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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

THE ATOMIC SAFETY AND LICENSING BOARD

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

In the Matter of	November 30, 2011
SHAW AREVA MOX SERVICES, LLC	Docket No. 70-3098-MLA
(Mixed Oxide Fuel Fabrication Facility Possession and Use License)	ALSBP No. 07-856-02-MLA-BD01

SHAW AREVA MOX SERVICES, LLC'S POSITION ON THE BOARD'S AUTHORITY WITH RESPECT TO CONTENTION 4 AND REPLY TO INTERVENORS' STATEMENT REGARDING CONTENTION 4

I. INTRODUCTION AND BACKGROUND

A. Pertinent Procedural History

This proceeding pertains to Shaw AREVA MOX Services, LLC's ("MOX Services" or "Applicant") License Application for the possession and use of byproduct, source, and special nuclear material at the MOX Facility.[1] On May 14, 2007, Nuclear Watch South, Blue Ridge Environmental Defense League, and the Nuclear Information and Resource Service (collectively

[1] *See* Letter from D. Stinson, MOX Services, to NRC, Duke Cogema Stone & Webster Mixed Oxide Fuel Fabrication Facility Submittal of License Application (Sept. 27, 2006) ("Sept. 27, 2006 Application Letter"), *available at* ADAMS Accession No. ML062750194. The Applicant submitted a revised license application on November 17, 2006. *See* Shaw AREVA MOX Services Mixed Oxide Fuel Fabrication Facility License Application at 13-1 (Nov. 17, 2006) ("Nov. 17, 2006 License Application"), *available at* ADAMS Accession No. ML070160311.

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"Intervenors") filed their Petition to Intervene and Request for Hearing in this proceeding.[2] On June 27, 2008, this Atomic Safety and Licensing Board ("ASLB" or "Board") granted that Petition, admitting Intervenors' Contention 4, reformulated as follows:

CONTENTION 4:

LICENSE APPLICATION FAILS TO ADDRESS HAZARDS POSED BY UNPLANNED INTERRUPTIONS IN THE TRANSFER OF RADIOACTIVE WASTE

> The License Application and Integrated Safety Analysis Summary (ISA Summary) (Chapter 5 of the license application) for the proposed mixed oxide fuel fabrication facility ([MOX Facility]) are inadequate because they do not address safety and public health risks posed by an inability to transfer liquid high-alpha waste from the facility, resulting in the need to forego receipt of radioactive materials, safely shut down the facility, or take other appropriate measures, and to store liquid high-alpha waste at the site for an extended period of time.
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> The [MOX Facility] License Application does not assure that there is always sufficient liquid high-alpha waste storage capacity to bring the facility to a safe configuration in the event that liquid high-alpha waste receipt by DOE is interrupted, in that it fails to describe how active waste generating operations would be terminated or curtailed before the liquid high-alpha waste storage capacity exceeds design limits, allowing for any backlog of such waste in the facility. *See* NUREG-1821 ([MOX Facility] Construction Authorization Request FSER), § 11.2.1.3.11, p. 11-48, in which the NRC Staff stated its expectation that actual setpoints would be provided in the License Application.
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> Additionally, the License Application does not address the safety issues associated with liquid high-alpha waste aging within the facility due to possible protracted onsite storage that might be occasioned by a delay in liquid high-alpha waste transfer operations caused by an unplanned interruption in the receipt of liquid high-alpha waste by DOE. This would entail including in the ISA Summary analyses of hazards posed by aging liquid high-alpha wastes over short, intermediate, and long duration timeframes. *See* Letter from Graham B. Wallis [ACRS], to Nils J.

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[2] *See* Petition for Intervention and Request for Hearing (May 14, 2007), *available at* ADAMS Accession No. ML071410426.

Diaz, Review of the Final Safety Evaluation Report for the Mixed Oxide Fuel Fabrication Facility Construction Authorization Request (Feb. 24, 2005).[3]

In the three years that followed, MOX Services and the NRC Staff provided monthly disclosures and updates to the hearing file, respectively. MOX Services alone provided thousands of documents to Intervenors. During this same period, the Intervenors submitted only two disclosures, both shortly after admission of Contention 4.

