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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Thomas S. Moore, Chairman
Charles N. Kelber
Peter S. Lam

In the Matter of	)	September 12, 2001
DUKE COGEMA STONE & WEBSTER	)	Docket No. 070-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	)	ASLBP No. 01-790-01-ML

Duke Cogema Stone & Webster's Answer to Environmentalists, Inc. Amendment to Petition to Intervene

Duke Cogema Stone & Webster ("DCS") hereby files its Answer to the Environmentalists, Inc. ("EI") "Amendment to Petition to Intervene," dated August 13, 2001 ("EI Amendment"). Section I provides an introduction and discusses the procedural history relevant to the Atomic Safety and Licensing Board's ("Board") disposition of EI's proposed contentions. Section II discusses the legal standards to be applied in ruling on the proposed contentions, including a discussion of the appropriate scope of the proceeding on the Construction Authorization Request ("CAR") submitted by DCS. Section III addresses each of EI's proposed contentions and demonstrates that none of those contentions meets the standards for admission in this proceeding.

For the reasons discussed below and in DCS' prior Answers on standing, EI's request for a hearing on the CAR should be denied.

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I. INTRODUCTION AND PROCEDURAL HISTORY

On May 18, 2001, EI requested a hearing before the Nuclear Regulatory Commission ("NRC") on the MOX Facility CAR ("Request for Hearing"). Although EI was only required to submit its arguments on standing, EI included six proposed contentions ("A" through "F"). DCS filed an Answer to EI's Request for Hearing on June 4, 2001 ("DCS Answer") addressing both EI's contentions and its standing arguments. The NRC Staff filed its Answer to EI's Request for Hearing (and the requests of others) on June 25, 2001 ("Staff Answer"), but did not address any of EI's contentions. EI filed additional contentions ("G" through "V") on August 13, 2001[1] in a pleading entitled "Amendment to Petition to Intervene." As demonstrated below, regardless of whether the Licensing Board finds that EI has standing to participate in the CAR proceeding, EI has failed to offer a single admissible contention. Accordingly, its Request for Hearing should be denied.

II. LEGAL STANDARDS GOVERNING THE ADMISSIBILITY OF CONTENTIONS

This section discusses the legal standards governing the admissibility of contentions in this proceeding. Subsections A through I discuss the general standards applicable to contentions in NRC proceedings. Subsection J discusses the appropriate scope of safety and environmental contentions that may be litigated within this particular proceeding.[2]

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[1] The contentions were served on counsel for DCS via fax from Judge Moore on August 13, 2001. The contentions, however, included an attachment (a map) which was not served by fax and which was not received by counsel for DCS until August 16, 2001, when it arrived via first class mail. Similar problems surfaced with the contentions of one of the other petitioners.

[2] The following discussion of the applicable legal standards is also included in DCS' Answer to the other petitioners' filings on proposed contentions.

A. Requirements for One Admissible Contention

In order to intervene in an NRC licensing proceeding, an individual or group must demonstrate that it has standing, and "proffer with specificity at least one admissible contention."[3] The NRC will deny a petition to intervene and request for hearing from a petitioner who has standing but has not proffered at least one admissible contention.[4] When a mandatory hearing is not required (as in this proceeding involving the MOX Facility), licensing boards should "take the utmost care" to assure that at least one good contention is advanced because, absent successful intervention, no hearing need be held.[5]

B. Petitioners Have the Burden

As provided in the NRC's Notice of Opportunity for a Hearing ("Hearing Notice"), the petitioners "have the burden of showing that the contentions are admissible."[6] As stated by the Commission, "[a] contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions."[7]

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3 *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996); *Gulf States Utility Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994).

4 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, 66 *Fed. Reg.* 19,994, 19,996 (April 18, 2001); *Florida Power & Light Co.* (Turkey Point Nuclear Power Plant, Units 3 and 4), CLI-01-17, NRC slip op. at 1 (July 19, 2001).

5 *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976).

6 66 *Fed. Reg.* at 19,996. A similar statement appears in the Commission's referral order; *Duke, Cogema, Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, NRC slip op. at 8 (June 14, 2001) ("It is the responsibility of all petitioners to provide the necessary information to show that their contentions satisfy the requirements for admission").

7 *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

C. Contentions Must Satisfy the Requirements in 10 CFR § 2.714(b)

According to the Hearing Notice,[8] the admissibility of contentions is governed by 10 CFR § 2.714(b)(2). This section states that "[e]ach contention must consist of a specific statement of the issue of law or fact to be raised or controverted," and requires that the petitioner provide the following information with respect to each contention:

> (i) A brief explanation of the bases of the contention.
>
> (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
>
> (iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

A contention that fails to meet any one of these requirements must be rejected.[9]

The Commission has described Section 2.714(b) as "strict."[10] This strict rule serves several purposes:

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8 66 *Fed. Reg.* at 19,996.

9 *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

10 *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 334 (1999).

> First, it focuses the hearing process on real disputes susceptible of resolution in an adjudication. For example, a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies. Second, the rule's requirement of detailed pleadings puts other parties in the proceeding on notice of the Petitioners' specific grievances and thus gives them a good idea of the claims they will be either supporting or opposing. Finally, the rule helps to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.[11]

D. Contentions Must be Specific

10 CFR § 2.714 requires that the bases for each contention be set forth with reasonable specificity.[12] For a contention to be admissible, a petitioner must "refer to the specific portion of the license application being challenged, state the issue of fact or law associated with that portion, and provide a basis of alleged facts or expert opinions, together with references to specific sources and documents that establish those facts or expert opinions."[13] As the Commission has stated, a "contention should refer to those portions of the license application (including the environmental report and safety report) that the petitioner disputes and indicate supporting reasons for each dispute."[14]

If the petitioner does not believe that the application adequately addresses a relevant issue, the petitioner is required to explain why the application is deficient.[15] Additionally, in such

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11 *Id.* (citations omitted).

12 *Id.* at 335.

13 As the Commission stated in its referral order, "[c]ontentions must be specific and accompanied by appropriate factual, documentary, or expert support." *Duke, Cogema, Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, NRC slip op. at 8 fn. 2 (June 14, 2001); *see also Yankee Atomic*, CLI-96-7, 43 NRC at 248 (*citing* 10 CFR § 2.714(b)(2)); *Duke Energy Corp.*, CLI-99-11, 49 NRC at 333.

14 *Florida Power & Light Co.*, CLI-01-17, NRC slip op. at 22.

15 *See Arizona Public Service Co.*, CLI-91-12, 34 NRC at 155-56.

cases, the petitioner must provide "supporting grounds" for its contention that the application "must but does [not] consider some information required by law."[16]

An issue that does not directly controvert a position taken in the application is subject to dismissal.[17]

E. Contentions Must Raise a Genuine Issue of Material Fact or Law

Section 2.714(b)(2) requires a petitioner to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.[18] "The dispute at issue is 'Material' if its resolution would 'make a difference in the outcome of the licensing proceeding.'"[19] A contention must be dismissed if it is determined that "the contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief."[20]

F. Contentions Must Be Supported by Facts or Expert Opinions

A "contention will be dismissed if the intervenor sets forth no facts or expert opinion on which it intends to prove its contention."[21] The NRC will not accept an expert opinion as an adequate basis for an issue if it "merely states a conclusion (*e.g.*, the application is 'deficient,' 'inadequate,' or 'wrong,') without providing a reasoned basis or explanation for that

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16 *Florida Power & Light Co.*, CLI-01-17, NRC slip op. at 22.

17 *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998).

18 *See Yankee Atomic*, CLI-96-7, 43 NRC at 248.

19 *Duke Energy Corp.*, CLI-99-11, 49 NRC at 333-34; *see also* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 *Fed. Reg.* 33,168, 33,172 (Aug. 11, 1989).

