UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF BRIEF IN SUPPORT OF EXCEPTION TO INITIAL DECISION (10 C.F.R. § 2.762)

Donald F. Hassell
Counsel for NRC Staff

November 12, 1982

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I. INTRODUCTION

On August 31, 1982, the Atomic Safety and Licensing Board (Licensing Board) in the above-captioned proceeding issued an Initial Decision (Decision), LBP-82-___, ___ NRC ___ (1982), which authorized the issuance of a full-power operating license for Diablo Canyon Nuclear Plant, Units 1 and 2, subject to certain conditions. Exceptions to certain rulings in that Decision were filed by the Staff on September 10, 1982, pursuant to 10 C.F.R. § 2.762(a). On September 17, 1982, the Staff filed a motion for clarification of the Decision to which the Licensing Board responded in a memorandum dated September 27, 1982. As a consequence of the Licensing Board's response in its memorandum of September 27, the Staff, on October 4, 1982, requested leave to withdraw two of its exceptions and informed the Atomic Safety and Licensing Appeal Board (Appeal Board) of Staff's intention to pursue an appeal of Exception 1. That request was granted by the Appeal Board on October 28, 1982. Pursuant to 10 C.F.R. § 2.762(a), the Staff hereby files its brief in support of its exception to the Decision.

II. STATEMENT OF THE CASE

On September 26, 1973, Pacific Gas and Electric Company (Applicant or PG&E), the Applicant, filed a revised application with the Atomic Energy Commission for operating licenses for Diablo Canyon Units 1 and 2.[1/] The application was docketed by the Commission and a notice of opportunity for a hearing on the application was published in the Federal Register on October 19, 1972.[2/] The application has been contested by the San Luis Obispo Mothers for Peace, Scenic Shoreline Preservation Conference, Inc., Ecology Action Club, Sandra Silver, Gordon Silver, Elizabeth Apfelbert and John J. Forester (collectively known as "Joint Intervenors") and by Governor Brown of the State of California as an interested State.

During the ensuing years, this application has been the subject of various evidentiary hearings, partial initial decisions, appeal board decisions and Commission decisions. This appeal relates to an Initial Decision concerning full-power operation which was issued by the Licensing Board on August 31, 1982.

On June 30, 1981, Joint Intervenors filed a Statement of Clarified Contentions with the Licensing Board. Following a prehearing conference, the Licensing Board on August 4, 1981 issued a Prehearing Conference

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1/ As required by the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2131-33, PG&E applied to the former U.S. Atomic Energy Commission (A.E.C.) for an operating license for each unit at the Diablo Canyon Station. Thereafter, the Energy Reorganization Act of 1974 (P.L. 93-438, 88 Stat. 1233, 42 USC § 5814) abolished the A.E.C., established the Nuclear Regulatory Commission, and transferred the A.E.C.'s licensing functions under the Atomic Energy Act to the new Commission.

2/ 38 Fed. Reg. 29105 (1973).

Order which admitted Joint Intervenors' emergency planning contention, thereby reopening the record on that issue, and denied the remaining contentions. The Appeal Board Order of December 11, 1981 affirmed the Licensing Board's August 4 ruling on the admission and rejection of contentions for the full-power proceeding.

The Commission's Memorandum and Order of September 21, 1981 directed the Licensing Board to include in the full-power proceeding Contentions 10 and 12 pertaining to the safety-grade criteria of pressurizer heaters and relief, safety and block valves.[3/] In the Licensing Board's September 30, 1981 Memorandum and Order, these contentions were admitted in the full-power hearing.

With regard to the emergency planning contentions, the Licensing Board in its December 23, 1981 Memorandum and Order held inter alia, that it will accept the memorandum of November 17, 1981 to Brian Grimes of NRC from Richard W. Krimm of FEMA "as the FEMA finding needed to carry out 10 C.F.R. § 50.47" in response to Joint Intervenors' claim that the memorandum did not satisfy the NRC regulations, and denied Joint Intervenors' request of December 9, 1981 for certification to the Commission of a question about the use of a "FEMA agency finding" or a "FEMA Staff report" in carrying out 10 C.F.R. § 50.47.[4/]

3/ Pacific Gas and Electric Company (Diablo Canyon Nuclear Plant, Units 1 and 2), CLI-81-22, 14 NRC 598, 600 (1981).

