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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Michael C. Farrar, Chairman
Nicholas G. Trikouros
Lawrence G. McDade
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

SUBJECT: *Filing in MOX Plutonium Fuel Fabrication Facility Licensing
Proceeding, Docket No. 70-3098*

Dear Administrative Judges:

I am writing to inform you that I have been retained by the Intervenor, Blue Ridge Environmental Defense League ("BREDL"), Nuclear Watch South ("NWS"), and Nuclear Information and Resource Service ("NIRS"), to represent them in this proceeding. Therefore, the organizations' representatives, Louis A. Zeller, Glenn Carroll, and Mary Olson, have authorized me to state that they are withdrawing their appearances from the proceeding.

Enclosed please find the following pleadings:

1. Notice of Appearance by Diane Curran and Notice of Withdrawal of Appearances by Glenn Carroll, Louis A. Zeller, and Mary Olson; and
2. Intervenor's Response to Atomic Safety and Licensing Board's Memorandum and Order of January 16, 2008, Regarding Case Management Issues.

Copies have been served on the ASLB and parties by e-mail and first-class mail.

Sincerely,



Diane Curran

Cc: Service list

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February 11, 2008

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

Before Administrative Judges:
Michael C. Farrar, Chair
Nicholas G. Trikouros
Lawrence G. McDade

In the Matter of

SHAW AREVA MOX SERVICES

Mixed Oxide Fuel Fabrication Facility
Possession and Use License

Docket No. 70-3098-MLA

ASLBP No. 07-856-02-MLA-BD01

**INTERVENORS' RESPONSE TO ATOMIC SAFETY AND
LICENSING BOARD'S MEMORANDUM AND ORDER OF JANUARY 16, 2008
REGARDING CASE MANAGEMENT ISSUES**

INTRODUCTION

In its January 16, 2008, Memorandum and Order (Recasting Contention 4 and Suggesting Certain Discussions), the Atomic Safety and Licensing Board ("ASLB") requested the parties to consult with each other regarding the appropriate contents of a case management order, and to report to the ASLB on their own view if they were unable to reach agreement. *Id.* at 2. Because the parties were unable to reach agreement, Blue Ridge Environmental Defense League ("BREDL"), Nuclear Watch South ("NWS") and Nuclear Information Service ("NIRS") (collectively "Intervenors") hereby present their views regarding necessary and appropriate measures for the fair management of this case.

DISCUSSION

As the ASLB has recognized, the NRC Staff's premature docketing of Shaw AREVA MOX Services' ("Shaw AREVA's") application for an operating license for the

proposed MOX plutonium fuel processing facility puts the Intervenor at an unfair disadvantage, because:

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 . . . the natural result is that facility proponents will argue that *any* safety contentions will likewise be premature and speculative.

LBP-07-14, Memorandum and Order (Ruling on Standing and Contentions), slip op. at 38 (emphasis in original). Having no control over the timing of the Notice of Hearing or of the construction and design processes, the ASLB has limited ability to ensure that the hearing will be fair to Intervenor. For instance, the ASLB has proposed to make the hearing process more efficient by suspending the requirement to submit contentions until after the NRC Staff issues the Safety Evaluation Report ("SER"). *See* transcript of January 8, 2008, oral argument at 213. While Intervenor believe this approach is appropriate for litigation of admitted contentions (*see* Intervenor's Response to Atomic Safety and Licensing Board's Order of October 31, 2007 at 5 (November 19, 2007) ("Intervenor's 11/19/08 Response")), Intervenor are concerned that it is inappropriate to set the date of issuance of the SER as the first date for filing of contentions, because a significant amount of construction may have taken place by the time the SER is issued in 2009. Intervenor believe their ability to use the hearing to seek changes to the facility design could be prejudiced if they are forced to wait to litigate their concerns until after a significant portion of the facility is built and the current design thus becomes a *fait accompli*.

Intervenors believe that there are some measures the ASLB can take, on its own, to improve the fairness and efficiency of this proceeding. But they respectfully submit that in the absence of fundamental changes to the licensing proceeding for the proposed MOX plutonium fuel fabrication facility, there are serious limits on the degree to which the ASLB can, by itself, meet those goals. Additional action by the Commission is also needed to ensure that the premature docketing of the license application does not prejudice the Intervenors' hearing rights.

Therefore, Intervenors request the ASLB to take the following actions:

(1) The ASLB Should Admit Reformulated Contention 4.

Reformulated Contention 4 raises a ripe and admissible challenge to the adequacy of Shaw AREVA's license application, and therefore it should be admitted.

