DPO Case File for DPO-2012-001

The following pdf represents a collection of documents associated with the submittal and disposition of a differing professional opinion (DPO) from an NRC employee involving the Applicability of Reporting Requirements in 10 CFR 70.72 for Shaw Areva MOX Services.

http://pbadupws.nrc.gov/docs/ML0417/ML041770431.pdf

The DPO Program is a formal process that allows employees and NRC contractors to have their differing views on established, mission-related issues considered by the highest level managers in their organizations, i.e., Office Directors and Regional Administrators. The process also provides managers with an independent, three-person review of the issue (one person chosen by the employee). After a decision is issued to an employee, he or she may appeal the decision to the Executive Director for Operations (EDO).

Because the disposition of a DPO represents a multi-step process, readers should view the records as a collection. In other words, reading a document in isolation will not provide the correct context for how this issue was considered by the NRC.

The records in this are public and have been redacted prior to discretionary release.

Document 1: DPO Submittal
Document 2: Memo Forwarding DPO from DPOPM to OGC (Acting General Counsel)
Document 3: Memo from OGC (Acting General Counsel) Establishing DPO Panel
Document 4: DPO Panel Report
Document 5: DPO Decision
Based on an E-mail from OGC, Shaw Areva MOX Services is not required to meet 10 CFR 70.72 for reporting changes that do not require pre-approval. 70.72(d)(2) requires the licensee to submit to the NRC annually, within 30 days after the end of the calendar year during which the changes occurred, a brief summary of all changes to the records required by 70.62.

The reason MOX Services does not report is because 10 CFR 70.72 states that "The Licensee shall..." and MOX Services is considered to be an "applicant" not a licensee.

This position was documented by OGC in the attached E-Mail.

Based on the above position, the applicant can make changes during the 10+ year construction period and would not have to submit any of those changes to the NRC for potential review until after the facility receives a license. They also would not be required to establish a configuration management system to track changes. The need for submitting changes on a yearly basis is so that the NRC has the opportunity to inspect and evaluate the changes in a timely manner.

10 CFR 70.60 states that "The regulations in 70.61 through 70.76 apply, in addition to other applicable Commission regulations, to each "applicant" or licensee that is or plans to be authorized to possess greater than a critical mass of special nuclear material, and engaged in...fabrication of mixed-oxide fuel...

It is my opinion that the regulations require that the licensee and/or applicant in this case, report changes made per 10 CFR 70.72. To date the applicant has not reported any changes although construction has been ongoing for 5 years and approximately 18,000 engineering change requests have been processed.

12 Check (a) or (b) as appropriate:

- a. Thorough discussions of the issue(s) raised in item 11 have taken place within my management chain, or
- b. The reasons why I cannot approach my immediate chain of command are:

15. ACKNOWLEDGMENT

Thank you for your differing professional opinion. It will be carefully considered by a panel of experts in accordance with the provisions of NRC 10.119, and you will be advised of any resolution. Your interest in improving NRC operations is appreciated.

[Signature]
Continuation for Item 12:

I discussed this issue with D. Tikhtinsky in headquarters and he discussed it with OGC and received back the E-mail response. It is my understanding the issue was previously discussed with OGC and the applicant with the same result.
To: 

Subject: 70.72 issue

Note: This email may contain Attorney-Client Communications or Attorney Work Product. Do not release unless the Commission determines otherwise.
Document 2: Memo Forwarding DPO from DPOPM to OGC Acting General Counsel
July 16, 2012

MEMORANDUM TO: Marian L. Zobler, Acting General Counsel  
Office of the General Counsel

FROM: Renée M. Pedersen, Sr. Differing Views Program Manager /RA/  
Office of Enforcement

SUBJECT: DIFFERING PROFESSIONAL OPINION INVOLVING APPLICABILITY OF REPORTING REQUIREMENTS IN 10 CFR 70.72 FOR SHAW AREVA MOX SERVICES (DPO-2012-001)

The purpose of this memorandum is to advise you of a Differing Professional Opinion (DPO) that was submitted to me while serving as the Differing Professional Opinions Program Manager (DPOPM). I received the DPO on June 29, 2012, and in coordination with the Director, Office of Enforcement, screened it in accordance with the guidance included in Management Directive (MD) 10.159, “The NRC Differing Professional Opinions Program.” On July 6, 2012, I notified senior management and the submitter that the preconditions for acceptance were met and that the submittal was accepted for review within the DPO Program as DPO-2012-001.

The DPO (Enclosure 1) raises concerns about whether Shaw Areva MOX Services is required to report changes made per 10 CFR 70.72. The submitter does not agree with the interpretation presented by an attorney in the Office of the General Counsel (OGC) that MOX Services is not required to report changes because they are considered an “applicant” and not a “licensee.”

