

RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of)
)
CONSUMERS POWER COMPANY) Docket Nos. 50-329 OM & OL
) 50-330 OM & OL
(Midland Plant, Units 1 and 2))

CONSUMERS POWER RESPONSE IN OPPOSITION TO
THE NRC STAFF'S MOTION FOR SUMMARY
DISPOSITION ON THE ISSUE OF QUALITY ASSURANCE

I. INTRODUCTION

In August, 1978, inspectors employed in the Midland quality assurance program, while monitoring the diesel generator building at Consumers Power Company ("Consumers Power") Midland site, detected building settlement in excess of that anticipated. The condition was promptly reported to the NRC as a significant construction deficiency. After investigation, Consumers Power identified the cause of the settlement -- inadequate soils compaction -- examined its quality assurance program to determine why the problem had not been discovered earlier and instituted changes and corrections in its program and its implementation. A description of the root causes of the quality assurance problems, the actions taken to correct them and the programs implemented to prevent their recurrence in soils and other areas was submitted to the NRC in April, 1979 and again

8107060405 810524
PDR ADDCK 05000329
PDR
G

supplemented in November, 1979.

On December 6, 1979 the NRC Staff (the "Staff") issued an "Order Modifying Construction Permits" (December 6, 1979 Order) which suspended all soils and remedial work, based in part upon a conclusion that "the quality assurance deficiencies involving the settlement of the Diesel Generator Building and soil activities at the Midland site ... are adequate bases to refuse to grant a construction permit." (December 6, 1979 Order, Part III, p. 4). Through its Motion for Summary Disposition, the Staff now requests a ruling that as a matter of law the quality assurance deficiencies they allege existed at the Midland site would have justified the denial of Consumers Power's application for a construction permit.

In support of this, the Staff asserts there is no genuine dispute as to three sets of allegedly uncontroverted facts:

- A. prior to December 6, 1979 certain enumerated quality assurance deficiencies constituted sufficient grounds for the issuance of their suspension order;
- B. these deficiencies constituted a "quality assurance breakdown" which caused inadequate soils compaction at Midland; and
- C. inadequate soils compaction caused the unanticipated settlement. (Staff Motion, Material Facts Statement, pp. 1-3).

Consumers Power submits that in light of the inaccuracies and omissions in the affidavits and documents

with which the Staff supports these assertions, the depositions and other evidence on file in this case and pursuant to NRC regulations, this Licensing Board must deny the Staff's Motion.

First, 10 CFR §2.749, the regulation under which the Staff seeks summary disposition, precludes a Licensing Board from granting a request for a finding that there was an adequate basis "to refuse to grant a construction permit."

Second, even if this Board were empowered to deny a construction permit by summary disposition, such numerous genuine issues of material fact exist as to each item the Staff sets forth that, as a matter of law, a hearing must be held to resolve them.

II. FACTUAL STATEMENT

A. History Of Soils Placement At The Midland Site.

Between 1975 and 1977 soils were placed at the Midland site in the area of the diesel generator building; construction of the diesel generator building began and was essentially completed in 1977. (Staff Motion, Keppler Affidavit, Attachment 2, p. 7; Consumers Power Response, Cooke Affidavit). By October, 1977 all major Q-listed soils support activities were completed. (Consumers Power Response, Cooke Affidavit; see also Staff Motion, Keppler Affi-

davit, Answer to Question 5, p. 3 where it is noted that by March, 1979 "soils placement activities had been substantially completed").

During this period from May 24 to May 27, 1977, the NRC conducted an extensive audit of the manner in which Consumers Power implemented its quality assurance program at Midland and concluded "that the licensee's program was an acceptable program and that the Midland construction activities were comparable to most other construction projects." (Staff Motion, Keppler Affidavit, Attachment 2, p. 7).

On August 21, 1978 the quality assurance monitoring program of the Diesel Generator Building noted that the building settlement was more than anticipated. Consumers Power promptly notified the NRC, both orally and by a 10 CFR §50.55(e)(1)(iii) Report, of a potential significant deficiency in construction. (Staff Motion, Gallagher Affidavit, Attachment 1).

B. Staff Investigations Conducted Prior To December 6, 1979 Do Not Disclose Any Breakdown In Quality Assurance.

The Staff conducted two preliminary investigations of the settlement problems, one in October, 1978 (Report 78-12, filed November 17, 1978, Staff Motion, Gallagher Affidavit, Attachment 2) and a follow-up investigation from December, 1978 through March, 1979 (Report 78-20, sent to Consumers Power March 22, 1979, Staff Motion, Gallagher

Affidavit, Attachment 7). The purpose of these investigations was to provide the NRC with an evaluation of the Midland soils problem and determine (1) whether a breakdown in the quality assurance program had occurred; (2) whether the occurrence had been reported properly and (3) whether the Final Safety Analysis Report (FSAR) which had been submitted by Consumers Power was consistent with the design and construction of the Project. (Staff Motion, Gallagher Affidavit, pp. 8-9).

None of the preliminary reports filed by Eugene Gallagher, the NRC Inspector who conducted them (nor any of the later 1979 investigation reports by Gallagher)* contain a finding that a quality assurance breakdown had occurred. While the reports note that the initial occurrence had been reported properly (Staff Motion, Gallagher Affidavit, Attachment 4, p. 3), they do identify possible FSAR inconsistencies. (See Reports 78-12, 78-20, Staff Motion, Gallagher Affidavit, Attachments 2 and 7).

Based on these reports, Gallagher concluded that (1) there was inadequate control and supervision of plant fill; (2) corrective action regarding nonconformances was inadequate; (3) construction specifications and design bases were not followed; and (4) interface between design organi-

* During 1979 Gallagher conducted three more investigations. (Staff Motion, Gallagher Affidavit, Attachments 8, 10 and 12).

zation and construction was inadequate. (Staff Motion, Gallagher Affidavit at 10; December 6, 1979 Order).

Numerous NRC documents generated during the period from the discovery of the soils problem in August, 1978 to the issuance of the December 6, 1979 Order attest that even though the NRC had found alleged quality assurance deficiencies, they did not conclude there was a quality assurance breakdown at Midland.

On December 14, 1978, James G. Keppler, Director of the NRC Region III Office, in a letter to Myron Cherry, counselor for certain intervenors in the Midland proceeding, wrote:

"[T]hese [quality assurance] deficiencies [occurring since 1973 at Midland] were isolated rather than generic in nature, were resolved in a responsible manner, and did not represent a serious breakdown in quality assurance." (Consumers Power Response, Attachment 1).

Robert E. Shewmaker was the NRC Senior Structural Engineer from the NRC Inspection and Enforcement Branch (I&E) providing primary technical assistance regarding the plant settlement. On February 6, 1979 he recorded in his notes of an internal NRC meeting that "the QA program is still intact." (Consumers Power Response, Attachment 2, Shewmaker Deposition Exhibit 21).

