

STAFF 10/1/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PENNSYLVANIA POWER AND LIGHT COMPANY
ALLEGHENY ELECTRIC COOPERATIVE, INC.

(Susquehanna Steam Electric Station,
Units 1 and 2)

Docket No. 50-387
50-388

NRC STAFF RESPONSE SUPPORTING APPLICANTS' MOTION
FOR PARTIAL SUMMARY DISPOSITION OF CONTENTION 2 (CHLORINE)

I. INTRODUCTION

On September 9, 1981, the Applicants filed a "Motion for Summary Disposition of Modified Contention 2 (Chlorine)" (Motion). In that Motion, the Applicants ask the Licensing Board for summary disposition in their favor of that portion of Contention 2 which relates to the health effects of a "higher level" of chlorination at the Susquehanna Steam Electric Station. The Applicants assert that the portion of Contention 2 which concerns chlorine levels presents no genuine issue of material fact and that Applicants are entitled to a decision in their favor as a matter of law.

The NRC Staff supports the Applicants' Motion. The Staff concludes that the Applicants' Motion and its supporting documentation clearly demonstrate the absence of any genuine issue of material fact with regard to the chlorination of water required for the operation of the Susquehanna facility and that the Board should dismiss that portion of Contention 2 dealing with chlorine as a matter of law.

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Section II of this pleading addresses generally the law applicable to motions for summary disposition. Section III sets forth the Staff's reasons for concluding that the chlorine portion of Contention 2 raises no genuine issue of material fact.

II. GENERAL POINTS OF LAW

The Commission's Rules of Practice provide for summary disposition of certain issues on the pleadings where the filings in the proceeding show that there is no genuine issue as to any material fact and that the movant is entitled to a decision as a matter of law. 10 CFR § 2.749. As the Commission's summary disposition rule is analogous to Rule 56 of the Federal Rules of Civil Procedure (summary judgment), Federal court decisions interpreting Rule 56 may be relied on for an understanding of the operation of the summary disposition rule.^{1/} Thus, in Adickes v. Kress & Co., 389 U.S. 144, 157 (1970), the Supreme Court held that the party seeking summary judgment has "the burden of showing the absence of a genuine issue as to any material fact."^{2/} To meet this burden, the movant must eliminate any real doubt as to the existence of any genuine issue of material fact.^{3/} To further this goal, the summary disposition rule provides that all material facts, set out in the statement which must

^{1/} Alabama Power Company (Joseph M. Farley, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974).

^{2/} See also Cleveland Electric Illuminating Co. (Perry, Units 1 and 2), ALAB-433, 6 NRC 741, 752-54 (1977).

^{3/} Poller v. Columbia Broadcasting Co., 368 U.S. 464, 468 (1962); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944).

accompany summary disposition motions, will be deemed to be admitted unless controverted by the opposing party. 10 CFR § 2.749(a).

Any other party may serve an answer supporting or opposing the motion for summary disposition. 10 CFR § 2.749(a). Attached to a motion opposing summary disposition must be a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be heard. 10 CFR § 2.749(a). A material fact is one which may affect the outcome of the litigation.^{4/} The opposing party need not show that it would prevail on the issues but only that there are genuine material issues to be tried.^{5/} A party opposing the motion, however, may not rely on mere allegations, but instead must demonstrate by affidavit or otherwise that a genuine issue exists as to a material fact.^{6/}

^{4/} Mutual Fund Investors Inc. v. Putnam Mgt. Co., 533 F. 2d 620, 624 (9th Cir. 1977).

^{5/} American Manufacturers Mut. Ins. Co. v. American Broadcasting - Paramount Theaters, Inc., 386 F. 2d 272, 280 (2d Cir. 1976).

^{6/} 10 CFR § 2.749(b); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980). See also Philadelphia Electric Co., et al. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-654, 14 NRC _____ (1981). There, the Appeal Board held that the burden of demonstrating the existence of a genuine issue of material fact will not be satisfied by anything short of the documented opinion of one or more qualified authorities. Slip Op. at 6.

