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C O U N S E L O R S A T L A W

DOCKETED
USNRC

November 13, 2003 (11:40AM)

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

November 5, 2003

Administrative Judge Thomas S. Moore
Chairman, Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Notice of Change to the MOX Facility Controlled Area Boundary;
Duke Cogema Stone and Webster (Savannah River Mixed Oxide Fuel
Fabrication Facility), Docket No. 70-3098- ML

Dear Judge Moore:

As you are aware, consolidated Contention 5 in the above-captioned proceeding alleges that Duke Cogema Stone & Webster LLC (DCS) would be unable to limit access to the designated Controlled Area Boundary (CAB) for the Mixed Oxide Fuel Fabrication Facility (MOX Facility) for any reason, pursuant to the requirements of 10 CFR § 20.1003. The underlying concern that served as the basis for the Contention was the location of the MOX Facility CAB. The CAB was placed at the Savannah River Site (SRS) boundary where access and egress is controlled by the Department of Energy (DOE), and within which other DOE facilities are located, and other DOE activities are performed.

The purpose of this letter is to advise the Atomic Safety and Licensing Board (Board) and the parties that DOE, by letter dated November 3, 2003 (a copy of which is attached), has now directed DCS to relocate the CAB so that it coincides with the "Restricted Area" boundary for the MOX Facility. Therefore, DOE facilities and activities on the SRS other than the MOX Facility will be excluded from the CAB. The DOE letter also directs DCS to meet the 10 CFR § 70.61 performance requirements for both workers and "individuals located outside the controlled area" (*i.e.*, members of the public) at the Restricted Area boundary (*i.e.*, at the new CAB as revised).

The Honorable Thomas S. Moore
November 5, 2003
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With respect to the CAR proceeding before the Board, consolidated Contention 5 is now clearly moot and is appropriate for dismissal on that basis. DCS will submit to the Board an appropriate motion to dismiss the Contention. We will also be seeking both GANE's and the NRC Staff's agreement on the motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Donald J. Silverman", with a long horizontal flourish extending to the right.

Donald J. Silverman

cc: Service List

**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 the November 5, 2003 letter from Donald J. Silverman regarding "Notice of Change to the MOX Facility Controlled Area Boundary" were served this day upon the persons listed below by electronic and First Class Mail.

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Washington, D.C. 20555-0001
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* Original and 2 copies



Marjan Mashhadi
11/5/03

Date



Department of Energy

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9800 South Cass Avenue
Argonne, Illinois 60439

NOV 03 2003

Mr. Robert Ihde, President and CEO
Duke, COGEMA, Stone & Webster, LLC
128 S. Tryon Street
12th Floor
PO Box 31847
Charlotte, NC 28202

Dear Mr. Ihde:

SUBJECT: Contract No. DE-AC02-99CH10888, Technical Direction and Change Order
Relating to the Mixed Oxide Fuel Fabrication Facility

Under the subject contract with the U.S. Department of Energy, DCS is required to design, construct, operate and obtain a Nuclear Regulatory Commission (NRC) license for the Mixed Oxide Fuel Fabrication Facility (MFFF), which will be located on the DOE Savannah River Site (SRS). DOE exercises exclusive regulatory authority and responsibilities pursuant to the Atomic Energy Act with respect to all other DOE facilities and activities at SRS, including DOE's Pit Disassembly and Conversion Facility and DOE's Waste Solidification Building which will be located within several hundred feet of the MFFF. DOE will continue to exercise and enforce its exclusive authority over the non-MFFF portion of SRS through DOE regulations, including 10 CFR Part 835, as well as DOE directives, standards, emergency planning provisions, and other mechanisms. Furthermore, SRS access, egress and security will continue to be controlled by DOE. Thus, the MFFF will be a DOE owned, NRC licensed facility subsumed within a site that is under DOE exclusive authority and jurisdiction, thereby creating a particularly complex regulatory and jurisdictional interplay between NRC and DOE.

INTRODUCTION

Section 202 of the Energy Reorganization Act of 1974, as amended by the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, grants NRC licensing and related regulatory authority for the MFFF. NRC's authority pursuant to section 202 is limited to the facilities specifically enumerated in section 202, and must not be construed to limit or otherwise interfere with DOE's authority over its other facilities and activities. See section 205 (d) of the Energy Reorganization Act, which makes it clear that NRC licensing authority shall not be construed to limit in any way the functions of DOE relating to the safety of activities within DOE's jurisdiction. See also section 203(c) and section 204(c) of the Energy Reorganization Act. Various NRC regulations similarly recognize the scope of NRC's licensing jurisdiction. See, e.g., 10 CFR 70.2, 10 CFR 70.4 (definition of "person"), 10 CFR 70.11, 10 CFR 19.2, 10 CFR 20.1002. cf., 10 CFR 20.1003 (definition of "person").



