RAS 3108

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Presiding Officer

In the Matter of DUKE COGEMA STONE & WEBSTER	)	Docket No. 070-03098
Mixed Oxide Fuel Fabrication Facility (Construction Authorization Request)	)	

Duke Cogema Stone & Webster's Answer to Blue Ridge Environmental Defense League's Request for Hearing Regarding Mixed Oxide Fuel Fabrication Facility Construction Authorization Request

I. INTRODUCTION

Duke Cogema Stone & Webster ("DCS") hereby submits its Answer to the Blue Ridge Environmental Defense League's ("BREDL") Request for Hearing Regarding Mixed Oxide Fuel Fabrication Facility ("MOX Facility") Construction Authorization Request ("CAR"). DCS, pursuant to 10 CFR § 70.22(f), has submitted to the Nuclear Regulatory Commission ("NRC") a CAR for a proposed MOX Facility to be located on the U.S. Department of Energy's ("Department" or "DOE") Savannah River Site ("SRS") in South Carolina.[1] DCS is the contractor that has been selected by the DOE to design, construct, operate and deactivate the MOX Facility as part of the U.S. government's overall program to disposition surplus weapons-grade plutonium in the wake of the ending of the Cold War.

[1] Letter from Robert H. Idhe to William F. Kane, February 28, 2001.

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On April 18, 2001, the NRC published in the Federal Register a "Notice of Acceptance for Docketing of the Application, and Notice of Opportunity for a Hearing, on an Application for Authority to Construct a Mixed Oxide Fuel Fabrication Facility" ("Notice").[2] In a letter to the NRC dated May 17, 2001, Mr. Donald J. Moniak, on behalf of both himself and BREDL ("Requestors"), has requested an NRC hearing on the CAR ("Request for Hearing" or "Request").

The NRC's Notice states:

> As required by 10 CFR 2.1205, a hearing request shall set forth with particularity the interest of the requestor in the proceeding, and how that interest may be affected by the results of the proceeding. Here, as an initial matter, any person requesting a hearing on the CAR will have to establish in their request for hearing that their interests could be affected if the CAR is approved, and the MOX fuel fabrication facility is built at the proposed site in South Carolina.[3]

Under the Atomic Energy Act of 1954, as amended ("AEA"), and NRC regulations, a hearing on the MOX Facility CAR is not mandatory. Rather, a hearing will only be held upon the request of a person or organization "*whose interest may be affected*" if the CAR is approved.[4] The person requesting the hearing bears the burden of demonstrating the need for a hearing.[5] In this case, such a demonstration will entail two separate but essential showings: first, that Requestors have legal standing to request a hearing regarding the MOX Facility CAR; and second, that

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2 66 *Fed. Reg.* 19,994 (2001).

3 *Id.* at 19,996.

4 Atomic Energy Act of 1959, as amended, § 189(a), 42 U.S.C. § 2239(a); *see also* 10 CFR § 2.1205 (emphasis supplied).

5 *See Babcock & Wilcox* (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 NRC 47, 48 (1994).

Requestors have at least one admissible contention related to the MOX Facility CAR.[6] Pursuant to the NRC's Notice, only the first showing is to be addressed at this stage of the proceeding.[7]

The NRC applies basic judicial concepts of standing.[8] Accordingly, Requestors must demonstrate that if the CAR is approved by the NRC:

(1) they will likely suffer a direct, palpable injury that is within the zone of interests protected by the AEA or the National Environmental Policy Act of 1969 ("NEPA")[9];

(2) the injury is traceable to the NRC's approval of the MOX Facility CAR (*i.e.*, causation); and

(3) the injury can be redressed by a decision in this proceeding.[10]

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6 66 *Fed. Reg.* 19,996.

7 *See id.* (stating that proposed contentions are to be filed within 50 days of the date the Presiding Officer is appointed). Throughout the Request, there are various statements that appear to more closely resemble areas that might form the basis for contentions, rather than bases for standing. *See* Request at 3-7, 9-10. Because NRC's Notice provides the Requestors an opportunity to submit contentions separately from their showing on standing, and because Requestors have indicated that they would at a later date "further define" their concerns "as contentions," (*Id.* at 9), DCS has not construed their Request as raising specific contentions for hearing. Were Requestors' statements to be so construed as written, they would lack the specificity and supporting basis sufficient to warrant their admission as contentions. In particular, Requestors have failed, among other things, to provide an explanation of the alleged facts or expert opinions upon which they rely, or any references to specific sources or to the specific portions of the CAR, Environmental Report or Quality Assurance Program that they dispute. *See* 10 CFR § 2.714(b)(2). Furthermore, several of their statements, even if true, would be "of no consequence . . . because [they] would not entitle [Requestors] to relief." 10 CFR § 2.714(d)(2)(ii). These include assertions regarding: DOE's alleged failure to meet its NEPA obligations (Request at 3-7); "bias" in DOE's Request for Proposals (*Id.* at 4); alleged false DOE statements to Congress (*Id.*); recognition of the federal government as the funding source for the MOX Facility (*Id.* at 5); alleged DCS "default" in its contract with DOE (*Id.* at 5-6); and DCS' alleged "fail[ure] to submit a waste management plan to NRC or DOE" (*Id.* at 6). *See* 10 CFR §§ 2.714(b)(2) and (d)(2).

8 *See Georgia Inst. of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995); *Portland General Elec. Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-333, 3 NRC 804 (1976).

