UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket No. 50-275
	)	Docket No. 50-323
PACIFIC GAS AND ELECTRIC COMPANY	)	(Design Quality Assurance)
	)	
Diablo Canyon Nuclear Power Plant Units 1 and 2	)	

ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY
TO PETITIONS FOR REVIEW OF ALAB-763
FILED BY JOINT INTERVENORS AND
GOVERNOR DEUKMEJIAN

I. INTRODUCTION

On April 21, 1983, the Atomic Safety and Licensing Appeal Board (Appeal Board) granted the motions of the Joint Intervenors and the Governor of California to reopen the record in the operating license proceeding to receive evidence on Pacific Gas and Electric Company's (PGandE's) program to verify the correctness of the Diablo Canyon design. Hearings on the 39 contested issues commenced October 31, 1983 in Avila Beach, California and consumed fifteen hearing days. Closing pleadings were filed by the parties and on March 20, 1984, the Appeal Board issued its decision, ALAB-763, in which it concluded (i) there is reasonable assurance the facility can be operated without endangering the health and safety of the public, and (ii) the licensing authorization previously granted in the Licensing Board's initial decision, LBP-82-70, remains in effect for Unit 1.

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On April 5, 1984 Joint Intervenors filed a Petition for Review of ALAB-763, and on April 26, 1984 the Governor of California filed a similar Petition. 1/

II. ARGUMENT

PGandE opposes Commission review of ALAB-763 and responds to the petitions of Joint Intervenors and Governor Deukmejian (hereinafter collectively referred to as "intervenors") as follows:

1. There is no need for the Commission to review ALAB-763.

A reading of the 106-page decision indicates that ALAB-763 is an accurate and comprehensive discussion of all the issues in contest in this proceeding, complete with numerous citations to the record. The citations indicate that the overwhelming weight of the evidence supports the Appeal Board's opinion. That alone should preclude Commission review of this well-documented opinion. However, in addition, intervenors appear to have failed to include in their petitions the matters required to be included by 10 CFR 2.786(b)(2)(ii). Their petitions should be denied on this basis as well.

2. The Appeal Board does not need to consider Joint Intervenors' motion to augment the record.

On February 14, 1984 Joint Intervenors filed a pleading styled "Joint Intervenors' Motion to Augment or, in the Alternative, to Reopen the Record." It contained material not presented to the Appeal Board during the

hearing and thus not officially part of the record in this proceeding. More importantly, a comprehensive answer to this pleading fully responding to all the Joint Intervenor charges and proving them to be without merit was filed by PGandE on March 6, 1984. [2/] The conclusion of PGandE's answer is worth repeating here because it provides a complete response to Joint Intervenors' argument.

> "Joint Intervenors' motion must not be considered in a vacuum. Rather, it must be viewed in light of the hundreds of thousands of manhours of review that the design of Diablo Canyon has received during the past year and the evidence this Board has received on the subject of design quality assurance at Diablo Canyon. It must also be seen as it relates to the regulatory framework under which plants such as Diablo Canyon are to be designed and built. As they argued at the DQA hearings, Joint Intervenors are of the view that the regulations require absolute assurance of absolute perfection in each and every instance. Anything less than absolute perfection is fatal. The adoption of such a view by this Board would, of course, prevent Diablo Canyon, or any other plant, from ever being licensed or operated. It is respectfully submitted that is indeed the goal of Joint Intervenors.
>
> The test here must be whether Diablo Canyon is designed and constructed to reasonably assure protection of the public health and safety. PGandE is confident that this Board has that reasonable assurance as a result of the evidence presented to it during the DQA hearings. A thorough review of Joint Intervenors' motion, its Exhibits, this response and the affidavits attached hereto should not intrude upon that reasonable assurance. It is respectfully requested that the motion be denied in its entirety." (PGandE Answer at 20.)

