UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-07-14

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

DOCKETED 10/31/07

SERVED 11/01/07

Michael C. Farrar, Chairman
Nicholas G. Trikouros
Lawrence McDade

In the Matter of	Docket No. 70-3098-MLA
SHAW AREVA MOX SERVICES	ASLBP No. 07-856-02-MLA-BD01
(Mixed Oxide Fuel Fabrication Facility)	October 31, 2007

MEMORANDUM AND ORDER
(Ruling on Standing and Contentions)

This proceeding involves a challenge to the November 17, 2006, application of Shaw AREVA MOX Services (MOX Services, or Applicant) for a license that would allow it to operate the Mixed Oxide Fuel Fabrication Facility (MFFF, or the MOX facility) that it is building for the U.S. Department of Energy (DOE) on the federal government's Savannah River Site (SRS) south of Aiken, South Carolina.[1] The MFFF, for which a Construction Authorization was issued on March 30, 2005, is designed to make mixed plutonium and uranium oxide (MOX) fuel for use in commercial nuclear power reactors as part of DOE's program for the disposition, through reprocessing, of surplus nuclear weapons plutonium.

The NRC Staff acknowledged receipt of the current application on December 20, 2006.[2] A notice of the application and opportunity to request a hearing on the application was

[1] The Applicant submitted its original application in September, 2006. Mixed Oxide Fuel Fabrication Facility License Application (Sept. 27, 2006), ADAMS Accession No. ML062750195. This application was revised at the request of the NRC Staff, and that version was submitted on November 17, 2007. Mixed Oxide Fuel Fabrication Facility License Application (Nov. 17, 2006), ADAMS Accession No. ML070160311 [hereinafter Application].

[2] Letter from David Tiktinsky, Senior Project Manager, Division of Fuel Cycle Safety and Safeguards, U.S. NRC, to Dealis W. Gwyn, Licensing Manager, Shaw AREVA MOX Services (Dec. 20, 2007), ADAMS Accession No. ML063530612.

published in the Federal Register on March 15, 2007.[3] On May 14, 2007, three citizens' organizations, two of which had participated in the earlier construction permit proceeding, jointly filed a timely Petition to Intervene along with a request for a hearing. The intervention petition included five contentions that formed the basis for the challenge to the requested license to operate the facility.

Construction of the facility, under the permit that had been issued 28 months earlier, did not begin until August 1, 2007. It is scheduled to be completed seven years from now. On August 22, 2007, following a site visit the previous day by the Board and representatives of the parties, a combined oral argument and prehearing conference was held in Augusta, Georgia, to consider the matters raised by the Petition to Intervene.

The Board finds herein that the Petitioners have standing to intervene in this proceeding. The Board further finds that three of their contentions are inadmissible and must be dismissed; we find that the other two, even though asserted to have been filed prematurely, have sufficient substance to avoid dismissal at this juncture. In that regard, the Board goes on to solicit the views of the parties on several alternative courses of action for dealing with those contentions that, if appropriate, might serve well in lieu of admitting and litigating them now.

We also consider herein certain collateral matters that arose after the argument.[4] We do not, however, address at this point the additional contention the Petitioners filed subsequent to the oral argument. Final pleadings on that contention are due within the next week, and the Board will turn its attention to that matter once those papers are in hand.

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[3] 72 Fed. Reg. 12,204 (Mar. 15, 2007). The notice was published after a redacted version of the Application was released on January 4, 2007. See Letter from David Stinson, President and COO, Shaw AREVA MOX Services, LLC, to Document Control Desk, U.S. NRC, Submittal of Redacted License Application (Jan. 4, 2007), ADAMS Accession # ML070160304.

[4] The parties earlier agreed that, to allow for scheduling conflicts, the purposes of the rule calling for a Board decision within 45 days of the final pleading would have been served by a Board decision by mid-September (see Tr. at 145). Post-argument, a matter arose (and is decided herein) for which the last pleading was filed September 10. See n. 25 and accompanying text (p. 9, below). See also our Oct. 17, 2007, Memorandum (p. 52, below).

I. PROCEDURAL BACKGROUND

A. The Prior Proceeding

This proceeding is the second adjudicatory stage in the review process for the possible licensing of the MOX facility. As described in our predecessor Board's decision cited in note 8, below, the first stage began on February 28, 2001, when the Applicant[5] filed a construction authorization request (CAR) seeking permission to build an MFFF on DOE's Savannah River Site.[6] According to the Environmental Report (ER) that was part of the Application, the 310-square-mile federally-owned SRS is a roughly circular tract of land situated within South Carolina's Aiken, Barnwell, and Allendale Counties; toward the southwest, it is bounded for 17 miles by the Savannah River, which forms the State border with Georgia.[7]

Within the SRS, the MFFF was to be located on a 41-acre site that lies within Aiken County and is 5.8 miles from the nearest SRS site boundary. See id. at 4-1 to 4-2. The largest population centers near the site are Augusta, Georgia and Aiken, South Carolina, with a number of smaller South Carolina towns (New Ellenton, Jackson, Barnwell, Snelling, and Williston) noted as being within 15 miles. Id. at 4-1.

The MFFF was designed to operate for 20 years and to convert 36.4 tons of surplus-weapons-derived plutonium oxide into MOX fuel for civilian reactors. Id. at 1-2. The MFFF, as proposed, would have an annual design throughput of 3.8 tons of plutonium. Id. After fuel fabrication, it is anticipated that the MOX fuel would be used in four Duke Energy Corporation reactors: Units 1 and 2 of the Catawba Nuclear Station near York, South Carolina, and Units 1

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[5] At that point, the Applicant was a consortium of several companies known as Duke Cogema Stone & Webster. The makeup and name of the consortium had changed by the time the current phase of the proceeding was launched.

[6] See 66 Fed. Reg. 19,994, 19,995 (Apr. 18, 2001).

[7] See DCS Mixed Oxide Fuel Fabrication Facility Environmental Report (Dec. 19, 2000) (Rev. 0) at 4-1.

and 2 of the McGuire Nuclear Station near Huntersville, North Carolina. Id. Although DOE would own the MFFF facility, its contractor, the Applicant consortium, would be the license holder and facility operator. Id. at 1-1.

Prior to receiving the Applicant's CAR, the Commission published a hearing notice setting out the general procedures to be followed in any proceeding concerning the MFFF. 66 Fed. Reg. 6701 (Jan. 22, 2001). This notice specified that the hearing would be conducted in two phases: one related to "design bases for the principal structures, systems, and components, the quality assurance program, and environmental issues," and the second related to "all other issues related to the issuance of a 10 CFR part 70 license." Id.

On April 18, 2001, after receiving the application, the Commission published a notice of acceptance for docketing and of opportunity for a hearing in the Federal Register. 66 Fed. Reg. at 19,994. Subsequently, one individual and three organizations – including Georgians Against Nuclear Energy (GANE) and the Blue Ridge Environmental Defense League (BREDL) – filed petitions to intervene and hearing requests in that proceeding.[8] In December 2001, the Board ruled that all three of the petitioning organizations had standing to intervene in the proceeding, but that only two (GANE and BREDL) had submitted admissible contentions. Id. The individual who filed independently was found not to have standing. Id.

GANE initially filed eight contentions that the Board found to be admissible: one dealing with the design features of the Applicant's material control and accounting system; another dealing with the physical protection system; a third dealing with alleged inadequacies in the seismic design of the facility; a fourth dealing with the alleged incorrect designation of the facility's controlled area; a fifth dealing with alleged inadequacies in the safety analysis; a sixth

[8] Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 410 (2001). The other organization that filed was Environmentalists, Inc. (EI). The individual filing an independent petition was Edna Forster; in addition, Donald J. Moniak filed jointly with BREDL.

dealing with alleged inadequate comparisons between the MFFF and alternatives; a seventh dealing with the failure to address the waste stream from a particular process at the MFFF; and the last addressing terrorism issues. Id. at 424, 432, 436, 438, 441, 444. For its part, BREDL submitted two admissible contentions, which were consolidated with GANE's control area and waste contentions. Id. at 452, 462.

The Commission reversed the Board's decision to admit GANE's terrorism contention.[9] All other admitted contentions were resolved by motions to dismiss, motions to withdraw, or motions for summary disposition,[10] and the prior proceeding was terminated in 2005.[11]

B. The Current Proceeding

On March 15, 2007, the Commission published a notice of acceptance for docketing of the current MOX Services license application and of opportunity to request a hearing on the application. 72 Fed. Reg. 12,204 (Mar. 15, 2007). A timely request for a hearing and petition to intervene was filed on May 14, 2007, by a group of three organizations (collectively, Petitioners): BREDL, which had participated earlier; Nuclear Watch South (NWS), the successor to earlier participant GANE; and the Nuclear Information Research Service (NIRS).[12] On June 5, 2007,

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[9] Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002).

[10] Licensing Board Order (Dismissing GANE Contention 9) (Jan. 28, 2003) (unpublished); Licensing Board Order (Granting GANE Motion to Withdraw Contention 6) (Aug. 4, 2003) (unpublished); LBP-03-21, 58 NRC 338 (2003) (granting Applicant motion for summary disposition of consolidated waste contention); Licensing Board Order (Granting GANE and BREDL Motion to Withdraw Consolidated Contention 5) (Nov. 26, 2003) (unpublished); LBP-04-9, 59 NRC 286 (2004) (granting Applicant motion for summary disposition of GANE contentions 1 and 2); LBP-05-4, 61 NRC 71 (2005) (granting Applicant motion for summary disposition of GANE contention 3).

[11] Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-15, 62 NRC 53 (2005).

[12] Petition for Intervention and Request for Hearing (May 14, 2007) [hereinafter Petition].

this Atomic Safety and Licensing Board was established to conduct the adjudicatory proceeding.[13]

The NRC Staff filed an answer opposing the petition on June 11, 2007.[14] The Applicant followed suit, filing an answer opposing the petition on June 13, 2007.[15] The Petitioners filed their reply on June 27, 2007.[16]

The Petitioners claim representational standing on behalf of members listed in the Petition who submitted affidavits indicating that they live at various distances within 50 miles of the proposed facility and that they authorized their respective organizations to represent their interests.[17] The Applicant and the NRC Staff challenge this assertion of standing on the grounds that the Commission has accepted a "proximity presumption" granting standing to residents within 50 miles of a reactor, but has not accepted any such presumption in non-reactor cases.[18] Because this is a non-reactor case, the Applicant and Staff argue that

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[13] 72 Fed. Reg. 32,139 (June 11, 2007). The Board was subsequently reconstituted, pursuant to 10 C.F.R. § 2.313(c), due to the unavailability of one of the original judges. 72 Fed. Reg. 40,344 (July 24, 2007).

[14] NRC Staff Response to Petition for Intervention and Request to Intervene (June 11, 2007) [hereinafter Staff Answer].

[15] Shaw AREVA MOX Services, LLC Answer Opposing BREDL et al., Petition for Intervention and Request for Hearing (June 13, 2007) [hereinafter Applicant Answer].

[16] Reply of the Petitioning Organizations to the Answers Filed June 11 and 13 by NRC Staff and the License Applicant to Our [Petition] (June 27, 2007) [hereinafter Reply].

[17] Petition at 3-5. All but one live between 20 and 32 miles from the facility.

[18] Applicant Answer at 4-5 (citing Florida Power & Light Co. (St. Lucie, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); Consumers Energy Co. (Big Rock Point ISFSI), CLI-07-19 (slip op. at 3) (Apr. 26, 2007); Georgia Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 11, 116-117 (1995)); Staff Answer at 4 (citing Virginia Elec. Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979); Georgia Tech, 42 NRC at 116; Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994) ; Exelon Generation Co. and PSEG Nuclear (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580 (2005).

Petitioners either (1) must show "an obvious potential for offsite consequences" at a particular distance where a proximity presumption might apply or (2) must satisfy the judicial standing requirements of injury, causation, and redressability. Applicant Answer at 7-8; Staff Answer at 3-4. Both the Applicant and the Staff argue that the Petitioners have failed to do so. Applicant Answer at 9-11; Staff Answer at 5-8.