4/ See also, Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2) Memorandum And Order In Response To Joint Intervenor's Motion For Summary Disposition (slip op. at 2) (January 15, 1982) wherein the Licensing Board specifically rejected Joint Intervenor's challenge to this holding.

On December 16, 1981, the Board issued a Notice of Hearing on the application of Pacific Gas and Electric Company for an operating license for Diablo Canyon, Units 1 and 2. Subsequently, hearings were held in San Luis Obispo, California from January 19, 1982 to January 26, 1982. On August 31, 1982 the Licensing Board issued the Decision authorizing the Director of Nuclear Reactor Regulation to issue a full-power license "consistent with the Board's decision in this case, subject to the Commission's determination and order."5/

On September 10, 1982, the Staff filed exceptions to certain rulings in that Decision in accordance with 10 C.F.R. § 2.762(a). The Staff also requested the Appeal Board to toll the time for the filing of briefs related to exceptions until the Licensing Board ruled on Staff's motion for clarification of the Decision. On September 13, 1982, the Appeal Board granted the Staff's motion and tolled the period for filing briefs concerning exceptions until the Licensing Board ruled on the Staff's motion for clarification.

On September 15, 1982, PG&E filed its exceptions to the Licensing Board's August 31, 1982 Decision and also moved to toll the briefing schedule until 5 days after the Licensing Board ruled on Staff's motion for clarification. Furthermore, PG&E expressed its desire to reserve the right to supplement the Staff's request. Exceptions to certain rulings in that Decision were filed also by Joint Intervenors and Governor Brown on September 16, 1982.

5/ Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Initial Decision, slip op. at 218 (August 31, 1982).

Motions for clarification of the Licensing Board's Decision were filed by the Staff and Applicant on September 16 and 24, 1982, respectively. In the Licensing Board's September 27, 1982 memorandum responding to the Staff motion for clarification, the Board clarified its earlier rulings in the Decision concerning preconditions to the issuance of a full-power license which related to FEMA findings on the State plan, completion of standard operating procedures (SOP's) and acquiescence by appropriate State jurisdiction to SOP's. On October 26, 1982, the Licensing Board issued a memorandum which provided, in response to Applicant's motion for clarification, an explicit statement about the adequacy of off-site emergency planning in the Decision's Conclusions of Law.

III. STATEMENT OF ISSUE ON APPEAL

Whether the Licensing Board erred in finding and requiring that additional FEMA findings on the adequacy of the State Emergency Response Plan, as it applies to Diablo Canyon, is a matter to be completed prior to the issuance of a full-power operating license.

IV. ARGUMENT

A. The Licensing Board Has Erred To The Extent That It Has Required The Director Of Nuclear Reactor Regulation (NRR) To Obtain A Formal FEMA Evaluation And Approval Under 44 C.F.R. 350 Of The State Plan Prior To The Issuance Of A Full-Power Operating License

1. Formal FEMA 44 C.F.R. 350 Review Required By The Board

The Decision provides as a condition that "[t]he Director of NRR must secure FEMA findings on the adequacy of the State Emergency Response Plan." (Initial Decision at 217-218). Moreover, the Licensing Board

specifically determined that a matter to be completed was "FEMA findings on the adequacy of the State plan as it applies to Diablo Canyon, ..." (Id. at 20). The decision and the record in this proceeding strongly suggest that this condition can be construed as requiring a formal 44 C.F.R. 350 FEMA evaluation and approval ("350 review") of the State emergency response plan prior to the issuance of a full-power license.