3. Intervenors seek to apply an incorrect standard of review.

At pages 4 and 5 of their petition Joint Intervenors quarrel with the Appeal Board finding that PGandE has provided reasonable assurance that the design of Diablo Canyon was adequate in view of the concession that undetected design errors doubtless exist. In particular they criticize footnote 68 of the Appeal Board's opinion and the language concerning "significant and substantive safety requirements and licensing criteria." The Governor makes a similar argument, claiming the Appeal Board has abandoned the "established regulatory standard" in favor of one of "unbridled discretion." (Gov. Pet. at 2.) However, the governing standard has always been that matters to be addressed by the Commission in licensing proceedings are matters which affect the health and safety of the public. Obviously, this means that the item in question must have safety significance. Otherwise, by definition it cannot affect the health and safety of the public, and thus is of no concern to regulatory authorities.

The basic premise of the intervenors' argument is that Diablo Canyon can not be licensed so long as there remains the possibility that a single deviation from "licensing criteria" might exist. Intervenors do not acknowledge any distinction in significance of deviations from licensing criteria nor do they ever even attempt to define what they mean by "licensing criteria."

"The term 'licensing criteria' clearly can be, and is, used with different meanings at different times by different people. The term encompasses everything from 'basic' criteria set by the NRC (e.g., there shall be a containment, ECCS, etc.) to extremely minor specifications or descriptions of design details set by the applicant or designers themselves. The term 'deviation from licensing criteria' can obviously mean anything from fundamental design errors having substantive safety significance to minor technical variations from design detail which have no safety consequence whatsoever. The intervenors make no such distinction and in fact treat each and every deviation from licensing criteria as if it, either alone or in combination with some other random or unknown deviation, will culminate in disaster. The evidence is clear that, to be meaningful, deviations or errors must be viewed in light of their significance. [e.g., Anderson, Tr. D-1385; Knight, Tr. D-2656.] To refuse to make such distinctions, as do counsel for intervenors, is to obscure a central issue of this proceeding. The real issue of proper design is one of conformance to substantive safety criteria and the resultant protection of public health and safety. It is not one of mere formalities and technicalities. Obviously substantive safety criteria must be satisfied 100% of the time. That all other criteria can never be met 100% of the time under any circumstances was testified to by many witnesses including the Governor's own, Dr. Apostolakis and Mr. Hubbard. [Apostolakis, Tr. D-2371-72; Hubbard, Tr. D-2130. See also: Reedy, Tr. D-1785; Moore, Tr. D-381-3; Cloud, Tr. D-1545; Cooper, Tr. D-1543; Knight, Tr. D-2692-3.] To follow intervenors' arguments to their logical conclusion would prevent licensing of all facilities in that one could never be 100% certain that there were no deviations from each and every licensing criteria." (PGandE Response to Intervenors' Proposed Findings of Fact at 4, 5; see also ALAB-763, footnote 68.)

Here, as the Appeal Board states:

> "But the witnesses relied upon by the Governor and joint intervenors all testified that not only was it likely there remained some design errors, but that it was extremely unlikely that any of the errors were safety significant." (Footnote 68, Opinion at 32.)

The Appeal Board went on to hold in effect that the standard provided in the statute and regulations is not perfection but rather:

> "adequate confidence" and "reasonable assurance" (Id.)

The Appeal Board found this adequate confidence and reasonable assurance in spite of the realization that undetected errors doubtless existed, because the testimony was that any remaining errors would not be safety significant. Further, there was testimony that none of the errors discovered to date, if they had remained undetected, would have resulted in the failure of any structure or system to perform its intended safety function or would have constituted an error of safety significance as defined in 10 CFR Part 21. (PGandE Proposed Findings of Fact and Conclusions of Law, par. 45.) Finally, intervenors offered no testimony that any of the errors, detected or undetected, were safety significant. (Footnote 82, Opinion at 41.) Thus, the regulatory standards have been met, and the standard of perfection intervenors seek to impose must be rejected. 3/

4. Counsel for the Governor has confused the scope of review required for the design verification program.

At page 5 of his petition Counsel for the Governor states that

> "Under an adequate QA program the entire design would be subjected to review by a second engineer or designer plus approval of all design work by a supervisor -- in addition to the inspections and audits required by Appendix B."