9 42 USC §§ 4321 to 4370f.

10 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996); *Westinghouse Elec. Corp.* (Export to South Korea), CLI-80-30, 12 NRC 253, 258-59 (1980).

These elements constitute the "irreducible constitutional minimum" requirements for standing in NRC proceedings.[11]

As discussed below, Requestors include Mr. Moniak in his individual capacity, and BREDL, either in its own capacity (organizational standing) or as the representative of its members (representational standing). Section II below discusses why Mr. Moniak lacks standing in his own right to obtain a hearing on the MOX Facility CAR. Section III discusses why BREDL lacks organizational standing. Finally, section IV explains why BREDL lacks standing to represent its members.

II. MR. MONIAK LACKS STANDING

In order to demonstrate standing, Mr. Moniak must first show that the approval of the MOX Facility CAR is likely to cause him to suffer distinct and palpable injury.[12]

> [T]he asserted injury must be 'distinct and palpable,' and 'particular [and] concrete,' as opposed to being 'conjectural...[,] hypothetical,' or 'abstract'... [W]hen future harm is asserted, it must be 'threatened,' 'certainly impending,' and 'real and immediate.'[13]

An injury in fact showing "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[14]

Mr. Moniak must also establish a plausible chain of causation between the proposed agency action and the injuries alleged.[15] The alleged injuries must result in a "concretely

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[11] *Bennett v. Spear*, 520 U.S. 154, 167 (1997); *Department of the Army* (Aberdeen Proving Ground, Maryland), LBP-99-38, 50 NRC 227, 229 (1999).

[12] *See Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 353 (1999).

[13] *International Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-01-15, 2001 WL 472989, *4 (2001), *citing Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 121 (1992).

[14] *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

[15] *See Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-04, 49 NRC 185, 192 (1999); *Sequoyah Fuels Corp* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994).

demonstrable way" from the approval of the MOX Facility CAR,[16] and Mr. Moniak must show a likelihood that those injuries would be "redressed" if the relief requested is granted.[17] "There must ... be a sufficient causal connection between the alleged harm and the requested remedy so that the complaining party 'stands to profit in some personal interest.'"[18]

Before discussing the specific deficiencies in Mr. Moniak's bases for standing, it is important to understand the context of his – and BREDL's – alleged interest in this proceeding. This is a case in which the Requestors – an individual and an organization highly critical of United States government policy decisions to use MOX fuel in commercial nuclear power reactors – have attempted to "manufacture" standing in an effort to prevent construction of the MOX Facility, which is an essential component of the U.S. government's surplus plutonium disposition strategy.[19] They have attempted this by creating a local office in the Savannah River area,[20] and by staffing that office with an individual who only a short time ago moved into the area for the express purpose of opposing the MOX Facility.

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16 *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility) LBP-93-4, 37 NRC 72, 81 (1993); *see also Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149, 155 (1998) ("the assertion of an injury without also establishing the causal link to the challenged [agency action] is insufficient to establish...standing").

17 *Westinghouse Elec. Corp.* (Nuclear Fuel Export License for Czech Republic – Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331 (1994).

18 *Babcock and Wilcox*, 37 NRC at 81.

19 A review of BREDL's website makes clear that the organization is dedicated to opposing the U.S. Government's decisions to use MOX fuel in commercial nuclear power reactors and is instead in favor of "immobilizing" all of the plutonium determined to be surplus to the nation's defense needs. http://www.bredl.org/sapc/background.htm. In 1997, BREDL "launched the Southern Anti-Plutonium Campaign" for the express purpose of "stopping the use of plutonium fuel in Duke Power and Virginia Power nuclear reactors...." http://www.bredl.org/nuclear/index.htm.

20 Just eight months ago, BREDL "launched the SRS project of [its] Southern Anti-Plutonium Campaign," in which Mr. Moniak, "[w]orking out of the Aiken field office since October...serves as SRS project coordinator." http://www.bredl.org/press/2001/plutonium_fuel_facility.htm.

In fact, Mr. Moniak has acknowledged publicly that he relocated himself to the Aiken, South Carolina area for the express purpose of challenging the licensing of the MOX Facility. In a recent public meeting held by the NRC for the purpose of "scoping" the MOX Facility Environmental Impact Statement ("EIS") currently under preparation by the NRC, Mr. Moniak stated:

> I moved here about seven months ago to work on trying to stop the MOX plant. It really doesn't matter where I live, though, because when it comes to plutonium there are no outsiders.[21]

Requestors have no real interest in, and are not personally affected by, the MOX Facility itself. Instead, they are in effect using the NRC hearing process as a vehicle for achieving their broader policy objectives. Requestors have no real personal stake in the proceeding, and have failed to meet the essential minimum requirements for standing. Under these circumstances, the Presiding Officer should look on the alleged claims of injury with great skepticism.

Mr. Moniak, in his individual capacity, lists a number of interests as bases for standing.[22] In each case, however, he fails to particularize how the NRC's approval of the CAR might adversely affect his personal interests. Nor should the NRC read between the lines of Mr. Moniak's statements to particularize his injuries for him. "In determining whether injury in fact

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[21] Transcript, NRC Mixed Oxide Fuel Scoping Meeting Public Hearing, North Augusta, South Carolina (April 17, 2001). http://www.nrc.gov/NRC/NMSS/MOX/index.html (PDF, pp. 83-84).

