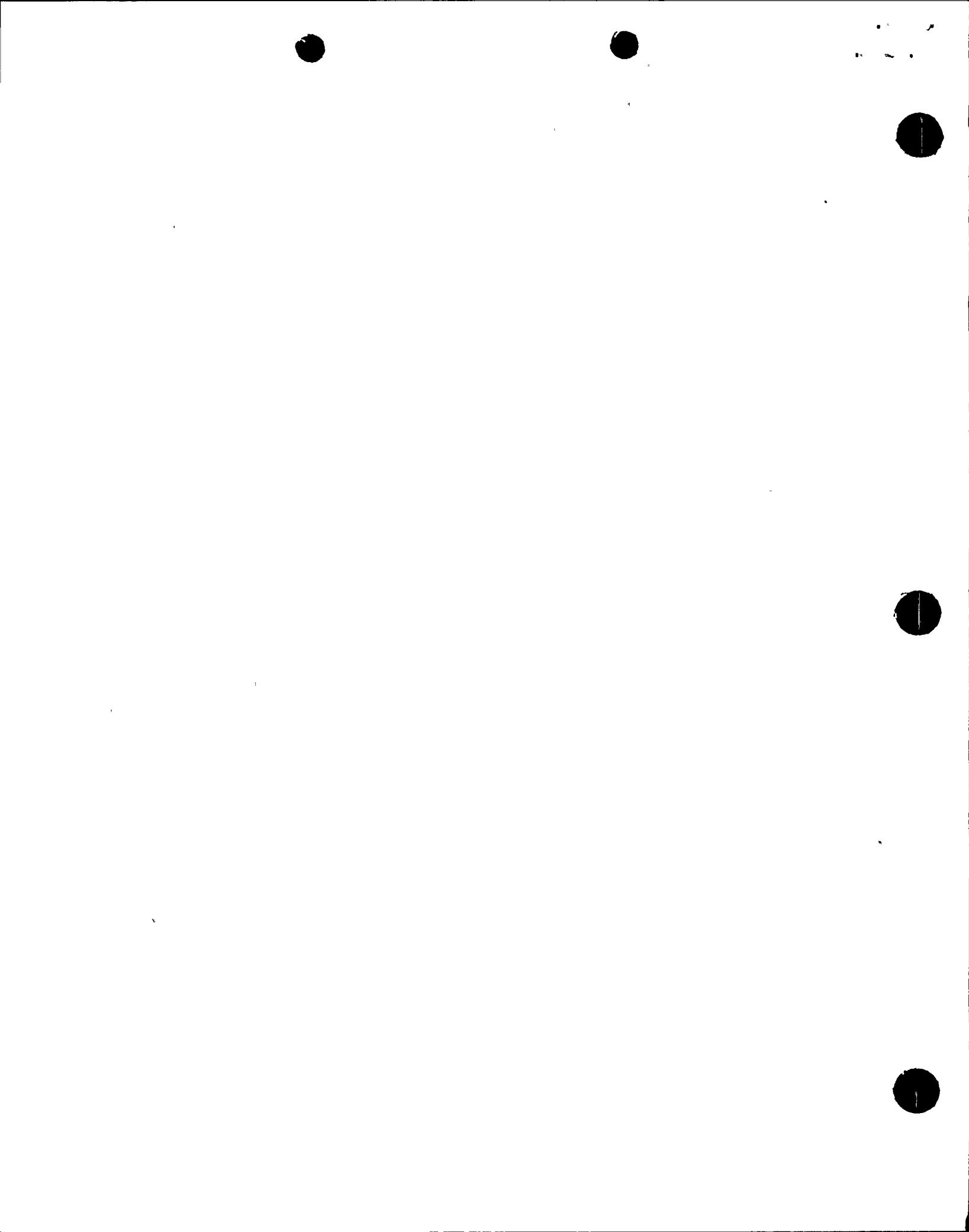
I. THE NRC ALLEGATIONS OF NON-COMPLIANCE
SET FORTH IN PARAGRAPH III (a) TO (e) OF ITS
NOVEMBER 26, 1980 ORDER ARE WITHOUT
FOUNDATION IN LAW OR REGULATION

NM will show that the allegations of paragraph III (a - e) of the NRC's November 26, 1980 Order are not supported by law or regulation as they pertain to the Item 2.1.8.b "interim fix" which was scheduled by the NRC for implementation by January 31, 1980. Additionally, NM will respond specifically to each allegation contained in the referenced paragraph and demonstrate that it had in fact complied with all requirements then extant.

Prior to doing so, however, it is essential to place in perspective the lack of guidance and difficulties which confronted a licensee faced in attempting to hurriedly comply with the ill-defined and confusing requirements of the NRC between July 1979 and the end of January 1980.

As is made clear and set forth in more detail in the background section of Appendix A hereof, Item 2.1.8.b, which is the subject matter of this proceeding, was originally referenced in NUREG-0578 issued July 1979 as a Category B item scheduled for implementation January 1, 1981. NUREG-0578 did not contemplate or address the "interim fix" for Item 2.1.8.b which NM was required to address by the Commission's Order to Show Cause dated January 2, 1980.

The NRC's September 13, 1979 notice-letter, at enclosure 8 thereof entitled "Near Term Emergency Preparedness Improvements Implementation



Schedule", with respect to Item 2.1.8.b High Range Radioactivity Monitors, required that methods be in place for estimating releases by January 1, 1980 as a Category A item and that high range monitors be in place by January 1, 1981 as a Category B item. No discussion or advice was contained in the September 13, 1979 letter with respect to the interim fix procedure, nor was any specific definition or description of the term "methods" supplied.

The NRC's October 30, 1979 notice-letter, in its narrative section, did discuss the need for an "interim fix" and did set forth a general description on how compliance might be effected, setting forth the following non-specific guidelines:

- (a) Methods were to be developed to quantify release rates up to 10,000 Ci/Sec for noble gas from all potential release points.
- (b) For noble gases, modifications were required to existing monitoring systems such as the use of portable high-range survey instruments set in shielded collimators so that they could "see" small sections of sampling lines. It was indicated that this was an acceptable method for meeting the intent of the NRC requirement.
- (c) Conversion of the measured dose rate (mR/hr) into concentration (uci/cc) could be performed using a standard volume source calculation.
- (d) If control-room read out of the monitor was impractical, in-situ readings with verbal communications with the control-room were deemed acceptable, as well as a capability to obtain radiation readings at least every 15 minutes during an accident.

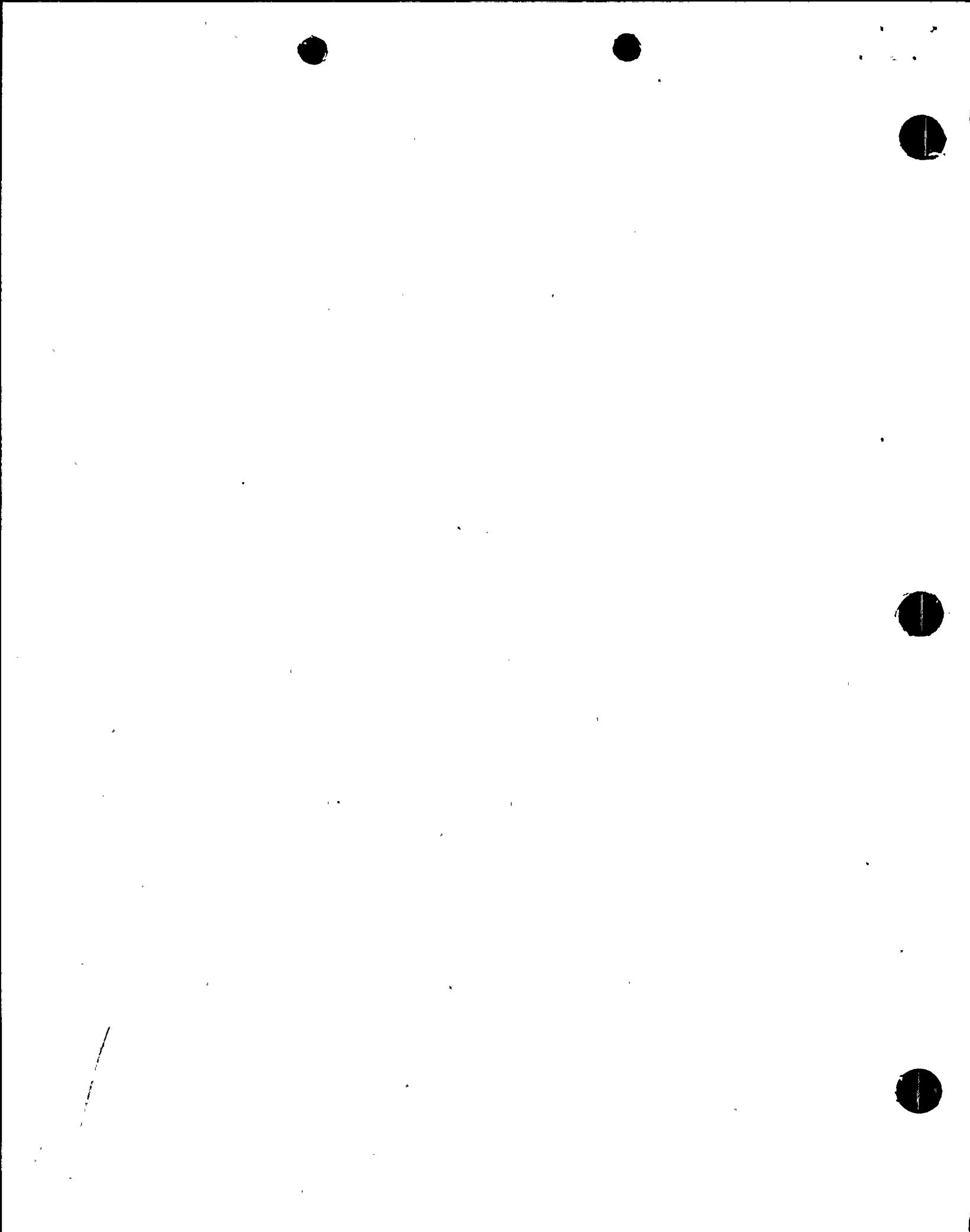
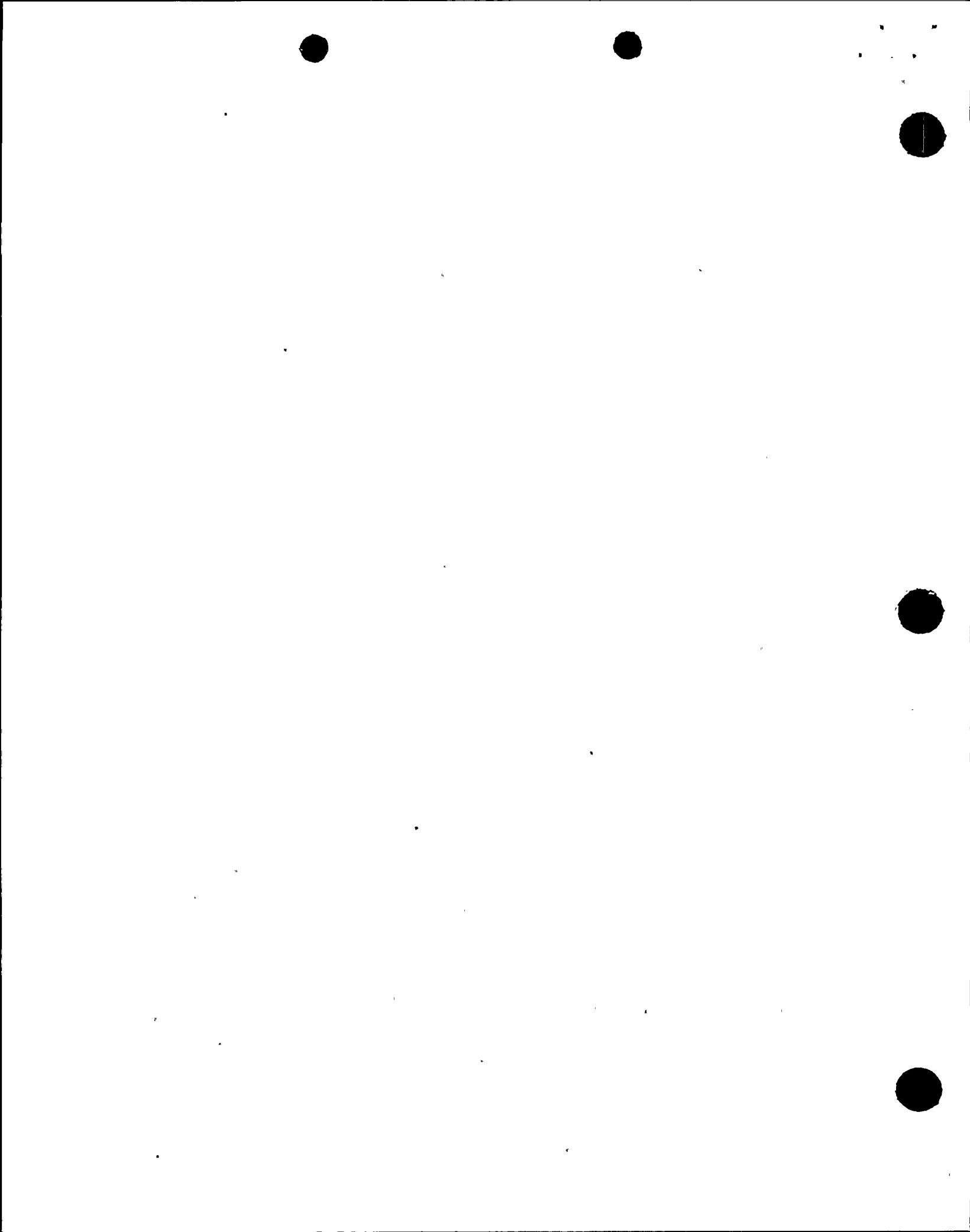


Table 2.1.8.b.1 of the October 30, 1979 notice-letter, entitled "Interim Procedures for Quantifying High Level Accidental Radioactivity Releases" required that:

- (1) a preselected location be provided to measure radiation;
- (2) shielding be provided to minimize background interference;
- (3) permitted the use of an installed monitor (preferable) or a dedicated portable monitor (acceptable) to measure radiation;
- (4) a predetermined calculation method be provided to convert radiation levels to radioactive effluent release rates.

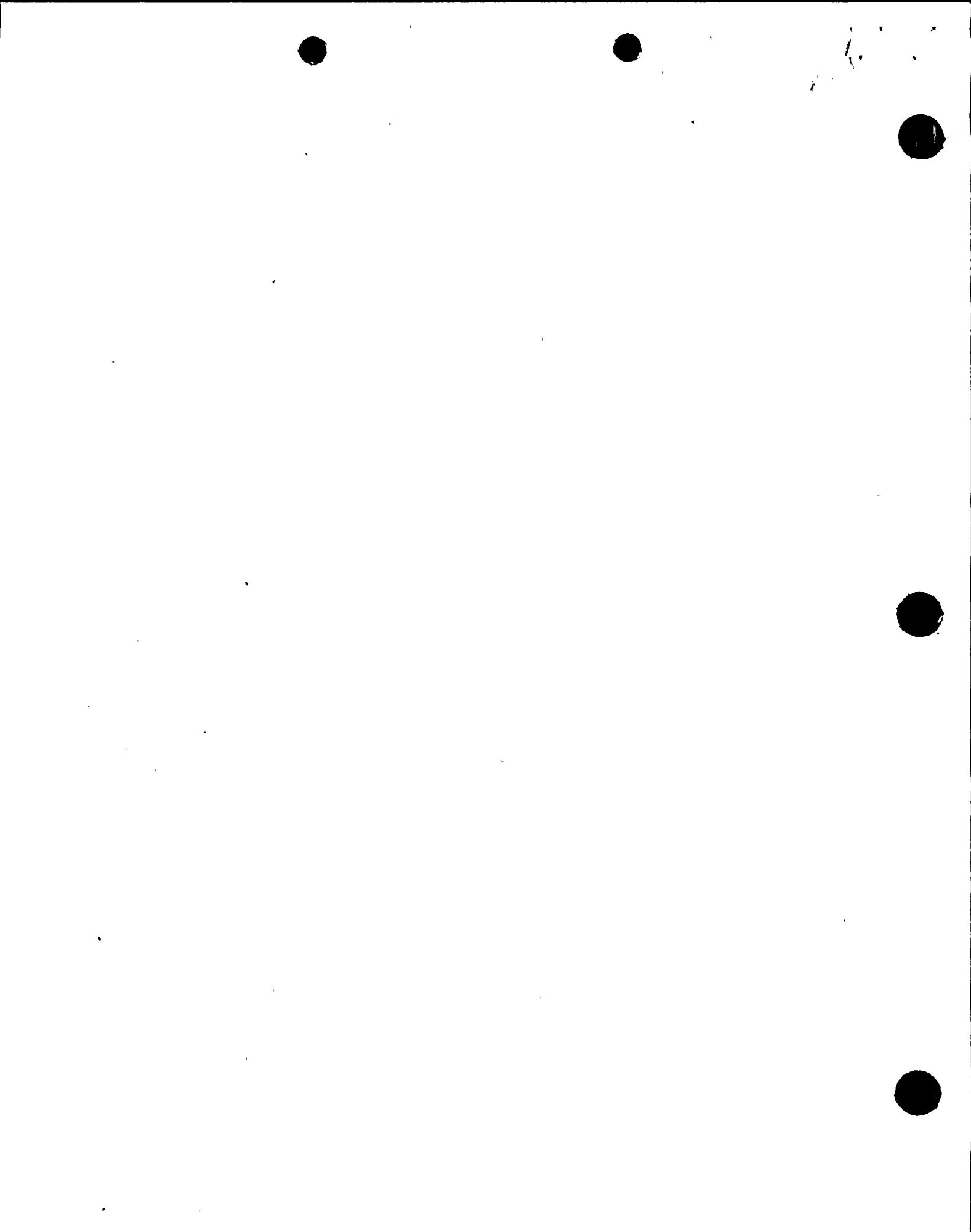
Aside from procedures requiring basically that a licensee report upon its proposed methods of compliance, the foregoing constituted the only directions or guidelines extant with respect to the Item 2.1.8.b "Interim fix" procedures at the time NM's Answer to Show Cause dated January 22, 1980 was submitted.

As previously stated in NM's response, Appendix A attached hereto at Paragraph III thereof entitled "Summary of Niagara Mohawk's Position in Response to the NRC's Notice of Violation", at page 12 thereof, NM was at all times responsive to and had achieved compliance with the requirements of the NRC on or before December 31, 1979. At no time during this time period to date was the public health and safety endangered; indeed, significantly, no charge stating that NM's actions in any way impaired public health and safety has been made by the NRC.



In sum, aside from the very general guidelines and examples offered or proposed by the NRC, no specific requirements for compliance with the 2.1.8.b "interim fix" had been promulgated by the NRC prior to the required response time of January 22, 1980 set forth in the NRC's ^{*/} January 2, 1980 Order to Show Cause.

^{*/} It was not until October 17, 1980, the date of NM's receipt of the NRC's immediate action letter, that any precise definition of "interim fix" criteria was received by NM from the NRC.