The memorandum of November 2, 1981 from the Acting Regional Director, FEMA Region IX to the Associate Director, State and Local Programs and Support, FEMA, which is a part of the FEMA interim findings entered in evidence, provides that: "[t]he State plan is tentatively scheduled for formal submission under the FEMA Rule process in July 1982."[6/] (Attachment at 2 to Attachment 2 to Applicant's Panel #1 Testimony, ff. Tr. 11782).

In discussing the status of the State of California's emergency plan, the Licensing Board determined that FEMA had not conducted its final review or provided its findings at the time of the hearing for the State of California emergency response plan. (Initial Decision at 16). Continuing, the Board observed that the State plan has been revised based on FEMA's review and comment on an earlier version of the plan. (Id.).

6/ The issuance of the FEMA finding under 44 C.F.R. 350 on the adequacy of the State plan was raised by Joint Intervenors and Governor Brown before the Licensing Board at the December 16, 1981 Prehearing Conference. (Prehearing Conference, December 16, 1981, Tr. 11451-474). During the discussion of that issue, the Staff informed the Board that the State emergency response plan was tentatively scheduled for formal submission under 44 C.F.R. 350 in July 1982. (Id. at Tr. 11468-469).

The Board then explained that:

> "The State has completed approximately 85 to 90 percent of the State agency SOP's, and it is expected that the remainder will be completed along with the basic plan by July 1982. FEMA will review the plan and proposed findings at that time." (Id.).

As this discussion by the Licensing Board suggests, the Board contemplated that FEMA would conduct a review of the State plan when completed in July 1982 which would lead to the preparation of findings. Support for this position can also be found in Finding of Fact 23 of the Decision and the Licensing Board's memorandum of September 27, 1982 responding to Staff's motion for clarification of the Board's initial decision. With regard to Finding of Fact 23, the Board stated, inter alia, that "FEMA has not issued its findings on the adequacy of the State plan but expects plan completion and commencement of review in Mid-1982." (Initial Decision Finding 23 at 97). Furthermore, in its memorandum of September 27, 1982, which responded to the Staff's motion for clarification of the Decision, the Board stated:

> The fact is that testimony in the record shows that a FEMA review was to take place in July of this year, subsequent to the hearing. The Board concludes that the results of that review should be submitted to the NRC Staff prior to the issuance of a full-power license.[7/]

Thus, the foregoing discussion supports the Staff's understanding that the record in this proceeding clearly shows that the "350" review was to have commenced in July 1982. Consequently, the Licensing Board's

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7/ Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2) Memorandum In Response To NRC Staff's Motion For Clarification Of The Licensing Board's Initial Decision Dated August 31, 1982, slip op. at 2 (September 27, 1982).

treatment of the question of FEMA findings related to the State plan given that the "350" review was to have commenced in July 1982 confirms that a proper reading of the condition imposed by the Board requires the Director of NRR to secure FEMA findings on the adequacy of the State plan pursuant to 44 C.F.R. 350, in order for the Staff to satisfactorily implement that condition. While the condition regarding securing FEMA findings does not by its terms require FEMA administrative approval pursuant to 44 C.F.R. 350 and thus might be construed as not requiring FEMA "350" findings, it is our view that such an interpretation is inconsistent with the Decision, the Board's memorandum of September 27, 1982 responding to Staff's motion to clarify the decision and the underlying record in this proceeding. The Staff submits that the record in this proceeding does not allow such an interpretation since the record, when reviewed in it totality, shows and compels the conclusion that the July 1982 review was to be pursuant to FEMA's proposed rule (44 C.F.R. 350).

2. Interim Findings vs. Findings And Determinations Pursuant To 44 C.F.R. 350

On December 7, 1979, the President directed that FEMA assume lead responsibility for all off-site nuclear emergency planning and response. (2 Pub. Papers 2203 (December 7, 1979)). In accordance with this, the NRC's emergency planning regulations provide that the NRC's finding as to whether there is reasonable assurance that adequate protective measures can and will be taken in the event of radiological emergency will be based, in part, on FEMA's "findings and determinations" as to whether

State and local emergency plans are adequate and capable of being implemented. (See 10 C.F.R. § 50.47(a)).