The Petition includes five contentions, which that document synopsized as follows:[19]

> 1) Whether MOX Services' License Application and/or [Environmental Impact Statement (EIS)] meet the relevant requirements in the National Environmental Policy Act and/or the Clean Air Act because of failures to address critical aspects regarding limits on emissions of hazardous air pollutants necessary for the protection of public health and safety;
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> 2) Whether MOX Services License Application meets the relevant requirements of the Atomic Energy Act because of its failure to prepare and submit an emergency plan to the NRC for potential radioactive releases to the public;
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> 3) Whether the Final Environmental Impact Statement on the construction and operation of a plutonium fuel factory is adequate to satisfy the requirements of NEPA and NRC implementing regulations because it fails to address new and significant information showing that neither MOX Services nor the U.S. Department of Energy ("DOE") has any concrete plans for the Waste Solidification Building ("WSB") that was proposed in the EIS and, as a result, high-alpha liquid waste from the proposed facility may have to be stored onsite posing hazards which have not been addressed by the NRC in the EIS;
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> 4) Whether the License Application for the proposed plutonium processing facility is inadequate because it does not address safety and public health risks posed by indefinite storage of liquid high-alpha waste at the site or contain measures for the safe storage of that waste; and
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> 5) Whether the Final Environmental Impact Statement for the proposed plutonium processing facility meets the relevant requirements of NEPA because it does not evaluate the environmental impacts of a terrorist attack on the proposed factory.

Petition at 5-6. The first two of these contentions are divided into subparts. Id. at 6-12, 12-16.

The Applicant and the NRC Staff assert that all of these contentions fail to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1), and that the Petitioners' request for a hearing

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[19] But see n. 87, below, regarding the full text of Contentions 3 and 4.

should therefore be denied. Applicant Answer at 2; Staff Answer at 8. Details of the pleadings regarding these contentions are presented in Sections III.B and III.C, below.

On August 22, 2007, the Board heard several hours of oral argument regarding the standing of the Petitioners and the admissibility of their contentions. The representatives of the Petitioners and counsel for the Applicant and the Staff presented their arguments and answered questions from the Board.[20]

There have been several filings by the parties since the oral argument. One set of filings was submitted in response to the Board's request, during the argument, for further information on the Staff's policy and procedures for keeping the Petitioners informed about new developments at the MOX Facility. To that end, the Staff supplied a letter on August 29, 2007, detailing its standard policies and procedures for informing all interested stakeholders of developments in connection with license applications.[21] The Staff's letter did not offer to take any additional steps to provide more information to those who had filed intervention petitions.

The Applicant subsequently provided a supplement to the Staff letter detailing the steps it would take, specific to the Petitioners, to keep them informed of new developments. These included "specific written notice . . . of any determination by MOX Services that the [Waste Solidification Building] will not be utilized for high-alpha liquid waste from the MOX Facility."[22]

Another set of filings was triggered by the Applicant's post-argument motion to deny Petitioner NIRS' request for hearing on the basis that NIRS had violated NRC requirements by

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[20] We had previously, on August 9, 2007, issued an Order Regarding Oral Argument Format that, among other things, set out a number of issues that we thought warranted particular emphasis there. A transcript of the oral argument was prepared (Transcript of Oral Argument Held in Augusta, GA (Aug. 22, 2007)) and can be obtained from the NRC's Agency Document Access and Management System (ADAMS) via Accession No. ML072400372.

[21] Letter from Margaret J. Bupp, Counsel for the NRC Staff, to the Licensing Board (Aug. 29, 2007).

[22] Shaw AREVA MOX Services, LLC Supplement to NRC Staff Letter Dated August 29, 2007 (Aug. 31, 2007) at 2.

failing to attend the combined oral argument and pre-hearing conference as anticipated in the Board's July 16, 2007, Scheduling Order.[23] NIRS responded by explaining that its absence was due solely to "unanticipated immediate medical circumstances" that prevented its representative from attending.[24] NIRS also indicated it had presumed the other Petitioners would represent it, because the Board had previously ordered the parties to consolidate their written replies. Id.

After receiving the NIRS response, the Staff also responded to the Applicant's motion.[25] Taking no position on the sanction request itself, the Staff simply requested that in the future NIRS directly contact opposing parties, instead of just its co-petitioners, when it needed to provide information relevant to the proceeding. The Staff went on to point to an exchange that had occurred at the oral argument that shed some light on the matter.

A third set of filings was initiated on September 12, 2007, when Petitioners NWS and BREDL sent the Board a letter for the stated purpose of alerting us to a new DOE plan to bring a different kind of surplus plutonium to the Savannah River Site and to reprocess a portion of it at the MOX Facility.[26] In their letter, NWS and BREDL indicated their intention to submit an additional contention based on this new information on or before October 5, 2007 (i.e., within 30 days of the date of the new DOE plan) and asked us to consider the existence of this new information "before issuing a decision" on the pending matters. Id.

Responding immediately to that letter, the Applicant strongly opposed any delay, which it argued would not be consistent with the agreed-upon schedule anticipating a Board decision by

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[23] See Shaw AREVA MOX Services, LLC Motion to Deny Petitioner Nuclear Information and Resource Service's Request for Hearing (Aug. 31, 2007) at 1-2.

[24] Response of [NIRS] to Motion by Shaw, AREVA, MOX Services to Deny [NIRS] a Hearing (Sept. 6, 2007) at 1.

[25] NRC Staff Response to [MOX Services NIRS Motion] (Sept. 10, 2007).

[26] Letter from Glenn Carroll, Nuclear Watch South, and Louis A. Zeller, Blue Ridge Environmental Defense League, to Licensing Board (Sept. 12, 2007).

mid-September.[27] Furthermore, the Applicant said, if the Petitioners were found by the Board to have demonstrated their standing, they would still have an opportunity, pursuant to 10 C.F.R. § 2.309(c), to submit late-filed contentions thereafter. Id. at 3.

As forecast, Petitioners NWS and BREDL filed an additional contention on October 5, 2007.[28] That contention, numbered 6, argues that the Applicant failed to comply with the National Environmental Policy Act (NEPA) because the EIS does not address recent changes proposed by DOE. Id. at 2. Specifically, the contention references an Amended Record of Decision issued by DOE on September 5, 2007, in which it discussed its plan to transfer roughly "2,511 additional 3013-compliant packages containing surplus non-pit weapons-usable plutonium metals and oxides" to the SRS.[29] In addition, Petitioners note that, according to that Federal Register notice, DOE is preparing a Supplemental EIS for Surplus Plutonium Disposition at the Savannah River Site to evaluate the potential environmental impacts of alternative methods to disposition surplus, non-pit plutonium materials, one of which is using the MFFF. Petitioners' New Contention at 3.

As Petitioners see it, the possible introduction of this additional plutonium would require the Applicant to modify the design of the MOX Facility. Id. at 1-2. In support of the contention, they include a declaration from Dr. Edwin S. Lyman, a Senior Staff Scientist at the Union of Concerned Scientists, standing behind the facts and opinions in the contention.

The applicable Rules of Practice call for the other parties' answers to that contention to be filed at the end of October. Those same rules permit Petitioners to file a reply a week thereafter.

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[27] Shaw AREVA MOX Services, LLC Answer to Nuclear Watch South's Letter Dated September 12, 2007 (Sept. 14, 2007).

[28] See Petitioners' Late-Filed Contention Regarding Need to Supplement EIS for Proposed MOX Plutonium Processing Facility (Oct. 5, 2007)[Petitioners' New Contention].

[29] Amended Record of Decision: Storage of Surplus Plutonium Materials at the Savannah River Site, 72 Fed. Reg. 51,807 (Sept. 11, 2007).

II. LEGAL STANDARDS

A. Petitioners' Standing

A petitioner's right to participate in a licensing proceeding is derived from Section 189a of the Atomic Energy Act (AEA), which provides for a hearing "upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a)(1)(A). The Commission's implementing regulation, 10 C.F.R. § 2.309(d), directs a licensing board, in ruling on a request for a hearing, to determine whether the petitioner has an interest affected by the proceeding by considering (1) the nature of the petitioner's right under the AEA or the National Environmental Policy Act of 1969 (NEPA) to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.

We have long been instructed to apply traditional judicial concepts of standing when determining whether a petitioner has set forth a sufficient interest to intervene under 10 C.F.R. § 2.309.[30] Those concepts require that a petitioner demonstrate "a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision," (i.e., (1) injury, (2) causation, and (3) redressability).[31] Further, a petitioner must also demonstrate that its injury arguably falls within the zone of interests protected by the statutes governing NRC proceedings, such as the AEA or NEPA.[32]

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[30] See Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 612 (1976); Georgia Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

[31] Georgia Tech, CLI-95-12, 42 NRC at 115; see Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988); Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993).

[32] See Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 13 (2001).

A petitioner may instead show "proximity standing," which "rests on the presumption that an accident associated with the nuclear facility could adversely affect the health and safety of people working or living offsite but within a certain distance of that facility."[33] In nuclear power reactor construction permit and operating license proceedings, a fifty-mile proximity presumption is recognized for standing purposes; "far closer proximity" has, however, been required to confer standing "in other licensing proceedings."[34]

In such cases, the proximity presumption will extend only to those offsite areas where the "proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences."[35] The appropriate distance for proximity standing is decided on a case-by-case basis "taking into account the nature of the proposed action and the significance of the radioactive source."[36]

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[33] Exelon Generation Co. and PSEG Nuclear (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580 (2005) (citations omitted).

[34] Consumers Energy Co. (Big Rock Point ISFSI), CLI-07-19, 65 NRC 423, 426-27 (2007) (with respect to a license transfer for an Independent Spent Fuel Storage Installation, rejecting the proximity presumption for petitioner living within fifty miles of the plant); see also Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 25 (2002) (allowing for the proximity presumption for those living within 17 miles of the nuclear facilities where the applicant "proposes to add tens of millions of curies of highly combustible radioactive hydrogen gas" to the core inventory); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25 (1999) (according the proximity presumption to an interested county whose border was 17 miles from a facility which wanted to increase its spent fuel storage capacity).

[35] Georgia Tech, CLI-95-12, 42 NRC at 116 (citations omitted). That decision involved a university research reactor. The university argued that a worst-case accident scenario would not result in off-site consequences further than 100 meters from the reactor. A licensing board found, however, that the petitioner had standing even though the member it was representing lived half a mile from the facility. Although a research reactor is much smaller than a power reactor, the board in that case found that it was not a "stretch of the imagination" to presume some off-site injury due to the release of noble gases. Id. at 113-17.

[36] Id. at 116-17 (citations omitted).

An organization seeking to intervene in a proceeding must demonstrate either organizational or representational standing. For organizational standing, the petitioner must show "injury in fact" to the interests of the organization itself.[37] For representational standing, the petitioner must demonstrate that at least one of its members would have standing to intervene on his or her own behalf, and that such a specifically identified member has authorized the organization to represent the member's interests.[38]

B. Contention Admissibility

Under 10 C.F.R. § 2.309(f)(1), a hearing request or petition to intervene "must set forth with particularity the contentions sought to be raised."[39] The purpose of the contention admissibility rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." 69 Fed. Reg. at 2202. The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." Id.

The application of the 10 C.F.R. § 2.309(f)(1) requirements has been set forth in detail in numerous cases and need not be repeated here.[40] The 10 C.F.R. § 2.309(f)(1)(iii) requirement that an "issue raised in [a] contention [be] within the scope of the proceeding" is, however, of

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[37] See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998).

[38] See Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

[39] In 2004, the Commission revised and reordered its procedural rules. See Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2217 (Jan. 14, 2004). The details of requirements a contention must meet can now be found at 10 C.F.R. § 2.309(f)(1)(i)-(vi), having been located, pre-2004, at 10 C.F.R. § 2.714(b)(2).