On February 15, 1979, an NRC Summary Report from Keppler to H.D. Thornburg, Director, NRC Division of Reactor Construction and Inspection, reflected NRC Region III's

assessment of the Midland project:

"Although... [Consumers Power] quality assurance program has undergone a number of revisions to strengthen its provisions, no current concern exist [sic] regarding its adequacy." (Staff Motion, Keppler Affidavit, Attachment 2, p. 10).

It concludes:

"[I]t is our conclusion that the problems experienced are not indicative of a broad breakdown in the overall quality assurance program. Admittedly deficiencies have occurred which should have been identified earlier... but the licensee's program has been effective in the ultimate identification and subsequent correction of these deficiencies." Id. at 13.

A finalized version of this report, issued October 18, 1979 by Gaston Fiorelli (Chief of the NRC Reactor Construction and Engineering Support Branch, Region III) and approved by all Region III quality assurance inspectors, including Gallagher, adopts the same conclusions. (Staff Motion, Keppler Affidavit, Attachment 3, p. 14). It further notes that even acknowledging the Midland soils problems

"[Consumers Power] has taken action to correct the problems and to upgrade his [sic] quality assurance program and QA/QC Staff." Id. at 13.

"The RIII inspectors believe that continuation of (1) resident site coverage, (2) the Licensee overview program, (3) the Licensee's attention and resolution of identified problems in this report, (4) ceasing to permit work to continue when quality related problems are identified with construction activities and (5) a continuing inspection program by regional inspectors will provide adequate assurance that construction will be performed in accordance with requirements and that any significant errors and deficiencies will be identified and corrected." Id. at 14.

In November, 1979, according to Shewmaker, the quality assurance branch of NRC's I & E Section had taken the position on the overall quality assurance program at Midland that:

"there were some minor items they wanted to see added in the way of a QA program to try and correct the kinds of problems that I & E had identified. But I don't think that they found any major defects in the program as such. (Consumers Power Response, Attachment 3, Shewmaker Deposition at 78).

Finally on November 28, 1979 at a meeting attended by Keppler, Shewmaker, Thornburg, and others, Keppler according to Shewmaker, supplied a description of a quality assurance breakdown:

"A major item not caught in the QA system; one that comes up by an occurrence, NRC finding, allegation, etc." (Consumers Power Response, Attachment 4, Shewmaker Deposition Exhibit 13).

Shewmaker remembered that Keppler said "there had not been such a quality assurance breakdown at the Midland site with respect to the soils issue." (Consumers Power Response, Attachment 3, Shewmaker Deposition at 108).

Notes of the meeting taken by Darl Hood, a Senior Project Manager in the NRC Division of Licensing, indicate that "I & E's position was that the overall QA performance [was] acceptable because it identifies QA deficiencies." (Consumers Power Response, Attachment 5, Hood Deposition Exhibit 15).

The first NRC document to conclude that the soils

quality assurance problem constituted a "breakdown" was the December 6, 1979 Order. This, at least, creates a dispute as to a material fact, precluding summary disposition.

C. Consumers Power's Response To Soils
Settlement Prior To December 6, 1979
Demonstrated A Commitment To Improving
Its Quality Assurance Program And Its
Implementation.

In meetings (See Staff Motion, Gallagher Affidavit, Attachments 3 and 13) and through the submission of answers to questions propounded by the NRC pursuant to 10 CFR §50.54(f), (Staff Motion, Gallagher Affidavit, Attachments 9 and 14; Consumers Power Response, Attachment 6) Consumers Power responded to the findings of the NRC's investigations.

The responses were framed in accordance with NRC requests.* First, they identified root causes of the deficiencies in the Midland quality assurance program which

* Consumers Power presented its findings to the NRC subsequent to its response to 50.54(f) Question 1 at a meeting on July 18, 1979. NRC's meeting notes indicate only 2 areas wherein the NRC questioned Consumers analysis: (1) the Staff found certain fill specifications incorrect; and (2) the Staff found Consumers Power response concerning specification modification inadequate. (Staff Motion, Gallagher Affidavit, Attachment 13). Gallagher, in his affidavit, characterizes this as "several points of disagreement." (Staff Motion, Gallagher Affidavit, p. 12).

Consumers Power redrafted its response taking into consideration the NRC concerns. (Consumers Power Response, Attachment 6, pp 23-18 to 23-19; 23-8 to 23-9.)

contributed to or impeded the earlier detection of the settlement. Second, they described the actions taken or to be taken to correct the soils quality assurance deficiencies (remedial actions soils); the corrections taken or to be taken to correct the written quality assurance program (programmatic); the actions taken or to be taken to preclude potential quality assurance problems in related areas other than soils (generic). (Consumers Power Response, Attachment 6, Response to 50.54(f) question 23, Revision 4, pp. 23-2 to 23-5).

Third, in Part (2) of its question 23 response Consumers Power outlined the measures it took, including instigating a re-review program, to insure that any possible inconsistencies in the FSAR were remedied. (Consumers Power Response, Attachment 6, Part 2). Finally, in Part 3 of its response to question 23, Consumers Power detailed the continuing improvements in its quality assurance program and its implementation it had been making since 1977, describing each action and its completion timetable. (Consumers Powers Response, Attachment 6, Part 3).

In his affidavit, Gallagher references the NRC's request for question 23 information and Consumers Power response in his description of "what action was taken to determine whether enforcement action [by the NRC] should be taken:"

"On September 11, 1979 the NRC issued question 23 which contained a request for additional quality assurance information. On November 13, 1979 Consumers Power Co. submitted revision 4 to the 50.54(f) submittals which contained their response to question 23 (Attachment 14) including specific corrective actions and commitments for implementation of its quality assurance program" (Staff Motion, Gallagher Affidavit, question 15 at 12).

The affidavit goes on to assert the conclusion that the "response to question 23 supports the allegation in NRC's December 6, 1979 Order Modifying Construction Permits (Attachment 15) that there was a breakdown in quality assurance." (Id. at 13).

Similarly, John Gilray, the principal NRC Quality Assurance Engineer in the NRC NRR Section, in his affidavit supporting the Staff Motion sets out the dates that Consumers Power submitted its responses to the NRC's §50.54(f) questions 1 and 23. Gilray goes on to say that he reviewed them. (Staff Motion, Gilray Affidavit at 2-3). He does not state the date upon which he began or completed that review.

Contrary to the implications in the affidavits, the NRC took no action to determine the appropriate enforcement action based upon Consumers Power response to question 23. From depositions it is clear that no one at the NRC had reviewed Consumers Power response to question 23 prior to the issuance of the December 6, 1979 Order. (Consumers Power Response, Attachment 7, Gallagher Deposition at 68; Attachment 8, Gilray Deposition at 47-50; Attachment 11, Fiorelli Deposition at 20).