20 10 CFR § 2.714(d)(2)(ii); 54 *Fed. Reg.* 33,168. A similar requirement is stated in the Hearing Notice of this proceeding ("The contention must be one which, if proven, would entitle the petitioner to relief.") 66 *Fed. Reg.* at 19,996.

21 54 *Fed. Reg.* at 33,171.

conclusion."[22] Furthermore, "a petitioner may not simply incorporate massive documents by reference as the basis for or as a statement of his contentions."[23]

G. Contentions Must Focus on the Application and Cannot Be Based Solely on NRC Staff Requests for Additional Information

An intervenor may not rely solely on an NRC request for additional information ("RAI") as the basis for a contention.[24]

> To satisfy the Commission's contention rule...Petitioners must do more than "rest on [the] mere existence" of RAIs as a basis for their contention. RAIs generally "indicate[] nothing more than that the staff requested further information and analysis from the Licensee." The NRC's issuance of RAIs does not alone establish deficiencies in the application, or that the NRC staff will go on to find any of the applicant's clarifications, justifications, or other responses to be unsatisfactory.[25]

Merely citing an RAI is "a far cry from the reasonable specificity our contention rule demands."[26] "Petitioners seeking to litigate contentions must do more than attach a list of RAIs and declare an application 'incomplete.' It is their job to review the application and to identify what deficiencies exist and to explain why the deficiencies raise material safety concerns."[27] To establish a genuine dispute with the applicant, "petitioners must use the RAI to make the issue of concern their own. This means they must develop a fact-based argument that actually and

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22 *Private Fuel Storage*, LBP-98-7, 47 NRC at 181.

23 *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989).

24 *Duke Energy Corp.* CLI-99-11, 49 NRC at 335-37; *see also Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993).

25 *Duke Energy Corp.*, CLI-99-11, 49 NRC at 336 (citations omitted); *See also Baltimore Gas & Elec.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 (1998).

26 *Duke Energy Corp.*, CLI-99-11, 49 NRC at 336.

27 *Id.* at 337.

specifically challenges the application....Documents, expert opinion, or at least a fact-based argument are necessary."[28] As the Commission has noted:

> RAIs are not always "irrelevant to the adjudicatory process." They can, for instance, provide a jumping-off point for the petitioners to focus upon particular parts of the application and thereby develop potential issues of concern. The extent to which an RAI might help support a contention must be considered on a case by case basis, but the Commission expects that in almost all instances a petitioner must go beyond merely quoting an RAI to justify admission of a contention into the proceeding.[29]

H. Contentions May Not Challenge NRC Rules and Regulations

A licensing proceeding is an improper forum for challenging the validity of previously-issued NRC rules and regulations.[30]

I. Contentions Must Be Within the Scope of the Notice of the Proceeding

The scope of permissible contentions is bounded by the issues specified in the Notice of Opportunity for Hearing.[31] A contention that raises matters that are not within the scope defined by the notice cannot be admitted.[32]

J. The Scope of this Proceeding is Limited to Only Those Issues Relevant to Whether the CAR Should be Granted

1. The Hearing Scope is Limited by the Hearing Notice and Commission's Referral Order in this Proceeding

In this case, the Hearing Notice explicitly limits the scope of contentions "to matters within the scope of the DCS application for authority to construct a MOX fuel fabrication

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28 *Id.* at 341, 342.

29 *Id.* at 341 (citations omitted).

30 *See* 10 CFR §2.758; *Florida Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 and 4), CLI-01-17, NRC slip op. at 17; *Yankee Atomic Electric Co.*, CLI-96-7, 43 NRC at 252.

31 *See Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 118 (1995).

facility."[33] Furthermore, the Hearing Notice states that contentions are expected to focus on DCS' CAR, Environmental Report ("ER"), or Quality Assurance ("QA") Plan for the MOX Facility.[34] Similarly, the Commission's referral order in this proceeding states that "[c]ontentions must be based on information (or alleged lack thereof) contained in either the Applicant's CAR or its environmental report."[35]

DCS has not yet submitted all of the information required for the NRC to issue a license to possess and use special nuclear material ("SNM") at the MOX Facility, and will not do so until 2002.[36] As is clearly reflected in the Hearing Notice, issues related to the application for possession and use of SNM will "be the subject of a separate notice of opportunity for hearing."[37] Thus, this proceeding must be governed by the following fundamental principle: only those contentions raising issues that are relevant to the findings that must be made by the NRC in ruling upon DCS' request for authorization to construct the MOX Facility are within the scope of this proceeding.

As provided in the Hearing Notice and referenced NRC regulations, in order to issue the construction authorization, the NRC must make the following specific findings:

1. "the design bases of the principal structures, systems, and components and the quality assurance program provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents" (10 CFR § 70.23(b)); and

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32 *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979); *see also Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

33 66 *Fed. Reg.* at 19,996.

34 *Id.*

35 *Duke, Cogema, Stone & Webster*, CLI-01-13, NRC slip op. at 8 fn. 2.

36 66 *Fed. Reg.* at 19,995.

2. "after weighing the environmental, economic, technical and other benefits against environmental costs and considering available alternatives, that the action called for [under the National Environmental Policy Act ("NEPA")] is the issuance of the proposed license, with any appropriate conditions to protect environmental values" (10 CFR § 70.23(a)(7)).

As stated by the Commission in this proceeding, "the presiding officer shall be guided by these safety and environmental regulations [10 CFR §§ 70.23(b) and 70.23(a)(7)] in determining whether proffered contentions are admissible under 10 C.F.R. § 2.714(b)(2) standards."[38] Thus, the only issues that are appropriate for litigation in this phase of the hearings are those that are material to these two findings.

2. Safety Issues Beyond the Scope of the Proceeding

Based upon the above, any proposed contention that addresses any of the following areas clearly is beyond the scope of the hearing on the CAR and would not provide the basis for granting a hearing request:

- any issues that do not call into question the design bases of the principal structures, systems and components ("SSCs");
- any issues regarding the adequacy of the design of non-principal SSCs;
- any issues that do not question the ability of the principal SSCs to meet the accident consequence performance requirements in 10 CFR Part 70, Subpart H or to provide adequate protection against natural phenomena; and
- any issues associated with MOX Facility normal operations, including, for example, technical or financial qualifications to operate the MOX Facility and radiological exposures resulting from normal operations.

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37 *Id.*

38 *Duke, Cogema, Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, NRC slip op. at 7 - 8 (June 14, 2001) (Emphasis added).

3. Environmental Issues Beyond the Scope of the Proceeding

The scope of the environmental issues that may be litigated in this proceeding is limited to the determination described in 10 CFR § 70.23(a)(7) (*i.e.*, whether "after weighing the environmental, economic, technical, and other benefits against environmental costs and considering available alternatives, that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values"). These issues revolve around the environmental impacts of construction and operation of the MOX Facility.

Construction and operation of the MOX Facility constitute one part of both a larger fuel cycle and a larger national program to dispose of surplus weapons material under the jurisdiction of the Department of Energy ("DOE"), not the NRC. The components of the national program include the following activities:

1. Transportation of surplus weapons plutonium and uranium oxide to the Savannah River Site ("SRS"), disassembly and conversion of the surplus weapons plutonium, and immobilization or transfer to the MOX Facility as feed material for MOX fuel.
2. Fabrication of MOX fuel at the MOX Facility.
3. Transportation of fresh MOX fuel to reactors.
4. Use of the MOX fuel in the reactors.
5. Transportation of the spent MOX fuel from the reactors to a repository.
6. Disposal of the spent MOX fuel in the repository.
7. SRS receipt and processing of wastes from the MOX Facility.
8. Deactivation of the MOX Facility.
9. Decommissioning of the MOX Facility.