[40] See, e.g., Entergy Nuclear Vermont Yankee and Entergy Nuclear Operations (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 272-74, 351-59 (2006); Entergy Nuclear Vermont Yankee and Entergy Nuclear Operations (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 147-51 (2006); Nuclear Management Co. (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 336-42 (2006).

particular relevance given the two-stage jurisdictional procedure established prior to the first MFFF proceeding. See p. 4, above. That procedure defined the scope of the first proceeding as encompassing "design bases for the principal structures, systems, and components, the quality assurance program, and environmental issues," and the scope of the second as including "all other issues related to the issuance of a 10 C.F.R. Part 70 license." 66 Fed. Reg. at 6701 (emphasis added).[41]

The Commission subsequently confirmed its intent to address all the environmental effects of both constructing and operating the MFFF in the first proceeding, noting that the environmental report submitted by the Applicant in the first proceeding covered both sets of activities.[42] The Commission emphasized that "nothing in our regulations joins together the NRC's NEPA and AEA obligations," and that a review of the environmental effects of operating the facility could therefore be conducted prior to the safety review that would be conducted as the second phase of the procedure. Id.

In practice, that means that no environmental report was submitted as part of the application in this stage of the proceeding, and that no Environmental Impact Statement (EIS) will be prepared as part of the Staff review. This limitation on the scope of this proceeding will be important as we consider environmental contentions in Section III.B below.

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[41] That procedure was not contained in the Part 2 or Part 70 rules; instead, it was created and designed by the Commission for this specific proceeding. The innovative approach thus taken at that stage may provide insight for resolving the procedural problems inherent at this stage (see pp. 50-51, below).

[42] Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-07, 55 NRC 205, 220-21 (2002).

C. Terrorism Precedent

Long-standing NRC precedent holds that terrorist attacks are not to be considered part of the NEPA analysis required for licensing actions.[43] This Commission precedent was successfully challenged in 2006 in the Mothers for Peace litigation.[44] In that case, the United States Court of Appeals for the Ninth Circuit held that the possibility of a terrorist attack at a nuclear facility could not be dismissed as "unquantifiable" or "remote and highly speculative," as the Commission had argued, and that NEPA therefore required the agency to consider the environmental effects of terrorist attacks in its NEPA review. Id. at 1029-35.

After analyzing the Mothers for Peace Court of Appeals decision, the Commission "reiterate[d its] longstanding view that NEPA demands no terrorism inquiry" in its 2007 decision regarding the Oyster Creek license renewal.[45] The Commission stated that it would accordingly follow the Mothers for Peace decision only in those cases arising in the geographical area where it is binding, but that it would continue to adhere to prior precedent in all other cases. Id. at 128-29. The Commission explained that it "is not obliged to adhere, in all of its proceedings,

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[43] See Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); Duke Cogema, CLI-02-24, 56 NRC 335; and Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1 (2003), all of whose antecedents go as far back as Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973) (citing Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968)). Among the reasons cited for not considering terrorist attacks or wartime sabotage as part of a NEPA evaluation are the tradition of relying on the military for such matters, the unavailability of classified information, and the undesirability of discussing counter-terrorism measures in a public proceeding. Id. See also Private Fuel Storage (Independent Spent Fuel Storage Installation), LBP-05-29, 62 NRC 635, 656 n.33 (2005) (noting that the Commission addresses the problem of terrorist attacks at nuclear facilities in cooperation with other agencies, including the military, and outside the hearing process).

[44] San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016 (9th Cir. 2006) (reversing CLI-03-01, 57 NRC 1), cert. denied sub nom. Pacific Gas & Electric Co. v. San Luis Obispo Mothers for Peace, No. 06-466 (Jan. 16, 2007).

[45] Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 126 (2007).

to the first court of appeals decision to address a controversial question," and noted that the Ninth Circuit decision does not prevent the government from relitigating the issue in future cases.[46]

Furthermore, the Commission stated that, in its judgment, prior NRC precedent is "consistent with Supreme Court NEPA doctrine" (id. at 129), which requires "a 'reasonably close causal relationship' between federal agency action and environmental consequences" before NEPA is triggered, a relationship similar to that of "proximate cause" in tort law.[47] The Commission thus rejected the Ninth Circuit's determination that this test is no longer applicable and noted that the risk of terrorism at a nuclear facility is determined by factors "external to the NRC licensing process." Id. at 130 (emphasis in original). According to the Commission, NRC licensing decisions are not the proximate cause of any environmental effects related to terrorist attacks on licensed facilities. Id.

In sum, for matters arising outside the Ninth Circuit, the Commission adhered to its initial view that addressing the possibility of terrorist attack is best handled outside the context of licensing proceedings. Id. at 130-134. This Board is bound by Commission determinations of that nature.

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[46] Id. at 128-29 & n.14 (citing United States v. Stauffer Chemical Co., 464 U.S. 165, 173 (1984); United States v. Mendoza, 464 U.S. 154, 160 (1984)). See also the companion decisions the Commission issued the same day: Nuclear Management Co. (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139 (2007); and System Energy Resources (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144 (2007).

[47] Id. at 129-30 (citing Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983); Dept. of Transportation v. Public Citizen, 541 U.S. 752, 767 (2004)).

III. BOARD DECISION

A. Petitioners' Standing

The position of the parties with respect to standing was summarized in Section II.A, above. The Board finds that the Petitioners have demonstrated representational standing on behalf of their members.[48] Our reasoning is as follows.

The Petitioners submitted affidavits from members whose residences are, with one exception, within 20 to 32 miles of the SRS. Petition at 4. Petitioners do not dispute the standard to be applied in this case – they agree with the Applicant and the Staff that the appropriate radius to demonstrate proximity in non-reactor cases must be determined on a case-by-case basis, as described in Section II.A above. Reply at 2. They argue, however, that the nature of the facility, which will handle large amounts of fissile and fissionable material, presents an "obvious potential for offsite consequences" over the area in which its affiants reside.[49]

They support this assertion by noting that the NRC Staff, in preparing the EIS for the facility as part of the previous proceeding, included residents as far away as 50 miles from the facility in its calculation of potential population doses.[50] They also note that the NRC's standard review plan for plutonium fuel facilities requires applicants to include measures to prevent nuclear criticality.[51]

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[48] At the outset, questions were raised about whether the Petitioners' members had properly authorized the organizations to represent them, and whether the organizations' pro se representatives were duly authorized. At oral argument, it was conceded that any such possible deficiencies had been cured (Tr. at 9). We thus do not address those matters herein.

[49] Id. See also Georgia Tech, CLI-95-12, 42 NRC at 116 (citations omitted).

[50] Petition at 4; Reply at 2 (both citing Environmental Impact Statement on the Construction and Operation of a Proposed Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina, NUREG-1767 (Jan. 2005) ¶ 4.3.5.2 [MOX EIS]).

[51] Reply at 2 (citing Standard Review Plan for Review of an Application for a Mixed Oxide (MOX) Fuel Fabrication Facility, NUREG-1718 (Aug. 2000) ¶ 6.1).

As a foundation for establishing standing, licensing board precedents support the application of a similar proximity radius in cases involving large amounts of spent nuclear fuel. See Shearon Harris, LBP-99-25, 50 NRC at 29-31. In that case, which involved a license amendment permitting a power reactor to increase on-site spent fuel storage capacity, a county located entirely within 50 miles of the facility and within 17 miles from the facility at its nearest point was found to have organizational standing. Id.

Precedent also supports applying a similar proximity radius for a reactor that intended to add additional material to its core inventory.[52] As in that situation, the Petitioners' members in this case live at a similar distance from a facility that will handle a significant quantity of fissile and fissionable material and that will have the potential for nuclear criticality and accidental release of radioactive material, as indicated in the Integrated Safety Analysis (ISA) Summary submitted as part of the Application. See Application at 5-6 to 5-36.

The Applicant's assertion (Answer at 11) that "Petitioners have not demonstrated that the MFFF involves a significant source of radioactivity with an obvious potential for offsite consequences," does not stand up in these circumstances. Given the nature of the facility and the available radioactive and chemical materials at risk, and the resulting potential for offsite consequences in the event of inadvertent release, criticality accident or chemical explosion, all reflected in the Applicant's and Staff's own documents, there was no need for these pro se Petitioners to plead these matters more specifically, and no need for further elaboration here.

In that regard, the Board does not accept the Applicant's and Staff's argument that licensing boards have no authority to infer obvious intermediate steps in a chain of causation that could lead to off-site doses. See Tr. at 14, 25. The Petitioners argue that nuclear criticality is a legitimate concern, Reply at 2-3, and both the Application and the Board's own technical expertise suggest that their concern is not at all unfounded.[53] The standard in these matters is

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[52] Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 25 (2002).

[53] The instant Application does, in fact, include extensive discussion of measures to be employed to prevent nuclear criticality at the MFFF. Application at 6-1 to 6-28.

that offsite consequences need only be plausible, not that they be probable or likely, and thus standing can be based on plausible but unlikely scenarios. Given the nature of the facility under consideration, we find that the Petitioners' position regarding the potential for offsite consequences is plausible in these circumstances.[54]

Petitioners are not required to demonstrate their asserted injury with "certainty," nor to "provide extensive technical studies" in support of their standing argument. Shearon Harris, LBP-99-25, 50 NRC at 31. Resolving standing questions is an entirely different matter than adjudicating the ultimate merits of a contention. We decline the opportunity to burden petitioners, at the standing stage, with conducting the type of extensive technical studies that might well have been required to meet the burden that the Applicant and the Staff would have them meet here.

In that regard, neither the Application nor the EIS appears to provide information that would allow the Petitioners to make judgments about where, within a 50-mile radius, doses resulting from an untoward incident at the facility might or might not occur. The MFFF is unique, so operating histories from other facilities are not available for comparison.[55] An independent technical analysis by the Petitioner would therefore seem to be the only realistic way to obtain the type of information that the Applicant and Staff claim is essential. The Board declines to impose such a requirement on petitioners at the standing phase of a proceeding, especially in a case such as this, where the chain of plausible causation is abundantly clear.

In making our determination as to whether the standing requirements are met, the Board has also been guided by two precedents applicable at this stage. First, the Commission has

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[54] See MOX EIS at ¶ 4.3.5.2 and Appx. E.

[55] During oral argument, the Petitioners presented information about what they said was a very similar AREVA facility in La Hague, France. Tr. at 32-33. The Applicant and the Staff argued that that facility is not comparable to the one before us (Tr. at 43, 47), and we have not considered information related to the La Hague facility in our analysis.

indicated that we are to "construe the petition in favor of the petitioner." Georgia Tech, CLI-95-12, 42 NRC at 115. Second, long-standing agency precedent instructs us that, as a rule, pro se petitioners are not held to the same standard of pleading as those represented by counsel.[56]

We note that board precedents also teach that a petitioner awarded standing in one proceeding need not restate all of its case to establish standing in another proceeding related to the same facility.[57] In that regard, the standing determination in the previous MOX proceeding was limited to the narrow ground that the petitioners would be exposed to radiation doses as MOX fuel was transported from the MFFF to the reactors where it would be used.[58] Analysis of transportation of MOX fuel was included in the ER submitted with the application in the CAR proceeding and was therefore within the scope of that proceeding. Id. at 418-19. Because the scope of this proceeding does not, however, include environmental issues except under limited circumstances,[59] the transportation issue is outside the scope of this proceeding and thus cannot serve as a basis for standing.

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[56] See Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487 (1973).

[57] See PPL Susquehanna (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 19 n.9) (2007); U.S. Army (Jefferson Proving Ground Site), LBP-04-1, 59 NRC 27, 29 (2004); Georgia Institute of Technology (Georgia Tech Research Reactor), LBP-95-23, 42 NRC 215, 217 (1995). It would, of course, be better practice for petitioners to present a fully developed argument for standing in each proceeding in which they seek to intervene, especially given that a Board in one proceeding is not bound to follow the ruling of another Board absent explicit affirmation by the Commission. Susquehanna, 66 NRC at 19 n.9 (citing Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 125-26 (1992), rev'd on other grounds, CLI-93-21, 38 NRC 87 (1993)).

[58] Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 414-21 (2001).

[59] See Section II.B, above (discussing scope of this proceeding with respect to environmental issues).