Such a review was performed at Diablo Canyon. (Moore, Tr. D-401, 402.) In addition, the Governor believes that the Internal Technical Program (ITP) or Independent Design Verification Program (IDVP) also should have conducted a 100% review of the entire design. (Gov. Pet. at 5.) However, neither the Commission order nor the staff letter mandating the Independent Design Verification Program required that a 100% review be conducted for reinstatement of the license, but merely that there be included in the program provision for a "suitable number and type of sample calculations..." to verify the design process. (PGandE Ex. 86, Attachment 1, par. 5; PGandE Exh. 87, Enclosure A., par. 5.) Consequently, it cannot be correctly maintained that a 100% verification is somehow legally required to demonstrate the plant is correctly designed. 4/

5. The Appeal Board has not adopted a lower standard for quality assurance at Diablo Canyon than it would require of any other plant.

In the final paragraph of Part I of the Governor's petition counsel for the Governor attempt to string together a number of mischaracterizations or remarks out of context in an attempt to support the conclusion that a lower standard of quality was applied at Diablo Canyon. PGandE submits that the pleadings and the Appeal Board decision provide sufficient refutation of the various elements strung together by Counsel to the Governor and they need not be repeated here. 5/

6. Joint Intervenors misconstrue the application of Appendix A.

In Section II.C. of their petition Joint Intervenors criticize the Appeal Board's prehearing conference ruling prohibiting litigation of the application of quality assurance programs to equipment "important to safety" but not "safety grade." Further, they cite the Appeal Board chairman's concurring opinion on this subject in ALAB-763. This issue also arose in the Shoreham proceeding, and the Staff's response to the Appeal Board in that proceeding was circulated to the parties and the Appeal Board by NRC Staff counsel by letter dated April 11, 1984. The Staff's response there provides a full and complete response to the issues Joint Intervenors attempt to raise in this portion of their petition. For the convenience of the Commission a copy of that response is attached hereto as Exhibit A.

7. There is ample evidence in the record to support the finding of design adequacy.

In the concluding portion of their Petition for Review (pp. 6-10) Joint Intervenors raise six arguments they allege show that the Appeal Board's decision is not supported by the weight of the evidence. Each is without merit.

(a) In their Points (1) and (4) Joint Intervenors take issue with the Appeal Board for not considering the evidence of Charles Stokes, the subsequent NRC investigation, etc. However, this alleged "evidence" is not before the Appeal Board in this proceeding and is not part of the record. More importantly, and as stated earlier, PGandE filed definitive replies to each of the various motions filed by Joint Intervenors and has addressed the concerns expressed by NRC Inspector Isa Yin. 6/ In each instance the various allegations have been shown to be without substance. Mr. Yin has stated publicly that he is satisfied the plant is ready for low power operation and, upon PGandE's performance of certain enumerated work, for full power as well.(4/6/84 Tr. at 338, 339.) Thus, nothing in these various filings detracts from the conclusion that the Appeal Board's decision is amply supported by the weight of all the evidence, including, if the Appeal Board chooses to consider it, the evidence in the pleadings filed by the Joint Intervenors since the conclusion of the hearings in this proceeding and the PGandE and Staff responses.

(b) Next, Joint Intervenors criticize the IDVP and the Project for not including the bulk of the Westinghouse design work in their review programs. However, the testimony on this issue is correctly summarized by the Appeal Board at pages 77 through 82 of ALAB-763. Westinghouse had an adequate, approved quality assurance program and the IDVP and the Project were entitled to rely on it.

(b) Nor was the sampling approach employed by the IDVP and the Project inadequate as next alleged by the Joint Intervenors. Again, the Appeal Board has accurately summarized the evidence in the record on this question. (Opinion at 29-44.) As the Board points out (p. 31) the standard PGandE is required to meet is not "absolute certainty" but "reasonable assurance." The Appeal Board properly concluded, based on the record, that this qualitative standard is "...not numerically quantifiable into expressions of probability of errors or error rates," and that the verification work actually performed must be examined "...to ascertain whether its scope and quality were sufficient to provide the requisite assurance of design adequacy." The Appeal Board carefully examined the evidence in the record and found affirmatively that the work done provided the requisite assurance. The Appeal Board did not ignore the statistical evidence offered by the Governor and the Joint Intervenors. It rejected it as having little utility in this situation. (Footnotes 69-71, Opinion at 32, 33.)

