

March 17, 2005

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

DOCKETED  
USNRC

March 18, 2005 (8:00am).

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of )

DUKE COGEMA STONE & WEBSTER )

(Savannah River Mixed Oxide Fuel  
Fabrication Facility) )

Docket No. 0-70-03098-ML

ASLBP No. 01-790-01-ML

**GEORGIANS AGAINST NUCLEAR ENERGY'S  
MOTION FOR LEAVE TO REPLY TO DCS AND NRC STAFF RESPONSES TO  
LATE-FILED CONTENTIONS REGARDING FINAL ENVIRONMENTAL  
IMPACT STATEMENT FOR PROPOSED PLUTONIUM MOX FUEL  
FABRICATION FACILITY**

Georgians Against Nuclear Energy ("GANE") hereby moves for leave to reply to the oppositions submitted by Duke Cogema Stone & Webster ("DCS") and the Staff of the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") to GANE's late-filed contentions regarding NUREG-1767, Final Environmental Impact Statement on the Construction and Operation of a Proposed Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina (January 2005) (hereinafter "FEIS"). See DCS Opposition to GANE's Late-Filed Contentions on the MOX Facility Final Environmental Impact Statement (March 10, 2005) (hereinafter "DCS Opposition") and NRC Staff's

Response to Late-Filed NEPA Contentions Submitted by Georgians Against Nuclear Energy (March 10, 2005) (hereinafter "NRC Staff Response").

Although the NRC's regulations do not specifically provide an opportunity for replies to responses to contentions, it is well-established that petitioners are entitled to an opportunity to reply. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-5465, 10 NRC 521, 525 (1979); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 72-73 (1981). GANE seeks permission to reply to various arguments by DCS and the Staff which mischaracterize GANE's contentions, the history of the proceeding, and the governing law. GANE respectfully submits that it would be unfair for the Atomic Safety and Licensing Board to dismiss GANE's contentions before GANE has had an opportunity to be heard in reply to DCS and the Staff. *Id.*

GANE's counsel has contacted counsel for DCS and the NRC Staff regarding this motion. Both stated that they intend to oppose this motion.

Respectfully submitted,



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GEORGIANS AGAINST NUCLEAR ENERGY'S  
REPLY TO DCS AND NRC STAFF RESPONSES TO LATE-FILED  
CONTENTIONS REGARDING FINAL ENVIRONMENTAL IMPACT  
STATEMENT FOR PROPOSED PLUTONIUM MOX FUEL FABRICATION  
FACILITY

I. INTRODUCTION

On February 28, 2005, Georgians Against Nuclear Energy ("GANE") submitted two late-filed environmental contentions regarding NUREG-1767, Final Environmental Impact Statement on the Construction and Operation of a Proposed Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina (January 2005) (hereinafter "FEIS"). Georgians Against Nuclear Energy's Late-Filed Contentions Regarding Final Environmental Impact Statement for Proposed Plutonium MOX Fuel Fabrication Facility (hereinafter "GANE's Contentions"). Both Duke Cogema Stone & Webster ("DCS") and the Staff of the U.S. Nuclear Regulatory Commission ("NRC" or

“Commission”) oppose the admission of the contentions. DCS Opposition to GANE’s Late-Filed Contentions on the MOX Facility Final Environmental Impact Statement (March 10, 2005) (hereinafter “DCS Opposition”) and NRC Staff’s Response to Late-Filed NEPA Contentions Submitted by Georgians Against Nuclear Energy (March 10, 2005) (hereinafter “NRC Staff Response”).

As demonstrated below, neither DCS nor the Staff has demonstrated that GANE’s contentions are inadmissible or that they do not satisfy a balancing of the late-filing criteria in 10 C.F.R. § 2.714(a)(1).

## **II. ARGUMENT**

### **A. Contention 21 Is Admissible.**

Contention 21 asserts that the FEIS is inadequate to satisfy the requirements of NEPA because it fails to provide an up-to-date discussion of the environmental impacts of liquid radioactive waste disposal. The contention is based on an announcement by the U.S. Department of Energy (“DOE”) in its budget proposal for 2006, that the DOE has suspended its plan to build the Waste Solidification Building (“WSB”), which would convert the liquid radioactive waste to solid waste. The WSB is the principal means identified by the FEIS for disposing of the large volume of liquid radioactive waste that will be generated at the proposed MOX Facility.

