

December 24, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
DUKE ENERGY CORPORATION) Docket Nos. 50-413-OLA
(Catawba Nuclear Station, Units 1 and 2)) 50-414-OLA

NRC STAFF'S REPLY TO
BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S RESPONSE
TO BOARD QUESTION 2(c) (LEGAL EFFECT OF COMMISSION'S TERRORISM RULINGS)

INTRODUCTION

During the pre-hearing conference on December 3 and 4, 2003, in Charlotte, North Carolina, the Atomic Safety and Licensing Board (Board) requested further information from the parties regarding specific issues. See December 4, 2003 Transcript of Pre-Hearing Conference Tr. at 278-280. On December 15, 2003, the Board issued an Order (Regarding Deadlines and Scheduling Issues), setting deadlines for the parties to respond to the Board's questions. The Blue Ridge Environmental Defense League (BREDL) filed its response on December 12, 2003.¹ The NRC staff (Staff) hereby submits its reply to BREDL's response to question 2(c) as designated in the ASLB's December 15, 2003 Order.

¹ See "Blue Ridge Environmental Defense League's Response to Board Questions," December 12, 2003 (BREDL's Response).

DISCUSSION

The Board asked BREDL to explain its assertion that the Commission's decisions,² which hold that environmental impact statements (EIS) are inappropriate forums for evaluations of terrorist attacks, do not apply to Duke's environmental report (ER). The ER does not evaluate the environmental impacts of a terrorist attack on plutonium being shipped to and from France. See December 4, 2003 Transcript of Pre-Hearing Conference Tr. at 129-31, 279. In its response, BREDL asserts that the Commission's decisions do not apply to Duke's license amendment application because Duke submitted its application to irradiate MOX under the United States-Russian plutonium disposition program. BREDL's Response at 6. BREDL argues that the Department of Energy (DOE) previously determined that the impacts of terrorist attacks on plutonium shipments were within the scope of the program's environmental analysis and, therefore, Duke's application to the NRC to irradiate MOX LTAs, as well as the proceeding before the NRC, is governed by DOE's past decision concerning the scope of environmental analyses. *Id.* BREDL's argument is without merit.

BREDL does not cite to a specific portion of any DOE document in which DOE "determined that the scope of the environmental analysis for this program includes the impacts of terrorist attacks on plutonium shipments." *Id.* BREDL contends that this proposition is contained in Appendix G of the Programmatic Environmental Impact Statement for Storage and Disposition of Weapons-Usable Fissile Materials (DOE/EIS-0229) (1996) (PEIS),³ but fails to indicate the exact

² *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 347 (2002). See also *Pacific Gas & Electric Company* (Diablo Canyon Power Plant Independent Fuel Storage Installation), CLI-03-1, 57 NRC 1, 6-8 (2003); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 1), CLI-02-27, 56 NRC 367, 370-71 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335, 338-339 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 365 (2002).

³ Appendix G of the PEIS is available on DOE's website at
(continued...)

location of this determination in the twenty-eight page appendix. BREDL's Response at 6. Section G.6 of Appendix G briefly mentions preparations taken to defend against terrorist attacks during transport, but does not discuss the environmental impacts of a terrorist attack on a plutonium shipment as BREDL asserts.⁴ PEIS at G-26. Regardless, any determination in Appendix G as to the scope of environmental impacts to be evaluated would pertain to the EIS that DOE was preparing for the program itself, and not future ERs prepared by applicants filing license application amendments with the NRC. Furthermore, Appendix G is silent as to the scope of environmental effects to be evaluated in future ERs submitted by licensees seeking to irradiate weapons-grade plutonium; therefore, BREDL's assertion that DOE determined that the impacts of terrorist attacks on overseas plutonium shipments falls within the scope of the environmental analysis is without merit.