All of these activities have been addressed by DOE in prior Environmental Impact Statements ("EISs").[39]

[39] Attachment 1 identifies the principal locations within the DOE EISs where these activities have been discussed and their environmental impacts addressed. While transfer and treatment of high alpha liquid waste from the

In fulfillment of its NEPA obligations, the DOE has prepared several EISs for the surplus plutonium disposition ("SPD") and related programs, including the:

- *Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement* ("S&D PEIS") (DOE/EIS-0229) (December 1996). The S&D PEIS evaluated various alternatives for disposition of surplus weapons material and determined that the preferred strategy was a combination of immobilization of some of the surplus weapons plutonium and use of the remainder as feed material for MOX fuel for use in existing reactors;
- *Surplus Plutonium Disposition Final Environmental Impact* ("SPD EIS") (DOE/EIS-0283) (November 1999).[40] The SPD EIS evaluated various alternatives for implementing the strategy selected in the S&D PEIS. This included evaluating the percent of plutonium disposed by immobilization or conversion to MOX fuel, and selection of the site for the disposition facilities;
- *Draft Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*, ("YM DEIS") (DOE/EIS-0250D) (1999).[41] This EIS examines the impacts of transport of spent nuclear fuel from reactor sites to the geologic repository and the impacts of disposal in the geologic repository. Spent MOX fuel is included in the spent nuclear fuel inventory evaluated.
- *Savannah River Site Waste Management Final Environmental Impact Statement* (DOE/EIS-0217) (1995).[42] This EIS examines the environmental impacts of continued waste management at SRS under expected, minimum, and maximum waste scenarios. Additional volumes of up to seven million gallons of high level waste are included under the maximum waste forecast.

DOE (not NRC) has overall responsibility for the program for disposing of surplus weapons plutonium, and has reviewed the overall program under NEPA. These facts have several important ramifications with respect to the scope of environmental contentions that are admissible in this proceeding:

MOX Facility were not specifically addressed in these EISs, the impacts associated with managing the high alpha liquid waste in the SRS HLW system are bounded by these EISs.

40 This EIS is available at http://www.doe-md.com/pu_docs.asp.

41 This EIS is available at http://www.ymp.gov/timeline/eis/deis.htm.

42 This EIS is available at http://nepa.eh.doe.gov/eis/eis0217/eis0217_toc.html.

- Contentions that pertain to programmatic decisions made by DOE or to the environmental impacts of activities addressed by DOE's programmatic EISs other than the MOX Facility itself are not admissible in this proceeding.

Ordinarily, when a federal action is part of a larger federal program, an agency will elect to prepare an EIS for the entire program, rather than simply preparing an EIS for each of the individual facilities that are part of the overall program.[43] As discussed above, DOE has already prepared two EISs governing the overall SPD program. In both of those cases, furthermore, opportunity was provided for public input and comment on DOE's environmental reviews. At issue, therefore, is (1) whether the NRC should defer to the DOE's programmatic EISs, or whether it must conduct its own environmental evaluation of the overall SPD program; and (2) whether issues related to the broader federal program may be litigated in an NRC licensing proceeding involving only one specific element of the program.

The NRC was faced with these issues in conjunction with licensing of the Clinch River Breeder Reactor ("CRBR"), which was one part of a broader program for developing liquid metal fast breeder reactors ("LMFBRs").[44] In that case, the Energy Research and Development Administration ("ERDA"), which was the predecessor to DOE, had prepared and issued an EIS for the LMFBR program. The intervenor in the CRBR licensing proceeding proffered contentions that (1) argued that the NRC should perform a NEPA evaluation of the costs and benefits of the LMFBR program and evaluate alternatives to that program, and (2) challenged "ERDA's conclusions concerning the need for an LMFBR program and the validity of ERDA's

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[43] *See Scientists' Institute for Public Information v. AEC*, 481 F.2d 1079, 1085-93 (D.C. Cir. 1973); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

[44] *See United States Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976).

environmental assessments."[45] The Commission concluded that the "need" for a demonstration facility should be "assumed as established by the ERDA EIS."[46] The Commission ruled that its licensing process:

> must be tailored in this case to avoid the Commission's substituting its judgment for that of ERDA with respect to broad planning decisions embodied in the LMFBR statement, such as investigating whether LMFBR technology is a worthwhile overall objective, whether a demonstration reactor is a necessary step in this investigation, and whether in view of the needs of the LMFBR program, construction of such a reactor at this juncture is required.[47]

As a result, the Commission limited the scope of the environmental review in the CRBR licensing proceeding to specific CRBR site and design issues related to implementation of ERDA's overall plan for development of the LMFBR that had not been fully addressed by the EIS for the LMFBR program.[48]

Two years after the *Clinch River* decision established the principle that the NRC should defer to decisions reached in another agency's programmatic EIS, the Council on Environmental Quality ("CEQ") implemented its NEPA regulations. One of the CEQ regulations refers to "tiering":

> Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (Sec. 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall

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45 *Id.* at 72-73.

46 *Id.* at 91-92.

47 *Id.* at 84.

48 *Id.*

> concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available.[49]

The NRC has incorporated the CEQ regulations on tiering into its own regulations (*see* 10 CFR Part 51, Appendix A.1.(b)), and courts have upheld the NRC's use of tiering in environmental analyses.[50]

Both the Commission's decision in *Clinch River* and the concept of tiering demonstrate that the scope of this proceeding is limited to specific site and design issues involving the MOX Facility that were not fully addressed in DOE's programmatic or other related EISs. Thus, for example, since DOE has rendered decisions on the need for the MOX Facility and the location of the MOX Facility in the F-Area at SRS, these issues are beyond the scope of this proceeding. Similarly, given DOE's assessment of the environmental impacts of the various related fuel cycle activities (other than the impacts of the MOX Facility itself), these issues as well are beyond the scope of this proceeding. There is no requirement under NEPA, and it would be contrary to administrative efficiency, for the NRC to reconsider DOE's determination of the environmental impacts of activities that are not being licensed in this proceeding.[51]

Therefore, the scope of NRC's environmental review in this proceeding is limited to the environmental impacts of construction and operation of the MOX Facility, and alternatives to mitigate those impacts.

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[49] 40 CFR § 1502.20 (emphasis added). *See also Guidance Regarding NEPA Regulations*, 48 *Fed. Reg.* 34,263 (July 28, 1983) (clarifying intent of promulgating tiering regulation).

[50] *See generally*, *Kelley v. Selin*, 42 F.3d 1501, 1518-19 (6th Cir. 1995) (finding NRC's use of tiering "appropriate").

[51] NRC's *Scoping Summary Report for Mixed Oxide Fuel Fabrication Facility, Savannah River Site* (August 2001) ("Scoping Summary Report"), Section 4.1, states that "Because the scope of the MOX FFF EIS is limited to the licensing action now under review by NRC, which is specific to the MOX FFF, issues pertaining to decisions already made by DOE will be addressed by referencing the appropriate DOE analysis." Accordingly, only the proposed action—to license the MOX Facility in the F-Area at SRS—and No action Alternatives will be discussed. *See id.*, Section 3.0.

- Contentions that attack programmatic decisions made by DOE, or that request the NRC to mitigate environmental impacts beyond the MOX Facility are not admissible in this proceeding because, even if proven, they would not entitle the petitioner to relief.

NRC has no jurisdiction over, and cannot change, the programmatic decisions made by DOE regarding the various disposal options for surplus weapons material. (Examples of such programmatic decisions include the decision to pursue MOX fuel fabrication as part of the program for dispositioning surplus weapons materials and the decision to site the MOX Facility at SRS.) Therefore, to the extent that a contention asks NRC to reconsider DOE's decisions, the contention seeks relief that the NRC cannot provide in this proceeding. Accordingly, such contentions must be dismissed under 10 CFR § 2.714(d)(2)(ii).

