

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 9921

ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

DUKE COGEMA STONE & WEBSTER
(Savannah River Mixed Oxide Fuel
Fabrication Facility)

Docket No. 070-03098-ML

ASLBP No. 01-790-01-ML

April 29, 2005

MEMORANDUM

(Explaining Earlier Denial of Admission of Late-Filed Contentions)

On March 24, 2005, we issued an order finding that the two late-filed contentions of Georgians Against Nuclear Energy (GANE) concerning 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) (FEIS), were inadmissible.¹ This memorandum elaborates on our reasons for denying the admission of GANE's contentions.

The Commission directed, early in this 10 C.F.R. Part 2, Subpart L proceeding, that contentions are to be evaluated for admissibility under 10 C.F.R § 2.714(b)(2), one of the procedural rules governing formal 10 C.F.R. Part 2, Subpart G proceedings.² The Commission also made 10 C.F.R. § 2.714(a)(1)(i)-(v), which sets forth the standard for late-filed contentions,

¹ See Order (Denying Admission of Late-Filed Contentions) (Mar. 24, 2005).

² See 66 Fed. Reg. 19,994, 19,996 (Apr. 18, 2001).

applicable to this proceeding.³ Because the Board finds that the contentions are inadmissible under 10 C.F.R § 2.714(b)(2), it is unnecessary to consider whether the contentions satisfy 10 C.F.R. § 2.714(a)(1)(i)-(v).

GANE contention 21 claims that the FEIS is inadequate to satisfy NEPA because it fails to provide a current discussion of the environmental impacts from liquid radioactive waste streams for the proposed MOX Facility.⁴ As stated in the FEIS, the MOX Facility would generate a large volume of liquid radioactive waste that will be processed in DOE's Waste Solidification Building (WSB).⁵ According to GANE, DOE has suspended its plans to process the liquid waste generated by the MOX Facility in the WSB while it explores "other unnamed waste disposal alternatives."⁶ GANE argues, therefore, that given the uncertainty DOE has introduced as to how it will process the waste, the discussion in the FEIS on waste disposal impacts can no longer satisfy NEPA's requirement that "the reasonably foreseeable environmental impacts of the proposed action have been examined."⁷

GANE argues that the NRC, as a federal agency, is required by NEPA to address "reasonably foreseeable impacts" for all proposed actions that might have a significant impact

³ See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478, 480-81 (2001).

⁴ See Georgians Against Nuclear Energy's Late-Filed Contentions Regarding Final Environmental Impact Statement for Proposed Plutonium MOX Fuel Fabrication Facility (Feb. 28, 2005) [hereinafter GANE Contentions] at 2.

⁵ See id. at 4, 6.

⁶ Id. at 6 (citing DOE/ME-0046, Volume 1, Department of Energy FY 2006 Congressional Budget Request, National Nuclear Security Administration at 528 (Feb. 2005) [hereinafter DOE Budget Request]).

⁷ Id. at 6-7.

on the environment.⁸ According to GANE, an agency is also required to continue to gather and evaluate new information that may affect the proposed actions' environmental impacts.⁹ Therefore, GANE concludes, if there are any substantial changes to a proposed action that raise environmental concerns, the NRC must supplement the EIS.¹⁰

GANE urges that DOE's suspension of its plans to build the WSB amounts to a "substantial change" to the proposed MOX facility, and thus the Board should consider the FEIS incomplete until DOE has determined whether to continue with its plans to build and operate the WSB. Additionally, GANE continues, if DOE decides to pursue a method of waste disposal that is both significantly different from the WSB and has not been circulated for public comment, then the NRC will need to supplement the FEIS accordingly.¹¹

DCS opposes the admission of GANE contention 21 claiming that it fails to raise a genuine issue of material fact or law.¹² DCS notes that DOE has not made plans to cancel the WSB, but only has not sought additional funds for the WSB for FY 2006. Therefore, DCS argues, the WSB continues to be the "baseline approach for the treatment of MOX Facility liquid wastes."¹³ Further, DCS argues that the DOE Budget Request does not trigger any obligations for the NRC because, not only has no substantial change occurred,¹⁴ but NEPA

⁸ See id. at 3 (citing Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079, 1092 (D.C. Cir. 1973)).