- D. The Chronology Of Staff Consideration Of Soils Settlement Enforcement Options Demonstrates That The Alleged Quality Assurance Deficiencies Were Never Regarded As A Basis For Suspension Of Midland Construction, Let Alone Denial Of A Construction Permit.
-

From the beginning of 1979, the Staff was engaged in a process of determining if any enforcement action should be taken in regard to the Midland settlement problems. However, there is no evidence that the quality assurance deficiencies put forth on December 6, 1979 as a basis for the suspension order were ever considered prior to that date as a reason for suspension or as a reason for a denial of a construction permit.*

On March 6, 1979, Keppler in a telephone conversation with Shewmaker, recapitulated an earlier position that a "show cause" order, to stop work at Midland, was necessary. (Consumers Power's Response, Attachment 9, Shewmaker Deposition Exhibit 14).

But no show cause order was issued. Instead of that enforcement action, the NRC decided to seek further information from Consumers Power through the issuance of a 50.54(f) question concerning identification of the root

* During 1979, prior to the issuance of the December 6, 1979 Order, with full knowledge of the Staff, Consumers Power placed the surcharge on the diesel generator building and removed it. (Consumers Power Response, Attachment 14, Hood Deposition Exhibit 8).

causes of the quality assurance deficiencies and the actions taken or proposed to be taken to correct them. (Staff Motion, Gallagher Affidavit, p. 12; Consumers Power Response, Attachment 3, Shewmaker Deposition pp. 53 and 60). Future decisions for enforcement action beyond that were to be based on Consumers Power's response to the question. Id. As noted, Consumers Power responded to this in April, 1979.

By April, 1979, the NRC considered issuing an "enforcement package" of civil penalties, mostly pertaining to alleged material false statements in the FSAR Consumers Power had submitted. (Consumers Power Response, Attachment 10, Hood Deposition Exhibit 19). No quality assurance deficiencies were mentioned.

On September 11, 1979, the NRC issued a second, supplemental 50.54(f) question pertaining to quality assurance (question 23). As noted, Consumers Power replied to this, by November 13, 1979, detailing the corrective actions taken and proposed. As discussed, no one at the NRC reviewed this response prior to December 6, 1979.

On November 28, 1979, the NRC officials (Keppler, Thornburg, Hood, Shewmaker, and others) met to discuss whether further NRC enforcement actions were necessary. Although they discussed the alleged quality assurance deficiencies, their considerations mostly concerned issuing a show cause order to seek more technical information concerning

engineering and design criteria for the proposed remedial fixes from Consumers Power. (Consumers Power Response, Attachment 11, Fiorelli Deposition at 13-17). Two or three smaller meetings were held after this to prepare the "mechanics of the order." (Consumers Power Response, Attachment 12, Thornburg Deposition pp. 32-35).

On December 6, 1979, the NRC issued an "Order Modifying Construction Permits" which suspended all soils activities and any remedial actions associated with them, after purporting to conclude that "the quality assurance deficiencies involving the settlement of the Diesel Generator Building and soil activities... are adequate bases to refuse to grant a construction permit...." Id. at 4.

III. ARGUMENT

A. The Staff Carries The Entire Burden Of Proving Its December 6, 1979 Order By Summary Disposition.

What is at issue here is not whether Consumers Power will ultimately prevail after an evidentiary hearing with respect to the adequacy of the quality assurance program and its implementation at Midland. The only issue the Staff's motion presents is whether there is sufficient dispute as to the material facts so that such a hearing must be held.

In order to deny Consumers Power a hearing as to the adequacy of the quality assurance portion of the NRC's December 6, 1979 suspension order, the Staff must conclusively prove it is entitled to judgment, as a matter of law, there being no genuine issues remaining for trial. Pacific Gas & Electric Co. (Stanislaus Nuclear Project Unit No. 1), LBP-77-45, 6 NRC 159, 163, (1977). The mere possibility of a genuine issue will defeat the motion. Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1) LBP-79-14, 9 NRC 557 (1979). The existence of contrary inferences from undisputed facts will defeat the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Morrison v. Nissan Motor Co., Ltd., 601 F.2d 139, 141 (4th Cir. 1979).

Consumers Power bears no such evidentiary burden at this point in the proceeding. It need not show, as must the Staff, that it will prevail on the factual issues; it need only point out factual issues exist. Stanislaus Nuclear Project Unit No. 1, supra, at 163. It has no responsibility as the Staff alleges, to "place" a fact "in issue." Indeed, "if a movant's papers are insufficient to establish the absence of a genuine issue of material fact, the merit of summary disposition is foreclosed without regard to the content of the answer opposing disposition." Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units

1 & 2), ALAB-443, 6 NRC 741, 752-54 (1977).

Summary disposition is a drastic measure, and the rules under which it is granted reflect this, and are given strict application. Perry Nuclear Power Plant Units, supra. Any evidence is rigorously construed against the moving party, each inference from the evidence is construed in favor of the opposite party. See Diebold, supra.

B. Section 2.749 Of The Commission's
Rules Of Practice Precludes This
Board From Granting The Staff's
Motion For Summary Disposition.

Quite apart from the basic disputes regarding the material facts which allegedly support the Staff's Motion, the Staff is simply not, as a matter of law, entitled to the relief it seeks.

10 CFR §2.749(d) states that no summary disposition can be had on the ultimate issue of whether to grant or refuse to grant a construction permit:

"However in any proceeding involving a construction permit, [summary disposition]...may only be used for the determination of specific subordinate issues and may not be used to determine the ultimate issue as to whether the permit shall issue."

The Staff's request for summary disposition is predicated on a determination of this ultimate issue -- whether as of December 6, 1979, the quality assurance deficiencies, "if known in 1972 would warrant the Commission to refuse to grant the construction permits" (Staff's Motion at 2).

Indeed, the affidavit of Darl Hood purports to establish, in inadmissible conclusory fashion (see footnote p. 40, infra) that the standards expressed in 10 CFR §50.100 for revocation, suspension or modification of a construction permit have been met. Since the issue of suspension is equivalent to failure to grant a construction permit, and thus the "ultimate issue" within the meaning of 10 CFR §2.749(d), the motion must be denied.

In Public Service Company of New Hampshire (Seabrook Station Units 1 and 2) LBP-74-36, 7 AEC 877, (1974) a motion for summary disposition requested a Board to find that an applicant's description of the tunnels to be used for cooling water and the ultimate heat sink was so inadequate that it did not meet the requirements of 10 CFR §50.34(a). The Board denied the motion, holding, "the language in 10 CFR §2.749(d) barring summary disposition on 'the ultimate issue as to whether the permit shall be issued' precludes granting the motion." Id. at 879.