DCS argues that GANE has not raised a genuine and material factual dispute regarding the adequacy of the FEIS because the DOE has not actually cancelled the WSB. DCS Opposition at 12. According to DCS, “the WSB remains the baseline approach for the treatment of MOX Facility liquid wastes.” *Id.* In the absence of an

actual decision by the DOE to cancel the WSB, DCS contends that other alternatives for waste treatment need not be considered because they are “remote and speculative.” *Id.*<sup>1</sup> Similarly, the Staff characterizes the question of whether the DOE will complete the WSB as an “uncertainty” that should not have any effect on the proceeding. NRC Staff Response at 16.

The question before the Atomic Safety and Licensing Board (“ASLB”) is whether GANE has submitted sufficient evidence to show the existence of a genuine dispute with DCS and the NRC Staff regarding the adequacy of the FEIS to address the environmental impacts of the high-alpha liquid radioactive waste stream to be generated by the proposed MOX Facility. 10 C.F.R. § 2.714(b)(2)(iii). As previously established in this proceeding, these impacts cannot be dismissed as inconsequential. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 443 (2001) (hereinafter “LBP-01-35”). GANE has offered the DOE’s 2006 budget proposal as evidence that the DOE is not firmly committed to the WSB as a means for disposing of the high-alpha liquid waste stream.

Moreover, there is nothing infirm or speculative about the evidence presented in Contention 21. The narrative in the DOE’s budget explains that DOE has placed the “detailed design” of the WSB “on hold” and is investigating other unnamed alternatives “involving the use of existing facilities to provide radioactive waste treatment capabilities at the Savannah River Site.” DOE/ME-0046, Volume 1, Department of Energy FY 2006

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<sup>1</sup> DCS also argues that GANE “mischaracterizes” the DOE’s budget request “by suggesting that DOE has made a decision to cancel the WSB.” *Id.* To the contrary, GANE has not asserted that the DOE has cancelled the WSB, but rather has correctly observed that the DOE has put its plan for the WSB on hold.

Congressional Budget Request, National Nuclear Security Administration at 528 (February 2005) (hereinafter "DOE Budget Request").<sup>2</sup> The DOE does not expect to make a decision until "later in FY 2005." *Id.* at 531.<sup>3</sup> The DOE's announcement thus throws into dispute the question of whether the FEIS for the MOX Facility adequately addresses the environmental impacts of liquid radioactive waste disposal by discussing the impacts of using the WSB.

DCS also cites *Andrus v. Sierra Club*, 442 U.S. 347, 349 (1979) for the proposition that the NRC should not be required to prepare an EIS or to supplement an existing FEIS "merely because another agency chose to defer funding for an ongoing project for a single year in order to consider potential changes to the project." DCS Opposition at 13. *Andrus v. Sierra Club* held that an agency's appropriation request to Congress does not constitute a "proposal for legislation" that triggers an EIS under Section 102(2)(C) of the National Environmental Policy Act ("NEPA"). The information relied on by GANE is not DOE's request for Congressional funding, but its announcement that it has decided to suspend a measure on which the NRC has relied in the EIS for the MOX Facility to mitigate the environmental impacts of the proposed action. Moreover, the "single year" in which the DOE has chosen to suspend work on the WSB is the same year in which the NRC proposes to allow DCS to go ahead with construction of the MOX Facility, based in part on the assumption that the high-alpha

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<sup>2</sup> See Exhibit 1 to GANE's Contentions.

<sup>3</sup> The NRC Staff incorrectly states that Contention 21 asserts that the DOE 'expects to make a decision' on the WSB sometime before October 1 of this year." NRC Staff Response at 13. GANE did not make any representation regarding October 2005, and is not aware of any fixed target month for the decision.

liquid radioactive waste stream will be treated in the WSB. The DOE's statement in its FY 2006 budget proposal constitutes the best available evidence of how the DOE's activities are likely to affect the environmental impacts of the proposed MOX Facility, and therefore should be considered in weighing the admissibility of the contention.

The Staff argues that the point at which the Staff should determine whether to supplement the FEIS would be if and when the DOE publishes a Record of Decision ("ROD") announcing any decision to cancel the WSB. NRC Staff Response at 14. *See also* DCS Opposition at 15. But the Staff fails to acknowledge that the DOE is independent of DCS and therefore has no obligation to make a decision about the WSB before construction of the proposed MOX Facility is authorized. In contrast, the NRC does have a legal obligation to ensure that all of the environmental impacts of the proposed MOX Facility are addressed before construction is authorized. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Given that the DOE's announcement has cast significant doubt on whether the WSB will be built, the NRC can no longer rely on the FEIS' discussion of the WSB for its discussion of the environmental impacts of disposing of the liquid high-alpha waste stream.