Similarly, while the NRC has the authority to order DCS to take action to mitigate the environmental impacts of the MOX Facility, it does not have the authority to order the entities responsible for the other SPD program-related activities to take action to mitigate the environmental impacts of their activities. Therefore, contentions that request the NRC to take action to mitigate such activities (such as mitigation of the impacts of transporting feed material to the MOX Facility) must be dismissed, because NRC cannot grant such relief in this proceeding.

- Contentions that pertain to activities that will be the subject of separate NRC licensing actions are not admissible in this proceeding.

The scope of this proceeding is limited to the construction authorization for the MOX Facility. Use of MOX fuel in a reactor and disposal of MOX fuel in a repository will be subject to separate NRC licensing proceedings. The NRC will be determining the environmental

impacts of those activities in those separate licensing proceedings.[52] Therefore, contentions that seek to litigate the environmental impacts of those activities in this proceeding are premature and outside the scope of this proceeding.[53]

III. ANALYSIS OF EI CONTENTIONS

EI has submitted 22 proposed contentions. DCS reproduces each of these below and demonstrates that none of the contentions is admissible in a hearing on the CAR.[54]

A. "There is a lack of information regarding operations similar to those planned by the Applicants. For example, the Nuclear Fuel Services plant in West Valley, New York is not discussed and yet this facility reclaimed uranium and plutonium from spent nuclear fuel for use in Mixed-oxide fuel. Evidence related to many of the areas of concern being faced by the Applicants is available from a number of sources, including the transcript of the NRC licensing proceedings held between 1973 and 1976, NRC Docket No. 50-332. The Applicants chose instead references which depended heavily on predictions and estimates rather than real operating experience."

There are no NRC regulations that require an applicant to discuss or reference every document that might be relevant to the matters discussed in licensing submittals to the NRC. EI does not specify what particular information or experience from the licensing proceeding on the Nuclear Fuel Services plant (which reprocessed spent nuclear fuel) – or any other facility – might be relevant to the MOX Facility. Moreover, a mere reference to an unspecified source —

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52 *See Scoping Summary Report*, Sections 4.3 and 4.5; 10 CFR § 60.21(a).

53 *See, e.g., Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, NRC slip op. at 17 (October 6, 2000) (in the context of a license transfer proceeding, the Commission rejected a contention that requested the NRC to consider the cumulative impacts of other license transfers involving the same applicant, holding that "[s]uch an inquiry would go well beyond the scope of the proceeding").

54 DCS initially responded to contentions A through F in its June 4, 2001 Answer, and is providing a supplemental response to those contentions in this Answer.

such as "a number of sources" or a "transcript"— does not provide an adequate basis for a contention.[55]

In addition, EI does not identify: (1) the specific information alleged to be missing from the CAR or ER; (2) the supporting reasons – or "bases" – for that belief; (3) any alleged facts or expert opinion in support of its contention; or (4) sufficient information to demonstrate that there exists a genuine issue of material fact or law, as required by 10 CFR § 2.714. Therefore, this contention should not be admitted.

B. "The Applicants failed to make use of the evidence contained in the transcripts of the Barnwell Nuclear Fuel Plant, a uranium and plutonium recovery facility planned by Allied General Nuclear Services (AGNS). Since the licensing of the AGNS's facilities was challenged under the provisions of NEPA by public interest organizations, including Environmentalists, Inc., an extensive record of evidence exists regarding a majority of the same issues now being considered in relation to the Applicants' request for a construction license. (Docket 50-332) These transcripts are available from the NRC. The issues taken up include transportation, radioactive waste management, health and safety issues, concern regarding containment, particularly in regard to plutonium, etc."

This contention suffers from the same inadequacies as Contention A, and should be rejected on the same bases.

C. "The Applicants don't use evidence from the transcripts of licensing proceedings related to the two Duke nuclear plants, which have been proposed for MOX fuel use. There is no explanation in the Applicants' reports of why evidence from such reliable sources is missing from their consideration. A majority of the 147-reference list is reports from the NRC, DOE or ones that were done under contract for the government, usually the Department of Energy. The realities associated with using the world's most powerful explosive, a substance which remains deadly for long periods of time, in an experimental project, tend to get lost in documents prepared by corporations and agencies proposing facilities and activities."

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[55] *See Florida Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 and 4), CLI-01-17, NRC slip op. at 22-24 (July 19, 2001); *see also Baltimore Gas & Elec.*, CLI-98-25, 48 NRC at 348 (*citing Public Service Co. of New Hampshire,* CLI-89-3, 29 NRC at 240-41).

This contention suffers from the same inadequacies as Contentions A and B, and should be rejected on the same bases.

D. "Another defect of the Applicants reports is the omission of the scientific findings of the National Academy of Sciences Committee on Geologic Aspects of Radioactive Waste Disposal of 1966, as well as reviews of the 1970's by geologists with the U.S. Geological Survey of the U.S. Department of the Interior. Both groups of scientists warned of problems at the location of the Savannah River Site and the proposed AGNS facilities primarily in regard to causing pollution of water sources. Without consideration of these findings, it is not possible to estimate the economic losses which could result from approval being given to the Applicants' CAR."

This contention suffers from the same inadequacies as Contentions A, B, and C, but does refer to alleged, unspecified "problems" with "pollution of water sources." This general assertion, however, lacks sufficient specificity to identify a genuine issue of material fact or law and is supported by no specific references to any supporting facts or expert opinions. Thus, this contention should not be admitted.

E. "The Applicants, in their reports, have failed to look at the possible outcomes of their facility from the viewpoint of business owners in the State, whether in manufacturing, real estate, sales or service companies. Some may be close to the proposed facilities, others along routes over which radioactive shipments travel. The Applicants have not adequately addressed other financial issues and questions."

Assertions that DCS has "failed to look at possible outcomes of [the MOX Facility] from the viewpoint of business owners" and "other [unspecified] financial issues and questions" do not raise a genuine issue of material fact or law, nor if proven to be true would they entitle EI to any relief. EI provides no statement of alleged facts or expert opinion and no references to specific sources or documents to support the contention. Furthermore, there is no basis for concluding that the contention raises any issue within the scope of the proceeding. Therefore, this contention should not be admitted.

F. "The Environmental Report has a 4-page section on Transportation. Only one reference is identified which is the DOE Environmental Impact Statement related to Surplus Plutonium Disposition. This practice of using the reports of the agency promoting a nuclear project has been going on for years. In this case, the Applicants are limiting the information used to what the DOE has to use as the basis of its decisions. Since the DOE's EIS and SPD is defective because of depending heavily on its own reports and those done by Westinghouse and other under contract to DOE, the Applicants' report is also defective."

This contention is improper as a matter of law. There is no prohibition on referencing previously conducted environmental reviews in the ER. Indeed, judicial and NRC precedent and the NEPA regulations expressly encourage the adoption and tiering of previous, relevant EISs.[56] Furthermore, this contention lacks the requisite specificity by failing to identify any omission of pertinent information or inclusion of incorrect information within the ER's evaluation of transportation impacts. It is also, in effect, a challenge to DOE's prior EISs that is outside the scope of this proceeding. Therefore, this contention should not be admitted.

G. "The Applicant's evaluation of the health effect to the local population from routine operation of the MOX Facility is invalid due to the lack of attention being given to relevant evidence contained in the transcripts of Allied General's proposed uranium and plutonium recovery facility (docket 50-332) and in other sources of information which have been tested by cross-examination and are thereby capable of resolving some of the confusion over what information is factual and what is not."

This contention suffers from the same inadequacies as Contention A, and should be rejected on the same bases. In addition, it is unclear why EI believes that DCS' assessment of potential health effects is invalid. The failure to identify the specific portions of DCS' submittals that are allegedly deficient also makes the contention inadmissible.[57]

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[56] *See, e.g., Kelly v. Selin*, 42 F.3d at 1519; *United States Energy Research and Development Administration Project Management Corp. Tennessee Valley Authority*, CLI-76-13, 4 NRC at 83-84; 40 CFR §§ 1502.20, 1506.3; 10 CFR Part 51, Appendix A to Subpart A, 1(b) and n.2.