In Detroit Edison Company (Greenwood Energy Center, Units 2 and 3) LBP-75-56, 2 NRC 565, (1975) a Licensing Board refused to grant a motion for summary disposition which asserted applicant's want of fiscal soundness based on applicant's failure to satisfy the Commission's financial requirements. That Board denied the motion because a negative finding on the applicant's financial character

would effectively deny the entire application, which would be "in conflict with the express provision of §2.749(d)." Id. at 568-69.

Similarly in this case a finding, as the NRC requests in its Material Facts Attachment item "A" (Material Facts), that "the following quality assurance deficiencies involving the settlement of the diesel generator building and soil activities [sic] at the Midland site are adequate bases to refuse to grant a construction permit" is impermissible under §2.749. Section 2.749 prohibits such judgment on an ultimate issue at this stage in the proceeding and the Staff's motion must be denied as a matter of law.

C. Genuine Issues Of Material Facts
Exist As To The Significance Of
Quality Assurance To The Soil
Settlement At Midland And As To
Whether Alleged Quality Assurance
Deficiencies Warranted The Issuance
Of The December 6, 1979 Order.

Even if the Board is empowered to deny a construction permit on summary disposition, such denial would be inappropriate in this case. An evaluation of the documentation with which the Staff supports its motion against other evidence in this case, and the legal standards upon which the motion relies, creates such numerous genuine issues of material fact that as a matter of law only a hearing can resolve them.

- (1) The standard under which a construction permit can be denied is not met by the facts set forth in the Staff's Motion.

The standard upon which the Licensing Board must measure the Staff's December 6, 1979 Order is found in 10 CFR §50.100:

"A...construction permit may be revoked, suspended or modified...because of conditions revealed by the application for license or statement of fact or any report, record, inspection or other means which would warrant the Commission to refuse to grant a license on an original application."*

Thus, to justify the quality assurance portion of the December 6, 1979 Order, the Staff on December 6, 1979 must have had information regarding Midland's quality assurance program which if known at the time of the issuance of the original permits would have sufficed to deny those permits.

The Appeals Board in Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NRC 383, 401 (1975) set out the conditions under which construction permits can be denied or suspended:

If the deficiencies...found either [1] posed a hazard during construction, [2] needed to be corrected before construction took place or [3] were uncorrectable or [4] if significant environ-

* The December 6, 1979 Order "modified" the Midland Construction Permit by suspending certain construction activities, subject to Consumers Power's hearing rights.

mental harm might come from continued construction...."*

Unless the Staff's documentation supporting its motion contains information showing that, as a matter of law, at least one of these four conditions existed as of December 6, 1979, its motion must be denied.

Consumers Power submits that it does not. The Staff's motion and its documentation contains no evidence or allegations whatsoever that the implementation of the Midland quality assurance program on December 6, 1979 posed a hazard or threatened environmental harm during construction. At best its gist is that deficiencies existing prior to December 6, 1979 either needed to be corrected before construction continued or were uncorrectable. As the discussion below points out the documentation the Staff presents is insufficient

* These are based on the standards in 10 CFR §50.35 governing the issuance of construction permits:

(a)...the Commission may issue a construction permit if the Commission finds that (1) the applicant has described the proposed design...and has identified the major features or components incorporated therein for the protection of the health and safety of the public...; and (4) on the basis of the foregoing, there is a reasonable assurance that (i) such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of construction of the proposed facility and (ii) taking into consideration [environmental concerns], the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public."

to sustain such findings as of December 6, 1979. On the contrary, strong evidence exists that as of December 6, 1979 any prior quality assurance deficiencies at Midland had been corrected sufficiently to permit construction to continue and these corrections had been presented to the Staff.

- (2) Genuine issues of material facts exist as to the Staff's basis for issuing the December 6, 1979 Order.

As noted above, the Staff's Motion incorrectly states the standard under which the grant of a construction permit can be refused. Moreover, an examination of the Staff's Motion and documentation against the proper standard, shows that there exists substantial issues of material fact concerning the Staff's basis for issuing the December 6, 1979 Order.

- (a) The Staff's Motion uses an incorrect standard in justifying issuance of the December 6, 1979 Order.

The Staff's Motion characterizes its supporting affidavits as presenting "evidence that prior to December 6, 1979" the quality assurance deficiencies were an adequate basis for their December 6, 1979 Order. Thus, the Staff is alleging it must only prove that anytime before it issued its order suspending work on December 6, 1979, quality assurance deficiencies existed which would have warranted the denial of a construction permit. As San Onofre makes clear, the standard for suspension of a con-

struction permit is not whether at any time during construction deficiencies exist. Rather, it is whether at the time of the issuance of the suspension order did the licensee have to take some further action to solve specific problems before construction could continue safely.*

The thrust of the construction permit standard is on the remedy of the problem, not the fact of the problem itself. To deny a permit each time a problem occurred would be to denigrate the processes of review built into the construction permit concept. See Public Service Co. of New Hampshire (Seabrook Station Units 1 and 2) LBP-74-36 7 AEC 877, 878-79 (1974). As noted in San Onofre, "once a utility

* The Staff apparently was aware of the correct standard to apply. Keppler in discussing the 1974 Midland show cause hearing stated:

"[T]here were two considerations that were involved in that hearing. The first consideration was whether or not the licensee had taken sufficient action to achieve compliance with respect to specific problems that had been identified by the NRC.

And the second issue... was whether there was reasonable assurance that the quality assurance program would be effective in the future...."

(Consumers Power Response Attachment 13, Keppler Deposition at 22).

Thus, as Keppler notes the standard is not as the Staff now suggests "were there problems" but were the problems solved and was there reasonable assurance the program would continue safely in the future.

company is informed that an aspect of its application is unacceptable, it is free to attempt to modify its proposal." San Onofre, supra, 1 NRC at 400. Thus in this case the Staff must prove that as of December 6, 1979 they had reason for the issuance of their suspension order considering the quality assurance program and its implementation as of December 6, 1979, not that suspension might have been appropriate sometime prior to that date had no corrections been attempted.

The Staff's position - that they only need show that deficiencies existed at sometime prior to December 6, 1979 would disregard the status of the Midland quality assurance program as of the date of its order. It would ignore the corrective actions taken by Consumers Power as of that date and it would neglect any evaluations whether construction could continue safely.

In light of the construction permit process, such a position borders the absurd.

A literal reading of the Staff's articulation of the suspension order standard would mean that any deficiency which remained uncorrected for any amount of time after a construction permit issued, even if the deficiency were corrected as of the issuance of a suspension order, would justify that suspension order.