Because the DPO takes issue with a position established by your organization, in accordance with section (D)(3)(c) of the Management Directive (MD) Handbook, I am forwarding this DPO to you for appropriate action.

MD 10.159-036 specifically addresses your responsibilities as an Office Director. In brief, you are required to:

- Establish an independent ad hoc panel (DPO Panel) to review the issue, draw conclusions, and make recommendations to you regarding the disposition of the issues presented in the DPO.

CONTACT: Renée M. Pedersen, OE/CRB  
(301) 415-2742
M. Zobler

- 2 -

- Provide appropriate oversight of and support to the DPO Panel to ensure a thorough and timely review of the DPO (while maintaining process independence).

- Review the DPO Panel's report to ensure that it clearly, accurately, and completely addresses the tasks outlined in your memorandum establishing the panel.

- Issue a DPO Decision to the submitter within the 120-day timeliness goal (November 2, 2012).

- Request Commission approval for DPO extensions beyond the 120-day timeliness goal. (Requests should be forwarded thru the DPOPM with the reason for the delay and a new completion date.)

- Forward status updates during the disposition of the DPO and until the time that all followup actions are complete.

- Identify and assign appropriate followup actions and establish completion dates within 2 weeks of issuing the DPO Decision. (The DPOPM and submitter should be copied on any followup action memoranda or correspondence.)

- Notify the DPOPM of followup action schedule delays, including the reason for the delay and a revised completion schedule. (The DPOPM will subsequently notify the submitter, reflect it in the DPO Monthly Status Report, and report it to the applicable Deputy Executive Director for Operations.)

- Forward a summary of the DPO to the DPOPM for inclusion in the Weekly Information Report. (In the event the DPO is appealed, the summary will be postponed until the DPO Appeal Decision is issued.)

- Take action to positively recognize the DPO submitter if the submitter's actions result in significant contributions to the mission of the agency.

- Review the DPO Case File for public release when the case is closed if the submitter requests public release.

Disposition of this DPO should be considered an important and time sensitive activity. The timeliness goal included in the MD for issuing a DPO Decision is 120 calendar days from the day the DPO is accepted for review. The timeliness goal for issuing this DPO Decision is November 2, 2012.

Process Milestones and Timeliness Goals for this DPO are included as Enclosure 2. The timeframes for completing process milestones are identified strictly as goals—a way of working toward reaching the DPO timeliness goal of 120 calendar days.

Although timeliness is an important DPO Program objective, the DPO Program also sets out to ensure that issues receive a thorough and independent review. Therefore, if you or the DPO Panel determines that an extension beyond 120 calendar days is necessary at any time during the process, please send me an email with the reason for the extension request and a new completion date. I will subsequently forward this request to the Commission for approval.
In an effort to support effective implementation, the Office of the Executive Director for Operations will establish tracking to address the three key deliverables for the DPO process:

(1) DPO Decision for DPO-2012-001 (November 2, 2012);
(2) Followup action memorandum (2 weeks after DPO Decision); and
(3) Weekly Information Report summary (2 weeks after DPO Decision);

Please ensure that all DPO-related activities are charged to Activity Code ZG0007.

Because this process is not routine, I will be meeting and communicating with all parties during the process to ensure that everyone understands the process, goals, and responsibilities. I will be subsequently sending you information intended to aid you, the DPO Panel, and support staff in implementing the DPO process.

An important aspect of our internal safety culture includes maintaining an environment that encourages, supports, and respects differing views. As such, all employees involved in the process should be instructed to exercise discretion and treat this as a sensitive matter. In an effort to preserve privacy, minimize the effect on the work unit, and keep the focus on the issues, employees should be instructed to simply refer to the employee as the DPO submitter. Managers and staff should be reminded to not engage in “hallway talk” on the issue and to refrain from behaviors that could perceived as retaliatory and or are chilling the DPO submitter or creating a chilled environment for others.

On an administrative note, please ensure that all correspondence associated with this case include the DPO number in the subject line, be profiled in accordance with the Agencywide Document Access Management System (ADAMS) template OE-011, be identified as non-public and declared an official agency record when the correspondence is issued. Please email the ADAMS accession number for the record to DPOPMP_Resource@nrc.gov and the record will be filed in the applicable DPO case file folder (DPO-2012-001) in the ADAMS Main Library. Following this process will ensure that a complete agency record is generated for the disposition of this DPO. If the submitter requests that the documents included in the DPO Case File be made public when the process is complete, you will be provided specific guidance to support a releasability review.
Finally, it would be helpful if you identify a point of contact (POC) who I can work with to support effective implementation of the DPO process. The POC can be the OGC OCWE Champion (Sara McAndrew) or someone else.