Furthermore, the record and affidavits supporting and opposing the motion must be viewed in the light most favorable to the party opposing the motion.^{7/} Finally, the proponent of a motion for summary disposition must meet its burden of establishing that it is entitled to judgment as a matter of law even if the opponent of such a motion fails to submit evidence controverting the conclusions reached in documents submitted in support of the motion.^{8/}

III. STAFF ARGUMENT

Contention 2, as presently constituted, alleges, in part, that no assessment has been made of the health effects of a higher level of chlorination at the Susquehanna facility should a higher level become necessary because of the discharge of organic wastes into the Susquehanna River upstream from the plant. That contention also states that the quantities and health effects of trihalomethanes and halomethanes to be released at anticipated or higher-than-anticipated levels of chlorination have not been adequately assessed. The Staff believes that this contention, insofar as it relates to chlorination at the Susquehanna plant, raises no genuine issue of material fact.

^{7/} See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877 (1974).

^{8/} Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant, Units 1 and 2), ALAB-433, 6 NRC 741, 753-54 (1977). Courts have, however, granted motions for summary judgment even though certain facts have been disputed when the disputed facts were found not material to the resolution of the legal issues presented. *Riedel v. Atlas Van Lines*, 272 F. 2d 901, 905 (8th Cir. 1959), cert. denied, 362 U.S. 942 (1960); *Newark Morning Ledger Co. v. U.S.*, 416 F. Supp. 689, 693 (D.N.J. 1975); *Aluminum Co. of America v. Burlington Truck Lines, Inc.*, 342 F. Supp. 166, 175 (N.D. Ill. 1972).

After reviewing the Applicants' Motion and the attached Statement of Material Facts and Affidavit of James Rios, the Staff supports the conclusions reached in those documents. (Affidavit of John C. Lehr (Lehr Affidavit) at 1). The Applicant will use gaseous chlorine in the main circulating water system to control biofouling of the system's heat exchange surfaces. Design and operating features of the plant such as sponge rubber balls circulating through the condenser to remove much of the biological growth from the condenser tube walls, automatic analyzers to stop the application of chlorine when the minimum effective concentration for biofouling control is achieved, and a dechlorination system will tend to minimize the amount of chlorine introduced into the circulating water system and the amount of active chlorine discharged to the Susquehanna River. (Lehr Affidavit at 2-3).

For the active chlorine that is discharged in the cooling tower blowdown, the National Pollutant Discharge Elimination System (NPPES) permit issued for the Susquehanna plant specifically limits the amount of discharge of free available chlorine. (Lehr Affidavit at 3). The permit also prohibits discharge of chlorine from any unit for more than two hours in any one day and prohibits discharges of chlorine from more than one unit at the site at a time. (Lehr Affidavit at 3).

The results of a pilot plant study conducted by the Applicants to describe the formation of trihalomethanes and other chloro-organic compounds when concentrated Susquehanna River water is chlorinated are within the range of values found during an on-going NRC study of the

products of low-level chlorination. (Lehr Affidavit at 3-4). Based on this NRC-sponsored study and on a study conducted by the Oak Ridge National Laboratory, the Staff concludes that the concentrations of trihalomethanes estimated by the Applicants to be produced at the Susquehanna facility are reasonable. (Lehr Affidavit at 5).

The estimated concentrations of total trihalomethanes likely to be discharged from the plant before mixing with river waters is an order of magnitude below the average value found in city drinking water systems and is about 2% of the allowable limit in drinking water supply systems permitted by regulations of the Environmental Protection Agency. (Lehr Affidavit at 6). The calculated concentration of total trihalomethanes discharged from the Susquehanna plant after mixing in the 7-day, 10 year low flow of the river is less than one-third of the water quality criterion for any trihalomethane approved by EPA for surface waters such as the Susquehanna River. (Lehr Affidavit at 7). The water quality criteria established by EPA are the maximum allowable concentrations that are consistent with the protection of human health and aquatic life, without consideration of cost or feasibility associated with meeting the criteria. (Lehr Affidavit at 7). Based on the low estimates of the trihalomethane concentrations likely to exist in the Susquehanna River as a result of operation of the facility, relative to the applicable EPA limitations to protect the public health, the use of chlorine for biofouling control at the site will not result in any significant impact on public health. (Lehr Affidavit at 7).

IV. CONCLUSION

For the reasons stated above, the Staff believes that it has been clearly demonstrated that the health effects of chlorine which may be discharged to the Susquehanna River as a result of operation of the Susquehanna nuclear facility have been adequately assessed. Thus, the Staff believes that summary disposition in favor of the Applicants on that portion of Contention 2 which deals with chlorine should be granted as a matter of law in accordance with 10 CFR §2.749.

Respectfully submitted,

May E. Wagner for
Lucinda Low Swartz
Lucinda Low Swartz
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 1st day of October, 1981.