Thus if a permit were issued in 1972, and a signi-

ficant construction deficiency occurred in 1973, which the licensee corrected in 1974, the NRC would be justified in 1981 in suspending the licensee's construction permit, even though at the time of the suspension corrections had already solved the problem and there were no consequences to future construction.

By not explicitly addressing the status of the quality assurance program as of December 6, 1979, the Staff's motion invites such an absurdity. By not dealing with the program and implementation as of December 6, 1979, the Motion and its supporting documentation leave open numerous questions as to the reasons for the Staff actions. Such questions can only be explored at an evidentiary hearing.

- (b) When measured against the proper standard, genuine issues of material fact exist as to the basis for the Staff's December 6, 1979 Order.

The Staff's Motion and documentation present only minimal evidence that the Staff was even aware of the status of the Midland quality assurance program as of December 6, 1979. This evidence is contained in Gilray's and Gallagher's affidavits. From both affidavits it can be inferred that the basis of the December 6, 1979 Order was their review of Consumers Power's complete response to question 23, and a decision that it was inadequate.

Gilray's statement is framed so as to imply that he reviewed question 23 upon its submission by Consumers

Power in November, 1979. (See Staff Motion, Gilray Affidavit p. 2-3). Gallagher's affidavit is similarly structured to at least imply someone at the NRC reviewed the material. (See Staff Motion, Gallagher Affidavit p. 12).

However, this inference is insufficient support for the Staff's position. First, as noted supra, in the case of summary disposition, if two contradictory inferences are available from the facts, the inference most favorable to the party opposing the motion must be accepted as true. Diebold, supra. A close reading of Gilray's response discloses that he in fact does not give the date of his review; Gallagher never explicitly states question 23 was reviewed at all. The absence of this crucial information gives rise to the inference that as of December 6, 1979 no one at the NRC had reviewed Consumers Power's response to question 23. If no one actually made such a review, there can be no basis for the assertion that the quality assurance corrections, completed and proposed were inadequate to permit construction to continue.

In fact evidence exists to show that no one at the NRC had reviewed Consumers Power's corrections of the quality assurance deficiencies as of December 6, 1979.

As of November 17, 1980 Gallagher stated neither he nor anyone else in his section of the NRC (T & E) had reviewed Consumers Power's question 23 response. He stated

that it was only just being reviewed by Gilray from the NRC's NRR section.* (Consumers Powers Response, Attachment 7, Gallagher Deposition at 68).

Gilray stated in his deposition that he had reviewed at least a portion of Consumers Power's response to question 23 in August and September, 1980. (Consumers Power's Response, Attachment 8, Gilray Deposition at 47-51).

To the extent these facts conflict with the information in the affidavits alone they warrant a denial of the summary disposition and a hearing to resolve the conflict.

To the extent these facts demonstrate the Staff had no knowledge of the state of Consumers Power's quality assurance program and implementation when they issued the December 6, 1979, they raise genuine issues of material facts as to:

- the state of the Midland quality assurance program and its implementation as of December 6, 1979;

* This response precluded Consumers Power from questioning Gallagher as to his opinions on the adequacy of the corrections. If in fact Gallagher's views as to the adequacy of question 23's response did form the basis of the December 6, 1979 Order, his deposition testimony deprived Consumers Power of their right to cross-examine on this matter. On this basis alone a hearing on the issue is necessary. Cf. Bergeron v. State Farm Mutual Auto. Ins. Co., 198 F.Supp. 723 (E.D. La. 1961); cf. Colby v. Klune, 178 F.2d 872 (2d Cir. 1949).

- the need for corrections before construction could continue as of December 6, 1979;
 - the adequacy of the corrective actions taken, initiated and proposed as of December 6, 1979;
 - whether the quality assurance deficiencies were uncorrectable as of December 6, 1979;
 - whether a quality assurance "breakdown" occurred as of December 6, 1979;
 - whether the quality assurance deficiencies "caused" the inadequate soils compaction at Midland;
 - whether it is material to this Motion that inadequate soils compaction caused Midland's settlement problems.
- (3) Genuine issues of material fact exist as to the state of the Midland Quality Assurance Program and its implementation as of December 6, 1979.

The Staff Motion and list of "Material Facts as to Which There Is No Genuine Issue to be Heard" ("Material Facts") incorrectly describe the state of Midland's quality assurance program as of December 6, 1979. While the Staff claims to have adopted as "admissions" by Consumers Power the description of the status of the quality assurance deficiencies in Consumers Power's response to question 23 (See Staff Motion, Gallagher Affidavit at 13) the Staff has failed to include all the relevant data from the response. The Staff's Motion merely lists quality assurance problems in the soils area which occurred at one time or another prior to December 6, 1979. Some of those problems had occurred in 1975-77,

were known to the Staff in 1978 and had been corrected by December 6, 1979. There is no attempt in the Motion to describe whether that deficiency was still part of the program as of December 6, 1979 or whether any corrective action had been taken or proposed or whether these actions were inadequate to their purposes.

For example, the Staff states that there existed "inconsistencies between construction specifications and consultant reports...between 1973 through the substantial reduction in soils construction during 1978-1979 without correction." (Staff Motion, Material Facts, A.1.). This is incomplete and thus incorrect.

As Consumers Power's response to question 23 noted, the situation as of December 6, 1979 was far different:

1. A quality assurance deficiency has been identified in the possible interpretation problems resulting when the Dames & Moore Consulting Report, containing specification information conflicting with that in the PSAR, was attached to the PSAR. As the response to question 23 notes "the information contained in the consultant report was subject to being misconstrued as a [construction] commitment." Therefore, the Staff description of this problem is even initially incorrect: one consulting report was involved -- Dames & Moore's -- not several as the Staff list of Material Facts states.
2. Immediate corrective action was taken to remedy the problems in the soils area. The Dames & Moore report was reviewed, its recommendations identified and dispositioned.

3. By December 1, 1979 Engineering Department Procedure 4.22 was revised to preclude repetition of similar deficiencies: the procedures now required that only those parts of consultant reports which were to be specific commitments in a Safety Analyses Report (SAR) were to be included in the text of the SAR.
4. Action was taken to insure that no other inconsistencies existed between the construction specifications in the SAR and other consultant reports. Consultant Reports were not attached to the FSAR but portions of them were extracted and incorporated into the FSAR text. A program was instituted to re-review the FSAR commitments to assure that the commitments were adequately reflected in project design documents. (Part 2 of Consumers Power's response to question 23 more fully describes this.) (See Consumers Power Response, Attachment 6).

As the above discussion notes as of December 6, 1979: a quality assurance deficiency had been identified, immediately corrected, programmatic changes had been instituted to preclude further problems, similar items reviewed to determine if the problem had implications outside of the soils area and programs developed to prevent such problems.