(d) In their Point (5), which concerns as-builts, the Joint Intervenors allege the Appeal Board cavalierly disregarded deficiencies which existed in PGandE's program on the assumption deficiencies on a job the size of Diablo Canyon are bound to exist. (Petition at 9.) However, this is a mischaracterization of the Appeal Board's approach. As can be seen from a review of the pertinent portion of the opinion (pp. 70-77), the Appeal Board considered the record very carefully before concluding that the revised control procedures under which the work was done, together with the verification work performed by the ITP and IDVP

> "...demonstrate that the Applicant's reconciliation of design documents is in conformity with Appendix B." (Opinion at 71.)

Here again the weight of the evidence amply supports the finding made by the Appeal Board.

(e) Finally, Joint Intervenors dispute the Appeal Board findings on PGandE management's commitment to quality assurance, citing the so-called "Quick Fix" design change program. Joint Intervenors' mischaracterization of this program and an explanation of how it worked are covered in the PGandE filing dated March 6, 1984 (Affidavit of Breismeister et al, pp. 39-43) and need not be repeated here. The record fully supports the Board's conclusion that the root causes of the design quality assurance deficiencies had been sufficiently identified by the IDVP and the Project, notwithstanding the failure to include PGandE's past management failings to develop an adequate quality assurance program during earlier portions of the original design. (Opinion at 83-89.)

8. PGandE's post-1981 QA programs met Appendix B.

In the second section of his petition (pp. 6-9) counsel for the Governor flails away at the PGandE QA program in effect from November 1981 to August 1982 and the Diablo Canyon Project Program in effect thereafter, finding both of them inadequate. 7/ However, the matters the Governor cites as evidence of this inadequacy 8/ were all extensively testified upon during the hearings, and they are accurately assessed in the Appeal Board's opinion at pages 89-98. The record amply supports the Board's conclusion that the various QA programs were adequate. 9/ (See also PGandE's Response to Intervenors' Proposed Findings of Fact at 31-37.)

9. The verification of the Diablo Canyon design has been completed.

The concluding section of the Governor's petition urges that the work begun in 1981 be completed. In fact, as outlined in great detail in ALAB-763, it has been. Based upon the extensive record adduced in this proceeding no reasonable person should have any doubts, lingering or otherwise, that the Diablo Canyon facility will perform in accordance with the regulations.

III. CONCLUSION

For the above reasons PGandE submits that the

Commission should refuse to review ALAB-763.

Respectfully submitted,

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Dated: May 8, 1984

Footnotes:

1/ By letter to the Secretary to the Commission dated April 13, 1984, the Governor requested an extension until May 4, 1984, within which to file a petition for review of ALAB-763. In a letter dated April 20, 1984 the Secretary granted the Governor until April 27, 1984 within which to file his petition, and gave the Applicant and Staff permission to file a single response to the two petitions ten days after service of the Governor's petition. This answer is timely filed. (10 CFR 2.710.)

2/ The Staff filed an equally comprehensive answer on March 15, 1984. On April 6, 1984 Joint Intervenors filed a supplement to their motion. PGandE and the Staff filed definitive responses to the supplement in pleadings dated April 23 and April 25, 1984, respectively.

3/ At page 3 of his pleading counsel for the Governor discusses the assessment of "safety significance" and criticizes the IDVP for having no opinion on the safety significance of the errors it detected and for having such an opinion on the undetected errors. However, the IDVP witness testified that they simply had not analyzed the detected errors for safety significance and that their opinion on the undetected errors was based on judgment. (Cooper, Tr. D-1557-1559.) He also explained that the IDVP had not attempted such an analysis because he was concerned that it would detract from the value of the IDVP work, which was to assess compliance with license criteria. (Cooper, Tr. D-1560-1562; Gov. Pet. at 1.)

4/ The Governor criticizes the Appeal Board for failing to distinguish between the design process and the design product, citing footnote 80 of the Opinion. (Gov. Pet. at 5, 6.) However, it seems too obvious to have to state, that if the process is adequate it follows that the design must be too. Further, Criterion III of Appendix B cited by the Governor deals with design control measures, which clearly refers to the process and not the final product -- the design. In short, the Governor's criticism is misplaced.