On April 29, 2009, more than two and a half years ago, MOX Services submitted its "Safety Evaluation of the Postulated Inability to Transfer High Alpha Waste from the MOX Fuel Fabrication Facility and the Short, Intermediate, and Long-Term Storage of High Alpha Waste in the KWD Unit" ("Safety Evaluation") to the Board and Parties.[4] At 43 single-spaced pages, excluding attachments and references, MOX Services' Safety Evaluation addressed the potential hazards that could result from an unplanned interruption in the ability to transfer liquid high alpha waste ("HAW") from the MOX Facility, that is, from the scenario postulated by Contention 4.[5] Along with the transmittal of the Safety Evaluation, MOX Services also provided an introduction to the Integrated Safety Analysis ("ISA") process used to ensure compliance with the 10 CFR § 70.61 performance requirements for the MOX Facility, along with an explanation as to how the Safety Evaluation fits into the ISA process.[6] In addition, MOX Services provided an Aqueous Polishing ("AP") Process Description and a detailed flowchart of the AP process, to

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[3] *Shaw AREVA MOX Servs.* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 464, 487-88 (2008).

[4] *See* Ex. APP000013, Letter from T. Matthews to Board Attach. A (Apr. 29, 2009).

MOX Services provided an updated Safety Evaluation on July 23, 2009. Ex. APP000007, Safety Evaluation of the Postulated Inability to Transfer High Alpha Waste from the MOX Fuel Fabrication Facility and the Short, Intermediate, and Long-term Storage of High Alpha Waste in the KWD Unit, DCS01-RRJ-DS-ANS-H-38426, Rev. 2 (July 22, 2009).

[5] *See id.*

[6] *See* Ex. APP000013, Attach. A.

further facilitate the Board's and Parties' understanding of the Safety Evaluation.[7] MOX Services also disclosed nearly forty relevant reference documents.[8] In short, the Safety Evaluation and supporting documents presented MOX Services' position on Contention 4 in extensive detail.

The NRC Staff provided its review of the Safety Evaluation—and in effect, Contention 4—in the Safety Evaluation Report ("SER") issued on December 15, 2010.[9] In the SER, the Staff concluded that MOX Services' Items Relied on for Safety ("IROFS") and management measures would preserve sufficient buffer volume in the liquid HAW tanks to safely shut down the AP process and store HAW over short, intermediate, or long timeframes.[10]

The Intervenors submitted their evaluation of Contention 4 on January 24, 2011.[11] Although at that time, Intervenors had the benefit of *thirty months* of the Staff's and MOX Services' disclosures, and *twenty months* to review MOX Services' 43-page Safety Evaluation and supporting documents, Intervenors' evaluation of Contention 4 was barely more than two pages long. About half of those two pages were dedicated to a simple, plainly evident, and immaterial misstatement made by one of MOX Services' experts on a single occasion. The remainder of Intervenors' evaluation consisted of three paragraphs dedicated to two new issues that are beyond the scope of this contention, and indeed, the purview of this Board, as explained

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7 *See* Ex. APP000007, Attach. A.

8 *See id.* at 41-43.

9 *See* Final Safety Evaluation Report for the License Application to Possess and Use Radioactive Material at the Mixed Oxide Fuel Fabrication Facility in Aiken, SC (Dec. 2010), *available at* ADAMS Accession No. ML103430615. Relevant excerpts from the SER have been submitted as Ex. APP000009.

10 *See id.* § 11.2.1.3.11.

11 *See* Letter from D. Curran to Board (Jan. 24, 2011), *available at* ADAMS Accession No. ML110270119.

further below. Only one paragraph related to MOX Services' Safety Evaluation and Contention 4.

Subsequently, MOX Services submitted to the Board and the Parties its pre-filed testimony on Contention 4.[12] That testimony, at 189 pages, described MOX Services' position with regard to Contention 4 in exhaustive detail, but in effect, merely expanded upon and clarified the information previously presented in MOX Services' earlier Safety Evaluation.

In response, Intervenors provided no testimony on Contention 4. Instead, they stated that "they [have] chosen not to take a position on [Contention 4] in the evidentiary proceeding."[13] The NRC Staff's pre-filed testimony, meanwhile, fully supported MOX Services' position.[14]

In light of the extensive evidence presented by MOX Services and the NRC Staff on Contention 4, and the Intervenors' abandonment of the Contention, MOX Services moved to dismiss Contention 4, with the support of the NRC Staff.[15] Intervenors did not oppose that motion.[16]

B. Intervenors' Statement on Contention 4

With this procedural posture, this Board instructed the Intervenors to explain their present position with regard to Contention 4.[17] On November 10, 2011, Intervenors filed their Statement

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12 *See* Ex. APP000002.