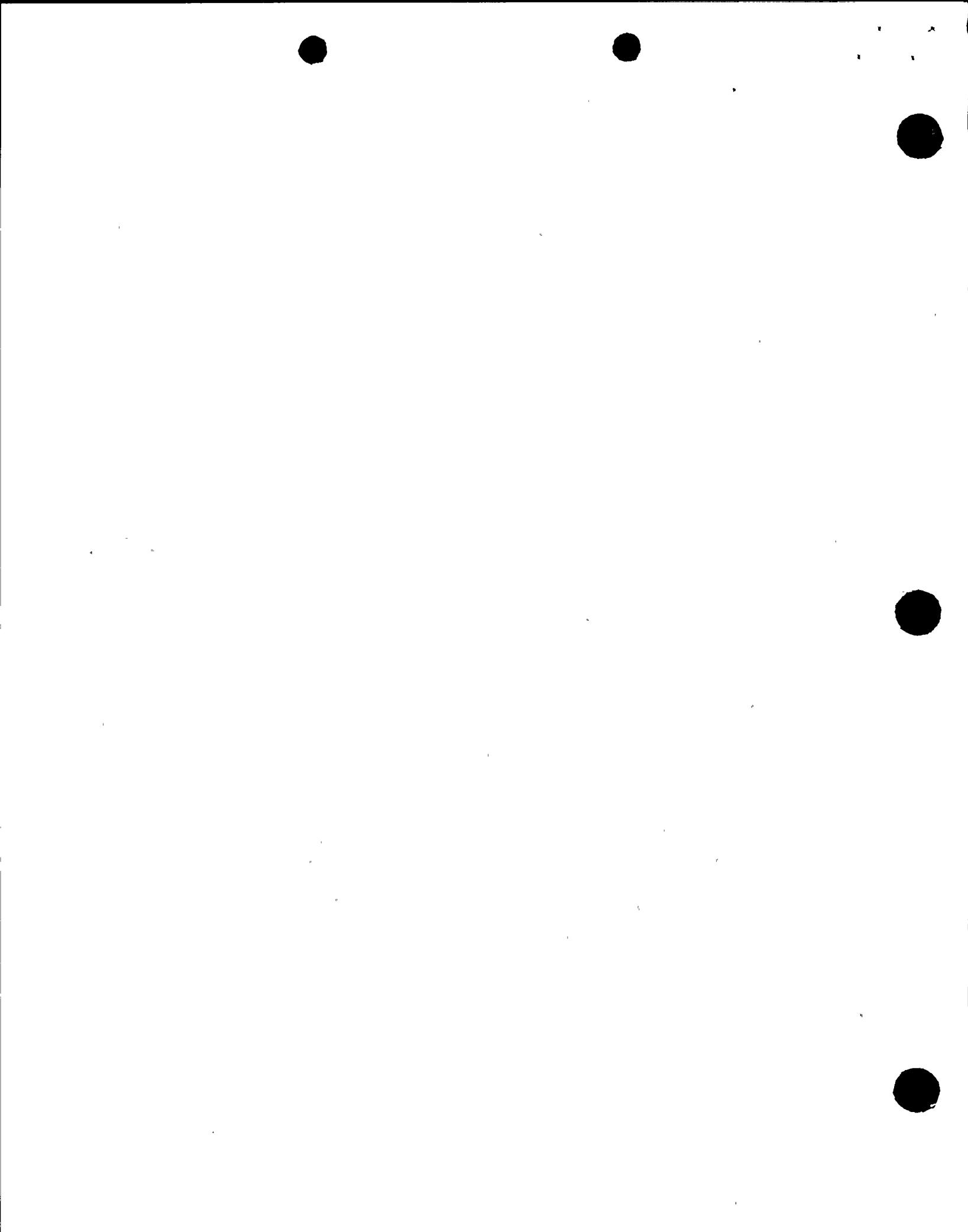
II. SPECIFIC REFUTATION OF NRC ALLEGATIONS

As previously stated, paragraph III of the November 26, 1980 Order contains allegations of non-compliance with Item 2.1.8.b interim fix procedures. Such allegations are as follows:

(a) NRC Allegation - "a lead cave to provide shielding had not been constructed nor had any action been taken to do so."

NM Response - No NRC guideline or criteria existed requiring that a lead cave be utilized to provide shielding. The only guideline or requirement identified by the NRC in January of 1980 was to "provide shielding to minimize background interference." Shielding, in fact, was provided and this requirement was satisfied by NM's installation of the lead brick which effectively provided the required background shielding to the portable monitor employed. It is important to correct an erroneous allegation set forth in the Director, Office of Inspector & Auditor (I&A) November 12, 1980 report, i.e. that a lead plate was installed which provided inadequate shielding. In fact, adequate shielding was supplied by the installation by NM of a lead brick which could supply substantially more background shielding than would have been provided by a lead plate. For further detailed discussion of this point, see Item 5 entitled "Response to Allegation of Failure to Install a Lead Cave" at pages 23 and 24 of Appendix A hereto.

(b) NRC Allegation - "a portable gamma survey instrument had not been installed nor had a dedicated instrument been identified."

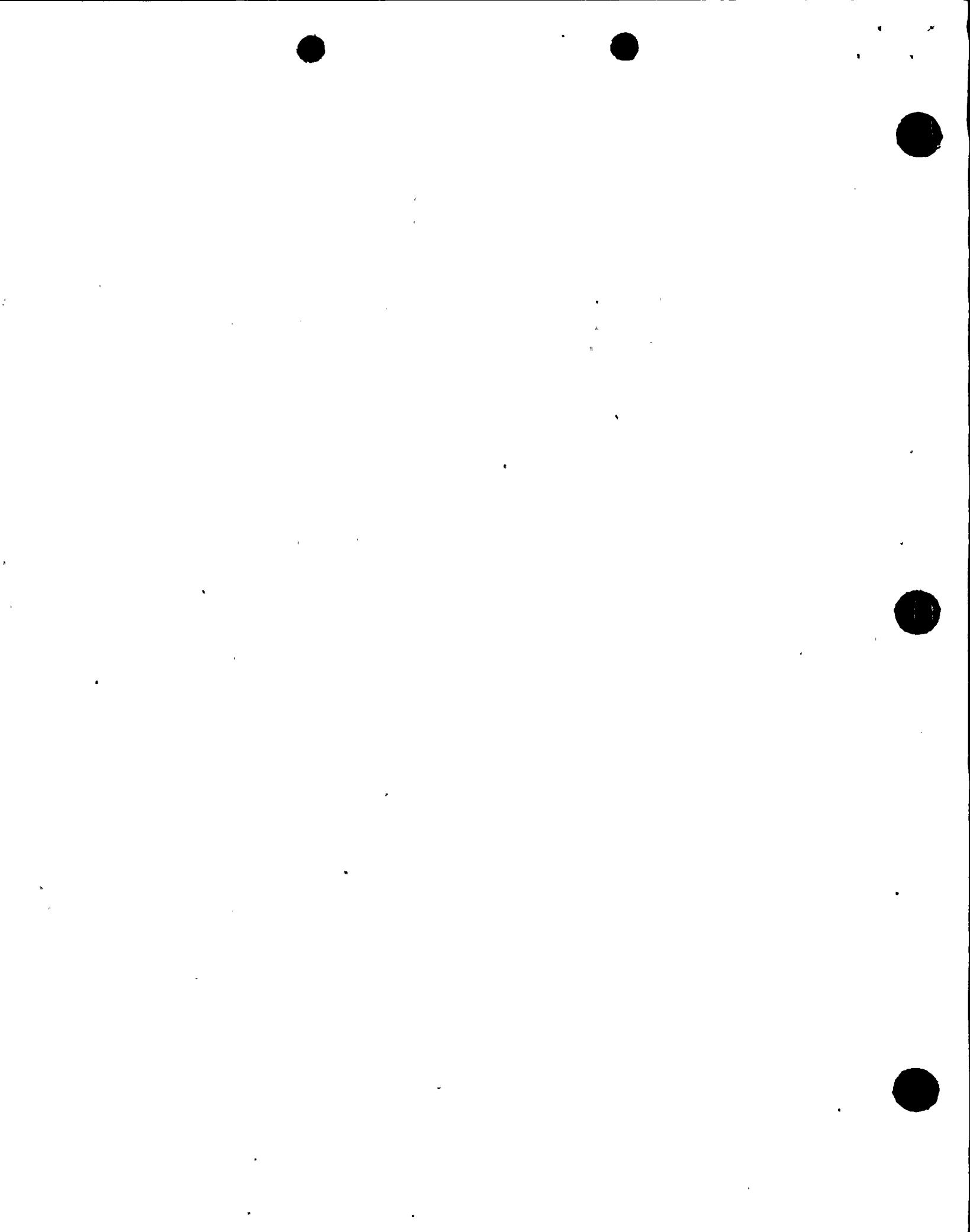


NM Response - Again, no guideline or NRC criteria were violated by NM when it utilized a portable monitor at all times maintained in its nearby emergency kit for installation in a preselected location to accomplish the purpose for measuring noble gases when existing built-in monitors went off scale. As specifically set forth in previously mentioned Table 2.1.8.b.1 of the October 30, 1979 NRC notice-letter, the use of a portable gamma survey instrument was designated as an acceptable alternative to a permanently installed monitor during the interim fix period. For a further detailed discussion of this point, see Item 4 entitled "Response to Allegation that High Range Survey Instrument was Neither Installed Nor Dedicated", pages 18 - 22 of Appendix A hereto.

(c) NRC Allegation - "there was no evidence that indicated that steps were being taken to perform calibration with a Xe-133 source to relate R/hr to stack release rates."

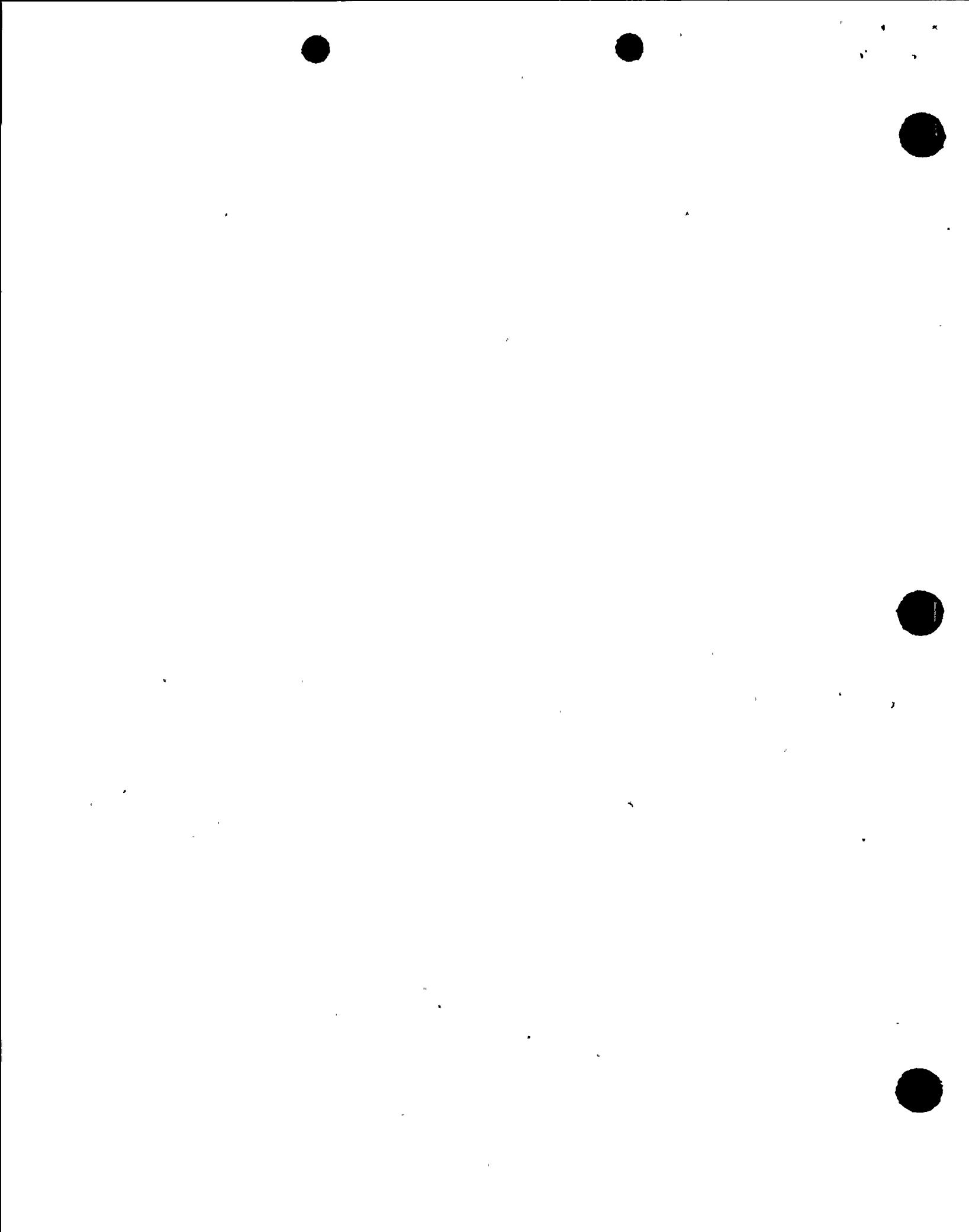
NM Response - There was no requirement extant to perform calibration with an Xe-133 source. The only calibration requirement for the interim fix was contained in NRC's October 30, 1979 so-called clarification letter as follows: "Methods are to be developed to quantify release rates up to 10,000 Ci/Sec for noble gases from all potential release points." Consequently, a requirement to calibrate with an Xe-133 source did not exist.

(d) NRC Allegation - ". . . there were no specific procedures to assure that in the event the existing in-line stack monitor goes off scale, a



portable gamma survey instrument would be properly installed, and readings taken locally approximately every 15 minutes and communicated verbally by means of a headset to the control room."

NM Response - Before responding specifically to this allegation, it is significant to once again point out the confusion that exists in the NRC's own Order and, more specifically, how the Commission's position with respect to Allegation (b) is contradicted in the same paragraph by its allegation set forth in Item (d) quoted above. Simply put, if any sense is to be made of Allegation (b), it must be that the NRC assumed a portable monitor would be permanently and physically affixed to the sample line. This is so because there has never been a dispute regarding the availability of the monitor or survey instrument being on site in a timely fashion. If the foregoing is a proper interpretation of the Commission's position in Item (b), then Item (d) does not make any sense at all because it is attempting to criticize NM for not having procedures available to assure that when existing in-line stack monitors go off scale, then and in that event a portable monitor would be properly installed (See also footnote, page 27, infra). Once again, it appears that confusion continues to reign within the NRC as to the interpretation of its own interim fix requirements. To specifically respond to the Item (d) allegation, however, as had been set forth in the testimony of NM's Ed Leach, procedures were, in fact, in place to assure that a portable gamma survey instrument would be available and that readings could be taken locally at



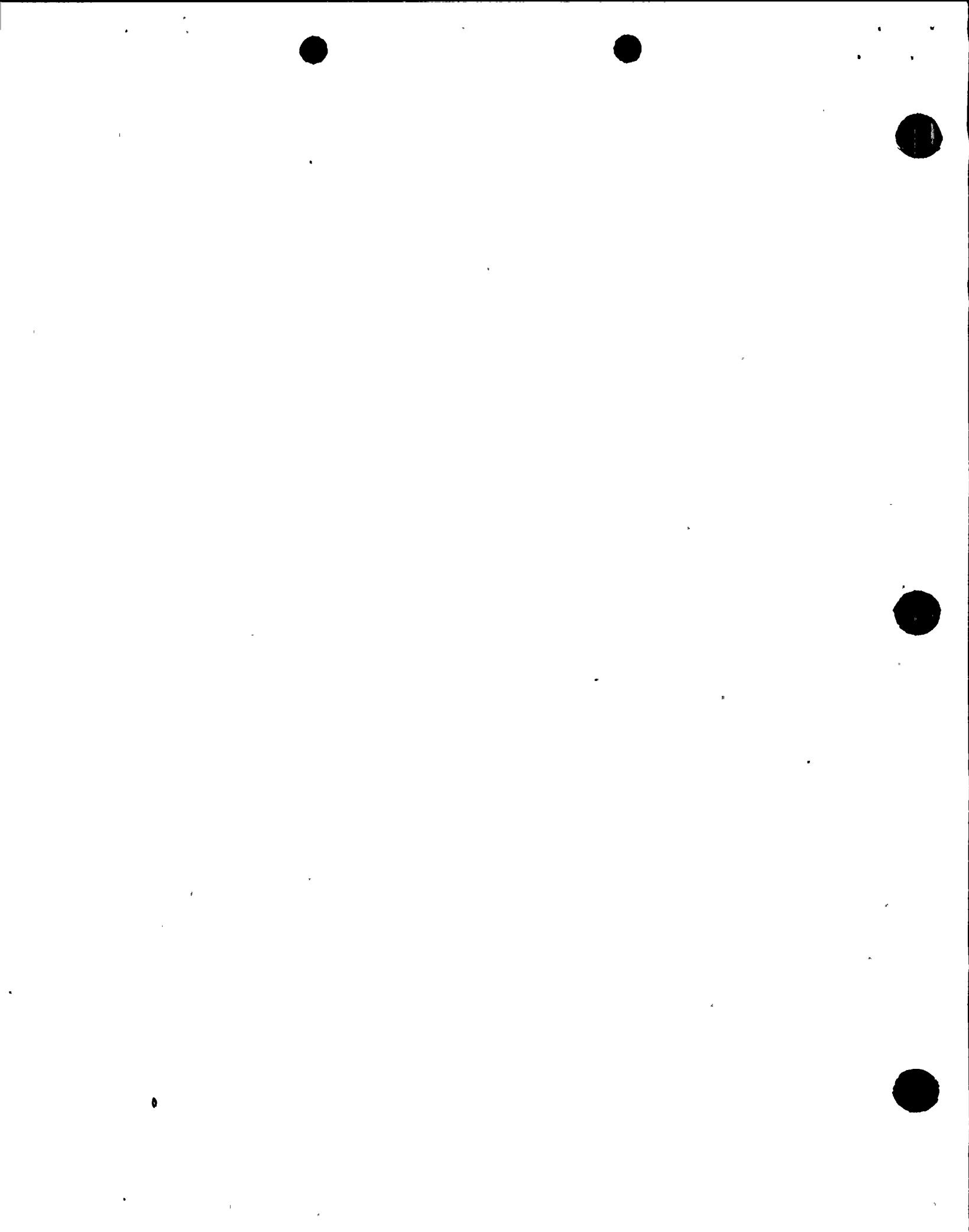
approximately 15-minute intervals and communicated to the control room.

Such procedures were totally in compliance with the NRC's published guidelines, supra. The statements under oath by Mr. Leach in his affidavits dated October 31, 1980 and November 18, 1980 have been uncontested and stand uncontroverted to date. More specifically, there is no directive contained in the NRC October 30, 1979 letter requiring specific "procedures for conducting all aspects of the measurement/analysis." It is an equally valid interpretation of paragraph IA (b) at page 34 of said letter that, if applicable, existing procedures could be adequate to perform the functions described.

There has never been a dispute regarding the availability of the monitor or survey instrument being on site in a timely fashion. In particular, NM's procedural document EPP-10 provides for quarterly verification of same.

There has never been a dispute regarding the existence of procedural document EPP-6 for taking in-plant radiation readings. The only question concerns whether this procedure is sufficient to ensure the "instrument would be properly installed, and readings taken." Procedure EPP-6 specifically provides (Section 4.1) for the Emergency Director (See EPP-13 for functions of this individual) to specify the "area to be surveyed". Proper installation in order to take a reading must be allowed as being a reasonable capability to ascribe to a technically qualified individual assigned this task [See, for example, Reg. Guide 1.33 and ANSI N18.7 (1976)].

Similarly, EPP-6 requires survey data to be reported to the Emergency

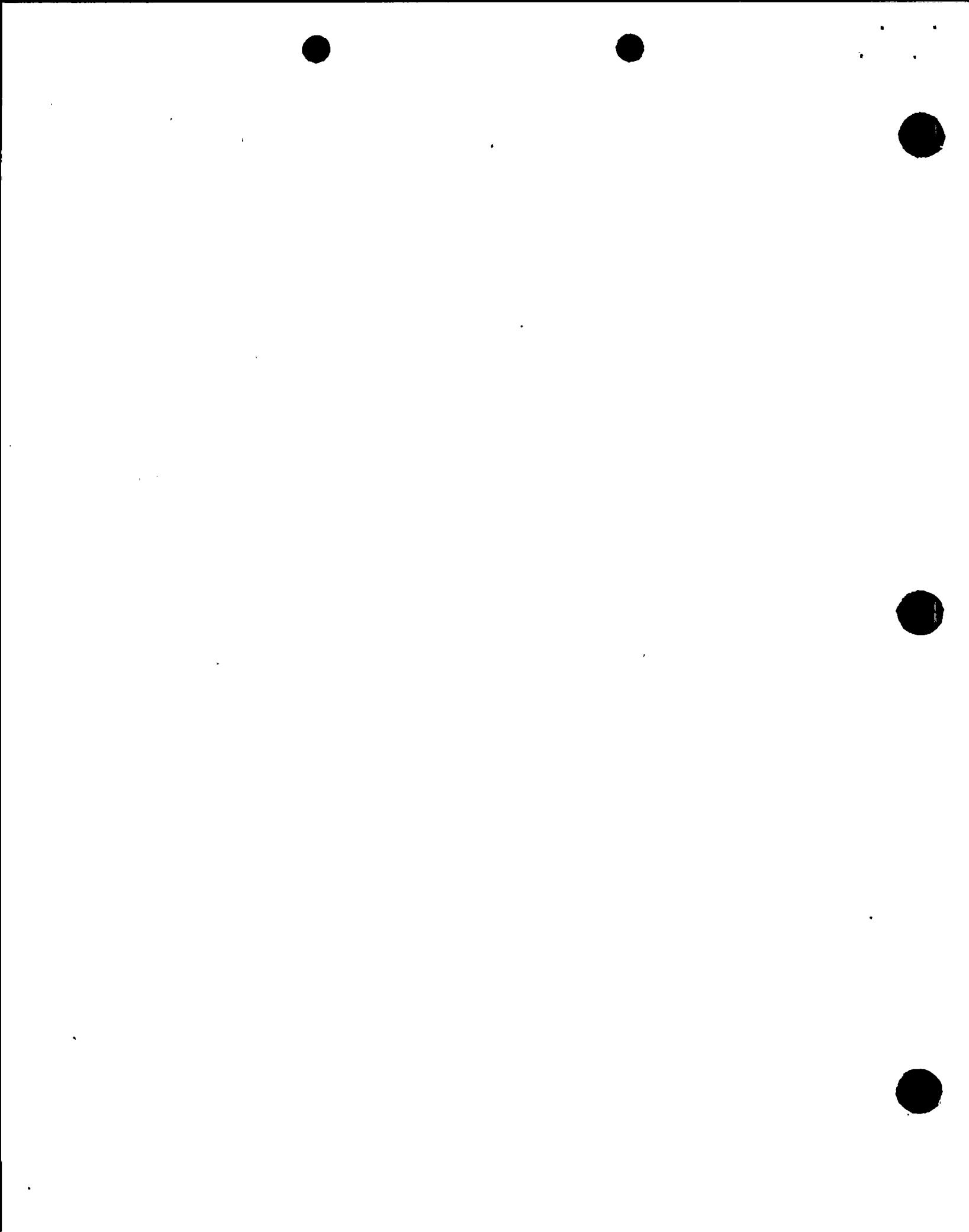


Director. EPP-17 specifically describes communications systems available in an emergency. Installation of headphones could take place at any time if readings need to be taken over a long period of time.

