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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SERVED 06/16/05

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Thomas S. Elleman
Dr. Richard F. Cole

In the Matter of

DOMINION NUCLEAR NORTH ANNA, LLC

(Early Site Permit for North Anna ESP Site)

Docket No. 52-008-ESP

ASLBP No. 04-822-02-ESP

June 16, 2005

Memorandum and Order

(Granting in Part and Denying in Part Summary Disposition on Contention EC 3.3.2 – Impacts on Striped Bass in Lake Anna)

Before the Board is a request by Dominion Nuclear North Anna, L.L.C. (Dominion) for summary disposition on Contention EC 3.3.2, “Impacts on Striped Bass in Lake Anna.”¹ For the reasons set forth below, the Board grants Dominion’s motion for summary disposition on the issue of thermal impacts on striped bass from the proposed fourth unit and denies the motion as it pertains to the issues of thermal impacts on striped bass in the North Anna River and impacts arising from the effect of increased temperature due to operation of the proposed third unit on striped bass in Lake Anna.

I. BACKGROUND

A. Procedural History

On September 25, 2003, Dominion filed an early site permit (ESP) application, seeking approval of a site for two new nuclear reactors at the location of the North Anna nuclear power

¹ Dominion’s Motion for Summary Disposition Contention EC 3.3.2 – Impacts on Striped Bass in Lake Anna (Apr. 22, 2005) [hereinafter Dominion Motion].

station in Louisa County, Virginia, where two existing nuclear power plants have operated since 1978. Under the 10 C.F.R. Part 52 licensing process, an entity may apply for an ESP, which allows for the resolution of certain site-related environmental, safety, and emergency planning issues before an entity makes the decision to build, or chooses the design of, a nuclear power facility for that site. If an ESP is granted an applicant would still need to file a separate application for a construction permit or combined license before a new nuclear power generation facility may be built. Thus, if granted an ESP, Dominion would still need to receive authorization for construction and operation of the new North Anna nuclear reactors in a separate licensing proceeding.

Responding to a November 25, 2003 notice of hearing and opportunity for petition for leave to intervene regarding Dominion's ESP application,² the Blue Ridge Environmental Defense League (BREDL), the Nuclear Information and Resource Service (NIRS), and Public Citizen (PC) (collectively, North Anna Intervenors or Intervenors) filed a request for hearing and petition to intervene.³ The Licensing Board, as originally constituted, found that the North Anna Intervenors had standing and admitted two contentions.⁴ One of those contentions, Contention 3.3.4, "Failure To Provide Adequate Consideration of the No-Action Alternative," has been settled and dismissed.⁵ The sole remaining contention, Contention EC 3.3.2, "Impacts on

² 68 Fed. Reg. 67,489 (Dec. 2, 2003).

³ Hearing Request and Petition to Intervene by [North Anna Intervenors] (Jan. 2, 2004).

⁴ LBP-04-18, 60 NRC 253, 270-72, 276 (2004). As originally constituted, the Board consisted of Chief Administrative Judge G. Paul Bollwerk, III, Deputy Chief Administrative Judge Paul B. Abramson, and Deputy Chief Administrative Judge Anthony J. Baratta, 69 Fed. Reg. 15,910 (Mar. 26, 2004), and may sometimes be referred to herein as the "Original Board." The Board was later reconstituted with its current members. 69 Fed. Reg. 49,916 (Aug. 12, 2004).

⁵ Licensing Board Order (Approving Settlement and Dismissal of Contention EC 3.3.4) (Jan. 6, 2005) (unpublished).

Striped Bass in Lake Anna,” is the subject of this summary disposition motion.