13 Intervenors' Initial Statement at 2 n.1 (Oct. 19, 2011).

14 *See* NRC Staff's Initial Statement of Position on Contentions 4, 9, 10, and 11, at 6-8 (Oct. 19, 2011).

15 *See* Shaw AREVA MOX Services, LLC's Partially Unopposed Motion to Dismiss and Motion to Strike at 7 (Oct. 31, 2011) ("October 31 Motion").

16 *See id.*

17 *See* E-mail from S. Lewman, "MOX Telephonic Status Conference" (Nov. 3, 2011).

Regarding Contention 4.[18] In this brief Statement, the Intervenors cited budgetary constraints for their decision not to advance any issues for hearing on this Contention, and identified four remaining concerns:

> *First*, the Intervenors noted an unexplained discrepancy in MOX Services' statements regarding the duration of timeframes for storage of liquid [HAW] at the facility. *Second*, while MOX Services had conceded that extended storage of liquid [HAW] might require a Resource Conservation and Recovery Act ("RCRA") permit, the company had not demonstrated how it would timely obtain or comply with a RCRA permit. *Third*, Intervenors were concerned that MOX Services had not made adequate financial provision to maintain the high level of safety needed if the [MOX Facility] became a *de facto* waste storage facility. *Finally*, the Intervenors asserted that MOX Services had not provided adequate justification for its failure to add an automatic level control to the [HAW] storage tanks, which Intervenors believe is necessary to provide a reasonable assurance that the tanks will not overflow.[19]

C. Board Invitation for a MOX Services Reply

During a teleconference with the parties on November 16, 2011, the Board invited MOX Services to reply to Intervenors' Statement Regarding Contention 4.[20] The Board also asked MOX Services to include in its reply, a discussion of the Board's authority with respect to Contention 4.[21]

Accordingly, Section II addresses the Board's authority with respect to Contention 4. Section III presents MOX Services' Reply to Intervenors' Statement Regarding Contention 4.

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[18] Intervenors' Statement Regarding Contention 4 (Nov. 10, 2011).

[19] Intervenors' Statement Regarding Contention 4, at 3 (emphasis added).

[20] *See* Tr. at 1030-32, Nov. 16, 2011. NRC regulations allow moving parties the right to reply when permitted by the presiding officer. *See* 10 CFR § 2.323(c).

[21] Tr. at 1033.

II. THE BOARD'S AUTHORITY WITH RESPECT TO CONTENTION 4

During the November 16, 2011 teleconference, Judge McDade requested that MOX Services address, in this Reply, the Board's authority to ask questions about Contention 4 at the hearing.[22] Recognizing that the Board lacks the authority to conduct a *sua sponte* inquiry in this proceeding, Judge McDade specifically asked whether the Board could seek Commission approval for *sua sponte* review of Contention 4, or whether the Board could view Contention 4 as a matter put into controversy by the Intervenors.[23]

As recognized by Judge McDade and briefly explained below, Commission regulations do not authorize *sua sponte* review in this proceeding. *Sua sponte* review, authorized by 10 CFR § 2.340(a), is only applicable to contested proceedings concerning applications for an operating license for a production and utilization facility; even then, it is reserved for serious safety, environmental, or common defense and security issues, and it is only permitted upon Commission authorization. Section 2.340(e), applicable to proceedings not involving production or utilization facilities, does not permit a licensing board to request Commission approval to consider an issue. Because Section 2.340(e)—rather than Section 2.340(a)—applies to this proceeding, this Board may not seek Commission approval to consider the issues raised in Contention 4.

Furthermore, although the Intervenors proffered Contention 4 and the Board admitted the Contention for disposition in an evidentiary hearing, the Board no longer has authority under 10 CFR § 2.340(e) to make findings of fact and conclusions of law on issues within the scope of that Contention. The Intervenors have not even attempted to meet their evidentiary burden and

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[22] *Id.*

[23] *Id.*

have abandoned the Contention. Thus, there are no issues "in controversy" with respect to Contention 4.