[22] Although it is not entirely clear from the Request, it appears that Mr. Moniak's bases for standing begin on page 7 of the Requestors' pleading, under item 6. The first seven pages of the Request do not identify any interest or injury in fact, but instead simply list those documents that Requestors believe: (1) constitute "part of the CAR"; (2) are "pertinent" or "essential to the licensing process"; or (3) should be encompassed in the hearing process as "essential guiding document[s]." Request at 1-2, 5. In the first seven pages, the Requestors also criticize DOE and DCS, including the manner in which DOE has implemented its responsibilities under NEPA, and the contract between DOE and DCS. *Id.* at 3-6. These statements are on their face insufficient to show any particularized injury to warrant standing. Furthermore, to the extent that Requestors believe there are certain documents that will be relevant and admissible at hearing, the Presiding Officer will certainly rule on such matters if there is a hearing, in the context of the admitted contentions. However, DCS believes that many of the documents cited by Requestors would not be relevant or admissible.

has been adequately set forth, [the NRC is] limited to assertions actually pleaded."[23] These assertions must be "set forth with particularity."[24] NRC regulations "do not permit the kind of 'notice pleadings'" provided for in the Federal Rules of Civil Procedure.[25] Rather, Requestors must provide detailed descriptions of their positions in order to support standing.[26] Each of Mr. Moniak's asserted injuries is discussed below.

(1) Mr. Moniak "owns and lives in residential property in Aiken County, South Carolina that is approximately 19.3 miles from the proposed MFFF."[27]

The mere fact that Mr. Moniak owns property and resides at a location in the general vicinity of the MOX Facility is not sufficient to confer standing. This is particularly the case where the individual has chosen to reside in the area not because of unrelated personal or professional reasons, but instead to challenge the licensing of the facility.[28] Although the NRC has presumed standing in reactor operating license proceedings where persons have resided within "the zone of possible harm from the nuclear reactor or other source of radioactivity," (generally considered to be within a 40-50 mile radius),[29] such a presumption is unavailable in this non-reactor case.[30]

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23 *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 127 (1992); *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 153 (1992).

24 10 CFR § 2.714(a)(2).

25 *Shieldalloy Metallurgical Corp.*, 49 NRC at 353-354.

26 *See* 10 CFR § 2.1205(e) (requiring a requestor to "describe in detail," among other things, its basis for standing).

27 Request at 7.

28 *Cf., Alabama Freethought Association v. Moore*, 893 F. Supp. 1522, 1535, n. 26 (N.D. AL 1995)(stating "This court cannot understand how voluntary exposure to purportedly offensive conduct can establish standing to obtain an injunction barring such conduct. To recognize standing in such circumstances would be to allow a plaintiff to 'manufacture' her standing").

29 *Florida Power and Light Co.* (Turkey Point, Units 3 and 4), LBP-01-06, 2001 WL 261863, *3 (2001).

30 *See, e.g., Florida Power and Light Co.* (St. Lucie, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989) (holding that in cases not involving the construction, operation, or major alteration of a nuclear reactor or

The proximity presumption is only applicable in proceedings where "the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences."[31] The proposed MOX Facility is to be located almost six miles within the SRS boundary.[32] Analyses performed to date show no such potential for offsite consequences. As shown in the CAR, the potential radiological consequences at the SRS boundary associated with any credible event would be low, and result in negligible impact on the health and safety of any member of the public.[33]

A similar basis for standing was rejected in *Babcock and Wilcox*, where the petitioners lived within two miles of a facility seeking a license amendment to allow extensive decommissioning activities.[34] The Licensing Board held that:

> It is not enough for the Petitioners simply to assert that they live close to the...facility. To meet their burden of proving that they have the requisite injury in fact, the Petitioners also must provide some evidence of a causal link between the distance they reside from the facility and injury to their legitimate interests.[35]

Thus, Mr. Moniak must plead with particularity how an accident at the MOX Facility could affect him or his property almost 20 miles away.[36] As discussed below, he has failed to do so.

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facility involving an obvious potential for significant offsite consequences, 50-mile proximity is insufficient to establish standing).

31 *Florida Power and Light Co.*, 2001 WL 261863, at *3, *citing Georgia Tech.*, CLI-95-12, 42 NRC at 116 (emphasis supplied). Standing is presumed for persons whose location is proximate to a power reactor because such facilities have a large source of energy for dispersing radioactive material over a wide area in the event of an accident. Comparable sources of energy do not exist at the MOX Facility.

32 MOX Facility CAR, Section 1.3.1.1.

33 *See* MOX Facility CAR, Section 5.5.3.

34 *Babcock & Wilcox*, 37 NRC 72.

35 *Id.* at 84.

36 *See generally, Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 194 (1991) ("[T]he fact that the individual may reside or work in close proximity to the nuclear facility does not create a presumption of standing [where] there is not obvious potential for offsite consequences").