The Staff also disputes GANE's assertion that by suspending its plans for the WSB, the DOE has made a major change to the proposed action. NRC Staff Response at 15. According to the Staff, the WSB is a "connected action," not part of the proposed action. The Staff misses GANE's point that part of the proposed action is the generation of a large quantity of high-alpha liquid radioactive waste, whose impacts must be addressed in the Environmental Report and the EIS for the proposed MOX Facility. In

the Environmental Report and the FEIS, DCS and the NRC Staff addressed these impacts by asserting that the high-alpha liquid radioactive waste would be converted to solid waste in the WSB, and then disposed of at the Waste Isolation Pilot Project. While the WSB is not DCS' own project, DCS and the Staff nevertheless rely on the WSB as a means for mitigating the environmental impacts of the liquid high-alpha radioactive waste stream.

Thus, regardless of the fact that the WSB is a project of the DOE and not DCS, its assumed existence constitutes a central feature of DCS' and the NRC Staff's analyses of the environmental impacts of the proposed action in both the Environmental Report and the FEIS. The DOE's decision to suspend its plans for the WSB has a corresponding negative effect on the adequacy of those analyses. As the Licensing Board ruled in admitting GANE's original Contention 11 on this issue:

The fact that the waste ultimately will be turned over to DOE, and therefore is not within the jurisdiction of either DCS or NRC once the waste leaves the MFFF, does not relieve DCS of its obligation, in the absence of any DOE analysis of the high-alpha waste, to analyze and address in the ER the environmental impacts of the wastes it generates.

LBP-01-35, 54 NRC at 443.<sup>4</sup>

Finally, the Staff argues that the contention is inadmissible because it does not identify a difference between DCS' Environmental Report and the FEIS. NRC Staff Response at 13, citing 10 C.F.R. § 2.714(b)(2)(iii). This regulation requires petitioners to

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<sup>4</sup> For this reason, the Staff's argument that the contention falls outside the scope of the hearing notice must also be rejected. *See* NRC Staff Response at 15. The fact that the WSB is not part of DCS's construction authorization request does not preclude the ASLB from inquiring into the adequacy of the FEIS to addresses the environmental impacts of the proposed MOX Facility in the absence of a firm plan for construction of the WSB.



base their environmental contentions on the applicant's environmental report in the first instance, and allows the petitioner to amend its contention if the language of the FEIS differs significantly from the language of environmental report. Nothing in the regulation, or in the cases cited by the Staff at page 13 n.28, holds otherwise.<sup>5</sup>

**B. Contention 21 Satisfies a Balancing of the Late-Filing Criteria.**

DCS does not dispute GANE's good cause in the late-filing of Contention 21, but objects to the late filing on other grounds. DCS Opposition at 8.<sup>6</sup> In particular, DCS emphasizes the third factor, citing a previous decision by this Board that GANE's failure to identify an expert witness or summarize the expert's testimony precluded admission of several late-filed environmental contentions under a balancing of the late-filing criteria.

*Id.*, citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), unpublished Memorandum and Order (Denying Admission of Late-Filed Contentions), slip op. at 8 (November 19, 2002) (hereinafter "11/19/02 Decision").

DCS overlooks a crucial distinction between the circumstances of the 11/19/02 Decision and Contention 21. In the 11/19/02 Decision, the ASLB found that GANE lacked good cause for its late-filed contentions. *Id.* Here, in contrast, DCS has not argued that GANE lacks good cause. As the ASLB observed, where good cause is not

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<sup>5</sup> Moreover, at this point it is appropriate for GANE to base its contentions on the FEIS, which has superseded the environmental report as the relevant environmental document in the case. See *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 385 (2002), quoting *Louisiana Energy Services, L.L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998) ("In the end, it is the NRC Staff that 'bears the ultimate burden of demonstrating that environmental issues have been adequately considered.'")

<sup>6</sup> The Staff opposes Contention 21 on timeliness grounds, but fails to identify any reason why the contention is untimely. NRC Staff Response at 9.

found, there must be a “compelling showing” on the other four factors – especially the third and fifth factors. *Id. See also Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 589 (1982). Here, GANE need not make a compelling showing on the other four factors because it has good cause. In any event, it does not appear to GANE that an expert witness is necessary with respect to Contention 21, because it does not take any particular technical expertise to determine whether or not the DOE has suspended its plans for the WSB.<sup>7</sup>

**C. Contention 22 Is Admissible.**

Contention 22 asserts that the FEIS is inadequate to satisfy the requirements of NEPA because it fails to consider immobilization as an alternative for mitigation of the environmental impacts from surplus plutonium disposal. The contention is based on the fact that while the DOE dropped consideration of immobilization as an alternative in 2002, it recently revived the alternative and has proposed to spend \$10 million investigating it in its FY 2006 budget request.