On June 24, 1980, FEMA published a proposed rule (44 C.F.R. 350) which established policy and procedures for the review of plans by a formal FEMA process for evaluation and approval of State and local emergency plans. (45 Fed. Reg. 42341). This process created under the proposed rule requires several steps. It is initiated by a request from a State which includes the submission of a completed State plan that includes local plans for jurisdictions wholly or partially within the plume exposure pathway Emergency Planning Zone (EPZ), for FEMA review. As a consequence of this review, FEMA issues final findings and determinations resulting in FEMA adminstrative approval or disapproval of State and local plans. (See 44 C.F.R. §§ 350.7-350.12 at 45 Fed. Reg. 42345-46 (1980)).

Independent of the formal FEMA process for evaluation and approval of plans under its proposed rule (44 C.F.R. 350), FEMA may provide interim findings and determinations on the status of State and local emergency plans to the NRC for use in the NRC licensing process pursuant to a "Memorandum of Understanding Between NRC and FEMA Relating to Radiological Emergency Planning and Preparedness" (MOU) entered into on November 4, 1980 (45 Fed. Reg. 82713-14 (December 16, 1980)). This MOU provides that:

> [n]otwithstanding the procedures which may be set forth in 44 CFR 350 for requesting and reaching a FEMA administrative approval of State and local plans, findings and determinations on the current status of emergency preparedness around particular sites may be requested by the NRC through the NRC/FEMA Steering Committee and provided by FEMA for use as needed in the NRC licensing process. These findings and determinations may be based upon plans currently available to FEMA or furnished to FEMA by the NRC. (45 Fed. Reg. 82714).

For this proceeding, Mr. John Eldridge, Emergency Management Specialist for FEMA Region IX who acted as the FEMA project representative for the Diablo Canyon Nuclear Power Plant site, testified, on behalf of FEMA, that FEMA has provided findings and determinations for Diablo Canyon under the terms of the MOU, based on its review and evaluation of, among other things, the State of California Nuclear Power Plant Emergency Response Plan, San Luis Obispo County Nuclear Power Plant Emergency Response Plan and FEMA Region IX Evaluation Findings, Diablo Canyon Nuclear Power Plant Offsite Emergency Response Plans Exercise, August 19, 1981. (Eldridge Testimony, ff. Tr. 12682 at 2-5). Those findings and determinations were admitted into evidence in this proceeding. (Attachments 2 and 3 to Applicant's Panel #1 Testimony, ff. Tr. 11782.) In a recent decision involving the State of California, a Licensing Board authorized the issuance of an operating license without requiring final findings and determinations pursuant to the formal FEMA adminstrative approval process under 44 C.F.R. 350.[8/] This administrative practice and procedure is also reflected in Metropolitan Edison Company (Three Mile

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8/ See, Southern California Fdison Company, et al. (San Onofre Nuclear Generating Station, Units ? and 3), 15 NRC 1163, 1212 (1982), (September 7, 1981). Further the following language of the full-power license clearly demonstrates that the issuance of that license was not contingent upon FEMA's issuing findings pursuant to 44 C.F.R. 350:

> "[i]n the event that the NRC finds that the lack of progress in completion of the procedures in the Federal Emergency Management Agency's proposed rules, 44 CFR 350, is an indication that a major substantive problem exists in achieving or maintaining an adequate state of preparedness, the provisions of 10 CFR 50.54(s)(2) will apply." License No. NPF-10, Amendment 7 at 3 (September 7, 1982).

Island Nuclear Power Station, Unit No. 1), Partial Initial Decision, 14 NRC 1211, 1461 (1981), where the Licensing Board found in its discussion of FEMA's findings and determinations that: "Pursuant to this MOU, FEMA has provided interim findings and determinations to NRC for at least nine facilities, three of which were granted NRC operating licenses."

