RAS 7161

December 12, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

DUKE ENERGY CORPORATION

(Catawba Nuclear Station, Units 1 and 2)

Docket No's. 50-413-OLA,
50-414-OLA

BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S RESPONSE TO BOARD QUESTIONS

I. INTRODUCTION

At the prehearing conference on December 3 and 4, 2003, the Atomic Safety and Licensing Board ("ASLB") requested further information from the parties regarding a number of issues. Pursuant to the ASLB's order of December 8, 2003, and the schedule agreed to by the parties, Blue Ridge Environmental Defense League ("BREDL") hereby provides information in response to the ASLB's inquiries.

II. RESPONSE TO QUESTIONS

A. Issues Relating to Duke's Proposed Withdrawal of Section 3.8

In its December 8 Order, the ASLB asked BREDL to respond to Duke's oral proposal to withdraw Section 3.8 of Duke's license amendment application. BREDL believes that Section 3.8 is misleading, because it falsely implies that the assertions it makes regarding the risks of using plutonium fuel in the Catawba reactor are based on a quantitative risk analysis.

Nevertheless, BREDL does not believe that withdrawal of Section 3.8 would cure the problem. The appropriate solution to the problem is to make proper use of

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quantitative risk assessment in the safety analysis for the proposed license amendment, not to completely withdraw any mention of it. As discussed by BREDL's counsel during the oral argument, BREDL believes that use of a quantitative risk analysis in this case is warranted under the guidance in Regulatory Guide 1.174.

B. Applicability of Council on Environmental Quality Regulations

The Supreme Court has held that the Council on Environmental Quality ("CEQ"), as the agency charged by the National Environmental Policy ("NEPA") with responsibility for reviewing government programs and advising the President with respect to NEPA compliance, is entitled to "substantial deference" in interpreting NEPA. *Andrus v. Sierra Club,* 442 U.S. 347, 358 (1979). Executive Order 11991 similarly provides that CEQ regulations are binding on federal agencies unless compliance would "be inconsistent with statutory requirements." Executive Order 11991, 3 C.F.R. 124 (1978).

The NRC has also taken a position that is consistent with *Andrus v. Sierra Club* and Executive Order 11991. In promulgating its own NEPA regulations, the Commission stated that:

> as a matter of law, the NRC as an independent regulatory agency can be bound by CEQ's NEPA regulations only insofar as those regulations are procedural or ministerial in nature. NRC is not bound by those portions of CEQ's NEPA regulations which have a substantive impact on the way in which the Commission performs its regulatory functions.

NRC Final Rule, Environmental Protection Regulations for Domestic Licensing and Related Regulator Functions and Related Conforming Amendments, 49 Fed. Reg. 9,352

(March 12, 1984).[1] BREDL notes that 40 C.F.R. § 1508.25(a), the CEQ regulation cited in Contention 4 is procedural in nature, because it merely defines the type of "connected" actions that must be considered in an EIS. Moreover, the regulation was not disavowed by the Commission when it promulgated its own set of NEPA regulations at 49 Fed. Reg. 9,352. Thus, 40 C.F.R. § 1508.25(a) is entitled to substantial deference by the NRC.

C. Legal Effect of Commission's Terrorism Rulings

In a number of decisions issued since the terrorist attacks of September 11, 2001, the Commission has established a policy of refusing to consider the environmental impacts of terrorist attacks in Environmental Impact Statements ("EISs") for its licensing actions.[2] The ASLB has raised a question as to why these decisions should not bar consideration of BREDL's Contention 9, to the extent that it challenges the adequacy of the DOE's November 2003 Supplemental Analysis, on which Duke relies, to address the

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[1] Nevertheless, in *Limerick Ecology Action v. NRC,* 869 F.2d 719, 743 (3rd Cir. 1989), the NRC took the position that it was not required to comply with CEQ regulations which then required a "worst-case" analysis. The Court upheld the Commission, on the ground that CEQ guidelines are not binding on an agency to the extent that the agency has not expressly adopted them." *Id.*

BREDL submits that the NRC's position, as affirmed by the Third Circuit, was inconsistent with its own commitment to comply with CEQ guidelines to the extent they are procedural in nature. In any event, during the pendency of the case, the CEQ withdrew the worst-case analysis requirement.

[2] *See, e.g., Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); *Pacific Gas & Electric Company* (Diablo Canyon Power Plant Independent spent Fuel Storage Installation), CLI-03-1, 57 NRC 1 (2003); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 1), CLI-02-27, 56 NRC 367 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2), Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002).

environmental impacts of attacks on or theft of plutonium that is shipped to and from France in order to produce plutonium fuel for testing in the Catawba reactor.[3]

BREDL respectfully submits that for two principal reasons, the decisions cited above do not operate to exclude consideration, in this proceeding, of the adequacy of DOE's Supplemental Analysis to demonstrate compliance with NEPA for purposes of this licensing proceeding.

First, the license amendment proceeding for the testing of plutonium fuel at the Catawba reactor is part of a DOE program, for which DOE is the agency responsible for NEPA compliance. DOE has already determined that the scope of the environmental analysis for this program includes the impacts of terrorist attacks on plutonium shipments. *See* Programmatic Environmental Impact Statement for Storage and Disposition of Weapons-Usable Fissile Materials (DOE/ES-229), Appendix G (1996) (hereinafter "Storage and Disposition PEIS").