DCS claims that GANE has mischaracterized the DOE’s budget request. According to DCS, DOE has not “revived” the immobilization option for “the 34 MT of surplus weapons-grade plutonium that is suitable for MOX fuel.” DCS Opposition at 19-

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<sup>7</sup> DCS also argues that the fifth factor should weigh against admission of the contention, because DOE “has not changed the WSB baseline described in the FEIS” and because “the WSB is not subject to NRC licensing.” DCS Opposition at 11 (emphasis in original). Given that DCS has conceded GANE’s good cause for the late-filed contention, however, this factor should be given little weight. In any event, the fact remains that the “WSB baseline” does appear to have changed, as the result of DOE’s decision to suspend its plans for detailed design of the WSB. Moreover, the fact that the DOE and not the NRC is responsible for the change should not increase GANE’s burden with respect to this factor.

20. DOE claims that its position is supported by the DOE documents that GANE has attached to the contention as exhibits. But DCS never grapples with the internal contradiction in these documents that is highlighted in Contention 22. As stated in the contention:

DOE seems to simultaneously count the six MT of surplus plutonium from Rocky Flats as “alternate feedstock” that is to be converted to MOX fuel, at the same time it that counts the Rocky Flats plutonium as part of the 13 tons of surplus plutonium for which there is no disposition path. The two inconsistent propositions can be found on the same page of the Report to Congress:

Subsequent to the 2002 decision [to drop the immobilization alternative], DOE determined that some surplus plutonium materials originally intended for immobilization could be processed and used to manufacture mixed oxide fuel. DOE issued the “Amended Record of Decision, Surplus Plutonium Disposition Program,” published in the Federal Register, Vol. 68, p. 20134, April 24, 2003, indicating that *about six metric tons of plutonium originally intended for immobilization could potentially be used as an alternative feedstock for the manufacture of mixed oxide fuel.* Therefore, with 34 metric tons of surplus plutonium to be dispositioned through the MOX fuel program, approximately 16 metric tons would be without a disposition path. However, about three metric tons of this surplus plutonium has subsequently been reclassified as programmatic feed material, resulting in a total of up to approximately 13 metric tons of surplus plutonium that currently is without a disposition path.

*All of the plutonium currently at SRS, which now includes all the surplus non-pit material once stored at the RGETS [Rocky Flats] is part of the 13 metric tons of surplus plutonium discussed above.*

*Id.* at 6 (emphasis added). As demonstrated in the 4/24/03 Amended ROD, DOE is counting the 6.5 MT of surplus plutonium from Rocky Flats as “alternate feedstock,” which will be part of the 34 MT of plutonium that will be converted to MOX fuel. *See* discussion above at 13. As reflected in the last paragraph of the above-quoted passage from the Report to Congress, DOE is also counting the 6.5 MT of surplus plutonium from Rocky Flats as part of the 13 MT for which there now exists no “disposition path.”

GANE’s Contentions at 15-16. Thus, as argued in the contention, the DOE has contradicted itself and created confusion regarding its intended means of disposing of the

6.5 MT of surplus plutonium that were originally slated for immobilization and re-assigned to MOX production in the DOE's April 24, 2003, Amended Record of Decision. The result is that the DOE has now opened for question what portion of the 34 tons of surplus plutonium that is described in the FEIS as slated for MOX production should be re-assigned to immobilization. At the very least, the FEIS should evaluate the appropriate disposition path for the 8.5 MT of surplus plutonium that were slated for immobilization under the U.S. Russian Agreement, including the 6.5 MT of Rocky Flats now designated as "alternate feedstock." GANE's Contentions at 18.

Moreover, contrary to DCS' argument at pages 21-22, Contention 22 raises an entirely different issue than the issue that was raised in GANE's previous contentions on the subject of immobilization. Those contentions challenged the reasonableness of DCS' and the NRC Staff's decisions to exclude immobilization from the alternatives considered in the Environmental Report and Draft EIS after the DOE had dropped consideration of the alternative. Here, in contrast, the DOE itself has established the reasonableness of the immobilization alternative by reviving it. Moreover, DOE's recent correspondence strongly indicates that for at least some portion of the 34 MT of surplus plutonium now slated for MOX fuel production, immobilization may be a preferable alternative.