Enclosures:
1. DPO submittal
2. Milestones and Timeliness Goals

cc: (w/o enclosures)
   M. Weber, DEDMRT
   N. Mamish, AO
Finally, it would be helpful if you identify a point of contact (POC) who I can work with to support effective implementation of the DPO process. The POC can be the OGC OCWE Champion (Sara McAndrew) or someone else.

Enclosures:
1. DPO submittal
2. Milestones and Timeliness Goals

cc: (w/o enclosures)
   M. Weber, DEDMRT
   N. Mamish, AO

DISTRIBUTION: (w/o enclosures)

M. Shannon, RII       V. McCree, RII
D. Seymour, RII       S. McAndrew, OGC
DPO-2012-001 File     OE R/F

ADAMS ACCESSION NO.: Package (ML12198A463)

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OFFICIAL RECORD COPY
Document 3: Memo from OGC (Acting General Counsel) Establishing Panel
MEMORANDUM TO: Brooke Poole, Panel Chair  
Carolyn Faria, Panel Member  
Joseph Brady, Panel Member

FROM: Marian Zobler  
Acting General Counsel

SUBJECT: AD HOC REVIEW PANEL - DIFFERING PROFESSIONAL OPINION INVOLVING APPLICABILITY OF REPORTING REQUIREMENTS IN 10 CFR 70.72 FOR SHAW AREVA MOX SERVICES (DPO-2012-001)

In accordance with Management Directive (MD) 10.159, "The NRC Differing Professional Opinions Program," I am appointing you as members of a Differing Professional Opinion (DPO) Ad Hoc Review Panel (DPO Panel) to review a DPO that was forwarded to me to disposition.

The DPO (Enclosure 1) raises concerns the applicability of reporting requirements in 10 CFR 70.72 for Shaw Areva Services.

I have designated Brooke Poole chairman of this DPO Panel and Carolyn Faria as a DPO Panel member. Joseph Brady was proposed by the DPO submitter and serves as the third member of the DPO Panel. In accordance with the guidance included in MD 10.159 and consistent with the DPO Program objectives, I task the DPO Panel to do the following:

- Review the DPO submittal to determine if sufficient information has been provided to undertake a detailed review of the issue.

- Meet with the submitter, as soon as practicable, to ensure that the DPO Panel understands the submitter’s concerns and scope of the issues. (Normally within 7 days.)

- Promptly after the meeting, document the DPO Panel’s understanding of the submitter’s concerns, provide the Statement of Concerns (SOC) to the submitter, and request that the submitter review and provide comments, if necessary. (Normally within 7 days.)

- Maintain the scope of the review to not exceed those issues as defined in the original written DPO and confirmed in the SOC.

- Consult with me as necessary to discuss schedule-related issues, the need for technical support (if necessary), or the need for administrative support for the DPO Panel’s activities.
Perform a detailed review of the issues and conduct any record reviews, interviews, and discussions you deem necessary for a complete, objective, independent, and impartial review. The DPO Panel should re-interview individuals as necessary to clarify information during the review. In particular, the DPO Panel should have periodic discussions with the submitter to provide the submitter the opportunity to further clarify the submitter's views and to facilitate the exchange of information.

Provide monthly status updates on your activities via email to Renée Pedersen, Differing Views Program Manager (DVPM) about the last day of the month. This information will be reflected in the Milestones and Timeliness Goals for this DPO. Please provide a copy of email status updates to the submitter and to me.

Issue a DPO Panel report, including conclusions and recommendations to me regarding the disposition of the issues presented in the DPO. The report should be a collaborative product and include all DPO Panel member's concurrence. Follow the specific processing instructions for DPO documents.

Consult me as soon as you believe that a schedule extension is necessary to disposition the DPO.

Recommend whether the DPO submitter should be recognized if the submitter's actions result in significant contributions to the mission of the agency.

Disposition of this DPO should be considered an important and time sensitive activity. The timeliness goal included in the MD for issuing a DPO Decision is 120 calendar days from the day the DPO is accepted for review. The timeliness goal for issuing this DPO Decision is 11/2/2012.

Process Milestones and Timeliness Goals for this DPO are included as Enclosure 2. The timeframes for completing process milestones are identified strictly as goals—a way of working towards reaching the DPO timeliness goal of 120 calendar days. The timeliness goal identified for your DPO task is 70 calendar days.

Although timeliness is an important DPO Program objective, the DPO Program also sets out to ensure that issues receive a thorough and independent review. The overall timeliness goal should be based on the significance and complexity of the issues and the priority of other agency work. Therefore, if you determine that your activity will result in the need for an extension beyond the overall 120-day timeliness goal, please send me an email with the reason for the extension request and a new completion date. I will subsequently forward this request to the DVPM who will forward it to the EDO for approval.

