

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman  
Dr. Paul B. Abramson  
Dr. Gary Arnold

In the Matter of  
TENNESSEE VALLEY AUTHORITY  
(Watts Bar Unit 2)

Docket No. 50-391-OL  
ASLBP No. 09-893-01-OL-BD01  
March 6, 2012

MEMORANDUM AND ORDER

(Denying TVA's Motion for Summary Disposition of SACE Contention 7)

This proceeding arises from an updated application pursuant to 10 C.F.R. Part 50 by the Tennessee Valley Authority (TVA) for a license to operate a second nuclear reactor at the Watts Bar Nuclear Plant (WBN) in Rhea County, Tennessee.<sup>1</sup>

On November 19, 2009, this Licensing Board granted a Petition to Intervene and Request for Hearing submitted by the Southern Alliance for Clean Energy (SACE) and admitted two of SACE's proffered contentions.<sup>2</sup> On June 2, 2010, the Board granted TVA's unopposed motion to dismiss Contention 1 as moot.<sup>3</sup>

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<sup>1</sup> See Tennessee Valley Authority; Notice of Receipt of Update to Application for Facility Operating License and Notice of Opportunity for Hearing for the Watts Bar Nuclear Plant, Unit 2 and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 74 Fed. Reg. 20,350, 20,350 (May 1, 2009).

<sup>2</sup> LBP-09-26, 70 NRC 939 (2009).

<sup>3</sup> Licensing Board Order (Granting TVA's Unopposed Motion to Dismiss SACE Contention 1) (June 2, 2010) (unpublished).

Presently before the Board is a motion for summary disposition of the remaining contention, Contention 7,<sup>4</sup> which, as admitted, reads as follows:

TVA's discussion of aquatic impacts is deficient in three key respects. First, TVA mischaracterizes the current health of the ecosystem as good, and therefore fails to evaluate the impacts of WBN2 in light of the fragility of the host environment. Second, TVA relies on outdated and inadequate data to predict thermal impacts and the impacts of entrainment and impingement of aquatic organisms in the plant's cooling system. Third, TVA fails completely to analyze the cumulative effects of WBN2 when taken together with the impacts of other industrial facilities and the effects of the many dams on the Tennessee River.<sup>5</sup>

The Board denies TVA's motion because there remains a genuine dispute over the material facts put in issue by the Contention, namely, the adequacy of TVA's analysis of aquatic impacts in its Final Supplemental Environmental Impact Statement (FSEIS).

#### I. STANDARDS GOVERNING SUMMARY DISPOSITION

In a proceeding governed by Subpart L, such as this one, the Board is to "apply the standards for summary disposition set forth in Subpart G,"<sup>6</sup> those standards require the moving party to demonstrate that "there is no genuine issue as to any material fact" and that "it is entitled to a decision as a matter of law."<sup>7</sup>

In a motion for summary disposition, the moving party bears the initial burden to demonstrate the absence of a genuine issue as to any material fact.<sup>8</sup> Further, "the evidence of

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<sup>4</sup> [TVA]'s Motion for Summary Disposition of Contention 7 (Nov. 21, 2011) [hereinafter Motion].

<sup>5</sup> Petition to Intervene and Request for Hearing at 30-31 (July 13, 2009) [hereinafter Petition].

<sup>6</sup> 10 C.F.R. § 2.1205(c).

<sup>7</sup> Id. § 2.710(d)(2).

<sup>8</sup> Id. § 2.325; Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio, 44041), CLI-93-22, 38 NRC 98, 102 (1993).

the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”<sup>9</sup> In turn, the non-moving party “may not rest upon ‘mere allegations or denials,’ but must set forth specific facts showing that there is a genuine issue.”<sup>10</sup> Nevertheless, the non-moving party need not show likelihood of success on the merits – only that there is a genuine issue of fact to be evaluated at the evidentiary hearing.<sup>11</sup> When the crux of the factual disagreement is a “battle of the experts,” summary disposition is unsuitable.<sup>12</sup> “[A] licensing board (or presiding officer) should not . . . conduct a ‘trial on affidavits.’”<sup>13</sup> More precisely, “[r]egardless of the level of the dispute, at the summary disposition stage, it is not proper for a Board” to choose which expert has the better of the argument.<sup>14</sup> “If ‘reasonable minds could differ as to the import of the evidence,’ summary disposition is not appropriate.”<sup>15</sup>

## II. ARGUMENTS OF THE PARTIES

### A. TVA’s Motion

TVA represents that there are no longer any material facts in dispute because it has addressed the issues raised by Contention 7 in “a series of comprehensive surveys,” thus

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<sup>9</sup> Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010) (citing Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986)).