Moreover, even if BREDL is correct, Duke is not required to comply with DOE's purported decision merely because Duke submitted its application to the NRC under DOE's program. BREDL's Response at 6. As previously stated by the Staff in its "Reply to Blue Ridge Environmental Defense League's Response to Board Questions," dated December 19, 2003, Duke's participation in the DOE program and the source of the plutonium Duke wishes to irradiate are irrelevant to the Staff in its decision making process, which is to determine whether the applicant's submission complies with Atomic Energy Act (AEA), National Environmental Policy Act

³(...continued)

<http://www.tis.eh.doe.gov/nepa/documents.html>. In the box labeled "Search ES&H" type "DOE/EIS-0229." Click on document that has 6 Kbytes, and is numbered 7 of 11.

⁴ At the pre-hearing conference, BREDL asserted that page 11 of DOE's November 2003 Supplement Analysis, titled "Fabrication of Mixed Oxide Fuel Lead Assemblies in Europe," which Duke has adopted as part of its application, discusses the impacts of terrorist attacks on the transportation of plutonium. See 12/4/03 Tr. at 118. The Supplement Analysis, however, discusses plans to defend against terrorism, and not environmental impacts from a terrorist attack on plutonium shipments. See "Answer of Duke Energy Corporation to the 'Blue Ridge Environmental Defense League's Supplemental Petition to Intervene' and the 'Contentions of the Nuclear Information and Resource Service,'" dated November 11, 2003, Addendum A at 11.

(NEPA), and the Commission's regulations. The fact that Duke submitted its application under DOE's program does not bestow on the NRC the authority to require an evaluation in an ER of the effects of terrorist attacks on overseas plutonium shipments where neither the AEA, NEPA nor the regulations compel one. Therefore, BREDL's argument that Duke must evaluate the effects of terrorist attacks on plutonium shipments in its ER because it applied under DOE's program fails.

Further, the application under review here in is to irradiate MOX LTAs. Duke is not applying to the NRC for a license to ship plutonium to and from France; that is the subject of an application for an export license filed by DOE and now pending before the NRC. Thus, the NRC will not review the environmental impacts of shipping plutonium overseas in conjunction with this application to irradiate MOX LTAs at Catawba.

The Commission's past decisions holding that the evaluation of terrorist attacks is beyond the purview of NEPA apply to Duke's application to irradiate MOX LTAs. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 347 (2002). In finding that EISs are inappropriate forums for evaluations of terrorist attacks, the Commission explained that:

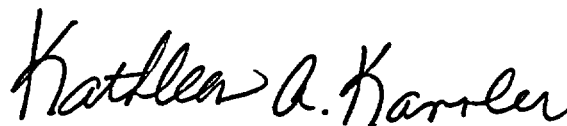
... an EIS is not an appropriate format to address the challenges of terrorism. The purpose of an EIS is to inform the decisionmaking agency and the public of a broad range of environmental impacts that will result, with a fair degree of likelihood from a proposed project, rather than to speculate about "worst-case" scenarios and how to prevent them.

By its own terms NEPA is not absolute. It directs federal agencies "to use all practicable means, consistent with other considerations of national policy," in environmental reviews. The NEPA process is governed by a "rule of reason." It does not extend to all conceivable consequences of agency decisions, no matter how far down the causal chain from a nuclear licensing decision and no matter how unpredictable.

Id. The Commission found that "the possibility of a terrorist attack . . . is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA." *Id.* at 349. The Commission further explained that "attempts to evaluate that threat

even in qualitative terms are likely to be meaningless and consequently of no use in the agency's decisionmaking." *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335, 338 (2002). In addition, the Commission stated that one of the purposes of NEPA, which is to inform the public of the environmental impacts of a major federal action, would be undermined if the environmental effects of terrorism were evaluated under NEPA, because the results would not be available to the public due to safeguards and physical security concerns. *See id.* at 338-39; *Private Fuel Storage*, 56 NRC at 347, 354-57. Pursuant to the Commission's past decisions, the Staff will not evaluate the effects of terrorist attacks in its environmental analysis, and therefore Duke's ER does not need to address this matter.

Respectfully submitted,

A handwritten signature in black ink that reads "Kathleen A. Kannler". The signature is written in a cursive style with a large initial 'K'.

Kathleen A. Kannler
Counsel for NRC staff

Dated at Rockville, Maryland
this 24th day of December, 2003