[57] *Florida Power & Light Co.*, CLI-01-17, NRC slip op. at 22.

The contention also raises issues beyond the scope of the CAR proceeding by failing to assert any deficiency in DCS' identification of the design bases of principal SSCs, its QA Plan or its ER, and by addressing health effects from "routine operations." As discussed in Section II.J.2 above, safety issues associated with normal plant operations are beyond the scope of this proceeding on the CAR. Finally, vague references to transcripts and "sources of information" in the AGNS proceeding which discussed a different applicant and a different facility are not sufficient.[58] Therefore, this contention should not be admitted.

H. "The Applicants' evaluation of the health effects to local populations, including E.I. members, is invalid because the assumptions made in regard to the use of HEPA filters in Appendix F, Section F.5 and F.6 do not meet the guidelines of the NRC."

This contention lacks specificity and fails to identify the specific sources of information upon which EI relies. EI does not specify which document is deficient. (DCS assumes that EI is referring to DCS' ER, since the CAR does not contain an Appendix F). Nor does EI specify how the discussion of HEPA filters in the ER's Appendix is insufficient, or identify the specific "NRC guidelines" to which it refers. Therefore, this contention should not be admitted.

I. "The Applicants', in their CAR and Environmental Report (ER), fail to adequately consider the long-term effects of the MOX Facility. For example the impacts of decontamination and decommissioning of the MOX Facility are omitted. (See Section 5.6.1 of CAR)."

This contention mentions both the CAR and the ER. To the extent that it alleges deficiencies in the CAR relating to the impacts of decontamination and decommissioning ("D&D") activities, it represents an improper challenge to NRC regulations and raises issues beyond the scope of the proceeding. The contention is an improper challenge to the regulations because there is no regulation requiring such an impact analysis in the CAR. On the contrary, all

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[58] *Id.*

that is required when an applicant applies for a Part 70 license is a "decommissioning funding plan ("DFP") pursuant to 10 CFR §70.22(a)(9) that specifies the means by which adequate financial assurance for ultimate decommissioning of the facility will be provided. Furthermore, no such plan need be filed until the possession and use license application is submitted.[59]

The contention, as it relates to the CAR, is also beyond the scope of this proceeding since it fails to call into question any of the design bases of principal SSCs or the QA Plan, and because it raises issues that would only be relevant to an application for approval of a decommissioning plan ("DP") (not to be confused with the DFP). No DP is required until an existing licensee intends to cease principal activities at a licensed site and terminate operations.[60] In any event, DCS will *deactivate* the MOX Facility and turn the facility over to the DOE for decommissioning or reuse.[61] The decision whether to decommission or reuse the facility will be solely within the discretion of DOE.

This contention also states that the ER omits a discussion of D&D impacts. On the contrary, the ER discusses D&D of the MOX Facility as a "related action," and tiers from the DOE's programmatic SPD EIS.[62] In addition, in response to an NRC Staff RAI on the ER, dated June 8, 2001, DCS conducted and provided to the NRC a summary-level review of the MOX fabrication ("MP") and Aqueous Polishing ("AP") facilities to determine waste quantities and cost estimates for D&D.[63]

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59 *See* 10 CFR §70.22(a)(9).

60 *See* 10 CFR §70.38.

61 *See* CAR, Section 1.2.4.1.

62 *See* ER, Sections 1.2.8 (referencing SPD EIS, Section 4.31.2) and 5.3.

63 *See* Letter from P. Hastings to Document Control Desk, July 12, 2001 (providing DCS responses to NRC Staff ER RAIs, answers to Specific Comment Nos. 2 and 50).

Finally, to the extent that EI is raising an issue about "long-term effects" of the MOX Facility (other than the effects of D&D), those effects are not specified and, therefore, provide an insufficient basis for admission of this contention. Consequently, this contention should not be admitted.

J. "The Applicants' evaluation of the detrimental impact on the health of local residents, including E.I. members, is invalid due to inadequate consideration being given to the cumulative effect of nuclear operations having taken place at the SRS since the 1950's.

Note: the failure to collect the data, evidence and records needed to perform a full scale health study does not mean that an adverse effect to local residents from exposure to routine and accidental releases over the years has not caused harm to people's health and lives. Although a Dose Reconstruction Project has been going on for some time, money for this study has been cut."

This contention lacks specificity and basis, contrary to 10 CFR § 2.714(b). Although EI states that the "Applicants' evaluation" is invalid, EI does not identify which document or specific sections of that document are inadequate. DCS assumes that EI is referring to the ER, since cumulative impacts are discussed in Section 5.6 of that document. Moreover, it is unclear why EI believes that DCS' determination of cumulative effects is invalid or inadequate, since Section 5.6.1 of the ER specifically discusses the cumulative impacts from SRS activities. The lack of specificity in identifying the alleged deficiencies in DCS' submittals makes this contention inadmissible.[64]

K. "The piece-meal approach taken in the overall project of disposing of excess weapons plutonium by removing the pits from nuclear bombs to recover some of the plutonium to fabricate into mixed oxide fuel has resulted in one of the numerous examples of the Applicants failing to comply with the National Environmental Policy Act (NEPA)."

This contention lacks specificity and basis contrary to 10 CFR § 2.714(b). EI fails to identify which document or section of a document takes a "piece-meal approach." DCS assumes

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[64] *Florida Power & Light Co.*, CLI-01-17, NRC slip op. at 22.

that EI is referring to DCS' ER, since the contention mentions NEPA. However, it is unclear what aspect of DCS' approach EI believes is "piece-meal" and what specific provisions of NEPA have been violated. The lack of specificity in identifying the alleged deficiencies in DCS' submittals makes this contention inadmissible.[65]

Furthermore, it is entirely consistent with NEPA for DCS to focus its ER on the environmental impacts of the MOX Facility itself. NEPA, CEQ regulations, and the NRC regulations implementing NEPA, encourage "tiering" to "focus on the actual issues ripe for decision at each level of environmental review."[66] Accordingly, EI's contention could be viewed as an impermissible attack on NRC regulations. To the extent that EI is challenging how the overall SPD program has been reviewed by DOE under NEPA, such a challenge is outside the scope of this proceeding and, even if proven, would not entitle EI to relief. Therefore, this contention should not be admitted.

L. "The NRC staff has pointed out a number of examples of the Applicant's failure to comply with NEPA. Some relate to leaving out consideration of alternatives, others address the Applicants not including adequate information, such as those related to the SRS site and the problems presented in terms of cumulative effects."

This contention does not satisfy the requirement to identify the specific portions of the CAR, ER or QA Plan that are allegedly deficient. It seems to rely solely on the fact that the NRC has issued RAIs pertaining to DCS' ER.[67] Merely citing or referencing an RAI is "a far cry

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65 *Id.*

66 10 CFR Part 51, Subpt. A, App. A (adopting CEQ regulations).

67 DCS assumes that EI is referring to the Staff RAIs on the ER since the contention mentions NEPA and NEPA-related terms, such as alternatives and cumulative impacts.

from the reasonable specificity [the] contention rule demands."[68] Nor does issuance of an RAI indicate a violation of NEPA.

Moreover, the contention does not satisfy the requirements for specificity and bases. It is unclear what "alternatives" EI has in mind, or what portions of the SRS site or cumulative effects have not been adequately addressed. "It is [petitioners] job to review the application and to identify what deficiencies exist and to explain why the deficiencies raise material safety concerns."[69] EI has failed to meet this burden. Therefore, this contention should not be admitted.

