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 THOMAS, E. B.    LeBoeuf, Lamb, Leiby & MacRae  
 RECIP. NAME    RECIPIENT AFFILIATION

SUBJECT: Motion to dismiss proceeding w/respect to Allegation B. of 801126 notice of violation. Concerns operation w/o lead cave shield & portable survey instrument. Requirement of law allegedly violated is impermissibly vague.

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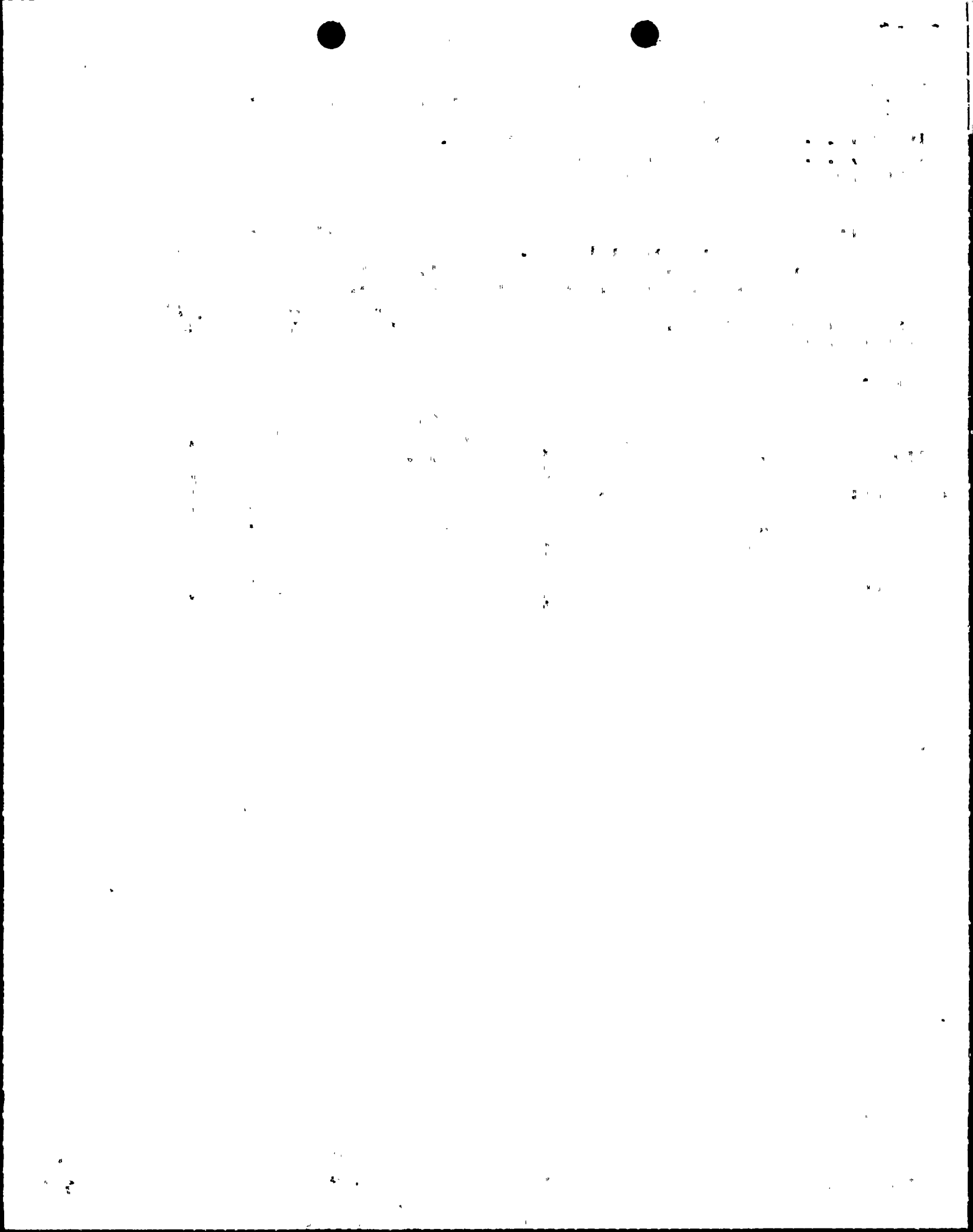
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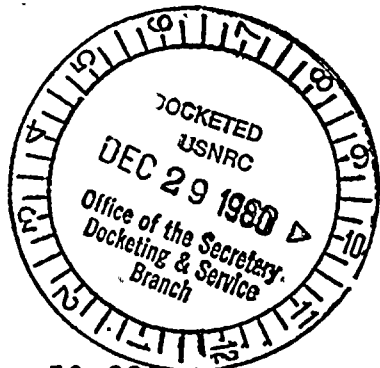
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BEFORE THE  
NUCLEAR REGULATORY COMMISSION



In the Matter of )  
 )  
NIAGARA MOHAWK POWER CORPORATION )  
 )  
(Nine Mile Point Nuclear Station )  
Unit #1 )

Docket No. 50-220

MOTION TO DISMISS PROCEEDING  
WITH RESPECT TO ALLEGATION B  
OF NOTICE OF VIOLATION

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Niagara Mohawk Power Corporation ("NM") hereby moves to dismiss the pending proceeding with respect to Allegation B in the Commission's Notice of Violation, served November 26, 1980. As grounds for this Motion, NM states:

1. In this Notice of Violation, the Director of the Office of Inspection and Enforcement alleged that:

"Contrary to the above the licensee operated its facility for 232 days during the period of February 1, 1980 to October 8, 1980 without a lead cave shield and without a portable gamma survey instrument installed or dedicated. (This had the potential for aggravating an accident. Each day this condition existed constitutes a separate violation and a Civil penalty of \$5,000 is proposed for each). (Cumulative civil penalties - 232 days between February 1, 1980 and October 8, 1980 - 232 x \$5,000 = \$1,160,000.)"

2. Assuming arguendo that every statement in this Allegation is true 1/, it does not state a violation of any section of the Atomic Energy Act of 1954, as amended,

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1/ Under Rule 12 of the Federal Rules of Civil Procedure, the statements made in a complaint are assumed to be true for the purpose of ruling on a motion to dismiss the complaint. For that reason, NM does not take issue with the factual aspects of Allegation B in this Motion.



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("the Act"), or any section of the Commission's regulations, or any condition of NM's license. The Commission may not notice a violation of anything other than a violation of the Act, the Commission's regulations, or a license condition. 10 C.F.R. §2.201 (1980). Since it is elementary that the Commission may not violate its own regulations, Allegation B does not state a violation as to which the Commission may assess civil penalties.

3. The Commission has, in essence, alleged that NM has violated a commitment that NM allegedly made in its December 31, 1979 letter to NRC, rather than a provision of the Act, the Commission's regulations, or a license condition. Whether that is true (although NM asserts that it is not), the Commission may not assess civil penalties for violating a commitment in excess of any Commission requirement.

4. In addition to the foregoing, the allegation is impermissibly vague in that it begins "Contrary to the above . . . ." (Contrast that statement with Allegation A, which begins "Contrary to section 186 of the Atomic Energy Act of 1954. . . ."). It is a basic principle of law that an alleged violation of law must provide notice



of the specific requirement of law that is alleged to have been violated. "Contrary to the above . . . ." falls woefully short of such a standard. Without such notice, NM is deprived of adequate notice of the alleged violation with which it is charged. Accordingly, this proceeding with respect to Allegation B must be dismissed.

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE

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December 29, 1980