Mr. Moniak states that he "grows vegetables for consumption at the cited property," but does not allege any plausible way in which the MOX Facility may impact his garden.[37] The Licensing Board denied standing under similar circumstances in *Philadelphia Electric Co.*, where the petitioner alleged that a nuclear facility "will cause radiologically contaminated food, which [petitioner] may consume."[38] The Board held that such "allegations are too remote and too generalized to provide a basis for standing to intervene," and that even if the allegations were assumed to be true, the Licensing Board "will not take it upon itself to manufacture through sheer speculation a mechanism by which the petitioner might conceivably receive the injury he fears."[39]

Mr. Moniak next argues that:

> his water supply is from the City of Aiken, which provides water to City residents and outlying Aiken County residents from two major sources...deep wells . . . approximately 15 to 16 miles from the proposed MFFF. . . . [and] from Shaw [sic] Creek . . . approximately 22.0 miles from the proposed MFFF.[40]

Again, Mr. Moniak fails to specify any particular injury. This lack of specificity is significant.[41] NRC case law has repeatedly held that such unsubstantiated allegations of contamination are too remote and too generalized to provide a basis for standing. For example, in *Atlas Corp.*, petitioner claimed that he may suffer radiological harm as a result of "drinking, bathing, and

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37 Request at 7.

38 *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-43A, 15 NRC 1423, 1449 (1982).

39 *Id.*; *see also Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 336 (1979) (refusing to allow intervention on the basis of the possibility of petitioners' consuming produce, meat products, or fish originating within 50 miles of the site).

40 Request at 7-8.

41 *Northern States Power Co.* (Pathfinder Atomic Plant, Byproduct Material License), LBP-89-30, 30 NRC 311, 315 (1989) (requiring for injury a statement as to "the nature of the environmental and radiological impacts that are expected to cause the alleged degradation" of the soil, water, and air).

cooking" with water from a river flowing next to the challenged facility.[42] The Licensing Board rejected his allegations, since he had "not provided any information that indicates whether these water-related activities are being conducted upstream or downstream from the facility, a fact critical to establishing whether these activities will establish the requisite injury in fact."[43]

Mr. Moniak has not explained how an accidental release would affect either the deep wells or Shaws Creek, both of which are located over 15 miles away from the MOX Facility. Nor could he provide such information. As noted in the CAR, only minor impacts may result at the SRS boundary from credible accidents at the MOX Facility.[44] The MOX Facility will not discharge radioactive liquids to the environment.[45] Moreover, the deep wells and Shaws Creek are located north of the proposed site. However, the land surrounding the proposed site and the shallow groundwater beneath the site drain to either Upper Three Runs or Fourmile Branch.[46] Both Upper Three Runs and Fourmile Branch flow into the Savannah River, which in turn flows southeast, away from Mr. Moniak's residence and his two alleged water supplies located to the north.[47]

Furthermore, Mr. Moniak's water supplies would not be affected even if a release traveled downward to the intermediate and deep aquifers beneath the proposed MOX Facility site, since these two aquifers also discharge to the Savannah River and southeast toward the coast.[48] In addition, there are two major confining units separating the water table from the deep

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42 *Atlas Corp.* (Moab, Utah Facility), LBP-97-10, 45 NRC 414, 426 (1997).

43 *Id.*

44 *See* MOX Facility CAR, Section 5.5.3.

45 *Id.* at Section 5.2.2.

46 *Id.* at p. 4-14 to 4-17.

47 *Id.*

48 *Id.* at p. 4-17.

aquifer (which is the drinking water aquifer).[49] Figure 1 of the Request shows the relationship of the locations of the proposed MOX Facility, the Savannah River, and the two water supplies. The Request itself thus demonstrates that there is no plausible way that a release from the MOX Facility to surface or ground water could impact Mr. Moniak's water supply.[50]

(2) Mr. Moniak "owns and lives in residential property in Aiken County, South Carolina that is approximately...1.3 to 4.3 miles from probable MOX Fuel shipping routes."[51]

The allegation that transportation of MOX fuel might occur on roads located over a mile from Mr. Moniak's location is also insufficient to confer standing.[52] It is important to note that DCS will not be transporting MOX fuel from the MOX Facility. Such transportation will be provided by DOE or another of its contractors. Thus, any assertion regarding transportation of MOX fuel is beyond the scope of the proceeding and is not appropriate for consideration as a basis for standing.[53]

In any event, a claim similar to Mr. Moniak's was rejected by the NRC in *Northern States Power Co.*, where a petitioner claimed standing on the basis that truck shipments of radioactive waste from decommissioning would be routed within a mile of his home, and that a transportation accident would expose him to unacceptable levels of radioactivity.[54] The Licensing Board held that:

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49 MOX Facility Environmental Report, Figure 4-7.

50 *See* Request at Figure 1.

51 Request at 7.

52 *See Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43-44 (1990); *Exxon Nuclear Co., Inc.* (Nuclear Fuel Recovery and Recycling Center), LBP-77-59, 6 NRC 518, 520.

53 *Westinghouse Electric Corp.* (Export to South Korea), CLI-80-30, 12 NRC 253, 260 (1980) ("Intervention may not be based on claims pertaining to matters that are beyond the scope of this proceeding").

54 *Northern States Power Co.*, 31 NRC at 42.