M. "The Applicants' evaluation of the possible and actual detrimental effects to South Carolina residents from the proposed MOX Facility, in terms of environmental harm, damaged health, safety problems, financial and business losses, is invalid because full consideration has not been given to South Carolina's unique situation of having all of the fresh MOX fuel shipments taking place within its border, (except for the few miles between the S.C. State line and the McGuire nuclear plant) This defect in both the CAR and the ER is of particular significance in relation to the terrorist issue. Depending on the outcome of any terrorist activities, the results could be catastrophic. In addition, there would always be the on-going condition of attracting terrorist groups to South Carolina. This in itself would have an adverse impact on business interests, particularly tourism.

The National Academy of Sciences (NAC), in its study Management and Disposition of Excess Weapons Plutonium (1995), warns that "If significant quantities of fresh fuel could be mobilized so as to become airborne as particulate matter, the resulting public health risks would be substantial." (Page 340)."

The first portion of this contention is factually incorrect, fails to identify the specific sources of information upon which EI relies, and raises issues beyond the scope of this proceeding. EI claims that both the CAR and ER are insufficient because they do not properly

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[68] *See Duke Energy Corp.*, CLI-99-11, 49 NRC at 336; *see also Sacramento Mun. Utility Dist.*, CLI-93-3, 37 NRC at 146-147.

[69] *Duke Energy Corp.*, CCI-99-11, 49 NRC at 337.

evaluate "possible and actual detrimental effects" to South Carolina residents resulting from the fact that "all of the fresh MOX fuel shipments tak[e] place within [South Carolina's] border."

The CAR does not need to discuss the impacts from fresh MOX fuel shipments because fuel shipments are not part of the design basis for the MOX Facility, and DOE will be responsible for those shipments. Thus the contention does not allege any deficiency in the design bases of the principal SSCs or the QA Plan.

The ER, contrary to EI's assertion, does consider the effects on South Carolina residents from fresh fuel shipments.[70] EI does not indicate why it believes DCS' evaluation in the ER is insufficient, or what "full consideration" of the effects would entail. The allegation that the impacts from fresh MOX fuel shipments will occur in one state rather than many states does not constitute a violation of any NRC requirement.

The second portion of the contention is an impermissible attack on NRC regulations. DOE will transport all fresh MOX fuel in containers certified under 10 CFR Part 71. These containers are required to withstand severe physical impacts and extreme temperatures caused accidentally or intentionally. Accordingly, EI's concerns regarding terrorist attacks have already been embodied in NRC regulations. These regulations cannot be challenged in this proceeding.

N. "The Applicants' evaluation of the health effect to the local population from routine operation of the MOX Facility is invalid because its ER fails to give adequate attention to the pathways by which groundwater could become contaminated due to such unsuitable geological conditions of the SRS area as having a shallow water table or as a result of SRS activities in the past. Neither the Applicants' ER or their CAR discuss U.S. Department of Interior's 1967 study, Geology and Ground Water of the SRP and Vicinity, SC or the NAC report by the Committee on Geologic Aspects of Radioactive Waste Disposal (May 1966). Both were prepared for the Atomic Energy Commission. Neither the

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[70] While DOE evaluated the impacts of fresh MOX fuel shipments in the SPD EIS (Section 4.4.2.6), DCS performed its own analysis as reflected in ER Section 5.4.3 and Appendix E, based on the actual transportation package to be used and transportation of the fresh MOX fuel to Catawba and McGuire.

> DOE nor DCS have complied with NEPA in regard to fully considering alternatives to locating the MOX Facility at the SRS or the alternatives that offer more benefits and fewer costs for disposing of excess weapons plutonium."

EI claims that both the CAR and ER are inadequate because they do not discuss releases to groundwater during "routine operations." Any challenge to the CAR must be based on a claim that DCS' identification of the design bases of principal SSCs does not provide "reasonable assurance of protection against natural phenomena and the consequences of potential accidents." Thus, "routine operations" are beyond the scope of a hearing on the CAR.

EI's challenge to the ER is factually incorrect and lacks the required bases. The ER does discuss impacts to groundwater during normal operations.[71] The ER states that since the MOX Facility does not process liquid directly to the environment (except stormwater), and the facility will not use settling or holding basins as part of the wastewater treatment system, "no impacts on groundwater water quality are expected."[72] Furthermore, the ER states that liquid waste from the MOX Facility will be transferred to the appropriate SRS waste management facilities.[73]

Regarding the claim that the ER's discussion of groundwater impacts is inadequate because DCS did not discuss Department of Interior and National Academy of Sciences reports from the 1960s, EI does not indicate which specific sections of these reports it would rely on, or why these reports are even relevant since the MOX Facility will not have liquid releases during routine operations.[74] Both the ER and the CAR derive groundwater characterizations from the *Natural Phenomena Hazards (NPH) Design Criteria And Other Characterization Information*

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71 *See* ER Sections 5.2.2 (Effects of Facility Operation—Impacts on Surface Water Use and Quality) and 5.2.3 (Effects of Facility Operation—Impacts on Groundwater Quality).

72 *See* ER Section 5.2.3.

73 *See* ER, Section 5.2.12.

74 *See Florida Power & Light Co.*), CLI-01-17, NRC slip op. at 22; *see also Baltimore Gas & Elec.*, CLI-98-25, 48 NRC at 348 (*citing Public Service Co. of New Hampshire,* CLI-89-3, 29 NRC at 240-41).

For The Mixed Oxide (MOX) Fuel Fabrication Facility At Savannah River Site (Westinghouse Savannah River Company 2000).[75] This Westinghouse Savannah River Company ("WSRC") report cites over 30 references on groundwater alone, all prepared after 1967. The WSRC report includes information from numerous well borings collected on the SRS since 1976 as part of Resource Conservation and Recovery Act ("RCRA") and Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") studies. The reports cited by EI have simply been supplanted by more recent information. Nor do NEPA or NRC regulations require an applicant to discuss every report ever issued on a topic.

Finally, the allegations that DOE and DCS did not consider "alternatives to locating the MOX Facility at the SRS" or alternative plutonium disposition methods are outside the scope of this proceeding. These allegations improperly challenge DOE's programmatic determinations. An NRC proceeding does not provide a forum to litigate whether DOE has met its separate NEPA obligations associated with the overall SPD program. In any event, DOE did analyze such alternatives in its programmatic EISs, concluding in the SPD EIS Record of Decision, issued in January 2000, that the three plutonium disposition facilities (including the MOX Facility) would be located at SRS.[76] Therefore, this contention should not be admitted.

O. "The Applicants fail to explain fully what equipment is required in terms of overcoming the accidents, leaks, worker exposures or exposure to the public, etc., such as those that have happened at facilities where plutonium and uranium are present. (Nuclear Fuel Services in West Valley, New York, SRS, Westinghouse plant on Bluff Road in Columbia, SC and facilities in other countries, including COGEMA facilities in France, etc.)."

This contention lacks specificity and basis. The CAR describes the design basis of the principal SSCs, which will prevent or mitigate exposures during postulated accidents and natural

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[75] This document was submitted to the NRC on July 12, 2001 as Attachment 14-2 to the ER RAI response.

phenomena. EI fails to assert any deficiency in DCS' identification of the design bases of principal SSCs, or to identify a specific section of the CAR (or other document) that does not "explain fully what equipment is required" to "overcome accidents" or "exposures."

Furthermore, vague references to accidents that have allegedly occurred at other facilities are not sufficient. The contention does not identify the specific experiences in question, state why those experiences are relevant to the MOX Facility, or explain how the CAR is deficient. Therefore, this contention should not be admitted.

P. "The Applicants do not explain the extent to which existing evidence from COGEMA's experience with operations similar to those proposed for the MOX Facility at the SRS has been factored into their evaluation of health effects to local populations as a result of normal operation conditions or during accidents. The presentations in the ER and CAR and listings of the references used support the conclusion that it is assumptions and theoretical modeling which are the major basis for the Applicants' predictions regarding health effect and other impacts from the MOX facility."