(e) NRC Allegation - "the facility continued to operate."

NM Response - In view of the fact that no guideline, recommendation, requirement, law or regulation of the Commission had been violated by the actions of NM, and because at no time was the public health or safety endangered, NM was legally entitled to continue to operate the Nine Mile 1 Nuclear Station and did so to the benefit of the citizens of New York State.

In sum, NM was in full compliance with the NRC "interim fix" requirements at the date of their scheduled implementation.

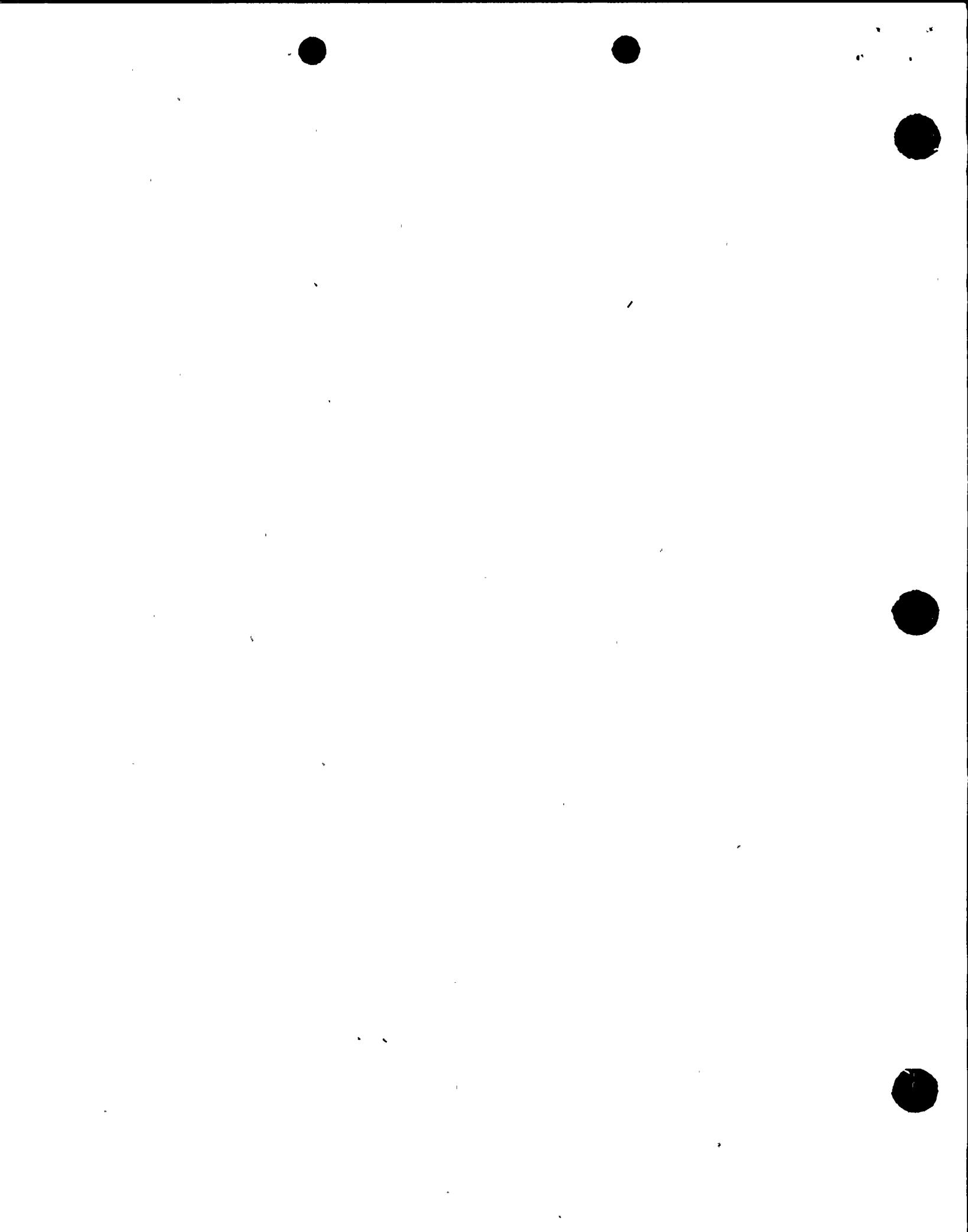


III. THE NRC ADMITS CONFUSION IN ITS CONDUCT
OF THE POST IMPLEMENTATION REVIEW OF THE
ITEM 2.1.8.b "INTERIM FIX"

Apparently because of the failure of the NRC to issue appropriate and complete guidelines and requirements for the implementation of the Item 2.1.8.b "interim fix", confusion in its post implementation review had existed for a substantial period of time within the NRC. This confusion among the staffs of the various offices of the NRC has been specifically documented by NRC representatives and NRC reports.

NM, by letter of December 5, 1980, requested certain information from the NRC regarding its post implementation review of the 2.1.8.b "interim fix" procedures. On December 18, 1980, James J. Cummings, Director, Office of Inspector and Auditor (I&A) responded by letter enclosing his office's November 12, 1980 report and interview memorandum of NRR personnel obtained in the course of its inquiry relating to Nine Mile Point Unit 1.

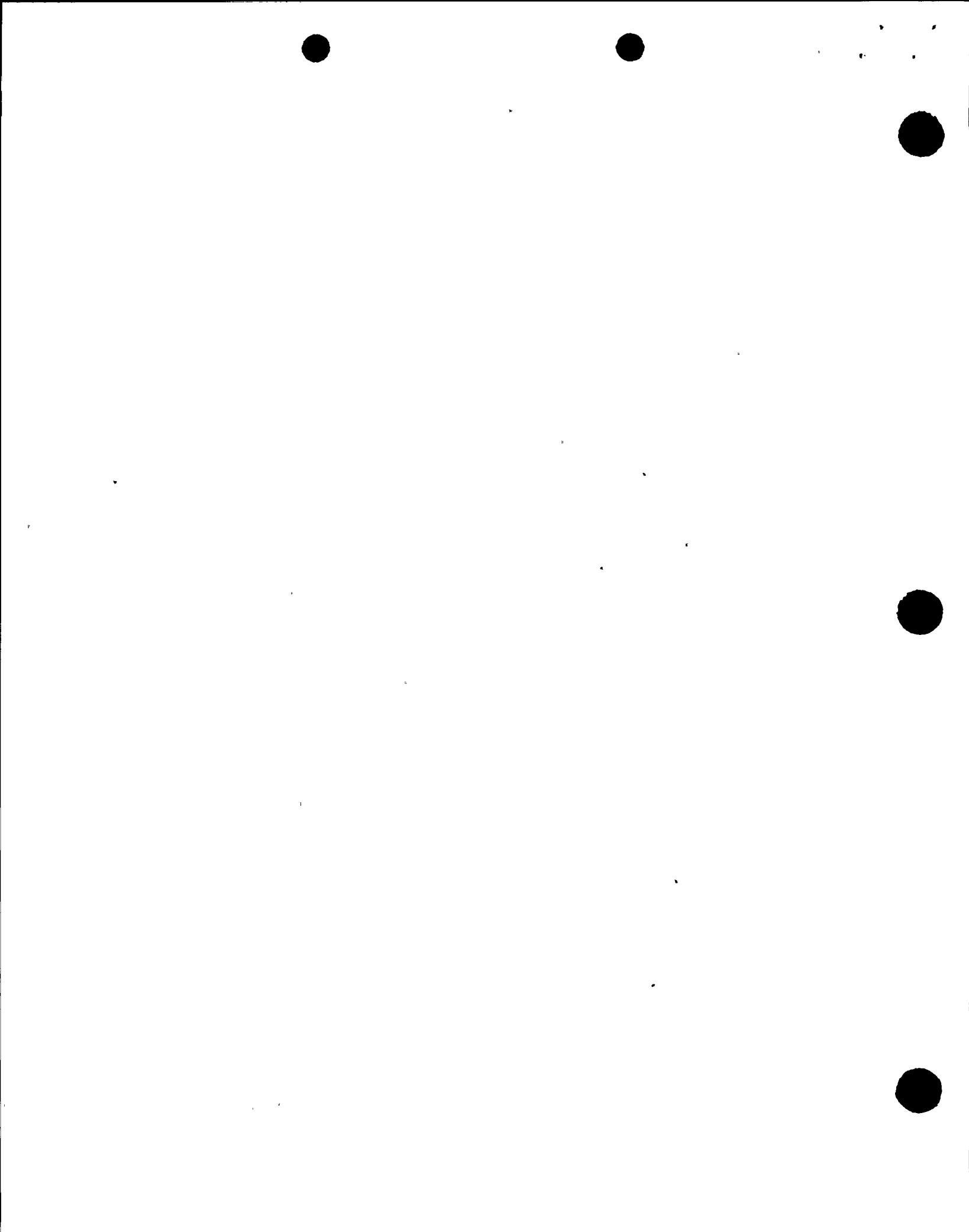
While admittedly the presence of confusion on the part of the NRC and in its various offices and staffs should not be used as a vehicle to exculpate NM from its responsibilities to maintain and operate Nine Mile Point Unit 1 in a safe and healthful manner to the public, the highly technical charges and extreme penalties that have been leveled against NM for alleged noncompliance with regulations and requirements, should be considered in the light of the failure of the NRC to communicate adequate instructions and criteria to its own staffs. Such instructions and criteria were admittedly



both confusing to, and were misunderstood by NRC representatives.

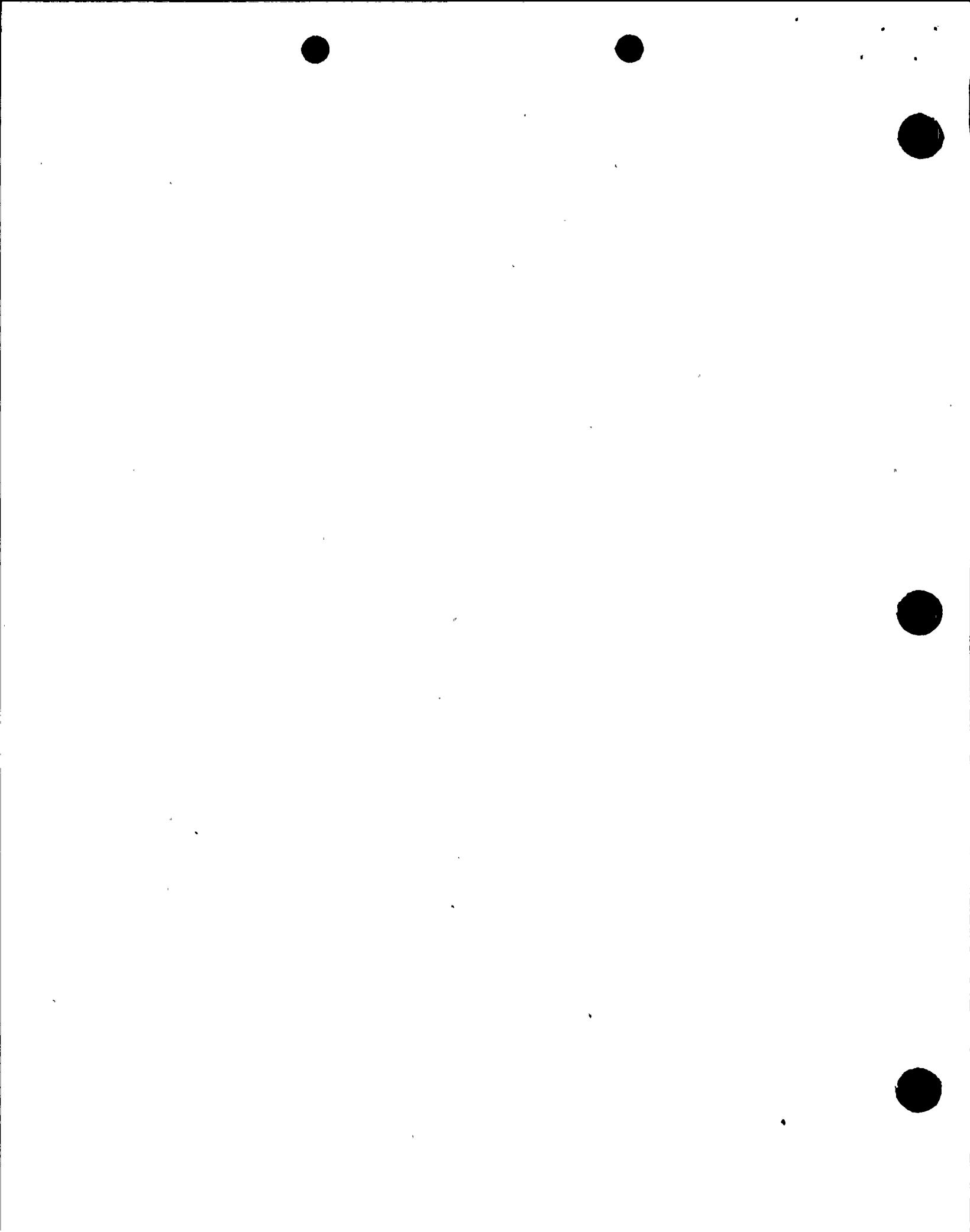
Specific instances of confusion and admissions of same are contained in the various reports and memoranda attached to the Director of I & A's letter of December 18, 1980. Some of the salient admissions and statements indicating confusion are set forth in a report attached to the December 18, 1980 letter entitled "Inquiry into NRR's Implementation of Short Term Lessons Learned Category A Requirements" where at page 5 thereof - a reference is made to a memorandum to the Office of I & E requesting that specific items be reviewed by I & E using the acceptance criteria contained in the NRR's October 30, 1979 clarification letter of Category A requirements. The report continues: "IE representatives told us, however, at the time IE did not believe these criteria were clear or well enough defined to permit IE to inspect the adequacy of licensees' actions in meeting Category A requirements." It is NM's understanding that, to date, adequate final acceptance criteria as requested have not been issued and that Temporary Instructions (TI) were only recently (early in October 1980) issued to I & E inspection teams.

* / It is important to note that the acceptance criteria which the NRC Office of I & E found to be unclear and not well enough defined to permit an I & E compliance inspection are the same criteria NM is now being charged with violating and are the basis of the maximum civil penalties of \$225,000 proposed by the Director of I & E and underlie the charges levelled at both Messrs. Perkins and Bartlett.



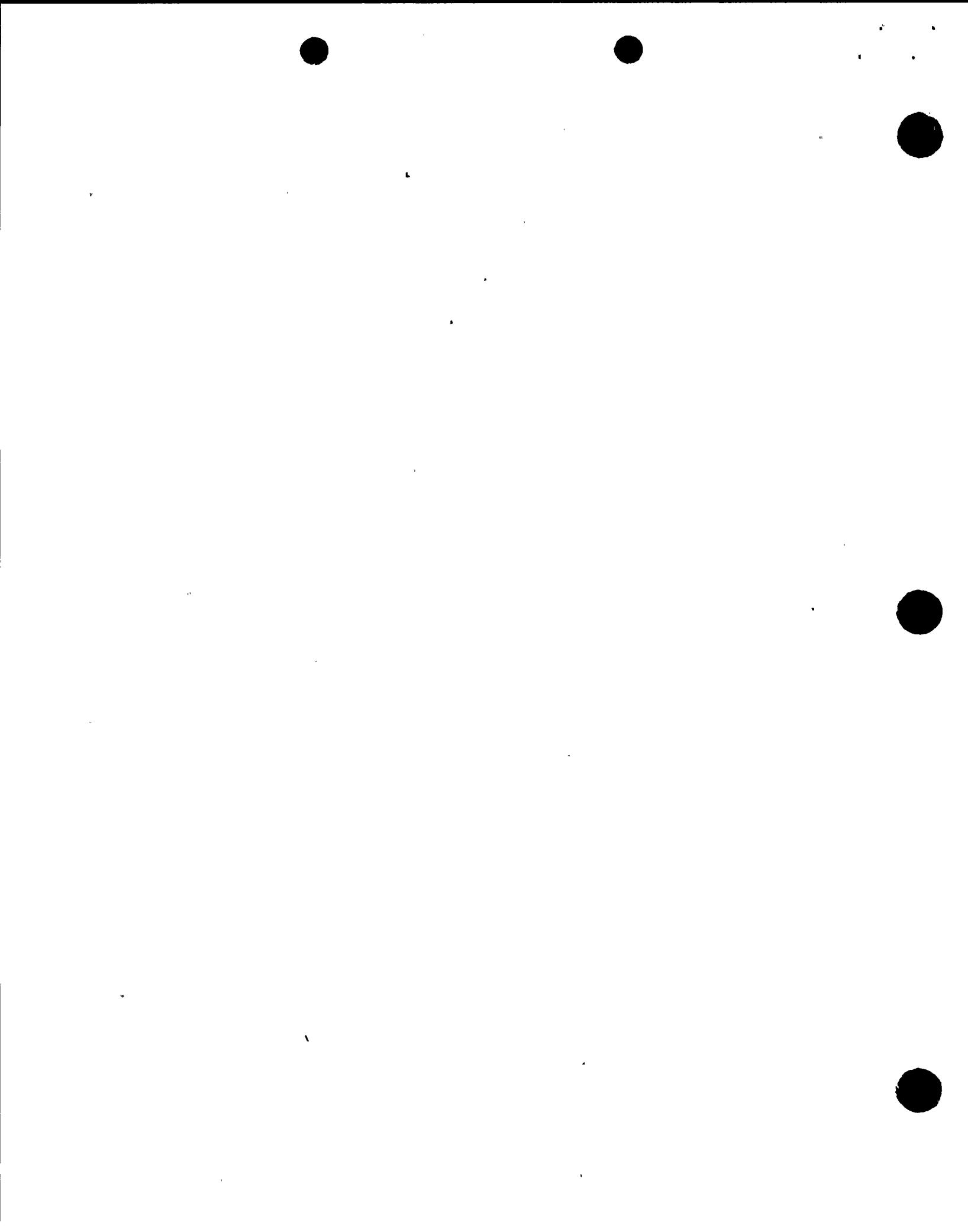
NM's response to these NRC admissions is obvious. While it denies noncompliance, as aforesaid, it must point out that it should not be charged with violations bearing severe penalties for allegedly violating regulations and requirements which were admittedly confusing and incomplete to the regulatory bodies themselves who were seeking to enforce same. Certainly, if the TI to I & E representatives establishing acceptance criteria were not available to I & E inspectors to assess compliance prior to October 1, 1980, knowledge of specific acceptance criteria should not be imputed to NM, as has in effect been done by the imposition of civil penalties in the maximum amount permitted by law totaling \$225,000, for failure to comply with such criteria. Upon receipt of specific direction and advice of what was actually intended by the NRC as acceptance criteria as finally explained in its immediate action letter to NM dated October 17, 1980, NM immediately conformed and implemented the NRC request within three days as is attested to by the October 23, 1980 letter from NM's Executive Vice President, James Bartlett addressed to Boyce H. Grier (Region I) Director, U.S. NRC.

Confusion apparently was not limited to the NRC's office of I&E, but pervaded the NRR staff as well in that the report at page 9 thereof, with reference to the duties of the NRR Item 2.1.8.b. "interim fix" post implementation teams states "it appears that the NRC review teams did not have a clear, consistent understanding of what they were supposed to do at the reactor sites". The report concludes at page 12 thereof as follows:



"If the problems within NRC surfaced as a result of the occurrence at Nine Mile Point are not corrected, it is likely that the confusion that existed during implementation of the STLL Category A Items will be experienced again as the remainder of the Action Plan is implemented."

In sum, despite the confusion which the NRC admits existed in its own interpretation and methods of implementing its own requirements, NM has constantly been in compliance with the NRC's requirements of the Item 2.1.8.b "interim fix".