Please ensure that all DPO-related activities are charged to Activity Code ZG0007.
Because this process is not routine, the DVPM will be meeting and communicating with all parties during the process to ensure that everyone understands the process, goals, and responsibilities. The DVPM will be subsequently sending you information intended to aid you in implementing the DPO process.

An important aspect of our internal safety culture includes respect for differing views. As such, you should exercise discretion and treat this matter sensitively. Documents should be distributed on an as-needed basis. In an effort to preserve privacy, minimize the effect on the work unit, and keep the focus on the issues, you should simply refer to the employee as the DPO submitter. Avoid conversations that could be perceived as “hallway talk” on the issue. We need to do everything that we can in order to create an organizational climate that does not chill employees from raising dissenting views.

As a final administrative note, please ensure that all correspondence associated with this case include the DPO number in the subject line, be profiled in accordance with ADAMS template OE-011, be identified as non-public and declared an official agency record when the correspondence is issued. Please email the ADAMS accession number for the record to DPOPM_Resource@nrc.gov and the record will be filed in the applicable DPO case file folder (DPO-2012-001) in the ADAMS Main Library. Following this process will ensure that a complete agency record is generated for the disposition of this DPO. If the submitter requests that the documents included in the DPO Case File be made public when the process is complete, you will be provided specific guidance to support a releasability review.

I appreciate your willingness to serve and your dedication to completing an independent and objective review of this DPO. Successful resolution of the issues is important for NRC and its stakeholders. If you have any questions, you may contact me or Renée Pedersen, DVPM, at (301) 415-2742 or email Renee.Pedersen@nrc.gov.

I look forward to receiving your independent review results and recommendations.

Enclosures:
1. DPO-2012-001
2. Milestones and Timeliness Goals

cc w/o Enclosures: Melvin Shannon
Renee Pedersen
DPO Milestones and Timeliness Goals

DPO-2012-001: Applicability of Reporting Requirements in 10 CFR 70.72 for Shaw Areva MOX Services (G20120587)

Assigned to: Marian Zobler, Acting General Counsel

DPO Panel: Brooke Poole (OCAA); Carolyn Faria (OE); Joe Brady (RIII)

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<tr>
<th>DPO Milestone</th>
<th>Timeliness Goals*</th>
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<tr>
<td>Individual submits DPO (NRC Form 680)</td>
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<td>DPOPM receives, screens, and accepts DPO</td>
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<td>Office manager establishes DPO Panel</td>
<td>14 days</td>
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<tr>
<td>DPO Panel conducts review and issues report</td>
<td>70 days</td>
<td>10/25/2012**</td>
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<td>- meets with submitter (=7 days)</td>
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<td>- establishes Statement of Concern (=7 days)</td>
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<tr>
<td>- confirms schedule with office manager (=7 days)</td>
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<tr>
<td>- completes review (=49 days after start of review)</td>
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<tr>
<td>- writes report (=21 days after completion of review)</td>
<td></td>
<td></td>
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<tr>
<td>Office manager issues DPO Decision</td>
<td>21 days</td>
<td>11/16/2012</td>
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**DPO TIMELINESS**

(time from acceptance of DPO to DPO Decision) 120 days 11/2/2012***

*The timeframes for completing process milestones are identified strictly as goals—a way of working towards reaching the Differing Professional Opinions (DPO) timeliness goal of 120 calendar days.

The timeliness goal for dispositioning a DPO (i.e., DPO Decision) will be established as 120 calendar days after a DPO has been accepted for review under the DPO Program.

Office managers should send requests for extension beyond the 120-day timeframe to the Differing Professional Opinions Program Manager (DPOPM), who will forward the request to the Commission with a recommendation.
Because this process is not routine, the DVPM will be meeting and communicating with all parties during the process to ensure that everyone understands the process, goals, and responsibilities. The DVPM will be subsequently sending you information intended to aid you in implementing the DPO process.

An important aspect of our internal safety culture includes respect for differing views. As such, you should exercise discretion and treat this matter sensitively. Documents should be distributed on an as-needed basis. In an effort to preserve privacy, minimize the effect on the work unit, and keep the focus on the issues, you should simply refer to the employee as the DPO submitter. Avoid conversations that could be perceived as "hallway talk" on the issue. We need to do everything that we can in order to create an organizational climate that does not chill employees from raising dissenting views.

As a final administrative note, please ensure that all correspondence associated with this case include the DPO number in the subject line, be profiled in accordance with ADAMS template OE-011, be identified as non-public and declared an official agency record when the correspondence is issued. Please email the ADAMS accession number for the record to DPOPM_Resource@nrc.gov and the record will be filed in the applicable DPO case file folder (DPO-2012-001) in the ADAMS Main Library. Following this process will ensure that a complete agency record is generated for the disposition of this DPO. If the submitter requests that the documents included in the DPO Case File be made public when the process is complete, you will be provided specific guidance to support a releasability review.