This contention does not raise a litigable issue. There is no requirement that DCS discuss COGEMA's experience in the CAR or ER. Accordingly, DCS has made no error or omission that must be remedied. Also, to the extent EI is indirectly challenging COGEMA's experience with MOX, such a challenge is outside the scope of this proceeding.[77]

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[76] *See DOE Press Release: R-97-001* January 14, 1997 (http://www.doe-md.com/pu_hybrid.htm) for internet link to Record of Decision.

[77] *See Vermont Yankee Nuclear Power Corp.*, CLI-00-20, NRC slip op. at 11-12 (October 6, 2000); *see also*, Staff Answer, at 35:

> COGEMA's record is a subject which is not within the scope of this proceeding. As described in the Notice, it is the DCS CAR which is at issue. The AEA issues of radiological health and safety raised by the CAR concern whether the design bases of the proposed MOX Facility's principal structures, systems, and components, together with the DCS quality assurance plan, are adequately protective against events such as hurricanes, earthquakes, and tornadoes, and the consequences of any potential accidents. *See* 10 C.F.R. § 70.23(b). If the CAR is approved, construction is completed, and the MOX Facility is eventually allowed to begin operating, the Staff at that point will have issued an operating license to DCS, not COGEMA. Such a license would authorize DCS -- not COGEMA -- to possess and use SNM at the SRS site.

Even if the contention were true, EI is not entitled to relief. The regulations do not prevent an applicant from using "assumptions and theoretical modeling" in its analyses. Accordingly, this contention raises no issue of material fact or law. Finally, to the extent this contention focuses on "normal operation conditions," it is outside the scope of this proceeding.

Q. "The Applicants, in Section 4.4 Hydrology of the ER, have failed to demonstrate that radionuclides leaked from the MOX Facility or some related operation could not migrate downward to the aquifers. The Applicants are depending on the liquid effluent system of the Department of Energy (DOE). This system has not been through the NRC's licensing process."

The first portion of this contention represents a clear misreading of the ER. Section 4.0 of the ER presents the "Description of the Affected Environment," with Section 4.4 focusing specifically on "Hydrology." This discussion does not focus on "impacts" to surface or ground water from operations or accidents, but merely presents the background hydrogeological conditions found at SRS. This structure adheres to the requirement in 10 CFR § 51.45(b) that the ER provide, among other things, "a description of the environment affected . . . ." Accordingly, Section 4.4 would not be expected, and is not required, to "demonstrate that radionuclides leaked from the MOX Facility or some related operation could not migrate downward to the aquifers."

Section 5.2.3, however, does discuss the potential for radionuclide impacts to groundwater. The ER states that since the MOX Facility does not process liquid directly to the environment (except stormwater), and the facility will not use settling or holding basins as part of the wastewater treatment system, "no impacts on groundwater water quality are expected."[78] Accordingly, EI's challenge to Section 4.4 of the ER is misplaced and does not raise a genuine issue of material fact or law.

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[78] *See* ER, Section 5.2.3.

The second portion of the contention represents a challenge to, and a clearly erroneous reading of, the applicable NRC regulations. Without identifying an error or omission in any specific section of the CAR or ER, EI claims that DCS is "depending on the liquid effluent system of the DOE . . .[which] has not been through the NRC's licensing process." There is no prohibition on the use of DOE's liquid effluent system, and no requirement that the DOE system be licensed by the NRC.

On the contrary, transfer of the liquid effluent to DOE is specifically authorized by NRC regulations. In particular, 10 CFR § 20.2001 specifically provides that a licensee may dispose of licensed material "[b]y transfer to an authorized recipient as provided ... in the regulations in parts 30, 40 ... [or] 70 of this chapter." 10 CFR § 70.42(b)(1) clearly authorizes the transfer of special nuclear material "[t]o the Department" without the DOE holding an NRC license. Similar provisions are contained in the NRC regulations governing byproduct material and source material (*see* 10 CFR §§ 30.41(b)(1) and 40.51(a)(1)). Since a licensee may dispose of waste by transfer to an authorized recipient, and DOE is an "authorized recipient," there is clearly no violation of the applicable NRC regulations.

Finally, to the extent that this contention challenges DOE waste management activities, these activities have been addressed in prior DOE EISs, and are beyond the scope of this proceeding. Therefore, this contention should not be admitted.

R. "There is no section in either the ER or CAR which identifies the specific benefits and costs of (a) fabricating MOX fuel nor of the (b) overall plan of disposing of excess weapons plutonium by means of the MOX proposal. Consideration of alternatives in terms of how each compares to the MOX fuel option is therefore impossible. This defect and the lack of consideration of what happens before the MOX fabrication operation and what happens following are among the numerous examples of the Applicants disregarding the intent and provisions of the NEPA."

This contention is factually incorrect and raises issues that are outside the scope of this proceeding. The CAR is not required to contain cost/benefit information and, thus, contrary to EI's contention, is not deficient.

Nor is the ER deficient. Section 6.0 of the ER does, in fact, discuss the costs and benefits of the proposed action and the no-action alternative. The ER's discussion of the "proposed action" encompasses EI's concern about costs and benefits of "fabricating MOX fuel." EI neither references this section in the ER, nor states why this discussion is deficient.

Regarding the costs and benefits of the "overall plan of disposing of excess weapons plutonium by means of the MOX proposal," any consideration of such costs and benefits is beyond the scope of this proceeding.[79]

Finally, EI's general allegation—in the context of costs and benefits—that DCS ignores NEPA as proven by a "lack of consideration of what happens before the MOX fabrication operation and what happens following," ignores years of environmental analyses by DOE. DOE's programmatic EISs address EI's concerns. Regardless, an NRC proceeding does not provide a forum to litigate whether DOE has met its separate NEPA obligations associated with the overall surplus plutonium disposition program. Therefore, this contention should not be admitted.

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[79] DOE considered the costs of all the alternatives considered in the SPD EIS. *See* SPD EIS ROD, p. 21-22.

S. "The Applicants in their ER do not take into consideration that children and babies suffer more damage from exposure to radiation than do adults (See 5.2.10.1 Radioactive doses to the public). These along with numerous other defects in the Applicants reports make their evaluations of health impacts from the MOX facility invalid."

EI claims that the ER's evaluation in Section 5.2.10.1—which discusses radiation exposure to the public during normal operations—is insufficient because it does not separately discuss exposure to children and babies. The public dose limits established by the NRC in 10 CFR Part 20 are protective of both adults and minors. In fact, DCS calculated that the projected dose to members of the public (3.4 E-05 mrem/yr) during normal operations is over six orders of magnitude lower than the limits proscribed in 10 CFR Part 20.[80] In other words, the doses are so low that normal operations would not have a material impact on members of the public, regardless of their age.

Accordingly, this contention is an impermissible challenge to the agency's regulatory standards. EI makes no showing that, even taking into account dose rates to children and babies, the Part 20 standards will not be met. Furthermore, the contention is based upon no expert opinion or supporting facts. Accordingly, the contention should not be admitted.[81]

T. "The Applicants in their ER (Section 5.2.10.2) fail to take into consideration that there are members of the public who spend time/or travel within the SRS boundaries, including persons who belong to E.I."

EI claims that the ER's evaluation in Section 5.2.10.2—which discusses radiation exposure to site workers during normal operations—is insufficient because it does not separately discuss "members of the public who spend time/or travel within the SRS boundaries." This is a

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80 *See* ER, Table D-8. The population doses for both the offsite public and site workers, as well as the dose for an average individual in the offsite public, also fall below natural background radiation levels. *See id.* at D-6.