> Nuclear waste safely and regularly moves via truck and rail throughout the nation under regulations of the NRC and Department of Transportation. The mere fact that additional radioactive waste will be transported if decommissioning is authorized does not ipso facto establish that there is a reasonable opportunity for an accident to occur...or for the radioactive materials to escape because of accident or the nature of the substance being transported.[55]

Similarly, in *Exxon Nuclear Co.,* a petitioner was denied standing based upon an allegation that spent fuel rods would be shipped over train tracks "very near to her home."[56] The NRC held that petitioner's "allegations of possible physical and/or economic injury are entirely speculative in nature, being predicated on the tenuous assumptions that the spent fuel will be shipped by the named carrier and that an accident might occur in the area proximate either to her residence or to her rental property."[57]

The fabricated MOX fuel will be shipped by DOE from the MOX Facility to commercial nuclear reactors located outside of SRS, in containers meeting NRC 10 CFR Part 71 Type B(F) shipping container requirements. These containers have been demonstrated to prevent the release of radioactive material under credible accident conditions. Furthermore, DOE has transported special nuclear material over an accumulated 90 million miles of roads since 1975 "with no accidents causing a...release of radioactive material."[58] Based on this information, the risk of an accident using this type of transport is very small. Mr. Moniak therefore cannot rely for standing upon the potential transportation of MOX fuel on nearby routes.

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55 *Id.* at 43.

56 *Exxon Nuclear Co., Inc.,* 6 NRC at 519.

57 *Id.* at 520.

58 *Transporting and Safeguarding Nuclear Material*, DOE Office of Public Affairs Fact Sheet, Albuquerque Operations Office, at 1.

(3) Mr. Moniak "participates in recreational activities including boating, fishing, hunting, canoeing, birdwatching, camping, wildlife observation, and study of the natural environment in the Central Savannah River Watershed..."[59]

Again, Mr. Moniak fails to particularize any injury or to allege any plausible way in which the MOX Facility may adversely affect his participation in recreational activities. While DCS is not familiar with the designation of the "Central" Savannah River Watershed, the Middle Savannah River Watershed encompasses an area of over 1,800 square miles and includes the counties of Aiken, Allendale, Barnwell, Burke, Columbia, Edgefield, McMormic, McDuffie, Richmond and Screven.[60] This is far too large an area to support a claim of standing.

Furthermore, as discussed above, by not providing any information regarding whether his water-related activities are being conducted upstream or downstream from the MOX Facility, Mr. Moniak fails to carry his burden of establishing the requisite injury-in-fact.[61] Moreover, only minor impacts may result at the site boundary from credible accidents at the MOX Facility. These minor impacts, should an unlikely accident occur, would not affect Mr. Moniak's recreational activities in the Middle Savannah River Watershed.

(4) "The cumulative impact of another high consequence plutonium processing facility at SRS substantially increases the risk of a major accident that could contaminate this property, lower area property values, degrade water supplies, impede and even prevent [Mr. Moniak's] ability to freely recreate in the area, and restrict his opportunities to consume fish and game species from the area."[62]

This claim also fails to sufficiently particularize any injury to Mr. Moniak's interests. Instead, it merely makes the unsupported statement that unspecified "cumulative impacts" will in some manner " increase[] the risk of a major accident." In contrast to Mr. Moniak's claim, as

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[59] Request at 8.

[60] USGS Cataloging Unit 03060106, http://www.epa.gov/surf3/hucs/03060106/index.html.

[61] *See Atlas Corp.*, 45 NRC at 425-26.

[62] Request at 8.

discussed above, analyses described in the CAR indicate that operation of the MOX Facility will not substantially increase the risk of a major accident that could impact the health and safety of the public.

(5) Mr. Moniak "owns property in Randall County, Texas that is approximately 30.5 miles from "Zone 4" of the Pantex Nuclear Weapons Plant where 12,500 plutonium pits containing an estimated 35-40 metric tonnes of weapons-grade plutonium is [sic] presently stored in substandard conditions..."[63]

There is no plausible way in which the MOX Facility in South Carolina will affect Mr. Moniak's property in Texas. Mr. Moniak may be mentioning his property near DOE's Pantex facility because he believes Pantex may be a source of plutonium for use in DOE's Plutonium Disassembly and Conversion Facility ("PDCF"), also to be located at the SRS. However, the agency action at issue here is the NRC's review of the CAR for the MOX Facility at the SRS in South Carolina. This claim is obviously far outside the scope of this proceeding.[64]

Mr. Moniak also asserts that he is entitled to a hearing on the MOX Facility CAR "[a]s an American citizen and taxpayer." In particular, he asserts that he has:

(6) "[an] ownership interest in the Federally-owned lands upon which the MFFF is proposed to be constructed, and is therefore affected by further radioactive or chemical contamination of these publicly owned lands as well as impacts on threatened and endangered wildlife and plant species."[65]

(7) "[a] financial and civic interest in sound government, and reasonable expectations that the Federal Government will not waste tax dollars on unnecessary and dangerous facilities when better alternatives exist...The MFFF is an example of a multi-billion dollar government expenditure that is unnecessary and dangerous."[66]

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[63] *Id.*

[64] *See generally, Westinghouse Electric Corp.*, 12 NRC at 260 ("Intervention may not be based on claims pertaining to matters that are beyond the scope of this proceeding").

[65] Request at 8.

[66] *Id.*

(8) "reasonable expectations that federal agencies such as the DOE will obey the laws of the nation [sic] be held accountable for violations of federal laws and making false and incomplete claims to his elected representatives in Congress..."[67]

(9) "a civic, moral, ethical, and financial interest in protecting federally owned facilities from unnecessary harm and protecting federal and other public properties from harm..."[68]

(10) "a profound civic, moral, ethical, and financial and property interest in the reduction of nuclear materials for weapons of mass destruction, in this case, plutonium...The MFFF and larger MOX fuel option for plutonium dispositions increases nuclear proliferation and security risks and threats as well as environmental harm..."[69]

None of these assertions demonstrates a sufficient injury-in-fact to permit standing.