IV. THE ORDERED REMOVAL OF THE (THEN)
SITE SUPERINTENDENT SHOULD BE VACATED

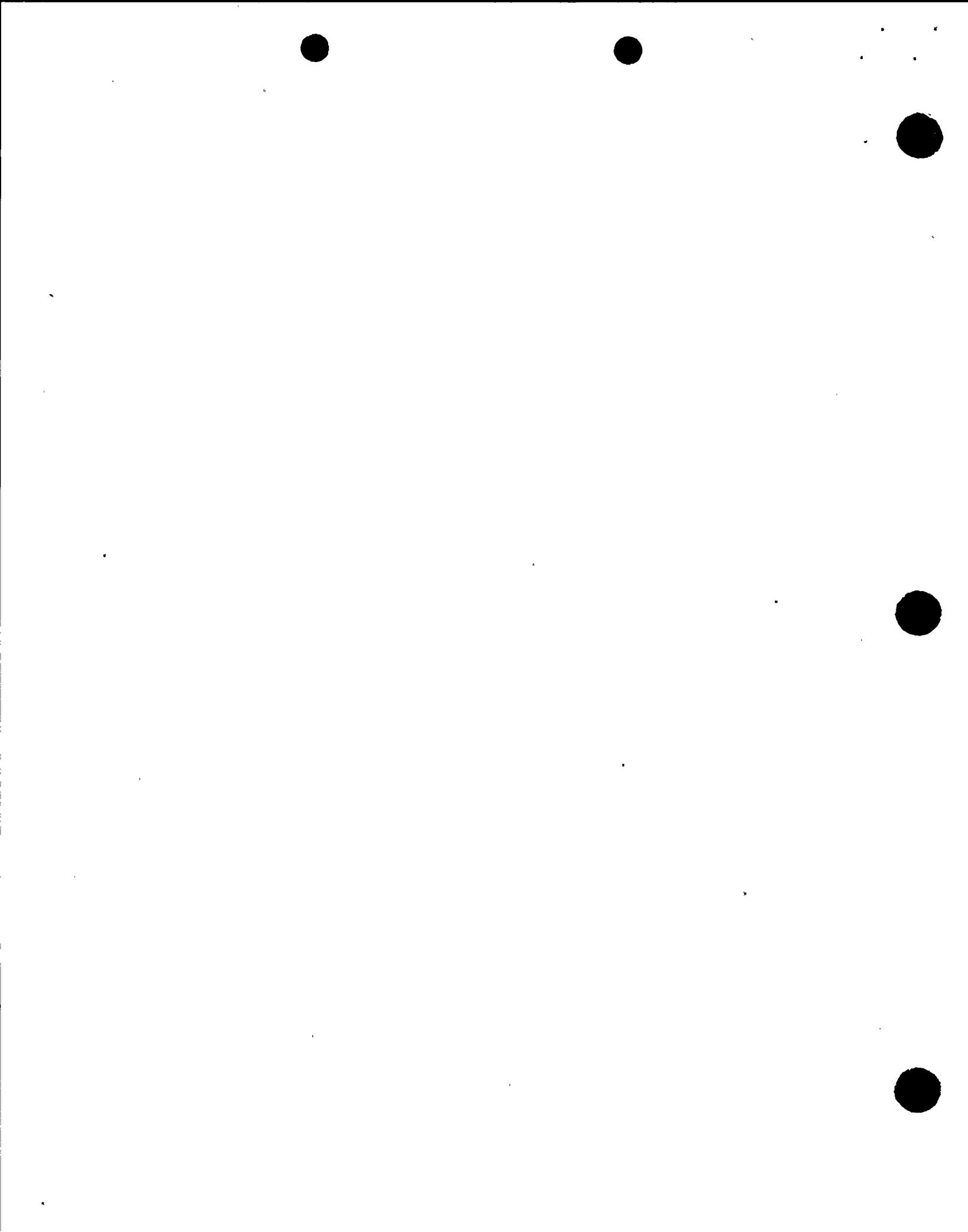
As noted above, by Order Clause A.(1) of the November 26, 1980 Order, the Director of I & E mandated the following:

"A. effective immediately, License DPR-63 is amended by adding thereto the following conditions:

- (1) 'Mr. T. J. Perkins, shall not be involved with nuclear matters for Niagara Mohawk Power Corporation';"

NM strongly protests the issuance of the foregoing Order under the circumstances relied upon by the Director of I & E in the instant proceedings. It should be noted that there is no express provision in either the Atomic Energy Act of 1954, as amended, or the Regulations of the NRC authorizing the removal of an individual in the manner chosen by the NRC evidenced by the Ordering Clauses in Paragraph VI of the November 26, 1980 Order.

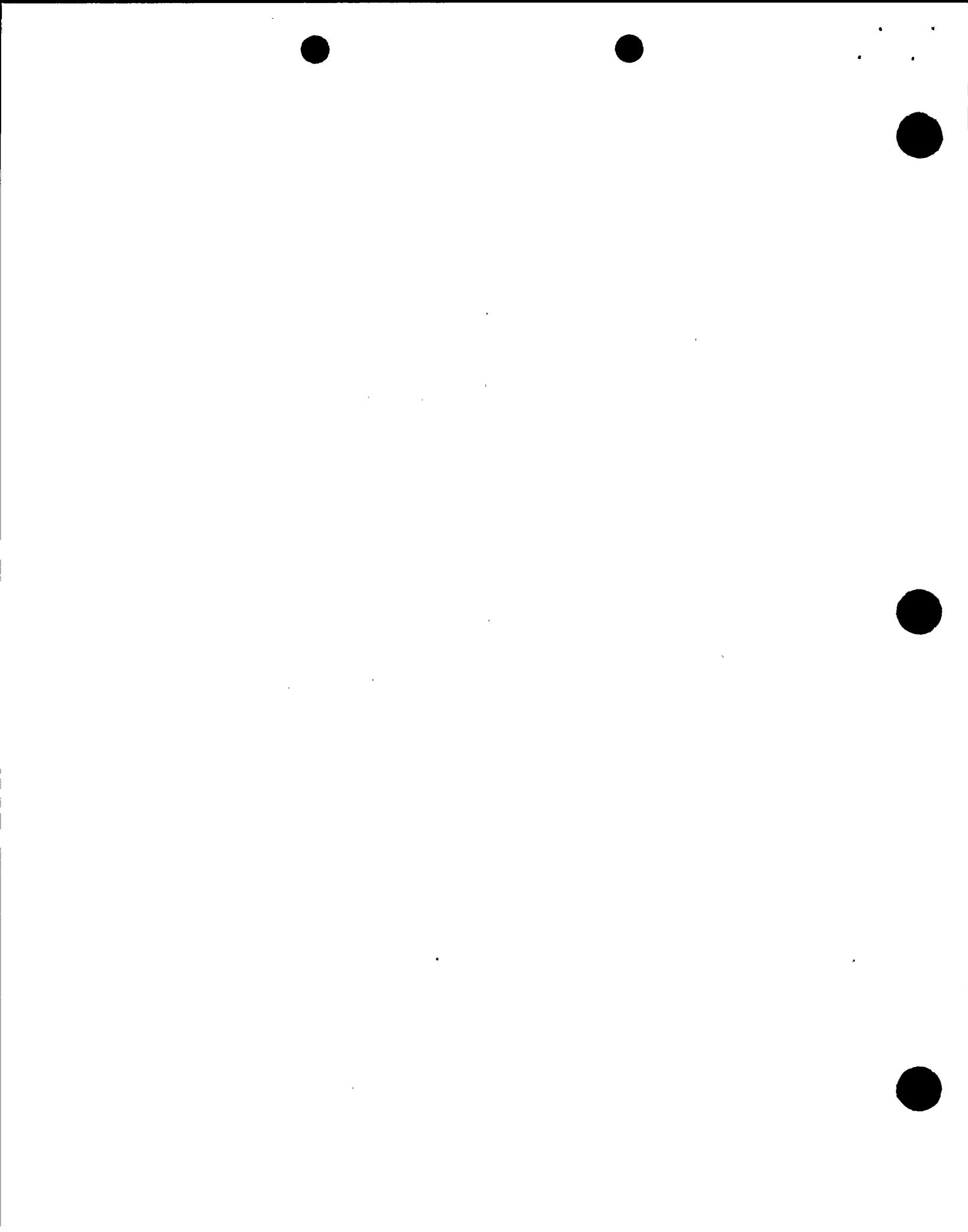
At the outset, it is clear that in the matters allegedly supporting the Director of I & E's summary removal of Mr. Perkins, there is no hint that NM evidenced a blatant disregard of an NRC order or requirement. Rather, what occurred, in NM's view, was at worst a slight deviation from a representation (albeit voluntarily) expressed in the December 31, 1979 status letter in the actions taken by NM personnel as a consequence of the issuance of Category A, Item 2.1.8.b.. In other words, what is in issue here is NM's manner of compliance and not a failure or an omission to comply, either casual or deliberate.



The key to determination of compliance with requirements of Category A, Item 2.1.8.b is not the December 31, 1979 letter, but the required sworn statement of January 22, 1980 in response to the Commission's Order to Show Cause dated January 2, 1980. The January 22, 1980 Answer to Show Cause covers the action taken by licensee and comports fully with the requirements. There was no incorporation on January 22, 1980 of the December 31, 1979 letter.

Mr. Perkins on two occasions (October 31, 1980 and November 18, 1980) at the request of NRC (Office of I & E) investigators signed affidavits prepared by such inspectors. His affidavits demonstrated complete candor and honesty, including his view of actual compliance with Category A, Item 2.1.8.b. The facts, in summary show that licensee had a portable gamma survey monitor, had an acceptable shielding in the form of a lead brick housing for instrumentation and allowable means of calibration of noble gas releases. No charge is made that radiological imbalance was not susceptible of measurement. Incidentally, the second grilling of Perkins resulting in his second affidavit creates suspicion of dissatisfaction by the Director of I & E with possible provable charges against Mr. Perkins and, hence, the second affidavit, candid and honest as his first, was apparently necessary to underlie the extraordinary punishment determined in the pending case.

Mr. Perkins is a 27 year employee of Niagara Mohawk. He has spent full time on both construction and operation of Nine Mile Point Unit 1, a span

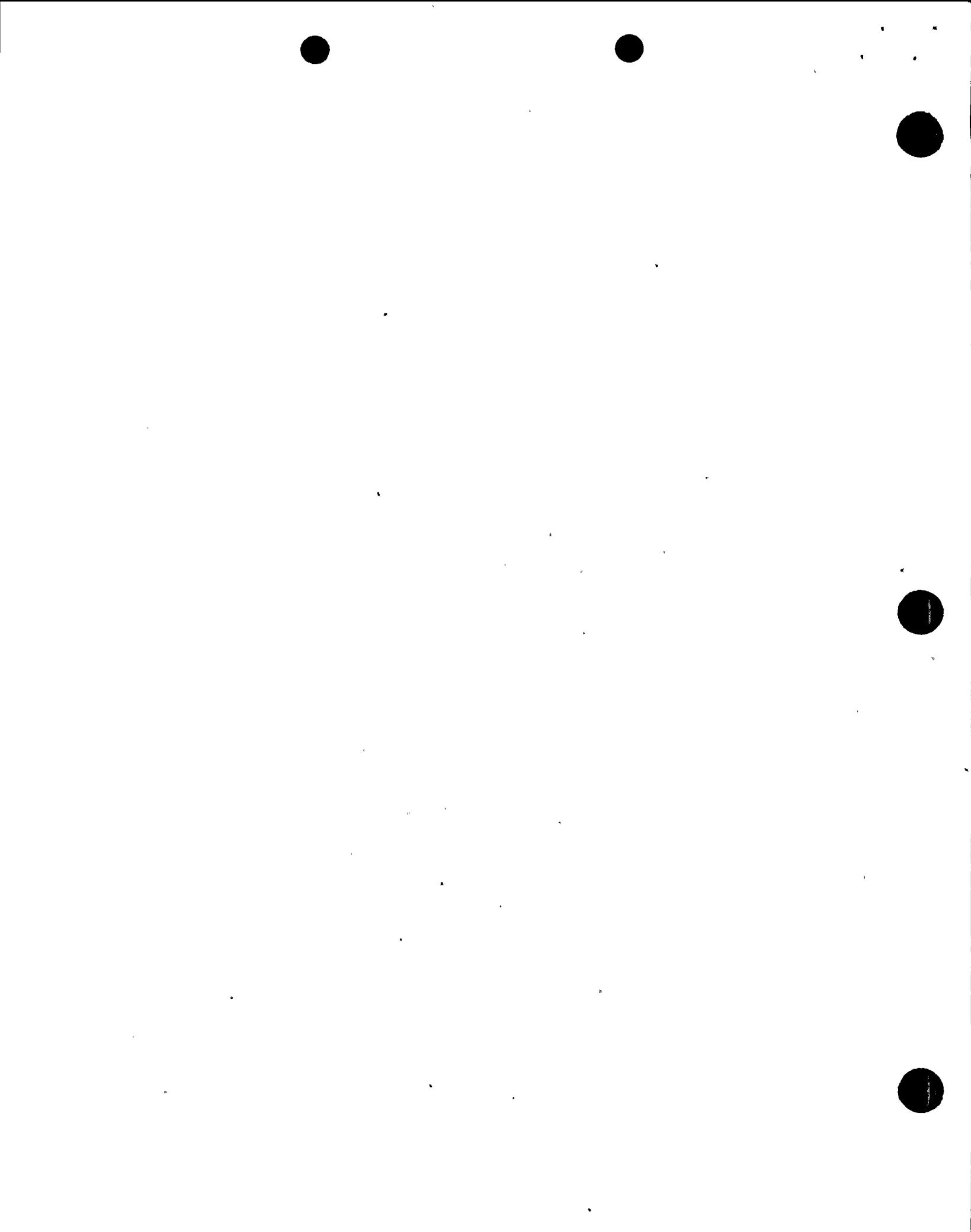


of some 17 years. He has earned the respect and trust of the unit's staff. As the Director has said, the hurt and enforcement of the banishment order would be very deep (Syracuse Herald Journal, December 23, 1980), particularly where there is no evidence of inability to provide any calculations occasioned by radiological imbalance.

To our knowledge, no ordered removal of a responsible supervisor in a licensed nuclear generating plant has to date been mandated by the NRC..

NM's compliance with Category A, Item 2.1.8.b was open and visible for NRC inspectors to see and question at all times on and after December 31, 1979. Paragraph III of the November 26, 1980 Order sets forth conclusions drawn by the Director of I & E, but fails to acknowledge that the Company did have equipment immediately available in addition to the four then-installed monitoring facilities.

When Mr. Perkins' actions are examined in that light, NM believes a dispassionate review will compel the conclusion that his cavalier banishment from nuclear matters (undefined) for NM is unsupported, much less justified. A review of Mr. Perkins' participation in the implementation of Category A, Item 2.1.8.b, follows.



1. The Alleged False Statement
And Its Materiality

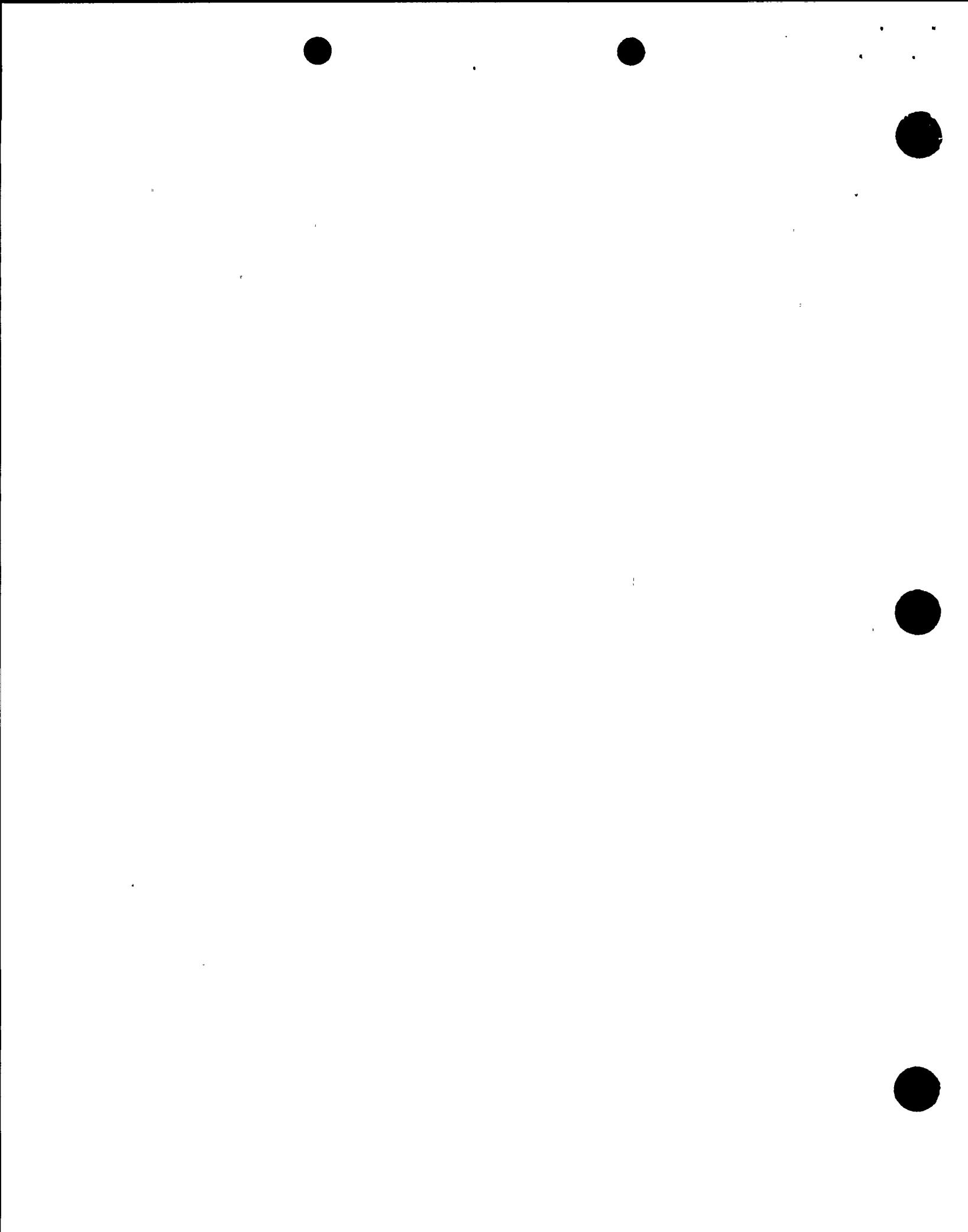
Paragraph IV of the November 26, 1980 Order states as follows:

"As noted above, at least one responsible manager in the licensee's organization, the (then) Site Superintendent, knew that the January 22, 1980 sworn statement submitted in response to the January 2, 1980 Order was false. This statement that the requirement of Category A Item 2.1.8.b was completed by December 31, 1980 was not only false but also material since operation of Nine Mile Point Unit 1 was permitted to continue beyond January 31, 1980 in the belief by NRC that the requirements of the Commission's Order dated January 2, 1980 were satisfied. Meeting requirement 2.1.8.b was necessary to mitigate the consequences of postulated accidents by providing reliable information on which to base decisions concerning protective actions, including evacuation. The material false statement is set forth in the Notice of Violation issued this date."

The allegation is made that Mr. Perkins knew that the January 22, 1980 sworn statement submitted in response to the January 2, 1980 Order was false. That conclusion fails to withstand analysis.

A. The Alleged Failure To Provide Shielding
(Lead Cave) [November 26, 1980 Order,
Paragraph III (a), pg. 4]

While it is correct, as stated in Mr. Perkins' October 31, 1980 affidavit (pp. 3-4), that at both the time of the December 31, 1979 submittal and the response to the Show Cause Order dated January 22, 1980, he knew the lead cave was not in place, that is not to say or sufficient to conclude, as the Director of I & E has done, that he (Perkins) " . . . knew that the January 22, 1980 sworn statement . . . was false."