DCS also argues that "GANE is attempting to cause a review of the DOE NEPA process and DOE decisions, even though DOE's NEPA process and DOE's prior decisions are not subject to the NRC licensing proceedings for the MOX Facility." DCS Opposition at 22 n.54. As this Board ruled in LBP-01-35, the NRC may rely on previous DOE NEPA analyses where those analyses are bounding. 54 NRC at 443. But no such

bounding analysis exists here. There is no DOE NEPA analysis that provides an up-to-date explanation of why the DOE has reversed course with respect to the immobilization alternative, identifies the portion of the surplus plutonium inventory formerly slated for MOX fuel production for which the DOE now considers immobilization to be appropriate, or explains the DOE's technical criteria for making that determination.<sup>8</sup>

DCS argues that DOE's funding request for the conceptual design of an immobilization facility is not a decision to immobilize plutonium, and therefore provides too speculative a basis for the contention. DCS Opposition at 23. In contrast to its previous statement that it intended to pursue a "preliminary investigation" of the immobilization alternative (*see* Exhibits 3 and 4 to GANE's Contentions), however, the DOE's proposed commitment of funds to actually design an immobilization facility constitutes concrete evidence of the DOE's intent to pursue the immobilization alternative. GANE respectfully submits that the statements made by DOE in its 2006 budget proposal reflect a reasonable degree of commitment to the immobilization alternative.<sup>9</sup>

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<sup>8</sup> DCS repeatedly asserts that the DOE has not repudiated its rationale for dropping the immobilization alternative in 2002, and that the rationale remains "valid." DCS Opposition at 19 and 22 n.54. Given the blatant inconsistency of the DOE's revival of the immobilization alternative with its previous decision to drop the immobilization alternative, however, the DOE's rationale can hardly be considered valid or viable under NEPA's rule of reason.

<sup>9</sup> It should also be noted that in the context of the late-filed criteria, both DCS and the Staff argue that GANE has waited too long to submit Contention 22, but should have raised the issue when the DOE first announced its preliminary investigation. *See* discussion below in Section D. DCS and the Staff should not be allowed to have it both ways.

Finally, DCS argues that a budget request is not sufficient to trigger supplementation of an EIS. *Id.*, citing *Sierra Club v. Andrus*. GANE does not rely on the budget request as a “trigger” but as evidence that in spite of statements in its NEPA documents, the DOE is actively pursuing the immobilization alternative; and that therefore the NRC no longer has a reasonable basis for avoiding a discussion of the immobilization alternative.

**D. Contention 22 Satisfies a Balancing of the Late Filing Criteria.**

Both DCS and the NRC Staff argue that GANE has failed to meet the good cause criterion of the late-filing standard, because it could have raised Contention 22 when the DOE first notified Congress of its intention to investigate the immobilization alternative. DCS Opposition at 16-17, NRC Response at 7-8. The letters written by DOE to Congress in May and June of 2004, however, referred to the DOE’s investigation of immobilization as “preliminary.” *See* GANE’s Contentions, Exhibits 3 and 4. While a feasibility study was promised, none ever appeared. Thus, it was not clear at that point that DOE actually intended to pursue the immobilization alternative beyond the stage of a preliminary inquiry. GANE reasonably waited until DOE announced its intention to go ahead with a conceptual design for an immobilization facility before filing a contention.

Moreover, as discussed above in the context of Contention 22’s admissibility, DCS and the Staff have argued that the DOE’s budget proposal is too “speculative” a basis for the contention. The fact that DCS and the Staff each hold such internally inconsistent positions regarding the appropriate timing of the contention only serves to confirm GANE’s reasonableness in filing it now. In any event, even if the ASLB finds

that GANE did not have good cause to wait to file Contention 22 until now, GANE respectfully submits that it satisfies the other late-filing criteria, for the reasons stated in GANE's Contentions at pages 19-21.

### III. CONCLUSION

For the foregoing reasons, the ASLB should admit Contentions 21 and 22.

Respectfully submitted,



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March 17, 2005

## CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2005, the foregoing GEORGIANS AGAINST NUCLEAR ENERGY'S REPLY TO DCS AND NRC STAFF RESPONSES TO LATE-FILED CONTENTIONS REGARDING FINAL ENVIRONMENTAL IMPACT STATEMENT FOR PROPOSED PLUTONIUM MOX FUEL FABRICATION FACILITY and GEORGIANS AGAINST NUCLEAR ENERGY'S RESPONSE TO NRC STAFF MOTION FOR PROTECTIVE ORDER and motion for leave to file the Reply were served on the following by e-mail and first-class mail:

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