Consumers Power submits that in this instance for this item there would be sufficient information to find that no construction hazard was posed, the corrective actions needed had been accomplished and no environmental concerns existed. Yet the Staff, describing none of this, cites this item as an example of a quality assurance deficiency which would warrant the refusal of a construction permit. Certainly, it

cannot be said that the suspension of soils work was indisputably justified as of December 6, 1979 because of this problem. In fact, this problem no longer existed as of December 6, 1979.

The above cited example is not isolated. Each of the 13 quality assurance deficiencies cited by the Staff in paragraph A of its "Material Facts" Statement and the affidavits supporting its Motion is similarly inadequately described. An analysis similar to that done above of each allegedly uncontroverted material fact the Staff lists gives rise to a multitude of genuine issues of material facts which cannot be disposed of without a hearing. (See Consumers Power Response to the Staff's list of Material Facts, item A1 through A13).

- (4) Genuine issues of material fact exist as to whether the Quality Assurance deficiencies had been adequately corrected as of December 6, 1979.

As set out supra, the Staff has disregarded the complete description of the Midland quality assurance program as of December 6, 1979. Thus, the Staff's Motion fails to address the issues of whether as of December 6, 1979: (a) corrections were needed to be taken before construction could continue; (b) the actions implemented and proposed were adequate to correct the deficiencies; and (c) the deficiencies were such that they were uncorrectable.

- (a) There are disputed material facts as to the necessity for changes in the quality assurance program before construction could continue.

The Staff's Motion and its associated documentation never confront the issue of why, given the existence of the quality assurance deficiencies, there was a need to remedy them before construction could continue. Rather, evidence shows that as of December 6, 1979 the NRC believed that (1) soils activities at the site were completed and (2) the quality assurance "implementation" deficiencies only related to soils activities. Keppler in his affidavit supporting the NRC Motion states:

"The deficiencies identified with respect to implementation of the quality assurance program were limited to soils work. Since the original soils activities had been substantially completed, no attempt was made at this time to stop soils work." Id. at 3.

The Staff presents no evidence that any of the remedial work relating to the settlement involved any quality assurance deficiencies. Thus, the Staff has not shown that as of December 6, 1979 even minimal corrections were needed before construction could continue.* Indeed, an

* As of December 6, 1979 Consumers Power remedial work required some soils placement in the tank farm area. However, in order for this to be significant to the Staff's Motion there must be a showing that the quality assurance deficiencies the Staff claims are still uncorrected would somehow affect this work. No such showing has been made.

examination of the events from August, 1978 to December, 1979 shows that even before the Staff had information concerning the corrections to the quality assurance problems, they had determined no show cause, work-stopping order was necessary for reasons relating to quality assurance. (See discussion, supra, regarding chronology of the Staff's decision to file the December 6, 1979 Order).

- (b) There are disputed material facts concerning whether the actions taken by Consumers prior to December 6, 1979 were adequate to correct the Quality Assurance deficiencies.

Based on the corrective actions taken and proposed in Consumers Power's response to question 23, no quality assurance deficiencies existed as of December 6, 1979. Thus, even if soils work had been contemplated after December 6, 1979, there was no need to suspend it.

Nothing in the Staff's motion directly contradicts this position because nothing in the motion nor its supporting affidavits directly discusses the actions taken by Consumers Power to correct the alleged deficiencies in quality assurance implementation. Only an inference in the affidavit of John Gilray even indirectly contravenes the idea that the corrective actions were inadequate.

In relation to Consumers Power response to question 23 Gilray states:

"I reviewed and evaluated the soils problem...to determine if CPC had given sufficient attention

to determining the root causes of the soils problem and to identify adequate corrective actions to preclude recurrence. I reviewed CPC's response to question 1 which was submitted on April 24, 1979..., and their response to question 23 which was submitted on November 13, 1979.

...

To date we have not received a satisfactory response from CPC to question 23. Based on my evaluation of the responses to questions 1 and 23 provided by CPC, I have concluded that prior to December 6, 1979 quality assurance with respect to soils work at the site was not implemented in accordance with the docketed quality assurance program description previously approved...."*

(Staff Motion, Gilray Affidavit at 2-3).

The hidden implication in this statement is that Gilray in finding the response to question 23 unsatisfactory, finds that the corrections taken and proposed in it are unsatisfactory. However, this inference, as a matter of law, is insufficient to support a finding that Consumers Power's remedies of alleged quality assurance deficiencies were inadequate.

Any affidavit, even the affidavit of an expert, must supply the basis upon which its assertions and conclusions rest. Bsharah v. Eltra Corp., 394 F.2d 502 (6th

* This conclusion conflicts with the conclusion the NRC made after an extensive audit of a quality assurance implementation at Midland in May, 1977. (Staff Motion, Keppler Affidavit, Attachment 2, p. 7). During this time, the soils placement activities which gave rise to the settlement problems occurred. (See Consumers Power Response, Cooke's Affidavit Appendix I).

Cir. 1968) (the unsupported conclusion in an affidavit that a grievance proceeding in a labor case had "broken down" was found to have no probative value); see also Citizens Environmental Council v. Volpe, 484 F.2d 870 (10th Cir. 1973), cert. den., 416 U.S. 936 (1973).

Nowhere in his affidavit does Gilray provide the basis for his "conclusion" that the question 23 response was not "satisfactory." He never describes the type of "evaluations" he made. He does not outline which items from his evaluations made him "conclude" that the quality assurance implementation prior to December 6, 1979 was inadequate. The conclusory nature of this statement alone raises fundamental questions which can only be resolved at hearing.*

* Gilray's implied conclusion in his affidavit that quality assurance implementation is still inadequate conflicts with his deposition testimony.

In his affidavit he states that question 23 has not been answered satisfactorily. When this issue was probed at his deposition, he stated that it was not the quality assurance implementation per se he found inadequate only Consumers Power's question 23 response: "I'd go as far to say that I would find it acceptable if the right information was provided in question 23. I see the implementation there, the organizational element there and it just hasn't been properly reflected and described in the response." (Consumers Power Response, Attachment 8, Gilray Deposition at 34).

This discrepancy presents several issues which can only be resolved through hearing. Gilray's affidavit bases his conclusion that quality assurance implementation was inadequate prior to December 6, 1979 on his review of Consumers Power's response to question 23. Based on his deposition

(Footnote continued on p. 35)

In fact NRC documents present an opposite picture. As of October 18, 1979, the NRC Region III's position was that there was no need for a suspension order because proposed corrective actions were adequate. In a report approved by Region III inspectors, including Gallagher, they asserted that if Consumers Power met 5 conditions* there would be adequate assurance that construction would be "performed in accordance with requirements and that any significant errors and deficiencies [would] be identified and corrected." (Staff Motion, Keppler Affidavit, Attachment 3, at 14). The Staff motion discloses no evidence that those 5 conditions had not been met as of December 6, 1979.