Second, neither Duke's license amendment application, nor this license amendment proceeding, has an independent life of its own apart from DOE: Duke would not be able to apply for a license amendment to test weapons-grade plutonium fuel at Catawba, were it not for the DOE's program for disposal of weapons-grade plutonium. Clearly, DOE has determined that the environmental impacts of terrorist attacks on plutonium shipments are relevant to its NEPA decisionmaking process. Neither Duke

[3] BREDL has also challenged the adequacy of the DOE's Supplemental Analysis in Contention 13 of Blue Ridge Environmental Defense League's Second Supplemental Petition to Intervene, which was filed on December 2, 2003.

nor the NRC can declare a portion of that analysis to be irrelevant to the DOE program of which Duke's license amendment application is a part.[4]

D. NEPA Case Law Regarding Alternatives

In Contention 5, BREDL asserts that Duke's Environmental Report is deficient because it fails to consider alternative nuclear power plants for testing and batch MOX fuel use, other than Catawba and McGuire. BREDL asserts that new information, not considered in the SPDEIS, demonstrates that the Catawba plant is not an appropriate choice for MOX fuel batch use, because of significant and previously unidentified design flaws that make it particularly vulnerable to accidents, including containment breach.

Duke argues that the contention asks for evaluation of alternatives that are "not presently available to either Duke or DOE and that are beyond the scope of the present environmental review." Answer of Duke Energy Corporation to the "Blue Ridge Environmental Defense Legue's Supplemental Petition to Intervene" Etc. at 38 (November 11, 2003) (hereinafter "Duke's Answer").

The parties seem to agree that consideration of alternatives is governed by a "rule of reason." *See* NRC Staff Response to Blue Ridge Environmental Defense League's Petition to Intervene, etc. at 14 (November 11, 2003) (hereinafter "NRC Staff's Response"), citing *Allison v. Department of Transportation,* 908 F.2d 1024, 1031 (D.C. Cir. 1990). The parties also agree that the purpose of a propose action is the primary determinant of the range of alternatives that must be considered. *See* Duke's Answer at

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[4] Moreover, Duke has relied on the DOE's environmental analyses to support its license amendment application. *See* Duke's License Amendment Application at page 5-5, which references the Storage and Disposition PEIS, and Duke's letter to the ASLB of November 11, 2003, forwarding the Supplemental Analysis. Duke cannot pick and choose which aspects of the DOE's environmental analysis are relevant for purposes of NEPA compliance. Duke must take the bitter with the sweet.

38, citing *Citizens Against Burlington Inc. v. Busey*, 938 F.2d 190, 194-196 (D.C. Cir. 1991); *City of Angoon v. Hodel,* 803 F.2d 1016, 1021 (9th Cir. 1986). But Duke and the Staff argue that the scope of reasonable alternatives is determined by the purpose and need of the applicant. Duke's Answer at 39, NRC Staff's Response at 14. Based on this premise, they argue that there are no reasonable alternatives other than the no action alternative, because Duke has no other plants that it wishes to use for plutonium fuel.

Duke's and the Staff's focus on the purpose of the applicant is fatally flawed. It is DOE's purpose which is primary in this government-subsidized program. Duke would not be making this license amendment application were it not for the DOE's program for disposition of weapons-grade plutonium. As stated in the 1999 Surplus Plutonium Disposition Final Environmental Impact Statement (1999) ("SPDEIS"), the purpose and need of that program is "to reduce the threat of nuclear weapons proliferation worldwide by conducting disposition of surplus plutonium in the United States in an environmentally safe and timely manner." *Id.* at 103. *See also* Duke's License Amendment Application at 5-5 (explaining that the 1996 Storage and Disposition PEIS "analyzed the potential environmental consequences of alternative strategies for the long-term storage of weapons-usable plutonium and the disposition of weapons-usable plutonium that has been or may be declared surplus to national security needs.") This is not a situation like *Citizens Against Burlington Inc. v. Busey*, where the range of reasonable alternatives was circumscribed by what was reasonable or feasible for the applicant.[5] Nor is it like *City of Angoon v. Hodel,* where the range of reasonable

[5] Nor is this case like *Roosevelt Campobello International Park v. U.S. EPA,* 684 F.2d 1041, 1046-47 (1st Cir. 1982) (upholding EPA's evaluation of alternatives that was "explicitly based on the premise that its role in reviewing privately sponsored projects 'is

alternatives was pre-determined by a conveyance of land by the U.S. Congress. The DOE may choose from the entire range of U.S. commercial reactors to which to offer its subsidy.

Moreover, the proposal to test plutonium fuel at Catawba reflects the choice of one plant out of a range of alternatives that was considered in the Draft and Final versions of the SPDEIS. In the draft version of the SPDEIS, DOE described the environmental impacts of using "from three to eight commercial nuclear reactors to irradiate MOX fuel." *See* Final SPDEIS at 1-1. In the Final SPDEIS, DOE looked at the impacts of using plutonium MOX fuel at three reactor sites, including Catawba. *Id.* Duke cannot cast that choice in stone by re-defining the purpose of the proposed action of which its license amendment application is a part. In light of significant new information showing that the choice of an ice condenser plant for testing and use of plutonium fuel is more dangerous than other reactors, it is appropriate to re-visit the previous evaluation of alternatives and consider using plutonium fuel in nuclear plants that do not have ice condenser containments. The question raised by Contention 5 is whether the range of alternatives examined in the SPDEIS should be revisited in light of new information. To dismiss this contention based on Duke's absurdly narrow re-casting of the purpose of the proposed action would defy the NEPA "rule of reason."

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to determine whether the proposed site is environmentally acceptable,' and not, as in the case of a publicly funded project, 'to undertake to locate what EPA would consider to be the optimum site for a new facility.'") (emphasis added)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2003, copies of Blue Ridge Environmental Defense League's Response to Board Questions were served on the following by e-mail and/or first-class mail, as indicated below:

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