B. Dominion’s Motion

On April 22, 2005, Dominion filed a motion pursuant to 10 C.F.R. § 2.1205 for summary disposition on Contention EC 3.3.2, claiming that there is no genuine issue as to any material fact relevant to the contention and that it is entitled to a (favorable) decision as a matter of law. Dominion Motion at 1. Dominion divided the admitted contention into three issues: (1) thermal impacts on striped bass in the North Anna River downstream of Lake Anna; (2) thermal impacts from a fourth unit; and (3) thermal impacts from a third unit on striped bass in Lake Anna. Id. at 2. Dominion’s motion includes a statement of material facts on which it asserts no genuine dispute exists, and supporting affidavits from John William Bolin, III⁶ and Dr. Patrick J. Ryan.⁷ Attached as an exhibit to Mr. Bolin’s affidavit is certain correspondence between Dominion and the Commonwealth of Virginia Department of Game and Inland Fisheries (VDGIF).

The North Anna Intervenors submitted an answer opposing Dominion’s motion on May 12, 2005.⁸ The Intervenors argue that Dominion failed to demonstrate there is no genuine

⁶ Dominion Motion, Affidavit of John William Bolin, III in Support of Dominion’s Motion for Summary Disposition of Contention EC 3.3.2 (Apr. 21, 2005) [hereinafter Bolin Aff.]. Mr. Bolin is a Manager of Environmental Biology for Dominion Resources Services, Inc. Id. ¶ 1. He has been employed by Dominion Virginia Power and then by Dominion Resources Services, Inc. for almost 33 years. Id. ¶ 2. During this time, Mr. Bolin has participated in or supervised the environmental monitoring and sampling programs for the North Anna Power Station. Id. ¶ 4. Mr. Bolin received a Bachelor of Science in Biology and Chemistry and is pursuing postgraduate studies with a general ecology emphasis from the University of Alabama. Id. ¶ 2.

⁷ Dominion Motion, Patrick J. Ryan Affidavit in Support of Dominion’s Motion for Summary Disposition of Contention EC 3.3.2 (Mar. 31, 2005) [hereinafter Ryan Aff.]. Dr. Ryan is a Manager of Geotechnical and Hydraulic Engineering Services for Bechtel Corporation, a contractor retained by Dominion to assist with the preparation of the ESP application. Id. ¶¶ 1, 3. He has been working on the project, specifically the assessment of site selection and thermal modeling, since 2002. Id. ¶ 3. Dr. Ryan received a Bachelor of Science and Master of Science in Civil Engineering from the University of Melbourne, Australia, and Ph.D. in Civil Engineering from the Massachusetts Institute of Technology. Id. ¶ 2.

⁸ Intervenors’ Response to Dominion’s Motion for Summary Disposition of Contention 3.3.2 (May 12, 2005) [hereinafter Intervenors’ Answer].

issue as to any material fact, or that they are entitled to summary disposition as a matter of law, and thus, the motion must be denied. Intervenor's Answer at 1. The Intervenor's answer is supported by a statement of material facts alleged to be in dispute, an affidavit from Shawn Paul Young,⁹ and a March 3, 2005 letter from the Virginia Department of Environmental Quality (VDEQ) to the NRC commenting on NRC's Draft Environmental Impact Statement (DEIS) for the North Anna ESP.

The NRC Staff (Staff) submitted its answer, along with the affidavit of Duane A. Neitzel on May 11, 2005.¹⁰ The Staff agreed with Dominion's framing of the issues and argued that the motion should be granted. Staff Answer at 1, 8. The Staff's arguments will be discussed where they raise different or valuable additional points.

II. LEGAL STANDARD FOR SUMMARY DISPOSITION

In a Subpart L proceeding, such as this one, the Board must apply the summary disposition standard set forth in Subpart G. 10 C.F.R. § 2.1205(c). Under this standard, summary disposition is proper if "the filings in the proceeding, depositions, answers to

⁹ Intervenor's Answer, Affidavit of Shawn Paul Young, (May 10, 2005) [hereinafter Young Aff.]. Mr. Young is a fisheries biologist and research facility manager for Clemson University. Id. ¶ 1. He has nine years experience researching the effects of hydroelectric facilities and reservoir management on both introduced and native fisheries, including six years experience studying reservoir striped bass. Id. ¶ 2. Mr. Young received a Bachelor of Science in Environmental Studies from Northland College, a Master of Science in Aquaculture, Fisheries, and Wildlife Biology from Clemson University, and, as of the Intervenor's filing, had completed all requirements for a Ph.D. in Fisheries and Wildlife Science from Clemson University and was awaiting for the degree to be officially granted. Id.

¹⁰ NRC Staff Answer Supporting Dominion's Motion for Summary Disposition of Contention EC 3.3.2 (May 11, 2005) [hereinafter Staff Answer]; Staff Answer, Affidavit of Duane A. Neitzel (May 2, 2005) [hereinafter Neitzel Aff.]. Mr. Neitzel is a staff scientist with the Ecology Group at the Battelle Pacific Northwest Division, Pacific Northwest National Laboratory and is under a technical assistance contract with the NRC. Id. ¶ 2. He is the lead technical reviewer on aquatic biology issues in connection with the ESP application and assisted in the preparation of the DEIS. Id. Mr. Neitzel received a Bachelor of Science in Zoology from the University of Washington and a Master of Science in Biology from Washington State University. Staff Answer, Exhibits to the Affidavit of Duane A. Neitzel, Ex. A.

interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” 10 C.F.R. § 2.710(d)(2). In general, the Commission applies the same standards that the Federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Advanced Medical Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).¹¹

In considering a motion for summary disposition, the Board must examine the record in the light most favorable to the non-moving party. Advanced Medical, CLI-93-22, 38 NRC at 102 (citing Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962)). The moving party bears the burden of demonstrating that there is no genuine issue as to any material fact. 10 C.F.R. § 2.325; Advanced Medical, CLI-93-22, 38 NRC at 102 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970)). If the moving party fails to make the requisite showing to satisfy its burden, the Board must deny the motion. Advanced Medical, CLI-93-22, 38 NRC at 102 (citing Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 753-54 (1977)). If, however, the moving party satisfies its initial burden and the non-movant then fails to demonstrate that a genuine issue of material facts exists, the Board may grant the motion for summary disposition. Id. at 102-03 (citing Northern States Power Co. (Prairie Island Nuclear Generating Plants, Units 1 & 2), CLI-73-12, 6 AEC 241, 242 (1973)). Thus, once the proponent of the motion for summary disposition has satisfied its initial burden, the party opposing the motion may not rest upon “mere allegations or denials” but must submit

¹¹ Advanced Medical and several of the other decisions cited in this Memorandum and Order refer to the 10 C.F.R. § 2.749 summary disposition standard. When the Commission recently amended its regulations section 2.749 was moved to 10 C.F.R. § 2.710 and new requirements on the timing of summary disposition motions, responses, and the presiding officer’s consideration of such motions were added. 69 Fed. Reg. 2182, 2218 (Jan. 14, 2004). As a general rule it appears that the summary disposition standards under the new regulations are the same as the standards prior to 2004.

rebutting evidence setting forth “specific facts showing that there is a genuine issue of fact.” 10 C.F.R. § 2.710(b); Advanced Medical, CLI-93-22, 38 NRC at 102. Although the non-moving party need not show it would prevail on the issue to defeat a properly supported motion for summary disposition, it “must at least demonstrate that there is a genuine factual issue to be tried.” Advanced Medical, CLI-93-22, 38 NRC at 102 (citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-92-8, 35 NRC 145, 154 (1992)).

III. ANALYSIS

With the preceding principles in mind, the Board turns to Dominion’s motion for summary disposition on Contention EC 3.3.2. For purposes of this ruling, we accept Dominion’s division of the contention into three issues. Before addressing each of these specific issues however, we examine Dominion’s initial argument regarding the scope of Contention EC 3.3.2.

A. Scope of Contention EC 3.3.2

Dominion and the Staff both suggest that the scope of Contention EC 3.3.2 is limited to the thermal impact on striped bass in Lake Anna and does not include the impact on striped bass in the North Anna River downstream of the North Anna Dam.¹² Dominion Motion at 3; Staff Answer at 2. In support of this position, both Dominion and the Staff draw attention to the Original Board’s ruling on the admission of contentions.

The plain language of the contention, however, convincingly demonstrates that the thermal impact on striped bass downstream in the North Anna River does in fact fall within the scope of the contention. As admitted, Contention EC 3.3.2 states:

The [Environmental Report (ER)] does not adequately address the adverse

¹² Lake Anna was created in 1971 by the construction of the North Anna Dam on the main stem of the North Anna River. DEIS at 2-5. Downstream of the North Anna Dam, the North Anna River joins the South Anna River to form the Pamunkey River approximately 27 miles southeast of the site. Id.

impact of operating one or two additional reactors on the striped bass in Lake Anna and the North Anna River. In particular, the ER does not adequately consider the impacts of the proposed reactors on the striped bass at Lake Anna and downstream arising from increased water temperature.

LBP-04-18, 60 NRC at 276 (emphasis added). Thus, as specifically re-written by the Original Board, the contention obviously includes the North Anna River downstream of Lake Anna.

Ignoring this plain language, Dominion focuses on the portion of the Board's decision stating that the contention is admitted "as it concerns the adverse thermal impacts on the striped bass population of Lake Anna" but inadmissible "as to other generalized portions of the contention." Id. at 271. Dominion, however, takes this portion of the contention decision out of context. In the first sentence of the ruling on Contention EC 3.3.2, the Board indicated the contention is admissible "as it concerns the adverse thermal impacts on the striped bass population of Lake Anna." Id. (emphasis added). In the next sentence, the Board found the Intervenor's proposed contention inadmissible "as to other generalized portions of the contention regarding the failure adequately to address effects on other aquatic life." Id. (emphasis added). This clarification merely indicates that the contention, as admitted, does not include issues related to the impacts on "other aquatic life," in contrast to the admissible issue of the impacts on striped bass.

Similarly, the Staff quotes the portion of the decision where the Board found that the North Anna Intervenor's "downstream impact assertions fail to raise and lack support regarding ESP-related concerns." Id. On its face, this sentence appears to exclude downstream impacts from the scope of the contention. Nonetheless, when this portion of the decision is placed in the context of the arguments and filings then before the Board,¹³ it is clear that reference to the

¹³ See Dominion's Answer to Petitioners' Contentions (May 25, 2004) at 50 (arguing proposed Contention 3.3.2 "seeks to raise issues relating to the effects of the existing dam rather than any impact resulting from the deployment of additional units"); NRC Staff Answer to Contentions of [North Anna Intervenor] Regarding the [ESP] Application for the North Anna Nuclear Power Plant Site (May 28, 2004) at 43-44 ("Construction and operation of the [North

Intervenors' "downstream impact assertions" refers to more general challenges related to the construction and operation of the existing North Anna Dam, which are indeed beyond the scope of this ESP proceeding, and not to issues related to the impact of operating additional reactors on striped bass in the North Anna River, which do raise "ESP-related concerns."

In short, given the plain language of Contention EC 3.3.2, we reject the assertion that the thermal impacts on striped bass in the North Anna River downstream of the North Anna Dam are outside the scope of the contention.

B. Thermal Impacts on Striped Bass in the North Anna River

Turning to the first of the three substantive arguments raised by Dominion, it asserts that there are no striped bass in the North Anna River for at least 25 miles downstream of the North Anna Dam and therefore there can be no adverse impact on these non-existent striped bass. Dominion Motion at 9. In support of this factual assertion, Dominion proffers Mr. Bolin's affidavit, in which he attests striped bass do not inhabit the 25-mile stretch of the North Anna River between the North Anna Dam and the "Fall Line."¹⁴ Bolin Aff. ¶ 15. Mr. Bolin does acknowledge that there is a 2-mile segment of the North Anna River below the Fall Line that striped bass may possibly reach during their spring spawning run from further downstream. Id. ¶ 17. Dominion concludes, however, that these striped bass could not be affected by thermal discharges from additional units because the temperature of water released from Lake Anna in the spring (the time striped bass make their spawning runs) is about 65E F, within the thermal tolerance of the striped bass, because river flow is at its maximum in the spring, and because

Anna] Dam is not part of the proposed action" and thus, cannot "supply the basis for an issue within the scope of this ESP proceeding").

¹⁴ The "Fall Line" is "where the relatively flat Atlantic Coastal Plain Physiographic Province transitions to the rocky Piedmont Physiographic Province." Bolin Aff. ¶ 13. In the North Anna River, severe rock impediments at the Fall Line prevent fish below the Fall Line from swimming further upstream. Id.

this stretch of the North Anna River is more than 25 miles downstream of the North Anna Dam. Dominion Motion at 11; Bolin Aff. ¶ 17.

The Staff agrees that no genuine issue of material fact exists concerning striped bass in the North Anna River between the Lake Anna Dam and the Fall Line. Staff Answer at 8. The Staff adds that even if spawning striped bass could make it above the Fall Line, eggs and larvae of striped bass often settle to the bottom of a river or stream and die in short reaches of spawning rivers, meaning the North Anna River could not support a striped bass population because of these limitations on natural freshwater reproduction. Id.

The Intervenors argue there is a genuine factual dispute about the striped bass in the North Anna River. Intervenors' Answer at 5. The Intervenors agree there are no striped bass between the Lake Anna Dam and the Fall Line. Id. Instead, they focus on the striped bass that reach the 2-mile stretch of the North Anna River just below the Fall Line. Id. The Intervenors claim that the thermal discharges from an additional reactor at Lake Anna may negatively impact the striped bass population in this portion of the North Anna River, where spawning, egg development, and larvae and juvenile rearing occur. Id. at 6-7. Their position is supported by the affidavit of Mr. Young, who states the “[p]otential impacts from additional reactors at North Anna include variable water temperature and flow rates affecting spawning of adult striped bass, reduction of flow rates needed for eggs to mature after release, and changes in community structure of aquatic invertebrate and vertebrate populations that serve as the food source for larval and juvenile striped bass.” Young Aff. ¶ 9; see generally id. ¶¶ 8-14.

We conclude that Dominion has failed to show that there is no genuine issue of material fact as to whether the thermal discharges from an additional reactor could impact the striped bass population along the 2-mile stretch of the North Anna River below the Fall Line. First, although they do not dispute the accuracy of the temperature estimates for the released flows

from Lake Anna in the spring, the Intervenor point out that reliance on spring data alone may be inappropriate because the thermal discharges from the new reactor may impact the development of juvenile striped bass downstream during the summer months, when the lake temperature is already high. Second, the Intervenor have adequately shown that the life cycle of the striped bass, from spawning to egg to larva to juvenile development, is sensitive to changes in water temperature and flow rates.¹⁵ Finally, Dominion has not demonstrated that the downstream thermal impacts of the new reactors would be insignificant. Dominion relies on a conclusory statement by its expert about distance creating enough of a buffer to make the impact on striped bass negligible, while the Intervenor cite studies that found striped bass 100 kilometers downriver have been affected by the operation of a dam. At the summary disposition stage it is unnecessary to “untangle the expert affidavits and decide ‘which experts are more correct.’” Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 510 (2001) (citing Norfolk So. Corp. v. Oberly, 632 F. Supp. 1225, 1243 (D. Del. 1986), aff’d on other grounds, 822 F.2d 388 (3d Cir. 1987)). Accordingly, on this issue, Dominion’s motion is denied.

C. Unit 4 Dry Cooling System

Dominion states that there is no genuine dispute on the thermal impacts from the fourth unit because Dominion has revised its proposal so that the fourth unit uses dry cooling towers instead of lake cooling. Dominion Motion at 11. Dominion maintains that the dry cooling towers

¹⁵ By relying on the adequacy of flow during the spring months, Dominion seems to have opened the door for the Intervenor to challenge the impact that downstream flow rates may have, in combination with increased water temperatures, during other seasons, on striped bass in the North Anna River. We do not suggest that the scope of this contention has been expanded to consider all downstream flow issues. The Original Board rejected general downstream flow considerations to the extent that they challenged the existing operation of the North Anna Dam. LBP-04-18, 60 NRC at 271. Nonetheless, given that it may be difficult, if not impossible to separate whether projected downstream impacts are caused by temperature, low-flow, or a combination of the two, we find that the synergistic impacts of flow and temperature are within the scope of this contention to the extent that they relate to impacts on striped bass.

result in zero increase in lake temperature because there is no thermal discharge into the lake and therefore there can be no adverse impact on striped bass. Id. at 12. The Staff agrees. Staff Answer at 9-10.

The Intervenor's Answer ignores the issue of the fourth reactor except to note, in the Intervenor's Statement of Material Facts in Dispute and Response to Dominion's Statement of Material Facts on which No Genuine Dispute Exists of May 12, 2005 [Intervenor's Statement], that "[t]he impact of an additional reactor on striped bass within Lake Anna could be 'large' in that it could potentially destabilize the Lake Anna striped bass fishery" Intervenor's Statement at 19. The Intervenor does not controvert Dominion's statement that there will be no thermal discharge from the fourth unit into Lake Anna.

It is clear to the Board that Dominion has carried its burden of showing that there is no genuine dispute regarding a material fact relating to the fourth unit and that Dominion is entitled to a favorable ruling on this point as a matter of law. The Intervenor's rebuttal is essentially a "mere allegation and denial" and fails to show us that there is a genuine dispute on a material fact. See 10 C.F.R. § 2.710(b). Accordingly, Dominion's motion for summary disposition on Contention EC 3.3.2 as it relates to the fourth unit is granted.

D. Impact of Unit 3 on Lake Anna

1. Thermal Impacts on Striped Bass

Dominion's third argument for summary disposition is that there is no genuine dispute of material fact that the ER "adequately" addresses "impacts arising from the effect of increased temperature due to the operation of a third unit on the striped bass fishery in Lake Anna."

Dominion Motion at 2. Dominion asserts that its ER correctly characterizes the thermal impact on the striped bass population as "moderate"¹⁶ because it would be sufficient to alter noticeably,

¹⁶ Dominion apparently relies on the NRC significance level definitions used in 10 C.F.R. Part 51, Appendix B, "Environmental Effect of Renewing the Operating License of a Nuclear

but not destabilize, important attributes of the resource. Id. at 12. In support of this conclusion, Dominion claims that it is “reasonable” to assume that the striped bass will be able to persist, even with the increased thermal discharges, because other southern reservoirs, with higher temperatures than those projected at Lake Anna with the additional units, have supported striped bass. Id. at 13; Bolin Aff. ¶¶ 24. Furthermore, Dominion notes that striped bass have shown the ability to seek out and find cooler waters during those months when temperatures rise above their thermal preference and, even if cooler refuges are unavailable for a time, striped bass can tolerate higher temperatures for a month or more before die offs occur. Dominion Motion at 13; Bolin Aff. ¶¶ 24. Although its thermal modeling leads Dominion to believe that the striped bass will survive despite the temperature changes caused by the additional units, Dominion acknowledges their analysis does not preclude the possibility of habitat restrictions and die offs. Dominion Motion at 13; Bolin Aff. ¶¶ 24. Essentially, Dominion is arguing that even with the habitat restrictions and the possibility of die offs, the ER correctly characterized the thermal impact on striped bass as “moderate.”

The Staff’s analysis of the impact of the third unit on the striped bass population in Lake Anna is similar to Dominion’s, acknowledging that the increased thermal discharges will have a moderate impact on the striped bass during drought years if not mitigated. Staff Answer at 16. During cooler months and non-drought years, however, the Staff concluded that the impact on striped bass will be small. Id. at 15-16.

The Intervenors raise two material factual issues related to the impact on striped bass in Lake Anna. First, the Intervenors challenge Dominion’s analysis used in reaching the conclusion that the impact is moderate. They claim the ER fails to account for seasonal changes in the lake’s dissolved oxygen levels, which may, in combination with the observed

Power Plant.”

seasonal changes of water temperature near the North Anna Dam, affect striped bass. Intervenor's Answer at 12; Young Aff. ¶ 16. Additionally, the Intervenor's claim that the striped bass summer habitat data should be broken down monthly in order to quantify and adequately assess habitat degradation in the deepest portions of the lake. Intervenor's Answer at 12; Young Aff. ¶ 16. Second, the Intervenor's argue that the available data show that there is the potential for a "large" impact on the striped bass population because die offs may occur. Intervenor's Answer at 12-14. Emphasizing the importance of summer habitat availability, the already thermally stressful conditions, and the fact that the available data point to possible habitat restrictions and die offs, the Intervenor's argue that the new unit would have a large impact on the striped bass population in Lake Anna. Id.

We find that Dominion has failed to satisfy its burden on this issue. Setting its characterizations of the "reasonableness" and "correctness" of the ER aside, Dominion has failed to show that there is no genuine dispute as to whether the ER's thermal analysis of the impact of striped bass in Lake Anna is, as stated in the contention, "adequate." This is not surprising, as "adequacy" is subject to greater opportunity for dispute and differing professional opinion, as shown by the competing affidavits presented to us here. Satisfied that Dominion has not shown that there is no genuine dispute as to the adequacy of the ER, a material fact, we decline to grant this motion or to reach the merits of the "adequacy" issue here.

2. Stocking Alternative Fish

Dominion also argues that, even if the ER incorrectly characterized the impact on striped bass as moderate, the issue is moot because of its commitment to support the development and stocking of an alternative fish that is more tolerant of higher temperatures. Dominion Motion at 14-15. Dominion has committed to work with the VDGIF to support, including financial assistance, the development and stocking of an alternative fish, such as the

Palmetto bass or any other fish that the VDGIF deems suitable, in order “to maintain an equally viable and enjoyable recreation fishery” at Lake Anna. Id. at 15; Bolin Aff. ¶ 31. Based on these commitments, Dominion argues that summary disposition is appropriate because there is no longer a genuine dispute concerning any material fact relating to Contention EC 3.3.2. Dominion Motion at 15-16.

The Staff recognizes the commitment that Dominion has made to provide financial assistance to aid in the development and stocking of a more thermally-tolerant species in Lake Anna. Staff Answer at 16 n.15. Although the Staff does not take a position on whether the Palmetto bass would provide an equivalent recreational fishery at Lake Anna, the Staff notes that any thermal impacts on the striped bass fishery can be mitigated. Id.

The Intervenors claim Dominion’s proposal to stock alternative species improperly shifts the scope of the contention from striped bass to the Lake Anna fishery at large. Intervenors’ Answer at 14-15. By shifting the focus away from striped bass, the Intervenors believe that Dominion misinterprets the scope of the contention, which focuses on the impact on striped bass, not the impact on the Lake Anna fishery. Id. at 16. Furthermore, the Intervenors argue that there is still too much uncertainty surrounding Dominion’s proposal, making it impossible to evaluate. Id.

Based on the record before us, we find that it is premature to determine whether Dominion’s proposal would qualify as an adequate substitute mitigation strategy. Although Dominion has pledged to assist in developing an alternative stocking program, there has not been an analysis of whether such a program is practicable. More importantly, even if there is an adequate supply of a species that would serve as a suitable replacement for striped bass, the decision on whether such a mitigation program is necessary in the first place may be based, in part, on Dominion and the Staff’s analysis and characterization of the thermal impacts on

striped bass.

III. CONCLUSION

For the foregoing reasons, Dominion's motion for summary disposition on Contention EC 3.3.2 is granted in part and denied in part.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD¹⁷

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA by G.P. Bollwerk for:/

Thomas S. Elleman
ADMINISTRATIVE JUDGE

/RA/

Richard F. Cole
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 16, 2005

¹⁷ Copies of this order were sent this date by Internet e-mail transmission to counsel for (1) applicant Dominion; (2) the North Anna Intervenors; and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
DOMINION NUCLEAR) Docket No. 52-008-ESP
NORTH ANNA, LLC)
)
(Early Site Permit for North Anna ESP Site))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING IN PART AND DENYING IN PART SUMMARY DISPOSITION ON CONTENTION EC 3.3.2 - IMPACTS ON STRIPED BASS IN LAKE ANNA) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 52-008-ESP
LB MEMORANDUM AND ORDER (GRANTING IN
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IMPACTS ON STRIPED BASS IN LAKE ANNA)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of June 2005