NM has already demonstrated that the express undertakings described in the December 31, 1979 status letter were neither included nor referenced in the January 22, 1980 response to the January 2, 1980 Order to Show Cause. Moreover, the conclusion reached by the Director of I & E is in manifest error in that he has totally ignored Mr. Perkins' explanation of his actions as documented in the same affidavit (pp. 3-4), viz:

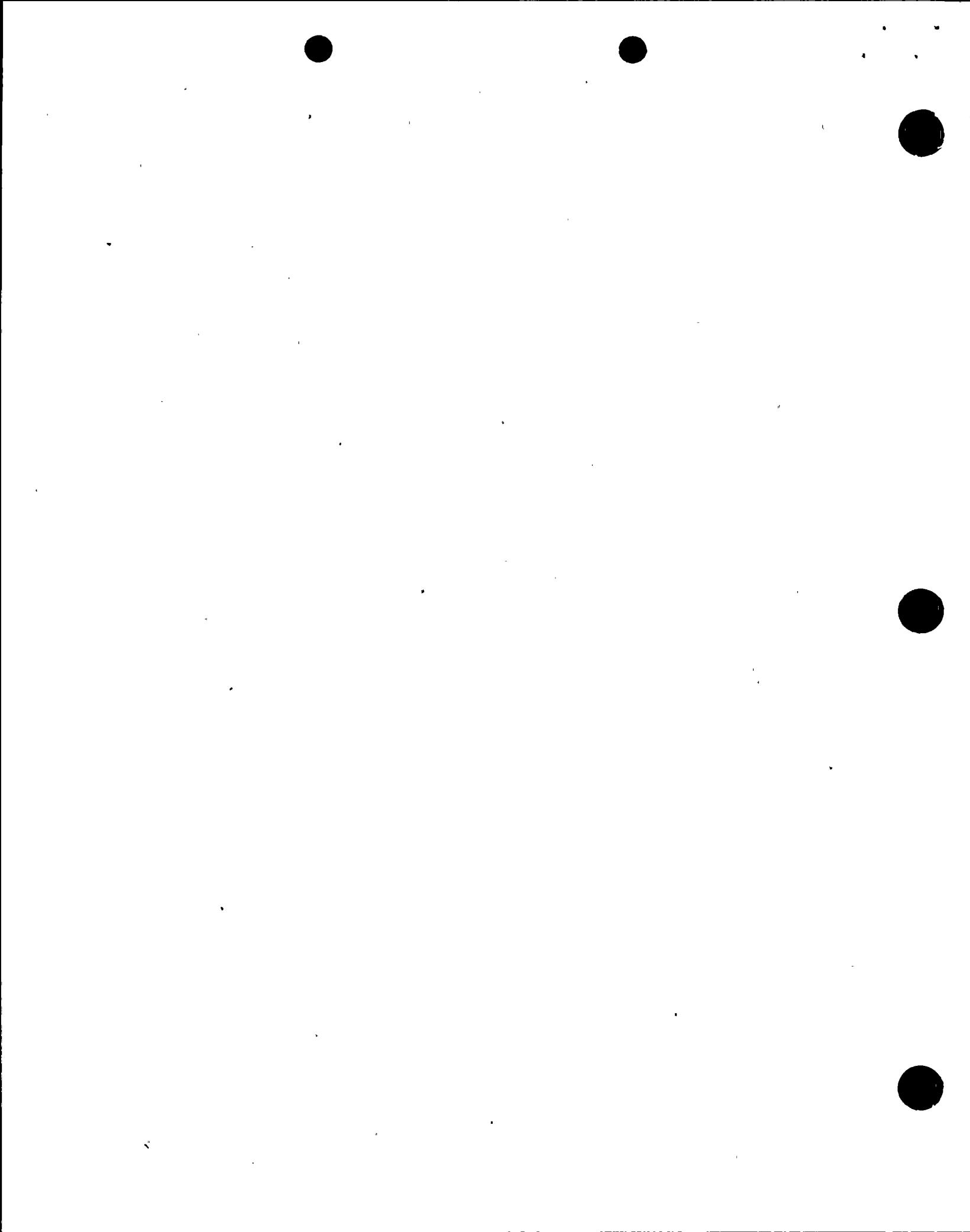
" . . . I knew the lead brick was in place and I knew the lead cave was not in place but I placed no significance to the absence of the cave. Prior to the 31st of December 1979 I recall having discussion with Ed Leach at which he advised me that he had the bricks in place and could insert the teletector but that he wanted to relocate the piping to make a better geometry for the teletector which meant the cave would not be installed until the modification was made. I gave Leach no particular time to be on the cave completion and left the responsibility with him to complete it. The December 31, 1979 deadline was not considered a factor for the cave completion."

(Emphasis supplied).

and, as stated in Mr. Perkins' November 18, 1980 affidavit (page 2):

" . . . However, since I placed no significance to the cave I did not feel it necessary to relay the fact that the cave was not completed to anyone else up the management chain."

In its Response to the Notices of Violation and of Proposed Imposition of Civil Penalties dated December 19, 1980 (Response to Notices) filed herein, NM detailed the action it had taken to meet the shielding requirements contained in Category A, Item 2.1.8.b (pp. 23-24). Accordingly, since NM has demonstrated that the requirements of Category A, Item 2.1.8.b were in fact met at the time the January 22, 1980 Answer to Show Cause was submitted, the charge

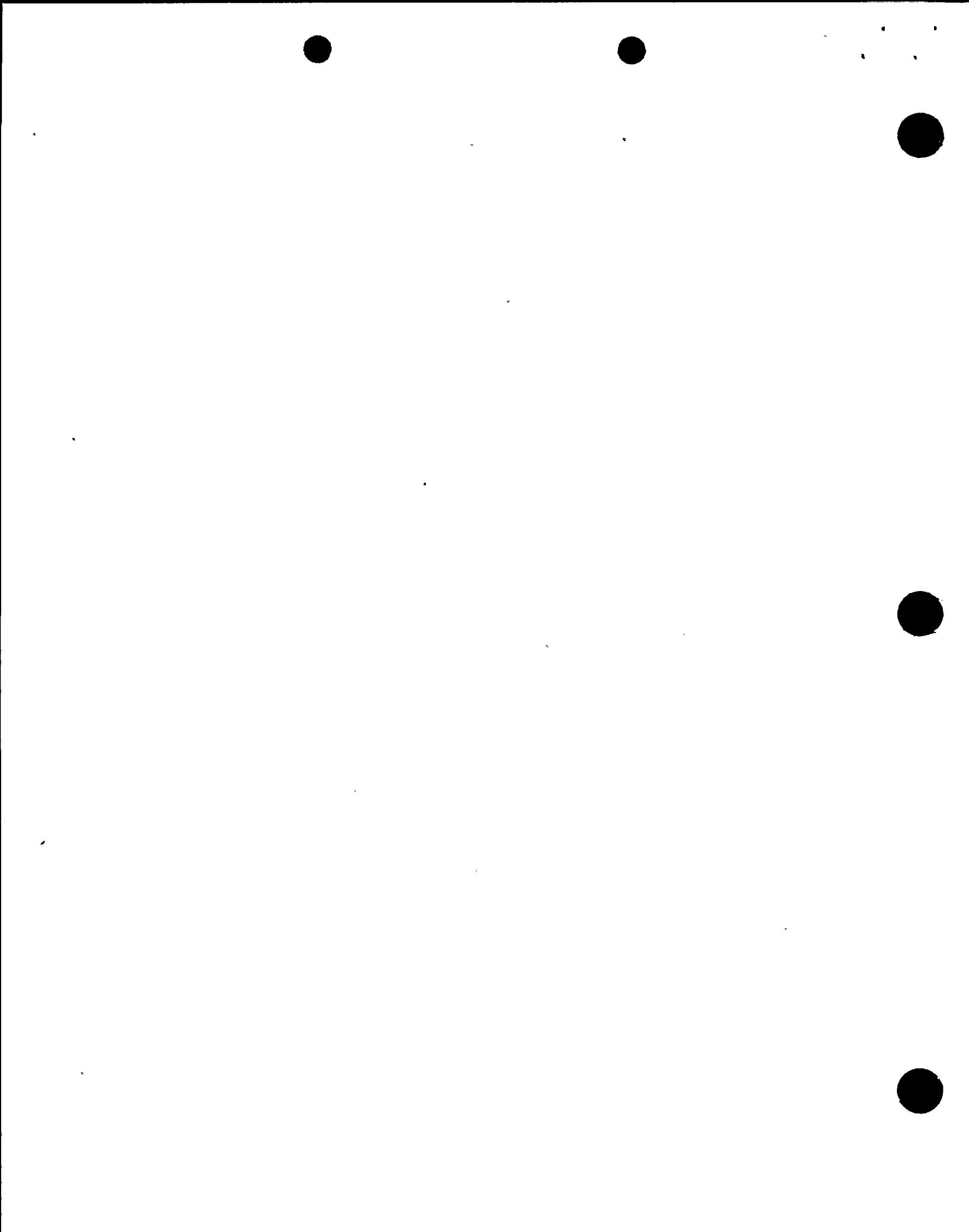


that a material false statement was made cannot be sustained irrespective of what was in Mr. Perkins' mind regarding the shielding configuration.

B. The Allegation That A Portable Gamma Survey Instrument Had Not Been Installed Nor Had A Dedicated Instrument Been Identified [November 26, 1980 Order, Paragraph III(b)]

In like manner, NM in Appendix A (pp. 18-22) demonstrated that it had in fact fulfilled the acceptable option of meeting this requirement of Category A, Item 2.1.8.b by means of a portable instrument to be removed from a predetermined location (emergency kit) for immediate use should the need therefor arise and that its inclusion and availability in the emergency kit constituted a "dedication" within the meaning of the requirement.

Recent media reports that other licensees had responded to Category A, Item 2.1.8.b in a manner similar to that employed by NM, strongly suggests that had the December 31, 1979 status letter stated NM's de facto response to the items alleged in (a) and (b) above (Paragraph III, November 26, 1980 Order), which items were the sole predicate for the issuance of the November 26, 1980 Notices of Violation and Proposed Imposition of Civil Penalties, in all probability neither the latter Notices, nor the November 26, 1980 Order addressed herein would have been issued. Upon information and belief, such similar responses of other licensees were accepted by the NRC as then fulfilling the requirements of Category A, Item 2.1.8.b. If NM is correct in this assessment, the drastic disciplinary action meted out by the terms



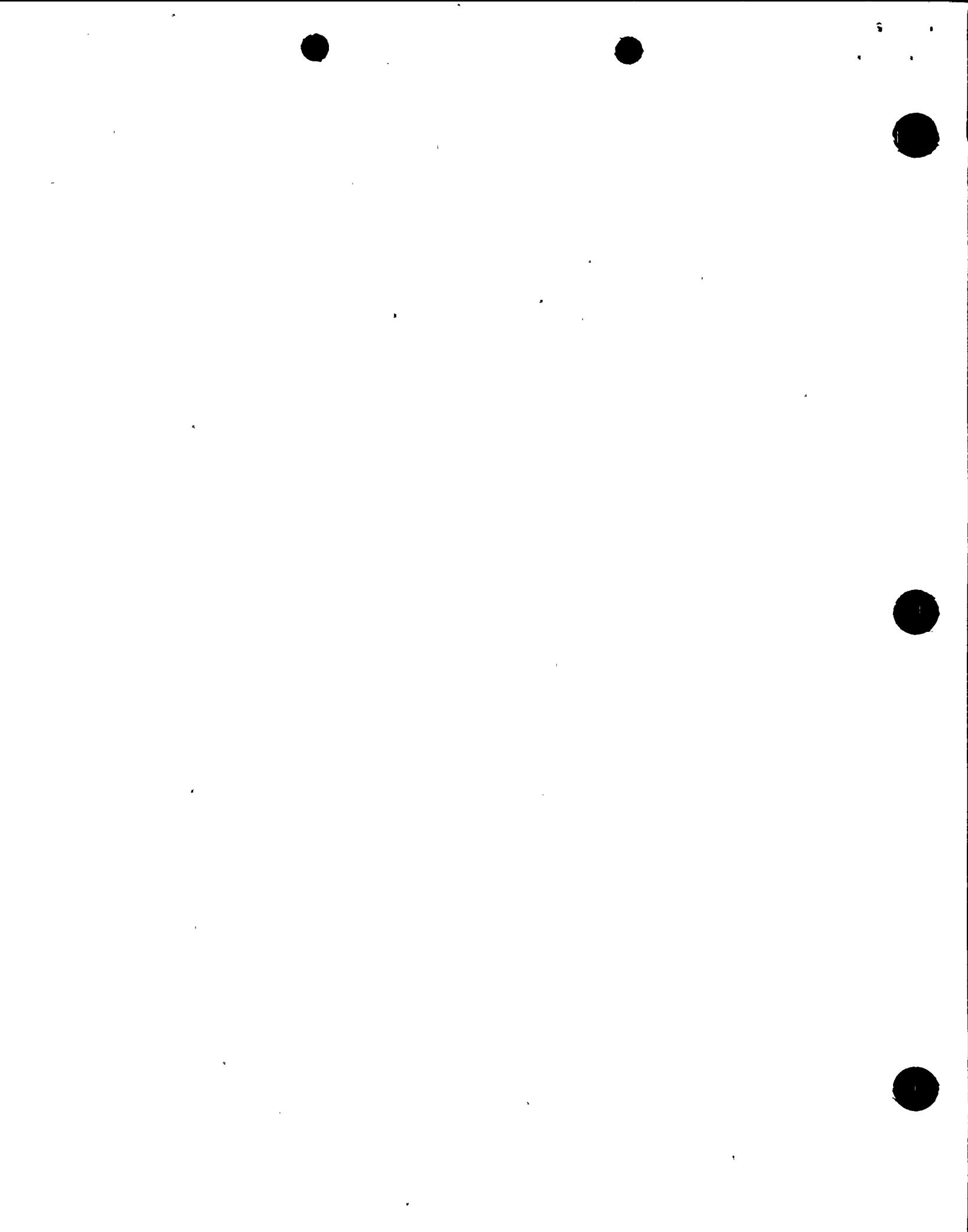
of the November 26, 1980 Order as respects Mr. Perkins' total and infinite deprivation of the use of his specialized profession, assumes an even greater tragedy. In the interests of justice and fairness, the NRC should reconsider this aspect of the November 26, 1980 Order.

It is unclear whether the allegations contained in the November 26, 1980 Order, Paragraph III, items (c), (d) and (e) [pg. 4] pertain to the removal of Mr. Perkins. Paragraph IV (pg. 6) of the last said Order appears to limit the Site Superintendent's (Mr. Perkins) responsibility to the alleged false statements set forth in the Notice of Violation. To the extent that Mr. Perkins' removal is predicated upon any of the allegations alleged in items (c), (d) and (e) addressed elsewhere in this response, such response in each respect is deemed included hereunder.

C. The Materiality Of The Alleged False Statements

As recited in the Notice of Violation, it is alleged that NM's January 22, 1980 Answer To Show Cause submitted in response to the January 2, 1980 NRC Order to Show Cause stating that the Category A, Item 2.1.8.b had been completed by December 31, 1979 is a material false statement (see Appendix A, p. 11). The Notice of Violation goes on to state:

"It is false in at least two respects: first, neither a high range survey instrument was installed nor was such instrument provided on a dedicated basis; and secondly, a lead cave to shield the instrument was not installed. This false statement and each of its subparts are material in that meeting the requirement



was necessary to mitigate the consequences of a postulated accident and the absence of meeting this requirement by January 31, 1980 required shutdown of the facility."

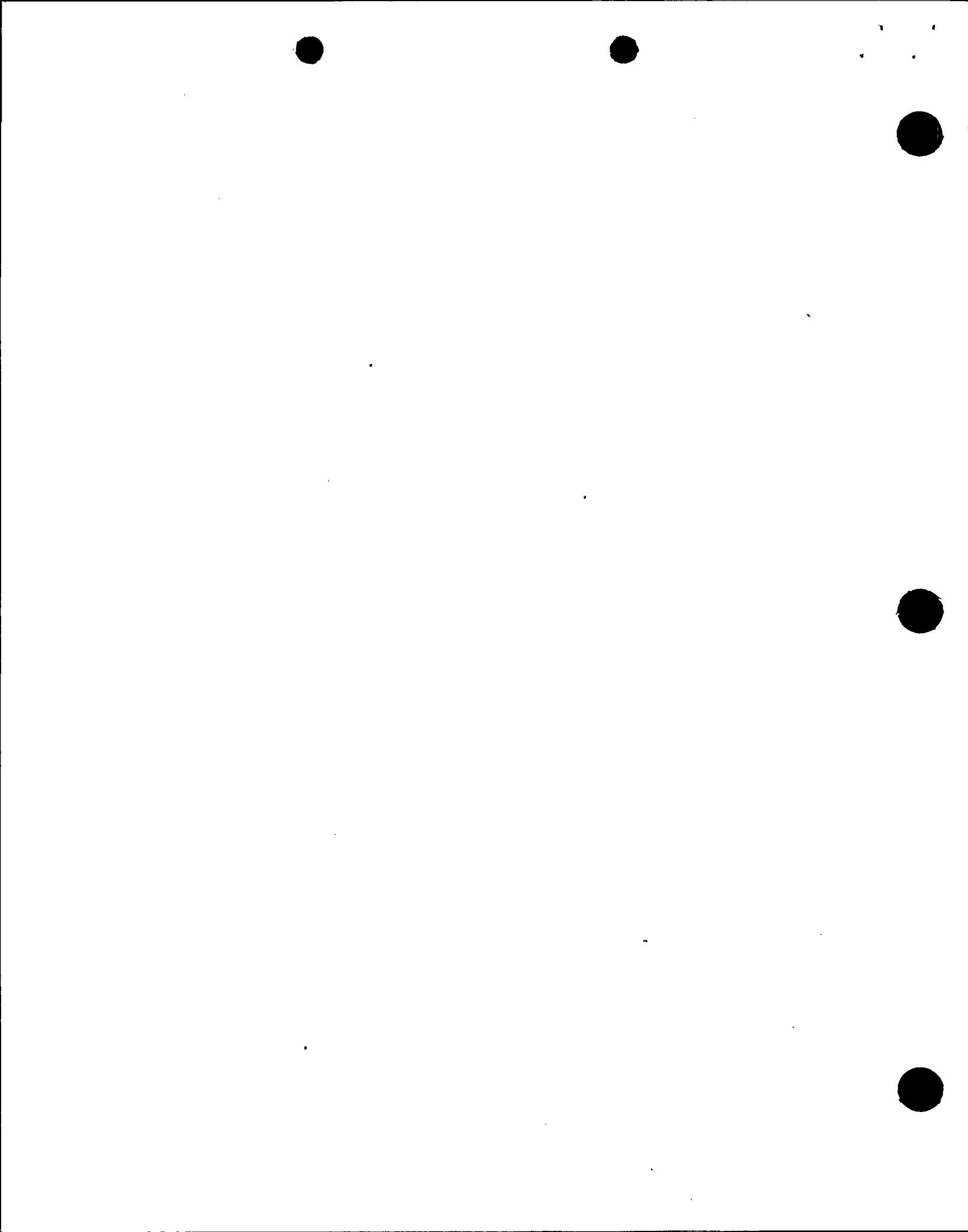
The foregoing allegation is substantially repeated in the November 26, 1980 Order, Paragraph IV (pg. 6) which states in relevant part:

"Meeting requirement 2.1.8.b was necessary to mitigate the consequences of postulated accidents by providing reliable information on which to base decisions concerning protective actions, including evacuation. The material false statement is set forth in the Notice of Violation issued this date."

NM believes that it has demonstrated that both the intent and demands of the NRC requirements which are here in issue, i.e., ". . . to mitigate the the consequences of postulated accidents . . .", were satisfied by the actions taken by its responsible personnel and at no time was the public health and safety endangered by reason of these actions. Assuming, arguendo, that its actions did not completely comport with the undertakings set forth in its December 31, 1979 status letter and assuming further that those undertakings in some way expanded the specified requirements of Category A, Item 2.1.8.b, the question arises whether the statements made were material.

In reaching any conclusion in this regard, it is necessary to consider both NM's response to the requirement in issue as well as the recorded pronouncements of the NRC as respects materiality.