The requirement that the Director of NRR must secure FEMA findings under the formal 44 C.F.R. 350 process on the adequacy of the State plan prior to the issuance of a full-power license could also lead to anomalous results. As the Licensing Board in the Three Mile Island restart proceeding stated:

> [w]e do not rely on the argument of the Combined Intervenors that only "final" FEMA findings pursuant to its yet-to-be promulgated regulation may constitute a rebuttal presumption. This would lead to the absurd result that the NRC, including this Board, could not make its emergency planning findings and determinations unless and until FEMA's proposed rules are made effective.[9]

Furthermore, it is unclear that FEMA would ever issue final findings and determinations for particular offsite plans under the formal 44 C.F.R. 350 process since that process is initiated only by a request from the state involved to conduct the "350" review. (See 44 C.F.R. § 350.7 at 45 Fed. Reg. 42345). There is no requirement under NRC regulations or FEMA's proposed rule that a particular state request such a review.

9/ Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), 14 NRC 1211, 1463 (1981).

Thus, should a Licensing Board interpret 10 C.F.R. § 50.47 of the NRC's emergency planning regulations as requiring a "350" review and findings, the Board would create the anomalous circumstance of never being able to reach a conclusion on emergency planning for a specific reactor where the state in question did not request a FEMA finding. The Staff submits that that is precisely the situation that has obtained in this case.[10/] Such a circumstance is not unfounded speculation. FEMA has testified, in describing what tasks had been completed or remained to be completed under the 44 C.F.R. 350 process for the Diablo Canyon site, that: "remaining to be done is the application by the State for review and approval of the plan and the FEMA Region and Headquarters review process based on that request." (Eldridge Testimony, ff. Tr. 12682 at 3). Significantly, as of this date the Staff is advised by FEMA that no such application has been made by the State.[11/]

Finally, the Staff notes that the relevant provision of the Commission's emergency planning regulation, i.e., 10 C.F.R. § 50.47 does not by its terms require final FEMA findings and determinations under 44 C.F.R. 350 on the adequacy of the State plan prior to the issuance of a

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10/ This potential result was brought to the attention of the Licensing Board by the NRC Staff. (Tr. 11454-455; NRC Staff Brief in Support of Findings of Fact and Conclusions of Law in the Form of a Proposed Initial Decision, at 9 (March 29, 1982).

11/ The latest "NRC/FEMA Joint Quarterly Report To Congress On Emergency Preparedness July 1, 1982 to September 3" ("Simpson Report") indicates that the State is not expected to make such application until January 1983. Letter from L. Giuffrida, Director, FEMA and N. Palladino, Chairman, NRC to the Honorable Alan K. Simpson, Chairman, Subcommittee on Nuclear Reactor Regulation dated October 22, 1982, Enclosure at 5.

full-power license. Although the Statement of Considerations accompaning the Commission's emergency planning regulation suggest that such findings may be used in the licensing process (45 Fed. Reg. 55406), the Commission has clearly established an alternate procedure under its MOU for the provision of interim FEMA findings for the licensing process. As demonstrated, this procedure has become the established practice in this agency and it was followed in this proceeding. Consequently, to the extent the Licensing Board's Decision has required final FEMA findings and determinations pursuant to 44 C.F.R. 350 prior to the issuance of a full-power license, it has established a precedent which is contrary to case law and inconsistent with the Commission's current regulatory scheme for emergency preparedness.

3. Conclusion

In view of the foregoing discussion, the Licensing Board's Decision imposing the condition that the Director of NRR secure, in effect, additional "final" FEMA findings and determinations on the State plan under 44 C.F.R. 350 is (1) contrary to the regulation in that it leads to results clearly at odds with the Commission's regulatory scheme for evaluating emergency preparedness and (2) inconsistent with the Commission's established and approved administrative procedure set out in the "MOU" dated November 4, 1980.

