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NUCLEAR REGULATORY COMMISSION

Title: Shaw AREVA MOX Services, LLC

Docket Number: 70-3098-MLA; ASLBP #. 07-856-02-MLA-B001

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

3 + + +

4 ATOMIC SAFETY AND LICENSING BOARD

5 ----------x

6 IN THE MATTER OF: :

7 Shaw AREVA MOX Services, LLC : Docket No. 70-3098-MLA

8 :

9 (Mixed Oxide Fuel Fabrication : ASLBP No.

10 Facility Possession and Use : 07-856-02-MLA-B001

11 License) :

12 ----------x

13 Wednesday, August 22, 2007

14

15 Courtroom 2, 2nd Floor

16 Augusta Federal Courthouse

17 600 James Brown Blvd.

18 Augusta, Georgia

19

20 The above-entitled matter came on for oral

21 argument at 9:00 a.m.

22 BEFORE:

23 HON. MICHAEL C. FARRAR

24 HON. LAWRENCE C. McDADE

25 HON. NICHOLAS G. TRIKOUROS

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1 P R O C E E D I N G S

2 JUDGE FARRAR: Good morning. This Atomic
3 Safety and Licensing Board is convened here this morning
4 to hear oral argument in a case entitled Shaw AREVA MOX
5 Services, which involves a Department of Energy contractor
6 and a project to recycle plutonium from nuclear warheads,
7 make into new fuel for nuclear power reactors.
8 I say we're here. Here happens to be the
9 Federal Courthouse in August, Georgia. I'd like to start
10 by thanking the people in the judges' office, the
11 marshals' office, and the clerk's office, particularly Mr.
12 Buford Rowe, for making this lovely space available.
13 Forty years ago about this time I was leaving a
14 federal court clerkship in New Orleans in the beautiful
15 building at 400 Royal Street; it brings back a lot of
16 memories to be in a lovely setting like this.
17 I'm Mike Farrar, the chairman of this board.
18 With me is Nick Trikouros and Larry McDade. Judge McDade
19 and I are trained as lawyers; Judge Trikouros as a
20 technical person. All three of us have an equal vote in
21 the proceeding.
22 Could I have the representatives of the parties
23 introduce themselves. First, for the Applicant.
24 MR. SILVERMAN: Thank you, Your Honor. My name
25 is Don Silverman. I'm with the law firm of Morgan, Lewis,

1 and Bockius in Washington, DC, and we are counsel for the
2 Applicant.
3 MR. ZABIELSKI: My name is Vince Zabielski, and
4 I'm also with Morgan, Lewis, and Bockius.
5 JUDGE FARRAR: Mr. Silverman, is your chief
6 client here? -- anyone you'd like to introduce from the
7 audience?
8 MR. SILVERMAN: We have a number of members
9 from the client that are here today.
10 JUDGE FARRAR: Okay. For the Petitioners.
11 MR. ZELLER: Yes, Your Honor. My name is Louis
12 Zeller, and I'm on the staff of the Blue Ridge
13 Environmental Defense League.
14 MS. CARROLL: My name is Glenn Carroll. I'm
15 with Nuclear Watch South, formerly GANE, Georgians Against
16 Nuclear Energy.
17 JUDGE FARRAR: All right. Ms. Olson is not
18 going to be here?
19 MS. CARROLL: Not here.
20 JUDGE FARRAR: All right. And for the NRC
21 Staff.
22 MS. BUPP: My name is Margaret Bupp; I'm
23 counsel for the NRC Staff.
24 MR. MARTIN: My name is Jody Martin; I'm also
25 counsel for the NRC Staff, and with us today we also have

1 Dave Kapinsky. He's the project manager for MOX.

2 JUDGE FARRAR: Okay. And your colleague?

3 MS. JONES: Andrea Jones.

4 JUDGE FARRAR: All right. For those of you

5 who've never attended an oral argument before, we have put

6 out an order of the proceedings if you want to get a

7 handout that would help you follow things.

8 But the more important thing to remember is

9 this is not a time for the lawyers to make speeches.

10 They've all filed one or more sets of written briefs;

11 we've studied those; we've read them. We could decide the

12 case on the basis of the written briefs only, but we

13 decided to have oral arguments. It's more for our benefit

14 to probe the intricacies or possible inconsistencies in

15 their position, so you will find us very vigorous in our

16 questioning. Don't think that's rude; they expect it.

17 And so it may be a rapid-fire event like that;

18 it's not their time to get up and make speeches.

19 For the representatives of the Petitioners, I'd

20 like -- you're laymen; I'd like to compliment you on the

21 quality of the written filings you made. In my 40 years

22 I've seen lawyers not do as good a job. So we compliment

23 you on that.

24 And if your oral presentations are as good --

25 you know, just listen to our questions; make sure you

1 answer them, and you'll do just fine.

2 If there are any reporters here, Dave McIntire

3 is in the back corner of the room; he's from our office of

4 public affairs in Washington. So if there are any people

5 from the news media who'd like to speak to him, you're

6 welcome to.

7 With that, let's begin. We have two areas of

8 inquiry. One is the legal standing of the Petitioners to

9 participate in this proceeding. We've allocated 40

10 minutes to those arguments.

11 The second is the admissibility of the various

12 contentions or issues that they have attempted to raise,

13 and we've got an hour and 50 minutes of those split

14 variably among five different contentions.

15 For the standing argument we're going to have

16 the Applicant and Staff go first.

17 Mr. Silverman, how were you all going to divide

18 that time?

19 MR. SILVERMAN: We'll be dividing our time on

20 all the issues equally, Your Honor.

21 JUDGE FARRAR: Equally.

22 MR. SILVERMAN: Between the Staff and the

23 Applicant, yes.

24 JUDGE FARRAR: All right. Who's going first?

25 MR. SILVERMAN: The Applicant will.

1 JUDGE FARRAR: Okay.

2 MR. SILVERMAN: Good morning, members of the

3 Board. I'm Donald Silverman, from Morgan Lewis, and I

4 represent the Applicant. I'm here to discuss the issue of

5 whether the petitioning organizations have demonstrated

6 standing in this proceeding.

7 Petitioners have two options for demonstrating

8 standing.

9 JUDGE FARRAR: Could I interrupt you. In your

10 initial set of papers -- and you didn't get to file a

11 surrebuttal -- there were kind of three questions. The

12 first is do the individual petitioners have standing and

13 that's what, I take it, you were about to argue.

14 There were also questions that may or may not

15 have been cured about whether the individuals had

16 authorized the organization to represent them and then, in

17 turn, whether the organization had properly delegated

18 these people who are here today to speak for them.

19 Are those latter two cured?

20 MR. SILVERMAN: They are cured. We're here to

21 discuss Petitioners' standing --

22 JUDGE FARRAR: Okay. So we're just talking

23 about the standing --

24 MR. SILVERMAN: Yes.

25 JUDGE FARRAR: -- of the individual petitioners

1 who have let these organizations represent them.

2 MR. SILVERMAN: Yes. The traditional concept

3 of standing --

4 THE REPORTER: Excuse me, Your Honor. May I

5 move his mike from the table to the podium? I'm not

6 picking him up very well.

7 (Pause.)

8 MR. SILVERMAN: As I was saying, the

9 Petitioners in this case have two options available to

10 them to demonstrate standing. One is to satisfy the

11 traditional elements of standing: injury in fact,

12 causation, redressability, et cetera. They have not done

13 that. They have relied exclusively, in our view, on the

14 concept of presumptive standing based upon geographic

15 proximity, which is an appropriate standard in the NRC

16 case law.

17 With respect to the geographic proximity

18 standard and whether they have presumptive standing on

19 that basis, the Board's asked some questions, and I will

20 answer those in the course of my brief remarks on this

21 particular issue.

22 First, there is no 50-mile presumption --

23 proximity presumption of standing in a non-reactor

24 proceeding; we think that's crystal clear in the case law.

25 And so to the extent that the Petitioners have alleged

1 that they live within 50 miles of the facility, that is
2 not an adequate basis to demonstrate standing.
3 There is, however --
4 JUDGE FARRAR: This 50-mile reactor proximity
5 obviously has been applied only to reactors, but this is a
6 novel and unique proceeding. Why should we assume that
7 the Commission would not want the 50 miles to be applied
8 to a facility of this nature?
9 MR. SILVERMAN: Well, all the cases that I'm
10 aware have strictly applied it to reactors and,
11 furthermore, there are quite a number of other proceedings
12 that the NRC has passed judgment on, and fuel cycle
13 facilities, enrichment plants, fuel fabrication
14 facilities, where that presumption has not been applied:
15 waste processing facilities, test reactors at
16 universities.
17 This presumption simply has not been applied to
18 anything but power reactors where there's a very high
19 source term and a higher risk of outside exposures if
20 there's an accident, and we think the case law is crystal
21 clear on that.
22 JUDGE McDADE: In this particular instance, the
23 affidavits indicate that the members live between 20 and
24 32 miles from the facility.
25 MR. SILVERMAN: Yes.

1 JUDGE McDADE: Assuming that we accept your
2 premise that there is no automatic presumption based on
3 geographic proximity, we use the rationale used in the
4 Georgia Tech case, which talks about deciding this on a
5 case-by-case basis.
6 Differentiating this case from Georgia Tech,
7 there there was very little fissionable material
8 available; it was basically a research facility; here
9 there's a considerable amount of fissionable material
10 available.
11 Why, on a case-by-case basis, would you argue
12 that there is not the possibility -- not a probability,
13 but a possibility -- of offsite consequences in the 20- to
14 32-mile range?
15 MR. SILVERMAN: Well, Your Honor, first of all,
16 the standard is is there an obvious potential for offsite
17 consequences associated with the facility, and the
18 critical issue, in our view, is that the legal standards
19 requires the Petitioners to demonstrate that that is the
20 case; that they have the burden to demonstrate that there
21 is an obvious potential for offsite consequences.
22 JUDGE McDADE: Isn't their representation that
23 there would be as many tons of plutonium available here
24 that would be processed sufficient to make that claim?
25 MR. SILVERMAN: I don't believe so, Your Honor.

1 It's one thing to have some discussion of the facility
2 itself, and it's quite another to be able to draw some
3 connection and some linkage between -- and some
4 demonstration of how that could result in an offsite
5 consequence.
6 When we look at the declarations of the
7 individual members of the petitioner organizations,
8 they're very, very vague. They're about as sparse,
9 frankly, as I have seen.
10 They say, This facility could jeopardize our
11 health and safety. We're concerned about the facility --
12 some of the declarations say, We're concerned about the
13 transportation of material.
14 But there's no allegation -- one, whether it is
15 true or not, there is no allegation that this facility
16 does create -- is a significant source of radioactivity.
17 And, second and more importantly, there is no discussion
18 of how there could be obvious potential for an offsite
19 consequence, so the key for us is that the Petitioners
20 bear that burden, and they have not met that burden.
21 JUDGE FARRAR: Except for this fact: Congress
22 established this kind of tribunal because of the
23 complexity of these cases, and they wanted to bring some
24 technical expertise to bear on it. Why, in the face of
25 their pleadings, are we not entitled to take the

1 equivalent of what would be judicial notice and draw upon
2 the documents you have filed -- your client has filed and
3 the Staff has filed and draw our own conclusions of the --
4 based upon the science and the process of what this
5 facility is capable of doing if there were some sort of
6 incident?
7 Why is that something that they have to tell
8 us? When you know it, the Staff knows it, and we know it,
9 why is their pleading, considering that they're lay
10 people -- why are their pleadings not sufficient to cause
11 us to look at the documents and say, Yes, they didn't
12 spell it out, but we know what they mean?
13 MR. SILVERMAN: Well, Your Honor, I guess I
14 question the assumption that you know it, we know it, and
15 others know it. The -- again, I think they have the
16 burden to come forward, and they haven't done that, but
17 aside from that, in direct response to your question,
18 certainly under normal operations this facility, according
19 to the information in the ER and the EIS, the dose
20 projections in this facility are in the range of 3.3
21 thousandths --
22 JUDGE FARRAR: Let's leave out normal
23 operations. In other words, as I understand standing,
24 it's because here's the facility; if something goes wrong,
25 people within a certain area could be in jeopardy. So

1 that's what I'm talking about, not normal operations.

2 MR. SILVERMAN: Right. With respect to

3 accidents, the application and the ISA demonstrate that

4 any high-consequence event would be very, very unlikely.

5 JUDGE FARRAR: Okay. But for standing, it's

6 not high likelihood or major consequences. As I

7 understand the judicial and the Commission's standing

8 precedents, any consequences are sufficient for standing;

9 they may not be sufficient to win a contention or to put a

10 condition on your facility, but any consequences get you

11 into Court. Once into Court, you may not win, but I

12 thought that all we're talking about is -- are these

13 people sufficiently enough affected even in a minor way to

14 give them standing. Isn't that what this case comes down

15 to?

16 MR. SILVERMAN: Yes. It is, Your Honor. And

17 the case law does indicate that it does not have to be a

18 very significant dose to warrant standing. The

19 Applicant's position fundamentally on standing in this

20 case, however, is that the Petitioners do have the burden

21 to allege those facts.

22 And these are experienced Petitioners; they've

23 been involved in both this proceeding and other

24 proceedings, including the Georgia Tech proceeding. And I

25 believe they know that law, and we don't believe they've

1 met that burden.

2 JUDGE FARRAR: Okay. One thing they pointed to

3 was a staff document that calculated doses out to 50

4 miles.

5 MR. SILVERMAN: Yes.

6 JUDGE FARRAR: Even if license staff was

7 deliberating wasting taxpayer money, I would assume that

8 them looking at 50 miles meant that they thought there was

9 at least, you know, some possibility that people within 50

10 miles might be affected. So why isn't the Petitioners'

11 pointing to the staff document sufficient?

12 MR. SILVERMAN: The -- I know the Staff is

13 going to be directly to that question. And I would be

14 happy on rebuttal to respond to any further questions, but

15 I would defer that to them, because there is an

16 explanation for that decision.

17 JUDGE FARRAR: Okay. All right.

18 MR. SILVERMAN: So to just sum up, in addition

19 to citing to that particular portion of the EIS, when the

20 Applicant indicated that we did not believe they had

21 standing in our answer, the response that came back, again

22 from Petitioners that do have some experience, cited that

23 particular provision of the EIS. They cited alleged

24 tritium releases from the PDCF facility, which is not the

25 facility that's being licensed here.

1 They cited the standard review plan that says
2 an Applicant is to prevent criticality. That does not --
3 JUDGE FARRAR: Let me get back to that other
4 facility, which is not subject to NRC licensing. But
5 isn't it a necessary part of the project? And, therefore,
6 why would it be wrong to consider the impact -- granted,
7 the NRC is only being asked to license the one facility,
8 but if here's a necessary adjunct, why isn't it sufficient
9 for standing to say that, That necessary adjunct might
10 affect us?
11 MR. SILVERMAN: Yes. I believe it is not
12 appropriate at all to do that in the context of standing.
13 It is one thing to challenge an environmental
14 report or an environmental impact statement by arguing
15 that the cumulative impacts of connected actions, such as
16 the PDCF facility, weren't adequately considered. That's
17 appropriate. That's part of the NEPA judgment. But the
18 legal standard here is, Does this facility that's being
19 licensed create an obvious potential for offsite
20 consequences, and have the Petitioners demonstrated that.
21 JUDGE FARRAR: Okay. Thank you, Mr. Silverman.
22 MR. SILVERMAN: Thank you.
23 JUDGE FARRAR: Ms. Bupp?
24 MS. BUPP: Thank you, Your Honors. My name is
25 Margaret Bupp; I represent the NRC Staff.

1 With regard to the standing question that is
2 specifically asked in your scheduling order, in the first
3 place, the Staff also agrees that there's no 50-mile
4 presumption for standing here in the present case and, in
5 fact, there is no presumption for any distance; rather,
6 what we must determine is whether there is a proximity at
7 which there's an obvious potential for offsite
8 consequences.
9 JUDGE FARRAR: Okay. But there has never been
10 a case like this. And so while it was perhaps easy for
11 the Commission to say, We have a lot of reactor cases;
12 let's simplify this and make it 50 miles per reactor, why
13 is this not a case where we can say, Let's make it X miles
14 for a facility? You know, in other words, if 50 miles is
15 right for a reactor, why isn't it permissible to say X
16 miles, whatever X is, is proper for a facility of this
17 nature?
18 It's not that the Commission said you can't
19 apply 50 to this facility. They only had reactors in
20 front of them at the time.
21 MS. BUPP: Well, Your Honor, you're correct
22 that there has never been a case like this before,
23 although there was an earlier proceeding on the
24 construction authorization phase of this project. But
25 there have been, as counsel for the Applicant pointed out,

1 many, many other materials licensing cases where the Board
2 very -- where the Commission very strictly upheld the idea
3 that in materials licensing cases and in research and test
4 reactor cases, you must have a proximity-plus standing,
5 rather than simple proximity standing.
6 And as the Commission has not thus far stated
7 that there is any proximity presumption for this type of
8 facility, it seems more in keeping with prior Commission
9 case law to apply the proximity-plus standard.
10 JUDGE TRIKOUROS: So as I understand it, we're
11 to look at this on a case-by-case basis?
12 MS. BUPP: Uh-huh.
13 JUDGE TRIKOUROS: The -- if I look at the
14 probability of an offsite dose associated with, say, the
15 new, advanced reactors that we're soon to be licensing,
16 it's exceedingly low, and, yet, the 50-mile proximity
17 assumption applies to those. There have been
18 criticalities at fuel cycle facilities around the world.
19 At least -- I know there has been at least one in Japan,
20 and there've been others.
21 So the probability, one might argue, is not
22 even as low as the new reactors for an impact within the
23 50-mile zone; certainly within a 20- or a 30-mile zone.
24 How would you respond to that?
25 MS. BUPP: Well, the Staff's position is not

1 that there is no distance at which there would be an
2 obvious potential for offsite consequences. The Staff's
3 position is simply that the Petitioners have not shown
4 that there is any distance at which there would be offsite
5 consequences. They do have a burden -- although it is a
6 low burden, they have some burden to show that there is an
7 obvious potential for offsite consequences at the distance
8 they espouse, whether it's one mile or ten miles or, in
9 this case, 20 to 30 miles. And they have not made that
10 showing.
11 JUDGE FARRAR: And is the showing -- if I
12 remember their papers correctly, the showing they
13 attempted to make was why the Staff thinks there's an
14 impact of 50 miles, because they did documents that --
15 they did studies that looked up to 50 miles. Why isn't
16 that called an admission against interest, or whatever you
17 want to -- you know, why doesn't that carry the day?
18 MS. BUPP: The Staff did do its calculations
19 out to 50 miles. However, this was not entirely an NRC
20 Staff decision to do the analysis out to 50 miles. The
21 Department of Energy -- as a policy for all of their
22 nuclear facilities, they do all of their EISs out to 50
23 miles no matter what the facility. They don't make a
24 judgment on the facility.
25 Because this is a facility that is being

1 operated by a contractor for DOE and because there were
2 connected actions that are DOE-run facilities where the
3 EISs were completed by DOE for doses out to 50 miles, for
4 consistency's sake, the Staff did the analysis in our EIS
5 out to 50 miles to make sure that it encompassed the DOE's
6 analysis.
7 JUDGE FARRAR: Well, then I would --
8 MS. BUPP: But it was not a judgment on this
9 facility at all.
10 JUDGE FARRAR: Then I would raise my question
11 why -- using the colloquial, Admission against the Staff's
12 interest. Why isn't that an admission against DOE's
13 interest, DOE being the real party in interest in this
14 case? It's their project.
15 MS. BUPP: You might need to ask DOE. I do not
16 represent DOE. But it is my understanding and the Staff's
17 understanding that DOE applies a 50-mile radius regardless
18 of the facility. It could be a waste storage facility, it
19 could be a fuel facility, it could be really any type of
20 DOE nuclear facility; they do their EIS out to 50 miles.
21 JUDGE FARRAR: Right. But then you -- when the
22 Staff did it, you used the same 50 miles. Your FEIS
23 didn't say, DOE did 50, but we're discarding the outer 25
24 of that because, as far as we're concerned, we needn't
25 look more than 25 miles; so DOE may have done this work

1 for consistency, but we're focusing on licensing this, and
2 we only need to look out to 25. You all didn't say that.
3 MS. BUPP: I mean I suppose we could have. But
4 we were also trying to look at the cumulative impacts that
5 included many DOE facilities. And although we did our own
6 analyses in the EIS, we also looked at the DOE analyses,
7 and those were not broken down into 20-mile radiuses or
8 30-mile radiuses; they were out to 50 miles.
9 JUDGE FARRAR: Okay. So if I'm a prospective
10 Petitioner and I want to get into this case, why don't I
11 read these documents and say, I don't have to make a
12 showing here, because the two Government Agencies have
13 made the showing, and I'm willing to rely on the way they
14 did their work? And so why would the Petitioners be
15 expected to do any more than they did?
16 MS. BUPP: Well, all that they did simply is
17 read the documents and say, It's out to 50 miles;
18 therefore, there is an obvious potential for offsite
19 consequences. They didn't look at what was actually
20 included in the EIS and explain how what was included in
21 the EIS shows that there's a potential for offsite
22 consequences.
23 JUDGE FARRAR: Maybe I'm not making myself
24 clear. Why wouldn't they just point to that and say, If
25 this is what the Government thinks, we're going along with

1 it? In other words, why did they -- your brief says, you
2 know, they haven't drawn the connection. The connection
3 jumped off the page to me. Why is -- why was it not
4 sufficient just to say, Here's what the Government does;
5 we'll go along with them?
6 MS. BUPP: Well, they need to show some
7 connection, that there is actually going to be a potential
8 for offsite doses. That just saying that they did an
9 analysis out to 50 miles -- if we had found that there was
10 going to be zero dose out to 50 miles or a negative does
11 out to 50 miles, that wouldn't be enough. They still
12 haven't shown that there is an obvious potential for
13 offsite consequences. Just by saying that we analyzed it
14 out to 50 miles doesn't actually mean anything.
15 JUDGE McDADE: Okay. You could analyze it out
16 to 50 miles and find out that there's no dose beyond 50
17 feet. Correct?
18 MS. BUPP: Yes, exactly. We could analyze it
19 out to a hundred miles. Sometimes we do EISs not because
20 we think that there might actually be a dose out to a
21 certain radius, but because the facilities are located in
22 such remote areas that you have to go out a great distance
23 to even reach a human being who might receive a dose. And
24 then we'll find that out of that distance where human
25 beings reside, there is no dose.

1 And so in those cases, it's not a function of
2 the facility; it's a function of the location of the
3 facility.
4 JUDGE FARRAR: Okay. But this is --
5 MS. BUPP: So there are many reasons why we
6 might pick --
7 JUDGE McDADE: But here there are individuals
8 within several miles of the facility.
9 MS. BUPP: Yes.
10 JUDGE McDADE: As I understand the position of
11 the Petitioners here -- and they can correct me if I'm
12 wrong -- it's basically a res ipsa kind of argument. They
13 say that they are within 20 miles of the facility, the
14 facility will have up to 78 tons of plutonium; ergo, there
15 is a potential for offsite consequences.
16 That's their argument. It's basically, It's
17 there; we're here; there's a potential. Your argument is
18 that they have to explain how one leads to the other; they
19 have a basic obligation to at least make out a plausible
20 argument, a theory, of how those offsite consequences
21 would occur. Is that correct?
22 MS. BUPP: Yes. There's an intermediate step.
23 The material's there; X event could happen, and,
24 therefore, we could receive a dose.
25 JUDGE McDADE: Okay. And going back to the

1 questions that Judge Farrar asked of Mr. Silverman, is
2 looking at all of the documentation -- the license
3 application, the environmental impact statement, all of
4 the documentation -- that is in front of us right now, do
5 we have an ability as a panel to look at that information
6 and make our own conclusions as to whether or not --
7 again, not a probability, but whether or not there is a
8 potential within the period of, say, 20 miles for offsite
9 consequences?
10 MS. BUPP: No. Although the burden is quite
11 low for interveners to establish standing, they do have
12 the burden to make a standing showing. It is not the
13 Board's burden to establish standing for interveners.
14 JUDGE McDADE: Well, put aside the Board's
15 burden. Does the Board have the authority to make that
16 jump?
17 MS. BUPP: I don't believe so, no. The
18 Commission has been quite clear that it is the
19 Petitioners' burden.
20 JUDGE McDADE: And how do you answer the fact
21 of just the res ipsa type of argument, 78 tons; 20 miles'
22 potential exists?
23 MS. BUPP: I believe that there needs to be an
24 intermediate step, that there needs to be some explanation
25 as to how that 78 tons will have an effect at 20 miles.

1 JUDGE McDADE: And that's an affirmative
2 obligation on the Petitioner in order to gain standing and
3 to litigate in this proceeding?
4 MS. BUPP: That is correct, Your Honor.
5 JUDGE McDADE: That's your position?
6 MS. BUPP: Yes, it is.
7 JUDGE McDADE: Okay.
8 JUDGE TRIKOUROS: Even though we're entitled to
9 use -- to read laymen's pleadings a little more liberally
10 than we would read lawyers'?
11 MS. BUPP: Yes. And, you know, it is also
12 well-established that you construe standing arguments in
13 favor of the Petitioner, but there must be an argument
14 there to construe.
15 JUDGE FARRAR: Would you consider this an
16 unusual site? The -- we've got releases from SRS. We've
17 got releases from Vogtle 1 and 2. We've got new releases
18 occurring from the MOX facility. We've got early site
19 permit applications in our hands right now for Vogtle 3
20 and 4. So this site is a -- I would call it an atypical
21 site with respect to offsite doses even for normal
22 operations of all these facilities, but would you agree
23 with that? Is it?
24 MS. BUPP: It was a challenge to create the EIS
25 to include all of the cumulative doses. And that was a

1 concern. And so this is in some respects unusual, but
2 there are other facilities where there -- other DOE
3 facilities where there would also be similar materials.
4 JUDGE FARRAR: When you explained why you did
5 the 50-mile calculation -- correct me if I'm wrong, but I
6 believe when you finished that calculation, you did not
7 put down, Although, because DOE for consistency looks to
8 50 miles, we looked at 50 miles, and our conclusion is we
9 really didn't have to look past 15 miles, because
10 nothing's possibly happening after 15 miles. You didn't
11 say that in the FEIS, or, X miles. You didn't say that in
12 the --
13 MS. BUPP: No. We didn't make a determination
14 as to where the offsite consequences would end. In fact,
15 our finding in the FEIS was that all impacts would be
16 small. And that was the finding that we made based on --
17 JUDGE FARRAR: But it didn't say, It didn't do
18 concentric rings, and said, They're infinitesimal between
19 40 and 50 or 30 and 40.
20 MS. BUPP: Honestly, I don't believe so, but I
21 would have to look at the EIS again to be certain.
22 JUDGE FARRAR: Okay. Then why should we hold
23 the interveners to a higher standard for creating their
24 documents than you're asking us to hold the Staff for
25 creating its documents?

1 MS. BUPP: I don't believe that we're holding
2 them to a higher standard. It's actually a very low
3 standard they have to meet to argue that there is some
4 impact. I mean, our documents do include doses, both at
5 the site barrier and then out to the public.
6 You know, we do have -- we do include a lot of
7 information in our document. And we're not asking them to
8 include as much information as the Staff would include in
9 an EIS; we're asking them to make a very simple, logical
10 connection between their proximity to the facility and the
11 potential dose. It's not a high burden. Unfortunately,
12 they haven't met the burden.
13 JUDGE McDADE: They have some obligation to
14 explain how --
15 MS. BUPP: Yes.
16 JUDGE McDADE: -- that offsite impact could
17 occur?
18 MS. BUPP: Yes.
19 JUDGE McDADE: Okay. At this point, we've used
20 25 minutes of the 15 minutes allocated.
21 MS. BUPP: Okay.
22 JUDGE McDADE: Do you have anything further on
23 this particular point on standing?
24 MS. BUPP: No, unless the Board has further
25 questions.

1 JUDGE McDADE: Okay.

2 JUDGE FARRAR: Thank you.

3 Let's go out of order momentarily.

4 Mr. Silverman, rather than you hold this for
5 rebuttal -- and the Petitioners won't have a chance -- do
6 you want to speak for 30 seconds to the DOE 50-mile policy
7 so that they'll have a chance to respond to that when it's
8 their -- as their turn comes up?

9 MR. SILVERMAN: Yes, Your Honor, I -- the 30
10 seconds or less on that particular issue.

11 As I understand what the Staff has done, they
12 selected the 50 miles as an input to their analysis, as an
13 input to determining where doses may -- what doses may be
14 and where they may be. It is not an output. And it's my
15 understanding based upon their approach here that they
16 selected that location and the selection of that location
17 has really nothing to do with what the actual doses are
18 that are associated with this facility.

19 JUDGE FARRAR: But as an output, they didn't
20 tell us the actual doses in concentric rings.

21 MR. SILVERMAN: I believe that information in
22 some form is in the EIS. But the selection of -- the
23 decision to select 50 miles is an input, and not an
24 output, and doesn't say anything in and of itself about
25 the offsite exposures.

1 JUDGE FARRAR: All right. Thank you.
2 Who's going to argue for the Petitioners?
3 MR. ZELLER: I am, Your Honor.
4 JUDGE FARRAR: Okay. Go ahead, Mr. Zeller.
5 And you heard the concession about the -- you being
6 authorized representatives and the Petitioners authorizing
7 the organization. So all you need to do is speak to the
8 individual standing.
9 MR. ZELLER: Yes, sir. I understand.
10 JUDGE FARRAR: Go ahead.
11 MR. ZELLER: All right. Thank you very much.
12 My name is Lou Zeller, and I'm with the Blue Ridge
13 Environmental Defense League, and I'm speaking on behalf
14 of my organization and Nuclear Watch South and the Nuclear
15 Information and Resource Service on the issues of
16 standing.
17 To begin with, the maximum legal exposure is 10
18 millirems per year for airborne emissions through any
19 environmental pathway, according to 40 C.F.R. 6192. This
20 translates into a risk of 5.6 excess fatal cancers per
21 10,000 people, according to BEIR V estimates. The
22 Petitioners submit that this alone should provide the
23 legal basis for standing in this matter in terms of
24 offsite consequences. Further, our presumption of
25 proximity rests upon the population dose calculated --

1 JUDGE McDADE: What is the evidence we have in
2 front of us of millirem exposure at the 20-mile range from
3 the facility?
4 MR. ZELLER: Pardon?
5 JUDGE McDADE: What is the evidence we have in
6 front of us of millirem exposure at the 20-mile range from
7 the facility?
8 MR. ZELLER: You --
9 JUDGE McDADE: Do we have any?
10 MR. ZELLER: You have no -- you have risk
11 assessments and computer projections of dose estimates.
12 For example, the population dose, 50 miles, according to
13 DCS is at -- documents filed were .12 person rems per year
14 from transportation. Other doses are calculated again out
15 to 50 miles, I believe, at .12 person rems per year
16 population dose from -- that's from normal plutonium fuel
17 factory operations. And --
18 JUDGE McDADE: Okay. It is the position of the
19 Applicant that in order for you to demonstrate standing
20 you have to make an argument, present to us specific
21 information, indicating offsite consequences. And what
22 I'm asking you to do is just succinctly state the evidence
23 that's currently before us in your mind that indicates
24 that there will be offsite consequences of the proposed
25 action at the distance of 20 miles, which is the nearest

1 of any of your members.

2 MR. ZELLER: Well, I think -- I listened very

3 carefully to the Applicants and to the Staff counsel's

4 earlier arguments, of course. And I understand that for

5 consistency's sake, 50 miles is used for reactors.

6 However, this is -- as you have pointed out, this is an

7 atypical situation and a single facility.

8 It might be fair to compare it to another

9 facility operated by AREVA or -- COGEMA at La Hougue,

10 where, at a 35-kilometer radius from La Hougue in

11 Normandy, France, that -- in The British Medical Journal,

12 a study found that leukemia was increased by relative risk

13 of 2.87 and 4.49 when categories were aggregated, and

14 levels of more-than-once-a-month consumption of local fish

15 and shellfish showed an increased relative risk of 2.66.

16 This is a study presented -- case control study

17 of leukemia among young people near La Hougue Nuclear

18 Reprocessing Plant. And it talks about the environmental

19 hypothesis revisited. So the --

20 JUDGE FARRAR: Was that a case control study,

21 or just one of those that says, Here's at least a

22 coincidence we need to study more and see what the

23 causation may or may not be?

24 MR. ZELLER: This is, Your Honor, a case

25 control study published in The British Medical Journal.

1 This was in 1997, 11 January. In terms of the --

2 JUDGE FARRAR: And what are the similarities or

3 dissimilarities between the facility at the Savannah River

4 site and La Hougue?

5 MR. ZELLER: Well, the La Hougue facility is

6 operated by the same contractor for the Savannah River

7 site. It is -- has often times been pointed to as an

8 example of the technology and the safety and the efficacy

9 and the efficiency and the utility and the history of this

10 type of process. In fact, it's also called a MOX

11 facility. It's the nearest plant that I could find

12 anywhere.

13 JUDGE FARRAR: Was this study referenced in

14 your petition or your reply?

15 MR. ZELLER: We did not make specific reference

16 to it.

17 JUDGE FARRAR: Okay. Go ahead.

18 MR. ZELLER: I would add that I understand that

19 proximity standing differs from traditional standing, but

20 I would say in response to that first that the plutonium

21 fuel plant is plainly a significant source of

22 radioactivity. The environmental report itself points to

23 a design capacity of 35 metric tons of plutonium and 660

24 metric tons of uranium. Projected impacts are based on

25 preliminary design and assumed to be bounding. Impacts of

1 proposed action are expected to occur for a ten-year
2 period, adding up to these totals.
3 So this is radioactive material with a
4 potential radiation release second -- either under
5 accident scenarios or under normal operations, as I
6 outlined before.
7 JUDGE FARRAR: How many warheads does it take
8 to leave us with that amount of plutonium, or is that
9 perhaps an irrelevant question?
10 MR. ZELLER: How many warheads? That's very
11 good. I believe it's somewhere on the order of ten
12 kilograms -- but don't hold me to that -- per warhead.
13 Furthermore, the plutonium fuel factory
14 environmental report specifies three receptors, or
15 categories of humans, who may be exposed to radiation from
16 the plant. These are: SRS site workers, of course, a
17 person at the fence line, the so-called maximally exposed
18 individual, and; the public, and; as has been pointed out
19 before and you've read, I'm sure, the third receptor, the
20 offsite population, is all members of the public within a
21 50-mile radius, or 80 kilometers.
22 In the Appendix D of the plutonium fuel factory
23 environmental report, it talks about the risk from
24 ionizing radiation. Potential offsite doses to the public
25 were determined for the NEI and the general population

1 residing within an assessment area, defined by 50-
2 miles/80-kilometers radius around the facility. The
3 entire population within the assessment area was assumed
4 to consist of adults.
5 I raise this because this would indicate to me
6 that the impacts form this radiation dose have been
7 underestimated. And this is among the concerns of people
8 that we are in communication with on a regular basis in
9 the Augusta and Aiken area, and that is that radiation
10 dose estimates underestimate the impacts on people,
11 particularly gestating females, unborn children and the
12 elderly, and very young children.
13 The use of the population or the person rem
14 itself -- the environmental report expresses population
15 dose in person rems. People dose is a collective
16 measurement which is based on population, of course,
17 within a given area.
18 According to Sanden [phonetic] Corporation,
19 it's an average individual dose multiplied by the number
20 of people exposed. Comparisons with background radiation
21 and regulatory standards notwithstanding, the population
22 dose is an additional radiation exposure above and beyond
23 that level to which people would be otherwise exposed.
24 Impacts of this additional exposure are measurable and
25 real.

1 Calculation of the offsite dose requires a
2 detailed assessment of the projected population based on
3 census data population projections through the proposed
4 operating period. The annual dose to a person living
5 within 50 miles was calculated by the annual offsite
6 population dose divided by the total population projected
7 to live within a 50-mile radius in the year 2030.
8 The negative health impacts on residents living
9 near the plutonium fuel or MOX plant in La Hougue are
10 instructive. The plant's operated by COGEMA, since 1976.
11 It has had numerous radioactive releases to the air, water
12 and to agricultural produce. Streams are purported to be
13 contaminated near La Hougue. One stream from which cattle
14 drank reported 3,800 Picocuries per liter in water.
15 A fire caused breakdown in the cooling system
16 at the waste dump/reprocessing plant and caused massive
17 contamination. A pipeline which carries radioactive water
18 from the nuclear treatment plant was breached scores of
19 times. A British scientist discovered radionuclides
20 concentrated 100 to 10,000 times in seaweed outside of the
21 plant eight kilometers from La Hougue.
22 A 1997 study that I mentioned before discovered
23 significant increases in leukemia incidence in young
24 people within 22 miles of the La Hougue plant. That's the
25 case control study I had mentioned earlier.

1 JUDGE McDADE: Okay. But at this point in the
2 proceeding, we're talking about standing. In order for
3 standing for your membership, you have to demonstrate that
4 there is some potential for offsite consequence. You
5 don't have to demonstrate that that consequence is
6 particularly high. For example, in the earlier proceeding
7 here on transportation, it was a very low dose that
8 members would be exposed to in order to establish
9 standing.
10 So we're not at this point yet talking about
11 the consequences of that dose; we're just talking about
12 what is before us right now that demonstrates that your
13 members within 20 miles to 32 miles of the facility will
14 have an increased dose, increased exposure, to
15 radionuclides. Can you focus on that for a moment and,
16 again, what's before us in the record, just to explain
17 that?
18 MR. ZELLER: Okay. All right.
19 (Pause.)
20 MR. ZELLER: Thank you, Glenn.
21 In our June 27 reply of the petitioning
22 organizations to the answers filed June 11 and 13 by NRC
23 Staff and the license Applicant to our petition of May 14,
24 on page 2, we say that, Individuals who work and live
25 outside the SRS within 50 miles of the proposed

1 facilities.

2 Second, NRC finds that tritium released

3 accident at the proposed pit disassembly conversion

4 facility would administer a sizable dose to members of the

5 public out to 50 miles. It's clear that the proposed

6 plutonium fuel receive would affect Petitioners' members.

7 JUDGE FARRAR: But Mr. Silverman would say

8 we're not entitled to look at that, because that's a

9 collateral facility that is not subject to our licensing

10 authority.

11 MR. ZELLER: Well, it is a part of the process

12 here, and it is a facility which, I understand, would not

13 be constructed at all if -- unless there was a fuel

14 factory alongside of it. And the consequences there are

15 spelled out. I'm sorry. Do you have just --

16 JUDGE FARRAR: Suppose -- isn't it possible --

17 was there even a suggestion that that facility could be

18 built elsewhere in the country in which it would be

19 built -- let's take your argument to its logical extreme.

20 If that facility could be elsewhere, then we

21 could have people who lived within two miles of wherever

22 elsewhere is come in to this facility saying, We don't

23 like this MOX facility at the Savannah River Site because

24 we live two miles from where this adjunct facility is

25 going to be in Texas, and so we want to come in here.

1 Wouldn't that be too attenuated a connection?
2 And if that's attenuated, how is that -- if that's too
3 attenuated, how is that different from your people saying,
4 Well, the facility itself won't bother us, but this
5 collateral facility would? Is that question kind of
6 clear?
7 MR. ZELLER: I think so.
8 JUDGE FARRAR: It's long and complex. But --
9 MR. ZELLER: Right. I know that's a
10 complicated question. And as my friend John Jacobs used
11 to say, If Zeide was a bubbe.
12 What we are talking about, of course, is these
13 facilities located -- and the reason I bring this up is
14 because here is an example of an offsite consequence with
15 a sizable dose to members of the public. It is to be
16 located here. It is one example of the emissions from the
17 facility having an impact. Some of the others which I
18 have already mentioned to you have to do with both the
19 predictions provided by the Applicant, that is: The .12
20 person rem figure, and the transport figures.
21 JUDGE FARRAR: From the operation of the --
22 MR. ZELLER: From the normal operations, .12.
23 JUDGE FARRAR: From the MOX facility itself?
24 MR. ZELLER: Correct. That is --
25 JUDGE FARRAR: Not these collateral buildings?

1 MR. ZELLER: That's right. That is from the
2 plutonium fuel factory itself, and then the transport was
3 in addition to that, to and from the plutonium fuel plant.
4 So even those small doses arguably have measurable
5 consequences in a population.
6 And, as I began talking about, these
7 predictions are very difficult to rely upon because of
8 some of the assumptions that go into them. Therefore,
9 that's why I began with the standard, the 10 millirem
10 standard, to doses of the public in terms of standing at
11 least, in that the only benchmark that we have that we can
12 hang our hats on legally is the 10 millirem standard,
13 which is written down in the Code of Federal Regulations.
14 If the .12 millirems person rems in population
15 dose turns out to be .14 or .16 or .66, it wouldn't matter
16 in terms of their ability to get a license, because it
17 would still be under the regulatory limit.
18 So whatever the prediction says, and if it
19 turns out that it's not accurate or that it hasn't
20 accounted for something or there has been some error or
21 some assumption which BEIR V or BEIR VII or BEIR XXVIII
22 down the road finds out is not adequate, we can rely upon
23 the one figure which is written in the Code of Federal
24 Regulations, which says that you can excess 5.6 excess
25 fatal cancers per 10,000 people.

1 That is cause for concern in the public. That
2 is a dose that is a measure of the impact upon the
3 population here. That is the concern of the people that
4 have signed affidavits in support of our standing.
5 JUDGE FARRAR: Are you conceding that if the
6 doses were all less than the maximum legal, you would
7 not -- people would not have standing? Or could they say,
8 Well, it's within the legal limits, but every little bit
9 counts, and, you know, there's no -- we are affected? You
10 may not have a contention that you'll win on, but you're
11 affected for standing purposes by a dose that approaches
12 the maximum legal limit? What's your position on that?
13 MS. SMITH: No, sir, I'm not saying that it
14 would be okay. But we have two different things here. We
15 have computer estimates and predictions based on a series
16 of assumptions, and we have the legal limit, which is
17 written down in black and white. Those are two separate
18 things.
19 JUDGE FARRAR: Do you have anything else?
20 Or --
21 MR. ZELLER: Just one moment.
22 (Pause.)
23 MR. ZELLER: I did look back into the history
24 again, to compare apples to apples, of the La Hougue
25 plant. It has had a series of accidents. And I didn't

1 bring that document with me today; I'd be happy to provide
2 some of the operating history at that plant. And my
3 associate here is bringing me something.
4 (Pause.)
5 MR. ZELLER: This is from the environmental
6 impact statement on the construction and operation of the
7 proposed mixed oxide fuel fabrication facility at the
8 Savannah River Site. This is the final report, NUREG-
9 1767, Volume 1, on page 4-48. Again, this talks about the
10 pit disassembly conversion facility and the estimates on
11 offsite of about 14 millirems.
12 JUDGE FARRAR: Okay. Thank you.
13 MR. ZELLER: Thank you.
14 JUDGE FARRAR: Our questioning took up far more
15 of the Applicant's and Staff's time than our questioning
16 of you did. So don't consider that you got unequal
17 treatment.
18 Mr. Silverman, Ms. Bupp, do you want to do a
19 very quick rebuttal, please?
20 MR. SILVERMAN: Just a few points, Your Honor.
21 The Board inquired of the Petitioners what
22 their basis was and what the evidence was for identifying
23 a proximity presumption and demonstrating standing and an
24 offsite obvious -- a potential for offsite dose in this
25 case, and I think it's very telling what the response is.

1 The response goes to, One, the La Hougue
2 facility in France, which, of course, this facility is
3 modeled after in part, but which is not the facility that
4 is being licensed here and which is not the facility that
5 is the subject of the environmental report, the EIS and
6 the other safety documents, and, Two, the PDCF facility,
7 which again is appropriate for discussion and the
8 environmental report, but doesn't -- is not an appropriate
9 basis for determining whether the Petitioners have
10 standing in this case. Those --
11 JUDGE FARRAR: You're -- I understand the
12 argument about the second one. We've discussed that. But
13 about La Hougue, if this facility is modeled on it, why
14 can't we reason by analogy to what has been experienced
15 there?
16 MR. SILVERMAN: Well, Your Honor, that would be
17 overly simplistic to do it. I'm not an expert in what the
18 similarities and differences are in those two facilities.
19 It was -- it's a facility that is in another country, that
20 has a different operating experience.
21 None of us have -- at least the Applicant
22 certainly has not prepared today a discussion of what the
23 actual impacts are to test what the Petitioners have even
24 said about La Hougue. I'm not even sure that information
25 is available. So they're focusing on the PDCF and the La

1 Hougue facility, and I think that says something about
2 their case.
3 And then I'd just like to close by saying with
4 respect to the Georgia Tech case that you referred to, if
5 our recollection is correct, the Petitioners were in the
6 range of about a half-a-mile from that facility. Here we
7 are talking about the closest -- the site boundary. The
8 closest point of the site boundary from this facility to
9 the Savannah River Site boundary is over eight kilometers.
10 When you add to that the 20 to 32 miles that the
11 Petitioners have indicated where they live, we're talking
12 about a very substantially different difference.
13 And finally, Your Honors, if you were to
14 establish a 50-mile proximity presumption in this case, I
15 think you would be setting, establishing, new law. Thank
16 you.
17 JUDGE McDADE: Okay. Before you move on, as I
18 understand the argument -- and I'm not saying this is a
19 good argument or bad argument; I'm just asking you to
20 address
21 it -- it is -- the Petitioners are saying that the pit
22 disassembly conversion facility would not exist if we do
23 not license this facility, and that there is a potential,
24 a demonstrated potential, for offsite impact as a result
25 of that. Should that alone grant them standing? If not,

1 why not?

2 MR. SILVERMAN: It cannot, Your Honor. It, the

3 law, and the standard is, Is the facility that is being

4 licensed by the NRC a facility that is a potential source

5 of a significant offsite consequence. It is not the PDCF.

6 You may not consider that for purposes of standing.

7 JUDGE McDADE: Well, for example --

8 JUDGE TRIKOUROS: Well, the requirements for

9 cumulative effects also, as I understand them, do include

10 ancillary buildings licensed by others. Isn't that

11 correct?

12 MR. SILVERMAN: That is absolutely correct with

13 respect to whether the environmental report and

14 environmental impact statement are appropriately scoped

15 and cover all the necessary impacts.

16 It is not -- it is a very different matter to

17 take another facility which is not the one that is being

18 licensed and determine whether as a result of a dose from

19 that facility that demonstrates that there is a

20 significant potential for an offsite consequence from our

21 facility. That's -- the standard for standing is the

22 facility being licensed: Does it create an obvious

23 potential for offsite impacts.

24 JUDGE McDADE: Well, is it from the facility

25 being licensed, or is it from the Agency action? The

1 Agency action is the licensing of the facility. The
2 licensing of the facility, they argue, will result in the
3 pit conversion facility being built and an offsite dose
4 occurring. That's their argument. Now my question is, Is
5 it the Agency action that we're looking at, which is the
6 licensing of the MOX facility, and what flows from that?
7 For example, transportation of plutonium to the
8 facility is a necessary part of it. That was taken care
9 of in the earlier proceeding here. Standing was
10 determined based on the potential for offsite consequences
11 moving plutonium to the facility and moving fuel from the
12 facility. Is the analogy that they make here not apt, as
13 well?
14 MR. SILVERMAN: It is not, Your Honor. I think
15 that the facility and the action are the same. I do agree
16 the action does include the transportation of material
17 from the facility, but it does not include the impacts
18 from a completely separate facility, albeit somewhat
19 related. I do not believe that's what the NRC case law
20 holds in this context.
21 JUDGE McDADE: Okay.
22 JUDGE FARRAR: Okay, Ms. Bupp.
23 MS. BUPP: I just have a few points, Your
24 Honors.
25 First with response -- in response to the

1 statements made about the La Hougue facility in France,
2 although the Staff, of course, has not had a chance to
3 review the studies relied upon by the Petitioners, we
4 would like to point out a few factual issues about the La
5 Hougue plant.
6 The La Hougue plant is a very, very large
7 facility that does include a MOX processing plant but also
8 includes several other nuclear facilities, including a
9 spent fuel reprocessing plant. And without having the
10 opportunity to study the studies relied upon by the
11 Petitioners, it's not entirely clear where these offsite
12 doses are coming from. And you should keep in mind the
13 actual character of the La Hougue plant. Also, with
14 respect to the PDCF --
15 JUDGE FARRAR: Would it have been legitimate
16 for them -- suppose in their opening petition they had
17 said, We read about La Hougue; that makes us nervous about
18 this place; we think it's going to be the same? Then you
19 could have responded and said, No, that's a totally
20 different facility. Is this a matter of proper pleading,
21 or, as Mr. Silverman said or as I think I understood him
22 to say, is it that that facility is another facility, and
23 so just don't look at it?
24 MS. BUPP: Okay. I think it's both. I mean,
25 first of all, there's the issue of proper pleading, that

1 we haven't had our chance to respond to any of this. But
2 also, it is a different facility that -- even the MOX
3 facility at La Hougue is run differently than this
4 facility will be run. But, also, that facility includes
5 many other plants and processes, and so it is an entirely
6 separate character as a facility.
7 And then, also with respect to the PDCF, I
8 think all the parties have spoken on that issue, but the
9 Staff does agree with the Applicant that the PDCF -- at
10 least at this stage of this proceeding, impacts from that
11 facility are not a proper basis for standing.
12 JUDGE FARRAR: All right.
13 MS. BUPP: Okay. If you have any --
14 JUDGE McDADE: At this stage of the proceeding.
15 Would it be at any other stage?
16 MS. BUPP: In the earlier construction
17 authorization stage, where the ER and EIS were at issue
18 and both the ER and the EIS addressed impacts from that
19 facility, it could be a proper basis for standing. But
20 here, where the only thing at issue is issuance of the
21 license that would lead to operation of the MOX facility,
22 that is not a proper basis for standing.
23 JUDGE McDADE: Okay. So as I understand the
24 argument that you've just made -- in the earlier
25 proceeding, the environmental impact statement was part of

1 what was being taken into consideration -- that any
2 argument made based on the pit disassembly facility
3 would -- if it would have been appropriate, it would have
4 been appropriate then, even if it was appropriate then, it
5 would not be appropriate now; it's outside the scope of
6 this proceeding since it could have been raised at the
7 earlier proceeding and wasn't?
8 MS. BUPP: Yes, Your Honor.
9 JUDGE McDADE: Okay.
10 JUDGE FARRAR: Okay. Thank you, Ms. Bupp.
11 JUDGE McDADE: Mr. Silverman, do you agree with
12 that?
13 MR. SILVERMAN: Not entirely, Your Honor. I --
14 we continue to adhere to the belief that, whether it was
15 the prior proceeding or this proceeding, when it comes to
16 standing, the issue is whether the facility that is being
17 licensed creates the obvious potential for offsite
18 impacts, and that in the earlier proceeding, raising an
19 issue about what the PDCF would create would not go to
20 standing.
21 JUDGE McDADE: No. I understand your position
22 there. The question that Ms. Bupp answered, which is what
23 I intended the question to be, is, For the sake of
24 argument, assume that would be a legitimate concern, it
25 would be a legitimate basis for standing, that,

1 nevertheless, since the environmental impact statement was
2 a part of the earlier proceeding, if it were to be raised,
3 it would have had to have been raised at the earlier
4 proceeding or would be waived.
5 MR. SILVERMAN: Yes. With that assumption, I
6 agree with that 100 percent.
7 JUDGE McDADE: Without conceding -- this is
8 just for the sake of argument. Without conceding that it
9 would be a basis, if it were, it's too late?
10 MR. SILVERMAN: Absolutely.
11 JUDGE McDADE: Okay.
12 JUDGE FARRAR: All right. Thank you.
13 We've used an hour of the 40 minutes we
14 allocated to that issue. People may have airplanes to
15 catch, so we'll try to perhaps cut some of the times back
16 a little as we move forward.
17 I was remiss in my introductions. I forgot
18 to -- I mentioned all the people here in Augusta who
19 helped, but I forgot our own people who helped. Trish
20 Harich, sitting up here with us, has worked with all the
21 good people here to help pull this event off. We also
22 have with us our law clerk, sitting in front, Marcia
23 Carpentier, who has been with us a couple of years, and
24 Zach Kahn, who just started recently.
25 And, Mr. Zeller and Ms. Carroll, I notice you

1 have someone who I think is familiar to us from last night
2 sitting with you at the counsel table. If you want to,
3 introduce her.
4 MS. CARROLL: Oh. This is Jeannine Honicker,
5 and she's a member of Nuclear Watch South, and she stayed
6 over. And we had an extra seat at the table, and I hope
7 it's okay if she sits with us.
8 JUDGE FARRAR: We're glad to have her. We --
9 she was one of the people who made a limited appearance
10 statement last night.
11 And we're glad to have you here, ma'am.
12 MS. CARROLL: She has also been an intervener
13 in the past.
14 JUDGE FARRAR: Okay.
15 Well, let's move ahead and discuss Contention
16 1. Let's try to cut the time periods down a bit. And
17 then we'll take a break after that, after we deal with
18 that contention.
19 On this one, the Petitioners are to go forward.
20 Who's going to do that argument?
21 MR. ZELLER: Oh. I'm sorry, Your Honor?
22 JUDGE FARRAR: On the contention of
23 admissibility, we'll start with Contention 1 and try to
24 cut the times back a little. And on that one, you all go
25 first. Which of you is going to make that argument?

1 MR. ZELLER: Yes, sir. I will.

2 JUDGE FARRAR: Okay. Thank you.

3 (Pause.)

4 JUDGE McDADE: Okay. If I could start off with

5 a question on this? As I understand, part of your

6 argument is that the Nuclear Regulatory Commission should

7 have done a supplemental environmental impact statement;

8 under 51.92(a), they would have to do a supplement if

9 there were seriously different circumstances than

10 previously envisioned.

11 Can you focus us on what circumstances, what

12 information is available now, that was significantly

13 different from the circumstances existed at the time the

14 original environmental impact statement was issued, I

15 believe, back in '05, and during the previous proceeding

16 here?

17 MR. ZELLER: All right. Yes, I can do that.

18 The issuing of an operating license for the

19 proposed plutonium fuel factory would allow the Applicant

20 to proceed with operations as permitted. Operating

21 permits are legally enforceable documents. Issuing of

22 this operating license would permit the Applicant to emit

23 air pollution from the plutonium fuel factory and the

24 supporting structures. Although --

25 JUDGE FARRAR: But you knew Judge -- the point

1 of Judge McDade's question is you knew that four years
2 ago, or whenever it was you first heard of the case. You
3 knew that, the Staff knew that, and it was addressed in
4 the EIS and was subject to being addressed in the hearing
5 at the first proceeding.
6 So the question is, What's new about that that
7 either lets you come in now and say, "Aha, there's new
8 evidence on this point," or should have triggered the
9 Staff to do a supplemental draft EIS which would have gone
10 out for comment? What's new since four or five years ago?
11 What would you tell us today that you would not have said
12 from the same podium in the first proceeding?
13 MR. ZELLER: Well, it's -- that's a difficult
14 question to answer because, you know, four or five years
15 ago, we did not have, of course, the license application,
16 which was filed late last year. So that, of course,
17 provided new insights into how the plant would be operated
18 and how and what type of emissions, air-pollutants, we
19 might expect from that under --
20 JUDGE FARRAR: Well, wasn't that all in the
21 Applicant's and Staff -- perhaps not in the same detail as
22 in the current documents, but wasn't all that covered
23 to -- I was going to say, "To a greater or lesser extent,"
24 but, actually, to a greater extent at that point?
25 MR. ZELLER: It was -- some of the same issues

1 were certainly covered. I agree with that. However --
2 JUDGE FARRAR: And then -- and you -- well, go
3 ahead.
4 MR. ZELLER: Yes. But there are -- there is
5 further development of it in the license application. Of
6 course, because in -- under the regulations for the
7 operating license, additional information is provided,
8 perhaps not enough information to satisfy us, because
9 that's what
10 we're -- some of the points that we are arguing here, in
11 that the pollution limits will not be controlled
12 adequately by what they have spelled out in the license
13 application --
14 JUDGE McDADE: Okay. In --
15 MR. ZELLER: -- under the Clean Air Act, which
16 comes back to the environmental impact.
17 JUDGE McDADE: In your petition, though, you
18 point to a revision of the license application was filed
19 in November '06. But the Applicant and the Staff indicate
20 that the data that you use from that revision don't
21 measure the same things, that there's no inconsistency
22 there, that you're -- basically, I believe the Staff's
23 language were that you're comparing apples and oranges and
24 saying they're not the same. And they're saying it's not
25 surprising that apples and oranges aren't the same.

1 You -- can you explain how that table that, I
2 believe, was on page 8 of the application or -- of your
3 petition, you know, is relevant here if they're measuring
4 different things? What's the inconsistency?
5 MR. ZELLER: Page 8? (Perusing document.)
6 Yes. On page 8, we did compare the EIS to the
7 application. So -- and we point to the inconsistencies
8 within that between those two documents. So there is new
9 information in the license application which we did not
10 have during the environmental impact statement, which was
11 filed on whatever date it was filed on.
12 JUDGE McDADE: But the Staff and the Applicant
13 say that the fact that those two tables are inconsistent
14 is not relevant, that one is measuring emissions from the
15 Savannah River facility in 2000 and the other is measuring
16 emissions from the prospective MOX facility, that you
17 wouldn't expect them to be the same; there's nothing
18 inconsistent there. Have -- is --
19 MR. ZELLER: Right.
20 JUDGE McDADE: Do you agree with that argument
21 by the Staff and the Applicant? Or -- if not, why not?
22 MR. ZELLER: What we attempted to show in our
23 petition, whether we did it well enough or not, is to show
24 that the plutonium fuel factory, the license
25 application -- emissions are quite high even compared with

1 the total facility emissions. And that's -- under the
2 Clean Air Act, what we are looking at here is the Nuclear
3 Regulatory Commission proceeding with an operating permit
4 for an air-pollution facility.
5 And I agree this is perhaps a novel argument,
6 which someone else said. That's not my term. But
7 under -- as a major emissions source, the Savannah River
8 Site has one single permit for the entire facility,
9 excluding a couple of the coal-fired units which many
10 people don't even know exist on a nuclear facility such as
11 this providing electric power. But for the most part, all
12 of the facilities are under one single Title V permit.
13 The plutonium --
14 JUDGE FARRAR: Is that an EPA permit, or state
15 permit?
16 MR. ZELLER: It's a Part 70 permit under the
17 Clean Air Act. And the permit is issued under Part 70 by
18 the State of South Carolina as an agreement state. That
19 goes to the point exactly in that --
20 JUDGE FARRAR: But if -- okay. Are you saying
21 that the new information you read suggests that they'll
22 violate that permit? And if so, isn't the answer to that
23 South Carolina superintendent via EPA will get after them
24 and the problem will be solved?
25 MR. ZELLER: Exactly the point. You anticipate

1 my argument. The issuance of this license application is
2 a -- should come under new source performance standards or
3 a major modification.
4 JUDGE FARRAR: But that's -- isn't that an
5 issue for the Clean Air people?
6 MR. ZELLER: However, under Title V -- a Title
7 V permit under the Clean Air Act is issued for operating
8 for facilities after they've begun operation. For
9 example, at the present time, Title V permits are issued
10 for a large percentage, but not all operating, major
11 sources in the United States, no matter where they're
12 located.
13 This operating license if issued by the Nuclear
14 Regulatory Commission would allow the facility to begin
15 operating. This is the chance -- this is perhaps the only
16 chance that we have for the application of NESHAPs,
17 radionuclide emissions, maximum achievable control
18 technology before the --
19 JUDGE FARRAR: Well, yes. But shouldn't you be
20 at the South Carolina -- I don't know if it's the DEP or
21 DEQ in that state.
22 MR. ZELLER: It will be too late, because the
23 plant would have been in operation already. And the
24 permit would come back and license what is already there.
25 JUDGE FARRAR: Okay. All right. Do -- without

1 going -- do you have anything else to point us to on this
2 question of what's new in the last several years?
3 And remember, this is a special proceeding. I
4 haven't seen any like it before where the Commission's
5 notice at the beginning said, We're going to do this and
6 this and environment at the first stage, and then we're
7 not going to do environment at the next stage; you're
8 going to have to do all of it at the first stage.
9 So we're in an unusual position. So do you
10 have anything else to show us what has happened lately,
11 meaning in the last several years, that should allow us to
12 say, Well, the Commission would want us to re-open
13 environment because of these new matters?
14 MR. ZELLER: I don't think of anything to add
15 in terms of modifying the environmental impact statement.
16 JUDGE FARRAR: Okay. Well, we have your
17 pleadings on the specifics of the other. And in light of
18 the time constraints, if you have nothing else, we'll hear
19 from your opponents.
20 MR. ZELLER: Just -- thank you, Your Honor.
21 Just to be clear, the Clean Air Act under
22 Section 165(a) states that no major emitting facility may
23 be constructed unless a permit has been issued for such
24 proposed facility which sets forth emission limitations
25 and a proposed permit has been subject to review in

1 accordance with the regulations of the Clean Air Act. So
2 what I'm saying is here we may be putting the cart before
3 the horse.
4 JUDGE FARRAR: But shouldn't you be down at the
5 DEP or DEQ saying, Watch out for these people; there's an
6 enforcement action working here?
7 MR. ZELLER: If the DEQ's not in the room, I
8 would be --
9 JUDGE FARRAR: But they have a role.
10 MR. ZELLER: They would have a role, but --
11 JUDGE FARRAR: No. I mean -- yes, they have a
12 room somewhere that you could make that argument to.
13 MR. ZELLER: Yes, exactly.
14 JUDGE FARRAR: Okay. Thank you, sir.
15 Mr. Silverman?
16 MR. SILVERMAN: Thank you, Your Honor. In the
17 interest of time -- we have Contention 1; it has got five
18 subparts to it. What I'd like to do, hopefully, is -- I
19 want to make three points that are generic to the entire
20 contention. And then, certainly, if you have specific
21 issues or questions about subcontentions, I'd be happy to
22 answer them.
23 JUDGE FARRAR: Go ahead.
24 MR. SILVERMAN: We have three reasons for why
25 we believe the contention as a whole, in its entirety,

1 ought to be dismissed. The first one is that, as you've
2 pointed out, we've had two different proceedings here.
3 We had a construction authorization proceeding,
4 and there were Commission notices on that subject. And in
5 our view, those Commission notices made it very clear that
6 environmental issues associate with the MOX facility were
7 to be litigated in that proceeding and addressed
8 completely in that proceeding.
9 The environmental report that the Applicant
10 filed covered construction and operating impacts. The EIS
11 that was prepared covered construction and operating
12 impacts.
13 The interveners were directed to file
14 contentions if they had contentions on the basis of the
15 environmental report, and they did so. They had a full
16 opportunity to raise environmental contentions in the CAR
17 proceeding. And in fact, by my count, there were roughly
18 20 contentions that were environmental-based contentions
19 and related to operation of the facility, not just
20 construction. Some of those were even dismissed as
21 untimely in the prior proceeding several years ago.
22 In this particular proceeding, there is no
23 environmental finding that the Staff has to make to issue
24 this license. And I do not understand how we can have
25 contentions on a matter that is not even the subject of a

1 finding that must be made by the Staff. So the first, our
2 first, point here is that we just don't think
3 environmental issues are appropriate at all under any
4 circumstance in this proceeding.
5 Now, I recognize there is some language -- and
6 this is my second point -- in a Commission order in this
7 proceeding and the Commission does say and I'll quote, "If
8 genuinely new environmental information emerges during
9 subsequent phases of the proceeding, there may be a
10 supplement to the EIS and late-filed contentions."
11 I'm having -- I've had a little trouble
12 explaining that language based upon my first argument,
13 because I believe there's no basis in this proceeding for
14 environmental contentions at all, but I've tried to take
15 that language and explain it. I think it is clear on its
16 face, and that is that in order for there to be an
17 environmental contention, there needs to be information,
18 new information that is significant enough that it
19 warrants a supplement to the EIS: There has been a
20 change; the Staff has said, Gee, we need to look at that
21 harder; it's not bounded by the environmental impact
22 statement that we prepared before. And that would
23 potentially open up the door if you read this language
24 literally from the Commission to environmental
25 contentions.

1 There is no such information. There has been
2 no such information identified by the Petitioners.
3 Certainly, the Staff has not indicated that there is any
4 need for a supplement. So we believe that is a second
5 independent basis for not allowing environmental
6 contentions. And this would, again, cover all of
7 Contention 1 and all its subparts.
8 And finally, as a generic point, even if there
9 were significant new information, the Commission has
10 spoken very clearly. They've said if there is such
11 significant information and there is a supplement to the
12 EIS, there may be late-filed contentions; these
13 contentions would be late-filed. It -- that requires that
14 the interveners address the late-filed standards at 10
15 C.F.R. 2.309 of the Commission's regulations, which
16 include the good cause standard and a number of other
17 standards. They did not do so in their petition.
18 We raised the issue in our answer. They did
19 not do so in their reply. They've completely failed to
20 address that issue, in our view. So on those generic --
21 JUDGE FARRAR: Wouldn't -- if the facts were
22 genuinely new and late-breaking and significant, wouldn't
23 good cause be a foregone conclusion? What you're saying
24 is it's not that --
25 MR. SILVERMAN: Yes, if there's --

1 JUDGE FARRAR: Your argument is more, Nothing
2 has happened. Although it's also, if something has
3 happened, they didn't talk of it, they didn't address it,
4 and you gave them a chance to by raising it in your reply.
5 MR. SILVERMAN: One, nothing has happened.
6 And, Two, if something had happened, they do have the
7 obligation to at least describe it and at least make the
8 argument that that provides good cause.
9 JUDGE FARRAR: Yes.
10 MR. SILVERMAN: And they haven't done that.
11 JUDGE FARRAR: On the business about the Clean
12 Air Act permit. If what they say is true about potential
13 violations, is there a remedy here?
14 MR. SILVERMAN: No, there is not. This is the
15 wrong forum, Your Honor.
16 JUDGE FARRAR: What is the forum?
17 MR. SILVERMAN: I'm not an expert in EPA
18 standards. I don't think they have adjudicatory boards.
19 I think there are ways to challenge permits that are
20 issued by the Agency. And in fact, I believe there were
21 even some documents that were attached to some of the
22 Petitioners' pleadings that appeared to be some sort of a
23 challenge to the air permit at the Savannah River Site;
24 I'm not sure those were ever filed.
25 JUDGE FARRAR: Okay.

1 MR. SILVERMAN: And I would be happy to talk
2 briefly about the other portions of the contention if
3 you'd like.
4 JUDGE FARRAR: No. I think that in light of
5 the time, we'll rest with that.
6 MR. SILVERMAN: Thank you.
7 JUDGE FARRAR: Ms. Bupp, do you all have
8 anything to add to what Mr. Silverman just said?
9 MS. BUPP: Actually, Mr. Martin will be
10 responding to this contention.
11 JUDGE FARRAR: Okay. Does he know that saying
12 relatively little at this time will win our favor?
13 MR. MARTIN: I'll take that under
14 consideration, Your Honor.
15 My first point is that we don't have much to
16 add. We just want to kind of reiterate our original
17 statements and -- unless you have any questions.
18 Once again, the Staff does not believe that any
19 new or significant information has been brought forward
20 here that would make us revisit the EIS. As both parties
21 have talked about, 5192 is the standard for supplementing
22 the EIS. And only if the standards set out in 5192(a) are
23 met would we revisit the EIS. And at that point, we
24 could.
25 JUDGE FARRAR: Now, under that regulation,

1 that's an obligation you all have yourselves.

2 MR. MARTIN: Correct.

3 JUDGE FARRAR: In other words, now suppose I'm

4 an intervener and said, Gee, you guys are asleep at the

5 switch; you didn't notice this new thing happened. Would

6 they come to -- should they go to you asking for a

7 supplement before they come to us, or are they parallel

8 remedies? Or --

9 MR. MARTIN: I believe they would first bring

10 it to our attention. However, if they -- in a situation

11 such as this, they could bring it to your attention, as

12 well. I think --

13 JUDGE FARRAR: But they did not bring anything

14 to your attention?

15 MR. MARTIN: Not that we're aware of, no.

16 Nothing has been brought to our attention as of yet. And

17 therefore, we still do not feel that there's any. It's

18 not necessary to revisit the EIS, and, therefore, it's not

19 within the scope of this proceeding.

20 JUDGE FARRAR: Okay.

21 JUDGE McDADE: But they could argue that the

22 environmental impact statement was inadequate because

23 there was not a supplement under 51.92, but in order to do

24 that, they would have to demonstrate that there was new

25 information that created a significantly different picture

1 of the environmental impact than that was available at the
2 time the original environmental impact statement was
3 issued. Correct?
4 MR. MARTIN: That is correct, Your Honor.
5 JUDGE McDADE: Okay. And it's your position
6 that they have not demonstrated this significant new
7 information that would require a supplement or an
8 amendment under 51.92(c)?
9 MR. MARTIN: That is correct. It's our
10 position that they haven't even really addressed that
11 standard at all, let alone at this point.
12 JUDGE McDADE: Okay.
13 MR. MARTIN: If Your Honors don't have any more
14 questions, thank you.
15 JUDGE FARRAR: Thank you, Mr. Martin.
16 It's 10:27 by the clock in the back there.
17 Let's take a break and be back here promptly at 10:35, and
18 we'll move right into Contention 2. Thank you.
19 (Whereupon, a short recess was taken.)
20 JUDGE FARRAR: All right. We'll go back on the
21 record and take up Contention 2, where the Petitioners go
22 first.
23 MR. ZELLER: Okay. Contention 2. Our
24 contention states, Whether MOX Services' license
25 application meets the relevant requirements of the Atomic

1 Energy Act because of its failure to prepare and submit an
2 emergency plan to the Nuclear Regulatory Commission for
3 potential radioactive releases to the public. And I
4 understand that you're interested in genuine disputes and
5 expert opinion in this area.
6 In our petition, we made reference to the
7 Federal Radiological Monitoring Assessment Center, which,
8 of course, I'm sure you know is under the US Department of
9 Energy and the National Nuclear Security Administration.
10 And this is the information which we relied upon in terms
11 of the dose conversion factors to translate 232 millirems
12 inhalation dose to 5,430 millirems thyroid dose, or 5.43
13 rems.
14 We believe this is -- a more accurate
15 assessment indicates that the 10 C.F.R. 70 threshold of
16 one rem required for the development and submission of an
17 emergency plan has been exceeded by a factor of five.
18 JUDGE TRIKOUROS: Can you -- can I ask you,
19 please, to explain to me? Are you saying that the
20 calculation that was done by the Applicant was incorrect,
21 or are you saying that they did it correctly with respect
22 to the regulations but that if they had done it another
23 way, it would have provided what you would call the
24 correct dose? Just where are you coming from on this?
25 MR. ZELLER: I believe that -- the Petitioners

1 assert that the work done by the Applicant has been done
2 incorrectly. For example, they relied, as we stated in
3 our petition, on outdated guidance, in fact, which has
4 been withdrawn from use by the Nuclear Regulatory
5 Commission.
6 JUDGE FARRAR: Was that withdrawn because it
7 was incorrect, or superseded by something better? I mean,
8 was it disavowed?
9 MR. ZELLER: Well, part of the problem with the
10 ARCON model, as we stated before, is that it is a limited
11 model. Gaussian dispersion models are used in a variety
12 of assumptions, and they're relatively simple mathematical
13 formulas of algorithms in predicting impacts at a certain
14 distance from an emission source: smokestack here, a
15 person a mile or two miles or 500 feet away.
16 The ARCON model does not extend much beyond the
17 perimeter of the Savannah River site from the smokestack,
18 or the emission points of the proposed plutonium fuel
19 factory. So, again, as we stated before, the ARCON model
20 is inaccurate and also withdrawn.
21 JUDGE TRIKOUROS: Well, the argument that was
22 presented was that, in fact, the calculation that was done
23 was within the distance limits of the ARCON 96 computer
24 code. Your argument seems to be more along the lines of
25 it is possible that if they had done the calculation for a

1 greater distance, it would have resulted in a higher dose.
2 And I never saw any substantiation of that.
3 Typically that's not the case, unless there was
4 some extenuating reason for that to be the case; for
5 example, some hillside that occurs down -- further down,
6 some reason for the deposition to take place at a greater
7 rate in the plume further down.
8 But I heard nothing or saw nothing from you
9 regarding specifics in that regard. You know, you
10 mentioned general effects like cavitation effects and that
11 sort of thing. But you never make any statement about
12 specific situations here that would make that happen, and
13 that's what I was looking for from this proceeding from
14 you.
15 You know, do we have any specific conditions
16 here that would lead one to believe that the dose at a
17 greater distance than the IOC point would be higher?
18 MR. ZELLER: The dose burden factors here are a
19 critical factor in predicting the impact of a given amount
20 of radionuclide emissions. And where we did state it
21 briefly in our petition was that there are better and more
22 recently developed estimates of that.
23 And these have been, for example, provided by
24 what I believe is a reliable source, the Federal
25 Radiological Monitoring Assessment Center, and which

1 provides data for major radiological emergencies in
2 support of state and local governments. The Nuclear
3 Regulatory Commission is participating in that and in fact
4 is the lead agency under the Department of Homeland
5 Security for this program.
6 There was a National Atmospheric Release
7 Advisory Center modeling decision support system for
8 radiological and nuclear emergency preparedness which
9 addresses the -- some of the basic questions about
10 Gaussian plume and puff models and their limitations.
11 This would -- this goes to the same point that we raised
12 earlier about the limits of the ARCON model.
13 And also the atmospheric and dispersion models
14 predict quantity such as time-integrated or time-averaged
15 air concentrations, peak concentrations at any time
16 interval during total exposure time, and accumulated
17 surface deposition. These quantities are converted into
18 products that are useful to a wide range of users.
19 This, again, comes from the Lawrence Livermore
20 National Laboratory publication of April 25, 2005, which
21 is the National Atmospheric Release and Advisory Center.
22 Within this document are some of --
23 explanations of some of the software systems, and, again,
24 the more accurate estimates of dose conversions factors so
25 that you may be able to more accurately assess what the

1 impact will be outside of -- on the general public.

2 And what I believe Shaw AREVA has attempted to

3 do here is to simply get by doing what they should do, and

4 I think they've done it incorrectly. They should simply

5 do that assessment, do the full assessment and not rely

6 upon -- or I believe the Commission should not rely upon

7 the document which was submitted which allows them to not

8 do that assessment.

9 JUDGE TRIKOUROS: I need to understand, though,

10 specifically has the Applicant met the regulations? Or

11 are you saying that the Applicant has not met the

12 regulations?

13 MR. ZELLER: Have not met the regulations.

14 JUDGE TRIKOUROS: It's important for us to

15 understand if you're simply saying that the Applicant met

16 the regulations, but I don't think the regulations are

17 correct in the way that they're applied, that their

18 requirements are incorrect. What exactly are you saying?

19 For example, certainly there are many effects

20 that you could point out that might have an impact, but I

21 need -- it's not clear that those effects would make

22 things worse or make things better. You haven't nailed it

23 down, so to speak, with respect to this application, and

24 we need to be able to do that.

25 JUDGE McDADE: And if I could interject

1 something here as well, as I understand the Staff's
2 position -- they say put the regulatory guidance aside --
3 at issue is whether or not 10 C.F.R. 70.22(i) has been
4 complied with.
5 The Staff represents that I has been complied
6 with, and the question to you is, specifically how do you
7 allege that that regulation has been violated here; how
8 have they not complied with 70.22(i)?
9 MR. ZELLER: Right. We do -- thank you. We do
10 state that they have not met the 10 C.F.R. 70.22.
11 JUDGE McDADE: How? I mean, not saying that --
12 MR. ZELLER: That by its --
13 JUDGE McDADE: -- the regulation is inadequate,
14 but how did --
15 MR. ZELLER: Right.
16 JUDGE McDADE: -- they fail to meet the
17 regulation?
18 MR. ZELLER: Of course. They have not shown --
19 they have relied on incorrect information to get an
20 estimate --
21 JUDGE TRIKOUROS: Well, incorrect --
22 MR. ZELLER: -- which --
23 JUDGE TRIKOUROS: It's a very important point:
24 incorrect relative to the requirements of the regulations,
25 or incorrect in the application of the regulations? So in

1 other words, was the calculations performed by the
2 Applicant incorrect in that it made some mistake or made
3 some -- have made some assumption that was not valid with
4 respect to the regulatory requirements?
5 Is that what you're saying? Or are you saying
6 that there are other methods out there that, if they were
7 used, would give a different answer?
8 MR. ZELLER: Well, both.
9 JUDGE TRIKOUROS: Well, let's concentrate on
10 the former right now.
11 MR. ZELLER: The former, as we stated before,
12 is the guidance has been withdrawn, which they used in
13 their estimates. Now, I don't know what the internal
14 Nuclear Regulatory Commission decision-making process is
15 on what guidance to post on their website and which
16 guidance to withdraw from their website.
17 And I'm assuming there are good reasons to do
18 that, and I'm certain there are, when guidance is
19 withdrawn from use, I would assume that someone would use
20 something different and not guidance which has been
21 withdrawn, for whatever reason.
22 JUDGE McDADE: Okay. But the guidance is
23 simply guidance. What we're focusing on is the regulation
24 itself, 70.22(i). The guidance has been withdrawn. The
25 Applicant followed that guidance, but whether they

1 followed the guidance or not, they still had an obligation
2 to comply with 70.22(i).
3 And what the Applicant has said is, first of
4 all, with regard to the guidance itself, it was withdrawn
5 back in 1998, so therefore if there was an issue simply
6 based on the withdrawal of that guidance, you should have
7 raised it at the earlier proceeding; if not, you've waived
8 it.
9 So the only issue here is whether or not they
10 complied with 70.22(i). And, again, what we're asking you
11 is specifically to explain to us what they did or failed
12 to do that puts them in violation of 70.22(i).
13 MR. ZELLER: If I understand your question
14 correctly, in that if we had objected or pointed this out
15 in 1998 --
16 JUDGE McDADE: Well, they're saying that there
17 was an earlier proceeding.
18 MR. ZELLER: Yes.
19 JUDGE McDADE: Prior to the earlier proceeding
20 that guidance had already been withdrawn; it had been
21 withdrawn in 1998, so therefore, if there was an issue
22 based solely on the withdrawal of that guidance -- and
23 they claim that there isn't, but even if there were, it
24 would have been waived by not raising it.
25 But the Staff is saying -- and what we're

1 asking you to focus on right now -- is put aside the
2 guidance. What we're looking -- because that -- all that
3 is is just a methodology: It suggests to Applicants
4 things they can do that, in the Agency's view, would bring
5 them into compliance with the regulation. It gives them
6 sort of an assistance on bringing themselves into
7 compliance.
8 What we're asking you to focus on is how
9 specifically are they not in compliance. What does
10 70.22(i) require that hasn't been met?
11 MR. ZELLER: Right. I understand that. The
12 threshold, of course, in there is the one rem, whether one
13 rem is exceeded in order to move forward, in order to not
14 perform -- put the emergency plan in -- to do the full
15 work that's required.
16 Therefore the dose factors which we brought,
17 which we provided as an example of a more reliable one,
18 shows that when that 230-millirem inhalation dose exceeds
19 that one-rem standard, that this information was available
20 to the Applicant; it was available to the Nuclear
21 Regulatory Commission itself, and it should have -- it
22 should provide pause to the Commission at this point.
23 JUDGE FARRAR: When you did your analysis of
24 the thyroid dose, did you apply the proper conversion
25 factors to tie it back into a regulation?

1 MR. ZELLER: Yes. Yes, we did some of the
2 number crunching, and we had some help from some experts
3 in that area.
4 JUDGE TRIKOUROS: The Staff in their review
5 understood that the Applicant had used the regulatory
6 guide that had been withdrawn. As I understand it, the
7 regulatory guide was replaced by a NUREG document. The
8 Staff looked at the source terms that were generated and
9 made the determination that they were correct with respect
10 to the latest guidance.
11 The Applicant appears to have applied the total
12 effective dose-equivalent methodology that was required,
13 that's acceptable in the -- under the regulations. They
14 used the weighting factors associated with the individual
15 organs, including the thyroid.
16 So it looks, from our perspective, okay. I
17 can't comment on the document that you used and its
18 acceptability with respect to the regulations, because
19 that -- because as far as I know, it is not typically used
20 for these types of calculations.
21 I'd like to understand from you if you believe
22 that the regulations were complied with as they're
23 specified in the EIS.
24 MR. ZELLER: I don't know how to state this any
25 more plainly, in that guidance which was relied upon by

1 the Applicant has been withdrawn, and that other expert
2 guidance would provide a different impact which falls
3 outside of the one rem required for the development and
4 submission of an emergency plan under 10 C.F.R. 70.22.
5 If there's another assessment here, it's not in
6 the license application that I've seen, and if it's in the
7 document somewhere, then I would like see that. It
8 certainly -- I would recommend that the Commission do that
9 work, and make it available, because I have not seen it.
10 JUDGE FARRAR: Mr. Zeller, we're way over our
11 time. We got enough -- that concludes -- is that a good
12 point to conclude?
13 MR. ZELLER: Thank you. Yes, it is.
14 JUDGE FARRAR: Thank you.
15 We'll hear then the Applicant and Staff
16 response.
17 And, Mr. Silverman, let me preface your
18 response. Ordinarily in these cases we get applicants who
19 don't follow a regulatory guide, and citizens groups come
20 in and say, Aha, you didn't follow a regulatory guide, and
21 the Applicant's and Staff's standard answer is, Yes, we
22 didn't follow it, but we adopted our own method, which
23 passes muster for the following reasons.
24 We now here have the flip side, where you're
25 clinging to a regulatory guide that's been withdrawn. So

1 I think that's the central focus. If you can address that
2 directly it would be helpful.
3 MR. SILVERMAN: I believe I can, Your Honor.
4 Our position on this is there's no genuine
5 dispute of material fact on that subject. The reg guides
6 are guidance, if -- they are not binding requirements, as
7 you well know, and there's no alleged non-compliance here
8 with NRC regulations.
9 We did use reg guide 3.35, which was withdrawn
10 in 1998.
11 JUDGE FARRAR: You used it after it was
12 withdrawn?
13 MR. SILVERMAN: Yes, Your Honor, that's --
14 JUDGE FARRAR: Okay.
15 MR. SILVERMAN: -- my understanding.
16 JUDGE FARRAR: So your people much have said,
17 It's withdrawn, but the reason it was withdrawn makes it
18 still useful for some purpose. What was that --
19 MR. SILVERMAN: Yes.
20 JUDGE FARRAR: -- that was their chain of
21 reasoning?
22 MR. SILVERMAN: I'm not sure --
23 JUDGE FARRAR: Help me with it.
24 MR. SILVERMAN: Sure. I think the simple
25 answer to this, Your Honor, is that it doesn't matter what

1 their motivation was because the inputs that were used
2 from reg guide 3.35 to do this calculation are also
3 contained in the most current guidance, which is the NRC
4 accident analysis handbook, which is NUREG CR 64.10.
5 The same information is in both documents. And
6 so whether you use the old withdrawn -- the same
7 information as relevant to the calculation that was
8 applied by the Applicant -- so whether you use the older
9 or you use the new, they have the same inputs. It does
10 not matter.
11 And it does not state a claim in any event that
12 we used a guideline that was withdrawn unless they
13 demonstrate somehow that we failed to comply with the
14 regulation.
15 JUDGE FARRAR: So is that an argument: It
16 might have been better practice and made everybody
17 understand things better if you had cited the new guide
18 rather than the old one, but it's just a matter of
19 superficial labels as opposed to substance. Is that --
20 MR. SILVERMAN: That is my understanding, Your
21 Honor.
22 JUDGE FARRAR: -- is that your argument?
23 MR. SILVERMAN: Yes. It might have been a
24 little clearer. And, of course, the Staff independently
25 evaluated our calculation in the SER and was satisfied

1 with it.

2 JUDGE FARRAR: Maybe it would be good to hear

3 from the Staff on why they let you do that, unless you --

4 again, I'm trying to --

5 MR. SILVERMAN: The only --

6 JUDGE FARRAR: -- save some time.

7 MR. SILVERMAN: Right. I have nothing else on

8 the issue of the outdated reg guide, that's contention

9 2.1. I would want to speak to contention 2.2 on the --

10 JUDGE FARRAR: Go ahead then.

11 MR. SILVERMAN: -- emergency plan. You want me

12 to do that now?

13 JUDGE FARRAR: You can do that now.

14 MR. SILVERMAN: Sure. I think the Board's

15 covered a lot, so I will try to be -- what I would

16 otherwise say, but I will try to be brief.

17 The -- one of the assertions here is that we

18 used this ARCON 96 code, which is a code that's used for,

19 as I understand it, near-field, close-by atmospheric

20 transport. But that was an extremely conservative

21 approach.

22 What we did was we calculated a maximum dose to

23 the individual outside the controlled area, which is 160

24 meters from the stack. We used that code for its

25 appropriate purpose, for a close-in, near-field

1 assessment. We came up with a dose that was less than one
2 millirem -- I'm sorry -- less than one rem. I apologize.
3 And we then therefore concluded that the public
4 at the Savannah River site boundary, which is over eight
5 kilometers away, would receive a dose considerably less
6 than that.
7 So we did not misuse that code in any way,
8 shape, or form. It was actually a very conservative
9 application of the calculation.
10 JUDGE FARRAR: So you did a conservative
11 application, and then made a logical leap. But Judge
12 Trikouros would say the logical leap is okay unless you
13 have some peculiar topography that would mean that the
14 farther out you went --
15 MR. SILVERMAN: Yes.
16 JUDGE FARRAR: -- perhaps there would be an --
17 MR. SILVERMAN: But we did --
18 JUDGE FARRAR: -- unusual --
19 MR. SILVERMAN: -- yes, but we did more than a
20 logical leap, because my understanding is the Applicant
21 has also looked at using the appropriate code for farther
22 distances out, the CAP-88 code, whether, in fact, it is
23 true that the doses would drop off with distance, and the
24 answer to that question is that they would.
25 JUDGE TRIKOUROS: Which code was that?

1 MR. SILVERMAN: CAP-88.

2 VOICE: It's EPA.

3 MR. SILVERMAN: EPA?

4 VOICE: Yes.

5 MR. SILVERMAN: Base code. And, you know,

6 there's a lot of discussion here about the Federal

7 Radiological Monitoring Assessment Center guidance. We

8 did not use that guidance. We used federal guidance

9 report 11. My understanding is that both documents have

10 the same dose conversion factors.

11 And the regulation here finally calls for an

12 analysis of total effective dose equivalent, not

13 individual organ dose. We took the thyroid individual

14 organ dose. We applied the appropriate weighting factor

15 that is set forth in the NRC regulations, and we correctly

16 came up with a dose that was below the one rem standard,

17 so there is no genuine dispute on this issue, in our

18 opinion.

19 JUDGE FARRAR: Okay. Thank you.

20 Staff, please.

21 MS. BUPP: The Board would like me to start

22 with the question that you just addressed to Mr. Silverman

23 about why the Staff allowed the Applicant to use the

24 outdated guidance.

25 JUDGE FARRAR: Right. In the intervenor's

1 mind, the Petitioner's mind, they came in with this, and
2 you should have, I suppose, sent it back saying, Hey, you
3 used something that's no longer operative, redo -- you
4 know, do your homework over again. Why did that not
5 happen?
6 MS. BUPP: The question in the Staff's mind
7 always when looking at a license application is whether
8 that application complies with the regulations. The
9 Applicant could have come in using no guidance at all or
10 using the completely updated guidance or, in the present
11 case, using slightly outdated guidance. The Staff's
12 process is the same: We look at their calculations no
13 matter what guidance they used. If any guidance was used,
14 check their calculations, make sure they're correct, and
15 then, if those calculations comply with the licensing
16 requirements in the regulations, do we make a positive
17 finding.
18 The fact that they would have -- if they had
19 used the up-to-date guidance, we wouldn't have given them
20 a free pass. We still would have gone through and
21 analyzed their calculations, looked at their calculations,
22 checked them. So our process is the same no matter how
23 they label the input.
24 JUDGE FARRAR: Well, you can say it's the same,
25 but if somebody comes in and uses outdated guidance,

1 doesn't -- why doesn't that prompt a letter back saying,
2 We withdrew that guidance for the following -- now those
3 reasons may be it was too strict; it may have been it was
4 not -- in other words, for some reason it was withdrawn,
5 and we haven't heard anyone explain to us yet why it was
6 withdrawn and explain why it was withdrawn in a manner
7 that meant relying on the outdated guidance is not fatal
8 to your case.
9 MS. BUPP: Well, but --
10 JUDGE FARRAR: But you withdrew it for some
11 reason.
12 MS. BUPP: Well, we withdrew it for different
13 reasons, but for the specific inputs that were used in
14 this case, they were superseded by more recent guidance.
15 And so the relevant portions of the withdrawn guidance are
16 still up to date, because they're in the more recent
17 guidance.
18 JUDGE FARRAR: Okay.
19 MS. BUPP: So --
20 JUDGE FARRAR: Unless you have something extra,
21 I mean, that was the central point we thought --
22 MS. BUPP: For contention 2.1, yes.
23 JUDGE FARRAR: -- for this, so.
24 MS. BUPP: For contention 2.2, I don't have a
25 great deal to add; simply to point out that the Staff's

1 main argument is that there has not been any evidence that
2 the calculations would not be applicable at a further
3 distance, either from the Applicant, from the Staff's
4 analyses, or, most importantly, put forth by the
5 Petitioners.
6 Unless the Board has further questions?
7 JUDGE FARRAR: So to Judge Trikouros's
8 question, it's a legitimate question, but you're saying
9 you and this Applicant were satisfied that those, say,
10 topographical conditions did not exist that would bring
11 his question into play?
12 MS. BUPP: Yes, we've been satisfied. And the
13 Petitioners haven't raised anything new.
14 JUDGE FARRAR: Okay.
15 JUDGE TRIKOUROS: Have you seen the Applicant's
16 calculation using the additional code, the other code that
17 he mentioned, an AP-88 [sic], was it?
18 MS. BUPP: No, I -- no, we have not.
19 JUDGE TRIKOUROS: Okay. And did you say that
20 was an EPA code, by the way? Is that -- was that -- I'm
21 not familiar with it in the nuclear industry at all.
22 MR. SILVERMAN: CAP-88 is an EPA code used for
23 air emission calculations.
24 MS. BUPP: Are there any further questions from
25 the Board?

1 JUDGE FARRAR: No. Thank you, Ms. Bupp.

2 MS. BUPP: Thank you.

3 JUDGE FARRAR: We will now do contentions -- as

4 it says in the handout, we'll do contentions 3 and 4

5 together. These deal with the likelihood or not of

6 building a waste solidification building, that raise

7 larger procedural issues. Applicant and Staff are first.

8 MR. SILVERMAN: Your Honor, if you'd like me to

9 proceed differently, I will, but what I'll do is I'll

10 start with contention 3; I think run through that quickly

11 and address your questions.

12 JUDGE FARRAR: Well, I'd rather we talk about

13 the notion of these things being speculative because they

14 haven't happened yet. And some people in the room are old

15 enough to remember the Lone Ranger and the thrilling days

16 of yesteryear. I'll take you back to the 1970s when we

17 had construction-permit and operating-license hearings on

18 reactors.

19 And at the operator license stage, Petitioners

20 came in with a lot of issues about bad things that had

21 happened during construction, and so we had hearings or

22 didn't have hearings on those issues.

23 Here they can't come in with bad things that

24 happened during construction because construction just

25 started, as I think you informed us, on August 1.

1 So why isn't any safety -- and forget
2 environmental contentions. Why is it not impossible for
3 them to come in with any safety contention they came in
4 with, whether it's the waste solidification building on
5 which you have certain arguments about it -- why wouldn't
6 any safety contention they raise now be speculative, and
7 if that's true, what do we do about it?
8 MR. SILVERMAN: Yes. Your Honor, in the old
9 NRC CPOL cases Petitioners often raised construction-
10 related issues like quality of construction in an
11 operating-license proceeding. There were opportunities in
12 a number of those cases to raise those issues, and some of
13 those contentions were determined not to be speculative.
14 The fact that we've got a notice here of
15 hearing that precedes some of the construction work --
16 most of the construction work, doesn't give the
17 Petitioners a right to raise a speculative contention
18 here.
19 More directly to your question, the intervenors
20 have opportunities available by the way of the regulations
21 to raise these issues at a later date if and when they are
22 not speculative. They have a right to file late-filed
23 contentions --
24 JUDGE FARRAR: Okay. Hold on, let me interrupt
25 you right there, and I'll -- let's walk through that

1 together.

2 MR. SILVERMAN: Sure.

3 JUDGE FARRAR: Suppose we found in this case

4 that they had standing, but that for one reason or another

5 the other contentions were not valid and that this one was

6 speculative because we don't know right now what's going

7 to happen with the waste solidification.

8 Would we then -- would you urge us to terminate

9 the proceeding? Would you urge us to say, okay, you're

10 in, you have standing; let's all take a rest and, you

11 know, come back in a year and let us know if you've

12 discovered anything that's not speculative because

13 something's gone wrong out at that site?

14 What is the -- how would we proceed in that

15 situation where, if we were to find you had standing, but

16 were to find that none of these -- I take it if we found

17 one contention came in right now, the proceeding would be

18 live and they could come back for the life of that

19 proceeding with new contentions as long -- and they'd have

20 to show good cause -- I don't use the term late filed; I

21 use recently filed because late filed can be pejorative.

22 If something just happens, they learn about it

23 on Monday and come in on Tuesday, to me that's good cause;

24 we just learned about it, yes, it wasn't filed at the

25 beginning, but here we are, the thing just happened.

1 So if we let one contention in, the proceeding
2 would be live and they'd have the rest of the
3 construction, which I think is scheduled to go to 2014, to
4 come back in. But if we throw out all the contentions,
5 are you going to tell me the proceeding's over?
6 MR. SILVERMAN: I am going to tell you the
7 proceeding's over, Your Honor. They have a -- to the best
8 of my knowledge, I'm not aware of another proceeding,
9 there may be one out there where in a situation where the
10 Board has decided that there is a reason outstanding but
11 there is no valid contention that they have not dismissed
12 the proceeding.
13 That does not mean the intervenors. There is
14 still one more remedy available to them at least, which is
15 a request to reopen the record of the proceeding, and
16 intervenors have done that in the past.
17 JUDGE FARRAR: Who do they make that to?
18 MR. SILVERMAN: They would make that probably
19 to the Secretary of the Commission, since the Licensing
20 Board would no longer empaneled, and that opportunity
21 presents itself.
22 JUDGE FARRAR: Then the Commission, or the
23 Secretary, on orders from the Commission, would either
24 refer that motion to the Commission itself, or tell the --
25 or the -- tell the Chief Judge of the Licensing Board

1 panel to resurrect the old Board or appoint some new Board
2 to deal with that.
3 MR. SILVERMAN: Absolutely. But I don't think
4 it's within this Board's authority to extend for this -- a
5 proceeding where there's no basis to keep it open; there's
6 no live contention under your assumption that all the
7 contentions are dismissed, on the possibility that the
8 intervenors might find some new information that's
9 significant at some later point in time related to the
10 construction, and then file contentions on that basis.
11 JUDGE FARRAR: But as you just described it,
12 it's a fairly easy step for them to take to say, Aha, a
13 year from now, here's something new we just heard about --
14 bad quality assurance, uncertified welders, whatever --
15 and file that contention. They don't have to overcome
16 enormous hurdles to take that step. Is that your
17 position?
18 MR. SILVERMAN: Well, my position is that if
19 there's an open proceeding, they have to meet what I refer
20 to and I think the rules refer to as the late-filed
21 standards. And if there's not, then they have to meet the
22 reopening standards, and they are what they are.
23 JUDGE FARRAR: But the reopening standards are
24 basically we just discovered -- in other words, if you
25 come in and say, We just discovered this genuine safety

1 issue, and so, you know, we were found to have standing in
2 the proceeding that's been closed, we would like to reopen
3 that proceeding.
4 Now, you would argue with them about whether
5 that's new information --
6 MR. SILVERMAN: Yes, sir.
7 JUDGE FARRAR: -- about whether it's
8 substantial information, but you're telling me here and
9 now, you wouldn't stand up and say, You can't do that;
10 that's not a permissible approach? You'd argue with the
11 merits but you wouldn't say, That's not the right avenue
12 to go down?
13 MR. SILVERMAN: If you're asking me whether --
14 we're speculating a little bit about the future here, but
15 if you're asking me if at this -- today, standing here, I
16 would say, No, they have no right to seek a reopening of
17 the record -- I would say they have a right to seek a
18 reopening of the record in accordance with the
19 Commission's standards.
20 JUDGE TRIKOUROS: Maybe you can help me
21 understand this a little better. If this were a nuclear
22 reactor there would be something called ITECs, which I'm
23 sure you're very familiar with.
24 These ITECs would be promises on the part of
25 you, the Applicant, to build the reactor in accordance

1 with everything you said you would do. If you didn't meet
2 those ITECs, then people would be able to question you,
3 and we would have a hearing, and there would be some
4 difficulties for you.
5 The waste solidification building is in the
6 application; it's a promise to build that building. As a
7 result there won't be the storage of large amounts of
8 liquid alpha waste; therefore, your safety analysis didn't
9 worry about that waste being -- in some manner getting out
10 into the environment. And the Applicant is saying, Well,
11 we don't think you're going to build that building. And
12 clearly that's speculative on their part.
13 What responsibility do you have? -- because
14 there doesn't appear to be anything in the system that
15 would call you out and say, You didn't do it in accordance
16 with the way that you promised, which was to build a waste
17 solidification building.
18 So you're saying if you don't build the waste
19 solidification building and if the Applicant doesn't pick
20 that up, then that's it?
21 MR. SILVERMAN: No, first of all, the waste --
22 we're not building a waste solidification building, and
23 it's not subject to this licensing proceeding, so perhaps
24 that's not exactly the right example. We're building the
25 MOX facility.

1 JUDGE TRIKOUROS: Well --

2 JUDGE FARRAR: No, no, no. That -- your papers
3 represent that you need -- that if you -- that you need to
4 build that, because that will deal with what would
5 otherwise be an onsite problem.

6 So we may not have licensing authority over
7 that, but if you decide not to build it, Judge Trikouros's
8 question, if I can paraphrase it, is, Okay, now you got
9 some stuff on site that you told us wouldn't be on site,
10 now it's there, what are you doing about it?

11 So now, even though the waste solidification
12 building is not our jurisdiction, or our problem --

13 MR. SILVERMAN: Right.

14 JUDGE FARRAR: -- what's onsite is our problem.

15 MR. SILVERMAN: Right. Right. And to the
16 extent that that is new and significant information that
17 either meets the standard for late-filed contentions or
18 reopening of the record, there are opportunities there for
19 the intervenors to raise that issue if and when that were
20 to happen.

21 JUDGE FARRAR: Let me ask you this, and let me
22 follow and let me see how -- let's push what you said. We
23 just talked about new -- a minute ago we talked about new
24 contentions generally, and they could come in under the
25 reopening.

1 With this one, since they have a contention in
2 front of us that you say is speculative, is this one where
3 you decide, or Congress decides, or whoever decides,
4 there's not going to be a waste solidification building,
5 would this be an automatic reopener?
6 MR. SILVERMAN: It would not be an automatic
7 reopener. I think --
8 JUDGE FARRAR: Tell me why.
9 MR. SILVERMAN: Well, I don't think there is
10 such thing as an automatic reopener, first of all.
11 JUDGE FARRAR: Well, if you say you're going to
12 have a waste solidification building because you need it
13 to deal with a problem onsite, and they say, aha, you
14 might not build it. You say that's speculative so we
15 throw them out. Then you say the next week, oh, we're not
16 going to build it. Why is that not an automatic reopener,
17 and think hard about your answer before you say it.
18 MR. SILVERMAN: Well, Your Honor, I have a
19 couple of responses to that. The first one, I just will
20 repeat, is there is a legal standard for reopening the
21 record. It may very well meet the standard, it may not, I
22 don't have the standard on my fingertips, but I believe it
23 does require some significant level of new information.
24 That may or may not be, and that's not before us today.
25 But let me add --

1 JUDGE FARRAR: Where -- how we write a decision
2 is before us today --
3 MR. SILVERMAN: Understood.
4 JUDGE FARRAR: -- and you're asking us to throw
5 these people out and say, you know, leave us on something
6 that's speculative, and I guess I'm asking you, do you
7 concede that if at some later point you don't build the
8 waste solidification building, that you would join
9 that -- and they'd come in with a request for reopener,
10 that you would support that request for reopener?
11 MR. SILVERMAN: No, I would not say that. And,
12 no, I think we have to distinguish here between
13 environmental contentions and safety contentions.
14 JUDGE FARRAR: This is a safety contention.
15 MR. SILVERMAN: On the safety side, let me
16 quote to you, and it came from -- you also quoted it in
17 your scheduling order, or one of your orders, I believe.
18 The construction related finding that needs to be made in
19 this possession and use license proceeding -- it's in 10
20 C.F.R. 70.23(a)(8), and it is, as far as I know, the only
21 construction related finding that has to be made, and it
22 says that the NRC must determine the license will be
23 approved if "construction of the principal structures,
24 systems, and components approved in the construction
25 authorization have been completed in accordance with the

1 application." That's the standard.

2 If there was new information related to some

3 change in the circumstances with the WSB that caused us to

4 not construct our facility the way we said we would

5 construct it, there's a significant question there, and

6 there may very well be some basis for reopening. In the

7 absence of that, I would think that there would not be

8 under that scenario.

9 JUDGE FARRAR: But if you don't concede now --

10 I'm not asking you to concede that not building the waste

11 solidification building would be a winning issue for them

12 on the merits, all I'm saying is, you know, would it be an

13 issue that comes in and then maybe you move from summary

14 disposition and say, Wait a minute, we didn't build this

15 building but here's what we're doing onsite to deal with

16 the problem, no need for a hearing on that.

17 MR. SILVERMAN: Well, I could come in in an

18 environmental context if, for example, there is -- it

19 creates significant new information and there's some need

20 to supplement the EIS on the basis of that, which is not

21 where we are today. And on the safety side, with respect

22 to this proceeding, once again, the issue is did we build

23 this plant in accordance with the PSSCs that were

24 established at the GAR [phonetic] stage.

25 If we did not, there's a basis to have that new

1 contention brought in. If we did, I have a real question
2 about whether there's a basis for that contention to be
3 admitted.
4 JUDGE FARRAR: Okay. But the more you say
5 that, the more you're forcing us toward the position that
6 we don't dismiss this contention as speculative, we leave
7 it pending because there's a little -- however speculative
8 you may describe it as, there's a little something behind
9 that speculation from the -- that has nothing to do with
10 NRC processes, but there's --
11 MR. SILVERMAN: Well --
12 JUDGE FARRAR: -- a little behind the
13 speculation so why is -- if you won't make that automatic
14 reopener concession, not on the merits, just as a matter
15 of procedure, then why wouldn't we leave this contention
16 open to see if, in fact, it is speculative.
17 MR. SILVERMAN: Because, Your Honor, it -- I
18 don't believe there is anything behind the contention.
19 Let's back up to the language of the contention. The
20 contention says there are no concrete plans to build the
21 WSB. They have provided no basis for that whatsoever.
22 That's the contention before us, no concrete plans -- this
23 is contention 3 -- to build that facility.
24 It's in the president's budget; the project's
25 been approved by the Department of Energy; the conceptual

1 design is completed of this facility, the preliminary
2 design is completed of this facility; the final design is
3 about halfway done; the intervenor --
4 JUDGE FARRAR: Then why isn't it easy for you
5 to say it's so non-speculative, I'm happy to give you the
6 automatic reopener, because it really ain't going to
7 happen?
8 MR. SILVERMAN: I can't predict the future,
9 Your Honor.
10 JUDGE FARRAR: Well, neither can we, and these
11 people have come --
12 JUDGE TRIKOUROS: But I don't even think that
13 is the question. There's the -- I understand the issue
14 that was raised by the Petitioners, but they -- whether
15 they know it or not, there's a broader issue, and that is
16 that if you have a design -- if this were a nuclear
17 reactor and we decided not to build the WSB, we would do a
18 design evaluation -- not having built the WSB, we would
19 have to do a safety evaluation of not having built the
20 WSB, we would have to take all of that into consideration,
21 do all the analyses associated with that over again.
22 If they were important results, we would have
23 to submit it to the Nuclear Regulatory Commission and they
24 would have to approve it. That would be my responsibility
25 as the person building --

1 MR. SILVERMAN: Yes.

2 JUDGE TRIKOUROS: -- this facility. Do you

3 have that responsibility?

4 MR. SILVERMAN: We have --

5 JUDGE TRIKOUROS: And if not, does the NRC have

6 that responsibility to overlook -- to look over your

7 shoulder?

8 MR. SILVERMAN: We have a very similar

9 responsibility, yes, under the Part 70 regulations.

10 There's -- I think you're referring to the 50.59 type

11 process.

12 JUDGE TRIKOUROS: Right.

13 MR. SILVERMAN: And in Part 70 there is a

14 comparable process.

15 JUDGE TRIKOUROS: Right. That's what I want to

16 hear you say, that, in fact, if the waste solidification

17 building is not built within the regulations that are

18 requirements, that you have to do a re-evaluation of your

19 application, submit that to the Nuclear Regulatory

20 Commission, where they would approve it, which would then

21 flag the Applicant's the opportunity to see that and

22 possibly file a contention.

23 But is that not the way it works?

24 MR. SILVERMAN: Well, you're -- I'd like to be

25 able to completely agree with you that we would have to do

1 the evaluation and submit the evaluation to the NRC. The
2 70.76 --
3 VOICE: Seventy-two.
4 MR. SILVERMAN: 70.72?
5 VOICE: Yes.
6 MR. SILVERMAN: I'm sorry -- 70.72 change
7 process. I'm not an expert in it, but what I do
8 understand is that they're sort of a screening level at
9 first. And any potential change has to be evaluated to
10 see if it even -- if it has to be evaluated at all, if it
11 does have to be evaluated, there are some changes that can
12 be made without prior approval, and they are made
13 available for the NRC -- all of those that were available
14 for the NRC Staff to inspect at any time.
15 They come in, and if they disagree, for
16 example, that we did that evaluation and that we should
17 have come to them about it and we should have gotten prior
18 approval, then there's an issue and there's potential
19 enforcement action.
20 JUDGE TRIKOUROS: Right.
21 MR. SILVERMAN: In some circumstances the
22 change is such that we would have to go, but there is a
23 process for doing that that's very comparable to the 50.59
24 change process.
25 JUDGE TRIKOUROS: Very important to have this

1 on the record, that this is not a you decide to build it a
2 different way and that's the end of it.
3 MR. SILVERMAN: Absolutely not.
4 JUDGE TRIKOUROS: It doesn't end there, and the
5 regulations -- Part 70 requires you to do certain things
6 which may or may not require the NRC to do certain things.
7 And the whole thing is open and above board, and people
8 can see these documents, and the NRC can see any documents
9 that you generate, even if you conclude that it doesn't
10 require NRC approval. In fact, I believe they do look at
11 that, their inspectors would look at that.
12 MR. SILVERMAN: That's absolutely correct.
13 JUDGE McDADE: If I could interrupt here and
14 just -- if I can get you to sort of correct my thinking
15 here. And I want to sort of get on this horse from the
16 other side and see if this follows through.
17 As I understand it, under NEPA, under 40 C.F.R.
18 1508.25, the disposition of the waste has to be
19 considered, that in the environmental impact statement the
20 NRC Staff did consider the disposition of the waste. The
21 way they considered the disposition of the waste is to say
22 that this facility, the WDB, would be built, and it would
23 take care of that.
24 Now, one of the concerns that I have, if we go
25 ahead and the license is issued, the NRC has no control

1 over whether or not that facility will be built. The
2 Applicant has no control over whether that facility will
3 be built or not.
4 Is the fact that the NRC did not consider in
5 its environmental impact statement that alternative, which
6 is something over which neither the NRC or the Applicant
7 has control over, could occur -- what happens to the waste
8 from an environmental impact statement, from a NEPA
9 standpoint, if the building is not built, if it is not
10 adequate? Does that not render the environmental impact
11 statement, not discussing this possibility, inadequate,
12 and if not, why not?
13 MR. SILVERMAN: Well, first I'd like to say,
14 Your Honor, that, once again, I think questions about the
15 adequacy of the environmental impact statement were
16 appropriate for the prior proceeding, not this proceeding.
17 But --
18 JUDGE McDADE: Well, that's the next step. The
19 question is whether or not the environmental impact
20 statement, first of all, when written, was inadequate,
21 secondly, whether or not a supplement would be necessary,
22 and then depending on the timing of that, whether or not
23 any challenge to that would have been waived by not
24 bringing it up in the earlier proceeding.
25 MR. SILVERMAN: I should defer to the Staff --

1 JUDGE McDADE: Let's do it one at a time.

2 MR. SILVERMAN: I should defer to the Staff on

3 whether -- what's the impact of this on the EIS, but my

4 own assessment is that they would have to evaluate the new

5 information to determine if a supplement was necessary,

6 and if a supplement was necessary, they would prepare one.

7 JUDGE McDADE: But at what point? For example,

8 once the license is issued -- the NRC issued the license,

9 they tell you, go ahead. Now we're now in 2016, you're

10 all set to go ahead, construction is complete, you have a

11 license to receive this material and process the material,

12 and there is no WSB.

13 Now what happens then from the standpoint of

14 the NRC, from the standpoint of the Applicant, from the

15 standpoint of NEPA, you know, it hasn't been considered at

16 this point in time. You know, does the NRC, at that time,

17 have an obligation to do a supplement environmental impact

18 statement? But in what context because they've already

19 issued the license.

20 MR. SILVERMAN: Understood.

21 JUDGE McDADE: What further authority do they

22 have?

23 MR. SILVERMAN: Understood. And I will defer

24 that very specific question, if I may, to the Staff. I

25 would say, if the issue is, again, technical and safety

1 contention, we have the 70.72 change process, the -- and
2 the opportunity to reopen a record as I've spoken about
3 before. On the environmental side --
4 JUDGE FARRAR: Now, let me interrupt there. We
5 were speaking about that opportunity in a different
6 context. In this case, where you file what's called a --
7 let's assume this would be a significant change in the
8 license, we need a license application amendment.
9 If the Staff looks at it and approves it, would
10 this type of change be significant enough that they'd have
11 to re-notice the opportunity for hearing because of the
12 significance of the license amendment?
13 MR. SILVERMAN: I think I would defer to the
14 Staff on that one as well. I would just like to say, on
15 the environmental side, if the WSB does not get built,
16 there's something that -- as far as I'm concerned, we're
17 in very, very speculative territory with no basis right
18 now to even speculate about this, but nevertheless,
19 assuming that, we also have -- this is a Department of
20 Energy facility.
21 They have their own NEPA procedures, and they
22 would have to evaluate what would need to be done in that
23 context. If they were changing the plan that they have in
24 place right now to build that facility, and there is
25 public process associated with that.

1 They do not have adjudicatory hearings, but
2 they have a NEPA process, they have public meetings, they
3 have scoping meetings, if necessary, if they're going to
4 redo an EIS, and they can be challenged in court like any
5 other federal agency if they -- if someone believes their
6 NEPA process has been violated.
7 JUDGE FARRAR: So people could respond with a
8 draft -- supplement to the draft change in the EIS. If
9 their change is rejected, then they go right to court
10 under the DOE system.
11 MR. SILVERMAN: I believe that's the case.
12 JUDGE McDADE: Okay. And, again, this
13 question -- you're standing up there -- but Ms. Bupp or
14 Mr. Martin, you have to also answer this -- at least as I
15 understand the methodology as explained, and through the
16 documents, through the regulations, that if, for some
17 reason, the waste treatment facility were not available,
18 we're now in 2016 or approaching that, you're at the point
19 where you're ready to actually start processing the
20 plutonium, you don't have anything available for the
21 waste.
22 At that point in time, procedurally, the
23 Applicant, who has no ability to just go out and build
24 this facility, is currently existing, you would do -- or
25 could do a 70.72 change, which would indicate a new

1 estimate of what you're going to do with the waste.
2 When that came in, the NRC Staff would then
3 have the ability at that point to do a supplement to the
4 environmental impact statement to view what is going to be
5 done with this waste, what is going to be the
6 environmental impact, could it meet their NEPA
7 requirements at that point in time, and at that point in
8 time could go ahead and either allow you to take new
9 action with regard to what to do with the waste, or not.
10 But that until you had something to do with
11 that waste, and there was a method that had been sent
12 through the NRC, had been approved by the NRC, you would
13 not be able -- even though the license had been approved,
14 you would not be able to start processing this material.
15 Is that a correct scenario?
16 MR. SILVERMAN: It's very close to accurate,
17 and it's a good segue to a point I wanted to make sure I
18 got here -- in here, and I have consulted with the
19 Applicant's technical folks on this issue.
20 If the WSB were not built or were not available
21 for any period of time, once the storage capacity of the
22 MOX facility, for the waste that we're talking about, was
23 filled up, they would have to shut the plant down -- that
24 is my understanding -- until that matter was resolved.
25 JUDGE McDADE: And the way --

1 MR. SILVERMAN: They would not take any more
2 waste.
3 JUDGE McDADE: Okay. And the way it could
4 be --
5 MR. SILVERMAN: Or they --
6 JUDGE McDADE: -- resolved is --
7 MR. SILVERMAN: -- would not generate any more
8 waste. Excuse me.
9 JUDGE McDADE: Right. Right. And the way it
10 could be resolved either is, for example, if the WSB were
11 delayed, or if the WSB's capacity was less than what was
12 anticipated, that you would then have the ability to come
13 forward with a proposal to the NRC on what to do with this
14 waste, that that would be in the context of a 70.72
15 change.
16 At that point, the NRC, to meet its NEPA
17 requirements, would have the opportunity to do a
18 supplemental environmental impact statement, review what
19 you proposed, make a determination as to whether or not
20 that satisfied the NEPA requirements, satisfied the NRC
21 regulations, and then either authorize you to make the
22 change, in other words, to handle the waste in a different
23 way, to not, and at that point in time there would be a
24 notice of an opportunity for hearing where at that point
25 someone could challenge the supplemental environmental

1 impact statement.

2 MR. SILVERMAN: Almost. If there was a change

3 in the facility that required a license amendment, okay,

4 so the storage capacity, for example, is inadequate and

5 they decide, We need to build five years of storage

6 capacity. If a license amendment were required to do

7 that, that would be an opportunity for hearing on that

8 license amendment -- opportunity to request a hearing on

9 that license amendment.

10 JUDGE McDADE: Okay.

11 JUDGE TRIKOUROS: Do these facilities have

12 technical specifications analogous to operating reactors?

13 These facilities are sort of halfway between chemical

14 processing plants and nuclear power reactors, so they're

15 an odd kind of combination.

16 MR. SILVERMAN: Yes.

17 JUDGE TRIKOUROS: Do they have technical

18 specifications with limiting conditions for operation?

19 MR. SILVERMAN: I believe, but bear with me

20 just one quick second.

21 (Pause.)

22 MR. SILVERMAN: Your Honor, there are no tech

23 specs per se, but we have to live within the bounds of the

24 safety limits established in the license application, and

25 there are safety limits established in the license

1 application, and I believe some of them are quantitative
2 and some are not.
3 JUDGE TRIKOUROS: So when you -- when the
4 license is issued, it will have in it certain requirements
5 that you have to live with, and --
6 MR. SILVERMAN: There will be potentially
7 license conditions established by the Staff, there will be
8 an obligation that we operate the plant in accordance with
9 the application. You go to the application; the
10 application has safety limits and parameters that have to
11 be met. You don't meet those safety limits and
12 parameters, you're subject to enforcement action.
13 JUDGE TRIKOUROS: So that if the WSB were not
14 built, if the WSB were unavailable, if the WSB were
15 operating differently than designed, any number of those
16 occurred, that would be picked up by the process and
17 corrected?
18 MR. SILVERMAN: Absolutely.
19 JUDGE TRIKOUROS: Or the plant would be shut
20 down?
21 MR. SILVERMAN: Yes.
22 JUDGE TRIKOUROS: And if there were a violation
23 of that, then the Applicant would be subject to
24 enforcement proceedings by the Office of Investigations,
25 and then we would be here with our Perry Mason hat on as

1 opposed to --

2 MR. SILVERMAN: We have a safety process; we

3 have an environmental process, and we have enforcement

4 process, yes.

5 JUDGE TRIKOUROS: All right.

6 JUDGE FARRAR: Let me ask you a wrap-up

7 question. At one point in their papers the Petitioners

8 refer to this as an operating-license proceeding, and you

9 took -- let me call it great offense -- let me tell -- let

10 me ask you why that label matters, because a lot of other

11 people seem to have called it an operating-license

12 proceeding also.

13 Is that significant, or did you really not take

14 offense; you were just trying to clarify that that's not

15 exactly the name of the --

16 MR. SILVERMAN: It's essentially the latter.

17 This is a materials license process. There was a

18 construction authorization, and now this is a license to

19 possess and use radioactive material, and we do want to

20 distinguish it from an operating license for a reactor.

21 JUDGE FARRAR: Right.

22 MR. SILVERMAN: And that is different, just in

23 term of the way the structure of the regulations function.

24 That's the principal reason.

25 The other reason that is probably worth

1 mentioning is because there are some places in the
2 petition there's pleadings where they refer to a
3 regulation that says you must do a supplement to an EIS
4 when you have an operating license for a production and
5 utilization facility, and this is neither of those things.
6 JUDGE FARRAR: But the Staff -- well, the
7 Staff, in its *Federal Register* notice and in its FEIS
8 called it an operating-license proceeding. The
9 Commission, in one of the decisions on the previous go-
10 round called this an operating-license proceeding. So as
11 long as we're careful not -- I mean, it's -- I mean,
12 you're not going to get a license to possess if you're not
13 prepared to operate properly. I mean, can we understand
14 it in that context?
15 MR. SILVERMAN: Yes.
16 JUDGE FARRAR: Yes. Okay. We're way over our
17 time on this. Thank you for answering our questions. You
18 can tell our degree of interest in this subject.
19 Ms. Bupp, do you -- let's get right to the
20 process kind of questions that you've heard us asking and
21 Mr. Silverman defer to you to some extent.
22 MS. BUPP: For the most part, I agree with what
23 Counsel for the Applicant has stated. I would just like
24 to maybe take an opportunity to briefly outline what I
25 would see the process being, if there were to be changes

1 in the facility.

2 The main change at issue is the failure to

3 construct the WSB, or constructing the WSB in a different

4 location, or some difference in the construction. And I

5 think that would trigger two parallel sort of processes.

6 The first would be, if the license has not yet

7 been issued, the Staff would simply look at what this

8 change was and determine whether or not it was significant

9 in terms of the EIS, and if so, we'd supplement the EIS,

10 and there would be an opportunity to come in with new

11 contentions on that supplement to the EIS --

12 JUDGE FARRAR: There -- you said --

13 MS. BUPP: -- or Staff's failure to supplement

14 the EIS.

15 JUDGE FARRAR: Why do you say there would be?

16 MS. BUPP: Excuse me?

17 JUDGE FARRAR: You said there would be an

18 opportunity to come in --

19 MS. BUPP: Yes.

20 JUDGE FARRAR: -- would that be because you

21 would issue an new notice of opportunity, or would the

22 Petitioners do what Mr. Silverman suggested and they would

23 come back to the Secretary of the Commission and say, This

24 is new information and there should be a reopener?

25 MS. BUPP: I think they could either. They

1 could come to the Secretary of the Commission and say it
2 should be reopened. If the Staff were to actually
3 supplement the EIS, we would issue another notice of
4 opportunity, at least to comment publicly on the EIS --
5 JUDGE FARRAR: You know -- yes --
6 MS. BUPP: -- and then could come in --
7 JUDGE FARRAR: Right.
8 MS. BUPP: -- at that time.
9 JUDGE FARRAR: And then their comments get
10 rejected, do you then issue a notice of opportunity for
11 hearing?
12 MS. BUPP: No, but they could go to the
13 Commission and ask to reopen it. The notice of
14 opportunity for a hearing comes with the license
15 application, not with the EIS.
16 JUDGE FARRAR: Would you support that motion to
17 reopen?
18 MS. BUPP: It depends on what their contention
19 is, but, you know --
20 JUDGE FARRAR: Forget the merits of the
21 contention. Would you support that as the right --
22 MS. BUPP: We wouldn't throw it out for
23 procedural reasons.
24 JUDGE FARRAR: Right. And you say this is the
25 right avenue, but unfortunately their contention, you

1 know, doesn't say anything, or whatever.

2 MS. BUPP: Yes. Precisely. Yes.

3 JUDGE FARRAR: But you would support them, that

4 that's the right avenue to follow?

5 MS. BUPP: Yes, if the license has not yet been

6 issued. If the license had been issued already, the

7 Applicant, and then the licensee, MOX Services, would have

8 to go through the 70.72 change process for whatever action

9 they would need to take in order to respond to the issues

10 of the WSB.

11 If their 70.72 change process resulted in them

12 applying for an amendment to the license, we would, again,

13 issue a notice of opportunity for a hearing for that

14 license amendment, and it would --

15 JUDGE FARRAR: Is that for --

16 MS. BUPP: -- carry with --

17 JUDGE FARRAR: -- all license --

18 MS. BUPP: -- us NEPA --

19 JUDGE FARRAR: -- amendments, or only things

20 you deem --

21 MS. BUPP: It would be for significant

22 license --

23 JUDGE FARRAR: Okay.

24 MS. BUPP: -- amendments. So assuming it's a

25 significant license amendment, we would issue another

1 notice of opportunity for a hearing and --

2 JUDGE FARRAR: Can you --

3 MS. BUPP: -- it does --

4 JUDGE FARRAR: -- reassure me here today that

5 you would view that as a significant license amendment?

6 MS. BUPP: It honestly does depend on what the

7 change is. If the change is that they're going to build

8 the WSB on another portion of the Savannah River site and

9 they would have to ship it one mile within the Savannah

10 River site rather than 50 yards, probably not significant.

11 If the change is that they're going to store

12 large quantities of material, without making any promises,

13 but that probably would be a significant enough license

14 amendment for a notice of opportunity for a hearing.

15 And any license amendment would, again, trigger

16 the Staff's NEPA obligations, and we would prepare either

17 an environmental assessment or an environmental impact

18 statement, and then there could be contentions on that.

19 JUDGE FARRAR: What do you think of the -- what

20 would you say if we said there was, yes, there's some

21 speculation, but there's something behind this contention,

22 and since there's -- neither of you will concede there's

23 an automatic reopener, we're just going to leave this

24 contention pending for a while?

25 MS. BUPP: I would disagree with that, because

1 I would disagree that there is anything behind the
2 contention at this point in time. As counsel for the
3 Applicant pointed out, there is -- there are plans, there
4 is already budgeting for the WSB; it's being designed.
5 And until the Department of Energy comes in with an
6 amended record of decision, there is -- everything is very
7 speculative.
8 JUDGE FARRAR: Didn't I read somewhere that the
9 United States Congress -- there are people in the United
10 States Congress who don't think this is -- who are trying
11 to eliminate the funding?
12 MS. BUPP: There are people in the United
13 States Congress who are trying to eliminate it, but until
14 there's 51 percent of the United States Congress who are
15 trying to eliminate the funding, it's speculative.
16 JUDGE FARRAR: So there are a lot of people in
17 the United States Congress thinking of a lot of things --
18 MS. BUPP: Yes.
19 JUDGE FARRAR: -- doesn't mean it's going to
20 happen. Okay.
21 JUDGE TRIKOUROS: Let me ask you, the process
22 that you go through -- when will you be issuing -- if you
23 were issue this license, when would you issue it, would it
24 be soon following these proceedings, would it be when
25 the -- after the construction is over, would it be

1 somewhere in between? How does that work?

2 MS. BUPP: The Staff has currently budgeted

3 three years to review the license application. Once that

4 license application review is complete, assuming that we

5 that it does meet all the safety requirements, at that

6 point in time we would issue the license. So if the

7 license application is acceptable, it will be in about

8 three years.

9 JUDGE FARRAR: But how can you do that

10 before -- it's four years before construction is

11 completed?

12 MS. BUPP: Honestly it's not that different

13 from any other materials licensee.

14 JUDGE FARRAR: Yes. No, I've heard that in

15 a --

16 MS. BUPP: Yes.

17 JUDGE FARRAR: -- irradiator case, that you

18 have 7,000 materials license --

19 MS. BUPP: Yes.

20 JUDGE FARRAR: -- and they're all the same.

21 The irradiator wasn't the same, and this sure ain't the

22 same.

23 MS. BUPP: Actually -- let me rephrase. It's

24 the process. For example, the NRC recently licensed two

25 uranium enrichment facilities. We gave them both

1 authority to start construction and to begin operations
2 before they even overturned a single spade of dirt. In
3 the LES proceeding for USEC they had buildings there, but
4 they had not really begun to refit the buildings, and they
5 couldn't begin to do that until they had issued a license.
6 So for this facility -- for those facilities,
7 if they make changes during the construction process, they
8 will have to go through the 70.72 change process. That
9 process -- even if they don't come in with a license
10 amendment application, their books are open to us, we go
11 in, we look at their documentation of the 70.72 change
12 process. If they're not following it correctly, we'll
13 take enforcement action.
14 If they do find that any changes are
15 significant enough to trigger a license amendment, we'll
16 then review that license amendment application.
17 JUDGE FARRAR: How do intervenors -- potential
18 intervenors in the case where you described, where you
19 issue the operating license well before construction is
20 completed, and say the company comes in, keeps you posted,
21 and you say, yes, that change is all right, not
22 significant, how do potential intervenors keep track of
23 that so that they can exercise -- so they have the
24 opportunity to come in and challenge things, that if they
25 knew about them, they would say, Hey, that's not what was

1 warranted at the beginning, we'd like to reopen
2 everything, or we'd like to come in now. How do they
3 track that kind of process which is not done out in the
4 open?
5 MS. BUPP: Well, it's not -- not everything
6 will be -- not every piece of paper will be completely
7 open, but there is a paper trail of our inspection
8 reports, when we go out and visit them, what kind of
9 information is available, what sorts of changes they're
10 making.
11 JUDGE FARRAR: Are those on the web?
12 MS. BUPP: Some of them are; some of them are
13 redacted or certain appendixes are not there because it's
14 not publicly available information. Some of the design
15 information is sensitive.
16 JUDGE FARRAR: Then how do the citizenry who
17 are supposed to have an opportunity for hearing -- how do
18 they exercise that opportunity for hearing?
19 MS. BUPP: Well, they're exercising it now at
20 this point in time. Once the license is issued --
21 JUDGE FARRAR: you know, now is fine --
22 MS. BUPP: Yes.
23 JUDGE FARRAR: -- but what you all are saying
24 is give them the bum's rush, throw them out, proceeding
25 over. We got seven years to go and now you're telling me

1 during that seven years all these things will be
2 happening. How do they find out about it so that they can
3 be no worse off than they were when this notice came out?
4 MS. BUPP: Once the license is issued, whether
5 it's the license for the MOX facility, whether it's the
6 license for a uranium enrichment facility, whether it's a
7 combined construction and operating license for a new
8 reactor, once that license is issued, the opportunity for
9 a hearing is closed.
10 But concerned citizens can keep abreast of the
11 docket and can keep abreast of what's going on, and if
12 they feel that the facility is not being constructed or
13 run properly, they can come in and petition for an
14 enforcement action under 10 C.F.R. 2.206.
15 JUDGE FARRAR: But the documents are redacted.
16 MS. BUPP: Not all of them are. Some of them
17 are because they're sensitive. We do not put every
18 document publicly available on the web. But the fact that
19 these documents exist -- you know, there are cover
20 letters; there are sheets that say that we went out for an
21 inspection report. Someone could come in, submit FOIA
22 requests, ask for the documents, if they have a right to
23 view them under FOIA.
24 So the information is out there, and they --
25 we're not asking for any separate treatment for this

1 facility than we would ask for uranium enrichment
2 facilities, or combined --
3 JUDGE FARRAR: Will you work as --
4 MS. BUPP: -- operating licenses for new
5 reactors.
6 JUDGE FARRAR: Will you work as hard under a
7 FOIA request as you do on applications from potential
8 licensees?
9 MS. BUPP: To gather the documents and get them
10 to them?
11 JUDGE FARRAR: Yes.
12 MS. BUPP: It's not as time consuming, but,
13 yes, we will work as hard on those.
14 JUDGE McDADE: But certainly, given the
15 contention here, if the WSB were not constructed, if there
16 were no shovel of dirt turned on the WSB between now and
17 2016, that would be something that a putative intervenor
18 would have no difficulty in securing that information?
19 MS. BUPP: No, they certainly would not. They
20 also -- I mean, as the Counsel for the Applicant has
21 said -- has stated, that there would be steps that the
22 Applicant, and then licensee, would have to go through.
23 At the same time, DOE, if they change their plans for the
24 WSB, even if we've already issued the license and even if
25 our NEPA obligations have been satisfied, at least for the

1 time, they will have to issue an amended record of
2 decision.
3 That triggers new NEPA obligations. They have
4 the same public participation obligations under NEPA that
5 the NRC has, and their NEPA analyses could be challenged
6 in federal court. So the DOE side of it certainly does
7 not end just because the NRC side of it has ended.
8 JUDGE FARRAR: Okay. But judgment -- they had
9 indicated, you know, they could keep track if the WSB
10 wasn't built. I'm not sure they can because they can't
11 necessarily get on the site. Are you willing to offer to
12 send them any key documents that you get from now to 2014
13 that deal with the construction or not of the WSB?
14 MS. BUPP: We normally have a docket for
15 various --
16 JUDGE FARRAR: People have lives and they don't
17 know when you -- you know, you put something on the docket
18 and they have a family wedding they're doing. And a month
19 later they see the docket and you say, oh, you should --
20 it's been a month; you should have known that a month ago.
21 MS. BUPP: Well, if they --
22 JUDGE FARRAR: You should have --
23 MS. BUPP: -- didn't know it, they could come
24 in and argue why they had good cause for not knowing it.
25 JUDGE FARRAR: Now, why -- if all that you and

1 Mr. Silverman is saying is true, why can't you make a
2 representation here that documents that come in affecting
3 the WSB will be sent to them?
4 MS. BUPP: We have a mailing list during our
5 review, and major documents -- or just the license or a
6 license applications are shared with the mailing list for
7 the docket, which includes -- when I say the docket, I
8 mean, the MOX Services facility has its own docket, it has
9 a mailing list. So they're already on the mailing list,
10 so they will get major documents. They won't get every
11 single piece of paper.
12 JUDGE FARRAR: I'm not talking every single
13 piece of paper, I'm --
14 MS. BUPP: But they will get major documents.
15 JUDGE FARRAR: I'm saying something that says
16 to them, aha, you -- you know, here's something that bears
17 directly on that contention that hypothetically got thrown
18 out in September 2007.
19 MS. BUPP: Yes.
20 JUDGE FARRAR: Mr. Silverman wanted to say
21 something. He's got --
22 MR. SILVERMAN: If you don't mind, I'd just
23 like to add, if the WSB were not to be built, if the DOE
24 ever made a decision not to do that, that would be a very
25 public process in the DOE world. They have NEPA

1 obligations; it's a major part of their overall plutonium
2 disposition program. Congress is interested in it;
3 everybody would know about it. The local press would know
4 about it; it would be a big deal.
5 JUDGE FARRAR: Why is this so hard? These
6 people have a contention today that you say is
7 speculative, and I can't get anyone to say, We'll send
8 them the paperwork. And you want the contention
9 dismissed.
10 JUDGE McDADE: Ms. Bupp has already indicated
11 that they're on the mailing list for any significant
12 documents that would be generated here, that they would
13 get them automatically.
14 MS. BUPP: They're -- I mean --
15 JUDGE McDADE: Mr. Silverman has indicated that
16 in addition to that, there are other sources of
17 information that would be available in the event that --
18 as a fail-safe, in the event that for some reason they
19 were not informed of that. Am I correct in what the
20 representations are of the Applicant and the Staff?
21 MS. BUPP: Yes, that's correct.
22 MR. MARTIN: You are, Your Honor.
23 JUDGE TRIKOUROS: I have another variation of
24 the question. When -- before the plant actually starts
25 production activities, does the NRC actually go in, or

1 does Staff actually go in and do -- or throughout the
2 process are they doing onsite inspections, are they
3 ensuring that it will be built in accordance with design
4 requirements, approved design requirements. Has all of
5 that happened?
6 MS. BUPP: We do -- I'm sorry, Your Honor.
7 JUDGE TRIKOUROS: Yes, I just want to make
8 sure. As I said, in the reactor world there would be
9 ITECs and it'd be a totally different story. But here I
10 assume it's more of an informal process. But you --
11 MS. BUPP: We do inspections continuously
12 throughout the process. We do the operational readiness
13 review, which is the main inspection, just before they
14 begin operation. But we have inspections concurrently
15 throughout the construction phase.
16 In fact, at the same time as we've been down
17 here for these hearings, there have been meetings between
18 the NRC Staff and the Applicant going on at the same time.
19 And I believe -- correct me if I'm wrong, but there's
20 already an onsite inspector who's there at the MOX
21 facility full-time. And in addition we send down more
22 inspectors from time to time to inspect the facility.
23 JUDGE TRIKOUROS: Right. I think that's
24 important for the record. There is an onsite inspector,
25 just as there is a reactor, there's an office of -- the

1 NRC has an office --

2 MS. BUPP: Yes.

3 JUDGE TRIKOUROS: -- there, constant inspection

4 is going on. Right?

5 MS. BUPP: Yes.

6 JUDGE FARRAR: Ms. Bupp, our questioning has

7 taken 40 minutes of -- 15 minutes you have, Mr.

8 Silverman -- and is there something you want to add,

9 particularly on this process question that would help us

10 render a decision?

11 MS. BUPP: I have nothing to add except to sum

12 up that the process is there for them to -- for the

13 Petitioners to either reopen the case, or to have their

14 concerns heard throughout the life of this license, let

15 alone throughout the licensing process.

16 JUDGE FARRAR: Okay. Thank you.

17 For the Petitioners, we allotted 20 minutes.

18 If you've noticed, many of the Board's questions were from

19 the perspective of what does it take to protect your

20 interest. So if you use less than 20 minutes you would

21 not be shortchanged.

22 So, Ms. Carroll, would you go ahead, please?

23 MS. CARROLL: Well, I can't thank you enough,

24 and it's heartening that you did ask all these questions,

25 and it answered a lot of questions that were coming to my

1 mind, and also really confused what I had to say at this
2 point, because --
3 JUDGE FARRAR: Well, one thought might be,
4 given the questions we've asked and the responses we've
5 given, why don't you start with what steps would -- having
6 heard all this, what steps do you think we should take
7 with this contention --
8 MS. CARROLL: I have some notes on that, but I
9 have just a couple of thoughts that I was prepared to
10 say and --
11 JUDGE FARRAR: Go ahead.
12 MS. CARROLL: -- not knowing that all of this
13 wonderful discussion would take place.
14 I want to say this is an unprecedented
15 proceedings. It's appreciated that you have noted that
16 this is a unique facility. And what is also unique is the
17 NRC oversight OF a DOE project. And we've been talking
18 about doing this in a couple of places, but this is -- and
19 this is the first time. And it's appreciated to see a
20 very engaged Board, and we just want to encourage you to
21 set a strong precedent.
22 That we're operating without an MOU here
23 between NRC and DOE, that may not be legally required;
24 it's very uncomfortable, and it comes to both the security
25 issues and this waste issue. But we do have an MOU on

1 GNEP, on the Global Nuclear Energy Partnership, and the
2 substance of that MOU is to limit the authority of the
3 NRC. So maybe it's a good thing we don't have that MOU.
4 I want to comment on the EIS. May be legal,
5 but it's shameful to us that we have two and a half pages
6 on a waste plan that doesn't exist. And the EIS should be
7 responding to a real plan.
8 And so let me just glance -- because I'm
9 telling you so much came up and I know we need to be
10 really quick here. We feel confident in the arguments
11 we've made already about this. We also feel confident in
12 our argument that these are not late-filed contentions,
13 and so I won't speak to that.
14 JUDGE FARRAR: Well, the argument here is the
15 reverse of late filed.
16 MS. CARROLL: I understand.
17 JUDGE FARRAR: They're saying --
18 MS. CARROLL: But I did want to get that out.
19 JUDGE FARRAR: -- your -- and the contention's
20 timely filed, but you're -- the opposition is saying it's
21 too early because you're talking about something that
22 hasn't happened and, in their mind, is too speculative to
23 assume will happen.
24 So assume this as you address where we are --
25 assume we agreed with the Applicant and the NRC Staff that

1 there's a large degree of speculation involved in this.
2 Assume you have standing, but there's a large degree of
3 speculation concern with this contention.
4 Our point is what do we do that treats all the
5 parties fairly and protects against various future
6 scenarios?
7 MS. CARROLL: Well, I have some very specific
8 notes on ideas on how we would like this to proceed.
9 JUDGE FARRAR: Tell us.
10 MS. CARROLL: But I want to make --
11 JUDGE FARRAR: This is your chance --
12 MS. CARROLL: This may sound broader than what
13 you're saying. We've been watching this for seven years,
14 and there has not been a waste plan for seven years. The
15 waste solidification building has been canceled once. I
16 think -- this isn't evidentiary, but I'm talking to a guy
17 at a Savannah River site CAB meeting about them not having
18 a waste plan, and suddenly it appears in the budget for
19 2008.
20 So we've got to get through the rest of 2007
21 and 2008. It's speculative all the way around whether
22 there'll be a waste solidification building, and has been
23 repeatedly.
24 Now, I just -- please let me -- because my
25 notes are very confused at this point.

1 JUDGE FARRAR: But --

2 MS. CARROLL: So we do not think the EIS is

3 addressing anything --

4 JUDGE FARRAR: Yes, but --

5 MS. CARROLL: -- it's speculative.

6 JUDGE FARRAR: -- let me urge you, forget about

7 your notes --

8 MS. CARROLL: Okay.

9 JUDGE FARRAR: -- and address the question in

10 front of us because we have to decide -- assuming we agree

11 that to some extent, you know, this is speculative, this

12 is not that you have information that they hired an

13 uncertified welder in the past, this is something that may

14 or may not happen in the future -- how do we write a

15 decision, what do we do in our decision that deals

16 properly with this so that if the WSB is not built,

17 there's an avenue for you to challenge that, and if it is

18 built, everybody's happy?

19 MS. CARROLL: Well --

20 JUDGE FARRAR: So don't worry about your notes,

21 about what you were going to say, address that question

22 for us, what should we do at this point?

23 MS. CARROLL: Okay. We think that the case

24 should be put on hold. I have a note, but you instructed

25 me to abandon it. We want you to put it on pause but keep

1 it in place. We put this in a place holder because this
2 has just been an ongoing, undealt-with issue.
3 So we do not want you to give us standing and
4 close the case because, first of all, there's never been a
5 2.206 petition accepted for a hearing. Second, we think
6 if the case --
7 JUDGE FARRAR: Okay. I wrote that in a
8 decision once, and the Commission disagreed with me, in
9 *Millstone*, but I don't think the Staff was -- or the
10 Applicant was saying you're relegated to 2.206.
11 Were you, Ms. Bupp?
12 MS. CARROLL: She did.
13 JUDGE FARRAR: You weren't --
14 MS. CARROLL: She did.
15 JUDGE FARRAR: You weren't talking about
16 2.206 --
17 MS. CARROLL: She did.
18 MS. BUPP: No, only --
19 JUDGE FARRAR: -- with that petition for the
20 Secretary.
21 MS. CARROLL: She did.
22 MS. BUPP: No, only if the license has already
23 been issued and there was some other change, or they were
24 saying that -- I just mentioned 2.206 as an avenue for any
25 change in the facility, or if there was any belief that

1 the facility was not operating properly, that it's another
2 avenue for the public to come into the NRC's process --
3 JUDGE FARRAR: But it's not the only --
4 MS. BUPP: -- after the license is issued.
5 JUDGE FARRAR: -- it's not the only avenue?
6 MS. BUPP: No.
7 JUDGE FARRAR: Mr. Silverman?
8 MR. SILVERMAN: I agree with that.
9 JUDGE FARRAR: Okay.
10 MS. CARROLL: Well, we think this is the
11 avenue, and it's the best avenue, it's the easiest one for
12 the public to use, and we've done due diligence, and we
13 filed timely, and we think we should continue on with
14 this. However you handle the lack of anything to discuss
15 for the next year and a half that it should be kept --
16 JUDGE FARRAR: Are you --
17 MS. CARROLL: -- on the shelf and ready to
18 reactivate when such time comes.
19 JUDGE FARRAR: Are you in fact on a mailing
20 list?
21 MS. CARROLL: I do get mail. What I'm
22 wondering is, if you close this thing, how that would
23 be -- how that would affect --
24 JUDGE FARRAR: Is the mail you get sufficient
25 for you to keep tabs on what's going on without going into

1 atoms and the other --

2 MS. CARROLL: Well, you know, I only got this

3 thing by intervening for five years before, and so it's

4 very difficult to get a beast like this on the internet.

5 So, no --

6 JUDGE FARRAR: That is --

7 MS. CARROLL: -- I don't think -- we did not

8 get a license application, for instance. We had to be

9 aware of it and go out on the internet, so --

10 JUDGE FARRAR: But, Ms. Carroll --

11 MS. CARROLL: -- no, we don't get --

12 JUDGE FARRAR: -- you --

13 MS. CARROLL: -- mailed the most significant

14 documents.

15 JUDGE FARRAR: -- do understand that you could

16 call the public document room and get any of these things.

17 Right?

18 MS. CARROLL: Well, they charge us for these

19 big documents, up towards $100.

20 JUDGE FARRAR: I'm talking about things where

21 you have to take no initiative whatsoever, that in other

22 words either the Staff or the Applicant, they take the

23 initiative to keep you informed.

24 MS. CARROLL: With -- yes.

25 JUDGE FARRAR: You are on a mailing list

1 from --

2 MS. CARROLL: Yes.

3 JUDGE FARRAR: -- the Staff.

4 MS. CARROLL: But I do not think that I

5 received a notice of operating license from them. I think

6 I had to be out there swimming in these waters to be aware

7 of that, checking the *Federal Register* and all of that.

8 It's --

9 JUDGE FARRAR: Is this something --

10 MS. CARROLL: -- you know, I don't know that --

11 we're trusting their selective process on what they send

12 us as Ms. Bupp said.

13 JUDGE FARRAR: Is this something you and Ms.

14 Bupp could work out over the next -- what's today,

15 Wednesday -- by next Wednesday send us a letter on exactly

16 what the mailing list -- what she's going to get on the

17 mailing -- she and the other potential intervenors are

18 going to get on the mailing list?

19 MS. CARROLL: I --

20 JUDGE FARRAR: That's to Ms. Bupp.

21 MS. BUPP: We can even tell you what they've

22 already received. They received the acknowledgment that

23 we got, the license application, they received the

24 *Federal* -- all the *Federal Register* notices, they received

25 those in advance of them actually being published in the

1 *Federal Register*. They received notices of public
2 meetings --
3 JUDGE FARRAR: No, no, no, no --
4 MS. BUPP: -- they --
5 JUDGE FARRAR: -- no, no, no, no, no. I'm
6 talking about documents from the Applicant that say,
7 Here's what's going on on the site.
8 MS. BUPP: I haven't gotten to what they will
9 receive in the future.
10 JUDGE FARRAR: Okay.
11 MS. BUPP: They will receive --
12 JUDGE FARRAR: Why don't you do this, by next
13 Wednesday, get in our hands a letter that says what they
14 will receive in the future, without them asking for it,
15 without them lifting their finger, they're going to get
16 and what kind of information are they going to get.
17 MS. BUPP: I mean they'll -- I will outline --
18 JUDGE FARRAR: Mr. Silverman --
19 MS. BUPP: -- it but they get everything that
20 all interested stakeholders receive.
21 JUDGE FARRAR: No, no, they're not an
22 interested stakeholder, they're a person -- they're people
23 who, at this moment, have a live petition for intervention
24 pending with us, and you've heard our concerns up here.
25 I'm not -- they're not --

1 MS. BUPP: We'll send a letter by next
2 Wednesday.
3 JUDGE FARRAR: -- they're not a stakeholder,
4 they are somebody with a live petition who have a serious
5 matter in front of us, and I want to know what they're
6 going to get.
7 MS. BUPP: We will send a detailed letter by
8 next Wednesday.
9 JUDGE FARRAR: Okay.
10 MS. CARROLL: I'm kind of uncomfortable with
11 that line of inquiry because another main point we have is
12 that the EIS already needs to be reopened, and they may
13 not be able to reopen it for a year and a half until they
14 have a plan they can review.
15 JUDGE FARRAR: No, no, what we're doing is
16 we're talking about if this contention were to be
17 dismissed, what would you have in your hands so that at
18 the appropriate moment you could readily come back, you
19 wouldn't learn about things six months too late, and
20 people would say, Sorry, you should have learned about
21 that six months ago, because they have a way to learn
22 about it but you don't.
23 We're just trying to find out if there's -- I'm
24 not saying what way the decision's going, but we want to
25 know what the process is for the future. That was

1 directly the question that we asked in our order, we
2 said, what steps are in place to provide fair opportunity
3 for hearing as construction continues, and thus to support
4 the dismissal of contentions as speculative.
5 That was exactly the question we framed, and we
6 want to know what processes are in place. We've discussed
7 some of the processes here, they may or may to be
8 sufficient of themselves.
9 Ms. Bupp, you can send us a letter saying that
10 you're going to have -- you're taking them off the mailing
11 list. That's your -- you know, that's your option, but
12 that would be one of the part of the -- one piece of the
13 package of processes that are in place. That's all we
14 want to know, what -- you've talked to the legal
15 processes. At least I want to know about the informal
16 processes.
17 And before your superiors or anybody else runs
18 to the Commission and say we're trying to superintend the
19 Staff's work, we're not. We're asking you what you will
20 do. You can -- we're not telling you what to do, we
21 want -- we just want to know what you're going to do.
22 MS. BUPP: Yes, and we do have a process in
23 place, and we'll have a more detailed explanation in the
24 letter by next Wednesday.
25 JUDGE FARRAR: Okay. Ms. Carroll, I'm getting

1 nervous about airplanes that people may be getting.
2 You've had relatively little time, but in the next few
3 minutes can you focus on anything you'd -- that we need to
4 know about this contention, and what would happen -- you
5 know, what steps we should take?
6 MS. CARROLL: Well, I believe I already said
7 that you should find a way to keep it on the shelf until
8 they give us a waste plan that we can actually evaluate.
9 And I'll close by saying we have been living with DOE's
10 practice of building major facilities without a waste plan
11 for 50 years.
12 And we have the NRC -- the first time ever
13 we've had the NRC to help us put DOE's feet to the fire
14 and make them make a plan before they waste more of the
15 taxpayers' money and bring up to 78 tons plutonium here
16 and ruin the place further.
17 And thank you so much for your very clear
18 evidence that you get it, and I hope the process works out
19 in a way that helps us stay engaged.
20 I'll say this one thing, if we have to go to
21 the DOE, it's just not good; you know, we'll wind up in
22 federal court and it's just not really possible for a pro
23 se intervenors to take on the DOE. The adjudicatory
24 process here, we have a little experience, and we think
25 you should keep it open and available to us.

1 Do you have any more questions?

2 JUDGE FARRAR: No. Thank you. Thank you for

3 that closing. I mentioned at the beginning of the

4 argument, leaving the clerkship in New Orleans 40 years

5 ago, and I've carried with me one thing since that day,

6 the Judge taught me people can stand to lose, but they

7 can't stand not to be treated fairly. And at least from

8 my part, some of the questions came from that motivation.

9 We have one issue left to do, which is

10 terrorism. We're way past our time. As people in the

11 audience may know, the Commission long ago said, for a

12 number of reasons, that terrorism contentions were not a

13 fit subject for consideration in these adjudicatory

14 proceedings. They rethought that after September 11,

15 stuck with the same conclusion. Their conclusion has been

16 rejected by the 9th Circuit Court of Appeals, which sits

17 out on the West Coast.

18 But the Commission has decided that even though

19 the government did not seek cert from the Supreme Court in

20 that case, that the Commission views that decision as

21 binding only in the 9th Circuit and they will await

22 another case and see what happens. They're applying that

23 same -- so they're sticking to their original holding

24 everywhere but in the 9th Circuit. We're not in the 9th

25 Circuit.

1 Is there anything that anyone -- and as I read
2 the Petitioner's papers, they largely recognize that and
3 really were using this as a placeholder that they've
4 preserved their rights if some other court does say to the
5 Commission, You have to consider terrorism, their
6 contention would have been on the books.
7 But is there anything in light of that
8 background that you'd like to say about that?
9 MS. CARROLL: Well, please forgive me, but we
10 want our three minutes on this, because it's --
11 JUDGE FARRAR: Go ahead.
12 MS. CARROLL: -- terribly important to us. We
13 filed on August 13, 2001 the contention, which we refiled
14 with you. We had a prehearing conference on September 21,
15 ten days after 9/11. Our Board accepted the contention,
16 and they made this decision, and please indulge me,
17 because this should be read. It's so clear.
18 Regardless of how foreseeable terrorist attacks
19 that could cause a beyond-design-basis accident were prior
20 to the terrorist attacks of September 11, 2001, involving
21 the deliberate crash of hijacked jumbo jets into the Twin
22 Towers of the World Trade Center in New York City and the
23 Pentagon in the nation's capital, killing thousands of
24 people, it can no longer be argued that terrorist attacks
25 of heretofore unimagined scope and sophistication against

1 previously unimaginable targets are not reasonably
2 foreseeable.
3 Indeed, the very fact that these terrorist
4 attacks occurred demonstrates that massive and destructive
5 terrorist acts can and do occur and closes the door, at
6 least for the immediate future, on qualitative arguments
7 that such terrorist attacks are always remote and
8 speculative, and not reasonably foreseeable.
9 These words of the Atomic Safety and Licensing
10 Board, which were overturned by the Commission, formed the
11 cornerstone of the 9th Circuit decision. This facility is
12 significantly more vulnerable and more of a security risk
13 than the Diablo nuclear power plant.
14 You want to know how we think you can address
15 the Commission's prohibition on this issue, and we beg you
16 to help lead the NRC in the direction it must go, that the
17 9th Circuit decision starts. It's time for the regulatory
18 agency to mature into its role. All we want is an
19 emergency plan.
20 This is different. NEPA is different than the
21 security regulations which look at fences and prevention.
22 This lets us know how to prepare an emergency plan if the
23 worse happens. Thank you.
24 JUDGE FARRAR: Thank you, Ms. Carroll.
25 Mr. Silverman, take it -- well, let me ask you

1 a question. I think it was in Oyster Creek that the
2 Commission said they were not going to apply the 9th
3 Circuit ruling to facilities outside the 9th Circuit.
4 But they pointed out -- I think it was in a
5 footnote in Oyster Creek -- that was only a license
6 renewal hearing, and so in terms of what was being done,
7 it was not really a dramatic federal action, should Oyster
8 Creek be limited to reactor renewal cases and therefore we
9 would have a clean slate to decide what to do with
10 terrorism, or are there other things in the Commission
11 opinion that say this is resolved.
12 MR. SILVERMAN: Your Honor, that was a license
13 renewal proceeding, and as I recollect, part of that was
14 the fact that a license-renewal proceeding has sort of
15 limited scope. But nevertheless, I believe there are
16 other Commission precedent statements where they have
17 said, This is a precedent that applies in the 9th Circuit
18 and only in the 9th Circuit with respect to this facility,
19 and that that's the Commission's policy, and that the
20 Licensing Board need to adhere to that as bind precedent.
21 The only other thing I would add, with all due
22 respect to Ms. Carroll's position, and appeals on the
23 subject, this is a contention, an identical contention
24 that was raised before and dismissed --
25 JUDGE FARRAR: Thank you, Mr. --

1 MR. SILVERMAN: -- in this proceeding. Thank
2 you.
3 JUDGE FARRAR: Ms. Bupp, Mr. Martin?
4 MS. BUPP: I believe it's the staff's position
5 and interpretation of the recent Commission decision is
6 fully outlined in our brief. So unless the Board has any
7 specific questions, we would rest on our reply.
8 JUDGE FARRAR: So you wouldn't think Oyster
9 Creek is limited to license renewal as Mr. Silverman
10 called it, we should read it as a broad policy, just
11 Commission policy decision that applies across the board
12 outside of the 9th Circuit. That applies to any kind of
13 proceeding outside of the 9th Circuit.
14 MS. BUPP: I would agree with Mr. Silverman
15 both at Oyster Creek could be read to other proceedings,
16 but I would also point out that on the same date Oyster
17 Creek was issued, the Commission issued two other
18 proceedings, the Palisades proceedings and also the Grand
19 Gulf decision which applied to an early site permit for a
20 new nuclear reactor.
21 And so if you look at the totality of all that
22 the Commission has said, I think you could see that their
23 decision not to apply the 9th Circuit decision outside the
24 9th Circuit would apply to all types of facilities.
25 JUDGE FARRAR: Okay.

1 JUDGE TRIKOUROS: The Commission is doing a
2 terror evaluation on the Diablo Canyon ISFSI facility.
3 Right?
4 MS. BUPP: Yes. And also on another license
5 application that's in the 9th Circuit as well.
6 JUDGE TRIKOUROS: When is that going to be
7 issued, do you know?
8 MS. BUPP: I actually think -- I'm sorry -- I
9 know that the final environmental assessment for the other
10 9th Circuit license application has been issued. I think
11 the Diablo Canyon should be soon, but I only know -- the
12 other one is actually my case, but the Diablo Canyon one
13 is not my case, but I believe it should be soon.
14 JUDGE FARRAR: All right. Ms. Carroll, did you
15 want to say something?
16 MS. CARROLL: Can you tell? Just I was short
17 because -- it's proper to be short right now, and Don
18 Silverman was not correct. We have raised a new and
19 significant addition to our original contention, which is
20 that broad powers were given to all federal agencies by
21 the Homeland Security Act, and we encourage you to help
22 lead the NRC in taking the authority here. And you can
23 read, and so I'll be quiet.
24 JUDGE FARRAR: We will look at it carefully.
25 It's now 12:15, we're not too bad in terms of

1 our time. We will take the case under submission. We
2 talked earlier about a mid-September date given the 45 day
3 rule that elapsed some time ago, but we were past that
4 because of scheduling difficulties. So we will continue
5 to target mid-September as the parties agreed for a
6 decision in this matter.
7 I want to thank all the parties for their
8 participation. You can see that we take our jobs, but not
9 ourselves, seriously. The questions, as I predicted,
10 would be fast and furious, but that's the way to get to
11 the bottom of things and make sure we have a full
12 understanding of our -- of your positions.
13 And to do that we have to press you kind of
14 hard, and counsel responded admirably. But more than
15 that, the representatives of the Petitioners who, perhaps
16 because they didn't have the benefit of law school, did a
17 fine job in trying to -- in addressing the issues and our
18 questions. And you've done a remarkable -- made a
19 remarkable effort on behalf of your clients, and I think
20 that should be noted.
21 What also should be noted is, as we struggled
22 with scheduling and other difficulties, procedural
23 difficulties in the case, how counsel and the
24 representatives of the Petitioners all worked together to
25 solve things better than we could have directed them. So

1 for that we thank you.

2 And we stand adjourned. Thank you.

3 (Whereupon, at 12:20 p.m., the hearing was

4 concluded.)

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CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Shaw AREVA MOX Services LLC
Oral Argument

Docket Number: 70-3098-MLA
07-856-02-MLA-B001

Location: Augusta, Georgia

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

Brenda Thompson
Official Reporter
Neal R. Gross & Co., Inc.