A. The Board Does Not Have *Sua Sponte* Authority in this Proceeding

The regulation that authorizes *sua sponte* review – that is, 10 CFR § 2.340(a) – only pertains to operating license proceedings for production and utilization facilities.[24] Section 2.340(e), which pertains to "proceedings not involving production or utilization facilities," does not include the language of Section 2.340(a) that permits *sua sponte* review. Rather, Section 2.340(e) permits licensing boards to:

> make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding, and on any matters designated by the Commission to be decided by the presiding officer.[25]

Because the instant proceeding does not pertain to a production or utilization facility, the plain language of the regulation makes clear, as Judge McDade has acknowledged, that the Board does not have *sua sponte* authority in this proceeding.

B. The Board May Not Ask for *Sua Sponte* Authority In This Proceeding

In proceedings where it is available, *sua sponte* review is reserved for extraordinary circumstances in which serious matters are at issue. The Commission regulations at 10 CFR § 2.340(a), pertaining to *sua sponte* inquiries, codified the Commission's Policy Statement on Conduct of Adjudicatory Proceedings.[26] That Policy Statement explains that a licensing board may consider matters on its own motion, *but only with Commission approval*, and "only where

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[24] *See* 10 CFR § 2.340(a).

[25] *See id.* § 2.340(e).

[26] *See* Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2210 (Jan. 14, 2004).

[the licensing board] finds that a serious safety, environmental, or common defense and security matter exists."[27] The Commission added, "[s]uch authority is to be exercised only in extraordinary circumstances."[28] Such circumstances do not exist merely by virtue of the fact that the matters satisfy the Commission's contention admissibility requirements.[29]

The issues raised by Contention 4, which the Intervenors have abandoned in order to focus on the remaining Contentions, do not give rise to serious issues warranting a request to the Commission. First, Contention 4 on the whole does not raise any environmental or common defense or security issues. With respect to the safety issues raised by Contention 4, MOX Services' Safety Evaluation and testimony and the NRC Staff's SER and testimony, demonstrate that MOX Services has established appropriate IROFS and management measures to address the hypothetical scenario posed by Contention 4. Second, Intervenors identify only one remaining concern within the scope of Contention 4, pertaining to an automatic level control.[30] As

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[27] *See* Policy on Conduct of Adjudicatory Proceedings; Policy Statement, 63 Fed. Reg. 41,872, 41,874 (Aug. 5, 1998).

[28] *Id.* Importantly, even these extraordinary circumstances are reserved only for licensing proceedings involving a production or utilization facility operating license. *See* 10 CFR § 2.340.

[29] The simple fact that the Board deemed Contention 4 to be admissible for hearing does not mean that the Contention presents "serious" safety matters that warrant the Board's independent review. The Commission has explicitly held as much. In the operating license proceeding for Comanche Peak Units 1 and 2, the Commission addressed a scenario in which the licensing board dismissed an intervenor, but retained several of the intervenors' contentions under its *sua sponte* authority. *See Tex. Util. Generating Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-81-36, 14 NRC 1111 (1981). As explained by the Commission, the licensing board drew a distinction between dismissal of an admitted contention and the assertion of a previously unraised issue *sua sponte*. *See id.* at 1113. Rejecting that distinction, the Commission held,

> The Board's reliance on the admission of a contention as a factor mandating the exercise of its *sua sponte* authority is misplaced. The mere acceptance of a contention does not justify a board to assume that a serious safety, environmental, or common defense and security matter exists or otherwise relieve it of the obligation under [10 CFR § 2.340(a)] to affirmatively determine that such a matter exists.

Id. at 1114. In addition, the Commission held that "the Board has confused its inherent power to shape the *course* of the proceeding . . . with its limited authority under [10 CFR § 2.340(a)] to shape the *issues* of the proceeding." *Id.* at 1113.

[30] *See* Intervenors' Statement Regarding Contention 4, at 3.

explained in Section III.C below, had Intervenors read the handful of relevant pages in MOX Services' pre-filed testimony or Safety Evaluation, the latter of which Intervenors have now had for thirty months, Intervenors would have realized this remaining concern has been addressed.