- (c) There are disputed material facts as to whether the deficiencies were uncorrectable.

The Staff Motion and its documentation fail to directly address this issue as well. No direct evidence has been proffered in the affidavits or exhibits to demon-

(Footnote continued from p. 34)
testimony he had information outside of Consumers Power's response to question 23 to support a finding that the quality assurance implementation was adequate. If this is so, it undermines the December 6, 1979 Order and presents a conflict which must be solved through hearing.

* The five conditions were the continuation of (1) resident site coverage; (2) the Licensee overview program; (3) the Licensee attention and resolution of identified problems in this report; (4) ceasing to permit work to continue when quality related problems are identified with construction activities and (5) a continuing inspection program by [NRC] required inspectors.

strate that the quality assurance deficiencies they allege were "uncorrectable." To the contrary, the evidence adduced at the depositions indicates the Staff believes that Consumers Power has in fact remedied any quality assurance deficiencies. (Consumers Power Response, Attachment 8, Gilray Deposition at 34).

The closest the Staff comes to this issue is its suggestion, in the Motion itself, that this Board take official notice of Consumers Power's "prior record of quality assurance performance discussed in previous decisions," (Staff Motion at 5-6), indirectly implying that some sort of extraordinary remedy may be necessary in this case. However, the Staff's request for official notice is so inadequate that it is insufficient on its face.

First, the Staff's request fails to satisfy the minimal requirements of 10 CFR §2.743(i) which, in providing for "official notice" in NRC proceedings, requires "each fact officially noticed [to]...be specified in the record with sufficient particularity." The Staff has not specified any particular facts for the Board to take official notice of, but merely references general language from an Appeals Board decision.

Second, even if the Staff were to particularize the wording it sought to be "noticed", their request would fail. The type of facts the Staff wishes to have this Board

officially notice clearly falls outside the scope of information admitted under §2.743(i), which restricts itself to facts "of which a court may take...notice or of any technical or scientific fact within the knowledge of the Commission as an expert body." The language in earlier decisions the Staff cites is not a scientific or technical fact or an item a "court may take judicial notice of."

In order to be a fact "a court may take judicial notice of," the item must fall within the purview of Federal Rule of Evidence 201. Rule 201 permits notice only of "indisputable adjudicative facts (i.e. those not subject to reasonable dispute)." 10 J. Moore, Federal Practice ¶201.10 (2 ed. 1979).

An adjudicative fact is one which could be introduced into evidence before a jury. 10 J. Moore Federal Practice ¶201.20 (2 ed 1979). This would include "record findings" which served as a bases for an earlier determination, (Safeway Stores, Inc. v. Federal Trade Comm'n, 366 F.2d 795, 802-03 (9th Cir. 1966), cert. denied 306 U.S. 932 (1967)) or even NRC documents or specific NRC inspection reports. See, e.g., Duquesne Light Company (Beaver Valley Power Station, Unit 2) ALAB 240, 8 AEC 829, 834 (1974); Duke Power Co. (Catawba Nuclear Station Units 1 and 2) LBP-74-22, 7 AEC 659, 667 (1974). A passing reference to past licensee conduct, as cited by the Staff, certainly is not within this

category.

Nor can the subject matter the Staff seeks "noticed" be deemed "indisputable." Under the federal rules and NRC practice, if there is a question as to whether a fact, part of the record in one proceeding, can be introduced as "indisputable" in another proceeding, the parties to the second proceeding must be given an opportunity to contest it. K. Davis, Administrative Law of the Seventies §15.00-6-8 (1st ed 1976). Use of summary disposition procedure would preclude Consumer's Power from contesting such facts here.

The Staff reliance on the use of official notice in Beaver Valley Power Station is misplaced. The question here is not whether a licensee's prior quality assurance performance is relevant to the issue of future quality assurance performance, but rather what sort of factual information demonstrating the performance can be "officially noticed" pursuant to NRC Rules.

The Beaver Valley Board was careful only to accept notice of particular adjudicative facts -- NRC investigation reports -- noting that the strength of their reliance on them related to the extent they were "made part of the record by way of supplemental proceedings," affording the applicant full opportunity to protect its interest through a hearing. Beaver Valley 8 AEC at 834.

The NRC Staff's request for official notice here

is neither precise nor does it concern indisputable adjudicative facts. It must be rejected.

- (5) Genuine Issues Of Material Fact Exist As To Whether A Quality Assurance Breakdown Occurred And The Significance Of That Conclusion.

The Staff's list of Material Facts, item "B," asserts that, as a matter of law, "this [sic] quality assurance breakdown cause [sic] inadequate compaction of the soils at the Midland site." The statement cannot be classified as an "undisputed" fact in this case: first, because it contains an assumption -- that there was a quality assurance breakdown -- which is unsupported by the record; and second, because it seeks judgment on an issue -- causation -- which is inappropriate for summary disposition.

- (a) The Staff offers no support for a finding that a "Breakdown" occurred.

The only evidence the NRC supplies which characterizes the seriousness of the quality assurance deficiencies is found in Gallagher's affidavit. He concludes that the deficiencies resulted in a "breakdown" in the quality assurance program which "caused" the settlement problem.

No other affidavit makes such a statement. Keppler's affidavit merely asserts that the implementation of the Midland quality assurance program was "ineffective" in regard to soils. (Staff Motion, Keppler Affidavit at 3). Gilray states that the Midland quality assurance program prior to December 6, 1979 was "not adequately implemented"

and was "ineffectively" implemented. (Staff Motion, Gilray Affidavit at 4-5).

Nowhere in his affidavit does Gallagher supply factual reasons to support his bald conclusion that a quality assurance breakdown occurred. Further, such a conclusion conflicts with other evidence in this case.

Neither Gallagher nor any other Staff evidence provides a definition of the concept of "breakdown". Without a definition of "breakdown", it is impossible to measure the significance of quality assurance deficiencies or why these alleged quality assurance deficiencies could be considered to constitute a "breakdown." As such, Gallagher's assertion that a breakdown is conclusory and must be disregarded. Esharah v. Eltra Co., supra, (holding that statements in affidavits asserting that no grievance procedures existed and thus there was a "breakdown" of the procedures were conclusions and without probative value).*

Other evidence in this case, notably statements and documents provided by the Staff clearly presents the inference that no breakdown occurred and that the quality

* Hood's affidavit also suffers a similar deficiency. He states that "had the Commission known at the time the original construction permits...were issued that [quality assurance] activities...would not be implemented...in accordance [with the approved plan] that knowledge would have warranted [the refusal of the permits]. Id. at 2-3. Hood offers no reasons to support this statement. His conclusions must also be disregarded. Benton-Volvo-Metrairie, Inc. v. Volvo Southwest, Inc., 479 F.2d 135 (5th Cir. 1973).

assurance deficiencies were not significant enough to preclude continued construction while they were being corrected.