First, it is well settled that an individual's status as a United States citizen or taxpayer is wholly insufficient to confer standing on that individual.[70] Furthermore, the injuries alleged as a citizen or taxpayer do not fall within the zone of interests protected by the AEA and NEPA.[71] The zone of interests encompassed by the AEA is radiological health and safety, while the zone of interests covered by NEPA is the identification and balancing of environmental harms.[72]

Second, these alleged interests constitute the type of generalized grievances regarding broad public interest concerns that have repeatedly been held to provide improper bases for

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67 *Id.*

68 *Id.* at 9.

69 *Id.* at 10.

70 *See generally, Babcock and Wilcox*, 39 NRC at 49; *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 477-482, 102 S. Ct. 752, 761-764 (1982) (the mere fact that a person is a taxpayer is an insufficient basis for standing to object to particular government conduct); *Northern States Power Co.*, 30 NRC at 315; *Exxon Nuclear Co., Inc.*, 6 NRC at 520.

71 *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), LBP-77-36, 5 NRC 1292, 1294 (1977), *aff'd in Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977); *Northern States Power Co.*, 30 NRC at 315.

72 *See e.g., Tennessee Valley Authority*, 5 NRC at 1420; *Gulf States Utilities Co.* (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31, 37 (1994).

standing.[73] "[A] generalized grievance shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing."[74] Nor can standing be based upon Requestors' general interest in ensuring the NRC's compliance with the dictates of federal and state laws and regulations.[75] "The Commission has made it abundantly clear that the assertion of...a general interest – again, one that is not unique to the organization asserting it but rather is broadly held – cannot serve to confer standing."[76]

Mr. Moniak asserts nine additional "reasons" why he will be affected by the MOX Facility:[77]

(11) Given the MOX Facility's radioactive material possession limits, "it is inevitable that environmental contamination will occur..."[78]

(12) "The 'design bases' for the MFFF will inevitably change..."[79]

(13) "The requirements of the MFFF are inadequately defined because" contrary to DCS statements, "4.0 MT of material scheduled for MOX under the current U.S./Russian agreement is not currently in plutonium pit form."[80]

(14) "The lack of a disposition path for . . . plutonium originally in the Plutonium Immobilization disposition path is likely to provoke major design changes at the MFFF to facilitate processing of these more difficult, impure materials in the MFFF."[81]

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73 *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998); *Florida Power & Light Co.*, 30 NRC at 329-30; *Transnuclear Inc.*, CLI-77-24, 6 NRC 525, 531 (1977).

74 *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No.1), CLI-83-25, 18 NRC 327, 333 (1983).

75 *See International Uranium (USA) Corp.*, 2001 WL 472989 at *4.

76 *Id.*

77 As discussed in footnote 7 above, Requestors' statements more closely resemble areas that might form the basis for contentions than bases for standing, but fall short of the minimum standards for admitting contentions.

78 Request at 9.

79 *Id.*

80 *Id.*

81 *Id.*

(15) "The MFFF design is in conflict with the DOE's Technical Standard for the Long-Term Stabilization and Storage of Plutonium Oxides and Metal, known as the 3013 standard."[82]

(16) "The proposed location of the MFFF in F-Area at SRS was not selected through the NEPA process, and has been criticized ..."[83]

(17) "There are substantial risks of plutonium contamination from [accidents]..."[84]

(18) "DCS has stated its intent to avoid preparing an emergency management plan..."[85]

(19) "DCS has proposed using ventilation systems involving HEPA filters in spite of the grave difficulties with these systems throughout the DOE nuclear weapons complex."[86]

These assertions suffer from several basic flaws.

First, they are highly speculative and vague. For example, possession of radioactive materials within NRC possession limits does not "inevitably" lead to "environmental contamination." Nor does the potential for unspecified MOX Facility design bases changes present a concrete and particularized injury. Similarly, generalizations regarding unspecified "risks of plutonium contamination" and "grave difficulties" with HEPA filters in the DOE weapons complex are too vague to provide a basis for standing.

Second, even if true, these assertions would not have any obvious impact on Mr. Moniak. In other words, in each case, Mr. Moniak has failed to explain how he personally would be affected or what injury he might sustain as an individual were the allegations to be true. For example, it is not at all clear how he, residing almost 20 miles away from the MOX Facility,

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82 *Id.*

83 *Id.* at 10.

84 *Id.*

85 *Id.*

86 *Id.*

would be affected by the alleged "inevitable" contamination, the design changes, the existence of plutonium "not currently in plutonium pit form," the alleged "conflict" with DOE's 3013 standard, or the emergency plan or HEPA filter concerns.

Finally, several of the assertions are factually incorrect. For example, the Request asserts that 4.0 metric tons of plutonium scheduled for MOX fuel fabrication is not currently in plutonium pit form.[87] In fact, under the relevant Agreement between the U.S. and Russia, only 0.57 metric tons of non-pit form plutonium will be processed into MOX fuel,[88] and the origin of such material will not affect the MOX Facility design. Similarly, the allegation regarding a "lack of a disposition path" through the Plutonium Immobilization Plant ("PIP") (which will be used to immobilize a portion of the surplus plutonium) erroneously implies that the PIP has been cancelled, when in fact work has been suspended to reduce funding requirements and will be resumed at a later date.[89]

Furthermore, it is not true that the MOX Facility design is "in conflict with" DOE Standard 3013.[90] On the contrary, the 3013 Standard is specifically included in the design specifications for the MOX Facility.[91] Also, DCS does intend to have an emergency plan integrated with the SRS program.[92]

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87 *Id.* at 9.