(2) The ASLB Should Admit Late-Filed Contention 7.

In order to ensure that Intervenors have an opportunity to challenge Shaw AREVA's compliance with 10 C.F.R. § 70.23(a)(8), the ASLB should admit the following late-filed Contention 7:

Contention: Shaw AREVA's application for an operating license should be denied because Shaw AREVA has not demonstrated that construction of the principal structures, systems and components approved under 10 C.F.R. § 70.23(b) has been completed in accordance with the application.

Basis: Shaw AREVA has hardly begun construction of the proposed facility, and therefore has not built the principal structures, systems and components that were approved by the NRC in its construction authorization decision. Therefore the NRC has no basis for concluding that Shaw AREVA has complied with 10 C.F.R. § 70.23(a)(8).¹

¹ This contention satisfies a balancing of the NRC's late-filing criteria in 10 C.F.R. § 2.309(c). First, as discussed above at page 4, Intervenors have good cause for submitting the contention now because they were previously unaware that the NRC Staff would seek to exclude the issue of compliance with 10 C.F.R. § 70.23(a)(8) from the licensing proceeding. Intervenors' counsel did not become aware of the NRC Staff's position until

In addition to raising a substantive concern about the safety of the proposed facility, Contention 7 addresses Intervenor's concern that the NRC Staff may unlawfully seek to preclude Intervenor's from litigating the adequacy of construction of the proposed facility. Up until the oral argument on January 8, 2008, Intervenor's reasonably believed that they would have an opportunity to challenge the adequacy of construction of the proposed facility around the time of publication of the SER. Thus, in their 11/19/07 Response, Intervenor's stated that:

Holding the proceeding in abeyance until the issuance of the draft SER will . . . ensure that the hearing does not go forward until one of the primary matters that may be contested in the proceeding is ripe, *i.e.*, the adequacy of construction to comply with the construction authorization.

Id. at 5. At the January 8, 2008, oral argument, however, counsel for the NRC Staff stated that the Staff intends to issue the license several years before construction is

she was able to review the transcript of the January 8 oral argument, which became available on January 22, 2008. The contention is also being filed within 30 days after the Staff made the representations at the January 8 oral argument.

Second, Intervenor's have established standing to participate in this proceeding, and therefore they have a "right under the [Atomic Energy] Act to be made a party to the proceeding. *See* LBP-07-14, slip op. at 22. Third, Intervenor's have established their interest in the safe operation of the proposed facility through their demonstration of standing. *Id.* Fourth, an order granting a license for the proposed facility may adversely affect Intervenor's interests if the proposed facility is not built according to its safety design.

Fifth, the hearing is the only avenue by which the Intervenor's can seek to enforce 10 C.F.R. § 70.23(a)(8), and thus they have no other means to protect their interest on this issue. Sixth, no other parties are representing the Intervenor's interest in ensuring that the finding made under 10 C.F.R. § 70.23(a)(8) is a licensing determination and not made after-the-fact. Seventh, while the Intervenor's participation may broaden the issues, such broadening would not be significant in view of the very lengthy time frame of this proceeding. Eighth, Intervenor's believe they will be able to contribute to the making of a sound record because they anticipate relying on the expert assistance of Dr. Edwin S. Lyman, their expert witness on the contentions admitted by the ASLB.

completed, and to make compliance with 10 C.F.R. § 70.23(a)(8) a condition of the license. Tr. at 230.²

Intervenors believe that the Staff's proposal violates Section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a), because it would remove a material issue from the scope of the hearing. *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1451 (D.C. Cir.1984), cert. denied, 469 U.S. 1132 (1985). Although Intervenors might otherwise have deferred submission of Contention 7 until construction had been completed, it is now clearly appropriate to submit the contention now, in order to preserve Intervenors' hearing rights in the future. Intervenors request the ASLB to hold Contention 7 in abeyance pending the Staff's completion of the SER.

(3) The ASLB Should Request the Commission to Suspend Construction Pending Completion of the Design for the Proposed Facility.

Although NRC regulation 10 C.F.R. § 70.23(b)(8) required that the principal design features of the proposed MOX plutonium fuel fabrication facility must be approved before construction could begin, major features of the design of the proposed facility are not yet settled. The absurd result is that a hearing has been noticed on the safety of operation before the applicant even knows with reasonable certainty what operation the facility must be designed and built to accomplish.

While many aspects of the MOX plutonium facility design are withheld from the public, several important examples of the application's incompleteness are publicly known:

² The transcript of the January 8, 2008, oral argument, was not made publicly available on the NRC's Agencywide Document Management System ("ADAMS") until January 22, 2008.