I appreciate your willingness to serve and your dedication to completing an independent and objective review of this DPO. Successful resolution of the issues is important for NRG and its stakeholders. If you have any questions, you may contact me or Renée Pedersen, DVPM, at (301) 415-2742 or email Renee.Pedersen@nrc.gov.

I look forward to receiving your independent review results and recommendations.

Enclosures:
1. DPO-2012-001
2. Milestones and Timeliness Goals

cc w/o Enclosures: Melvin Shannon
            Renee Pedersen

Document Name: G:GC/Zobler/DPO Documents-2012/DPO Panel Memo frm MZ.doc

OFFICIAL RECORD COPY
MEMORANDUM TO:  Margaret M. Doane, General Counsel
FROM:  Brooke D. Poole, DPO Panel Chair
        Carolyn Faria, DPO Panel Member
        Joseph Brady, DPO Panel Member
SUBJECT:  DIFFERING PROFESSIONAL OPINION PANEL REPORT
APPLICABILITY OF REPORTING REQUIREMENTS IN 10 C.F.R.
§ 70.72 FOR SHAW AREVA MOX SERVICES (DPO 2012-001)

By memorandum dated July 25, 2012, Marian L. Zobler, Acting General Counsel appointed us as members of a DPO Ad Hoc Review Panel (DPO Panel) to review DPO 2012-001. The DPO Panel has completed its review in accordance with the guidance in Management Directive 10.159. The NRC Differing Professional Opinions Program

The DPO Panel Report is enclosed for your consideration. The DPO Panel’s conclusions are summarized as follows

Based on the documents reviewed by the DPO Panel, and on discussions with the DPO submitter and other knowledgeable individuals, the DPO Panel finds that the reporting requirement of 10 C.F.R. § 70.72(d)(2) applies to Shaw AREVA MOX Services, LLC’s (MOX Services) mixed-oxide fuel fabrication facility (MOX facility). Particularly, the Panel concludes that changes related to construction performed under the construction authorization are subject to Section 70.72 to the extent that those changes are appropriately encompassed by the requirements of that rule. Consequently, the DPO Panel finds that MOX Services should evaluate potential changes during construction to determine whether NRC approval is required prior to their implementation consistent with the requirements of 10 C.F.R. § 70.72 and should submit an annual summary of facility changes made in the previous calendar year consistent with 10 C.F.R. § 70.72(d)(2).

Further, the DPO Panel finds that MOX Services currently has in place processes in Chapter 16 of its currently-pending application to possess and use special nuclear material, and separately in internal guidance that governs changes during construction. These processes are not identical to the evaluation process set forth in section 70.72. Specifically, the application and internal guidance appear to set forth overlapping and potentially inconsistent direction on the evaluation of construction changes.

The DPO Panel also offers the following recommendations

We recommend that the General Counsel confirm that the reporting requirement of section 70.72(d)(2) currently applies to actions taken by MOX services under the construction authorization (CAMOX-001) for the MOX facility. We further recommend that OGC transmit this

During the pendency of the DPO Panel’s review, Ms. Doane was appointed General Counsel.
position to the Office of Nuclear Material Safety and Safeguards (NMSS) in writing, together with any desired clarifying guidance on interactions between NMSS and the Office of the General Counsel regarding the application of section 70.72 on a case-by-case basis.

The General Counsel should advise NMSS to communicate to MOX Services that section 70.72 applies to its current activities under CAMOX-001, explaining the basis for this determination. NMSS, working with regional inspection staff, should collaborate with MOX Services to obtain annual reports encompassing activities undertaken since commencement of construction. This effort might include revising applicable regulatory guidance (e.g., RG 3.74).

The General Counsel should request that NMSS work with MOX Services to revise (via license application amendment or other appropriate mechanism) the change processes identified in the current license application and MOX Services' internal guidance, to ensure that those processes are internally consistent and expected to result in compliance with section 70.72.

Please do not hesitate to contact us should you have questions regarding the enclosed report.

cc DPO submitter
Roy Zimmerman, Director, Office of Enforcement
Renee Pedersen, DPO Project Manager
Differing Professional Opinion (DPO)
Regarding the Applicability of Reporting Requirements in 10 C.F.R. § 70.72 to Shaw AREVA MOX Services
(DPO-2012-001)

DPO Panel Report

Brooke D. Poole, Panel Chair

Carolyn Farla, Panel Member

Joseph Brady, Panel Member

October 25, 2012
Introduction

On June 29, 2011, a Differing Professional Opinion (DPO) was filed regarding the applicability of the requirements in 10 C.F.R. § 70.72 to Shaw AREVA MOX Services LLC (MOX Services) for reporting changes to its mixed-oxide fuel fabrication facility (MOX facility) that do not require prior NRC approval. In particular, the DPO challenged a statement made in a February 6, 2012, e-mail from an attorney in the Office of the General Counsel (OGC) to a Senior Project Manager in the Office of Nuclear Material Safety and Safeguards (NMSS). The submitter challenged the statement made by the attorney in that e-mail, that section 70.72 applied by its terms, to licensees but not license applicants.