<sup>10</sup> Advanced Med. Sys., CLI-93-22, 38 NRC at 102.

<sup>11</sup> Id.

<sup>12</sup> See Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 122 (2006) (citing Phillips v. Cohen, 400 F.3d 388, 399 (6th Cir. 2005)).

<sup>13</sup> Pilgrim, CLI-10-11, 71 NRC at 297 (citing Anderson, 477 U.S. at 242, 255).

<sup>14</sup> Vermont Yankee, LBP-06-5, 63 NRC at 122 (citing Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 510 (2001)).

<sup>15</sup> Pilgrim, CLI-10-11, 71 NRC at 297-98 (citing Anderson, 477 U.S. at 250-51).

rendering the contention moot.<sup>16</sup> According to TVA, it has shared the results of these eight surveys with SACE and the NRC Staff, and SACE has not contested any of the results.<sup>17</sup>

With regards to SACE's first allegation, that TVA mischaracterized the current health of the aquatic ecosystem near WBN, TVA notes that SACE's expert called for new surveys and data, particularly on fish and mussel populations.<sup>18</sup> In response, TVA points to its studies completed in the past two years that purport to measure the present health of fish and mussel communities and the present effects of WBN Unit 1 on fish communities.<sup>19</sup> TVA asserts that these studies sufficiently resolve SACE's dispute with its application as expressed in the first prong of Contention 7.

TVA references the same studies as responsive to SACE's second allegation, that TVA used outdated data and inadequately assessed the impacts of entrainment and impingement from the coolant intake system and the impacts of coolant discharge on marine organisms. The

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<sup>16</sup> Motion at 11; see also id. Attach. 9, TVA, Comparison of Fish Species Occurrence and Trends in Reservoir Fish Assemblage Index Results in Chickamauga Reservoir Before and After [WBN] Unit 1 Operation (June 2010); id. Attach. 10, TVA, Analysis of Fish Species Occurrences in Chickamauga Reservoir – A Comparison of Historic and Recent Data (Oct. 2010); id. Attach. 11, Third Rock Consultants, Mollusk Survey of the Tennessee River Near [WBN] (Rhea County, Tennessee) (October 28, 2010, rev. November 24, 2010); id. Attach. 12, TVA, Discussion of the Results of the 2010 Mollusk Survey of the Tennessee River Near [WBN] (Rhea County, Tennessee) (Mar. 2011); Attach. 13, TVA, Aquatic Environmental Conditions in the Vicinity of [WBN] During Two Years of Operation, 1996-1997 (June 1998, rev. June 7, 2010) [hereinafter Attach. 13]; id. Attach. 14, TVA, Comparison of 2010 Peak Spawning Seasonal Densities of Ichthyoplankton at [WBN] at Tennessee River Mile 528 with Historical Densities During 1996 and 1997 (Apr. 2011, rev. Nov. 2011) [hereinafter Attach. 14 or Peak Entrainment Study]; id. Attach. 15, TVA, Fish Impingement at [WBN] Intake Pumping Station Cooling Water Intake Structure During March 2010 Through March 2011 (Mar. 2011, rev. Apr. 2011) [hereinafter Attach. 15]; id. Attach. 16, TVA, Hydrothermal Effects on the Ichthyoplankton from the [WBN] Supplemental Condenser Cooling Water Outfall in Upper Chickamauga Reservoir (Jan. 2011) [hereinafter Attach. 16 or Hydrothermal Study].

<sup>17</sup> Motion at 11.

<sup>18</sup> Id. at 12.