5/ For example the quotation from the Appeal Board order dated August 16, 1983 obviously indicates the Appeal Board's state of mind before hearing and reviewing the evidence. Their current state of mind is set forth at length in ALAB-763. In addition the issues of sampling, errors in the sample, violations of licensing criteria, undetected errors and significance have all been responded to supra pp.3-6.

6/ Certain of the PGandE filings and other responsive material are contained in the following documents: PGandE Letter DCL-84-046 dated February 7, 1984 and enclosure (Small Bore Piping); PGandE's Answer in Opposition to Joint Intervenors' Motion to Augment or, in the Alternative, to Reopen the Record, dated March 6, 1984 (DQA); PGandE Letter DCL-84-123 dated March 29, 1984 and enclosure (GAP I); PGandE Letter DCL-84-131 dated April 4, 1984 (Yin); PGandE's Answer in Opposition to Joint Intervenors' Supplement to Motion to Augment or in the Alternative, to Reopen the Record, dated April 23, 1984; PGandE Letter DCL-84-166 dated April 30, 1984 and enclosure (GAP 2); Transcript, PGandE/NRC Meeting April 2, 1984; Transcript, ACRS Meeting April 6, 1984; SSER, Supplements 20 and 22.

7/ Curiously, at page 7 of his Petition counsel for the Governor states:

> "...neither the staff nor the IDVP reached any conclusion on compliance with Appendix B, and the Appeal Board makes no finding on Appendix B."

However the Appeal Board recites that the seismic design was done under a QA program meeting the provisions of Appendix B (Opinion at 22), and that the nonseismic review was as well. (Opinion at 39.) This is also implicit in the Appeal Board's ultimate conclusion (Opinion at 101.) The Staff testified that the present program represented an adequate commitment to Appendix B [Haass, Tr. D-2977-79], and the timely implementation of an acceptable QA program was confirmed by the Staff through its inspection activities. [Morrill, ff. Tr. D-2906, at 4-5.] The IDVP concluded that the Project QA program was being effectively implemented. [Reedy et al., ff. Tr. D-1459, at 8-3; Reedy, Tr. D-1699; PGandE Exhibits 90 and 133.]

8/ Including the PAC and EDS reports (which were not audits), various alleged deficiencies in implementing the programs, the Bechtel management audit, various other audits, lack of design audits, etc.

9/ At page 9 of his petition counsel for the Governor once again brings up the incomplete design interface control matrixes in his Exhibits 37, 38, 39. In the first place these interfaces are internal only and do not include contractors, e.g. Governor Ex. 37, p. 2. Furthermore, such internal interfaces are defined in written work requests with the matrix summarizing the information after the fact. [Jacobson, Tr. D-927.] Additionally, the use of a matrix is not even a QA requirement. [Jacobson, Tr. D-3167.] Additional evidence confirming the adequacy of internal interface control is found in Governor's Exhibits 48 and 49, the checklists for the IDVP QA audit which show this area to have been audited and found to be satisfactory. [Gov. Ex. 48, p. 23; Gov. Ex. 49, p. 23.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket No. 50-275
	)	Docket No. 50-323
Diablo Canyon Nuclear Power Plant, Units 1 and 2	)	
	)	

CERTIFICATE OF SERVICE

The foregoing document(s) of Pacific Gas and Electric Company has (have) been served today on the following by deposit in the United States mail, properly stamped and addressed:

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Philip A. Crane, Jr.

Date: May 8, 1984

* Copies delivered by
U.S.Postal Service Express Mail

Exhibit A

April 3, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	)	Docket No. 50-322 (OL)

NRC STAFF MEMORANDUM IN
RESPONSE TO APPEAL BOARD QUESTIONS

I. INTRODUCTION

During oral argument on the appeal of this proceeding, the Appeal Board raised certain questions about the recent Diablo Canyon[1/] decision. Specifically, the Appeal Board asked the Staff to submit a memorandum addressing: (1) what position the Staff took in Diablo Canyon concerning the admission or exclusion of the issue of that applicant's compliance with 10 C.F.R. Part 50, Appendix A, General Design Criteria (GDC) 1; and (2) the Staff's view of the correctness of the statement by Judge Moore in his concurring opinion in Diablo Canyon that, if the Commission agrees with the Staff's position concerning the meaning of "important to safety", then the Diablo Canyon intervenors must be given an opportunity to litigate the issue regarding that applicant's compliance with Appendix A. This memorandum responds to these questions.