That does not, however, end the matter in terms of the earlier proceeding. Although the Board's order on standing there focused only on transportation, it also noted that one petitioner in that case – GANE, now known as NWS – proffered other grounds for standing that were not opposed by the Applicant or the Staff. Duke Cogema, LBP-01-35, 54 NRC at 414-15. Among these were the potential for serious accidents at the site, the risks of driving on public roads that cross the SRS, and the risks associated with recreational activities along the Savannah River.[60] In that regard, the location of the GANE affiant's residence was the crucial issue for the NRC Staff,[61] and that the same individual is an affiant in the current proceeding for both NWS and NIRS.[62] Although these facts are not dispositive in themselves, they provide additional support for the Board's decision regarding the appropriate distance at which to apply the proximity presumption and the resulting standing of these two organizations.

We also note that the NRC Staff's analysis has not broken down population doses by distance from the facility, and that its calculations include residents up to 50 miles from the MFFF. See MOX EIS at ¶ 4.3.5.2 and Appx. E. This issue was discussed at oral argument, at which time counsel for the NRC Staff asserted that this calculation should not be taken as an indication that radiation doses would indeed be received by individuals at that distance. Tr. at 20-23. Rather, the Staff's counsel claimed that a 50-mile radius is routinely used by DOE for all

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[60] See Georgians Against Nuclear Energy's Amended Petition to Intervene (July 30, 2001), ADAMS Accession No. ML012200153; Duke Cogema Stone & Webster's Answer to Georgians Against Nuclear Energy's Amended Petition to Intervene (Aug. 10, 2001) at 1, ADAMS Accession No. ML012280113; NRC Staff's Response to Supplemental Filings on the Issue of Standing (Aug. 10, 2001) at 19-20, ADAMS Accession No. ML012260265 [Staff Filing on Standing in CAR Proceeding].

[61] Staff Filing on Standing in CAR Proceeding at 20.

[62] Petition at 4. The affiant lists the same address in both proceedings and notes that her residence is approximately 20 miles away from the facility. See Request for a Hearing submitted by Glenn Carroll on behalf of Georgians Against Nuclear Energy (May 17, 2001), Exh. 1, Affidavit of Susan Bloomfield (May 14, 2001), ADAMS Accession No. ML011410340.

calculations for DOE facilities, regardless of whether any doses are projected at that distance. Tr. at 20-21. Thus, we were told, that practice does not warrant our drawing any specific standing presumption in any particular proceeding. Id.

The Staff's argument properly suggests that the EIS calculation itself cannot be used to demonstrate with certitude that a 50-mile radius is appropriate for applying the proximity presumption in this case. The Board must take into account, however, when we evaluate the Petitioners' standing argument, the paucity of information provided both by DOE's contractor-Applicant and by the NRC Staff in its EIS. If the two federal agencies themselves, with the resources at their disposal, do not see fit to calculate projected doses at several different distances from the MFFF and to differentiate areas that might receive radiation doses from those that will not, it is hardly reasonable, or fair, to expect the Petitioners to do better. In such a situation, the factors we have discussed assume more importance than they might have if more detailed dose calculations had been available.

For these reasons, we find that the Petitioners have demonstrated standing based on their members' proximity to the facility, given the level of the facility's inherent potential for off-site consequences as detailed above. Having determined that the Petitioners have standing, we turn now to the contentions they advanced, treating first those contentions that we find inadmissible and then considering how to proceed with the others.

B. Inadmissible Contentions

1. Outside the Scope
(*Contention # 1, Hazardous Air Pollutants, and Contention # 5, Terrorist Attacks)*

The first and the last of the Petitioners' five contentions are inadmissible because they fall outside the scope of the current proceeding. They therefore do not satisfy the terms of 10 C.F.R. § 2.309(f)(1)(iii).

a. In Contention 1, the Petitioners argue that "the License Application submitted by MOX Services fails to meet the relevant requirements in NEPA because it will not adequately address pollution impacts and require controls necessary to limit hazardous air pollution." Petition at 7. This contention is divided into five subparts.

In the first one, the Petitioners argue that the MFF does not comply with emissions standards for hazardous air pollutants under the Clean Air Act (CAA), because the Application includes projected emissions for certain radionuclides that are higher than the projected emissions in the EIS from the previous proceeding. Id. at 8. Second, the Petitioners argue that the high-efficiency particulate air (HEPA) filters proposed for use in the ventilation system at the MFF "are an unreliable means of controlling radionuclide emissions." Id. at 9. Third, the Petitioners claim that EPA standards require the use of maximum achievable control technology (MACT), and that no such MACT has been determined for radionuclides. Id. at 10. For this reason, the Petitioners say, the NRC must determine the appropriate control technology before issuing an operating license for the facility. Id. Fourth, the Petitioners argue that the facility could ultimately end up processing more plutonium than originally envisioned, and that an EIS for the site must therefore be based on the maximum annual throughput of the plant multiplied by the number of years of operation. Id. at 11. Finally, the Petitioners argue that the Application does not account for "higher levels of morbidity and mortality in females and infants caused by low levels of radiation." Id. at 12.

The Applicant argues that all parts of this contention are inadmissible because they are all based on NEPA and therefore are outside the scope of the proceeding because – barring new developments – all environmental issues were to be resolved in the first proceeding. Applicant Answer at 19. At the time of the first proceeding, the Applicant says, the Commission established the rule that if new environmental information arises at a later phase of the proceedings, existing rules "provide for the possibility of supplements to the EIS and for late-filed hearing contentions."[63] For this reason, says the Applicant, all environmental contentions at this stage must therefore satisfy the requirements of 10 C.F.R. § 2.309(c) regarding nontimely filings.[64] According to the Applicant, the Petitioner has not even attempted to address these requirements, and Contention 1 must therefore be dismissed in its entirety. Applicant Answer at 23.

The NRC Staff agrees with the Applicant regarding the inadmissibility of Contention 1, but bases its arguments on a different section of the regulations. According to the Staff, the EIS for the MFFF has already been issued and is therefore beyond the scope of this proceeding – unless the Petitioners successfully plead for supplementing the EIS in accordance with the terms of 10 C.F.R. § 51.92. Staff Answer at 9. Supplementing the EIS is to be done when "significant new circumstances or information relevant to environmental concerns" become apparent. Id. at 9-10. It is not, however, to be done any time that any new information becomes available, but only when the new information presents "a seriously different picture of the

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[63] Id. at 21 (quoting Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478, 481 (2001)).

[64] Id. at 20-23. The most important of these is "[g]ood cause, if any, for the failure to file on time." 10 C.F.R. § 2.309(c)(i). See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 24 (1996); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). Petitioners seeking admission of a nontimely filing must, however, also address the remaining seven factors in 10 C.F.R. § 2.309(c)(ii)-viii). In this regard, see n. 95, below.

environmental impact of the proposed project from what was previously envisioned."[65] Because the Petitioners did not present information that would lead to an EIS supplement, the Staff argues that Contention 1 is outside the scope of the proceeding. Staff Answer at 10.

The Board agrees that, because of the nature of the two-step structure created for the MOX facility (see n. 41, above, and accompanying text), environmental contentions are beyond the scope of the current proceeding unless they meet requirements beyond the ordinary contention admissibility tests of 10 C.F.R. § 2.309(f)(1). Two possibilities for what these additional requirements might be have been suggested by the parties – the requirements for nontimely filings under 10 C.F.R. § 2.309(c), and the rules for supplementing the EIS pursuant to 10 C.F.R. § 51.92. The Board also calls attention to 10 C.F.R. § 2.309(f)(2)(i)-(iii), which permits the filing of new contentions upon leave of the presiding officer when the moving party shows that the information underlying the contention was not previously available, that the information is materially different than information previously available, and that the new contention is submitted in a timely fashion after the new information becomes available.

The Board finds that, although the Petitioners make passing reference to new information and to 10 C.F.R. § 51.92, the pleadings contain no systematic effort to argue for contention admissibility under any of these three legal theories. The Petitioners do not address the factors governing admission of nontimely contentions under 10 C.F.R. § 2.309(c), in particular the question of good cause for failure to file in a timely manner. Similarly, the Petitioners do not address the requirement that a petition to supplement the EIS must demonstrate that new information gives "a seriously different picture of the environmental impact of the proposed project from what was previously envisioned." Finally, the Petitioners

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[65] Id. at 10 (quoting Hydro Resources, Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-99-22, 50 NRC 3, 14 (1999), which in turn quotes Sierra Club v. Froehlke, 816 F.2d 205, 210 (5th Cir. 1987)).

make no effort to show which elements of the information they submit in support of their contention constitute the type of new information that could support contention admissibility under 10 C.F.R. § 2.309(f)(2)(i)-(iii).

Accordingly, the Board finds that Contention 1 is outside the scope of this proceeding and must therefore be rejected.

b. In Contention 5, the Petitioners state that:

> The Final Environmental Impact Statement for the proposed plutonium processing facility is inadequate to satisfy the National Environmental Policy Act because it does not evaluate the environmental impacts of a terrorist attack on the proposed plutonium fuel factory or transport. . . . [A] license must not be given for construction and subsequently for operation of a plutonium fuel factory at the Savannah River Site which is situated on the border of Georgia on the Savannah River because it is vulnerable to malevolent acts such as terrorism and insider sabotage which could create an unacceptable beyond design basis accident. . . . [M]alevolent acts must be analyzed as a foreseeable environmental impact under NEPA. Lack of analysis of the malevolent acts scenario leads to failure to design safeguards and failure to plan for emergency response and mitigation measures.

Petition at 23-25. By this contention, the Petitioners have essentially re-submitted the contention filed by GANE in the earlier proceeding.[66] In addition, the Petitioners assert that, due to "new and significant information," the NRC must prepare a supplemental EIS as required by 10 C.F.R. § 51.92(a)(2). Petition at 24.

The original GANE contention asserted that the facility is open to malevolent acts, including terrorism and insider sabotage, and that the NRC must address these scenarios in the EIS in order to comply with NEPA. See id. at 25. The Petitioners argue that several factors have changed the way the NRC should approach terrorism-related issues. First, they argue that the terrorist attacks of September 11, 2001 – just weeks after the original contention was filed – demonstrate that the possibility of terrorism could no longer be considered as not reasonably

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[66] See Duke Cogema, LBP-01-35, 54 NRC at 444-47.

foreseeable.[67] Second, they argue that the Department of Homeland Security, in the 2004 National Response Plan, "delegated to the NRC certain responsibilities in the event of a nuclear or radiological terrorist incident."[68] Third, they argue, the Ninth Circuit Court of Appeals decision in Mothers for Peace requires the NRC to consider terrorism under NEPA. Id. at 29. Finally, the Petitioners state that the Commission's subsequent decision to "disregard" the Ninth Circuit's ruling outside of that court's geographical range is "unreasonable." Id. at 30.

The Applicant's response to Contention 5 is fourfold. First, the Applicant asserts that the contention is NEPA-based and thus beyond the scope of this hearing. Second, the Applicant points out that the same contention was already rejected by the Commission in the prior MFFF proceeding, at which time the Commission stated that there was no obligation under NEPA for the NRC to consider terrorism or malevolent acts in the MOX licensing proceeding.[69] The Applicant asserts that GANE's failure to appeal the Commission's ruling is enough to support rejecting the contention on "procedural grounds to preclude Petitioners from inappropriately gaining a second opportunity to appeal an already-settled issue to the Commission or the courts." Id. at 40. Third, the Applicant disagrees with the Petitioners' position that the decision in Mothers for Peace supports admitting Contention 5, and argues that the Ninth Circuit's decision is not controlling in this case, by virtue of the Commission's decision in Oyster Creek. Id. at 41. Finally, the Applicant argues that the Petitioners have not identified new information or circumstances that would require a supplemental EIS under 10 C.F.R. § 51.92(a)(2). Id. at 39.

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[67] See id. at 28 (quoting Duke Cogema, LBP-01-35, 54 NRC at 446).

[68] Id. (citing Tom Ridge, Secretary, Dept. of Homeland Security, Preface to National Response Plan (Dec. 2004)).

[69] Applicant Answer at 39 (quoting Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335, 338 (2002)).

The NRC Staff agrees with the Applicant with respect to the third of these arguments. The Staff rejects the Petitioners' position that Mothers for Peace supports admitting the contention, arguing that Oyster Creek is controlling. Staff Answer at 24. The Staff claims that the contention thus fails to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1) because it does not include a material dispute that is within the proceeding's scope. Id. at 25.

In their reply, the Petitioners concede that they are merely seeking to "preserve the argument in the hope that the NRC will bite the bullet and face the starkly genuine threat that the environment could be impacted by an act of terrorism at a nuclear facility." Reply at 9. The Petitioners maintain that they remain convinced that terrorist attacks against nuclear facilities – especially those containing fissionable material – are foreseeable, and that NEPA requires the NRC to analyze such risks as part of the EIS. Id.

Based on the Commission's ruling in Oyster Creek and its companion cases (see notes 45 and 46, above), we find that Contention 5 is beyond the scope of this proceeding and fails to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), (vi), and is therefore inadmissible. Because the MFFF is located outside the geographic range of the Ninth Circuit, the Commission's decision in Oyster Creek is controlling: "NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities." Oyster Creek, CLI-07-8, 65 NRC at 129. Because "licensing boards are bound to comply with [Commission adjudicatory decisions] whether they agree with them or not,"[70] we reject Contention 5. See also Shoreham, ALAB-156, 6 AEC at 851, and Private Fuel Storage, LBP-05-29, 62 NRC at 656 n.33 (both cited in note 43, above)

In addition to being outside the scope of this proceeding, Contention 5 fails to meet the requirements of §§ 2.309(f)(1)(iv) and (vi), which require that a contention raise an issue that is

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[70] South Carolina Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 28 (1983).

"material to the findings the NRC must make to support the action that is involved in the proceeding," and that has "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." As the Commission stated in Oyster Creek, regardless of the Mothers for Peace decision, "there simply is no 'proximate cause' link between an NRC licensing action . . . , and any altered risk of terrorist attack. Instead, the level of risk depends upon political, social, and economic factors external to the NRC licensing process." Oyster Creek, CLI-07-8, 65 NRC at 130.

Furthermore, the Commission has already rejected the same contention in the earlier phase of this proceeding. In that case, the Board admitted the contention only to have the Commission reverse the decision. The Commission held that "the NRC has no obligation under NEPA to consider intentional malevolent acts, such as those directed against the United States on September 11, 2001, in conjunction with licensing of the MOX fuel fabrication facility."[71]

Petitioners had ample opportunity to seek judicial review of this decision but failed to do so. In addition, the Petitioners have not offered any new information or circumstances that would require a supplemental EIS under 10 C.F.R. § 51.92. Therefore, the Petitioners do not have the necessary grounds to challenge the Commission's decision rejecting the terrorism contention in the prior proceeding.

2. *Lack of Materiality (Contention # 2, Accidental Release of Radionuclides)*

Contention 2 alleges that "the license application fails to adequately assess consequences of an accidental release of radionuclides from the plutonium fuel factory." Petition at 13. It has two subparts. First, the Petitioners claim that "MOX Services relied on outdated regulatory guidance to calculate radiological impacts of a hypothetical criticality event."

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[71] Duke Cogema, CLI-02-24, 56 NRC at 338 (citing Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); accord, Dominion Nuclear Connecticut, (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002)).

Id. According to the Petitioners, the Applicant relied on NRC Regulatory Guide No. 3.35, dated 1979, which was withdrawn in 1998. Id. Second, the Petitioners claim that the Emergency Plan Assessment[72] submitted by the Applicant has several flaws that invalidate the conclusion that an emergency plan for the MFFF is not required. Petition at 15. The Petitioners argue that air modeling software used by the Applicant, ARCON96, is not appropriate for calculating doses to the general public because of limitations in the model's source-receptor distance. Id. Furthermore, the Petitioners say that the Applicant's projected doses to members of the public if a criticality event occurs, which amount to 86% of the 1 rem dose threshold that would trigger the requirement for a complete emergency plan, are in fact significantly above that threshold when the inhalation dose from radioactive iodine release is correctly converted to a thyroid dose using the FRMAC dose conversion factors. Id. at 16.

The Applicant addresses the first subpart of Contention 2 by noting that "NRC Regulatory Guides do not constitute binding requirements" and that the Petitioners have therefore failed to identify any area in which the Application does not meet regulatory requirements. Applicant Answer at 31. In addition, the Applicant says, the Petitioners "have failed to identify any health and safety issue" related to the first subpart of the contention. Id. at 32. Finally, the Applicant argues that NRC Staff evaluated the substance of the analysis that the Applicant prepared and determined that, although it was based on outdated guidance, it "was consistent with current guidance and therefore acceptable." Id.

The Applicant addresses the second subpart of the contention by arguing that the Petitioners' presentation of "flaws" in the Environmental Plan Assessment is simply erroneous. Id. at 33-35. The ARCON96 code was not used to model doses to the general public (the nearest of whom would be over 8 kilometers from the facility), the Applicant says, but was

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[72] Mixed Oxide Fuel Fabrication Facility Evaluation Pursuant to 10 C.F.R. § 70.22(i)(1)(I) - Emergency Plan Assessment (Nov. 2006), ADAMS Accession No. ML063250129 [hereinafter Emergency Plan Assessment].

instead used to model doses to a hypothetical individual located "only 160 meters from the MFFF stack." Id. at 33-34. Similarly, the projected dose of 86 percent of the 1 rem threshold was calculated at 160 meters and not at the SRS boundary, over 8 kilometers away. Id. at 34. Finally, the Applicant argues, the effective dose impact to the thyroid from radioiodines was included in the overall dose estimation and calculated according to methods prescribed in Federal Guidance Report 11, published by the Environmental Protection Agency (EPA).[73]

The NRC Staff agrees with the Applicant regarding the first subpart of Contention 2. Staff Answer at 17. Although the Staff agrees with the Applicant that the second subpart is also inadmissible, the Staff presents a somewhat different justification for that position. In particular, the Staff argues that calculating the dose from radioiodines in the manner proposed by the Petitioners would violate NRC regulations, and that the second subpart of Contention 2 therefore amounts to an attack on those regulations. Id. at 19. Under 10 C.F.R. § 2.335(a), Commission regulations are not subject to attack in adjudicatory proceedings. Id. at 19 n.14. According to the Staff, the other bases proposed for the second subpart of this contention do not satisfy the pleading requirements of 10 C.F.R. § 2.309(f)(1), and the second subpart of the contention is therefore inadmissible.

The Board agrees with the Applicant's and Staff's position regarding the first subpart of Contention 2. Compliance (or non-compliance) with regulatory guidance documents does not necessarily enable a conclusion to be drawn as to the regulations themselves: compliance with a Staff guidance document does not, by itself, prove compliance with all regulatory requirements applicable in a licensing proceeding, and failure to comply with a guidance document does not

[73] Id. at 35 (citing U.S. EPA, Federal Guidance Report 11, Limiting Values of Radionuclide Intake and Air Concentration and Dose Conversion Factors for Inhalation, Submersion, and Ingestion (1988) at Table 2.1).

demonstrate failure to comply with the relevant regulations.[74] Similarly, the fact that a given guidance document upon which an applicant relied was withdrawn does not suffice to support a contention. The applicant's analysis itself must be challenged, and the fact that it does or does not match the requirements of a specific guidance document – or matches the guidance of a withdrawn document – is only one factor to consider in evaluating the challenge. The first subpart of Contention 2 must therefore be rejected as a stand-alone matter; we turn to the remainder of the contention to determine whether it supplies the necessary additional ingredients of a valid challenge.

On that score, the Board finds that the second subpart of Contention 2 must also be rejected. The fundamental reason for this decision is that, in formulating their contention, the Petitioners appear to have misunderstood the nature of the Applicant's analysis. That analysis, as presented in the Emergency Plan Assessment, appears to be extremely conservative.[75] As noted by the Applicant, the analysis assumes a hypothetical "Individual Outside the Controlled Area," or IOC, who is located only 160 meters from the MFFF stack, rather than the allowable 8.82 kilometers away at the nearest boundary of the SRS (Applicant Answer at 33-34). That hypothetical person would, then, experience doses considerably higher than any member of the public outside the boundaries of the Savannah River Site. If an analysis employing such a conservative assumption indicates that no emergency plan is necessary, then there is a considerable margin between any doses the public – located at least 50 times further away – might receive and the 1 rem threshold that would trigger the emergency plan requirement.

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[74] See Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 98, 100 (1995); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 544-45 (1986).

[75] See Applicant Answer at 33 (citing Emergency Plan Assessment).

Confusion over the location of the IOC, as opposed to the boundary of the SRS, also appears to underlie the Petitioners' arguments regarding the use of the ARCON96 model. The Petitioners and the Applicant agree that the ARCON96 model is limited to receptors less than 10,000 meters from a source of radioactive material. Petition at 15; Applicant Answer at 33. If the Applicant were using this code to project doses outside the boundaries of the SRS site, the Petitioners' argument could have merit. The Applicant appears, however, to be using the code to estimate doses at much closer range, well within the limitations of the model.

The Petitioners' argument regarding radioiodines and thyroid dose does not depend on this difference in distance, but – as noted by the Staff – is not accompanied by factual support that would satisfy the requirements of 10 C.F.R. § 2.309(f)(1). Staff Answer at 19. The Board need not address whether the logic in the Petitioners' presentation is meant to constitute an attack on Commission regulations, as suggested by the Staff. See id. Rather, the Petitioners appear to be back-calculating specific organ doses from the effective dose equivalent that was calculated on the basis of dose to all the organs.[76] On its face, this reverse procedure does not support the allegation that radioiodine exposure could lead to projected doses above the threshold that indicates the need for an emergency plan.

The Board therefore rejects Contention 2 for failure to demonstrate the existence of a factual dispute on a material issue of law or fact and to provide the required support for the Petitioners' position. The contention therefore fails to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1)(v)-(vi), and cannot be admitted.

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[76] Even if the Petitioners are correct and the projected thyroid dose should actually be 5.43 rem, the weighting factors of 10 C.F.R. § 20.1004 would still need to be applied to calculate the effective dose equivalent and in turn the total effective dose equivalent that is relevant to the 1 rem threshold. The weighting factor for the thyroid is 0.03, so a thyroid dose of 5.43 rem contributes only 0.16 rem to the effective dose equivalent.

C. Remaining Contentions (# 3 and # 4, Radioactive Waste Storage)

1. *General Considerations*

Petitioners' third and fourth contentions challenge the Applicant's plans for the handling of radioactive waste that will be generated by the MOX facility. Although the former contention is said to be environmentally-based and the latter safety-oriented, the proffered basis for the latter also incorporates the bases underlying the former, and thus to that extent they are interrelated; in any event, the two contentions present a common, overriding issue.[77]

That common issue is whether – given the totality of the situation before us – the contentions are speculative and/or premature and, if so, in what fashion a rejection of those contentions, and the possible concomitant dismissal of the pending petition, should be framed and/or conditioned. That matter becomes crucial because if the pending contentions are deemed premature and/or speculative, it would not be because of any defects specific to them but rather because of an overriding circumstance: the timing of the Notice of Hearing, issued before construction had commenced, virtually assures that any contention presented at this juncture that attempts to challenge alleged deficiencies in project construction, or the resultant impact on facility operation, would suffer from similar deficiencies.

Put another way, a Notice of Hearing of the type issued here is generally intended to provide an opportunity to challenge aspects of a facility's construction or subsequent operation. But when such a Notice is issued before construction is commenced, it is to be fully expected that additional petitions to intervene, or statements of contentions, would need to be filed as construction unfolds and (hypothetically) reveals attendant shortcomings. Nonetheless, facility proponents have frequently argued that such later filings should be considered "nontimely." See further discussion at note 95 (p. 48), below.

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[77] As we read the common basis presented for both contentions, it pleads the existence of sufficient new information to avoid the general ban on consideration of environmental issues at this stage (see pp. 14, 25, above). We thus consider the two contentions together. Even if the "environmental" one (# 3) is barred, however, the bases it presents survive by virtue of their incorporation in the "safety" contention (# 4). In that circumstance, there is little reason to attempt to separate the contentions for present purposes.

We are understandably reluctant to issue a decision that would in effect establish a sorting system, for this case and others, containing only two bins – labeled "premature" and "nontimely" – into which a prospective intervenor's proffered contentions must be placed, thus putting them at a disadvantage on one count or the other. Instead, we must determine whether the proffered contentions are appropriate in this instance, where prematurity norms must be applied in a manner that fits the circumstances; and if not, whether to condition rejection of such contentions so as to preserve the opportunity for them to be re-presented later, if their concerns come to fruition, without having to overcome higher pleading hurdles,.

In resolving these questions, we must honor the fundamental purpose served by a Notice of Hearing, one which is so obvious it might be overlooked, i.e., to provide facility opponents a fair opportunity to be heard. Failure to honor that purpose might later provide fertile ground for judicial challenges. We explain our reasoning on these matters below.

2. *Parties' Positions.*

a. Petitioners' Asserted Basis**.** The Petitioners believe that the environmental and safety analyses of the project are deficient in dealing with liquid waste streams. First, as set out in Contention 3, they assert those analyses do not address a matter that has become apparent since the earlier proceeding, namely, that the Applicant and DOE lack "any concrete plans for construction or operation of the Waste Solidification Building (WSB)." [78] For that reason, and others stated in Contention 4 (id. at 23) related to operational safety, waste may have to be stored onsite for an extended period of time, thereby raising environmental issues not examined in the EIS and correlative significant safety issues not examined in the SER. Relying upon

[78] Petition at 17. Specifically, the Petitioners assert that "new and significant information now shows that there is no concrete prospect that the WSB will be built before plutonium fuel processing begins or even that it will be built at all." Id. at 18. They support this view with three points: (1) in four years DOE has not produced a design for the WSB; (2) there is no agreement between the DOE, NRC and MOX Services to deal with the waste; and (3) there is no information in the application dealing with the WSB. Id. at 18.

these points, the Petitioners conclude that it may be fairly assumed that the facility's waste will end up being stored onsite, with attendant safety and environmental concerns that were not anticipated, much less analyzed, in the documents supporting the Application.[79]

b. Applicant's Response**.** The Applicant's position is that Contention 3 is an environmental one that does not provide any new and significant information about the MFFF or the WSB but is merely "speculation regarding the likelihood and timing of DOE's development of the WSB." Applicant Answer at 35. The Applicant asserts that "DOE is in fact on schedule to design and construct the WSB." Id. at 37. The Applicant points to the President's 2008 budget request to Congress as evidence both of the adherence to schedule and the existence of funding.

In terms of the Petitioners' belief that the application does not address the WSB, the Applicant asserts that the EIS (in § 2.2.4) evaluated the environmental impacts of the WSB and that there is no further NRC requirement in that regard because the "WSB is, after all, a DOE facility separate from the MFFF, and not subject to NRC licensing." Id. According to the Applicant, because only the MOX facility itself comes within the NRC's jurisdiction, any inquiry at all concerning other aspects of the overall DOE project would be outside the scope of our authority.

Furthermore, the Applicant states, "there is no requirement for the EIS to address the impacts of long-term storage of high-alpha waste at the MFFF based upon speculation that the WSB will not be built." Id. at 37-38. At oral argument, the Applicant mentioned that if the WSB is not built, DOE's environment regulations will come into play, triggering an evaluation based

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[79] The Petitioners point in this regard to what they categorize as DOE's well-known failures to deal promptly and thoroughly with waste management issues (at the Savannah River Site and elsewhere) as lending support to their thesis. Accordingly, they urge that we postpone the adjudicatory process until there is "adequate public assurance that plutonium fuel factory waste will not add further insult to the terribly burdensome waste problem already plaguing SRS." Id. at 23.

on that agency's NEPA procedures, including the public process DOE goes through in dealing with NEPA issues. Tr. at 104-05.

The Applicant raises parallel objections to Contention 4. Specifically, it argues that Contention 4 too is "highly speculative" with "no basis supporting the assertion that high-alpha waste will be stored 'indefinitely' onsite." Applicant's Answer at 38.

c. NRC Staff Response. The Staff asserts that issues related to the EIS were to be taken up during the earlier proceeding and are thus outside the scope of this one, unless the Petitioners have shown that the EIS must be supplemented pursuant to the criteria set out in 10 C.F.R. § 51.92(a). The Staff argues that the Petitioners have not made that demonstration.

In that regard, the Staff asserts, the Petitioners want the Staff to amend the EIS simply because DOE has not yet moved forward with the construction of the WSB; according to the Staff, more tangible indicia that DOE is indeed changing its WSB plans are needed, in which case DOE "would be required to publish an amended Record of Decision (ROD) to that effect in the Federal Register." Staff Answer at 21. Since DOE has not done so, the need for an amended EIS has not been triggered, leaving "no need to supplement the EIS to account for purely speculative future changes." Id.

The Staff too makes the point that this proceeding is limited to the operation of the MOX facility, and since the disposal of waste will happen "at areas of SRS unconnected to the MOX [f]acility and outside the scope of the NRC's regulatory authority, issues related to the safety of waste disposition are outside the scope of the Staff's review of the Application." Id. at 22. Furthermore, the Staff does not believe that Petitioners have provided the "requisite facts or expert opinion" to support the contention in any event.

3. *Board Ruling*

An understanding of the nature of the issues before us can be readily discerned from the history of this proceeding. Having previously (in 2005) received a construction permit in which a number of issues were understood to be reserved for a later stage, the Applicant now seeks an operating license before any tangible steps have been taken in the construction of the facility.[80] With that application in hand, the NRC issued the Notice of Hearing, purportedly providing the citizenry, including the Petitioners before us, the opportunity to challenge, among other things, improprieties in the construction process.

But virtually any contention that Petitioners might have in mind at this juncture relating to safety aspects of the construction process as conducted, or of facility operation, would have to contain some element of speculation, given that construction had not yet begun and the design had not yet been completed. In this situation, and in any others where the Notice of Hearing might be viewed as premature (see, e.g., note 89, below), the natural result is that facility proponents will argue that any safety contentions will likewise be premature and/or speculative.

If those arguments were to carry the day, however, NRC hearing opportunities could soon come to be viewed as chimerical – a result that would seem to be the opposite of what Commissioners past and present have said is their goal.[81] For in an "early notice" situation like

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[80] Construction officially started in the beginning of August, 2007, with Petitioners having been required to file their contentions two and a half months earlier, by May 14, 2007.

[81] See, e.g., "A Vision of Tomorrow, A Plan for Today," a speech by former Commissioner Jeffrey S. Merrifield at the NRC 2001 Regulatory Information Conference (Mar. 14, 2001, NRC News # S-01-005) ("The Commission has a significant responsibility to provide fair and meaningful opportunities for public involvement in our licensing proceedings."); "Perspectives on Nuclear Regulation and the Global Interest in Nuclear Energy," remarks of Commissioner Peter B. Lyons at the Trombay Colloquium (Mar. 27, 2006, NRC News # S-06-011) (in speaking about the "opportunity for public hearings," stressing how very seriously the agency takes its "responsibility for public participation" because "when the public has an opportunity to . . . participate in our decision-making process, nuclear safety is enhanced and public confidence in the NRC as a fair, stable and strong nuclear regulator is strengthened.").

this one, it would never be possible for a petitioner to have a contention admitted if potentially legitimate safety concerns about actual construction practices, or upcoming operational procedures, were automatically rejected, without recourse, because they were filed before construction had either commenced at all or proceeded any distance. It would be paradoxical to let that situation label the challenge, rather than the notice, as premature, thus ending the process and eliminating ready later opportunities to raise construction-practice matters freely.

We begin, then, by turning to an analogy. As was conceded at oral argument (Tr. at 110-11), the license sought in this proceeding (i.e., to possess and to use special nuclear materials at this unusual facility) is the functional equivalent of an operating license for more standard facilities, such as nuclear power plants. Traditionally, operating license applications for such facilities were neither docketed nor noticed for hearing until substantial progress had been made under the previously-awarded construction permit, as a crucial issue at the operating license stage was whether the facility had indeed been constructed in accordance with the permit.[82]

In this proceeding, however, the notice of hearing at this operating-license-equivalent stage was issued before construction had even commenced, much less progressed substantially. In that circumstance, the arguments of the Applicant and the NRC Staff that the Petitioners' safety arguments are "speculative" may – by those parties' lights – be true. But those arguments turn out to be either hollow or excessive, for, it bears repeating, any safety contention about construction outcomes – a key issue in the regulatory scheme for permits such

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[82] See, e.g., Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2), ALAB-188, 7 AEC 323 (1974) (Staff issued full-power operating license three days after Licensing Board operating license adjudication completed; facility had already begun low-power testing); Metro. Edison Co., Jersey Cent. Power & Light Co., Pennsylvania Elec. Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 612, 614, 619 (1977) (construction 90% completed within two years of time for intervention in operating license stage).

as this, see 10 C.F.R. § 70.23(a)(8) [83] – could scarcely avoid containing elements of speculation or prematurity if it has to be filed before that construction had even commenced.[84]

In that regard, the construction which commenced on August 1 is not scheduled to be completed (assuming full Congressional funding along the way[85]) until 2014, seven years from now. For its part, the Staff Safety Evaluation Report – a key document in the licensing process – is itself not scheduled for release until December 2009, i.e., over two years from now.

We thus need to consider not only how this matter should be resolved now under 10 C.F.R. § 2.309(f)(1), see p. 13, above, but also how it will progress later. Our decision is informed by documents that bear on the specifics of the two contentions before us. As noted above, the contentions, particularly when read together, raise concerns about waste stream handling and the resultant impact on the safe operation of the facility.

To be sure, as the Applicant and Staff point out, the Waste Solidification Building is not subject to NRC licensing. But that is not the end of the matter. For failure to build the WSB, or to operate it properly, would jeopardize the commitment to operate the MOX facility itself – which is subject to NRC licensing – in a safe and environmentally sound fashion, and would thus require alteration of the licensed facility's design or operations to remedy the situation. And matters entirely independent of whether the WSB comes into existence are of even more concern here.

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[83] Subsection (a)(8), applicable only to a limited type of facility, provides that one issue to be considered here at this stage is whether "construction of the principal structures, systems and components . . . has been completed in accordance with the application."

[84] The Board presiding over another licensing proceeding (the Pa'ina irradiator case) recently faced a similar quandary. See pp. 45-46 and note 93, below.

[85] The Applicant makes much of the inclusion of project funding in the President's budget. But this is only the beginning of the budget process, with a host of Congressional overseers and appropriators involved in the final say as to funding levels.

That conclusion should not be a surprising one. Concerns about any interruption in the transfer of liquid waste out of the MOX facility – for any reason – have long been recognized as having a resultant, indeed a significant, influence on the safe operation and environmental impact of the MOX facility. For example, when this issue came up in the earlier, construction request phase of the proceeding, the Staff addressed it in the following fashion:

> The staff notes that an explicit inventory limit on waste is not specified in the revised CAR. Currently, the facility is designed to accommodate up to 90 days equivalent of most waste solutions (e.g., of the values in Table 11.2-1, because the storage of the [Low Level Waste] destined for the waste solidification building will likely be less than 90 days equivalent), although the applicant anticipated that there will be transfers of liquid wastes every 2 weeks. The applicant indicated that the facility will shut down before exceeding the liquid waste storage capacity. The staff interprets this to mean active waste generating operations would be curtailed at some setpoint before the tankage is completely full, until the potential backlog of waste at the facility is cleared. Actual setpoints would be defined by [Duke Cogema Stone & Webster] as part of any license application it may later submit. The staff finds this approach acceptable for construction authorization.

NUREG-1821 (MFFF CAR FSER), § 11.2.1.3.11, p. 11-48 (emphasis added).

We have not been pointed to anything, and have found nothing, in the Application that explicitly addresses the issues thus raised by the Staff in the first licensing stage. It is thus clear that the key safety issue the Petitioners are seeking to bring forward in Contention 4 involves a matter of some substance that focuses on a real, not a fanciful, safety concern.

On that score, the Staff is currently scheduled to complete its review and to prepare the safety evaluation for this application in December 2009. Presumably, at that time, the Staff will address this matter, as its earlier documents indicated it would. At this point, however, the materials before us indicate that, whether or not the WSB is built, there is some uncertainty about the system for liquid waste handling, enough to call into question the safety of MOX facility operations.

In that regard, 10 C.F.R. § 70.72(a) requires that a licensee "establish a configuration management system to evaluate, implement, and track each change to the site, structures, processes, systems, equipment, components, computer programs, and activities of personnel."

The system established under 10 C.F.R. § 70.72(a) must address, among other things, the "[i]mpact of the change on safety and health or control of licensed material," 10 C.F.R. § 70.72(a)(2), and "[t]he impacts or modifications to the integrated safety analysis, integrated safety analysis summary, or other safety program information . . . ." 10 C.F.R. § 70.72(a)(6). This would require that any increase in the maximum inventory of either radionuclides or chemicals used to perform the evaluations in the ISA Summary be subject to the requirements of Section 70.72(a).

The importance of this issue is also reflected in the concern expressed by the Advisory Committee on Reactor Safeguards (ACRS). Its views on waste handling appear in the comment on the CAR review, to which the Petitioners directed our attention; we quote at some length here from those views because of their relationship to the twin contentions before us:

> MF^3 [the MOX facility] will return waste to the Department of Energy. The facility to receive this waste at the Savannah River site has not been designed, nor have the waste acceptance criteria been established. This raises the possibility that additional unit operations will have to be added to MF^3. Perhaps of more importance, the possibility of unplanned interruptions in waste receipt by the Department of Energy needs to be considered in the integrated safety analysis of the MF^3 design. It will be necessary to conduct operations at MF^3 in a way that assures there is always sufficient waste storage capacity to bring the facility to a safe configuration in the event that waste receipt is interrupted. A protracted hiatus in waste receipt would raise issues of waste aging within MF^3. Experience has shown chemical evolutions brought on by evaporation, radiolysis, and other chemical processes can lead to the formation of hazardous chemicals or conditions in wastes awaiting transport to the Department of Energy. Measures to mitigate any hazards posed by aging wastes need to be addressed in the safety analyses for the final stage of the authorization process for MF^3 for timeframes of short, intermediate, and long duration.[86]

The Staff statement quoted at p. 41, above, relates directly to this ACRS comment, which in turn raises the broader question of waste storage, independent of the WSB, relating to an interruption in waste transfer to the DOE for <u>any</u> reason. The ISA does not consider this

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[86] Letter from Graham B. Wallis, Chairman, NRC Advisory Committee on Reactor Safeguards, to Nils J. Diaz, NRC Chairman (Feb. 24, 2005) at 5 , ADAMS Accession No. ML050660219.

because of the assumption of routine and continual waste transfer to the DOE. But together, the third and fourth contentions can be fairly read as raising these broader questions.[87]

The current existence of the uncertainty about the safety analysis of the system for liquid waste handling, referred to above, provides a sufficient basis to support the proffered contentions, given the other support the Petitioners have mustered. If that uncertainty is cured, the contentions may later be mooted – but the speculation about the endeavor at this stage must cut against the Applicant, not the Petitioners.

Put another way, although not characterized this way by the Applicant and Staff, the Petitioners have, by alleging that certain necessary safety-related steps or analyses have not been taken, in effect presented a classic "contention of omission." Responding that the actions will be taken later does not defeat the contention for prematurity. Instead, it merely sets the stage for facility proponents later to bring forward, as they routinely do, a solution that allegedly cures the deficiency; they then move to dismiss the contention, triggering in turn a period during which the Petitioners can amend the original contention to challenge the solution's substance.[88]

Accordingly, it is appropriate to admit the contentions. We could then proceed to litigate whether the Applicant has given adequate consideration to its waste storage and disposal situation. There may, however, be a number of other ways in which to proceed, short of litigating the merits of the contentions now. Because some of these options were not covered by the previous briefs and at the oral argument, and because after issuing today's decision we must still address the admissibility of a newly-presented contention (see p. 2, above), there is

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[87] We quoted at the outset of this decision only a synopsis of the contentions, as set out in the Petition (see p. 7, above). The contentions themselves were considerably longer, and we commend the full version of # 3 & # 4 to the reader's attention. In light of the other record materials before us, we find that, taken together or considering only the safety contention, they deal with a matter of real substance. On that score, our primary concern is with the safety-related contention. Proceeding by analogy to a court's pendent jurisdiction, however, we carry the environmentally-related contention along (for now) because of the potential environmental consequences of safety failures. Even if that were impermissible, the safety contention remains.

[88] See Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002), as to this common process.

time available to present them here as alternatives for the parties to consider and to invite their comments thereon. After receiving those comments, we will couple our final ruling on that matter with our ruling on the remaining contention, making the entire controversy then ripe for Commission review, by way of an appeal by one or more of the parties, or by other means.

With all this background analysis in mind, we express our willingness to reconsider our decision to this extent: we pose the following alternatives – which would insure that if future developments warrant the petitioners have a fair opportunity to press contentions in the nature of those now admitted – to the admission and adjudication of those contentions at this time:

i. Reject those contentions on condition that one or more additional Notices of Hearing would be issued at appropriate times. It seems clear that the drafters of the Rules of Practice did not anticipate the difficulties engendered by Notices of Hearing at this early stage of the construction process, and the Rules are silent as to how we should proceed when faced with that circumstance.[89] In making the determination as to how best to fill in that regulatory gap, we

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[89] It is not just this case in which this type of issue might arise. A similar situation could develop with respect to proceedings involving applications by holders of licenses to operate nuclear power plants to renew or to extend the standard 40-year term of those licenses for an additional 20 years. By rule and decision, the Commission has mandated that any safety-related opposition to such renewal can be based only on matters stemming from the "aging" of the facility. See 10 C.F.R. § 54.21 and § 54.29; see also Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,463 (May 8, 1995); see, e.g., Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7-8 (2001).

Naturally, such renewal applications have to be filed some time in advance of the expiration of the initial 40-year license term, both to allow for the expected length of the proceeding and to provide the licensee the opportunity to formulate alternative plans for serving electric demand were the requested renewal to be denied. Typically, such applications have been filed some 5-10 years before license expiration. The Commission's Rules, however, allow for filing for the extension as much as 20 years before license expiration. 10 C.F.R. § 54.17(c). (Recently, the Commission waived that rule to allow a licensee to apply for extension some 21½ years before license expiration. See Vogtle Electric Generating Plant Units 1 and 2 License Renewal Application (June 2007) at 1.1-13.)

That situation would appear to have the potential to raise the same type of question that we face: where a facility has not yet aged to the point where aging impacts were expected to be felt, petitioners could have difficulty in raising certain types of contentions that would focus on the impacts of aging on the specific facility before the proceeding's curtain is closed for want of a valid contention.

could take guidance from the new rules applicable to the so-called "combined operating licenses" (COLs). [90]

Those rules establish a one-step process in which the initial Notice of Hearing, covering both the construction and operating phases, is issued at the outset of a proceeding. Superficially, then, it might appear that petitioners in such proceedings would be faced with the same difficulties as the Petitioners before us, namely, a situation in which they must file at the outset contentions challenging construction that has not yet taken place.

Upon analysis, however, the guidance provided by the COL rule could prove apt here. For the COL rule specifically provides that an additional Notice of Hearing will be issued as completion of construction nears, so as to allow facility opponents to seek -- in the ordinary course and without undue burden (compare, e.g., reopening closed proceedings, touched on at Tr. 90, 112-13) -- a hearing based on problems revealed by prescribed inquiries.[91] Perhaps something of a similar nature could be employed here; we leave it to the Applicant and Staff to suggest at what later stage(s) such additional notice(s) might be employed here (e.g., following SER issuance), and to announce their support for such a measure, if they choose to do so.[92]

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[90] Licenses, Certifications, and Approvals for Nuclear Power Plants; Final Rule, 72 Fed. Reg. 49,352, 49,536-37, (Aug. 28, 2007).

[91] In particular, 10 C.F.R. § 52.103(a) states that

> Not less than 180 days before the date scheduled for initial loading of fuel into a plant by a licensee that has been issued a combined license under this part, the Commission shall publish notice of intended operation in the Federal Register. The notice must provide that any person whose interest may be affected by operation of the plant may, within 60 days, request that the Commission hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria in the combined license . . . .

72 Fed. Reg. at 49,536-37.

[92] To be sure, the regulations governing enrichment facilities provide for a single construction/operation hearing. 10 C.F.R. § 70.23a. But the issue of concern here apparently did not arise at either the LES and USEC hearings, i.e., there was no suggestion that those enrichment facility hearings (or the issuance of their construction/operation licenses) had to await either the start or the substantial completion of facility construction. For that reason, we do not believe that the decisions therein provide us definitive guidance on how to proceed here.

ii. Defer ruling on the contentions until a more appropriate time. In suggesting this alternative, we take a cue from the action recently taken by our colleagues on the Pa'ina Board (see note 84, above). There, those opposing the licensing of an irradiator that was the subject of an adjudicatory hearing sought a stay of the Staff's issuance of the license pending the outcome of the adjudicatory process. Under the rules applicable to that type of proceeding, a stay must be sought within five days of the "issuance of the notice of the NRC staff's action." 10 C.F.R. § 2.1213(a).

The stay request pointed to certain irreparable injury, but the applicant then replied that such injury was not imminent, in that it could not occur until that applicant was able to secure a lease for the property upon which it sought to place the irradiator. At that time, there was thus no irreparable harm threatened upon which to base a stay. But once the harm were to become actuated, it would be too late under the rules to request a stay.

Faced with this paradox, the Board took the eminently sensible – and just – step of simply holding the motion in abeyance until the conditions leading to the potential irreparable injury were actuated. Furthermore, the Board required the Applicant to keep the Board updated on the status of the lease negotiations.[93]

By the same token here, if on reconsideration we were to determine that the Petitioners' contentions were not ripe now but might later be actualized, we could simply defer taking action on their admissibility. This option benefits the parties by now freeing them from litigation that may prove unnecessary. At some further stage, after events had removed the prematurity, we could take up the question of their admissibility, or that of amended contentions.[94]

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[93] See Pa'ina Hawaii (Materials License Application), Licensing Board Order (Temporarily Holding in Abeyance Stay Application) (Oct. 5, 2007) (unpublished).

[94] In proffering this alternative, we recognize that the Commission has "long declined to assume that licensees will refuse to meet their obligations under their licenses or our regulations." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 29 (2003) (citing GPU Nuclear, Jersey Central Power & Light Co., and Amergen Energy Co. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000)); Curators of the University of Missouri (TRUMP-S Project), CLI-95-8, 41 NRC 386, 400 (1995); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-207, 7 AEC 957, 958 (1974)). But given the timing of the Notice of Hearing here, contentions

iii. Reject the contentions but determine not to dismiss the proceeding at this juncture. Under this approach, we would reject the contentions but not dismiss the proceeding, instead simply holding the adjudication open. This step would recognize that the Petitioners have demonstrated their standing and have put forward contentions that might be better considered when their merits become more ripe, as they have the potential to do. Upon motion by the parties presented to us at an appropriate juncture, we could reconsider the admissibility of the contentions (or new or amended ones, see note 95, below,) and, if admitted, consider whether their merits should be disposed of summarily.

iv. Reject the contentions in return for acceptance of a license condition. Were the Applicant to agree to accept a license condition requiring the availability of the WSB and the needed implementation of alarms, setpoints and procedures before it could begin to receive material for processing, it would have to seek amendment of that license condition were its plans to change. Agreement of the parties that an amendment would automatically trigger a new Notice of Hearing would provide the Petitioners essentially the same opportunity they seek now to preserve, and the contentions could be rejected, without prejudice, to abide events.

In proffering these alternatives, we are (1) giving recognition to the Petitioners having been found to have standing and (2) noting that, as events unfold over the next seven years, appropriate avenues could therefore be made available by the Commission or by the Staff to provide due and fair opportunity for the submission of additional contentions without placing unnecessary hurdles and inconsistent directives (see note 95, below) in the Petitioners' path. We suspect that such additional contentions may well be filed from time to time as construction

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challenging construction outcomes will necessarily contain an element of the theoretical. As we have seen, that is not the Petitioners' fault – the Applicant's plans themselves have elements of incompleteness and are thus open to challenge via contentions of omission. The overriding consideration is a simple one: the Petitioners are raising a serious safety matter that troubles both the ACRS and this Board. To reject their contention(s) and dismiss the proceeding at this juncture would be to abdicate our responsibilities and to raise questions about the legitimacy of our processes.

developments unfold and reveal possible shortcomings upon which contentions might plausibly be based; it would serve the public interest were a way developed to consider them fairly.[95]

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[95] In this regard, there is an apparent inconsistency between two portions of the Commission's rules establishing a framework for considering contentions filed after the initial petition was due. That being so, we take this opportunity to observe that any new contentions filed by these Petitioners – whose original petition was timely and who have demonstrated their standing – that are attributable to the Applicant's construction activity or change of plans or design, should be governed by the basic provisions of 10 C.F.R. § 2.309(f)(2) rather than by the more restrictive elements of 10 C.F.R. § 2.309(c) applicable to "nontimely filings."

In explaining that inconsistency, we start with the basic rule governing contentions (10 C.F.R. § 2.309(f)), which indicates (in subsection (2) thereunder) that contentions "must be based on documents or other information available at the time the petition is to be filed . . . ." Along those lines, new or amended contentions can be freely filed, at least with respect to environmental contentions, if new data or conclusions appear in new documents. Id.

Otherwise, after the initial filing, permission of the Board must be sought to file new or amended contentions. Such permission is to be given only if (i) the contention is based on information which "was not previously available;" (ii) that information is "materially different than information previously available;" and (iii) the contention was submitted "*in a timely fashion*" in terms of "the availability of the subsequent information." 10 C.F.R. § 2.309(f)(2)(i)-(iii).

As sensible and fair as that provision would appear, "nontimely . . . contentions" (which presumably are different from the "new or amended contentions" defined as "timely" above) may be accepted only upon a showing of good cause for failure to file on time and a weighing of, among other things, "the availability of other means" for protecting the interest asserted, the extent to which that interest will be represented by existing parties, and "the extent to which the [petitioner's] participation will broaden the issues or delay the proceeding." 10 C.F.R. § 2.309(c)(1)(i)-(viii).

The apparent inconsistency in these regulations has drawn comment from prior Boards, each of which has concluded that when new contentions are based on breaking developments or information, they are to be treated as "new or amended," not as "nontimely." See, e.g., Amergen Energy Co. (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 NRC 391, 395-96 & n.3 (2006); and Entergy Nuclear Vermont Yankee and Entergy Nuclear Operations (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 & n.21 (2005). We adopt that same interpretation, as it generally reconciles the apparently inconsistent regulations. To do otherwise would seem to leave grave doubts both (1) as to how the regulations should be applied in circumstances like those before us, and (2) as to the legitimacy of the dramatically different impact they can have, if not applied cautiously, on parties who are essentially similarly situated except for having one contention, versus none, admitted initially. And even if the contentions were somehow deemed nontimely, in the circumstances before us there would be per se "good cause" for that shortcoming if they were filed within a reasonable period (say 30 days as other Boards have directed) of the new developments which triggered them. Moreover, it could fairly be said in that circumstance that it was not the petitioners' participation, but the Applicant's and Staff's action, which "broaden[ed] the issues" or "delay[ed] the proceeding." Put another way, if the developments which led to the new contention are the result of physical activity or written publications of an applicant or of the Staff, why would a "broadening of the issues" be attributed to the reaction of a petitioner in bringing a challenge to those new developments, rather than to the action of the parties that generated the new developments in the first place? As to another factor, there being no other "existing parties," these Petitioners' interests could of course not be otherwise represented. 10 C.F.R. § 2.309(c)(vi).

Because another, related matter was presented to us recently and remains to be decided, we are issuing today's decision in preliminary or interlocutory form. It will not be finalized until we rule on the additional contention recently filed by the Petitioners.

For that reason, and because the lengthy construction schedule allows us to take some additional time to resolve this matter properly and completely without harming any party's legitimate interests,[96] we use this interim period to solicit the views of the parties as to the four alternatives we have suggested, including at what stages the Applicant and the Staff would be prepared to have new Notices of Hearing issued if we were to close this proceeding as they had previously urged. At the time we decide those matters, we will also rule upon the admissibility of the additional pending contention. That order, whether it confirms the judgments announced today or reconsiders and revises them, will constitute our final ruling on the Petition herein, thus triggering the running of the applicable period for appeal to the Commission.

We concede that this approach may be viewed as unorthodox. But so are the questions that have been presented to us. Had we accepted the Applicant's and the Staff's view and dismissed outright the waste-related contentions and the attempted intervention – in circumstances where the notice of hearing was issued so far in advance of concrete developments on the construction front – our decision would, we think, have called the integrity of the proceeding into question.

An outright dismissal would raise profound questions about the fairness (in terms of procedural due process) of an interpretation of the regulations that would result in a Notice of Hearing being largely fanciful in terms of creating a genuine opportunity for a hearing. Instead, what the Applicant's and Staff's interpretation would accomplish is to have the Notice of Hearing

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[96] In this regard, this may be the appropriate place to observe that a party's objections to brief extensions of time sought by its adversaries, in circumstances where those extensions cannot possibly have any real-world adverse impact, would seem to lack the comity litigants usually extend to each other.

create – whether inadvertently or deliberately – the opportunity, not for a hearing, but for an especially early termination of unfettered hearing rights.

In that respect, our decision avoids having the Notice of Hearing become illusory or misleading,[97] a result the Commission surely did not intend in promulgating its regulations.[98] In that vein, we are unwilling to accept the Applicant's and Staff's position when doing so would require us to issue a decision that mocks, rather than furthers, the values inherent in a fair process.[99]

At the end of the day, it might turn out that the course we are following will lead to a result fully consistent with what occurred at the earliest stage of the proceeding, when the Commission created – outside of the regulations – a split-scope adjudicatory process (see

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[97] As former Commissioner Merrifield once stressed, "enhancing public confidence and communicating honestly and effectively with the public" are not burdens, but responsibilities. "Safety: The Foundation upon Which Economic Value is Built," remarks at 2001 ANS Annual Meeting (June 18, 2001)(NRC News # S-01-05)(emphasis added). Although there stressing the industry's responsibilities, surely the values he mentioned are those of this agency as well.

[98] We are unwilling to ascribe such an intent to the Commission's realignment of the Rules of Practice over the past 10-15 years. To be sure, the rule changes were explicitly intended to promote efficiency and effectiveness. Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,169-76 (Aug. 11, 1989); Policy on the Conduct of Adjudicatory Proceedings, Policy Statement, 63 Fed. Reg. 41,872, 41,873 (Aug. 5, 1998); Changes to the Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2190-91 (Jan. 14, 2004). But each time the Commission repeated that instruction, it coupled it with the admonition that the changes were not intended to create unfairness. 54 Fed. Reg. at 33,170-71; 63 Fed. Reg. at 41,873; 69 Fed. Reg. at 2191. We trust that the resolution we ultimately reach in this proceeding will resolve the host of fairness issues raised by the "premature notice."

[99] As we see it, it is not so much the contention at issue (or any other safety contention that might have been filed) that should be called premature. Rather, it is the Notice of Hearing that more accurately deserves that label.

note 41, above) designed for this proceeding. By parity of reasoning to what the Commission did at the outset, it would serve the public interest were the parties to aid us in finding a way to fill in the regulatory interstices by creating an effective, efficient and fair means for dealing with the quandary before us. Whether or not our case management authority (see 10 C.F.R. § 2.319) would allow us to do the same on our own, it seems clear that the parties could agree to follow such a course (subject to our finding it to be in the public interest).

D. Post-Argument Matters

As noted at the outset, several matters have been raised with us since the oral argument. We dispose of two of them here. The other must await our receipt of responsive pleadings, which we expect shortly.

1. *Proposed Dismissal of NIRS*.

The Applicant's motion to deny NIRS' request for a hearing as a sanction for the non-appearance of any NIRS representative at oral argument appeared to have much to commend it when filed. The Applicant is generally correct that a party should not be permitted to participate in a proceeding when it absents itself from a scheduled session without first requesting that it be excused from participating.

In light, however, of the explanation thereupon given by the NIRS Director regarding not only the circumstances surrounding her absence but also her belief that her attendance was not required because of the joint nature of the Petitioners' presentation, we deny the Applicant's motion. In doing so, we nonetheless emphasize that all parties are obligated (unless excused) to attend scheduled sessions as well as to communicate readily and cooperatively with each other when the conduct of adjudicatory business requires it. With all parties now fully attuned to these obligations, the Board expects that no party's conduct in this regard will require the filing of any further motions for sanctions.

2. *Filing Delay*.

The Petitioners' suggestion that we delay our opinion to await the filing of an additional contention, a suggestion strongly opposed by the Applicant, has been overtaken by events. The delay in issuing this opinion (see note 4, above) was unrelated to the Petitioners' suggestion (see our unpublished Oct. 17, 2007, Memorandum providing "Notice of Expected Date for Decision"). The filing of the additional contention mooted both the suggestion and its opposition.

3. *Additional Contention*.

The Applicant's and Staff's responses to the additional contention now before us are due around month's end. The Board will begin its deliberations on that matter at the expiration, in the first week of November, of the Petitioners' time to file a reply. It is our present expectation to decide that matter at the same time we rule on the parties' "reconsideration" submittals called for elsewhere in this opinion, at which time our ruling on the intervention petition will be final and subject to Commission review.

In accordance with the foregoing opinion, the parties shall proceed as follows:

1. The Applicant and the NRC Staff shall file by Friday, November 9, briefs addressing the "reconsideration" alternatives set out in Section III.C.3 above, and any related matters – or other alternatives – they wish to bring to the Board's attention.

2. The Petitioners shall file by Monday, November 19, a response to the Applicant's and Staff's briefs.

The Board will combine its decision on those matters with its ruling on the additional contention filed on October 5, about which the last pleadings are due, pursuant to our regulations, in the first week in November.

For the reasons assigned in the foregoing opinion, the Board has reached the following conclusions:

1. The Applicant's request for sanctions against NIRS is DENIED.

2. Each of the Petitioners has demonstrated its representational STANDING to participate in this proceeding.

3. Petitioners' contentions # 1, # 2, and # 5 are inadmissible and are DISMISSED.

4. Petitioners' contentions # 3 and # 4 are ADMITTED, and Petitioners' request for a hearing is thus GRANTED, with both rulings subject to the reconsideration that will occur regarding contentions # 3 and # 4, and with the grant of a hearing also dependent upon the Board's eventual ruling on contention # 6.

5. The Board's decision is, by virtue of its interlocutory nature, NOT FINAL, and thus no appeal to the Commission is in order at this point; the time for any such appeal has therefore not yet begun to run against any party.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/

Lawrence G. McDade
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 31, 2007

Copies of this Memorandum and Order were sent this date by e-mail to (1) counsel for Applicant Shaw AREVA MOX Services, (2) counsel for the NRC Staff, and (3) the representatives of Petitioners Blue Ridge Environmental Defense League (BREDL), Nuclear Watch South (NWS), and the Nuclear Information Research Service (NIRS).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Shaw AREVA MOX Services, LLC	)	Docket No. 70-3098-MLA
	)	
(Mixed Oxide Fuel Fabrication Facility Possession and Use License)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON STANDING AND CONTENTIONS) (LBP-07-14) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of November 2007