Accordingly, NRC regulations do not apply to workers and visitors to the non-MFFF portion of SRS. Moreover, DOE does not consider these individuals to be "member[s] of the public", "individuals located outside the controlled area", "individuals who are not workers . . . at a facility not related to the licensed activities", or "member[s] of the public offsite" as those terms are used in NRC regulations.

Due to the location of the MFFF and the statutory basis for NRC's licensing authority, the licensing for the MFFF necessarily involves certain issues not ordinarily present in other NRC licensing proceedings. DOE expects DCS to address those issues in a manner consistent with DOE's authority and responsibilities under the Atomic Energy Act and consistent with the Energy Reorganization Act.

With this background, DOE directs DCS to proceed as follows.

TECHNICAL DIRECTION

1. Controlled Area Boundary

Consistent with the Energy Reorganization Act and DOE's authority under the Atomic Energy Act, DCS shall move the controlled area boundary to coincide with the MFFF restricted area boundary. DCS shall revise the construction authorization request (CAR) accordingly, and if and to the extent necessary, revise the Environmental Report accordingly. DCS shall make the minimal revisions necessary. DCS shall submit a license application which reflects the revised location of the controlled area boundary. DCS shall obtain DOE review and approval of the revisions to the CAR, the revisions to the Environmental Report (if and to the extent necessary), and the license application before these documents are submitted to NRC. DCS shall follow the direction in paragraph 4 of this letter with respect to the above-referenced documents and revisions. DCS shall not revise the current location of the restricted area boundary (i.e., the boundary with which the controlled area boundary must coincide) without DOE review and approval before any such revision is discussed or forwarded to the NRC either formally or informally.

2. Performance Requirements at the Restricted Area Boundary (Controlled Area Boundary as revised pursuant to Paragraph 1 above)

As a matter of safety and good business, DCS shall meet the NRC performance requirements for workers and individuals outside the controlled area (i.e., "members of the public") at the restricted area boundary for the MFFF (i.e., at the controlled area boundary as revised pursuant to paragraph 1 above.) As explained in the Introduction to this letter however, DOE does not consider such workers and individuals to be "members of the public" subject to NRC regulation. In meeting these performance requirements, DCS documents and discussions with NRC and other parties shall be consistent with the direction in paragraph 4 of this letter.

3. Commitments in the CAR

Consistent with the Energy Reorganization Act and DOE's authority under the Atomic Energy Act, DCS shall withdraw the following three commitments (and associated language) made to the NRC in the CAR (October 31, 2002, p.1.1-2):

- a. "The controlled area boundary (at the SRS or MFFF site boundary) will be controlled by DCS via an agreement with DOE";
- b. "An augmentation of the existing SRS radiation protection training program . . . in accordance with . . . 10 CFR 19.12(a)(1)-(5)"; and
- c. "The posting and maintenance of notices . . . within F Area [of SRS], in accordance with . . . 10 CFR 19.11."

DCS may, in its discretion, replace the second withdrawn commitment (training) and third withdrawn commitment (posting) with modified commitments. However, any modified commitments shall limit NRC-regulated training to MFFF workers and shall limit NRC-regulated posting to within (and on the fence of) the MFFF restricted area boundary (i.e., the controlled area boundary as revised). Any revised commitments shall follow the direction in paragraph 4 of this letter. Any revised commitments shall be reviewed and approved by DOE before they are discussed or forwarded to NRC either formally or informally. The first commitment referenced above shall be withdrawn in its entirety and shall not be replaced. DCS shall not agree or commit to NRC inspection of DOE activities or facilities outside of the MFFF restricted area boundary (i.e., the controlled area boundary as revised.)

4. Jurisdictional Issues

DCS shall act in accordance with the jurisdictional constraints, described in the Introduction to this letter, in all documents and discussions with or provided to other parties or to the NRC, either formally or informally, including but not limited to the CAR, the Environmental Report, the license application, briefs, pleadings, commitments and correspondence concerning the MFFF. In this regard, the DOE facilities, activities, workers and visitors in the non-MFFF portion of SRS are not subject to NRC regulation or jurisdiction either directly or indirectly. Rather, DOE exercises exclusive authority under the Atomic Energy Act to protect the health, safety, security and environment with respect to such DOE facilities, activities, workers, and visitors at the non-MFFF portion of SRS.