81 The second sentence of the contention which alleges "numerous other defects in the Applicants reports," is clearly inadequate as a valid contention. The lack of specificity in identifying the portions of the DCS' reports that are allegedly deficient makes the contention inadmissible.

clear misreading of the ER, and therefore does not raise a genuine issue of material fact or law. EI's contention is inadmissible on this basis alone.

The contention is also factually inaccurate. The ER, in other sections, discusses radiological exposure risk to the public.[82] Exposure during normal operations to any individual "spend[ing] time or travel[ling] within the SRS" is bounded by the dose to a site worker.[83] DCS calculated the site worker exposure based on a worker being present at SRS, 24 hours a day, every day of the year (more than 8,000 hours).[84] Even with this duration at the site, the maximum site worker dose is at least three orders of magnitude lower than the 10 CFR Part 20 public dose limit. Since EI has not challenged DCS' site worker dose calculations, the contention raises no material issue of fact or law for resolution in this proceeding. Therefore, this contention should not be admitted.

U. "The lack of coverage on the subject of fires and their potential for spreading radioactive particulate matter is a flaw which makes the Applicants' evaluations of safety and health impacts invalid. This ties in with the deficiencies regarding emergency planning and considerations of such local concerns as those associated with residents not being informed or trained about what to do during accidents. Even volunteer firemen may not have the background or equipment to protect those along the fallout route, whether from the MOX Facility or on a highway over which radioactive shipments travel. In the case of transportation accidents, there is the problem of not having monitoring stations and other types of equipment to help in determining the path which a release of gases or radioactive particulate matter may take."

The first portion of this contention lacks specificity and basis, and fails to identify the specific sources of information upon which the petitioner relies. EI fails to identify which document or section of a document does not evaluate the "subject of fires." DCS assumes that EI is referring to the CAR, since the contention deals with safety and the potential effects of an

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82 *See* ER, Section D.1.2.

83 *See* ER, Table D-6.

84 *See id.*

accident (a fire). However, the CAR does contain a conservative fire hazards analysis,[85] and the MOX Facility fire safety design meets the applicable requirements or intent of NFPA standards and national building codes.[86] EI fails to identify why the CAR's discussion is invalid or why consideration of the spread of particulates is not bounded within DCS' analyses. It also fails to call into question the design bases of any principal SSCs.

The second portion of the contention alleges deficiencies in "emergency planning." This part of the contention is outside the scope of this proceeding, fails to identify a genuine issue of material fact or law, and fails to set forth the supporting reasons for EI's beliefs. As stated in the Hearing Notice, "[c]ontentions shall be limited to matters within the scope of the DCS application for authority to construct a MOX fuel fabrication facility."[87] Issues related to emergency planning are outside the scope of the CAR. In particular, DCS need not submit an emergency plan until it submits its application to possess and use licensed materials.[88] Accordingly, the contention is, at best, premature, and should not be admitted.[89]

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85 *See* CAR, Section 7.4.

86 *Id.* at Section 7.4.2.

87 66 *Fed. Reg.* at 19,996.

88 *See* 10 CFR § 70.22(i) and NUREG-1718, Section 14.5.1 ("[t]he applicant is not expected to submit . . . an emergency plan . . . with the portion of the license application submitted for the construction approval review").

89 Furthermore, an applicant 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. *See* 10 CFR § 70.22(i). As discussed in Chapter 14 of the CAR, the MOX Facility should satisfy those limits. Even though DCS believes its analyses will show that no plan need be submitted to the NRC, DCS does intend to have an emergency planning and response program. This program will be coordinated with the emergency planning function at SRS, and is expected to include a MOX Facility-specific annex to the existing SRS Emergency Plan.

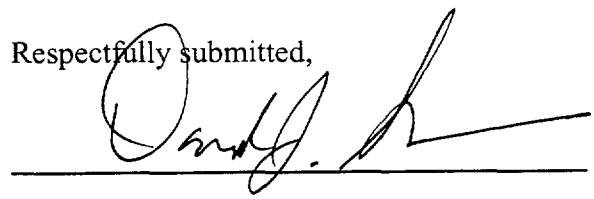
V. "The attached map supports EI's Contentions M, O, P, U, W, and the Affidavit of Basil Garzia."

The referenced map does not, by itself, form an admissible contention. Nor does the map cure any of the defects in contentions M, O, P, U or W. Therefore this contention should not be admitted.

IV. CONCLUSION

As demonstrated above, EI has not articulated an admissible contention. Therefore, DCS requests that EI's Request for Hearing be denied.

Respectfully submitted,



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Attorneys for Duke Cogema Stone & Webster

Dated: September 12, 2001

Duke Cogema Stone & Webster's
Answer to Environmentalists, Inc.
Amendment to Petition to Intervene

ATTACHMENT 1

DOE Action	NEPA Citation
1a. Transportation of surplus weapons plutonium and uranium oxide to SRS	SPD FEIS: Section 4.4.2.6
1b. Disassembly and conversion of surplus weapons plutonium	SPD FEIS: Section 4.4.2
1c. Immobilization of surplus weapons plutonium	SPD FEIS: Section 4.4.2
2. Fabrication of MOX fuel	SPD FEIS: Section 4.4.2 MFFF ER: Section 5
3. Transport of MOX Fuel to mission reactors	SPD FEIS: Section 4.4.2.6
4. Use of MOX Fuel in mission reactors	SPD FEIS: Section 4.28
5. Transportation of spent MOX fuel from mission reactors to a repository	YM DEIS: Chapter 6
6. Disposal of spent MOX fuel in the repository	YM DEIS: Chapter 5
7. SRS receipt and processing of wastes from the MOX facility	SPD FEIS: Sections 4.4.1.2 & 4.4.2.2 SRS FEIS: Section 2.4.2
8. Deactivation of the MOX Facility	SPD FEIS: Section 4.31.1 MFFF ER: Section 5.3
9. Decommissioning the MOX facility	SPD FEIS: Section 4.31.2

MFFF ER—*Mixed Oxide Fuel Fabrication Facility Environmental Report*

SPD FEIS—*Surplus Plutonium Disposition Final Environmental Impact Statement*

SRS FEIS—*Savannah River Site Waste Management Final Environmental Impact Statement*

YM DEIS—*Draft Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Thomas S. Moore, Chairman
Charles N. Kelber
Peter S. Lam

In the Matter of	)	
DUKE COGEMA STONE & WEBSTER	)	Docket No. 070-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	)	ASLBP No. 01-790-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of "Duke Cogema Stone & Webster's Answer to Environmentalists, Inc. Amendment to Petition to Intervene" were served this day upon the persons listed below, by both e-mail and United States Postal Service, first class mail, with the exception of Environmentalists, Inc, which was served by Federal Express.

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September 12, 2001

Secretary of the Commission
U.S. Nuclear Regulatory Commission
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Attn: Rulemakings and Adjudications Staff

Re: DCS Answer to BREDL and EI Contentions
ASLBP No. 01-790-01-ML, Docket No. 070-03098-ML

Duke Cogema Stone & Webster, LLC ("DCS") hereby files its Answers to BREDL and EI's proposed contentions in the Construction Authorization Request proceeding for the Savannah River Mixed Oxide Fuel Fabrication Facility.

Due to the tragic national events which closed DCS' counsel's offices in Washington, D.C. yesterday, and after consultation with the Licensing Board, DCS will file its Answer to GANE's contentions tomorrow. DCS has alerted GANE to this effect.

In addition, due to the continued suspension of airline flights, we understand that Federal Express air service has been interrupted. Accordingly, overnight delivery to Environmentalists, Inc. by Federal Express may be delayed. We have spoken with EI's representative, Ms. Thomas, and offered to send the Answers by facsimile. Ms. Thomas indicated that Federal Express, although delayed, would be sufficient.

Sincerely,

Alex S. Polonsky

cc: service list