

June 11, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
SHAW AREVA MOX SERVICES)	Docket No. 70-3098-MLA
Mixed Oxide Fuel Fabrication Facility)	
)	
(License Application for Possession and)	ASLBP No. 07-856-02-MLA-BD01
Use of Byproduct, Source and Special)	
Nuclear Materials))	

NRC STAFF RESPONSE TO
PETITION FOR INTERVENTION AND REQUEST FOR HEARING

INTRODUCTION

On May 14, 2007, the Blue Ridge Environmental Defense League (BREDL), Nuclear Watch South (NWS), and Nuclear Information and Resource Service (NIRS) (collectively, "Petitioners"), pursuant to 10 C.F.R. § 2.309, filed a petition for a hearing ("Petition") on a license application by Shaw AREVA MOX Services ("MOX Services" or "Applicant") for the Mixed Oxide Fuel Fabrication Facility ("MOX Facility") in Aiken, South Carolina.¹ For the reasons stated below, the NRC staff ("Staff") respectfully requests that the Petition be denied.

BACKGROUND

On January 4, 2007, MOX Services filed a license application ("Application") for possession and use of byproduct, source, and special nuclear materials at the MOX Facility. The Staff published a notice of an opportunity for the public to request a hearing in the

¹ The Petition was timely filed but was received after 5 p.m. on May 14, 2007 so, in accordance with 10 C.F.R. § 2.306, one day has been added to the response period.

Federal Register on March 15, 2007. Notice of License Application for Possession and Use of Byproduct, Source, and Special Nuclear Materials for the Mixed Oxide Fuel Fabrication Facility, Aiken, SC, and Opportunity to Request a Hearing, 72 Fed. Reg. 12204 (March 15, 2007) (“Notice”). If licensed, the MOX Facility, located on a portion of DOE’s Savannah River Site (SRS), will convert depleted uranium and surplus weapons-grade plutonium into MOX fuel.

The current Application is the second stage of a two-stage licensing process for the MOX Facility. The Applicant (then Duke Cogema Stone & Webster or “DCS”)² filed a Construction Authorization Request (CAR) for the project on February 28, 2001. See Notice of Acceptance for Docketing of the Application and Notice of Opportunity for a Hearing, on an Application for Authority to Construct a Mixed Oxide Fuel Fabrication Facility, 66 Fed. Reg. 19994 (April 18, 2001). After completing a safety evaluation report (SER)³ and environmental impact statement (EIS)⁴, the Staff issued a construction authorization for the facility on March 30, 2005. Notice of Issuance of Construction Authorization to Duke Cogema Stone & Webster, Charlotte, NC, 70 Fed. Reg. 17721 (April 7, 2005). Petitioners BREDL and NWS (then known as Georgians Against Nuclear Energy or “GANE”) filed petitions for a hearing

² On October 23, 2006, DCS requested a conforming amendment to its construction authorization to reflect a corporate name change. Letter from David Stinson, President, Shaw AREVA MOX Services, LLC, to the Nuclear Regulatory Commission, October 25, 2006 (ADAMS ML063110298). According to the amendment request, DCS’s Board of Governors voted to change DCS’s name to Shaw AREVA MOX Services, LLC on August 23, 2006, but did not make any change in corporate control, financial qualifications, or day-to-day management or operations. Based on the fact that the change involved only a change in name and not a change in corporate ownership, the NRC approved the conforming amendment on November 30, 2006. Letter from Jack Strosnider, Director, Office of Nuclear Material Safety and Safeguards, NRC, to David Stinson, President, Shaw AREVA MOX Services, November 30, 2006 (ADAMS ML063200264).

³ NUREG-1821, “Final Safety Evaluation Report on the Construction Authorization Request for the Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina” (2005).

⁴ NUREG-1767, “Environmental Impact Statement on the Construction and Operation of a Proposed Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina” (2005).

based on the CAR. Both were granted standing,⁵ and a number of contentions were admitted.⁶ All contentions, however, were eventually withdrawn or disposed of through summary disposition, and the CAR proceeding was terminated on July 20, 2005. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-15, 62 NRC 53 (2005).

DISCUSSION

I. Standing

A. Requirements for Standing

A petition for a hearing must demonstrate that the petitioner has standing to intervene. 10 C.F.R. § 2.309(d)(1). In order to demonstrate standing, a petition must: (1) identify the petitioner; (2) state the nature of the petitioner's right under the Atomic Energy Act of 1954, as amended, to be made a party to the proceeding; (3) state the petitioner's interest in the proceeding; and (4) state the possible effect of any order or decision in the proceeding on the petitioner's interest. *Id.* The NRC interprets the requirements of 10 C.F.R. § 2.309(d)(1) in keeping with judicial concepts of standing. *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998). Courts have long applied the "injury-in-fact" test, under which the petitioner must allege an injury-in-fact, "a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision." *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21,

⁵ In the CAR proceeding, the Board stated that GANE and BREDL "have each demonstrated representational standing by showing that at least one of their respective members has standing, i.e., has stated an injury in fact," via an assertion of "threatened harm to their health from unwanted doses of ionizing radiation from the MOX fuel that will be transported from the [MOX Facility] to the mission reactors over the same public highways the Petitioners' members travel because of their close geographic proximity to the [MOX Facility] or the mission reactors." *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 417 (2001).

⁶ NIRS did not seek to intervene in the earlier proceeding.

38 NRC 87, 92 (1993), *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991). This injury must be actual or threatened, rather than abstract and conjectural. *Perry*, CLI-93-21, 38 NRC at 92; *see also Lujan*, 504 U.S. at 560. The injury-in-fact also must be “arguably within the zone of interests protected by the governing statute,” in the case of the NRC, either the Atomic Energy Act or the National Environmental Policy Act. *Yankee*, CLI-98-21, 48 NRC at 195; *Perry*, CLI-93-21, 38 NRC at 92.

