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 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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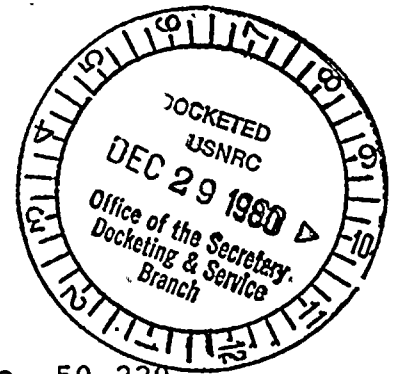
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BEFORE THE
NUCLEAR REGULATORY COMMISSION



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

US NRC
DISTRICT SERVICES
BRANCH

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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