When DCS encounters potential licensing, regulatory and/or jurisdictional issues which may limit or otherwise affect DOE authority, or safety or security at SRS, DCS shall continue to inform DOE of such issues as soon as possible. Timely notification will afford DOE early opportunity to engage DCS and to establish a DOE-approved position prior to DCS engaging the NRC, either formally or informally.

5. Additional matters

DCS shall obtain DOE review and approval of any written correspondence with the NRC or other parties concerning this direction letter and actions pursuant to this direction letter. DCS shall include DOE in all formal and informal discussions with the NRC or other parties concerning this direction letter and the actions pursuant to this letter.

DCS may, in light of the direction in paragraphs 1 through 3 above, decide to designate additional engineered or administrative controls or control systems as IROFS (item relied on for safety.) Such action is allowed but not required by this direction letter.

DCS may also decide to request certain exemptions from the NRC regulations. Any such exemption request must be consistent with this direction letter and must be reviewed and approved by DOE before it is provided to NRC either formally or informally. Any such exemption request is allowed but not required by this direction letter.

CHANGE ORDER

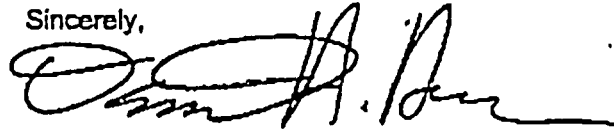
6. In accordance with clause 52.243-2 "Changes - Cost Reimbursement" (Aug. 1987) Alternate II (APR 1984) of the subject contract, DCS is hereby directed to conduct an evaluation of the impacts to design, technical issues, cost, schedule, licensing documentation and any other activities resulting from the technical direction in paragraphs 1 through 3 of this letter. DCS's evaluation shall include defensible accident probabilities, uncertainties, doses and specific supporting rationale for the impacts and activities. DCS shall base the evaluation on the current location of the restricted area boundary. If DCS recommends potential modifications, if any, to the current restricted area boundary for DOE approval, such recommended revisions and related impacts shall be included in the evaluation. DCS shall use its best efforts to minimize to the extent possible the necessary revisions, activities and impacts for implementation of this technical direction. DCS shall submit an evaluation report in accordance with this paragraph within 30 days of receipt of this letter. DOE and DCS staff will meet to confirm a mutual understanding of the specific design elements, technical issues, licensing documentation and other activities likely to be impacted.
7. DCS shall submit a separate cost proposal within 30 days of receipt of this letter detailing the costs incurred to complete the non-design activities pursuant to the technical direction in paragraphs 1 through 3 of this letter and the costs incurred to complete the evaluation pursuant to paragraph 6 of this letter. "Non-design activities" as used in the preceding sentence means activities other than changes to the MFFF design, changes to the integrated safety analysis which would depend upon MFFF design changes, or any modification to the current restricted area boundary which has not been approved by DOE. The cost proposal shall contain sufficient cost and pricing data as required by contract clause 52.215-21 "Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data - Modifications (OCT. 1997)." At that time, discussions will be initiated to definitize the price for this change order. DCS is not authorized to exceed \$25,000 in the performance of this change order and shall notify this office in writing when 85% of that ceiling is reached. If necessary, DOE will consider authorization of an additional cost ceiling at a later date.

Mr. Robert Ihde

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8. Upon receipt of this letter, DCS shall immediately implement all activities resulting from paragraphs 1 through 5 of this letter except MFFF design changes, changes to the integrated safety analysis which depend upon design changes, and any modification to the restricted area boundaries which have not been approved by DOE. After DOE review and approval of the evaluation pursuant to paragraph 6 of this letter, DCS will be further directed with respect to design changes, if any, and changes to the restricted area boundary, if any, recommended in the evaluation via separate direction from the Contracting Officer.

Sincerely,



David H. Hess
Special Programs Division
Office of Acquisition and Assistance
Contracting Officer

cc: DCS: Touchstone, Brabazon, Jain
NA-26: Siskin, Nulton, Olencz, Rhoads, Johnson, Alberstein, Oliver, Cygelman
NA-26-SR: Franks
GC: McRae, Martin