Shewmaker, in his notes recording an internal NRC meeting, quotes Keppler's definition of a quality assurance "breakdown:"

"[When] a major item [is] not caught in the QA system; one that comes up by an occurrence, NRC finding, allegation...." (Consumers Power Response, Attachment 4, Shewmaker Deposition, Exhibit 13).

Using Keppler's definition, since the settlement problems to which the quality assurance deficiencies relate were discovered by the quality assurance program itself, there was no quality assurance "breakdown".

Further, none of the NRC's own documents, generated prior to December 6, 1979, allege that a quality assurance breakdown occurred or that the quality assurance deficiencies uncovered at Midland were significant. On the contrary, while acknowledging that there were some quality assurance problems, these documents show that it was the consensus at the NRC that no breakdown occurred. As Keppler wrote in December, 1978

"[T]hese [QA] deficiencies [occurring since 1973] were isolated rather than generic in nature, were resolved in a responsible manner and did not represent a serious breakdown in quality assurance. (Consumers Power Response, Attachment 1).*

* By law, the NRC is only concerned about a "breakdown" which is "significant" or serious. See, 10 CFR §50.55(e)(1)(i).

The opinion that no overall breakdown occurred was expressed by Shewmaker (Consumers Power Response, Attachment 2, Shewmaker Deposition, Exhibit 21) and in the Region III assessment of Consumers Power's quality assurance performance in October, 1979. (Staff Motion, Keppler Affidavit, Attachment 2). Gallagher himself asserts that the purpose of his initial Midland investigations was to discover if a quality assurance breakdown occurred. (Staff Motion, Gallagher Affidavit at 8). Yet, any conclusion that such a breakdown occurred is conspicuously absent from any of his investigation reports. (See generally Staff Motion, Gallagher Affidavit, Attachments 2, 4 and 7).

In light of these obviously inconsistent conclusions and disparities in perception within the NRC itself, material fact questions remain unanswered and a hearing on the issues of the significance of the quality assurance deficiencies and the concept of a "breakdown" is necessary.

- (b) The Staff offers no support for a finding that a quality assurance breakdown "caused" inadequate soils compaction.

Similarly, the Staff's assertion concerning the "causation" of the compaction problems must be rejected. It is premised on an unsupported conclusion (that a "breakdown" occurred) and in any event is not the sort of finding appropriate to summary disposition.

Gallagher again is the only affiant who asserts that a quality assurance "breakdown" "caused" inadequate

compaction of the soils at Midland. His use of the term "breakdown", as noted above, is not probative.

Further, the type of "causation" referred to is some sort of legal causation and thus not susceptible to determination without a hearing. Even Gallagher's affidavit does not suggest that some tangible aspect of quality assurance -- a program which inspects and monitors conformance to specification and regulation requirements -- physically operated on the supporting soils of the diesel generator building to produce the settlement.

Rather Gallagher's affidavit suggests some consequential chain of happenstance with quality assurance acting as a link. Gallagher deduces that quality assurance deficiencies caused the settlement because, i.e.: (1) the quality assurance program did not properly check specification mistakes and construction mistakes of improper soils placement; (2) quality assurance deficiencies contributed to the conditions which permitted a Q-listed structure to be built on an improper soils foundation; and (3) ultimately a building settlement in excess of what was anticipated occurred.

In short, the Staff position is that problems with quality assurance permitted inadequate compaction of soils. Whether they "caused" them is a question of "proximate causation":

"[T]he limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct. In a philosophical

sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond....But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts...."

Prosser, The Law of Torts, (4th ed. 1971) at 236. Questions such as "causation" are inappropriately suited for summary disposition. Cf. Arney v. United States, 479 F.2d 653, 660 (9th Cir. 1973).

Since "causation" is an assumption itself, resting upon the unsupported conclusion that a "breakdown" occurred, in this case judgment as to causation must be reserved for a full hearing.

- (c) The Staff has not sustained its burden in proving that inadequate soils compaction is material to the quality assurance portion of the December 6, 1979 Order.

Finally, in its list of Material Facts, the Staff asserts in item "C" that "inadequate compaction at the Midland site caused the soil settlement problems...." It supports this by the allegations in Joseph Kane's affidavit. However, it fails to include any data, besides Gallagher's conclusory statements discussed supra, which demonstrate how the item is relevant to the quality assurance portion of the December 6, 1979 Order.

The item's only relationship to the issue of summary disposition as the Staff has framed it, is its connection to Gallagher's conclusion that a quality assurance

breakdown "caused" the poor compaction. As noted in the previous section, the breakdown assertion is both contradicted by other evidence in the case and is so conclusory as to lack any probative value. The causation assumption Gallagher makes is similarly defective. Thus, the invalidity of Gallagher's conclusion makes tenuous the connection of the alleged "actual" cause of the soils settlement -- the poor compaction -- to the primary issue of the summary disposition motion -- quality assurance.

In San Onofre, supra, and Seabrook, supra, Licensing Boards found that the remedy to a deficiency, not the deficiency itself, is the material consideration in determining whether a construction permit should be issued or refused. As the Staff presents item "C" in its list of Material Facts, it has little connection to the problems alleged in Midland's quality assurance program and no relationship to the remedies Consumers Power has instituted to solve these problems. As such, given the ambiguities, contradictions, and omissions of the Staff's evidence, the fact that poor compaction caused the settlement is immaterial to whether a construction permit could be denied as of December 6, 1979.

IV. CONCLUSION

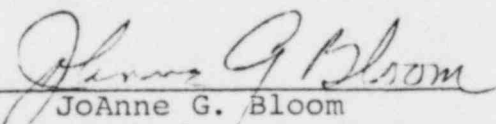
The Licensing Board must deny the Staff's request

for summary disposition on the issue of quality assurance.

First, 10 CFR §2.749(d) precludes this Board from determining by summary proceeding the ultimate issue of whether to grant or refuse to grant a construction permit. Even the Staff agrees that is the ultimate question in this case. Thus, grant of the Staff's Motion would be improper here.

Second, even if the Board is empowered to deny a construction permit by summary disposition, in light of the inaccuracies and omissions in the affidavits and documents with which the Staff supports its Motion, numerous genuine issues of material fact exist which can only be resolved through an evidentiary hearing. In such circumstances, summary disposition is inappropriate.

Respectfully submitted,

By 
JoAnne G. Bloom
Attorney for Consumers
Power Company

ISHAM, LINCOLN & BEALE
One First National Plaza
Suite 4200
Chicago, Illinois 60603
(312) 558-7500