Section 2.340(e), applicable here, not only does not contain the "serious safety, environmental, or common defense and security matter" language, it does not contain the language specifically conditioning *sua sponte* review on Commission approval (as does 10 CFR § 2.340(a)).[31] In other words, although Section 2.340(a) permits *sua sponte* review only upon Commission approval, even that option is simply not available under Section 2.340(e). Thus, the Board may not seek authority for *sua sponte* review from the Commission.

Accordingly, there is no serious safety issue that would give rise to the extraordinary circumstances under which this Board could request Commission approval to review Contention 4. Even if such extraordinary circumstances existed, such a request is not available to this Board.

C. The Board's Authority With Respect to Contention 4 is Limited to the Issues Put Into Controversy by the Parties, and Limited Further Because Intervenors Have Abandoned the Contention.

A licensing board may issue an initial decision on matters put into controversy by the parties. But when intervenors fail to meet their evidentiary burden and abandon an admitted contention, that contention is no longer in controversy. This result logically follows from NRC case law holding that issues not advanced by a party are deemed waived.[32] Further, this result

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[31] *See* 10 CFR § 2.340(a) ("the presiding officer shall make findings of fact and conclusions of law on . . . any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, *and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer*") (emphasis added).

[32] *See* discussion *infra* at pp. 11-12 and notes 34-36.

more clearly follows from Commission precedent that licensing boards must dismiss even those abandoned contentions that raise serious safety matters.[33]

Although *sua sponte* review is not available to this Board, 10 CFR § 2.340(e) permits a licensing board in proceedings not involving production or utilization facilities to render an initial decision on matters put into controversy by the parties, or matters designated by the Commission. As the Commission has not designated any specific matters for the Board's review in this proceeding, this Board may only make findings of fact and conclusions of law on the matters put into controversy by the Parties. In the subject proceeding, the issues raised in Contentions 4, 9, 10, and 11 *had* been put into controversy by the Intervenors. As a result, had the Intervenors provided evidence on Contention 4, this Board would have had the authority to make findings of fact and conclusions of law on the matters raised in those Contentions alone.

But the Intervenors have presented absolutely no evidence and abandoned Contention 4. They have thus removed the issues raised therein from controversy.

It is a well established principle that the party advocating an admitted contention has the burden of going forward with evidence in support of that contention.[34] Elements or arguments of the contention not advanced by the intervening party are deemed waived.[35] Licensing boards

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[33] *See* discussion *infra* at pp. 12-13 and notes 38-39.

[34] *Pub. Serv. Co. of N.H.* (Seabrook Station Units 1 & 2), LBP-83-20A, 17 NRC 586, 589 (1983); *Phila. Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 191 (1975); *see also Metro. Edison Co.* (Three Mile Island Nuclear Station Unit 1), ALAB-772, 19 NRC 1193, 1245 (1984) (contention challenging ability to operate safely gives rise to "burden of going forward"), *rev'd in part on other grounds*, CLI-85-2, 21 NRC 282 (1985); *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-697, 16 NRC 1265, 1271 (1982) ("Of course, licensee generally bears the ultimate burden of proof. But intervenors must give some basis for further inquiry." (citation omitted)).

[35] *See, e.g., Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), LBP-05-12, 61 NRC 319, 326 (holding that an intervenor waived all aspects of its contention that it did not advance in its pleadings: "While an applicant has the ultimate burden of proof on any issues upon which a hearing is held, hearings are held on

have found multiple reasons for this result. For example, the presiding officer in *Hydro Resources* explained:

> Arguments that the Intervenors failed . . . to raise or develop . . . will be treated as waived for several reasons. First, the Intervenors' failure to raise an argument . . . deprives [the applicant] of a fair opportunity to discern and attempt to rebut that argument. Second, my function as the Presiding Officer of this Licensing Board is to be an impartial arbiter of the challenges raised by the Intervenors, and the integrity of this function would be undermined if I were required to search the record for evidence to construct and develop the Intervenors' arguments. Finally, judicial economy and efficiency are promoted by a rule that relieves the Licensing Board from the task of searching for the Intervenors' arguments by "dig[ging] through the reams of paper which [they] have deposited . . ., particularly [when the Intervenors] did not consider the [arguments] sufficiently important to raise [them].[36]

Where an intervenor has wholly abandoned a contention, as in this case, the Board likewise has an even more limited role with respect to the issues raised in that Contention.