NM has repeatedly demonstrated that it was in a position at all times to meet the contingency contemplated by Category A, Item 2.1.8.b. To this

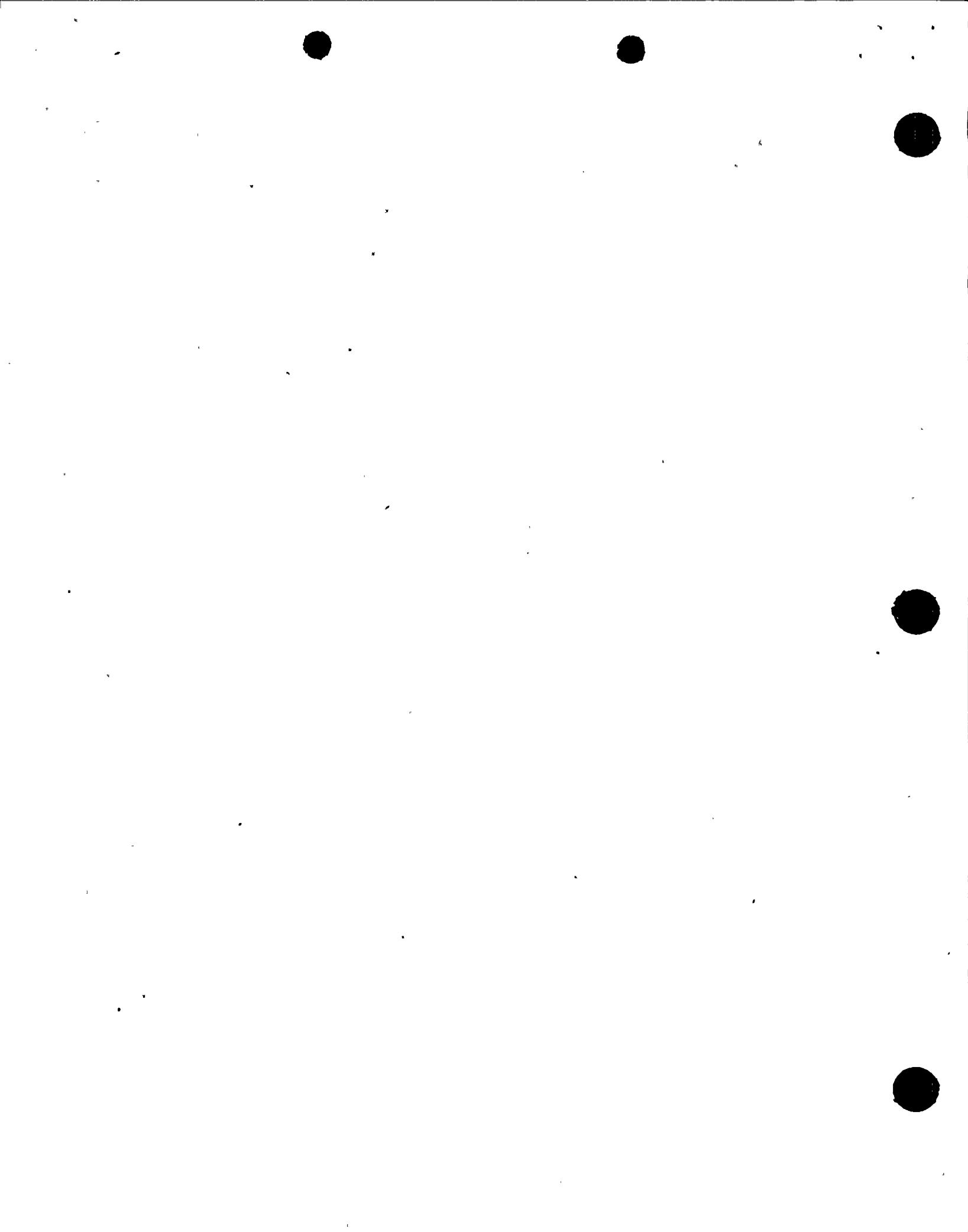


end, it had by December 31, 1979:

- (1) At all times maintained a portable high-range monitor survey instrument in the emergency kit at a predetermined location permitting a response time to the point of utilization of approximately ten (10) minutes should the need therefor arise;
- (2) Installed a lead brick at a preselected location on the sample line to provide shielding to minimize background interference. The lead brick configuration included a location hole to accommodate the probe which was part of the portable monitoring instrument.

In Virginia Electric and Power Company ["VEPCO"] (North Anna Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), the NRC dealt extensively with the issue of materiality of statements and information required of licensees. While that case concerned information largely related to seismic matters, it is equally applicable to the matters here in issue. The VEPCO decision also decided issues not relevant here, e.g., the omission to provide required information which the Commission found to constitute a "material false statement", as well as a determination that knowledge of falsity is not necessary for liability under Section 186 of the Atomic Energy Act.

As applied to the instant proceedings, the Commission's decision in VEPCO is helpful. That decision provides in relevant part (pp. 487-8):

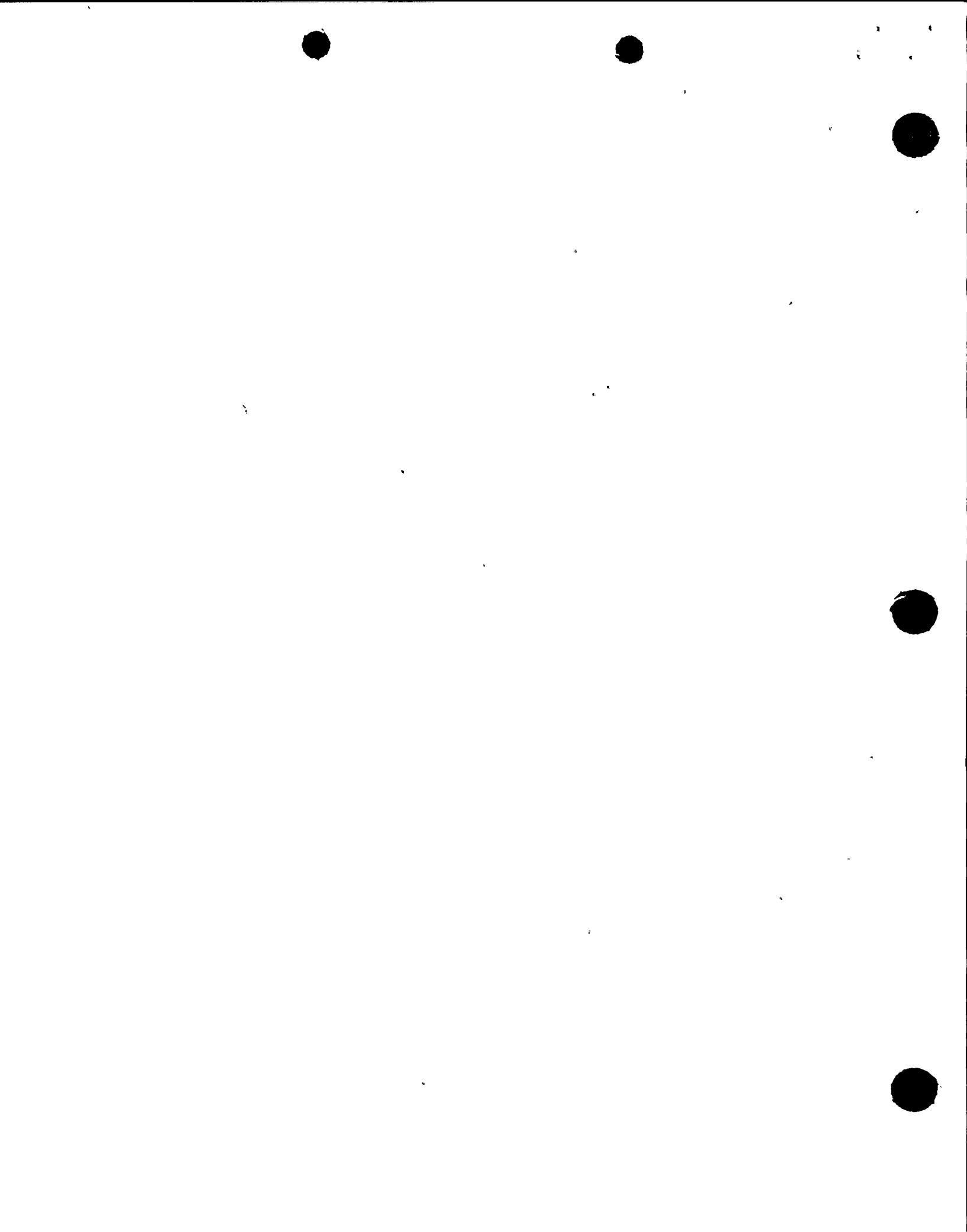


"Whether a particular bit of information is material in a given context must, as the Court of Appeals for the District of Columbia Circuit has emphasized, 'be judged by the facts and circumstances in the particular case.' Weinstock v. United States, 231 F.2d 699, 701-702 (1956). There is no obvious boundary between material information and trivia, but clear cases of both exist, and a careful attention to context along with a healthy dose of common sense will resolve most problems. Information with no potential bearing on the licensing process is not material. Moreover, materiality is dependent in part on the stage of the proceeding involved. At the very beginning of the licensing process, when initial investigations are being made, the applicant has greater latitude to inquire into areas that may prove, when that inquiry is concluded, to be without significance in terms of the licensing decision. At the hearing stage, in contrast, where agency decisionmaking is imminent, arguably relevant data must be promptly furnished if the agency is to perform its function."

and again (p. 491):

"As discussed above, determinations of materiality require careful, common-sense judgments of the context in which information appears and the stage of the licensing process involved. Materiality depends upon whether information has a natural tendency or capability to influence a reasonable agency expert. There will be hard cases in determining which omissions are material, just as there are hard cases in determining which affirmative false statements are material." . . .

Applying the foregoing to the statements made by NM in their most prejudicial light, it should have been apparent that the proposed use of a portable monitoring instrument would lead a "reasonable agency expert" to

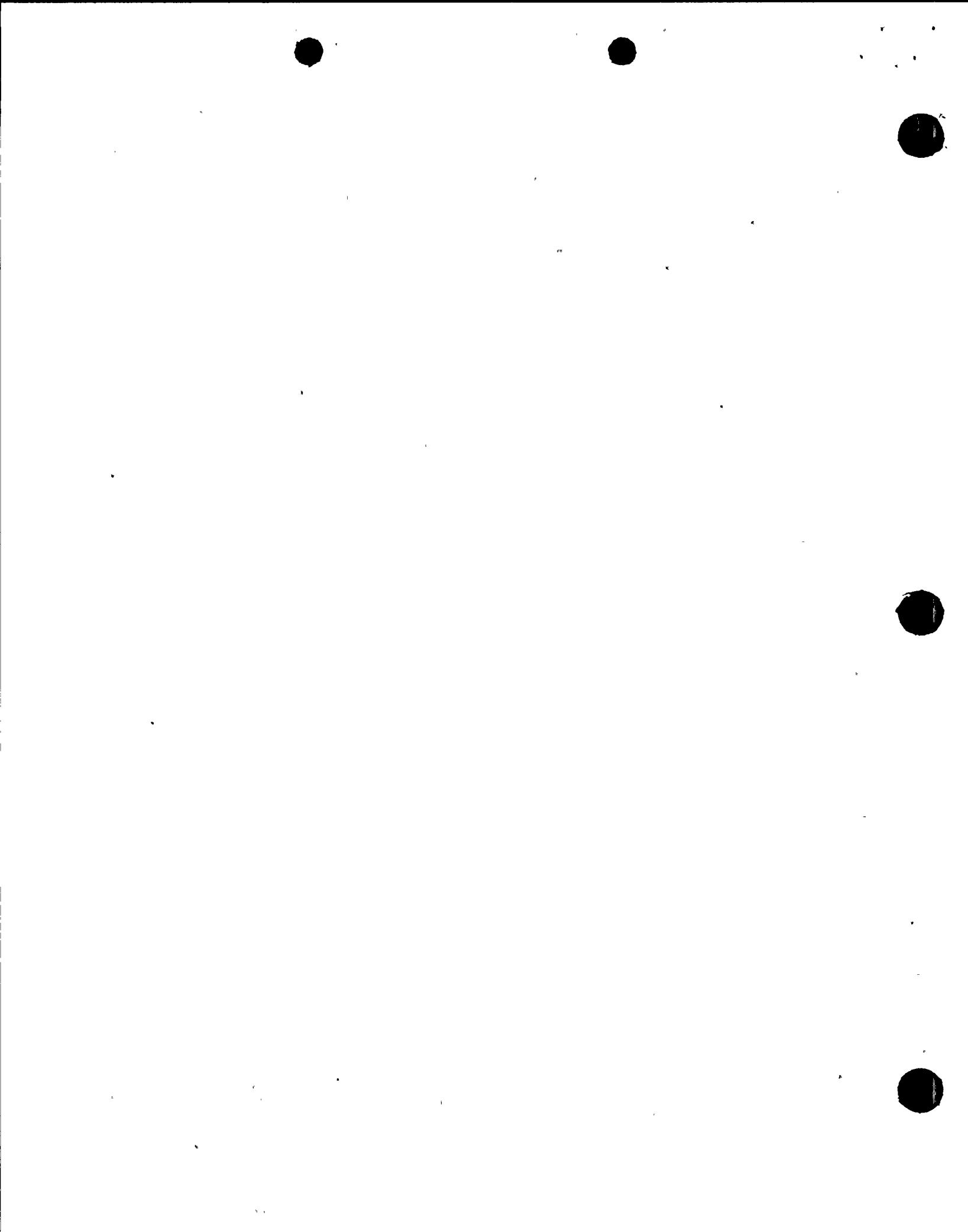


* /

conclude that a permanent installation was not proposed. Moreover, since "Category A" items were by definition an "interim fix", greater latitude should be accorded to the licensee in its response to the tentative requirement. In other words, statements made as a consequence of conceded interim measures are more closely akin to those which pertain . . . "At the very beginning of the licensing process, when initial investigations are being made . . ." (Category A items) " . . . in contrast where agency decision-making is imminent . . ." as would be the case when the "final fix" or "Category B" requirements were ultimately determined and implemented.

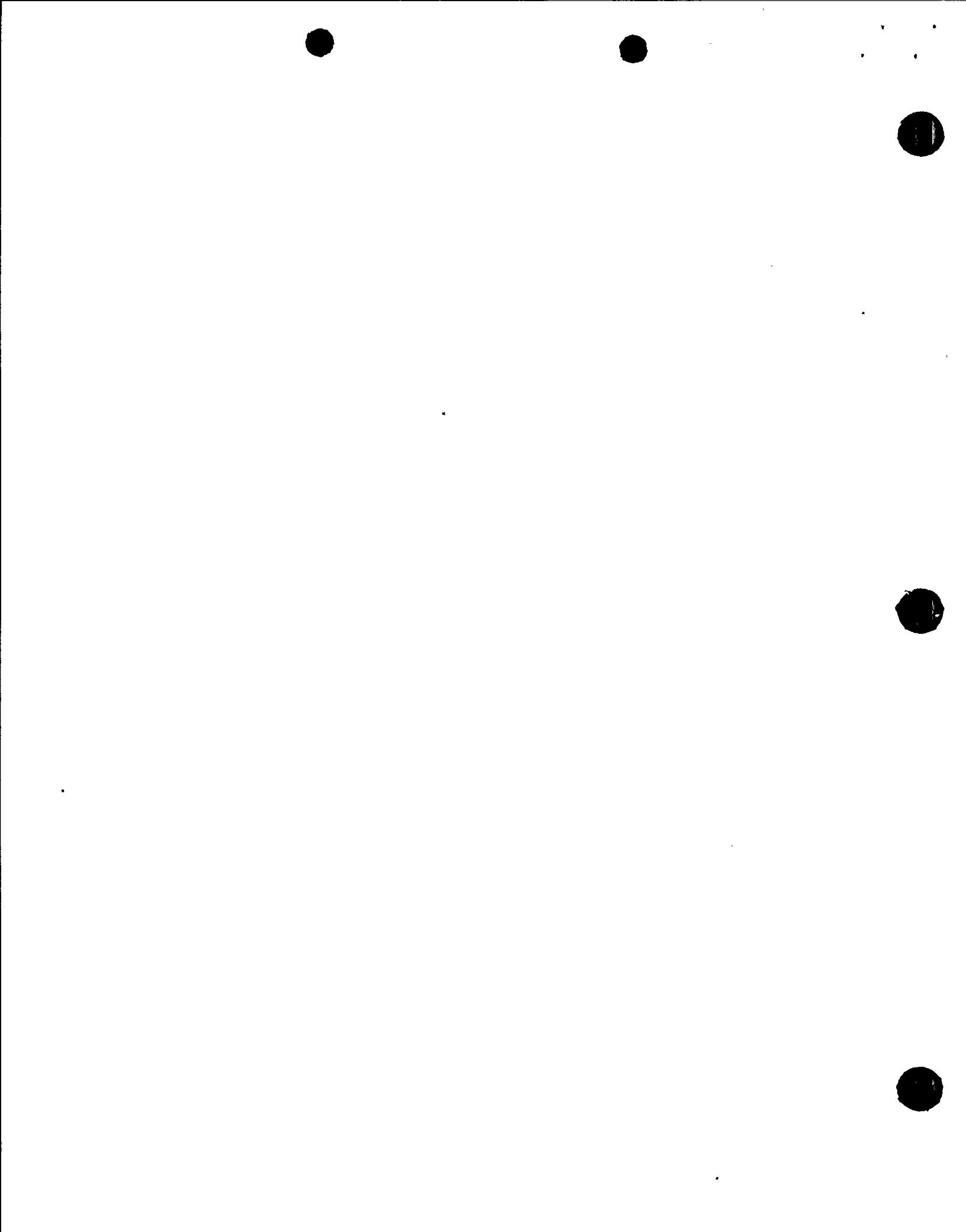
Moreover, assuming, arguendo, that NM's Answer To Show Cause dated January 22, 1980 included an express commitment to install a lead cave (which it did not), it is NM's view that whenever a statement involving an alleged commitment (e.g., a lead cave) which goes beyond the express requirement (e.g., "provide shielding") of a given regulation is under scrutiny, that factor should be accorded considerable if not controlling weight when the materiality of that statement is in issue. This is particularly true when shielding was in fact provided as in the instant case.

* / Significantly, Paragraph III(d) of the November 26, 1980 Order expressly recognizes that the use of a portable survey instrument was proper. The subparagraph reads in relevant part: (d) there were no specific procedures to assure that in the event the existing in line stack monitor goes off scale, a portable gamma survey instrument would be properly installed, . . .". (Emphasis supplied). This allegation should be compared with allegation A) in the Notice of Violation (p. 2) which charges in part that ". . . neither a high range survey instrument was installed nor was such instrument provided on a dedicated basis; . . .".



For these reasons, NM submits that the tests of materiality laid down in VEPCO have not been met. If NM is correct, the very underpinnings of the charges levelled by the Director of I & E are effectively shorn. Certainly with the stakes so high as respects Mr. Perkins' ability to continue to maximize his capabilities in an area to which he has devoted much of his lifetime, any doubt should be resolved in his favor. If there was any culpability on anyone's part in this matter, it was not related to what actually was done by NM personnel under Mr. Perkins' supervision but, rather, the failure to follow up the December 31, 1979 status letter with a further explanation of the precise manner in which NM satisfied the requirements of Category A, Item 2.1.8.b. Under the circumstances here involved, the peremptory removal of one of NM's key nuclear operating personnel appears as excessively severe. The removal has already produced a lowering of morale in a group where their talents and availability are admittedly in short supply. The removal may in the long run prove counter-productive when proper consideration is given to the impact of the Director's action on the morale of those engaged in and charged with the responsibility of the operation of a licensed facility.

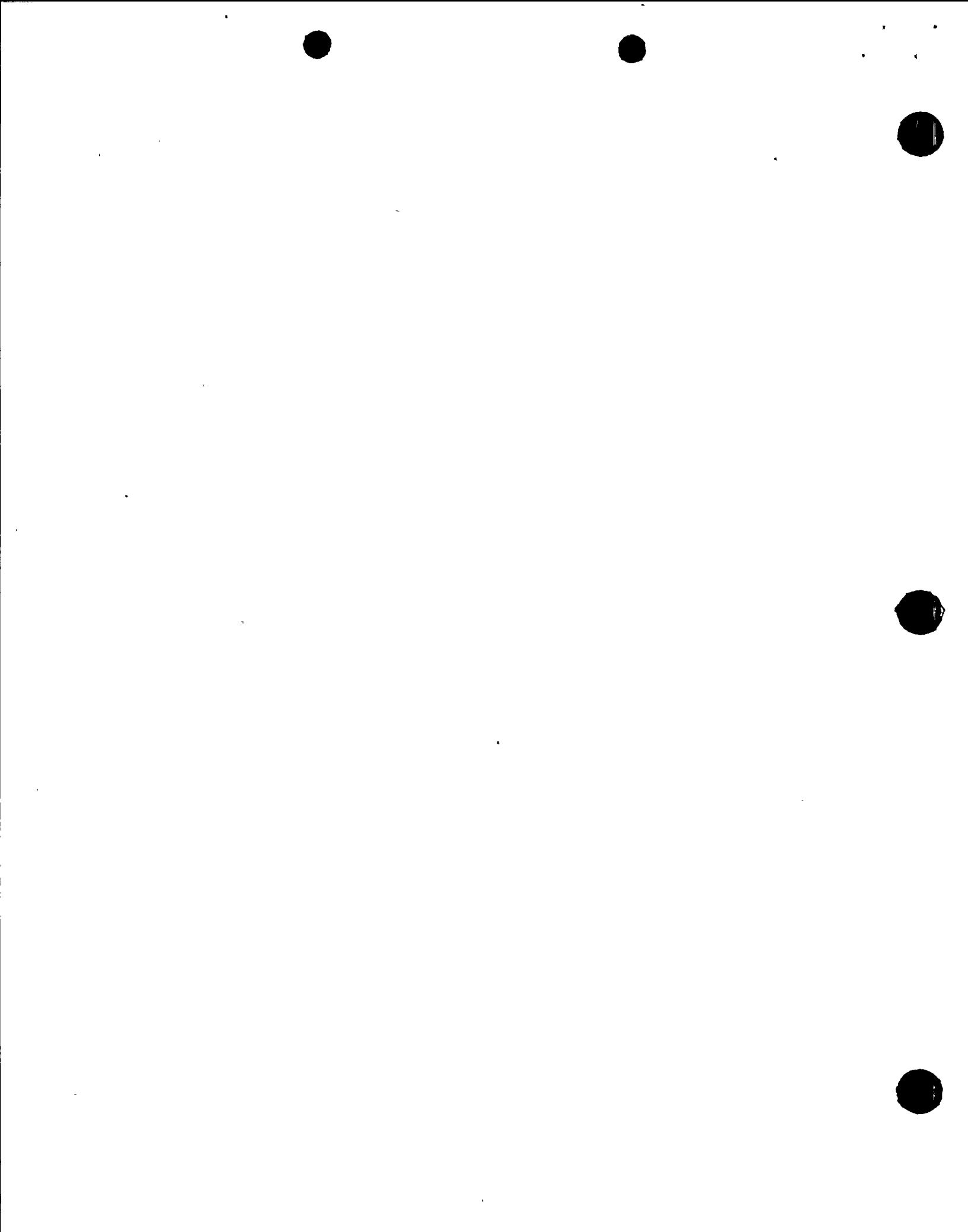
In urging the NRC to vacate that part of the November 26, 1980 Order as respects Mr. Perkins, NM is not unmindful that the submission of accurate information is vital to the successful and continued safe operation of a licensed facility. NM believes the instant case falls far short of a



scenario which would perhaps otherwise justify the permanent exclusion of an individual from nuclear matters.