On July 25, 2012, the Acting General Counsel established the DPO Ad Hoc Review Panel (DPO Panel) to independently review the matter. Subsequently, on August 8, the DPO Panel interviewed the submitter regarding his DPO, and then developed a concise Statement of Concerns that would guide the DPO Panel’s review. On August 13, the submitter approved the Statement of Concerns.

Using the Statement of Concerns as a guide, the DPO Panel next interviewed several individuals who were knowledgeable about the exchange that gave rise to the DPO, and also knowledgeable about the licensing and inspection process associated with the MOX facility. Separate interviews were conducted with representatives from OGC who were involved in the drafting of the e-mail that gave rise to the DPO, as well as subsequent correspondence, the NMSS Senior Project Manager for the MOX facility, together with another MOX facility Project Manager familiar with the section 70.72 reporting process, and the DPO submitter’s supervisor in Region II, together with a Senior Project Inspector for the MOX facility. The DPO Panel also reviewed a number of relevant documents, including:

- 10 C.F.R. Part 70, Subpart H, including Section 70.72 and associated regulatory history.
- Relevant regulatory guidance (particularly Regulatory Guide 3.74, “Guidance for Fuel Cycle Facility Change Processes” (Jan. 2012), and NRC Inspection Procedure 88107 “Quality Assurance: Design and Documentation Control (Pre-Licensing and Construction)” (May 18, 2005);
- Relevant e-mail correspondence (internal to the NRC) on the issue.
- The MOX construction authorization itself (CAMOX-001) including relevant amendments thereto;
- The application for the MOX facility’s request for a license to receive and possess material at the MOX facility;
- MOX Services’ internal guidance relevant to the issue—PP8-6, Rev. 10, “Licensing Basis Configuration Management” (June 7, 2012).

After completing its initial interviews and document review, on October 18, 2012, the DPO Panel re-interviewed the submitter. During that interview, the DPO Panel discussed with the submitter the applicable regulations, regulatory history and guidance, and other documents reviewed by the Panel, as well as persons interviewed, and provided him an opportunity to suggest further sources of information for review.
Statement of Concerns

In February 2001, Duke Cogema Stone & Webster filed a construction authorization request seeking permission to build a MOX facility on DOE's Savannah River Site. The NRC issued a construction authorization (CAMOX-001) pursuant to 10 CFR Part 70 on March 30, 2005. Construction of the facility, under the permit that had been issued 28 months earlier, began in August 2007, and is ongoing. MOX Services, the successor to Duke Cogema Stone & Webster and the holder of the construction authorization, submitted a request for a license to operate the MOX facility in November 2006, that application currently is pending before the agency.

The DPO pertains to certain actions that are required under Part 70. Section 70.60 states, as relevant here, that "the regulations in § 70.61 through § 70.76 apply to each applicant or licensee that is or plans to be authorized to possess greater than a critical mass of special nuclear material, and engaged in the fabrication of mixed-oxide fuel or fuel assemblies." Section 70.72(c) provides that the licensee may make certain changes to site structures, processes, systems, equipment, components, computer programs, and personnel activities without prior NRC approval. In turn, section 70.72(d)(2) requires, for such changes, that "the licensee submit to the NRC annually, within 30 days after the end of the calendar year during which the changes occurred, a brief summary of all changes to the records required by § 70.62(a)(2)."

MOX Services has not filed a report under section 70.72(d)(2) since the commencement of construction. A February 6, 2012, e-mail from an OGC attorney to the MOX facility Senior Project Manager, NMSS, states that, by its terms, section 70.72 is limited to "licensees," and indicates that the most recent revision to that regulation makes no reference to license applicants. Therefore, given that MOX Services currently is a license applicant, the agency "can continue without imposing [section] 70.72 reporting requirements on applicants."