B. The Licensing Board Erred In Determing That The Interim Findings Of FEMA Do Not Meet The Requirement Of 10 C.F.R. § 50.47, Thus Requiring The Director, NRR To Secure Findings On The Adequacy Of The State Emergency Response Plan

The Licensing Board determined that a matter to be completed is "FEMA findings on the adequacy of the State Plan as it applies to Diablo

Canyon." (Initial Decision at 20). In responding to Staff's motion for clarification of the Decision, the Board went on to explain the following:

> ...the necessary findings regarding the State plan have not been made in the record. While there is reasonable assurance on the record that the State plan is substantially completed, Section 50.47 explictly requires FEMA findings of adequacy before an operating license may issue. The record does not contain such findings. The Board has concluded that the interim findings of FEMA do no meet the requirements.[12/]

Based on the record in this proceeding, the Staff submits that there are several reasons which demonstrate that this Board imposed pre-condition to the grant of a full-power license is incorrect.

1. Prior Licensing Board Rulings On FEMA Findings

The issue of the FEMA finding on the adequacy of the State plan was raised by Joint Intervenors, in its Request for Directed Certification served on December 9, 1981, and Governor Brown before the Licensing Board at the December 16, 1981 Prehearing Conference.

In addressing this issue, the Licensing Board held that "[o]n the basis of established and approved procedure, the Board will look to the Richard W. Krumm [sic] memorandum of November 17, 1981 as the FEMA

12/ Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Memorandum In Response To NRC Staff's Motion For Clarification Of The Licensing Board's Initial Decision Dated August 31, 1982, slip op. at 1-2 (September 27, 1982).

finding needed to carry out 10 C.F.R. § 50.47" and denied Joint Intervenor's request for certification to the Commission.[13/]

Furthermore, in its Memorandum and Order of January 15, 1982,[14/] the Licensing Board denied Joint Intervenor's Motion for Summary Disposition of Contention 1 of January 7, 1982 which challenged that holding by contending, inter alia, that FEMA had made no finding on the adequacy of the State plan and whether it is capable of being implemented. A review of the record related to this matter shows there is adequate support for these rulings since the evidence provides adequate support for the following: (1) FEMA has made interim findings and determinations "based upon plans currently available;"[15/] (2) the status of State planning has in fact been considered by FEMA to the extent necessary based on the State's limited role for offsite emergency preparedness; and (3) FEMA's interim findings and determinations are sufficient for purposes of

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13/ Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Memorandum And Order, slip op. at 3, (December 23, 1981).

14/ Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Memorandum And Order In Response To Joint Intervenor's Motion For Summary Disposition Of Contention 1, slip op. at 2 (January 15, 1982).

15/ This language is from the MOU which provides that the findings and determinations, other than for 44 C.F.R. § 350, which may be provided for use as needed in the NRC licensing process ". . . may be based upon plans currently available to FEMA or furnished to FEMA by NRC." (45 Fed. Reg. 82714).

10 C.F.R. § 50.47(a) given the nature of the responsibilities for off-site emergency preparedness around the Diablo Canyon Nuclear Power Plant.

2. Evidence Of FEMA's Interim Findings

Mr. John Eldridge of FEMA stated in his testimony that the November 2, 1981 evaluation and status report together with the accompanying memoranda, which included the November 17, 198[1] memorandum from Richard W. Krimm of FEMA, constituted FEMA's findings and determinations as to whether State and local emergency plans were adequate and capable of being implemented. (Eldridge Testimony, ff. Tr. 12862, at 4-5). Mr. Eldridge testified that the November 2 evaluation is based upon (1) FEMA's knowledge and understanding from its review of the County plan, training and drills it worked on with the State, the status report it prepared on the emergency planning exercise conducted in August [1981] and the knowledge he gained from working with the State and County in revising the plans. (Eldridge, Tr. 12748-749). Under cross-examination by Joint Intervenors, Mr. Eldridge also explained that FEMA findings on the State plan comparable to the FEMA findings on the San Luis Obispo County plan would not be made, thus the November 2, 1981 evaluation concentrated on the County plan because in California, as contrasted to other states, the basic responsibility for protection of life and property rests at the county level. (Eldridge at Tr. 12709-710). In those areas where the State is primarily responsible for re-entry and recovery and ingestion pathway sampling and interdiction of foodstuffs, he did review State preparedness, and concluded that since the State Standard Operating Procedures (SOPs) were 90% completed the