Clearly, licensing boards have the authority to dismiss abandoned contentions.[37] But the relevant case law, as well as the regulations and regulatory history discussed above, suggest that licensing boards *must* dismiss abandoned contentions. For example, the Appeal Board has held:

> The Commission's regulations limit operating license proceedings to 'matters in controversy among the parties' or matters raised on a licensing board's own initiative *sua sponte*. Where only a single intervenor is participating in an operating license proceeding, its withdrawal serves to bring the proceeding to an end. Where there is more than one intervenor in a case, the withdrawal of one does

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only those issues that an intervenor brings to the fore. And the burden of going forward on any issues that make it to the hearing process is on the intervenor that is pursuing that issue."), *aff'd*, CLI-05-19, 62 NRC 403 (2005).

[36] *Hydro Res., Inc.* (P.O. Box 777, Crownpoint, NM 87313), LBP-05-17, 62 NRC 77, 98 n.14 (2005) (citations omitted). Although the regulation that was at issue in *Hydro Resources* has been superseded and is no longer applicable to Subpart L proceedings, the board's logic in that case is transferable to current proceedings, such as this one, in which a party fails to advance a particular issue.

[37] *Boston Edison Co.* (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156, 157 (1976).

> not terminate the proceeding. Under NRC procedure, however, it does serve to remove the withdrawing party's contentions from litigation. The Commission has made it clear, in this regard, that the mere acceptance of contentions at the threshold stage does not turn them into cognizable issues for litigation independent of their sponsoring intervenor.[38]

Indeed, as highlighted by the text above, our current procedural posture is not nearly the most draconian. Consider the extreme example, where a sole intervenor in an operating licensing proceeding for a production or utilization facility withdraws its sole contention. In that scenario, the Commission has held that licensing boards *must dismiss even those contentions that raise serious safety matters*:

> Because the parties to an operating license proceeding may fail to raise a serious matter that can profitably be addressed in the proceeding, the Commission's regulations at [10 CFR § 2.340(a)] permit matters not put into controversy by the parties to be examined and decided by the presiding officer where he or she determines that a serious safety, environmental, or common defense and security matter exists. However, this provision for *sua sponte* review is intended to operate only in the context of an ongoing operating license proceeding. When there is no proceeding before a board, it is deprived of the ability to gain the perspective on issues that is acquired by receiving the input of parties to a proceeding. In such circumstances, the Board loses its reason for being—to serve as a forum for hearing parties with differing viewpoints. *Absent that function, we believe that it is more appropriate to apply the expertise of this agency's staff and the informal staff review process to the issues.*
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> Therefore . . . we wish to make clear that a licensing board does not have the authority to raise a *sua sponte* issue relating to an application for an operating license or amendments to an operating license when there is no proceeding before the board relating to the application. This rule applies, for example, where a single intervenor left in a proceeding voluntarily or involuntarily has withdrawn from the proceeding. If, as a result of its involvement in such a proceeding, a licensing board believes that there are

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[38] *Houston Lighting & Power Co.* (S. Tex. Project, Units 1 & 2), ALAB-799, 21 NRC 360, 382-383 (1985) (citations omitted).

> serious safety issues that remain to be addressed, it should dismiss the case and refer the issues to the Staff for review.[39]

Thus, the remaining issues—even serious matters that might merit *sua sponte* review—are deemed suitably resolved by the Staff review process once abandoned by intervenors.

Given our procedural posture, the Board must dismiss Contention 4. The Board may not independently pursue any substantive issue at its own initiative, or solicit Commission approval to do so.

III. INTERVENORS' REMAINING ISSUES

As explained in Section I.B above, Intervenors have identified four outstanding matters that they allege pertain to Contention 4. Intervenors have acknowledged that the first of the four has been resolved to their satisfaction. Of the remaining three, two are beyond the scope of this proceeding, and certainly beyond the scope of Contention 4. Those issues are beyond this Board's purview (unless and until the Intervenors demonstrate satisfaction of the Commission's pleading requirements for new or late filed contentions, under 10 CFR §§ 2.309(f)(2) or (c)). MOX Services has resolved the remaining issue, as demonstrated below. Accordingly, no aspects of Contention 4 remain to be heard in this proceeding.