⁹ See id. (citing Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1023-24 (9th Cir. 1980) and 42 U.S.C. § 4332(2)(A), (B)).

¹⁰ See id. (citing 10 C.F.R. § 51.92(a) and Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 374 (1989)).

¹¹ See id. at 7.

¹² See DCS Opposition to GANE's Late-Filed Contentions on the MOX Facility Final Environmental Impact Statement (Mar. 10, 2005) at 11 [hereinafter Applicant Response].

¹³ See id.

¹⁴ See id. at 14.

does not require an analysis of environmental effects of remote or speculative alternatives.¹⁵

The possibility of DOE cancelling its plans to build the WSB, DCS claims, is simply too speculative to warrant the NRC supplementing the FEIS. The NRC Staff agrees with DCS that the mere possibility that DOE might cancel its plans to build the WSB is too speculative.¹⁶

Pursuant to 10 C.F.R. § 51.92(a)(1)-(2), we find that there are no “substantial changes in the proposed action” or any “significant new circumstances or information” relevant to environmental concerns that require supplementation of the EIS. At this point, DOE has not indicated any intention to cancel the WSB. Rather, the DOE Budget Request merely states that the WSB “is on hold pending evaluation of cost-effective alternatives, involving the use of existing facilities to provide radioactive waste treatment capabilities at the Savannah River Site. A decision is expected later in FY 2005.”¹⁷ Because DOE has made no plans to cancel the WSB at this point in time, processing the waste generated by the MOX Facility in the WSB remains the proposed course of action. Accordingly, the FEIS is not out-of-date, as GANE contends, and the NRC does not need to supplement the FEIS at this time.

Should DOE ultimately conclude that it will not continue with its plans to build the WSB, and decide instead to pursue some other alternative method of waste disposal, then DOE must publish, pursuant to 10 C.F.R. § 1021.315(e), an amended Record of Decision in the Federal Register.¹⁸ Cancellation of the WSB, or publication of an amended Record of Decision, would then require the Staff to determine whether to supplement the EIS. Therefore, for the above-

¹⁵ See id. at 12 (citing Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 551 (1978) and Kleppe v. Sierra Club, 427 U.S. 390, 406 (1976)).

¹⁶ See NRC Staff’s Response to Late-Filed NEPA Contentions Submitted by Georgians Against Nuclear Energy (Mar. 10, 2005) at 13 [hereinafter Staff Response].

¹⁷ See DOE Budget Request, Exhibit 1, at 528.

¹⁸ As the NRC staff points out, DOE previously followed this procedure in 2002 when it cancelled the planned immobilization facility at the Savannah River Site. NRC Staff Response at 14 (citing “Surplus Plutonium Disposition Program,” 67 Fed. Reg. 19432 (Apr. 10, 2002)).

mentioned reasons, GANE contention 21 is inadmissible because it fails to raise any genuine issue of material fact or law at this time.

GANE contention 22 asserts that the FEIS is inadequate to satisfy NEPA because it fails to consider immobilization as an alternative to mitigate the environmental impacts of surplus plutonium disposal.¹⁹ Again, relying upon the DOE Budget Request, GANE argues that DOE has revived its previous plan to use immobilization as an alternative to the MOX process.²⁰ GANE claims that the NRC Staff should supplement the FEIS to take into consideration whether immobilization is a suitable alternative for disposal of the 34 metric tons of surplus plutonium currently slated for MOX fuel fabrication.²¹ As with contention 21, GANE contends that the NRC must supplement the EIS if there are any substantial changes to the proposed action that raise issues relevant to environmental concerns.²²

GANE provides a detailed history of the immobilization alternative. It notes that DOE first considered immobilization back in 1999 when it prepared a EIS comparing the environmental impacts of immobilization, MOX production, and long-term storage of 50 metric tons of surplus plutonium.²³ DOE concluded that the best approach for waste disposal was a “hybrid approach” in which 33 (subsequently changed to 34) metric tons of surplus plutonium was designated for MOX fuel, and the remaining 17 metric tons was immobilized.²⁴ DCS then

¹⁹ See GANE Contentions at 7.