First, despite its commitment to resolve the issue in the operating license application, as discussed in reformulated Contention 4, Shaw AREVA's license application "still does not assure that there is always sufficient waste storage capacity to bring the facility to a safety configuration in the event that waste transfer is interrupted." This is a design issue that should be resolved before construction proceeds. *See* Memorandum and Order (Recasting Contention 4 and Suggesting Certain Discussions) at 5 (January 16, 2008).

Second, as discussed in Intervenor's Contention 6, the U.S. Department of Energy ("DOE") is considering changes to the federal program for disposition of surplus weapons-grade plutonium that would result in "modifications" to the proposed MOX plutonium processing facility.³ Specifically, the DOE is "evaluating the costs and feasibility of further reducing or eliminating the mission of the Plutonium Vitrification process (*e.g.* use only the MFFF [MOX Fuel Fabrication Facility] and H-Canyon to dispose of the 13 MT of surplus plutonium)." *Id.* As discussed in Contention 6 (and supported by the expert declaration of Dr. Edwin S. Lyman), the use of the proposed MOX plutonium fuel fabrication facility to process plutonium that was formerly destined for vitrification may require the processing of significant quantities of nonconforming feed material, thus requiring a change to the plant's design basis. *Id.* at 6.

Third, Shaw AREVA continues to build the MOX plant even though the security framework at the facility, including the design basis threat ("DBT") that will apply,

³ Petitioners' Late-Filed Contention Regarding Need to Supplement EIS for Proposed MOX Plutonium Processing Facility at 4-5 (October 5, 2007), citing "Plan for Alternative Disposition of Defense Plutonium and Defense Plutonium Materials That Were Destined for the Cancelled Plutonium Immobilization Plant," attached to press release accompanying Amended Record of Decision: Storage of Surplus Plutonium Materials at the Savannah River Site, 72 Fed. Reg. 51,807 (September 11, 2007).

remains unclear. The applicable DBT is uncertain because the MOX plant will be an NRC-licensed Category I facility located on a DOE site. The choice between the NRC DBT and the DOE DBT is important because there are significant differences between the NRC's DBT and the DOE's DBT for facilities possessing "formula quantities of strategic special nuclear material" (SSNM), otherwise known as a Category I quantity of SSNM.

Certain design features of the proposed MOX plutonium fuel fabrication facility could be significantly affected by the details of the DBT. For example, the DOE Category I DBT is based on a broader view of the domestic threat to nuclear facilities than the NRC DBT.⁴ The NRC and DOE originally intended to enter into a memorandum of understanding regarding which DBT will apply (as well as other issues related to their overlapping jurisdiction), but as of April 12, 2007, the NRC said that it "has not yet concluded whether a MOU will be necessary on physical protection."⁵ Instead, the NRC asserted that "the MOX facility will meet the new ... DOE and NRC DBT criteria."⁶

Yet the NRC has not explained how it will verify this claim in the absence of an MOU. For instance, the GAO has revealed that since September 11, 2001, DOE and NRC have not fully cooperated in sharing classified information on potential misuse of

⁴ Gene Aloise, U.S. Government Accountability Office ("GAO"), "Nuclear Security: DOE and NRC Have Different Security Requirements for Protecting Weapons-Grade Material from Terrorist Attacks," GAO-07-1197R (September 11, 2007) ("GAO Report").

⁵ David Tiktinsky, Sr., summary of the April 12, 2007 public meeting on the license application for the MOX fuel fabrication facility at 4 (May 8, 2007) ("Tiktinsky Memorandum"), ADAMS accession number ML071230230.

⁶ Tiktinsky Memorandum at 2.

Category I special nuclear material.⁷ Thus it is not even clear if NRC staff security reviewers have access to the appropriate DOE security documentation. Moreover, the NRC authorized construction of the MOX plant in April 2005, but the most recent revision of the DOE DBT was in November 2005. It is therefore difficult to see how the design as approved by NRC could have taken into account the most recent DOE DBT. If it is later discovered that certain design features are incompatible with implementation of the appropriate DBT, then retrofitting may be the only alternative to the need for expensive compensatory operational measures. It would be far more efficient for NRC to determine the appropriate security framework for the MOX facility and verify the design is consistent with that framework before the plant is constructed.