NM has intentionally based its arguments concerning Mr. Perkins' status on the merits. Nonetheless, the NRC should not ignore Mr. Perkins' past record in its deliberations. Nowhere in the charges made is there any suggestion that the actions complained of were the culmination of any other instances of mal- or misfeasance. As a result of this isolated incident, Mr. Perkins' reputation in the industry has in all likelihood already been irretrievably damaged. Fairness dictates that Mr. Perkins be rehabilitated to the extent possible by vacating that part of the November 26, 1980 Order which amended License DPR-63 precluding his personal involvement with nuclear matters for NM.

To the extent that the arguments and their rationale set forth in Paragraph V hereof next following (pp. 30-33) apply to Mr. Perkins' status, they shall be deemed to be incorporated herein by reference.



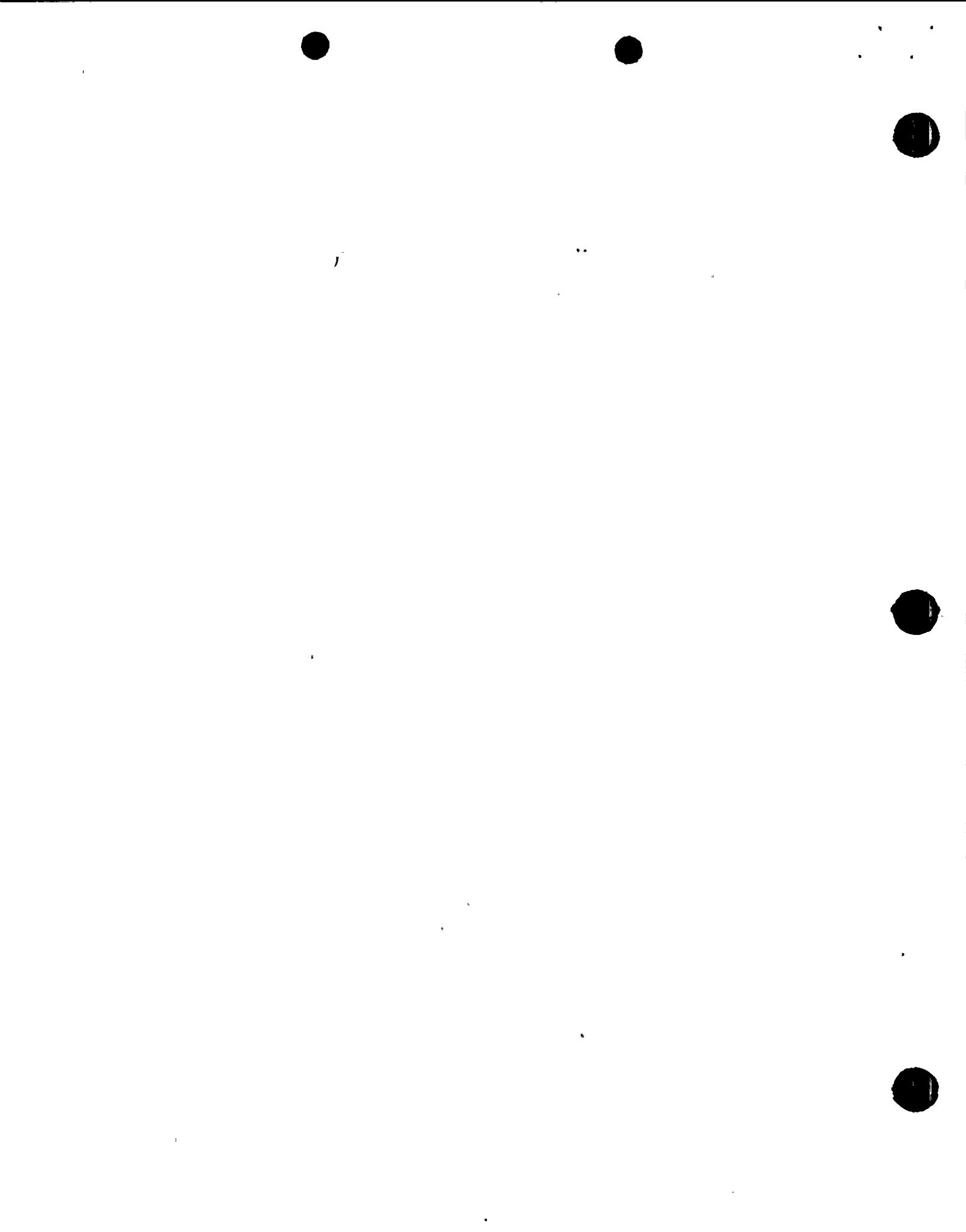
V. THE SHOW CAUSE ORDER AS RESPECTS
NIAGARA MOHAWK'S EXECUTIVE VICE PRESIDENT
(MR. JAMES BARTLETT) SHOULD BE VACATED

As noted above, the November 26, 1980 Order, Paragraph IV B. (p. 8) required that:

"B. the Licensee Show Cause why Mr. James Bartlett, The Executive Vice President, who signed the January 22, 1980 letter, should not be similarly removed from involvement in nuclear matters."

While any allegation of some purported wrongdoing is totally lacking from the express terms of the above quoted Paragraph VI B, NM nonetheless assumes for the purpose of this Answer that, consistent with other portions of the November 26, 1980 Order (Paragraph III D, pp. 5-6) and the concomitant Notices of Violation and Proposed Imposition of Civil Penalties issued herein, the Director of I & E perceives the January 22, 1980 Answer To Show Cause executed by Mr. Bartlett as containing a "material false statement."

NM previously addressed this issue in detail (Appendix A, Paragraph III A, pp. 12-13) and no new matters are alleged in the November 26, 1980 Order which in any way detract from or impinge upon those arguments. Suffice it to say that nowhere in the January 22, 1980 Answer To Show Cause do the words "a high range survey instrument was installed . . . on a dedicated basis" or the words ". . . a lead cave to shield the instrument was installed," nor, for that matter does any description of the precise manner of compliance with the requirements of Category A, Item 2.1.8.b other than the use of the word "Procedures," appear (Appendix A, page 13).

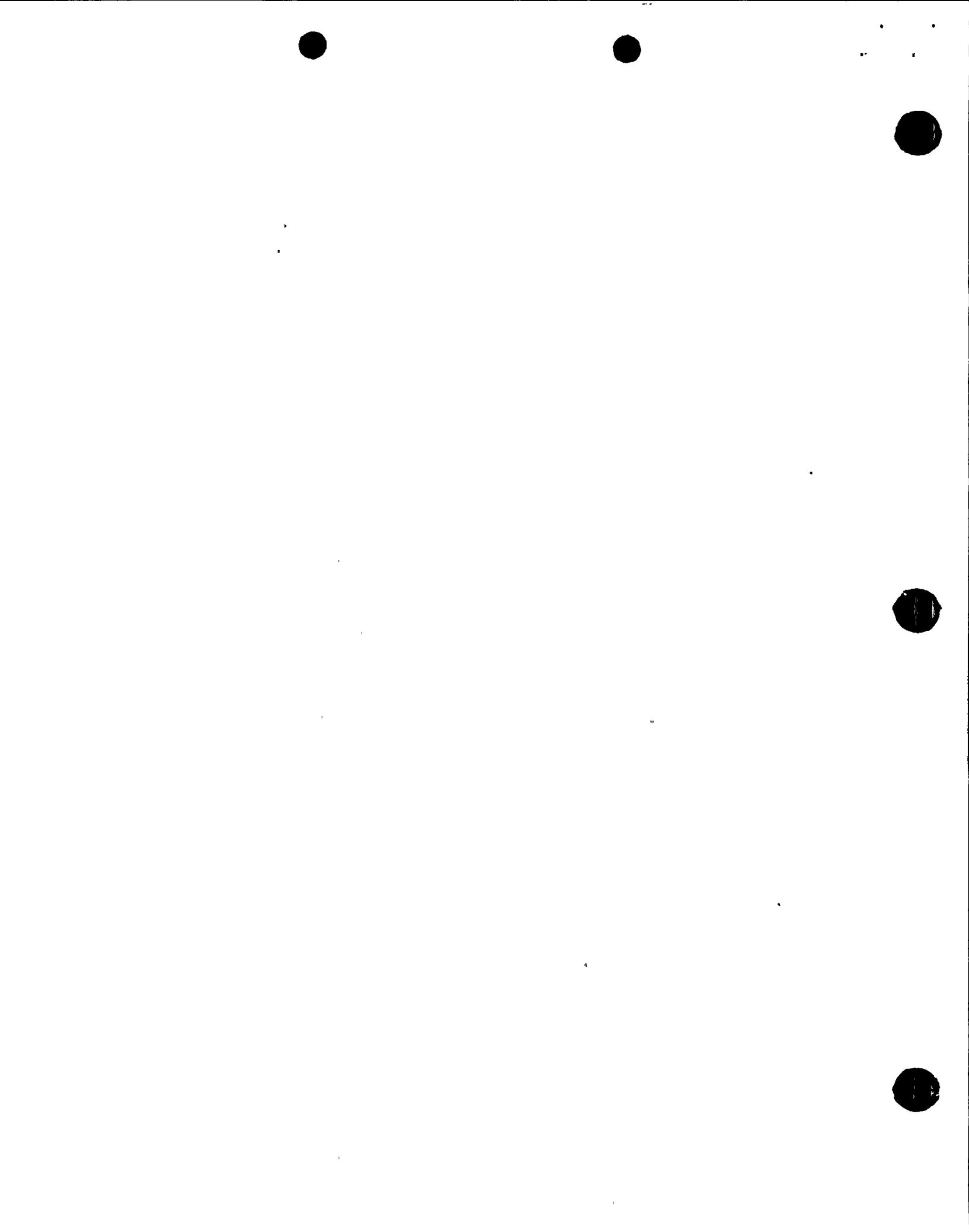


Significantly, the November 26, 1980 Order expands the Director of I & E's lexicon in characterizing the January 22, 1980 Answer To Show Cause in that it allegedly " . . . contained a false statement that the actions required by 'Category A' Item 2.1.8.b were complete when in fact they were not . . ." (Paragraph III D., page 6; emphasis supplied). It cannot be more emphatically gainsaid that NM's "actions" in fact met the requirements of Category A, Item 2.1.8.b. NM believes that had the Director of I & E looked to the "actions" taken by the Licensee and weighed those actions against the manifest requirements of Category A, Item 2.1.8.b, rather than against the choice of words gleaned from a collateral document, i.e., the December 31, 1979 status letter, this entire controversy would in all likelihood have never materialized and the professional reputations of both Mr. Bartlett and Mr. Perkins would have been preserved.

The November 26, 1980 Order, Paragraph III, subparagraph D, also states:

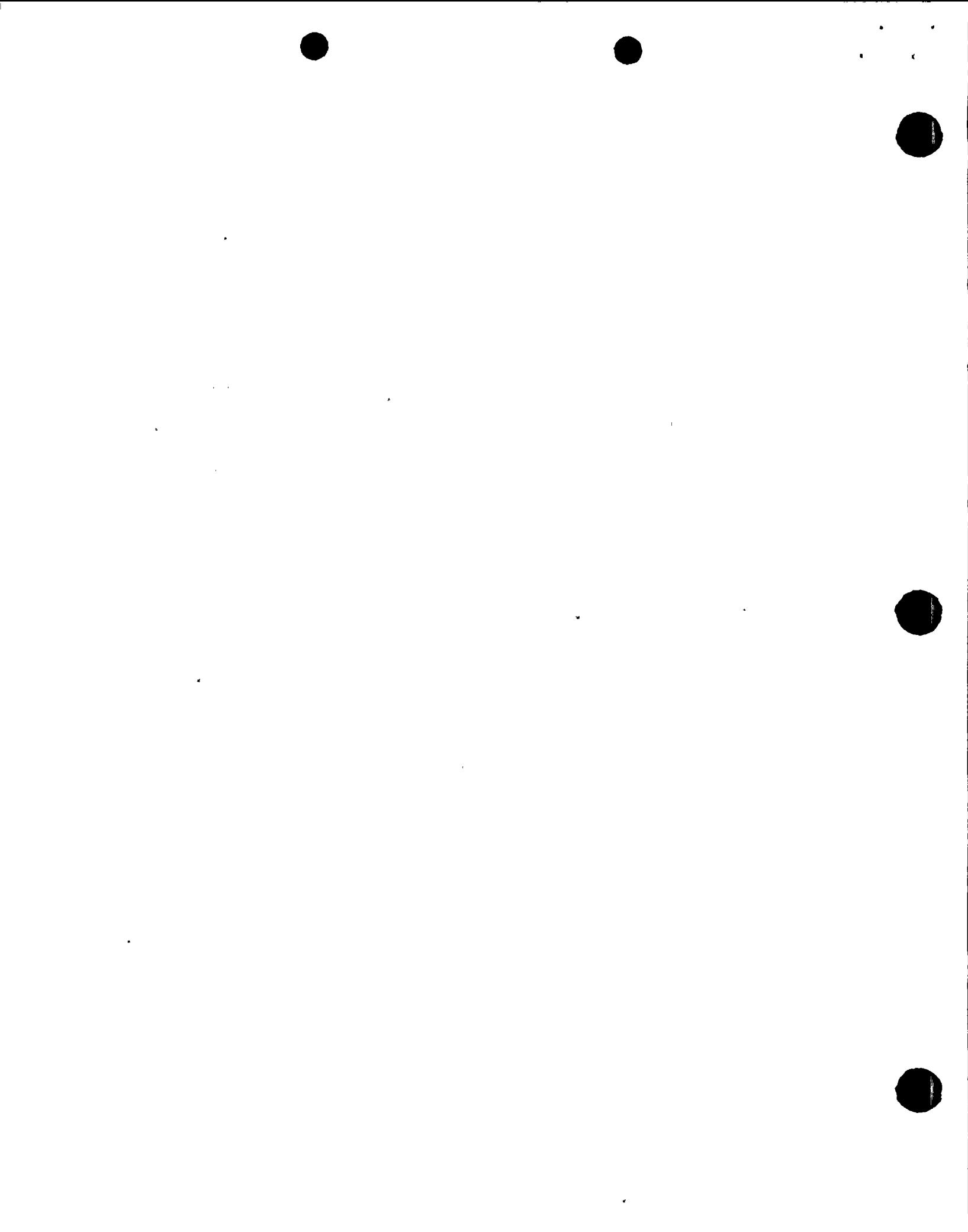
"In addition, it was found that:

. . . D. The failure of the (then) Site Superintendent to communicate to responsible corporate officers the actual status of actions required by the Commission's Order dated January 2, 1980 and the failure of the Executive Vice President to take steps to verify the completeness and accuracy of the response prepared for his signature under oath resulted in the execution of a response to the Order which contained a false statement that the actions required by 'Category A' Item 2.1.8.b were complete when in fact they were not . . .".



For the purposes of this Answer, NM has assumed that the foregoing alleged "finding" insofar as it alleges the ". . . failure of the Executive Vice President to take steps to verify the completeness and accuracy of the response prepared for his signature under oath . . .", is germane to Mr. Bartlett's qualifications for continued involvement in nuclear matters.

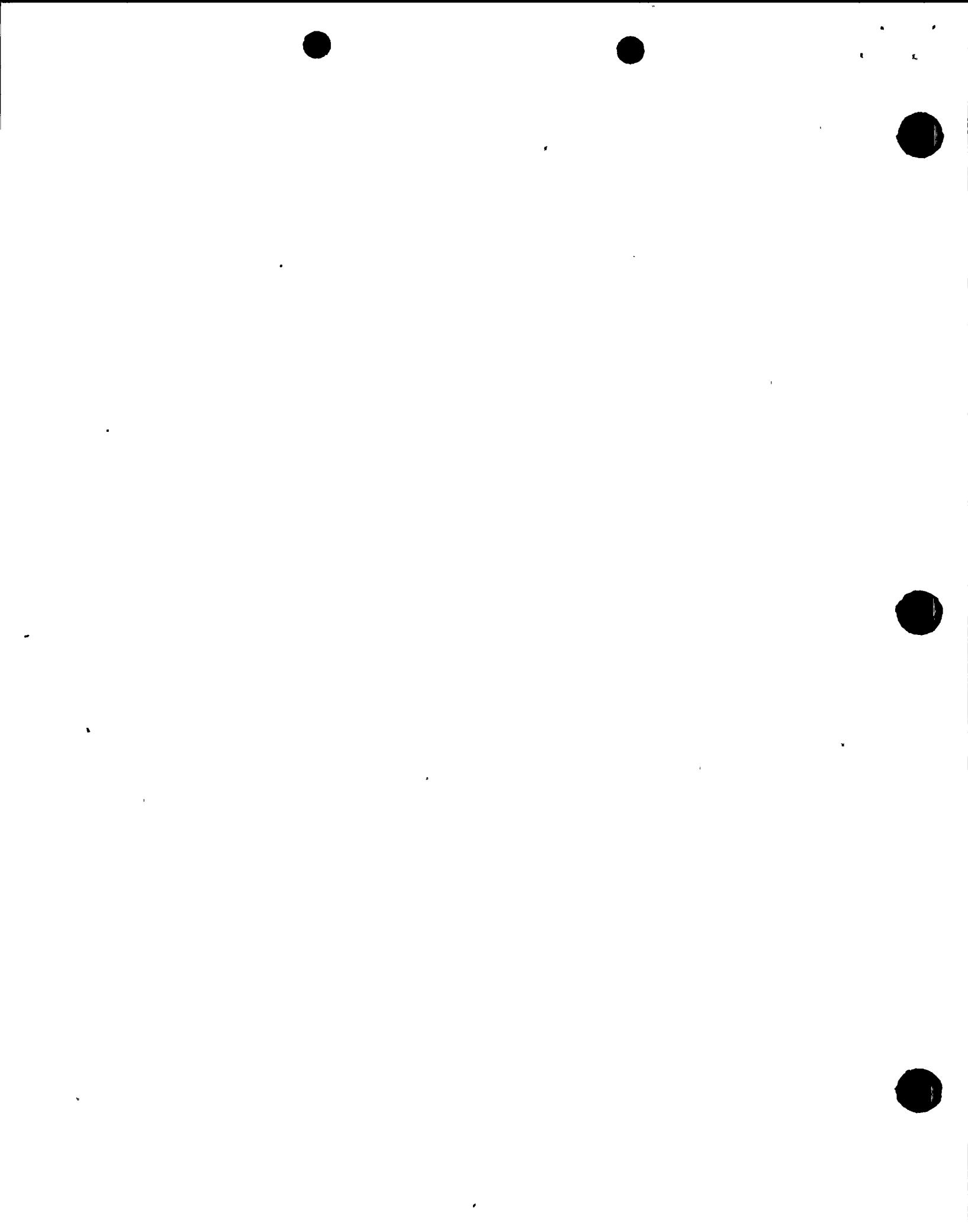
Obviously, if it is correctly determined that no material false statement was made by virtue of the sworn statement evidenced by the January 22, 1980 Answer To Show Cause, the above-quoted finding becomes moot. Notwithstanding the foregoing, as respects Mr. Bartlett's participation in the matters under scrutiny, it is important to note Mr. Perkins' statement that since he attached no significance to the lead cave, he did not convey the fact that the cave was not completed to higher management (Page 21, supra). Thus, giving proper recognition to the factual content of the January 22, 1980 Answer To Show Cause, the only verification which is critical is whether "Implementation Category" (A), "Requirement" (2.1.8.b), "Title" (High Range Radiation Monitors Effluents-Procedures) and "Date Implementation Completed" (December 31, 1979) [Exhibit A to the January 22, 1980 Answer To Show Cause; Appendix A, Page 12] correctly represented the status of NM's compliance with the requirement as NM asserts and has repeatedly demonstrated. Stated differently, there was in fact no failure of the Executive Vice President to ". . . verify the completeness and accuracy of the response prepared for his signature under oath." In any event, the procedures



included in Appendix B will provide additional assurance that such verification will at all times be thoroughly documented.

In summary, since no material false statement was made in the January 22, 1980 Answer To Show Cause, NM believes the foregoing satisfies any issue raised by Paragraph VI B. of the November 26, 1980 Order as respects Mr. Bartlett's continued involvement in nuclear matters and, accordingly, this portion of the Order should be vacated. Mr. Bartlett's 41 years of conscientious, dedicated service to the Licensee deserves no less vindication.