A. Intervenors' First Issue Has Been Resolved to their Satisfaction

Intervenors conclude, in their Statement Regarding Contention 4, that their first issue has been resolved to their satisfaction. Specifically, Intervenors state, "MOX Services' testimony at pages 34-35 resolved Intervenors' first concern about the unexplained discrepancy in MOX

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[39] *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-91-13, 34 NRC 185, 188 (1991) (emphasis added).

Services' statements regarding the duration of timeframes for storage of liquid [HAW] at the facility."[40] Accordingly, no issue remains for the Board's resolution.

B. Intervenors' Second and Third Issues are Beyond the Scope of Contention 4 and Also, Beyond the Jurisdiction of this Licensing Board

Intervenors describe their second outstanding issue as pertaining to MOX Services' acquisition of a RCRA permit to store liquid HAW, and their third outstanding issue as pertaining to financial assurance to operate as a waste storage facility.[41] For similar reasons, both of these issues are not appropriate for review by this Board.

First, both issues are beyond the scope of this NRC licensing proceeding. Whether MOX Services needs or obtains a RCRA permit is a question for South Carolina's Department of Health and Environmental Control ("SCDHEC"), which implements RCRA under delegated authority by the U.S. Environmental Protection Agency.[42] Similarly, questions of the funding of the MOX Facility are reserved for the U. S. Congress, which appropriates funds to the U.S. Department of Energy for this purpose.[43]

Second, both issues are well beyond the scope of Contention 4. The plain language of Contention 4, as admitted by the Board, contains no references to RCRA permits or financial qualification requirements that may, by some speculative reach, be tangentially related to storage of liquid HAW at the MOX Facility.[44] To the contrary, the language of the contention is limited

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40 Intervenors' Statement Regarding Contention 4, at 4.

41 *See id.* at 3.

42 42 U.S.C. § 6926 (2006); *See* South Carolina; Decision on Final Authorization of State Hazardous Waste Management Program, 50 Fed. Reg. 46,437, 46,440 (Nov. 8, 1985) (noticing EPA's grant of Final Authorization to the state of South Carolina to operate its program in lieu of the federal RCRA program).

43 *See* License Application Ch. 2.

44 *See MFFF*, LBP-08-11, 67 NRC at 487-88.

to "the waste storage capacity to bring the facility to a safe configuration," and "the safety issues associated with liquid [HAW] aging within the facility."[45] Moreover, there is no indication that the Intervenors or this Board intended that Contention 4 encompass questions of RCRA permitting or financial qualifications when Contention 4 was offered or admitted.[46] Had the Intervenors wanted to pursue these issues, they would have had to demonstrate satisfaction of the Commission's pleading requirements for new or late-filed contentions, under 10 CFR §§ 2.309(f)(2) and (c).

Third, both issues are entirely speculative and without any basis in the application presented by MOX Services, which is the subject of this proceeding. MOX Services continues to assert that it has no intention of storing liquid HAW, and that the underlying premise of Contention 4—the postulated inability to transfer liquid HAW—is unfounded.

For these reasons, and without even reaching the merits, the second and third issues raised by Intervenors in their Statement Regarding Contention 4 must not be considered further by the Board.

C. Intervenors' Fourth Issue is Resolved, as Demonstrated in MOX Services' Safety Evaluation and Testimony, and the Staff's SER and Testimony

Intervenors raise only one issue within the scope of Contention 4, and have admitted that they failed to review MOX Services' testimony to determine whether that issue was addressed.[47] Yet this fourth issue (whether MOX Services has provided adequate justification for exclusion of

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[45] *Id.*

[46] *See* Petition for Intervention (containing no reference to RCRA or financial qualification concerns); *MFFF*, LBP-08-11, 67 NRC 460 (likewise containing no reference to RCRA or financial qualification).

[47] *See* Intervenors' Statement Regarding Contention 4, at 4.

an automatic level control in the HAW storage tanks), was addressed in MOX Services' pre-filed testimony and Safety Evaluation.