Finally, the National Nuclear Security Administration (“NNSA”) recently announced that it has “added to the mission of the MOX program.” NNSA Press Release, http://www.nnsa.doe.gov/docs/newsreleases/2007/PR_2007-12-13_NA-07-60.htm (December 13, 2007). According to the press release, “starter fuel could be produced for fast reactors.” In addition, the press release stated that it was “important to note that [DOE] Secretary Bodman announced in September the planned addition of nine more metric tons of weapons-grade plutonium for the MOX program.” *Id.* Such a major expansion of the mission of the proposed MOX plutonium fuel production facility is likely to have significant design implications.

Thus, in important aspects related to the safety and security of the proposed MOX plutonium fuel fabrication facility, the design of the facility is not yet complete. Under the circumstances, it is not appropriate for the Commission to allow construction of the

⁷ GAO Report at 3.

facility. Instead, the Commission should order Shaw AREVA to suspend construction until all principal structures, systems, and components related to safety and security have been completed. Suspension of construction on the proposed facility is warranted from the perspective of ensuring that safety and security of the proposed facility are maximized through an appropriate design, not through less effective after-the-fact modifications to an already-constructed facility.

In addition, suspension of construction pending completion of the design is necessary to protect Intervenor's right to a prior hearing on safety and security-related design issues. As the ASLB observed in LBP-07-14, the uncertainty regarding the design puts Intervenor in an untenably unfair position, because they must now file contentions on issues that are still undeveloped in the license application. As a result, the Intervenor's contentions are attacked as premature if they are filed in a timely way, and attacked as too late if Intervenor wait until the issues are developed.

Finally, suspension of construction is required in order to comply with NRC regulations implementing the National Environmental Policy Act ("NEPA"), because it is now clear that the NRC lacked sufficient information on which to make a pre-construction finding that "the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values." 10 C.F.R. § 70.23(a)(7). In order to protect the integrity of the NEPA decision-making process, the Commission should suspend construction until it has reasonable assurance that all significant design issues have been resolved.

In order to ensure the integrity and effectiveness of its review of safety, security and environmental protection in the MOX plutonium processing facility licensing

process, and in order to protect the fairness and efficiency of the proceeding, the Commission should order the suspension of construction until the design of primary safety and security systems is complete. The Commission should also suspend the hearing process until that point. If – as contemplated by the regulations – the primary features of the facility design are completed before the operating license proceeding begins – the procedural problems that now plague this proceeding are likely to be resolved.

CONCLUSION

Accordingly, Intervenor request that the ASLB admit reformulated Contention 4 and late-filed Contention 7 and request the Commission to suspend construction of the proposed MOX plutonium fuel fabrication facility until the design is complete with respect to its principal structures, systems, and components. The Commission should also suspend the Notice of Hearing until completion of the design.

Respectfully submitted,



Diane Curran

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

In the Matter of

SHAW AREVA MOX SERVICES

Mixed Oxide Fuel Fabrication Facility
Possession and Use License

Docket No. 70-3098-MLA

ASLBP No. 07-856-02-MLA-BD01

**NOTICE OF APPEARANCE BY DIANE CURRAN AND
NOTICE OF WITHDRAWAL OF APPEARANCES BY
GLENN CARROLL, LOUIS A. ZELLER, AND MARY OLSON**

Pursuant to 10 C.F.R. § 2.314, Diane Curran hereby enters an appearance in this proceeding as duly authorized legal counsel for Blue Ridge Environmental Defense League ("BREDL"), Nuclear Watch South ("NWS"), and Nuclear Information and Resource Service, Inc. ("NIRS"). Undersigned counsel is a member in good standing of the bars of the District of Columbia; the State of Maryland; the U.S. District Court for the District of Columbia and the Central District of California; the U.S. Court of Appeals for the D.C. Circuit, First Circuit, Third Circuit, Ninth Circuit, and Tenth Circuit; and the U.S. Supreme Court.

Undersigned counsel is also authorized to state that as of this date, Louis A. Zeller withdraws his appearance as the duly authorized representative of BREDL, Glenn Carroll withdraws her appearance as the duly authorized representative of NWS, and Mary Olson withdraws her appearance as the duly authorized representative of NIRS.

Respectfully submitted,



Diane Curran

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February 11, 2008

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

I certify that on February 11, 2008, copies of the foregoing Notice of Appearance by Diane Curran and Notice of Withdrawal of Appearances by Glenn Carroll, Louis A. Zeller, and Mary Olson and Intervenors' Response to Atomic Safety and Licensing Board's Memorandum and Order of January 16, 2008, Regarding Case Management Issues were served on the following by e-mail and first-class mail as indicated below:

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