Although the Commission has historically presumed standing in power reactor construction and operating license proceedings based on a petitioner’s proximity to the facility, *see, e.g., Virginia Elec. Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979), a presumption of standing based on geographic proximity alone is not applied in cases other than those involving construction and operating licenses for power reactors, including cases involving fuel facilities such as the MOX Facility. *See Georgia Institute of Technology*(Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995). Rather, for all non-reactor licensing cases, a showing of potential harm must be made in addition to a demonstration of geographic proximity. *Id.* Under this “proximity-plus” theory, “a presumption of standing based on geographical proximity may be applied . . . where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.” *Id., citing Sequoyah Fuels Corporation* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n. 22 (1994). Whether a proposed action carries with it an “obvious potential for offsite consequence,” and, if so, at what distance a petitioner can be presumed to be affected, must be determined “on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.” *Id.; see also Exelon Generation Company, LLC and PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580 (2005).

An organization may demonstrate standing by showing “either immediate or threatened injury to its organizational interests or to the interests of identified members.” *Georgia Tech*, CLI-95-12, 42 NRC at 115. If basing its standing on that of a member, “the organization must demonstrate that the individual member has standing to participate, and has authorized the organization to represent his or her interests.” *Id.*

B. Petitioners’ Claims of Standing

Although Petitioners BREDL and NWS⁷ had standing in the proceeding on the CAR, that demonstration of standing was based on detailed arguments related to the potential injury to individual members of the organizations from transportation of MOX fuel from the facility. Transportation issues were relevant only to the environmental report and EIS and are not within the scope of the current proceeding. Instead, the Petitioners’ now claim standing based on the interests of individual members living within a 50 mile radius of the MOX Facility.⁸

Petition at 3-4. The Petitioners seem to argue that offsite consequences may be assumed within a 50 mile radius because Chapter 4 of the EIS states that “population doses [for radiological risks associated with accidents] were calculated for *up to* a distance of 80 km (50 mi) from the release point”. *Id.* at 4; EIS at 4-46 (emphasis supplied). Although not explicitly stated, it appears that the Petitioners argue that there is an obvious potential for off-site consequences up to 50 miles from the facility. Although petitions seeking standing will be construed in favor of the petitioner, *Georgia Tech*, CLI-95-12, 42 NRC at 115, *citing Kelley v. Seldin*, 42 F.3d 1501, 1508 (6th Cir. 1995), the petitioner nevertheless bears the burden of establishing standing. *Commonwealth Edison Co.* (Zion Nuclear Power Station,

⁷ As noted above, GANE was granted standing in the earlier proceeding. Although the organization has not presented documentation of the name change, NWS holds itself out as a new incarnation of GANE.

⁸ None of the three organizations claim immediate or threatened injury to their organizational interests resulting from the licensing of the proposed MOX Facility.

Units 1 and 2), CLI-00-05, 51 NRC 90, 98 (2000). Because a determination as to whether and at what distance from a facility a petitioner can be presumed to have standing must be determined on a case-by-case basis, CLI-95-12, 42 NRC at 116, the Petitioners must offer some evidence that this particular facility has an obvious potential for offsite consequences at the distance espoused by the Petitioners. The Petitioners have not met that burden. The Petition does not show that there is a connection between the fact that the Staff calculated doses in the EIS for a distance of up to 50 miles from the MOX Facility and a conclusion that there is an obvious potential for off-site consequences up to 50 miles from the MOX Facility. Without additional support, it is not readily apparent that there is an obvious potential for offsite consequences within a 50 mile radius as asserted by the Petitioners.

Twenty members of the Petitioner organizations have submitted affidavits to demonstrate that they have standing to intervene. All but two of these affidavits state only that the affiant lives in proximity to the proposed MOX Facility (at a distance ranging from 20 miles to 35 miles), the operation of the facility could adversely affect his or her health and safety, and he or she authorizes one of the Petitioner organizations to act on his or her behalf. The Petition states that, because these affidavits “show that Petitioners’ members live near the proposed site, i.e., within 50 miles . . . [the] Petitioners have presumptive standing by virtue of their proximity” to the proposed MOX Facility. Petition at 5. However, as discussed above, the Petitioners have not shown that there is an obvious potential for offsite consequences at a radius of 50 miles from the proposed facility, nor have the Petitioners shown that there is a potential for consequences within a smaller radius. Thus, none of the individual members have demonstrated standing based on their proximity to the proposed MOX Facility,⁹ and the

⁹ If a Petitioner fails to demonstrate that they have standing based on proximity to the facility combined with “an ‘obvious potential for offsite consequences . . . [the] standing inquiry reverts to a ‘traditional standing’ analysis of whether the petitioner has made a specific showing of injury, causation, (continued. . .)

Petitioners cannot assert representational standing on the basis of their members' standing.

Two individuals, Susan Bloomfield and Gary Zimmerman, seek standing on a basis other than simple proximity to the proposed MOX Facility. Ms. Bloomfield submitted two affidavits, one as a member of NWS and one as a member of NIRS. In both affidavits she states that she "attend[s] concerts and fireworks by the Savannah River" and that she also "use[s] the river for boating, downstream of the proposed facility and drive[s] through the Savannah River Site when [she visits her] son and granddaughter who live in Hilton Head, SC." However, Ms. Bloomfield does not provide sufficient information on the location and frequency of these activities to allow for a determination of harm nor has she sufficiently described how such activities would potentially be updated by operation of the MOX Facility. See *Private Fuel Storage, LLC*, CLI-99-10, 49 NRC 318, 325 (1999); *Shieldalloy Metallurgical Corp.*, CLI-99-12, 49 NRC 347, 355 (1999).

Mr. Zimmerman, a member of NWS, claims standing based on the fact he resides downstream from the SRS in Bluffton, South Carolina, whose municipal water supply is drawn from the Savannah River. In order to establish standing based on an injury-in-fact, a petitioner must show that their asserted injury is "fairly traceable to the challenged action." *Perry*, CLI-93-21, 38 NRC at 92. In the present circumstance, Mr. Zimmerman must show a causal nexus between the challenged action, licensing and operating the proposed MOX Facility, and the injury, consuming water downstream of the facility. Mr. Zimmerman, however, has failed to

(. . .continued)

and redressability." *Peach Bottom*, CLI-05-26, 62 NRC at 581. The affidavits provide little detail on the potential injury to the affiants or the connection between injury to the affiants and the proposed MOX Facility. Such "broad and conclusory statements are insufficient to establish standing." *Zion*, CLI-00-05, 51 NRC at 98.

do so and, thus, has not demonstrated standing. Because none of their individual members have established individual standing, neither BREDL, NWS nor NIRS has demonstrated that it has representational standing.¹⁰

II. Contentions

In addition to establishing standing, a hearing request must include at least one admissible contention. 10 C.F.R. § 2.309(a). For each contention, the petitioner must provide: (1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue raised in the contention is within the scope of the proceeding; (4) a demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions which support the requestor's position; and (6) sufficient information to show that a genuine dispute exists on a material issue of law or fact, including references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute or the identification of each failure to include necessary information in the application and the supporting reasons for the petitioner's belief. 10 C.F.R. § 2.309(f)(1). As explained below, even if one of the Petitioners were found to have standing, the Petitioners have not set forth any valid contention on which a hearing request could be granted.

¹⁰ In an issue related to standing, the Staff also notes that Mary Olson signed the Petition for NIRS, however, Ms. Olson has not filed a notice of appearance in accordance with 10 C.F.R. § 2.314(b). Even if NIRS had demonstrated standing, Ms. Olson may not appear before the Board in a representative capacity until or unless she files such a notice.

A. Contention 1: FAILURE TO LIMITS (sic) EMISSIONS OF HAZARDOUS AIR POLLUTANTS

Contention 1 states that the Applicant fails to meet the relevant requirements of the National Environmental Policy Act (NEPA), because the Applicant did not “adequately address pollution impacts and require controls necessary to limit hazardous air pollution.” Petition at 7.¹¹ Petitioners’ first Contention should not be admitted because it is outside the scope of this proceeding. 10 C.F.R. § 2.309(f)(iii).

The scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985)*. As stated in the Notice of Opportunity to Request a Hearing, this proceeding covers the Application submitted on January 4, 2007. 72 Fed. Reg. 12204 (March 15, 2007). There was an earlier proceeding on the CAR and environmental issues. 66 Fed. Reg. 19994 (April 18, 2001). Thus, the instant proceeding is limited to the action being licensed, operation of the MOX Facility, as described in the Application. All five subparts of Contention 1 attack the sufficiency of the EIS. This EIS has already been issued, and is therefore outside the scope of this proceeding, unless the Petitioners can satisfy the requirements of 10 C.F.R. § 51.92 which sets the standard for supplementing an EIS. While they cite the proper regulation (Petition at 6), the Petitioners never address the requirements for supplementing an EIS, nor do they show how the information presented in Contention 1 satisfies these requirements.

Section 51.92 states that the Staff will prepare a supplemental EIS if: “(1) there are substantial changes in the proposed action that are relevant to environmental concerns; or (2) there are significant new circumstances or information relevant to environmental concerns

¹¹ Petitioner’s first proposed Contention is broken into 5 subparts. The Staff will analyze each of these subparts individually.

and bearing on the proposed action or its impacts.” 10 C.F.R. § 51.92(a). The Commission has further interpreted this requirement as follows:

A supplement to the EIS is not required "every time new information comes to light after the EIS is finalized." As a general matter, the agency must consider whether the new information is significant enough to consider preparation of a supplement. The new information must present "a seriously different picture of the environmental impact of the proposed project from what was previously envisioned."

Hydro Resources, Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-99-22, 50 N.R.C. 3, 14 (1999) (internal citations omitted). As shown below, the Petitioners have not identified significant new information nor shown that there have been substantial changes to the project. Because the information presented in support of Contention 1 does not meet the standard in 10 C.F.R. § 51.92 for triggering a supplement to an EIS, the environmental challenges in Contention 1 are outside the scope of this proceeding.

Contention 1.1: The plutonium fuel factory proposed by MOX services does not comply with national emission standards for radionuclides to the atmosphere.

Petitioners support Contention 1.1 by noting that the Clean Air Act lists radionuclides as a hazardous air pollutant and state that the "goal of the radionuclide emission standard is to limit the lifetime risk of induced fetal cancer to a maximally exposed individual to approximately one in 10,000." Petition at 7-8. Petitioners allege that "[c]ertain airborne radionuclide emissions from the proposed plutonium fuel factory are predicted to exceed site-wide SRS emissions" and that "the calculation in the plutonium fuel factory Application as compared to the EIS would appear to predict very different estimates of certain radionuclide emissions." Petition at 8. As discussed below, Contention 1.1 is inadmissible because it is outside the scope of this proceeding and does not provide sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(iii), (vi).

Contention 1.1 is outside the scope of this proceeding because it attacks the adequacy of the EIS without showing that the EIS must be supplemented pursuant to 10 C.F.R. § 51.92.

The Petitioners cite portions of the Clean Air Act and sections of the Application, but the Petitioners never specify why this information is new and significant or how it constitutes a significant changed circumstances from what was evaluated in the Commission approved EIS on the CAR, as required by 10 C.F.R. § 51.92. Petition at 7-8.

Further, Contention 1.1 does not provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of fact. 10 C.F.R. § 2.309(f)(vi). Petitioners cite to Table 10.2-1 in the Application and compare it to table 3.8 from the EIS to demonstrate a dispute of fact regarding the release of airborne radionuclides. Petition at 8. This reliance is misplaced. The cited tables on their face do not purport to measure the same values; in fact, table 3.8 in the EIS specifically measures the radionuclides emitted from the entire SRS during the year 2000, while Table 10.2-1 in the Application is titled “*Estimated* Radiological Releases from the MFFF during Normal Operations.” (emphasis provided). Consequently, a comparison of these tables cannot form the basis to show a genuine issue of fact exists because Petitioners are comparing apples to oranges; one table shows a historical snapshot of emissions from the year 2000 for all activities at the SRS while the other table is a projection of estimated future emissions from the operation of only the MOX Facility.

Additionally, Petitioners have not demonstrated that a genuine legal dispute exists with the Applicant. 10 C.F.R. § 2.309(f)(1)(vi). Petitioners state that “NRC-licensed facilities must meet requirements of the Clean Air Act,” (Petition at 7) but Petitioners never explain how the Applicant fails to meet the requirements of the Clean Air Act nor which portion of the Clean Air Act the Applicant is alleged to be violating. It is not enough for Petitioners to merely cite generally to a statute; instead, properly formatted Contentions “must focus on the license application in question, challenging either specific portions of or alleged omissions from the application.” *LES* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004); *aff’d* CLI-04-25, 60 NRC 223 (2004). Here, the Petitioners mention the Clean Air Act and implementing regulations regarding fetal cancer rates, then discuss the supposed differences

(which, as stated *supra*, are not actually differences) between the Application and EIS. There is no discussion as to how the MOX Facility's radionuclide emissions relate to fetal cancer rates or how the MOX Facility violates the Clean Air Act. Therefore, the Petitioners have not provided sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(vi).

Contention 1.2: HEPA Filter Unreliability Allows Excess Radionuclide Risks

Contention 1.2 states that the "NRC cannot assure that the plutonium fuel factory will meet NESHAP radionuclide emissions limits" because of the unreliability of high-efficiency particulate air (HEPA) filters. Petition at 9. Petitioners support Contention 1.2 by citing a letter from Dr. Peter Rikards to the DOE, where Dr. Rikards expresses concern over the ability of HEPA filters to stop plutonium "creep." Petition at 9. Contention 1.2 should be denied because it is outside the scope of this proceeding and because it is not material to a finding the NRC must make to support this Application. 10 C.F.R. 2.309(f)(1)(iii), (iv).

Although the scope of this proceeding is limited to the Application and excludes environmental issues, including the adequacy of the EIS, unless the requirements of 10 C.F.R. § 51.92 are met, Contention 1.2 challenges the validity of the EIS without addressing the factors in 10 C.F.R. § 51.92. The use of HEPA filters was analyzed in several locations in the EIS, including *inter alia*, Section 2.2.5 discussing the alternative of using sand filters instead of HEPA filters, section 4.3.1.2.2 discussing HEPA filters in the HVAC system with regard to risk to SRS employees, section 4.3.2.2 discussing the effect of HEPA filters on air quality during normal operations, and section 4.3.8 discussing the differences in environmental impacts between using sand filters and HEPA filters. Petitioners never identify any significant new information or changed circumstances that require this portion of the EIS to be supplemented pursuant to 10 C.F.R. § 51.92. Contention 1.2 is supported by a letter written to the Department of Energy on November 22, 2002 (Petition at 9). This letter cannot constitute new information

that has developed since the Commission approved the EIS as it pre-dates the EIS by more than two years; therefore, Contention 1.2 does not meet the requirements for supplementing the EIS and is outside the scope of this proceeding.

Contention 1.2 should also be denied because the Petitioners have not shown it is material to a finding the NRC must make to support this Application. 10 C.F.R. § 2.309(f)(1)(iv). Petitioners make the blanket statement that the “NRC cannot assure that the plutonium fuel factory will meet NESHAP radionuclide emissions limits,” (Petition at 9) but they never specify what “NESHAP radionuclide emissions limits” are, why they are relevant to this proceeding, nor why the NRC must evaluate them while reviewing this Application. Even a *pro se* petitioner must submit more than “bald or conclusory allegation[s]” of a dispute with the applicant. *Louisiana Energy Services* (National Enrichment Facility) (*LES*), CLI-04-25, 60 NRC 223, 225 (2004). Petitioners have not specified any regulation or law being violated, nor how the use of HEPA filters could violate these laws or regulations. Petitioners’ general statement, standing alone with no discussion as to its relevancy to this proceeding, is insufficient to meet the Commission’s pleading requirements.

Contention 1.3: Maximum Achievable Control Technology is Required

Contention 1.3 discusses the Environmental Protection Agency’s maximum achievable control technology (MACT) requirements, then notes that the Applicant plans on applying for an Air Quality Permit from the South Carolina “DHEC” and concludes by stating that “no MACT has been issued for radionuclides;” therefore, “the NRC must determine the control technology before issuing an operating license.” Petition at 10.

Contention 1.3 is insufficient because it lacks any statement as to why it is within the scope of this proceeding, why it is relevant to a decision the NRC must make or what dispute exists between the Petitioners and the Applicant. 10 C.F.R. § 2.309(f)(1)(iii), (iv), (vi).

This Contention appears to state that because the Environmental Protection Agency has not

established an MACT for radionuclides, the NRC is required to make this determination.

Petition at 10. Despite these assertions, Petitioners do not show why the NRC is required to establish MACT standards for radionuclides or why a lack of an MACT for radionuclides makes the Application inadequate or is otherwise material to the Application. Petitioners do not cite a regulation or statute that would support this novel theory. Petitioners must provide more than bald or conclusory allegations. *LES*, CLI-04-05, 60 NRC at 225. Instead, Petitioners must “include references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute. . .” 10 C.F.R. 2.309(f)(1)(vi). Petitioners have only provided a bare assertion with no supporting arguments; therefore, Contention 1.3 is not admissible.

Contention 1.4: NRC Failed to Assess Emissions Based on Accurate Surplus Plutonium Throughput; Fails to Meet Requirements of Clean Air Act

Contention 1.4 claims that the EIS is invalid because it must be “based on the maximum throughput of 78 tons of plutonium in its estimates of both criteria pollutants and hazardous air pollutants, including radionuclides,” and currently it is only based on a maximum throughput of 37.5 tons. Petition at 10-12. As support, Petitioners cite several DOE statements regarding that agency’s current and future stockpile of plutonium. Petition at 11.

Contention 1.4 is inadmissible because it is outside the scope of this proceeding, it is not relevant to a decision the NRC must make and it does not demonstrate a genuine dispute of law or fact with the Applicant. 10 C.F.R. § 2.309(f)(1)(iii), (iv), (vi). This Contention challenges the validity of the EIS without showing that the EIS must be supplemented pursuant to 10 C.F.R. § 51.92. All of the information cited by the Petitioners regarding DOE’s plutonium supply was available well before the EIS was issued;¹² consequently, this information is not new and

¹² Petitioners cite to treaty language between the United States and the Russian Federation from (continued. . .)

significant as required by 10 C.F.R. 51.92. Therefore, Contention 1.4 is outside the scope of this proceeding.

Additionally, Contention 1.4 is not relevant to a decision the NRC must make. 10 C.F.R. § 2.309(f)(1)(iv). The NRC is only licensing the MOX Facility; it is not licensing DOE's entire plutonium reserves. Consequently, the total amount of plutonium DOE receives from nuclear weapons is not relevant to this proceeding. As long as DOE does not propose to change the amount of plutonium processed into MOX in the MOX Facility, the total amount of plutonium that DOE possesses is inconsequential. Petitioners have pointed to no information showing that DOE plans on converting all 78 tons of surplus plutonium into MOX; in fact, they have provided no information that the proposed amount of plutonium to be processed has changed at all. This proceeding is to review the DOE application to operate the MOX Facility within the limitations proposed in the Application. Petitioners have provided no bases or reference to information in the Application that would indicate that DOE intends to process more than the 37.5 tons they represent to be the maximum throughput for the MOX Facility. Therefore, the total amount of plutonium DOE possesses is not relevant to any decision the NRC must make.

Similarly, Petitioners have not shown a genuine dispute of material law or fact with the Applicant. 10 C.F.R. § 2.309(f)(1)(vi). Petitioners point to no information that shows the Applicant plans on changing the amount of MOX from the original estimates in the EIS. Instead, they only point to public statements that show how much plutonium DOE possesses, without any statement showing that all of this plutonium will be converted into MOX, or that the MOX

(. . .continued)

September 2000, and a DOE publication entitled "Plutonium: the first 50 Years," from 1996. Petition at 11. The EIS was published in January, 2005.

Facility will increase production above the original output levels. In fact, the Application clearly states that DOE plans on creating only 37.5 tons of MOX. Application § 1.1.2.¹³ Consequently, Contention 1.4 does not demonstrate a genuine dispute of material law or fact.

Contention 1.5: The Plutonium fuel factory LA does not properly account for the higher levels of morbidity and mortality in females and infants caused by low levels of radiation

Contention 1.5 is supported by a study from the National Academy of Sciences that concludes that “there is no safe level of radiation” and that “raised its previous estimates of the relative effects of radiation in females. . .” Petition at 12.

Contention 1.5 is inadmissible because it lacks any citation or reference that demonstrates why it is within the scope of this proceeding, why it is relevant to a decision the NRC must make, or what genuine dispute of material law or fact exists between the Petitioners and Applicant. 10 C.F.R. § 2.309(f)(1)(iii), (iv), (vi). Petitioners merely cite a study with no explanation on how it relates to any portion of this proceeding. Petition at 12. Absent is any reference to a section of the Application or EIS that the Petitioners feel is inadequate, a citation to any authority that shows there is an omission from the Application or EIS or any demonstration of a dispute between the Applicant and Petitioner. Consequently, Contention 1.5 is inadmissible because it fails to meet or address most of the elements in 10 C.F.R. § 2.309.

¹³ In order to increase the amount of MOX created, the Applicant would have to evaluate the change in accordance with 10 C.F.R. § 70.72.

B. Contention 2: ACCIDENTAL RELEASE OF RADIONUCLIDES

Petitioners' Contention 2 alleges that the Application "fails to adequately assess consequences of an accidental release of radionuclides from" the MOX facility, and that the assessment in the Application "is founded on outdated guidance, invalid models and flawed assumptions." Petition at 13. The Intervenors have divided Contention 2 into two sub-contentions. Both sub-contentions concern the assessment included in the Application in accordance with 10 C.F.R. § 70.22(i), which requires each application to include either an emergency plan or an evaluation showing that the maximum offsite dose to the public as the result of a release of radioactive materials will be below regulatory limits. Therefore, unlike the Petitioners' contentions related solely to the EIS, this issue is arguably within the scope of the present proceeding. However, as explained further below, neither Contention 2.1 nor Contention 2.2 should be admitted.

Contention 2.1: Applicant's method for calculating radiological impacts is founded on outdated guidance

Contention 2.1 relates to the method used in the Application to calculate radiological impacts of a hypothetical criticality event. These impacts were calculated to comply with 10 C.F.R. § 70.22(i). The contention consists entirely of a statement that the method used in the Application to calculate radiological impacts of a hypothetical criticality event is founded on outdated guidance, Regulatory Guide 3.35, which has been withdrawn by the NRC. See Regulatory Guide 3.35, Assumptions Used for Evaluating the Potential Radiological Consequences of Accidental Nuclear Criticality in a Plutonium Processing and Fuel Fabrication Plant (Rev. 1, 1979); 63 Fed. Reg. 2426 (Jan. 15, 1998). This statement alone is not sufficient "to show that a genuine dispute exists with [MOX Services] on a material issue of law or fact" nor does this statement demonstrate that the issue raised in the contention is material to the findings that the NRC must make because it does not raise an issue related to regulatory compliance. 10 C.F.R. § 2.309(f)(1)(iv) and (vi).

Here, the Petitioners have not alleged any regulatory violation. Guidance documents, such as Regulatory Guides, by their very nature do not impose requirements on applicants or licensees; only laws, regulations, orders and licenses impose requirements. *University of Missouri*, CLI-95-1, 41 NRC 71, 98 (1995). Although conformance with regulatory guides will usually result in the Staff finding that an applicant or licensee has complied with the regulations, “nonconformance with such guides does not equate to noncompliance with the regulations.” *Id.* Here, the Petitioners have alleged simply that the Applicant has not used the proper guidance. However, without also alleging that the analysis prepared by the Applicant based on Regulatory Guide 3.35 does not comply with the regulations, the Petitioners have not raised an issue material to the findings the NRC must make and have not shown that there is a genuine dispute on a material issue of law or fact. Thus, Contention 2.1 should not be admitted.

Contention 2.2: MOX Services improperly failed to submit an Emergency Plan Basis

Contention 2.2 alleges that the Applicant improperly failed to submit an emergency plan for the proposed MOX fuel fabrication facility. The regulations require each applicant for a license to submit either an emergency plan or an “evaluation showing that the maximum dose to a member of the public offsite due to a release of radioactive materials would not exceed 1 rem effective dose equivalent or an intake of 2 milligrams of soluble uranium.” 10 C.F.R. § 70.22(i)(1)(i). Here, the Applicant has provided an analysis showing that total effective dose equivalent (TEDE) will not exceed 1 rem. The Petitioners argue that the 1 rem threshold will be exceeded. Petition at 16. However, as shown below, the Petitioners have not offered any relevant factual support for the contention, nor have the Petitioners raised a genuine dispute with regard to a material issue of law or fact.

The main basis for Contention 2.2 is an allegation that the dose for iodine was miscalculated. The Petitioners allege that the total effective dose equivalent for iodine should be converted to establish the thyroid dose, which, according to the Petitioners’ calculations

would be 5.43 rem, a dose much higher than the 1 rem threshold dose. Petition at 16. It is well-established that a contention may not directly challenge the validity of a regulation.¹⁴ 10 C.F.R. § 2.335(a). Nevertheless, the Petitioners advocate that the dose should have been calculated in a manner that contravenes the regulations. 10 C.F.R. § 70.22(i)(1)(i) specifically states that the offsite dose may not exceed 1 rem *effective dose equivalent*, defined as “the sum of the products of the dose equivalent to the body organ or tissue and the weighting factors applicable to each of the body organs or tissues that are irradiated.” 10 C.F.R. § 70.4; *see also* 10 C.F.R. § 20.1004. While the regulations clearly state that the effective dose equivalent is not equal to the dose for the affected organ, the Petitioners argue the opposite. Thus, Contention 2.2 is an impermissible attack on the regulations and is inadmissible.

The remaining bases also do not demonstrate that the contention is admissible. First, the Petitioners argue that the dose assessment is flawed because it was prepared using the ARCON96 model. However, the Petitioners, contrary to 10 C.F.R. § 2.309(f)(1)(v), offer no “statement of the facts or expert opinions which support [their] position on the issue.” The only factual support offered by the Petitioners is a list of several characteristics¹⁵ of the model that they maintain render the model unsuitable for calculating the potential dose to the public, but the Petitioners do not explain how these general characteristics of the model render it unsuitable. Without explaining via some supporting expert opinion or reference why the

¹⁴ The only exception is where a party to an adjudicatory proceeding files a petition seeking to have a regulation waived or excepted for the proceeding upon a showing that there are special circumstances in the proceeding such that application of the rule or regulation would not serve to purpose for which the regulation was adopted. 10 C.F.R. § 2.335(b). Here, there has been no petition for waiver and no showing of special circumstances.

¹⁵ These characteristics are listed in “Directory of Atmospheric Transport and Diffusion Consequence Assessment Models,” at A-35, Office of the Federal Coordinator for Meteorological Services and Supporting Research (1999) (available at http://www.ofcm.gov/atd_dir/pdf/frontpage.htm). This document states the characteristics, capabilities, parameters, strengths, and weaknesses of the model and states that it “is a model for calculating [dose] concentrations in the vicinity of buildings,” but the document does not state whether or not the model could be put to other uses.

highlighted characteristics of the model render the accuracy of the dose assessment calculations inadequate,¹⁶ the Petitioners have not set forth sufficient information to support an admissible contention.

C. Contention 3: EXTENDED ONSITE STORAGE OF RADIOACTIVE WASTE NOT ADDRESSED IN EIS

Petitioners' Contention 3 alleges that the EIS is incomplete because it does not address extended onsite storage of radioactive waste from the proposed MOX Facility. As discussed above, issues related to the EIS for the proposed MOX Facility are outside the scope of the present proceeding unless the Petitioners show that the EIS must be supplemented pursuant to 10 C.F.R. § 51.92(a). Because the information presented in support of this contention does not meet the requirements for supplementing an EIS pursuant to 10 C.F.R. § 51.92(a), Contention 3 is outside of the scope of the present proceeding and, therefore, is inadmissible.

A final EIS will only be supplemented where there are "substantial changes in the proposed action that are relevant to environmental concerns" or "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 10 C.F.R. § 51.92(a)(1)-(2). Currently, the EIS states that wastes generated by the MOX Facility will be processed in the Waste Solidification Building (WSB) to be constructed by DOE; the impacts analysis in the EIS is based on construction and use of the WSB. See EIS at 2-14 to 2-17. Petitioners' Contention 3 alleges that because DOE has not moved forward with construction and operation of the WSB, the Staff must amend the EIS to consider the environmental impacts of long-term onsite storage of radioactive wastes. However,

¹⁶ The Petitioners do argue that because the model's maximum source-receptor distance is 10,000 meters while the farthest controlled area boundary is 22,530 meters, the Applicant cannot use the dose calculated via the model to show that the offsite dose will be below the 1 rem threshold established in 10 C.F.R. § 70.22(i)(1)(i). This argument defies logic. If the dose is below the threshold onsite, it follows that the dose will likely decrease substantially, and, in any event, not increase, farther from the facility.

the Petitioners fail to put forth any changed circumstance or new information as required by 10 C.F.R. § 51.92(a). If DOE were to change its plan to construct and operate the WSB, DOE would be required to publish an amended Record of Decision (ROD) to that effect in the *Federal Register*. To date, DOE has not filed any amended ROD with regard to the agency's plans for the WSB,¹⁷ and without an official change in DOE plans, there is no need to supplement the EIS to account for purely speculative future changes.¹⁸ The Petitioners have raised no other information showing that circumstances have changed since the EIS was issued.¹⁹ Therefore, there is no need to supplement the EIS, and the issues raised in Contention 3 are outside the scope of the current proceeding.

¹⁷ The Staff notes that DOE has filed several timely notices in the *Federal Register* when plans for other MOX-related activities on the Savannah River Site changed. See, e.g. "Surplus Plutonium Disposition Program," 67 Fed. Reg. 19432 (April 10, 2002). There is no reason to suspect that DOE would fail to file an amended ROD if the plans for the WSB were changed.

¹⁸ During the review of the CAR, the Board made the same determination. In 2005, GANE argued that the EIS should be supplemented "because it fails to provide a current discussion of the environmental impacts from liquid radioactive waste streams for the proposed MOX Facility." "Memorandum (Explaining Earlier Denial of Admission of Late-Filed Contentions)" at 2, April 29, 2005 ("Memorandum"). GANE's contention was based on a claim that DOE had suspended its plans to construct the WSB and, therefore, the NRC must revisit the EIS. In finding the contention inadmissible, the Board first noted the standard for supplementing an EIS under 10 C.F.R. § 51.92(a), and found that because DOE had not officially cancelled the WSB or filed an amended ROD with regard to the WSB, the standard was not met. Memorandum at 4. Thus, the contention failed to raise any genuine issue of fact or law and was inadmissible. *Id.* at 5.

¹⁹ The factual support for the Petitioners' claim that the WSB will not be constructed is not relevant to the question of whether the WSB will actually be constructed and operated. The Petitioners put forth a three page list of past episodes which they claim demonstrate "that there is no basis for confidence in DOE's track record." Petition at 19. None of these incidents, however, relates to the schedule for constructing the WSB. The Petitioners also point to a review of the Staff's SER for the CAR by ACRS that discusses concerns regarding the safety of long-term storage of radioactive waste from the MOX Facility, but this letter does not provide any concrete evidence that the WSB will not be built.

D. Contention 4: LICENSE APPLICATION FAILS TO ADDRESS RADIOACTIVE WASTE STORAGE

Contention 4 alleges that the Application “is inadequate because it does not address safety and public health risks posed by indefinite storage of liquid high-alpha waste at the site or contain measures for the safe storage of that waste.” Petition at 23. As discussed below, this contention is inadmissible because it is outside the scope of the proceeding, and is unsupported by referenced facts or expert opinion.

As discussed in relation to Contentions 1 and 3 above, the scope of the instant proceeding is limited to the action being licensed, operation of the MOX Facility, as described in the Application. The Application states that both solid and liquid wastes will be transferred to DOE for disposition. Application at 10-2. The environmental impacts of disposition of radioactive wastes by DOE were discussed in the EIS because disposition of waste is a connected action that must be considered in the evaluation of the MOX Facility under NEPA. See 40 C.F.R. § 1508.25; see also EIS at 4-26 to 4-37. However, because DOE will disposition waste at areas of SRS unconnected to the MOX Facility and outside the scope of the NRC’s regulatory authority, issues related to the *safety* of waste disposition are outside the scope of the Staff’s review of the Application. Even if DOE were to undertake long term storage of radioactive wastes, such action would be outside the scope of the current license proceeding. Thus, any contention related to the safety of long-term waste storage is outside the scope of the present proceeding and Petitioners’ Contention 4 is inadmissible.

In addition, the Petitioners have not provided the requisite facts or expert opinion in support of Contention 4. The Petitioners refer to the basis of Contention 3 as the basis for Contention 4. However, none of the information provided as basis for Contention 3 adequately supports Contention 4. The basis for Contention 3 is conjecture that DOE will not construct and operate the WSB, supported primarily by a three-page listing of past DOE failings, none of which relate to the proposed MOX Facility. Petition at 19-22. The Petitioners only put forth one

item of factual support that relates to the MOX Facility: a letter to former Chairman Diaz from the Chairman of the Advisory Committee on Reactor Safeguards (ACRS) regarding ACRS's review of the Staff's SER for the CAR. Petition at 19. The letter expresses concerns about the safety of long-term storage of radioactive waste at the MOX Facility. However, the letter reflects only information available at the time the Staff issued the SER for the CAR, and it is not readily apparent that the ACRS would proffer the same opinion based on the current Application, which does not include any plans for long-term storage of radioactive waste.²⁰ Because the Petitioners have not offered any relevant fact or expert opinion in support of Contention 4 as required by 10 C.F.R. § 2.309(f)(1)(v), and, as discussed above, because the issue raised in Contention 4 is outside the scope of the instant proceeding, Contention 4 is inadmissible.

E. Contention 5: FAILURE TO ADDRESS IMPACT OF TERRORIST ATTACKS ON PLUTONIUM FUEL FACILITY AND TRANSPORT

Contention 5 alleges that the NRC must supplement the EIS to address the environmental impacts of terrorist attacks on the proposed activities to satisfy the NEPA requirements. Petition at 29-30. As a supporting basis, Petitioners rely, in part, on a Ninth Circuit decision, *San Luis Obispo Mothers For Peace vs. Nuclear Regulatory Commission*, 449 F. 3d 1016 (9th Cir. 2006) ("Mothers for Peace"), which held that the NRC must consider the environmental impacts of a terrorist attack against an independent spent fuel storage installation (ISFSI) at the Diablo Canyon Nuclear Power Plant. Petition at 29-30. In this regard, Petitioners offer the Ninth Circuit decision as new information requiring that the Staff must also consider the environmental impacts of a terrorist attack at the proposed MOX Facility. Petition at 30. However, Petitioners' Contention 5 fails to demonstrate that a genuine dispute exists on a material issue of law or fact, raises issues which are outside of the scope of this

²⁰ The issues raised by the ACRS may apply to any long-term storage of radioactive waste by DOE at other parts of the SRS, but such storage is not the subject of the instant proceeding.

proceeding, and ignores Commission decisions directly addressing the impact of the Ninth Circuit decision in NRC licensing proceedings. See 10 C.F.R. § 2.309(f)(1)(iii) and (vi). For the reasons discussed below, this contention is inadmissible.

The Commission has consistently held that the NRC has no legal duty to consider the environmental impacts of terrorism at NRC licensed facilities. *Nuclear Management Company, L.L.C.*(Palisades Nuclear Plant), CLI-07-09, 65 NRC 139, 141 (2007). Further, the *Mothers for Peace* decision is not controlling authority in all NRC license proceedings. As the Commission explained recently regarding *Mothers for Peace*, "...[t]he NRC is not obliged to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question." *AmerGen Energy Company, L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-07-08, 65 NRC 124, 128 (2007). In *Oyster Creek*, the Commission rejected a contention by the state of New Jersey that the NRC was required under NEPA to conduct a review of the environmental impacts of terrorism in a license renewal proceeding. Though the Commission recognized the implications of terrorism and the authority of the Ninth Circuit's decision in that circuit, the Commission found New Jersey's argument unpersuasive. Instead, the Commission reiterated its position that a reasonably close causal relationship between the federal agency action and the environmental consequences of that action must exist in order to trigger a NEPA review, and that such a relationship does not exist with terrorism.²¹ *Oyster Creek*, CLI-07-08, 65 NRC at 129.

²¹ Following the same line of reasoning in *Oyster Creek*, the Commission also rejected terrorism-related NEPA contentions in two other decisions. Referencing their decision in *Oyster Creek* and their decision not to follow *Mothers for Peace* in each instance, the Commission found contentions requiring an evaluation of terrorist attacks under NEPA inadmissible in the license renewal of a nuclear power plant *Nuclear Management Company, L.L.C.* CLI-07-09, 65 NRC 139 (2007) (Palisades Nuclear Plant), and an early site permit in *System Energy Resources, Inc.* (Grand Gulf ESP site), CLI-07-10, 65 NRC 144, 147 (2007).

The Petitioners have identified no information that would distinguish the instant proceeding from *Oyster Creek* or other similar proceedings. Based on the Commission's clear directives in these decisions, Contention 5 fails to demonstrate that a genuine dispute exists on a material issue of law or fact and raises issues which are outside the scope of the proceeding. Contention 5, therefore, should not be admitted.

CONCLUSION

As explained above, the Petitioners have not demonstrated that they have standing to intervene in the proceeding nor have they submitted an admissible contention. Therefore, the hearing request should be denied.

Respectfully submitted,

/RA by Margaret J. Bupp/

Margaret J. Bupp
Jody C. Martin
Andrea Jones
Counsel for the NRC Staff

Dated at Rockville, MD
this 11th day of June, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
SHAW AREVA MOX SERVICES) Docket No. 70-3098-MLA
Mixed Oxide Fuel Fabrication Facility)
)
(License Application for Possession and) ASLBP No. 07-856-02-MLA-BD01
Use of Byproduct, Source and Special)
Nuclear Materials))

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Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Dated at Rockville, Maryland
this 11th day of June, 2007

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Use of Byproduct, Source and Special)	
Nuclear Materials))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "STAFF RESPONSE TO PETITION FOR INTERVENTION AND REQUEST FOR HEARING" and NOTICES OF APPEARANCE for Margaret J. Bupp, Jody C. Martin, and Andrea Z. Jones in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk(*); and by electronic mail as indicated by a double asterisk (**) on this 11th day of January, 2007:

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