The DPO submitter believes that MOX Services is a licensee (as that term is defined in 10 CFR § 2.4) because it possesses a construction authorization, and is therefore subject to the requirements of section 70.72 including the requirement to perform the review under section 70.72(c) to make certain changes without prior agency approval, and the requirement to report such changes to the NRC under section 70.72(d)(2). However, even if MOX Services is not considered to be a licensee, because 10 CFR § 70.60 also applies to "applicants," MOX Services, a current applicant for a second Part 70 license, nonetheless is subject to the requirements of sections 70.72(c) and (d)(2). In particular, the submitter has three primary concerns:

1. Based on OGC's stated position, MOX Services may make changes during the construction period and need not submit any of those changes to the NRC for potential review until after the MOX facility receives an operating license. Given that approximately 18,000 changes have been processed to date, the agency will not be able to timely review all changes made. Under this interpretation, changes would not be submitted to the NRC until the operating license has issued. Subsequent to submittal of

Section 70.62(a)(2) requires that the licensee or applicant maintain records demonstrating compliance with elements of its safety program, including process safety information, the integrated safety analysis, and management measures.
the DPO on July 12, 2012, the same OGC attorney sent an email to the submitter and others indicating that the MOX facility is a licensee for the purpose of the construction authorization, such that activities under the construction authorization fall within the scope of section 70.72. It is not clear whether this is OGC's settled position on the question.

2. If it is not held to the reporting requirement, MOX Services would not include these changes in its configuration management system. Absent imposition of the requirement, MOX Services may not capture all facility changes that have been, or will be, made.

3. The NRC needs to have in-hand the required change records in a timely fashion, in order to perform adequate inspections to assure that the changes made under section 70.72(c) by MOX Services during the multi-year construction process were (and are) appropriate and do not require NRC approval.

Factual Background

Regulatory Requirements in Question

This DPO involves the interpretation of several provisions of 10 C.F.R. Part 70. Section 70.60 addresses the applicability of Subpart H ("Additional Requirements for Certain Licensees Authorized to Possess a Critical Mass of Special Nuclear Material"). That section states, in relevant part (emphasis added):

The regulations in §70.61 through §70.76 apply to each applicant or licensee that is or plans to be authorized to possess greater than a critical mass of special nuclear material, and engaged in fabrication of mixed-oxide fuel or fuel assemblies, or any other activity that the Commission determines could significantly affect public health and safety.

Subpart H was implemented in 2000, in order to increase confidence in the margin of safety at the facilities affected by the rule, including mixed-oxide fuel fabrication facilities. The general purpose of the section 70.72 facility changes/change process provision is set out in the proposed rule.

Section 2.4 defines a "licensee" as a person who is authorized to conduct activities under a license. "License," in turn, means a "license, including an early site permit, construction permit, operating license, combined license, manufacturing license, or renewed license issued by the Commission." 10 C.F.R. §2.4 (emphasis added). For the purposes of this DPO review, the Panel assumes that the MOX facility construction authorization qualifies as a construction permit under this provision. Section 70.4 defines "construction" as "the installation of foundations or in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the regulations in this part that are related to radiological safety or security."

Past incidents at fuel cycle facilities have often resulted from changes not fully analyzed, not authorized by licensee management, or not adequately understood by facility personnel. Therefore, effective control of changes to a facility's site, structures, systems, equipment, components and activities of personnel is a key element in assuring safety at that facility. This section would require the licensee to establish and use a system to evaluate changes and the potential impacts of those changes before implementing them. By using this system to evaluate, implement, and track changes to the facility, the licensee can make certain changes without NRC pre-approval. For changes that affect the on-site documentation, such as the ISA, management measures or process-safety information, the licensee would be required to notify NRC within 12 months of the change.

In the 2000 final rule, the NRC added section 70.62, which requires the establishment of a safety program based on an integrated safety analysis (ISA). Section 70.62 was described in the final rule as follows:

This section describes requirements for establishing and maintaining a safety program that demonstrates compliance with the performance requirements of §70.61. The elements of this safety program include the compilation of process safety information, the performance of an ISA, and the application of management measures to ensure the availability and reliability of items relied on for safety.

At the time of the final rule, section 70.72(d)(2), the reporting requirement, stated as follows:

For changes that do not require pre-approval under §70.72, the licensee shall submit to NRC annually within 30 days after the end of the calendar year during which the changes occurred, a brief summary of all changes to the records required by §70.62(a)(2) of this subpart.

The current section 70.72(d)(2) is substantively unchanged from the 2000 rule and provides:

For changes that do not require pre-approval under §70.72, the licensee shall submit to the NRC annually within 30 days after the end of the calendar year during which the changes occurred, a brief summary of all changes to the records required by §70.62(a)(2).

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\(^d\) 10 C.F.R. § 70.72(d)(2)(2012). In 2006, the NRC made a change to subsection 70.72(c)(2). The NRC clarified that, if an item relied on for safety (IROFS) is not needed to meet section 70.61 performance requirements, then a licensee may remove or replace the IROFS without NRC staff approval and without showing equivalent replacement of the safety function. Section 70.72(d)(2) was unchanged by this rulemaking. See generally Final Rule, Facility Change Process Involving Items Relied on for Safety, 71 Fed. Reg. 56,344 (Sept. 27, 2006).
Section 70.62(a)(2) in turn requires:

Each licensee or applicant shall establish and maintain records that demonstrate compliance with the requirements of paragraphs (b) through (d) of this section.