1/ Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC ___ (March 20, 1984).

II. DISCUSSION

On May 10, 1983 and May 17, 1983, several intervenors in the Diablo Canyon operating license proceeding filed motions to reopen the record for the purpose of receiving new evidence on quality assurance issues. One of the issues on which the intervenors sought to reopen the record was whether the Independent Design Verification Program (IDVP) construction quality assurance effort performed by Stone & Webster Engineering Corporation had unduly restricted its focus only to "safety-related" structures, systems and components rather than addressing all items "important to safety".[2/]

The Staff filed its response opposing these motions on June 6, 1983.[3/] The Staff's opposition to the admission of the "important to safety" issue was based primarily on the scope of the Commission's November 19, 1981 Order suspending the Unit 1 operating license and on the scope of the issue previously litigated before the Licensing Board. The Staff noted that the Commission's Order, while it used "important to safety" and "safety-related" apparently interchangeably, set forth in the Attachment the requirements for reinstatement of the suspended license using only the term "safety-related". Staff Response at 15. Thus,

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2/ See Joint Intervenors' Motion to Reopen the Record on the Issue of Construction Quality Assurance, at 12, 16 and Exhibit A; Motion of Governor George Deukmejian to Reopen the Record on Construction Quality Assurance, at 21. Pertinent pages from these pleadings are provided as Attachments 1 and 2, respectively.

3/ NRC Staff's Response to Joint Intervenors' and Governor Deukmejian's Motions to Reopen the Record on Construction Quality Assurance, dated June 6, 1983 (this "Staff Response" is provided as Attachment 3).

the Staff argued, the assertion that the IDVP had been unduly restricted in focusing only on the "safety-related" plant items was "simply misplaced" in the context in which it was being relied on by the intervenors. Id. The Staff also noted that the specific finding by the Diablo Canyon Licensing Board which was the subject of the motion to reopen was cast solely in terms of compliance with the requirements of 10 C.F.R. Part 50, Appendix B. Since Appendix B applies to safety-related plant items, the Staff argued, any reopening of the issue was "properly limited to the scope of the finding which is being reopened." Finally, the Staff also opposed certain aspects of intervenors' proffered contentions on grounds of lateness and lack of good cause for the lateness in raising these issues. See Staff Response at 8, 28-29.

The Diablo Canyon Appeal Board was clearly informed in the Staff's Response that the Staff considered "important to safety" broader than "safety-related". An affidavit of Walter P. Haass (who had also been a witness in the Shoreham Contention 7B litigation) explained the broader requirement of 10 C.F.R. Part 50, Appendix A, GDC 1 and attached the November 20, 1981 "Denton Memorandum" setting forth the definitions of the terms in the regulations.[4/] See also Staff Response at 16, n.15.

During a prehearing conference on August 23, 1983, the Appeal Board ruled that the issue of the applicant's compliance with Appendix A, GDC 1 could not be litigated. Judge Johnson explained

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4/ The Haass Affidavit is provided as Attachment 4; other affidavits included with the Staff Response have not been supplied because of their number and bulk.

(at Tr. D-67) that "to the extent that such a distinction now exists [between "important to safety" and "safety-related"], we do not believe that such a distinction was intended between General Criteria [1] and the items covered by Appendix B." Judge Johnson later stated (at Tr. D-68) that "[i]f there is now to be a distinction made between safety-related items and items important to safety, it is our opinion that it should not be applied retrospectively to the design phase of the Diablo Canyon plant."[5/] (Pertinent transcript pages are provided as Attachment 5.)