²⁰ See id. (GANE notes that DOE dropped consideration of immobilization as an alternative for disposal of the surplus plutonium back in 2002, but that the current DOE Budget Request has proposed spending 10 million dollars re-investigating its use for FY 2006).

²¹ See id. at 7-8.

²² See id. at 9 (citing 10 C.F.R. § 51.92(a)).

²³ See id. at 10 (citing DOE/EIS-0283, Surplus Plutonium Disposition Final Environmental Impact Statement at 1-1 thru 1-2 (Nov. 1999) [hereinafter DOE/EIS-0283]).

²⁴ See id. (citing DOE/EIS-0283 at 102, which notes that the 17 metric tons of plutonium to be immobilized is unsuitable for fabrication into MOX fuel).

submitted an Environmental Report (ER) for the proposed MOX Facility where those 33 metric tons of plutonium were slated for MOX fuel. GANE states that the ER did not address the environmental impacts of immobilization of that fuel but instead indicated that DOE had discussed the impacts of immobilization in previous environmental studies.²⁵

Among its many alternative disposal considerations, GANE indicates that DOE dropped immobilization as the sole method of disposal for all the surplus plutonium after issuing the FEIS based on Russia's concern that immobilization left the plutonium accessible for later use in nuclear weapons, so when suitable, downgrading the plutonium into MOX fuel was the preferable method of disposal.²⁶ DOE published an amended Record of Decision to reflect this conclusion. GANE then claims that the NRC's FEIS, relying on DOE's determination that immobilization is no longer a feasible alternative for that fuel, evaluates only the environmental impacts generated from converting the now 34 metric tons of surplus plutonium into MOX fuel.²⁷

As GANE presents it, DOE again has indicated its intention to consider whether plutonium not suitable for MOX fuel should be immobilized.²⁸ GANE claims that because DOE is now "actively pursuing immobilization as an alternative for disposal of surplus plutonium," the NRC must supplement the EIS with an analysis of the environmental impacts generated by immobilization.²⁹

²⁵ See id. at 11-12.

²⁶ See id. at 12 (citing Surplus Plutonium Disposition Program, Department of Energy, National Nuclear Security Administration, Amended Record of Decision, 67 Fed. Reg. 19432, 19434) (Apr. 19, 2001)).

²⁷ See id. at 14.

²⁸ See id. at 15-17.

²⁹ See id. at 17-18,19.

DCS opposes the admission of GANE contention 22 for several reasons.³⁰ First, DCS claims that GANE is confused as to what fuel DOE plans to dispose of through immobilization.³¹ For whatever fuel DOE may seek to immobilize, DCS contends, the 34 metric tons of surplus plutonium determined to be appropriate for use at the MOX Facility remains set aside for fabrication into fuel at the MOX Facility.³² Therefore, DCS continues, DOE has not “revived” immobilization for those 34 metric tons of surplus plutonium and DOE’s prior grounds for determining that immobilization is not an appropriate alternative for that plutonium remains “accurate and valid.”³³ According to DCS, the plutonium currently being evaluated by DOE for immobilization is “either not suitable for fabrication into MOX fuel, or not allowed under the agreement with Russia.”³⁴ Thus, DCS concludes, because DOE still plans to use the above-mentioned 34 metric tons of plutonium in the MOX fuel fabrication process, the NRC does not need to supplement its EIS to re-consider immobilization as an alternative, and contention 22 fails to present a genuine dispute on a material issue of law or fact and must be rejected.³⁵

The NRC Staff agrees with DCS that contention 22 is inadmissible, and further notes that GANE has failed to explain why the NRC must re-analyze the immobilization alternative in its FEIS after it properly incorporated DOE’s FEIS analysis. In fact, the Staff argues, the NRC concluded that because DOE considered immobilization as an alternative, “a new NRC analysis

³⁰ DCS and the Staff also note that this is not the first time GANE has sought to admit this contention. See DCS Response at 2; Staff Response at 3-4, 17; see also Memorandum and Order (Denying Admission of Late-Filed Contentions) (Nov. 19, 2002) (unpublished) at 5; Memorandum (Denying Admission of Late-Filed Contentions) (July 24, 2003) (unpublished) at 4-6.

³¹ See DCS Response at 19.

³² See id.

³³ Id.

³⁴ Id.