88 *See* Agreement Between the Government of the United States of America and the Government of Russian Federation Concerning the Management and Disposition of Plutonium Designated as no Longer Required for Defense Purposes and Related Cooperation, at Annex on Quantities, Forms, Locations, and Methods of Disposition.

89 *See* http://twilight.saic.com/md/pu_immob.htm.

90 Request at 9.

91 *See* Contract DE-AC02-99CH10888, Statement of Work.

92 Under 10 CFR § 70.22(i), DCS need not submit an Emergency Plan to the NRC if its analyses demonstrate that the maximum dose to a member of the public offsite would not exceed certain limits. DCS intends to submit such an analysis with its future application for a possession and use license for the MOX facility, but is not required to submit either the analysis or an Emergency Plan as part of the CAR.

Finally, contrary to the Requestors' allegation, the proposed location of the MOX Facility in F-Area was selected through the NEPA process. DOE selected the F-Area as the proposed site in its Surplus Plutonium Disposition Environmental Impact Statement,[93] and DCS has described the process it utilized to select the specific location within the F-Area in its Environmental Report.[94]

Mr. Moniak has failed to show that he is likely to suffer a direct, palpable injury to interests protected by NEPA or the AEA, and has failed to provide the requisite demonstration of causation and redressability. Accordingly, Mr. Moniak has not demonstrated standing to obtain a hearing on the MOX Facility CAR, and his Request for Hearing should be denied.

III. BREDL LACKS ORGANIZATIONAL STANDING

The Request states that "the parties petitioning for participation in the hearing [include] BREDL as an organization with affected members."[95] As an organization, BREDL states two bases for standing:

(1) "[B]ecause as an organization it has substantial 'interest in the proceeding,' as required by 10 CFR 2 Subpart L..."[96]

(2) "[B]ecause BREDL as an organization has significantly influenced, and will continue to significantly influence, the plutonium storage and disposition debate."[97]

BREDL cites articles on its own website and transcripts from scoping meetings for the MOX Facility EIS as evidence of its "interest and influence," but sets forth no facts whatsoever to

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93 SPDEIS, Section 2.7.1.

94 MOX Facility ER, Sections 5.7.2.3 through 5.7.2.6.

95 Request at 1.

96 *Id.* at 11.

97 *Id.*

demonstrate that it, as an organization, will be adversely affected by the NRC's action.[98] A mere "interest in the problem" - even if BREDL is "seriously influencing" debate - is insufficient to give an organization standing.[99] In *Sierra Club v. Morton*, the U.S. Supreme Court stated that an organization could not predicate its standing to enjoin agency approval of a commercial development in a national game refuge upon an asserted "special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country."[100] The basis for the holding was that:

> [A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved'...[I]f a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization, however small or short-lived....[101]

Similarly, in *Dellums v. United States Nuclear Regulatory Commission*, the court found that "the interests of [an] organization in 'opposing nuclear proliferation and ensuring proper safeguards for nuclear energy'" constitute a generalized goal insufficient to confer standing.[102] The court held that "even assuming the NRC's orders would adversely affect the [organization's] general interest, this court has consistently held that harm to an interest in 'seeing the law obeyed or a social goal furthered' does not constitute injury in fact."[103]

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98 BREDL does not provide a street address for its office in Aiken; only a P.O. Box. *See* Request at 1 (Letterhead).

99 *Sierra Club*, 405 U.S. at 739; *Dellums v. U.S. Nuclear Regulatory Commission*, 863 F.2d 968, 972 (D.C. Cir. 1988).

100 *Sierra Club,* 405 U.S. at 730.

101 *Id.* at 739.

102 *Dellums*, 863 F.2d at 972.

103 *Id.*

Under these well-established precedents, BREDL must allege facts showing that it will be adversely affected.[104] To allow intervention without such a showing would be to allow any individual or organization to "vindicate [its] own value preferences through the judicial process."[105]

Furthermore, a generalized interest in "influenc[ing] the plutonium storage and disposition debate" is wholly inadequate, particularly since "plutonium storage and disposition" policy decisions are made by the DOE, not the NRC. Thus, it appears that BREDL's real interest is to use this proceeding as a vehicle for challenging policies that are not even within the jurisdiction of the NRC. Therefore, BREDL lacks organizational standing.

IV. BREDL LACKS REPRESENTATIONAL STANDING

BREDL has also failed to establish representational standing. To invoke representational standing, BREDL must show:

(1) its members have standing in their own right;

(2) the interests the organization seeks to protect are germane to its purpose; and

(3) neither the claim asserted nor the relief requested requires the participation of the individual members.[106]

The petitioning organization must identify at least one member whose interests it is authorized to represent, provide the member's place of residence, and the extent of the member's

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[104] *See e.g., Private Fuel Storage* (Independent Spent Fuel Storage Installation), 2000 WL 1099908, at *3 (2000); *American Legal Fund v. FCC*, 808 F.2d 84, 92 (D.C. Cir., 1987).

