

October 22, 2010

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO INTERVENORS' MOTION FOR ISSUANCE OF AN ORDER  
ESTABLISHING PROCEDURES FOR PUBLIC DISCLOSURE AND REDACTION

INTRODUCTION

On October 18, 2010, intervenors Nuclear Watch South, Blue Ridge Environmental Defense League, and Nuclear Information and Resource Service (collectively "Intervenors") moved for the Atomic Safety and Licensing Board ("Board") to take or require six different measures with respect to Sensitive Unclassified Non-Safeguards Information ("SUNSI") in the Mixed Oxide ("MOX") Fuel Fabrication Facility ("MFFF") licensing proceeding.<sup>1</sup> As the Intervenors stated, the Motion represents significant efforts undertaken by all parties to reach a consensus and reflects many points of agreement. The NRC Staff ("Staff"), therefore, responds solely to those requests for which there are still points of disagreement: paragraphs III.A and III.E.

BACKGROUND

Shaw AREVA MOX Services ("MOX Services") responded to the Motion on October 20, 2010, agreeing in large measure with the Intervenor's requests.<sup>2</sup> MOX Services' only point of

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<sup>1</sup> "Intervenors' Motion for Issuance of an Order Establishing Procedures for Public Disclosure of Information and Redaction of Sensitive Documents" (October 18, 2010) ("Motion").

<sup>2</sup> "Answer of Shaw AREVA MOX Services, LLC to Intervenors' Motion for Issuance of an Order

disagreement with the Intervenor was in connection to paragraph III.E of the Motion. In response to that particular paragraph, which states that Intervenor reserve a right to appeal a Freedom of Information Act (“FOIA”) request to the Board, MOX Services posits that Intervenor’s rights to appeal are specifically proscribed in 10 C.F.R. § 9.29 and are not within the scope of this adjudicatory proceeding. As such, it is not within the province of the Board’s authority to oversee this proceeding to resolve disputes the Intervenor may have in the future regarding how the Staff administers the FOIA process.

### DISCUSSION

#### I. The Board’s Role in the FOIA Process and Redaction of Information

The source of Staff’s disagreement with paragraph III.E of Intervenor’s Motion is this: in paragraph III.E, the Intervenor erroneously conflate the NRC FOIA process with the Board’s duty to administer the instant licensing proceeding. Intervenor repeatedly state that their intent is to develop a “process by which information inappropriately designated as [SUNSI] can be released to the public.”<sup>3</sup> However, as touched upon by MOX Services in its Answer, Intervenor have full access—per the terms of the December 31, 2008 Protective Order as approved by the Board—to any Controlled Information they would otherwise have the right to possess were it not for its designation as Controlled Information.<sup>4</sup> However, the Intervenor do not state that they are concerned that they lack the necessary information with which to fully participate in a hearing on the claims that they have raised. Instead, Intervenor’s concern lies with the general public’s access to information related to, or arising out of, the instant licensing proceeding. A process already exists by which the public may request the disclosure of information by the NRC. The NRC’s FOIA regulations, as contained in 10 C.F.R. Part 9, Subpart A, “prescribe[]

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Establishing Procedures for Public Disclosure of Information and Redaction of Sensitive Documents” (Oct. 20, 2010) (“MOX Services’ Answer”).

<sup>3</sup> See *e.g.*, Motion at 1.

<sup>4</sup> Order (Adopting Protective Order) (Dec. 31, 2008).

procedures for making NRC agency records available to the public for inspection and copying.”<sup>5</sup>

The NRC’s FOIA regulations specifically address the redaction of documents and the right to seek appeal FOIA determinations—the very same issues of concern to the Intervenors. No exception to these regulations is provided for documents that happen, by circumstance, to be related to or arising out of an NRC licensing proceeding. Thus, for the foregoing reasons, the Staff disagrees with paragraph III.E.

II. Intervenors’ Request to Limit the Use of Sensitive Information

In paragraph III.A., Intervenors also request the Board to require the parties to endeavor to limit their use of protected information.<sup>6</sup> To support this request, Intervenors state in a footnote that “[t]he *South Texas* decision does not appear to affect the ASLB’s authority to require the Staff to submit entire pleadings in publicly releasable form where possible.”<sup>7</sup> Although Intervenors are correct that *South Texas* does not address that issue, the Staff disagrees with the inference that Intervenors make: that the Board could require the parties to submit entire pleadings in a publicly available form. The Staff must be able to present its opinions and support its case using whatever documentation it deems appropriate, even if that documentation is SUNSI or otherwise classified information. Especially in this case, where the Intervenors have access to all the same SUNSI information that the Staff and MOX Services have, and the proposed contentions clearly involve SUNSI information, the Staff should not be required, to its own detriment, to exclude information from its filings.

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<sup>5</sup> 10 C.F.R. § 9.11.

<sup>6</sup> Motion at 5.

<sup>7</sup> *Id.* at 5, fn.3. *South Texas Project Nuclear Operating Company* (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC \_\_\_\_ (2010) (“*South Texas*”), concerns a Staff determination that a potential party could not have access to a SUNSI document under a Commission procedure not relevant to this proceeding, and a Board decision ordering redaction of the document in question. That procedure is entitled “Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information, Attachment 1” (Feb. 29, 2009) and can be found at ML080380626.

CONCLUSION

While the Staff agrees with, or alternatively does not oppose, many of the Intervenors' proposed measures, the Staff disagrees with the Intervenors' proposals regarding the FOIA process and redaction and elimination of SUNSI information.

Respectfully submitted,

**/RA/**

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Counsel for the NRC Staff

Dated at Rockville, MD,  
this 22nd day of October, 2010.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO INTERVENORS' MOTION FOR ISSUANCE OF AN ORDER ESTABLISHING PROCEDURES FOR PUBLIC DISCLOSURE AND REDACTION" in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (\*); and by electronic mail as indicated by a double asterisk (\*\*) on this 22nd day of October, 2010:

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