<sup>19</sup> Id. at 12-13.

studies include a revised entrainment analysis, with direct measurement data on entrainment;<sup>20</sup> a survey of actual impingement data at the Condenser Cooling Water (CCW) intake;<sup>21</sup> and a study of hydrothermal impacts that documented and measured the thermal plume from WBN and its correlation with “temporal and spatial distribution of fish eggs and larvae.”<sup>22</sup> TVA stresses that its new studies were conducted in accord with the recommendations of SACE and its expert Dr. Shawn Young.<sup>23</sup> In response to SACE’s specific allegation that TVA failed to analyze the impacts of an overflow of excess cooling water from the holding ponds, TVA states that it need not address this issue because overflow has not occurred, is unlikely to occur, and is essentially a worst case scenario that need not be considered under the National Environmental Policy Act (NEPA).<sup>24</sup>

TVA addresses the final prong of SACE’s contention, the inadequacy of TVA’s cumulative impacts analysis, by arguing in part that SACE’s demand for a more detailed analysis is “legally and factually flawed.”<sup>25</sup> According to TVA, its original analysis of the baseline quality of the aquatic environment, as supplemented by its new studies, is fully sufficient to comply with NEPA. Contrary to SACE’s argument that TVA has not considered the cumulative effects of the other industrial facilities along the Tennessee River along with WBN, TVA states that its “comprehensive snapshot of the Chickamauga Reservoir” “inherently accounted for all existing industrial impacts.”<sup>26</sup> Additionally, TVA alleges that its new aquatic studies fill in any

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<sup>20</sup> See id. at 15; Attach. 13; Attach. 14.

<sup>21</sup> See id. at 16-17; Attach. 15.

<sup>22</sup> Id. at 18; Attach. 16.

<sup>23</sup> Id. at 14, 18.

<sup>24</sup> Id. at 19 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 354-55 (1989)).

<sup>25</sup> Id. at 20.

<sup>26</sup> Id. at 21, 22.

gap that SACE identified in its assessment of the additional impact from WBN Unit 2.<sup>27</sup> TVA states that the additional analysis confirms that the incremental impact of operating WBN Unit 2 would not be materially different from the current impact of Unit 1.

In addition to the eight studies attached to its motion, TVA includes the affidavit of four experts, who provide information as to the methodology and results of the studies.<sup>28</sup>

Additionally, TVA provides a statement of material facts on which it says there is no genuine dispute, consisting of 84 numbered paragraphs.<sup>29</sup>

#### B. NRC Staff's Answer in Support of the Motion

On December 20, 2011, the NRC Staff filed its answer to TVA's motion.<sup>30</sup> The Staff supports the motion and states that TVA has now adequately addressed all of the alleged omissions referenced in Contention 7 and that no material issue of fact remains.<sup>31</sup> The bulk of the Staff's answer echoes and reinforces the arguments in TVA's motion that its new studies are responsive to SACE's allegations of omission and inadequacy in TVA's FSEIS. Like TVA, the Staff emphasizes that SACE has not filed any new contentions or otherwise challenged the additional studies performed by TVA.<sup>32</sup> The Staff further represents that its experts have reviewed TVA's motion and its new studies and concur that TVA has successfully addressed

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<sup>27</sup> See id. at 23.

<sup>28</sup> Id. Joint Affidavit of Dennis Scott Baxter, John Tracy Baxter, Dr. Charles Coe Coutant, and Dr. Paul Neil Hopping (Nov. 21, 2011).

<sup>29</sup> Id. Statement of Material Facts on Which No Genuine Issue Exists in Support of [TVA]'s Motion for Summary Disposition of Contention 7.

<sup>30</sup> NRC Staff's Answer to TVA's Motion for Summary Disposition of Contention 7 Regarding Aquatic Impacts (Dec. 20, 2011).

<sup>31</sup> Id. at 9.

<sup>32</sup> Id. at 4, 10, 15, 17.

SACE's objections.<sup>33</sup> Additionally, the Staff points to its Draft Final Environmental Statement (DFES), released publicly on November 1, 2011, which it says incorporates the analysis conducted by TVA in its new studies, and expands upon TVA's cumulative impacts analysis.<sup>34</sup> Accordingly, the Staff suggests that Contention 7 has also been mooted by the DFES.

### C. SACE's Answer Opposing the Motion

SACE filed its answer opposing TVA's motion on December 20, 2011,<sup>35</sup> in which it argues that "TVA fails to demonstrate that the concerns raised in Contention 7 have been resolved by [TVA's] recent studies," and therefore a genuine dispute of material facts remains.<sup>36</sup> In SACE's view, TVA's new studies make "some progress," but the amount of data collected is insufficient to properly analyze the impacts of WBN Unit 2, and there are important gaps in the data that are presented.<sup>37</sup> Specifically, SACE asserts that one year of additional data on entrainment, impingement, mussels, and thermal impacts is insufficient; that TVA did not collect data at all relevant locations; and that the studies contain material errors and omissions.<sup>38</sup>