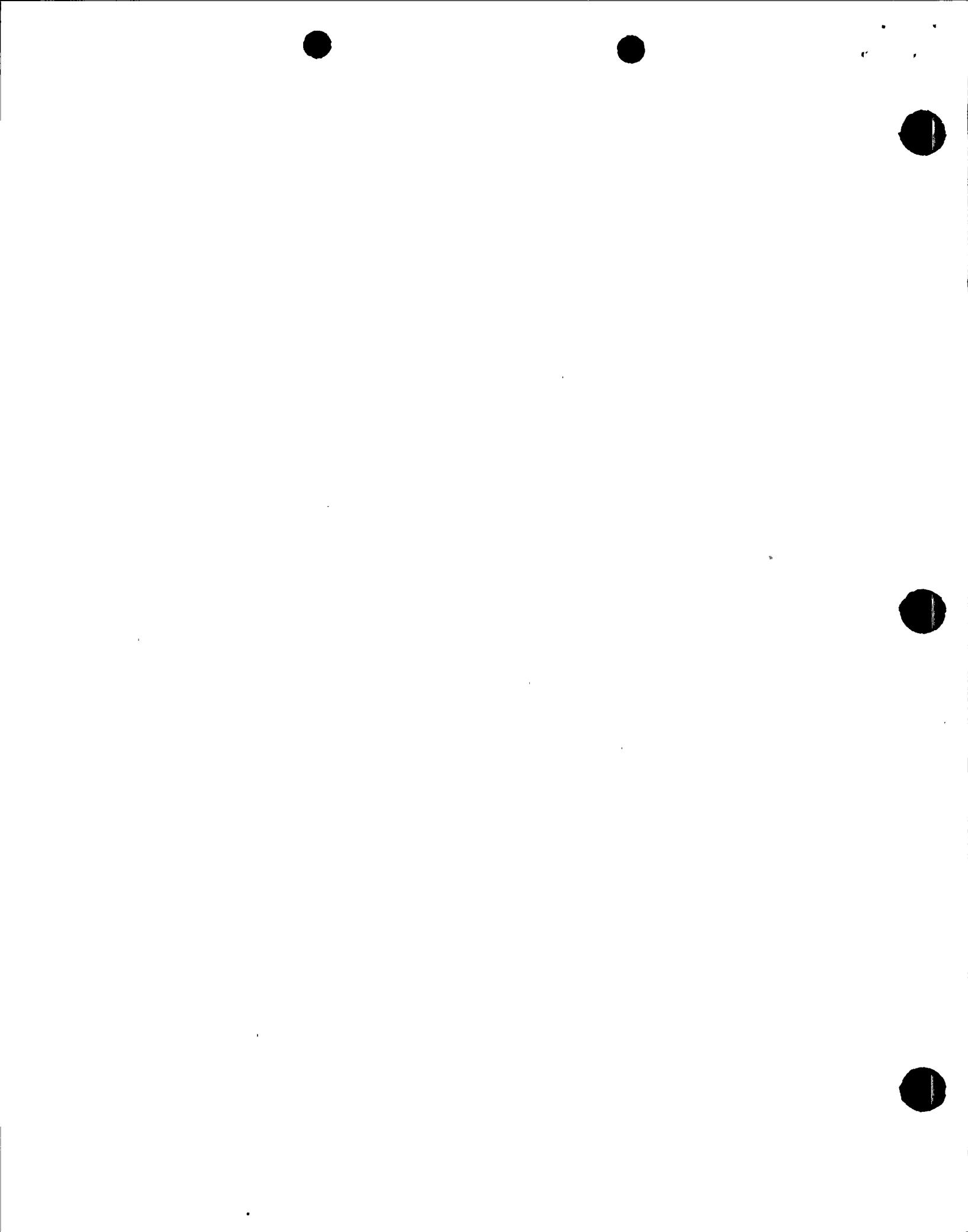
To the extent that the arguments and their rationale set forth in preceding Paragraph IV hereof (pp. 17-29) apply to Mr. Bartlett's qualifications to continue his involvement in nuclear matters, they shall be deemed to be incorporated herein by reference.



VI. IMPLEMENTATION OF PROCEDURES PURSUANT
TO NRC'S NOVEMBER 26, 1980 ORDER PARAGRAPH
VI A(2)

Appendix B (with copy of accompanying transmittal to the Director of I & E attached hereto and entitled "Implementation Procedures" contains two revisions of NM procedures entitled Item I "Nuclear Generation Staff Procedure Preparation of NRC Submittals For Nine Mile Point Unit 1" (effective December 31, 1980) and Item II "Nine Mile Point Nuclear Station Site Administrative Procedures, Procedure No. APN-16" (effective December 31, 1980).

The two procedural revisions are in response to Paragraph VI A(2) of the NRC's November 26, 1980 Order and formally document previously existing practices and procedures for Nine Mile Point Unit 1. The verification and documentation procedures described in Appendix B are offered as a continuing effort to improve procedures at Nine Mile Point Unit 1 and should not be construed as an admission of any alleged inadequacies of previously existing practices and procedures.



* * *

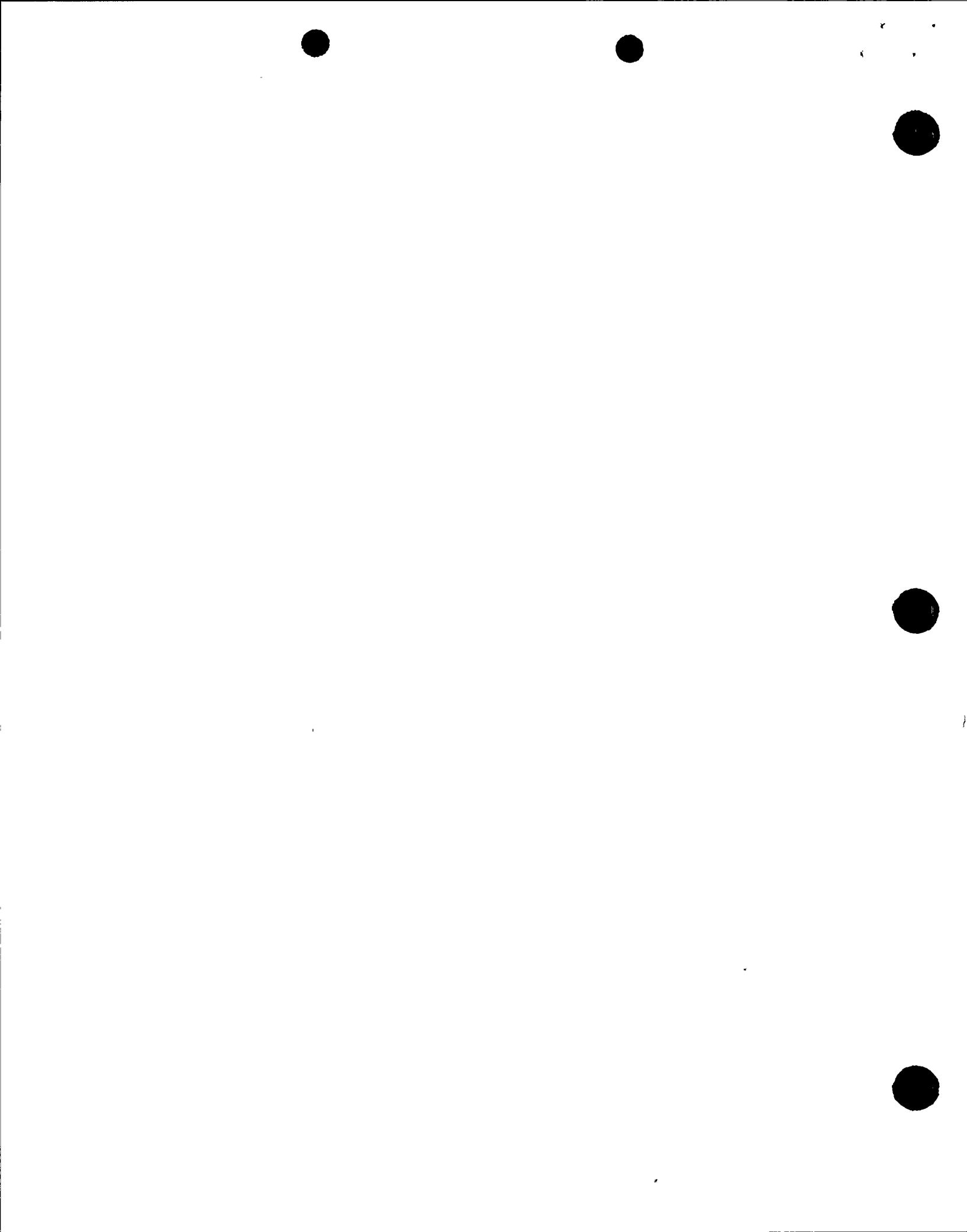
NM further alleges with respect to the referenced paragraphs of the November 26, 1980 Order as follows:

1. Admits the allegations set forth in Paragraph I.
2. Admits the allegations set forth in Paragraph II except that NM denies so much thereof as states:

"In its Answer TO SHOW CAUSE dated January 22, 1980 the Licensee stated under oath that the action on 'Category A' Item 2.1.8.b of NUREG-0578 had been completed on December 31, 1979."

NM's Answer To Show Cause dated January 22, 1980 insofar as the same pertains to "Category A", Item 2.1.8.b is set forth in Appendix A hereto (page 12) and is hereby incorporated by reference as correctly stating the content of NM's response to the NRC Order to Show Cause dated January 2, 1980.

3. Denies the allegations set forth in the first subparagraph of Paragraph III except as admitted above in paragraph II hereof, pages 8-12, in NM's answer to the specific allegations contained in said subparagraph.
4. Denies the allegations set forth in subparagraph A of Paragraph III except that NM admits that the management control system at the Nine Mile Point Nuclear Station placed reliance on both written and oral information from subordinates and that effective December 31, 1980, written procedures are to be followed in the preparation of NRC submittals for Nine Mile Point Unit 1. The procedures are annexed as part of Appendix B.



5. Admits the allegations set forth in subparagraphs B and C of Paragraph III.

6. Denies the allegations set forth in subparagraph D of Paragraph III.

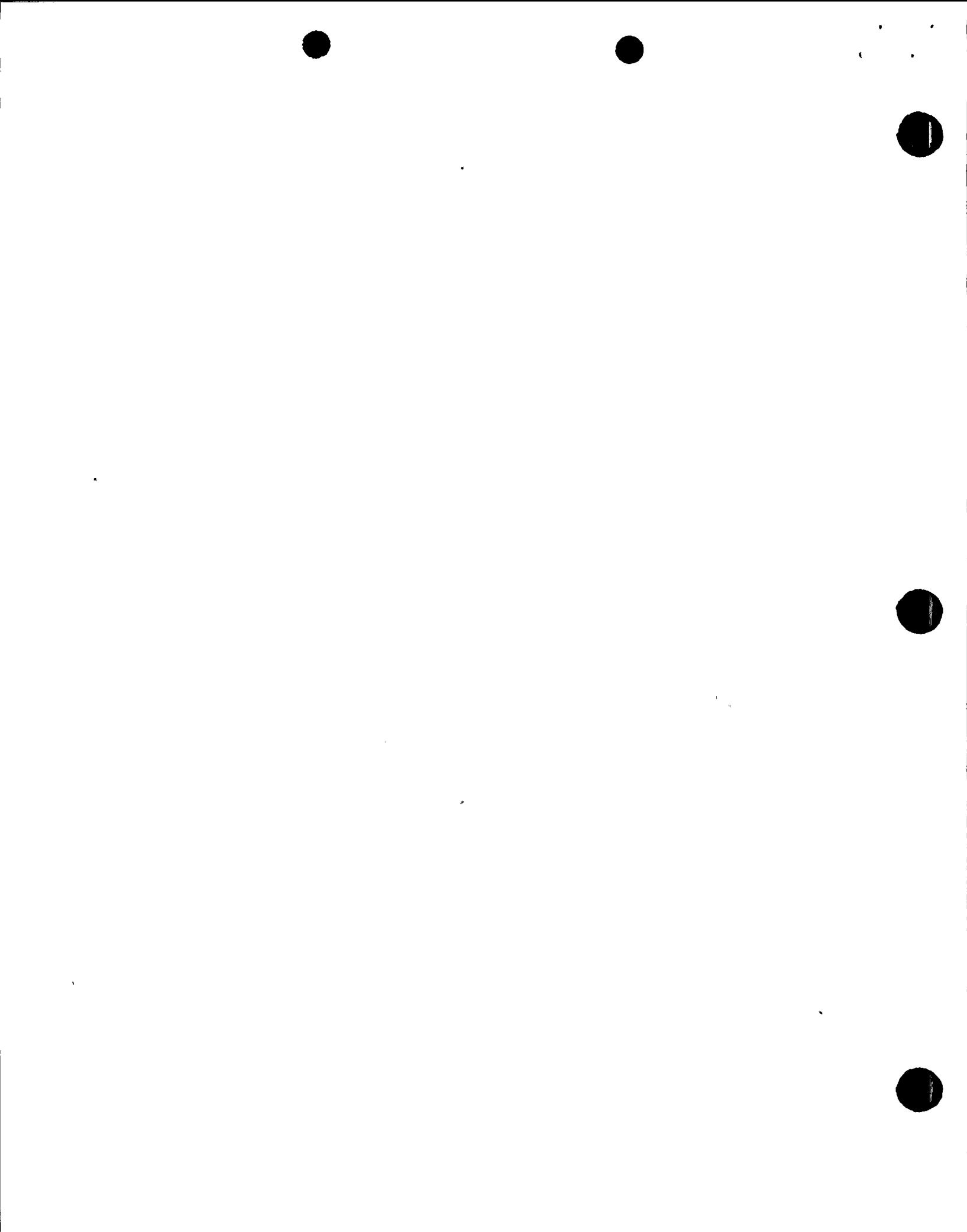
7. Denies the allegations set forth in Paragraph IV for the reasons set forth above, except that NM admits so much thereof as states:

"Meeting requirement 2.1.8.b was necessary to mitigate the consequences of postulated accidents by providing reliable information on which to base decisions concerning protective actions, including evacuation."

8. Denies the allegations set forth in Paragraph V except that NM admits so much thereof as states:

"Under Section 186 of the Atomic Energy Act of 1954, as amended, and in the Commission's regulations, in 10 CFR 50.100, an operating license may be suspended for a material false statement or a finding which would warrant the Commission to refuse to grant an operating license on initial application."

In accordance with 10 CFR Section 2.202(b), NM hereby demands a hearing with respect to all issues which may remain unresolved after the filing of this Answer and Protest and a preliminary determination thereon is rendered by the NRC.



CONCLUSION

For the reasons set forth above, the NRC should:

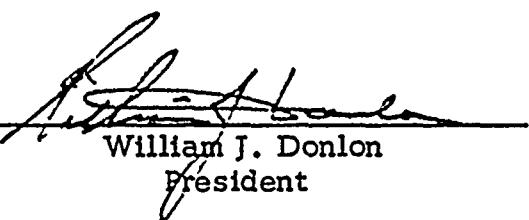
- (a) Annul and vacate subparagraph A.(1) of Paragraph VI of the November 26, 1980 Order to the end that Mr. T. J. Perkins shall be free without limitation to be involved with nuclear matters for NM;
- (b) Render a determination that the procedures set forth in Appendix B hereof, a copy of which has been submitted to the Director, Office of Inspection and Enforcement, satisfies in all respects the requirements of subparagraph A.(2) of Paragraph VI of the November 26, 1980 Order; and
- (c) Annul and vacate subparagraph B. of Paragraph VI of the November 26, 1980 Order to the end that Mr. James Bartlett shall be free without limitation to be involved with nuclear matters for NM.

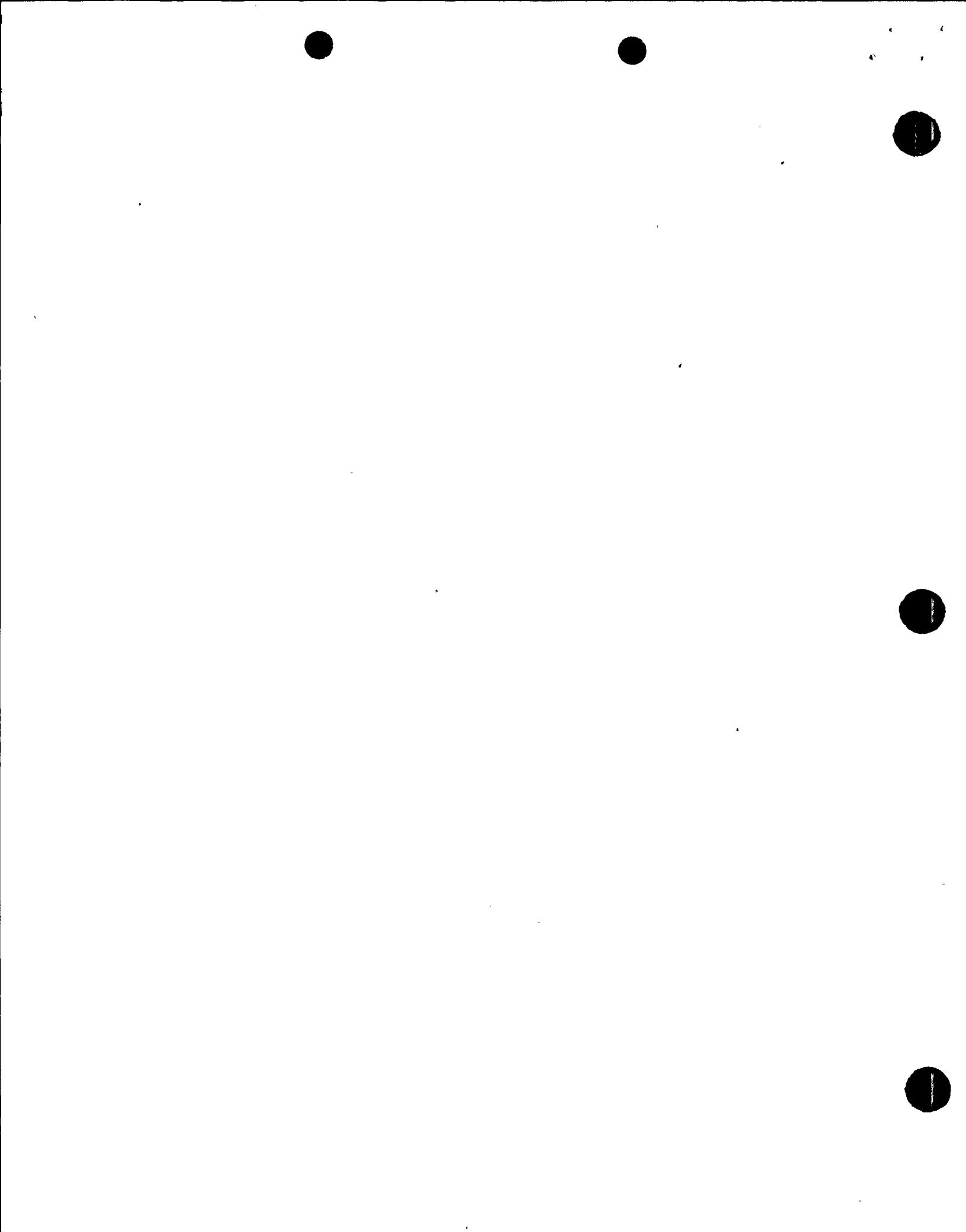
Respectfully submitted,

Dated at Syracuse,
New York, January 3, 1981.

NIAGARA MOHAWK POWER CORPORATION

By _____

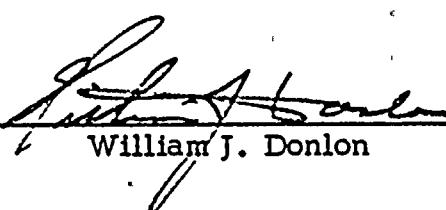

William J. Donlon
President



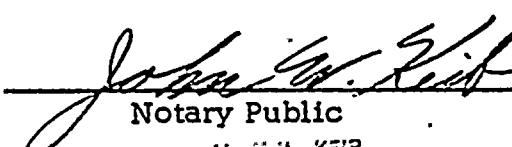
STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

WILLIAM J. DONLON, being duly sworn, deposes and says:

I am President of Niagara Mohawk Power Corporation, a domestic corporation; I have read the foregoing document entitled: "ANSWER AND PROTEST ON BEHALF OF NIAGARA MOHAWK POWER CORPORATION TO ORDER FOR MODIFICATION OF LICENSE (EFFECTIVE IMMEDIATELY) AND ORDER TO SHOW CAUSE" and knows the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.


William J. Donlon

Subscribed and sworn to before me
this 3rd day of January, 1981.


John W. Reid
Notary Public

... 44-7203475
Notary Public New York
Qualified in 1982
My Comm. No. 44-7203475-2
Jan 3, 1981