Section 70.62(b) requires each licensee or applicant to maintain process safety information, including information relevant to the hazards the material used or produced, as well as information relevant to the process technology and equipment. Section 70.62(c) requires each licensee or applicant to conduct and maintain an ISA that identifies particular radiological, chemical, and facility hazards, potential accident sequences caused by process deviations or other external or internal events, the consequence and likelihood of such accident sequences (and the methods used to determine them), and each item relied on for safety (pursuant to section 70.61(e)). Finally, section 70.62(d) requires each licensee or applicant to establish management measures to ensure compliance with the performance requirements of § 70.61.

Licensing Documents Currently in Place for the MOX Facility

As discussed above, construction authorization CAMOX-001 was issued in 2005. Since 2007 construction of the facility has been ongoing. MOX Services has established a procedure by which it processes changes to its licensing basis. This procedure, PP8-6, governs changes to licensing basis configuration management, including changes to the [MOX facility] site footprint structures, systems and components (SSCs), processes, computer programs and activities of personnel (including procedures and tests) which describe the design, construction, hot start-up, maintenance and operation of the [MOX facility]. In short, the procedure describes a determination and evaluation process to identify impacts to the MOX facility licensing basis and to ensure either prior NRC approval, or NRC notification, as applicable. Particularly regarding NRC notification, the procedure states as follows:

3.5.1 For changes that are judged by the Licensing Manager to potentially have a significant impact on the licensing documents (e.g., ISAS [ISA Summary], LA, etc.), an action tracking item shall be initiated by Licensing to track the Licensing Manager’s discussion of the Licensing Evaluation and associated document changes with NRC.

3.5.2 For changes that do not require a notification (i.e., do not have a significant impact on the licensing documents), MOX Services shall include these changes in the next update of the licensing document(s).

See generally 10 C.F.R. §§ 70.62(b), (c) and (d).


The procedure states that the list includes documents (e.g., Emergency Response Plan and Manual) or classes of documents (e.g., design requirements documents) that “may impact licensing basis information.”

Id. Section 3.5, “NRC Notification.”
Also as noted above. MOX Services submitted its currently-pending application to receive and possess special nuclear material in 2006 (License Application). Changes to the License Application are addressed in Section 16.2.3 of the application itself. That section provides among other things, that MOX Services may make a change to the "sites, structures, processes, systems, equipment, components, computer programs, and activities of personnel" without prior NRC approval, if the change:

- Does not decrease the level of effectiveness of the design basis as described in the LA.
- Does not result in a departure from a method of evaluation described in the LA used in establishing the design bases.
- Does not affect compliance with applicable regulatory requirements.
- Does not conflict with an existing license condition.

Section 16.2.3 goes on to provide that, for changes to the License Application that do not require prior NRC approval, MOX Services will submit to the NRC annually, within 30 days after the end of the calendar year during which the changes occurred, a brief summary of the changes.

In February 2011, MOX Services sought an amendment to its construction authorization, to acknowledge project updates since the construction authorization was approved, and to minimize confusion regarding the current licensing basis during construction and operation of the facility. In August 2011, the NRC approved the amendment, which revised the construction authorization to add a reference to the design bases contained in the License Application. The MOX Facility CAR lists the 53 principal systems, structures, and components (principal SSCs) and shows their associated safety functions. MOX Services has since identified, in its Integrated Safety Analysis (ISA), approximately 12,000 IROFS designated to perform the design basis safety functions of the principal SSCs. At the time the construction authorization request was approved, the staff determined that the design bases of the principal SSCs, together with the Quality Assurance program, provided reasonable assurance of protection against natural phenomena and the consequences of potential accidents. The IROFS design basis sections describe the IROFS for the facility that support the performance of the MOX facility's safety functions. In turn, the IROFS address the safety functions needed to satisfy the design bases defined in the construction authorization. The upshot of this amendment is that MOX Services is required to build the principal SSCs for the MOX facility according to the design bases in the construction authorization, which have been refined in the License Application.

License Condition 3.C of the construction authorization provides as follows:

This construction authorization authorizes MOX Services to construct the facility in accordance with the design bases of the PSSCs described in the CAR as

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refined in the [License Application's] items relied on for safety design basis sections (and supplements thereto), and environmental protection commitments set forth in MOX Services's Environmental Report and revisions thereto.

Events Associated with the DPO

On February 6, 2012, an OGC attorney transmitted an e-mail to the Senior Project Manager for the MOX facility, stating as follows:

The DPO Panel learned that at the time, OGC understood the project manager to be posing a general question—simply, whether the rule, by its terms, applied to applicants or licensees, or both. