

RAS 14614

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

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October 30, 2007 (8:00am)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of:	)	October 29, 2007
Shaw AREVA MOX Services, LLC	)	Docket No. 70-3098
(Mixed Oxide Fuel Fabrication Facility	)	ASLBP No. 07-856-02-MLA-BD01
Possession and Use License)	)	
	)	
	)	

**SHAW AREVA MOX SERVICES LLC'S ANSWER  
OPPOSING PETITIONERS' LATE-FILED CONTENTION**

**I. INTRODUCTION**

In accordance with 10 CFR § 2.309(h), Shaw AREVA MOX Services, LLC ("MOX Services"), hereby files its Answer to Petitioners' Late Filed Contention Regarding Need to Supplement EIS for Proposed MOX Plutonium Processing Facility ("Request for Late-Filed Contention" or "Request"), jointly filed on October 5, 2007, by the Blue Ridge Environmental Defense League ("BREDL") and Nuclear Watch South ("NWS") (collectively "Petitioners").

For the reasons set forth below, Petitioners' Request for Late-Filed Contention pre-supposes decisions and analyses not yet made by the Department of Energy (DOE), is speculative and premature, fails to demonstrate that the NRC's standards for admissibility of contentions have been met, and should therefore be denied.<sup>1</sup>

<sup>1</sup> Furthermore, Petitioners' October 5, 2007 Request for Late Filed Contention is based in part on DOE's March 28, 2007 Notice of Intent to Prepare a Supplemental Environmental Impact Statement for Surplus Plutonium Disposition at the Savannah River Site, 72 Fed. Reg. 14,543 (Mar. 28, 2007) ("NOI for SEIS"). That NOI was issued over six weeks before Petitioners' initial Petition for Intervention and first set of Contentions. To the

## II. PETITIONERS' LATE-FILED CONTENTION IS INADMISSIBLE

Petitioners have proffered the following late-filed contention:

The license application for the mixed oxide ("MOX") plutonium fuel factory ("MFFF") fails to comply with the National Environmental Policy Act ("NEPA") or NRC implementing regulation 10 C.F.R. § 51.92, because the U.S. Nuclear Regulatory Commission's ("NRC's" or "Commission's") environmental impact statement ("EIS") for the [Mixed-Oxide Fuel Fabrication Facility] does not address significant *proposed* changes in the U.S. Department of Energy's ("DOE's") strategy for disposing of surplus weapons-grade plutonium, which in turn would require modifications to the design of the MOX plutonium fuel processing facility. The environmental impacts of these design changes, their implications with respect to connected actions, and alternatives that would avoid or mitigate their impacts, must be considered before the facility can be licensed to operate.

Request for Late-Filed Contention at 1-2 (emphasis added).

Petitioners' Late-Filed Contention is premised on DOE's March 28, 2007 *Notice of Intent to Prepare a Supplemental Environmental Impact Statement for Surplus Plutonium Disposition at the Savannah River Site*, 72 Fed. Reg. 14,543 (Mar. 28, 2007) ("NOI for SEIS") and DOE's September 11, 2007 Amended Record of Decision: Storage of Surplus Plutonium Materials at the Savannah River Site ("Amended Plutonium Storage ROD"), 72 Fed. Reg. 51,807.<sup>2</sup> In addition, Petitioners' Late Filed Contention relies on DOE's September 2007 Plan

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extent that Petitioners rely on the NOI, their Late-Filed Contention should have been included in Petitioners' initial pleadings, prior to the Atomic Safety and Licensing Board's pre-hearing conference in August, 2007.

As is evident from Petitioners' Late Filed Contention, Petitioners are keenly aware of DOE's activities and publications in the Federal Register. Petitioners nevertheless attempt to justify this piecemeal approach by citing DOE's September 2007 *Plan for Alternative Disposition of Defense Plutonium and Defense Plutonium Materials for the Cancelled Plutonium Immobilization Plan*, which Petitioners contend "constitutes the first time the DOE has announced that the MOX plutonium processing facility will require modification." Request for Late Filed Contention at 7. As will be discussed later in this Answer (*infra*, at footnote 10), Petitioners' assertion in this regard distorts and paraphrases out-of-context from the above-referenced Disposition Plan, and is premised on DOE decisions and analyses which have not yet been made.

<sup>2</sup> DOE's Amended Plutonium Storage ROD was based on DOE's *Supplement Analysis, Storage of Surplus Plutonium Materials at the Savannah River Site* (DOE/EIS-0229-SA-4, August 2007), which was prepared by DOE in accordance with NEPA. DOE's *Supplement Analysis* analyzed environmental impacts from the proposal to transfer, at an earlier date than previously planned, surplus, non-pit weapons-usable plutonium to

for Alternative Disposition of Defense Plutonium and Defense Plutonium Materials That Were Destined for the Cancelled Plutonium Immobilization Plant<sup>3</sup> (“Disposition Plan”), an alternative disposition plan which DOE submitted to Congress in accordance with section 3155 of the National Defense Authorization Act for Fiscal Year 2002 (Public Law 107-107).

In its Amended Plutonium Storage ROD, DOE, consistent with its prior decisions to consolidate the storage of surplus, non-pit<sup>4</sup> weapons-usable plutonium at DOE’s Savannah River Site (SRS), decided to transfer (at an earlier time than previously planned) surplus non-pit weapons-usable plutonium metals and oxides, and potentially unirradiated fuel assemblies and fuel pins, from three other DOE sites<sup>5</sup> to consolidated storage facilities at SRS.<sup>6</sup> See 72 Fed. Reg. at 51,807, 51,808. DOE decided to begin transferring and consolidating this material to: reduce the number of sites with special nuclear material; enhance the security of these materials; reduce the risk plutonium poses to the public and environment; reduce or avoid the costs

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consolidated storage facilities at DOE’s Savannah River Site. The *Supplement Analysis* evaluated whether the proposal would be a substantial change or present significant new circumstances or information relevant to environmental concerns. The *Supplement Analysis* showed that the potential environmental impacts would not be a significant change, would not constitute a substantial change relevant to environmental concerns, and did not represent new circumstances or information relevant to environmental concerns. See Supplement Analysis at 14 .

<sup>3</sup> The Disposition Plan is available at:  
<http://www.em.doe.gov/pdfs/Plan%20for%20Alternative%20Disposition%20of%20Plutonium.pdf>.

<sup>4</sup> A “pit” is a weapons component.

<sup>5</sup> The three sites are: (1) the Hanford Site near Richland, Washington; (2) the Lawrence Livermore National Laboratory in Livermore, California; and (3) the Los Alamos National Laboratory in Los Alamos, New Mexico. 72 Fed. Reg. 51,807.

<sup>6</sup> DOE had previously decided to consolidate storage at SRS; however, except for material from DOE’s Rocky Flats Environmental Technology Site, DOE had previously decided to transfer such plutonium to SRS at the time of disposition (or movement to lag storage at the disposition facility). In DOE’s Amended Plutonium Storage ROD, DOE decided to begin earlier transfer of such plutonium to SRS for storage pending disposition. See Amended Plutonium Storage ROD at 3-4.

associated with plutonium storage, surveillance and monitoring, and security at multiple sites; and relocate the material to DOE's planned site for disposition. *Id.*<sup>2</sup>

Significantly, while the Amended Plutonium Storage ROD documented DOE's amended decision concerning *storage* of plutonium, it made no decision regarding the ultimate *disposition* of the surplus plutonium. In fact, DOE specifically stated that "long-term storage of surplus plutonium and the ultimate disposition of that plutonium [are] separate actions, [and that] combining long-term storage and disposition . . . serve[s] no significant programmatic objective." *Id.* at 51,808 (citing a prior DOE ROD). Thus, while the Amended Plutonium Storage ROD was very specific regarding the sources and amounts of materials that would be transferred to SRS for *storage* under the ROD, it did not provide for any specific *disposition* path. *See id.*

Because DOE cancelled (in 2002) the previously planned plutonium immobilization plant, DOE currently has up to 13 metric tons of surplus weapons-usable non-pit defense plutonium and defense plutonium materials that require a new disposition pathway. *See* Disposition Plan at 1. In accordance with Public Law 107-107, DOE's Disposition Plan describes its anticipated approach -- using a variety of potential alternative technologies in up to three potential facilities -- to disposition this plutonium, so as to remove from South Carolina, under any of the options, surplus plutonium transferred to SRS (or in storage at SRS) that was originally planned for the cancelled plutonium immobilization plant. *See* Disposition Plan at 1-

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<sup>2</sup> In the Amended Plutonium Storage ROD, DOE noted that separate from the consolidated storage activities, DOE had issued the above-referenced *Notice of Intent to Prepare a Supplemental Environmental Impact Statement for Surplus Plutonium Disposition at the Savannah River Site* and was preparing a *Supplemental Environmental Impact Statement for Surplus Plutonium Disposition at the Savannah River Site*, to evaluate the environmental impacts of alternatives to disposition surplus, non-pit plutonium materials. The Amended Plutonium Storage ROD also stated that selection of one or more available disposition alternatives at SRS would "facilitate a disposition path out of South Carolina." *Id.* at 51,809. These non-pit surplus plutonium materials were previously destined for the now-cancelled Plutonium Immobilization Plant, as explained in the Disposition Plan.

2. The Disposition Plan is clear, however, that the technologies and facilities ultimately used to disposition the non-pit plutonium depend on subsequent DOE NEPA analysis (the SEIS referenced above) and subsequent DOE decisions. *Id* at note 2.

As is evident from the Disposition Plan, DOE has *not* decided which of the various alternative technologies or facilities would be used to disposition the surplus non-pit plutonium. Thus, while the MOX Fuel Fabrication Facility is included in the options to disposition some of this plutonium,<sup>8</sup> the Disposition Plan does not make any final disposition decisions. To the contrary, the Disposition Plan expresses DOE's intention to continue to evaluate the options before DOE makes final decisions on the mix of facilities and technologies to be ultimately used for the disposition of surplus non-pit plutonium. *See* Disposition Plan at 6-7.

Although DOE is evaluating various options for the disposition of the surplus non-pit plutonium materials that are being consolidated at SRS, any final decision regarding disposition will only be made *after* DOE has completed its own SEIS, which will evaluate environmental impacts of the various disposition alternatives, including the "no action" alternative. *See* Disposition Plan at 8; *see also* NOI for SEIS, 72 Fed. Reg. at 14,545. That SEIS is tentatively scheduled to be completed in July, 2008. Disposition Plan at 8. As DOE stated in its NOI for SEIS, "DOE . . . will now prepare an SEIS . . . to evaluate the potential environmental impacts of

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<sup>8</sup> As described in DOE's Disposition Plan, DOE's preferred option is to disposition up to 13 metric tons of surplus non-pit plutonium using up to three facilities: a proposed, new small scale Plutonium Vitrification process; the existing H-Canyon facility; and the planned MOX Fuel Fabrication Facility. *See* Disposition Plan at 6, 12. According to DOE's Disposition Plan, DOE is also evaluating a ceramic process in lieu of the proposed vitrification process. DOE's Disposition Plan also includes an alternative approach that would either reduce or eliminate the need for the proposed vitrification process (or alternative ceramic process), and instead disposition the surplus non-pit plutonium through the MOX Fuel Fabrication Facility and H Canyon. *See* Disposition Plan at 2-3. Importantly, the Disposition Plan emphasizes that DOE's baseline approach continues to be construction and operation of the MOX Fuel Fabrication Facility, the Pit Disassembly and Conversion Facility, and the Waste Solidification Building to disposition 34 metric tons of surplus weapon-grade plutonium. *Id.* at 4.

[various] alternatives.” 72 Fed. Reg. at 14,543. The critical point is that, while DOE has decided that it will transfer additional plutonium materials to SRS for storage, it has not yet decided on what specific disposition path it will use for those materials.

Because DOE has made no decision to change the quantity or purity of plutonium to be fabricated into MOX fuel at the MOX Fuel Fabrication Facility, Petitioners’ request is clearly premature. As discussed below: (1) pursuant to 10 CFR § 51.92(a), there are no “substantial changes in the proposed action that are relevant to environmental concerns” or “new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts”;<sup>9</sup> and (2) Petitioners have failed to identify any genuine dispute of material fact or law, contrary to 10 CFR § 2.309(f)(1). Accordingly, Petitioners’ Request for Late-Filed Contention should be denied.

**A. There Is No New Significant Environmental Information Relevant To the MOX Fuel Fabrication Facility**

Petitioners allege that the MOX Fuel Fabrication Facility license application “fails to comply” with NEPA and 10 CFR § 51.92 in particular, because the NRC’s EIS for the MOX Fuel Fabrication Facility does not address allegedly “significant proposed changes in DOE’s plutonium disposition strategy” which Petitioners contend could affect the design of the MFFF.

Request at 1-2. 10 CFR § 51.92(a) requires that a supplemental EIS be prepared if either:

- (1) There are substantial changes in the proposed action that are relevant to environmental concerns; or
- (2) There are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

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<sup>9</sup> MOX Services continues to believe, as stated in its June 13, 2007 Answer Opposing BREDL, Et Al., Petition for Intervention and Request for Hearing, at 21, n.8, that it is not at all clear how *any* consideration of environmental issues is material to the findings to be made in, or within the scope of, this proceeding.

Neither of these circumstances is present here.

Neither DOE's decision to consolidate storage of surplus non-pit plutonium at SRS, nor its ongoing evaluation of the disposition path for that plutonium, reflect any change in the proposed action before the NRC (*i.e.*, licensing of the MOX Fuel Fabrication Facility) at this time. Moreover, there are no significant new circumstances or information relevant to environmental concerns and bearing on the proposed action. Petitioners acknowledge that DOE has only "proposed" alternative approaches for disposition of its surplus non-pit plutonium. It is premature to speculate what decision DOE will make concerning the mix of facilities and technologies to be used to disposition surplus non-pit plutonium. In the absence of a DOE decision, it is also premature to speculate whether such decision would constitute a substantial change relevant to environmental concerns, or significant new circumstances or information relevant to environmental concerns, so as to require that NRC supplement its EIS for the MFFF. Moreover, it is utterly premature to speculate as to the impact of any such proposed approach on the design of the Mixed Oxide Fuel Fabrication Facility.<sup>10</sup>

The United States Supreme Court requires that federal agencies apply a "rule of reason" when evaluating the need to prepare a SEIS. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373-74 (1989). Accordingly, a federal agency must prepare a supplemental EIS regarding a pending major federal action if new information becomes available that will affect the quality of the human environment in a significant manner or to a significant extent not already considered. *See id.* Application of this "rule of reason" necessarily turns on the value of

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<sup>10</sup> On pages 5-6 of their Request, Petitioners engage in a highly speculative discussion of potential design changes to the MOX Fuel Fabrication Facility. Whether or not design changes will be needed will depend upon the nature of the additional material, if any, to be processed at the Mixed Oxide Fuel Fabrication Facility. The Disposition Plan merely notes that one of the disposition approaches would require "some modification." *See* Disposition Plan at 7. The Disposition Plan should not be construed to suggest that significant, non-routine facility changes would be needed.

the new information to the still-pending decision-making process. *See id.* In this respect, the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance. *Id.*

Consistent with the Supreme Court's views as expressed in *Marsh*, the NRC has held that a supplemental EIS is not necessary "every time new information comes to light after the EIS is finalized." *Hydro Resources, Inc.*, CLI-99-22, 50 NRC 3, 14 (1999) (quoting *Marsh* at 373). Rather, as a general matter, the NRC must consider whether the new information is significant enough to require preparation of a supplement. *See id.* The new information must present "a seriously different picture of the environmental impact of the proposed project from what was previously envisioned." *Id.* (quoting *Sierra Club v. Froehike*, 816 F.2d 205, 210 (5th Cir. 1987)). Clearly, Petitioners' premature reliance on potential, future DOE decisions fails to meet these standards.

Accordingly, Petitioners' Late-Filed Contention should be dismissed by this Board.

**B. Petitioners Have Not Shown That A Genuine Dispute Exists On A Material Issue Of Fact Or Law**

For similar reasons, the Board should also reject Petitioners' Late-Filed Contention because they have failed to identify any genuine dispute of material fact or law, contrary to 10 CFR § 2.309(f)(1). As discussed above, DOE's Amended Plutonium Storage ROD deals only with consolidation and storage of materials at SRS. While the Amended ROD documented DOE's decision to begin to consolidate storage of surplus non-pit plutonium at SRS earlier than had previously been planned, DOE's amended decision for *storage* of plutonium contained no decision with respect to the ultimate *disposition* of the affected plutonium. *See* 72 Fed. Reg. 51,807.

Furthermore, absent any further DOE decision, the *current* DOE disposition strategy calls for disposition through the MOX Fuel Fabrication Facility of the same 34 metric tons assumed in the NRC's FEIS. See Disposition Plan at 4 ("Construct and operate a MFFF, a PDCF, and a Waste Solidification Building (WSB) to dispose of at least 34 MT of weapon-grade plutonium..."); See NUREG-1767, Vol. 1, Environmental Impact Statement on the Construction and Operation of a Proposed Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina xvii (Jan. 2005) ("The proposed MOX facility would convert 34 metric tons (MT) (37.5 tons) of surplus weapons grade plutonium into MOX fuel"). Accordingly, there is no genuine dispute of material fact or law to litigate.

### III. CONCLUSION

For the reasons set forth above, Petitioners' Late-Filed Contention should be dismissed. The Contention pre-supposes DOE's NEPA analysis and a DOE decision not yet made, is speculative and premature, and fails to demonstrate that the NRC's standards for admissibility of contentions have been met. Accordingly, Shaw AREVA MOX Services, LLC respectfully requests that Petitioners' Request for Late-Filed Contention be denied.

Respectfully submitted,



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	)	
Shaw AREVA MOX Services, LLC	)	Docket No. 70-3098
(Mixed Oxide Fuel Fabrication Facility	)	
Possession and Use License)	)	ASLBP No. 07-856-02-MLA-BD01

**CERTIFICATE OF SERVICE**

I hereby certify that copies of "Shaw AREVA MOX Services, LLC's Answer Opposing Petitioners' Late-Filed Contention" were served upon the persons listed below, by e-mail and first class mail, this 29th of October, 2007.

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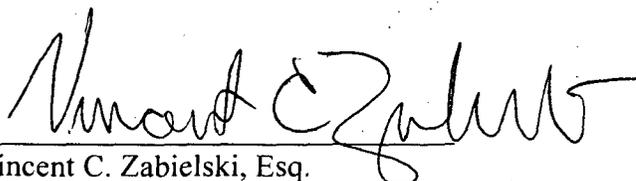
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