A further explanation for the rejection of this issue was given by the Appeal Board in ALAB-756.[6/] The Appeal Board expressed first its "considerable doubt" about the correctness of an interpretation distinguishing "important to safety" and "safety-related". Putting that question to one side, however, the Appeal Board also stated that intervenors had failed to identify a single structure, system or component "important to safety" that the applicant's quality assurance program failed to cover so as to provide a basis for litigation of the matter. Moreover, the Appeal Board found the motion on this point

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5/ The Staff does not agree with this basis for rejecting the Diablo Canyon intervenors' Appendix A issue. To the extent that the Diablo Canyon Appeal Board is at odds with Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814 (1983), the latter decision should be followed here. As discussed below, other bases exist for upholding the Diablo Canyon result.

6/ 18 NRC ___, ___ (December 19, 1983) (slip op. at 23-24, n.31)

"grossly out of time" where the Final Safety Analysis Report and the Safety Evaluation Report had been available publically since 1974. Id.

In ALAB-763,[7/] the Appeal Board issued its decision on the reopened matters. In a concurring opinion to ALAB-763, Judge Moore explained that the ruling excluding the GDC 1 issue from the Diablo Canyon proceeding was based on the past synonymous use of the terms "important to safety" and "safety-related" by the applicant and the Staff. "[T]o the extent the quality assurance criteria are currently interpreted to distinguish between the terms", Judge Moore explained, "such distinction would not be retroactively applied to Diablo Canyon." Id. at 104 (footnote omitted). Judge Moore acknowledged Board Notification 84-011 transmitting, among other matters, the Staff's Generic Letter on the issue and stated as follows:

> If the Director's position on this matter is now that of the Commission (including the asserted long-standing nature of this interpretation), then it would appear that the Governor and the joint intervenor must be given an opportunity to litigate the issues regarding the applicant's compliance with Appendix A.

The Staff does not agree with Judge Moore's suggestion that the position articulated by the Staff in the Generic Letter (and in the Shoreham proceeding) requires that the Diablo Canyon applicant's compliance with Appendix A be litigated. Reasons other than the correct definition of "important to safety" supported the rejection of that issue as a litigable issue at Diablo Canyon. The Appeal Board stated in ALAB-756 that, even putting aside the definitional question, intervenors had failed to identify a single structure, system or component "important

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7/ 19 NRC ___, ___ (March 20, 1984) (slip op. at 104-06)

to safety" not covered by the applicant's quality assurance program. The Appeal Board further stated that, in any event, intervenors' attempt to raise this issue was "grossly out of time." These bases for rejecting the GDC 1 issue are valid even if the Commission agrees with the Staff's interpretation of "important to safety". For these reasons, the Staff does not agree with the last sentence of Judge Moore's concurring opinion.

III. CONCLUSION

The Staff has addressed in this memorandum the two questions posed by the Appeal Board during oral argument on March 27, 1984. The position taken by the Staff in the Diablo Canyon proceeding was consistent with that taken by the Staff here although the Staff also argued that the issue of the Diablo Canyon applicant's compliance with Appendix A was not within the scope of the proceeding under the particular circumstances presented there. Judge Moore was incorrect when he suggested in his concurring opinion to ALAB-763 that the Diablo Canyon applicant's compliance with Appendix A would have to be litigated if the Staff's position on the correct construction of "important to safety" is now that of the Commission.

Respectfully submitted,

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Assistant Chief Hearing Counsel

Richard J. Rawson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 3rd day of April, 1984

ATTACHMENTS TO NRC STAFF MEMORANDUM
IN RESPONSE TO APPEAL BOARD QUESTIONS

Attachment 1: Joint Intervenors' Motion to Reopen the Record on the Issue of Construction Quality Assurance, dated May 10, 1983

Attachment 2: Motion of Governor George Deukmejian to Reopen the Record on Construction Quality Assurance, dated May 17, 1983

Attachment 3: NRC Staff's Response to Joint Intervenors' and Governor Deukmejian's Motions to Reopen the Record on Construction Quality Assurance, dated June 6, 1983

Attachment 4: Affidavit of Walter P. Haass, dated June 6, 1983

Attachment 5: Prehearing Conference Transcript, August 23, 1983, pages D-1 through D-68