As explained in MOX Services' Pre-Filed Testimony on Contention 4, its Safety Evaluation, *and* its Initial Statement of Position, liquid HAW will accumulate relatively slowly compared to the large storage capacity in the MOX Facility.[48] In fact, the storage capacity of the liquid HAW tanks (29,000 liters) is sufficiently large that under normal operation (generating 1000 liters of liquid HAW per week), the MOX Facility could continue to operate for many weeks before storage limits needed to safely shut down the MOX Facility would even be approached.[49]

Even with this slow accumulation, MOX Services has established buffer space required for safe shutdown of the facility, which operator actions are required to maintain.[50] MOX Services has explained that a failure of this buffer control could only occur if there is: (a) a complete loss of HAW inventory control associated with batch processing during a period when HAW could not be transferred; or (b) a failure to respond to an unanticipated overflow into one of the HAW tanks over a period of several weeks.[51]

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[48] *See* Ex. APP000002, at 38-43; Ex. APP000007, at 12-14; MOX Services' Initial Statement of Position on Contentions 4, 9, 10 and 11, at 17-18 (Sept. 29, 2011).

[49] *See, e.g.*, Ex. APP000002 at 39-40.

[50] *See id.* at 40-43.

[51] *Id.* at 42-43. *See also id.* at 31 ("the over-sizing and the inter-connectivity of the KWD HAW tanks (via the overflow lines) would prevent a high level in any single tank, and operators would have had to ignore multiple process warnings (each tank has a high level warning) and not have been tracking the quantity of wastes sent to the KWD HAW unit as required by procedure and ensured by the QA program").

Importantly, and as stated in MOX Services' testimony, this latter scenario is even less credible *because of the level controls in each of the HAW storage tanks.*[52] To be clear, each of the HAW storage tanks in the MOX Facility contains the level monitoring and control equipment sought by Intervenors in this fourth stated issue.[53]

Yet MOX Services goes beyond these level controls to ensure preservation of buffer storage volume in the HAW tanks. Although the scenario in which MOX Services fails to maintain adequate buffer volume is not credible, MOX Services has nevertheless conservatively designated as an IROFS the administrative control required to maintain adequate buffer space to complete flushing activities during shutdown.[54]

As presented in the SER, the Staff concluded that designation of this new IROFS to maintain the buffer capacity in the HAW unit satisfies the performance requirements of 10 CFR § 70.61.[55] The Staff reiterated that conclusion in its Pre-Filed Direct Testimony of James Hammelman Concerning Contention 4.[56]

In sum, the MOX Facility contains the level controls in the HAW tanks sought by Intervenors. Still, MOX Services has taken additional, conservative measures to ensure that the MOX Facility retains sufficient buffer volume in the liquid HAW storage tanks to safely shutdown the MOX Facility, in the event of an unplanned interruption in the transfer of liquid

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52 *See id. See also id.* at 42 ("To maintain 400 liters (or more) of buffer space, operating procedures *and existing process level instrumentation* in the KWD HAW unit will be employed. . . . The batch controls are augmented by *normal process level controls on each tank* and a low HAW total buffer storage volume indication and warning (i.e., the operator is notified if the remaining total buffer volume in the KWD HAW is becoming low).") (emphasis added).

53 *See id.* at 38-39.

54 *See id.* at 43.

55 *See* Ex. APP000009, at 11-58 to 11-60.

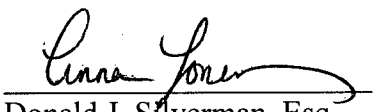
56 Exhibit NRC000002, at 15-17.

HAW. The NRC Staff has reviewed these measures, and concluded they are sufficient to satisfy the Commission's applicable performance requirements. Accordingly, no aspect of this fourth issue remains for the Board's resolution.

IV. CONCLUSION

For the reasons stated above, and consistent with MOX Services' October 31 Motion, MOX Services respectfully requests that the Board dismiss Contention 4.

Respectfully submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

THE ATOMIC SAFETY AND LICENSING BOARD

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

In the Matter of	November 30, 2011
SHAW AREVA MOX SERVICES, LLC	Docket No. 70-3098-MLA
(Mixed Oxide Fuel Fabrication Facility Possession and Use License)	ALSBP No. 07-856-02-MLA-BD01

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2011, copies of "Shaw AREVA MOX Services, LLC's Position on the Board's Authority with Respect to Contention 4 and Reply to Intervenors' Statement Regarding Contention 4" were served upon the persons listed below by email and first class mail.

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