³⁵ See id. at 24.

of this alternative was not required.”³⁶ The Staff further notes that GANE has made no allegations that NRC’s incorporation of DOE’s analysis was improper.³⁷ Further, the Staff claims, GANE fails to identify what analysis the NRC could perform of the immobilization alternative that was not already considered by DOE in the analysis adopted by the NRC.³⁸ The Staff also makes the distinction that any “substantial changes” in DOE’s overall plan for disposal of all the surplus plutonium, does not mean there have been “substantial changes” to DCS’s limited proposal to turn 34 metric tons of that plutonium into MOX fuel.³⁹

We agree with DCS and the Staff that contention 22 is inadmissible because GANE has not demonstrated that the FEIS is incomplete. As the Staff correctly notes, both the Council on Environmental Quality and the NRC regulations not only endorse, but encourage the NRC to “incorporate” the analysis of another agency in preparing an EIS “to eliminate repetitive discussions of the same issues.”⁴⁰ In both the draft and final EIS’s, the Staff referenced and adopted DOE/EIS-0283 and its analysis on several immobilization alternatives for the surplus plutonium. As provided in DOE/EIS-0283, DOE considered several variations of plutonium disposal, from immobilizing all 50 metric tons of the surplus plutonium to a hybrid approach that immobilized some of the plutonium and converted some of the plutonium into MOX fuel.⁴¹ Therefore, DOE has already analyzed immobilization as an alternative method of disposal for the surplus plutonium. Any “revival” at this point to return to immobilization as an alternative

³⁶ NRC Staff Response at 17 (citing draft and final EIS at 2-23).

³⁷ See id.

³⁸ See id. at 18.

³⁹ See id.

⁴⁰ Id. at 17-18 (citing 40 C.F.R. § 1502.28 and 10 C.F.R. Part 51, Appendix A, Section 1(b)).

⁴¹ See DOE/EIS-0283 at 2-2, 2-9, 2-10, 2-21, 2-29, 2-63.

means of waste disposal does not generate any NEPA obligations because its environmental impacts has already been considered. As a properly incorporated document, the analysis provided in DOE/EIS-0283 is contained in the NRC EIS, and thus the EIS is complete in this regard.

Furthermore, DOE has not indicated that the 34 metric tons of plutonium slated for MOX fuel production is now slated for immobilization. As the DOE budget documents cited by GANE clearly indicate, any “revival” of immobilization plans is solely for plutonium that is not suitable to be fabricated into MOX fuel. As these documents state, DOE is examining immobilization “to prepare excess plutonium that cannot be fabricated into MOX fuel” (emphasis added).⁴² They further provide that immobilization should be examined “to enable disposition of plutonium stored at Savannah River Site that cannot be converted into mixed oxide fuel.”⁴³ As the budget documents clearly state, the 34 metric tons of plutonium that DCS will turn into MOX fuel for DOE are not being considered for immobilization. Thus, any changes DOE may possibly make to its disposal plans for the remaining plutonium that is not suitable for MOX fuel production have no affect on DCS’s plan to use the suitable plutonium for MOX fuel.

⁴² GANE Contentions at 15 (quoting Letter from Spencer Abraham, DOE Secretary, to Hon. John T. Conway, Chairman, Defense Nuclear Facilities Safety Board, Attach. at 1. (May 28, 2004)).

⁴³ GANE Contentions at 15 (quoting DOE Budget Request).

For the foregoing reasons, both contention 21 and 22 fail to raise a genuine issue of material fact or law and, therefore, are inadmissible.

IT IS SO ORDERED

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁴⁴

/RA/

Thomas S. Moore
ADMINISTRATIVE JUDGE

/RA/

Charles N. Kelber
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 29, 2005

⁴⁴ Copies of this Order were sent this date by Internet e-mail transmission to (1) GANE; (2) BREDL; (3) DCS; and (4) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
DUKE COGEMA STONE & WEBSTER) Docket No. 70-3098-ML
)
(Savannah River Mixed Oxide Fuel)
Fabrication Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM (EXPLAINING EARLIER DENIAL OF ADMISSION OF LATE-FILED CONTENTIONS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 70-3098-ML
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EARLIER DENIAL OF ADMISSION
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Dated at Rockville, Maryland,
this 29th day of April 2005