State could respond, with assistance from the Department of Energy and the Environmental Protection Agency in any areas where State planning was not complete. (Id. at 12710). Mr. Eldridge noted that the NUREG-0654, Rev. 1,[16/] evaluation criteria should be applied to the appropriate governmental level responsible. This is consistent with the guidance provided by NUREG-0654, Rev. 1.[17/] As a result, when asked on cross-examination by counsel for Governor Brown whether in answering question 16 on page 5 of his written testimony that "State and local plans are adequate and capable of implementation", he had misspoken, he replied: "No. In fact it should be in terms of both because, for the purpose of this particular evaluation, we feel it was not necessary to do a detailed analysis of the State plan." (Eldridge at Tr. 12744-5). As he summarized, "the point is that it was the County plan we focused on and that was sufficient for our determinations." (Id.).

The Licensing Board recognized that there is a division of responsibility between the State and the County and determined that the County has the basic responsibility for protection of life and property, (Initial Decision at 16) and also found that the County has been assigned major emergency responsibility. (Id. at 95, Finding of Fact 15). The Board also observed that the areas of responsibility of the State are addressed in the State plan, that these responsibilities do not require

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16/ Criteria For Preparation And Evaluation Of Radiological Emergency Response Plans And Preparedness In Support Of Nuclear Power Plants, NUREG-0654/FEMA-Rep-1/Rev. 1 (November 1980).

17/ Id. at 24.

an immediate response because they do not deal with life threatening situations, and that it is FEMA's view that the State could respond in these areas if needed. (Initial Decision at 16).

For this proceeding, FEMA found that with completion of 12 corrective actions related to seven of the 16 planning standards set out in 10 C.F.R. § 50.47(b), "[T]here is reasonable assurance that an adequate level of emergency preparedness will exist in San Luis Obispo County." (Attachment 3 to Applicant's Panel #1 Testimony, ff. Tr. 11782; Eldridge at Tr. 12749). FEMA stated that the corrective actions, being "primarily administrative in nature" and within the ability of FEMA and the NRC Staff to insure completion prior to full-power operation, "do not represent matters which should in any way preclude the Atomic Safety and Licensing Board from making a finding of reasonable assurance of adequate offsite preparedness capability at this time." (Staff's Ex. 35, in evidence at 12695). Mr. Grimes, Director Division of Emergency Preparedness, NRC testified that the FEMA interim finding contained in the November memoranda (together with the follow-up memorandum to him from Mr. Krimm of December 29, 1981 (Staff's Ex. 35)) is adequate "for the Board to make a reasonable assurance finding on the issues in this case" (Grimes at Tr. 12677) constitutes NRC Staff acceptance of these FEMA findings.

3. Conclusion

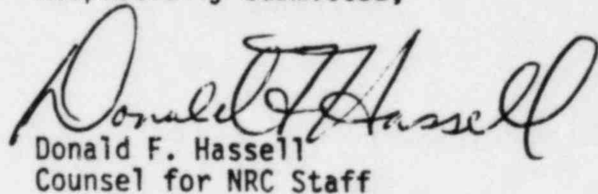
Based on the foregoing reasons and the record in this proceeding, the necessary and sufficient finding by FEMA pursuant to 10 C.F.R. § 50.47(a)(2) as to the adequacy of the local and State emergency plans

related to Diablo Canyon has been made and is contained in the record of this proceeding. Although the FEMA findings in this case do not refer explicitly to the State plan and thus do not contain a finding of adequacy on the State plan *per se*, the record in this proceeding compels the conclusion that FEMA has in effect made a "constructive" finding of adequacy on the State plan since FEMA has considered and evaluated to the extent necessary the emergency preparedness responsibilities of the State of California given its limited role in offsite preparedness at Diablo Canyon.