[105] *Allied General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976) (hereafter *AGNS*), *citing Sierra Club*, 405 U.S. at 740.

[106] *See Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *see also Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 396-97 (1979).

activities near the facility.[107] Although the Request states that BREDL is acting on behalf of "BREDL members,"[108] the only member actually mentioned is Mr. Moniak. As discussed in Section II of this Answer, because Mr. Moniak has not established standing in his own right, he cannot provide a basis for BREDL's standing.

However, even if other specific members had been identified, the interests BREDL asserts on behalf of its members do not meet the minimum standards for standing. BREDL first alleges that its members "drive on, live along, and recreate near" MOX fuel transportation routes.[109] According to BREDL, MOX fuel shipments will "increase[] DOE radioactive material shipments in the area between SRS and [the] irradiation facilities," resulting in "unnecessary convoys of truck traffic" that will "create great public uncertainty and anxiety..."[110] As discussed in Section II above, such claims relating to the potential impacts of DOE transportation activities are outside the scope of this proceeding, and too speculative to confer standing, particularly given the absence of any reference to the location of any BREDL member (other than Mr. Moniak), DOE's designated system of transport for these unirradiated fuel elements, and the historically low risk of such an accident.[111]

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[107] *See generally, Energy Fuels Nuclear Inc.* (White Mesa Uranium Mill), LBP-97-10, 45 NRC 429, 431 (1997) (noting that "an organization typically would file an affidavit showing...that a particular person or group of people, whom it is authorized to represent, live in particular addresses, [and] stating how far they live from the proposed [facility]"); *Northern States Power Co.* (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 141 (1996); *Babcock and Wilcox Co.*, 39 NRC at 50; *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP-91-4, 33 NRC 153, 158 (1991).

[108] Request at 11-14.

[109] *Id.* at 11.

[110] *Id.* at 11-12.

[111] *See supra*, at 11-12.

BREDL next argues that it has standing because its members "live, work, and recreate within 50 miles of the proposed MOX fuel irradiation facilities...."[112] According to BREDL, the use of MOX fuel in the reactors will result in "unnecessary and higher risks of a major nuclear accident," create "near de-facto plutonium storage facilities," and place Charlotte, North Carolina "at increased risk of radioactive contamination...."[113]

These statements both fail to particularize any injury to BREDL's members and present issues far outside the scope of this proceeding. The agency action at issue is the NRC's review of the CAR for the MOX Facility at the SRS in South Carolina, and not the separate reactor licensing actions that will be taken to permit use of the MOX fuel at the irradiation facilities. It is axiomatic that "[i]ntervention may not be based on claims pertaining to matters that are beyond the scope of this proceeding."[114] Accordingly, BREDL cannot rely on its members' proximity to commercial reactors to confer standing in a hearing regarding the MOX Facility.

BREDL next argues that its members "living within the 50 mile radius of the proposed MFFF have the same interests and will be affected in similar ways" as those set forth in paragraphs 6.a through 6.d of the Request.[115] The cited paragraphs state that Mr. Moniak resides near the MFFF and the planned transportation routes, grows vegetables for consumption, uses the Aiken water supply, and engages in recreational activities in the Central Savannah River Watershed. DCS has already explained in Section II of this Answer why these claims are not sufficient to confer standing on Mr. Moniak. Obviously, as applied to unnamed, unknown

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112 Request at 12.

113 *Id.*

114 *Westinghouse Electric Corp.*, 12 NRC at 259.

115 Request at 13.

members of BREDL, they fall even farther short of the applicable minimum standards for standing.

The remaining bases cited by BREDL to demonstrate standing relate to the status of its members "[a]s American citizens and taxpayers" of the United States, and closely parallel the claims made on behalf of Mr. Moniak discussed in Section II of this Answer. This portion of the Request adds nothing new and simply attempts to apply the same inadequate bases cited on behalf of Mr. Moniak to BREDL's unnamed, unidentified members. It cannot possibly provide a basis for BREDL's standing.

V. CONCLUSION

Requestors have relied almost exclusively on the alleged interests and injuries of one employee living almost 20 miles away from the proposed MOX Facility. As to that individual, the Request fails to demonstrate the essential minimum requirements for standing. BREDL's organizational and representational interests are similarly inadequate to provide a basis for standing.

For the foregoing reasons, Duke Cogema Stone & Webster requests that BREDL's Request for Hearing be denied.

Respectfully submitted,

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Dated May 29, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Presiding Officer

In the Matter of DUKE COGEMA STONE & WEBSTER	)	Docket No. 070-03098
Mixed Oxide Fuel Fabrication Facility (Construction Authorization Request)	)	

NOTICE OF APPEARANCE

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the District of Columbia, hereby enters his appearance as counsel on behalf of Applicant, Duke Cogema Stone & Webster, in any proceeding related to the above-captioned matter.

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Dated: May 29, 2001

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NOTICE OF APPEARANCE

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the State of New York, hereby enters her appearance as counsel on behalf of Applicant, Duke Cogema Stone & Webster, in any proceeding related to the above-captioned matter.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Duke Cogema Stone & Webster's Answer to Blue Ridge Environmental Defense League's Request for Hearing" and Notices of Appearance of Donald J. Silverman and Marjan Mashhadi were served upon the persons listed below by U.S. mail, first class, postage prepaid, this 29th day of May, 2001.

Secretary of the Commission*
Attn: Rulemakings and Adjudications Staff
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