SACE supports its answer with the declaration of its expert, Dr. Young.<sup>39</sup> SACE further supplements its answer with an annotated version of TVA's list of material facts, in which it relies on Dr. Young's declaration to specifically dispute many of TVA's factual assertions.<sup>40</sup> For example, SACE disputes TVA's statement that "dual unit operation does not pose any greater

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<sup>33</sup> Id. at 9; id. Joint Affidavit of Dr. Dennis T. Logan and Rebekah Harty Krieg Concerning TVA's Motion for Summary Disposition of SACE Contention 7 (Dec. 20, 2011)

<sup>34</sup> See id. at 9, 19-20.

<sup>35</sup> [SACE]'s Opposition to [TVA]'s Motion for Summary Disposition of Contention 7 Regarding Aquatic Impacts of Watts Bar Unit 2 (Dec. 20, 2011) [hereinafter SACE Answer].

<sup>36</sup> Id. at 1-2.

<sup>37</sup> Id. at 8.

<sup>38</sup> Id. at 8-9.

<sup>39</sup> Id., Declaration of Sean Paul Young, Ph.D (Dec. 20, 2011) [hereinafter Young Declaration].

<sup>40</sup> Id. [SACE]'s Statement of Disputed Material Facts (Dec. 20, 2011).

risk of thermal damage to the aquatic community in the WBN vicinity than does operation of Unit 1 alone,”<sup>41</sup> as well as its conclusion that “there is no basis to support a finding that operation of WBN Unit 1 caused the observed changes in fish species and occurrence,” among others.<sup>42</sup>

SACE argues that Contention 7 is not a contention of omission, as TVA and the Staff contend, but rather a contention of adequacy, and therefore TVA’s new studies do not, of their own accord, moot the contention. Accordingly, SACE states that it “was not required to amend the contention to address each study that TVA prepared in order to maintain the viability of [the] Contention.”<sup>43</sup>

Aside from its assertion of continuing factual disputes with TVA’s application, including the new studies, SACE makes several additional arguments with respect to TVA’s motion. First, SACE urges the Board to reject TVA’s use of the current condition of the Tennessee River as the baseline for its environmental analysis.<sup>44</sup> According to SACE, the “historic conditions in the Tennessee River are uniquely relevant to the cumulative impacts of WBN2,” and therefore a true baseline would reflect the condition of the river before it had been degraded by dams and other industrial uses.<sup>45</sup> Next, SACE attempts to counter TVA’s claim that the overflow of cooling water from the holding ponds is a “worst case scenario” that need not be considered under NEPA.<sup>46</sup> SACE states that the use of the holding pond (and presumably therefore the risk of overflow) is not speculative, but foreseeable.<sup>47</sup> Finally, SACE alleges that TVA misrepresents the reason why WBN began to use a Supplemental CCW, and asserts that the real reason, as

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<sup>41</sup> Id. at 15, citing Young Declaration at 14-18.

<sup>42</sup> Id. at 10, citing Young Declaration at 7-18, 22-31.

<sup>43</sup> Id. at 13.

<sup>44</sup> See id. at 4-6.

<sup>45</sup> Id. at 5.

<sup>46</sup> See id. at 7.

<sup>47</sup> Id.



expressed in the Staff's DFES, was not to increase efficiency but to correct for a design flaw of the original CCW.<sup>48</sup>

### III. BOARD DECISION

We find that TVA has not carried its burden to demonstrate that no genuine issue of material fact remains in this proceeding. TVA and the Staff suggest that the fact that TVA did additional studies means that the contention is moot, because TVA has thus addressed the alleged omissions in its FSEIS.<sup>49</sup> However, SACE is correct that Contention 7 is not one of omission, but of inadequacy: indeed, SACE stated quite plainly in its petition that "TVA's finding that WBN Unit 2 will have no significant impacts on aquatic life in the Tennessee River is inadequately supported."<sup>50</sup> The omission of certain information was not the only basis proffered by SACE in support of its allegation of inadequacy.