V. CONCLUSION

Based on the foregoing discussion, it is the Staff's position that in the context of this proceeding, the Licensing Board has erred in requiring the Director, NRR to secure FEMA findings on the adequacy of the State plan based on a "350" review prior to the issuance of a full-power operating license.

Respectfully submitted,



Donald F. Hassell
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of November, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN SUPPORT OF EXCEPTION TO INITIAL DECISION (10 C.F.R. § 2.762)" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 12th day of November, 1982:

Dr. John H. Buck
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Mr. Thomas S. Moore, Member
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

John F. Wolf, Esq.
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Mr. Glenn O. Bright
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Elizabeth Apfelberg
1415 Cozadero
San Luis Obispo, CA 93401

Dr. Jerry Kline
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Philip A. Crane, Jr., Esq.
Pacific Gas and Electric Company
P.O. Box 7442
San Francisco, CA 94120

Mr. Frederick Eissler
Scenic Shoreline Preservation Conference, Inc.
4623 More Mesa Drive
Santa Barbara, CA 93105

Mrs. Raye Fleming
1920 Mattie Road
Shell Beach, CA 93449

Richard E. Blankenburg, Co-publisher
Wayne A. Soroyan, News Reporter
South County Publishing Company
P.O. Box 460
Arroyo Grande, CA 93420

Byron S. Georgiou
Legal Affairs Secretary
Governor's Office
State Capitol
Sacramento, CA 95814

Mr. Gordon Silver
Mrs. Sandra A. Silver
1760 Alisal Street
San Luis Obispo, CA 93401

Joel R. Reynolds, Esq.
John R. Phillips, Esq.
Center for Law in the Public Interest
10951 West Pico Boulevard
Third Floor
Los Angeles, CA 90064

Arthur C. Gehr, Esq.
Snell & Wilmer
3100 Valley Center
Phoenix, Arizona 85073

Paul C. Valentine, Esq.
321 Lytton Avenue
Palo Alto, CA 94302

Bruce Norton, Esq.
3216 North 3rd Street
Suite 202
Phoenix, Arizona 85012

David S. Fleischaker, Esq.
P.O. Box 1178
Oklahoma City, Oklahoma 73101

Richard B. Hubbard
MHB Technical Associates
1723 Hamilton Avenue - Suite K
San Jose, CA 95125

John Marrs, Managing Editor
San Luis Obispo County
Telegram-Tribune
1321 Johnson Avenue
P. O. Box 112
San Luis Obispo, CA 93406

Herbert H. Brown
Kirkpatrick, Lockhart, Hill, Christopher & Phillips
1900 M Street, N.W.
Washington, DC 20036

Harry M. Willis
Seymour & Willis
601 California St., Suite 2100
San Francisco, CA 94108

Janice E. Kerr, Esq.
Lawrence Q. Garcia, Esq.
350 McAllister Street
San Francisco, CA 94102

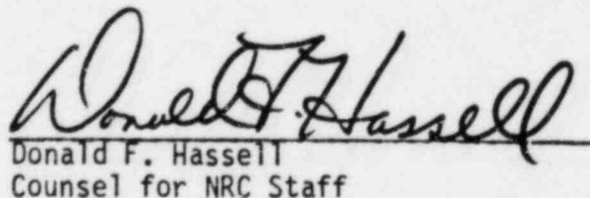
Mr. James O. Schuyler
Nuclear Projects Engineer
Pacific Gas and Electric Company
77 Beale Street
San Francisco, CA 94106

Mark Gottlieb
California Energy Commission
MS-18
1111 Howe Avenue
Sacramento, CA 95825

Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Docketing and Service Section
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *



Donald F. Hassell
Counsel for NRC Staff