At its base, the contention alleges not that TVA failed to perform certain studies, but that its analysis of aquatic impacts was deficient.<sup>51</sup> We acknowledged as much in our order admitting Contention 7, observing that "SACE has raised a genuine issue with regard to the accuracy of TVA's characterization of the current aquatic environment in the vicinity of the Watts Bar facility and the adequacy of TVA's analysis of the impact that the operation of Unit 2 could have on the surrounding aquatic environment."<sup>52</sup> Consequently, it is not enough that TVA performed new studies. For the contention to be moot, those studies must resolve the concerns expressed in the contention. TVA states that SACE's concerns have been resolved, but SACE is not prevented from arguing that TVA's application remains inadequate, notwithstanding the

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<sup>48</sup> Id. at 11-12.

<sup>49</sup> See Motion at 1-2; Staff Answer at 9.

<sup>50</sup> Petition at 32 (emphasis added).

<sup>51</sup> See id. at 35; SACE Answer at 12-13.

<sup>52</sup> LBP-09-26, 70 NRC at 989 (emphasis added).

revisions and new studies. Nor was SACE required to amend its contention or offer new contentions in response to each of TVA's studies.

In particular, the parties continue to disagree on each of the three components of Contention 7. First, there is a continuing dispute over TVA's characterization of the health of the Tennessee River ecosystem. Dr. Young states that "despite alarming evidence of significant decline in the diversity and numbers of aquatic organisms in the Tennessee River in the vicinity of WBN, TVA continues to assert that the aquatic health of the river is good" and that TVA "mischaracterize[s] the baseline condition" of the river.<sup>53</sup> While TVA may disagree with Dr. Young's persistent view that the ecosystem is in a poor condition, this is nevertheless a factual dispute fit for evidentiary hearing, not summary disposition. Second, SACE continues to allege that, taking into account the new studies, TVA's conclusions rest on inadequate data.<sup>54</sup> In support, Dr. Young provides specific criticism of the methodology and conclusions of TVA's studies with respect to entrainment, impingement, and thermal impacts.<sup>55</sup> Finally, SACE renews its criticism of the sufficiency of TVA's cumulative impacts analysis, alleging that TVA fails to discuss "the extensive portfolio of energy and industrial facilities that the Tennessee River supports."<sup>56</sup> SACE has raised a genuine dispute as to whether TVA's cumulative impacts analysis is consistent with the requirements of NEPA.

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<sup>53</sup> See Young Declaration at 5.

<sup>54</sup> SACE Answer at 8.

<sup>55</sup> See Young Declaration at 7-17. Among his particular criticisms, Dr. Young states that TVA's Peak Entrainment Study fails to measure entrainment at the Supplemental CCW intake and ignores a significant decline in the number of fish eggs, and that its Hydrothermal Study "grossly overstates the size and diversity of the fish population" due to a mathematical error. Id. at 8-10, 16.

<sup>56</sup> SACE Answer at 10.

In summary, we are presented here with the type of “battle of the experts” for which summary disposition is unsuitable.<sup>57</sup> TVA’s claims that it has addressed and resolved the concerns raised by SACE in Contention 7 are flatly contradicted by SACE and its expert. SACE’s opposition is based not merely in allegations and denials, but in specific factual criticisms of TVA’s application and its new and revised studies.

Additionally, we find that Contention 7 has not been mooted by the NRC Staff’s release of its DFES. Because the DFES relies on TVA’s analyses, SACE’s disputes with TVA’s FSEIS are transferred to the NRC Staff’s DFES. SACE need not refile their contention against the DFES.<sup>58</sup>

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<sup>57</sup> See Vermont Yankee, LBP-06-5, 63 NRC at 122.

<sup>58</sup> See 10 C.F.R. § 2.309(f)(2); see also Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-1, slip op. at 7 (Feb. 2, 2011).

IV. CONCLUSION

Because genuine disputes of material fact remain between the parties, TVA's Motion for Summary Disposition of Contention 7 is DENIED.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>59</sup>

*/RA/*

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Lawrence G. McDade, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Paul B. Abramson  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Gary Arnold  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
March 6, 2011

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<sup>59</sup> A copy of this Memorandum and Order was sent this date by the agency's E-Filing System to (1) Counsel for the NRC Staff; (2) Counsel for the TVA; and (3) Counsel for SACE.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
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TENNESSEE VALLEY AUTHORITY ) Docket No. 50-391-OL  
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(Watts Bar Nuclear Plant, Unit 2) )  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING TVA'S MOTION FOR SUMMARY DISPOSITION OF SACE CONTENTION 7) have been served upon the following persons by the Electronic Information Exchange.

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[Original signed by R. Giitter \_\_\_\_\_]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 6<sup>th</sup> day of March 2012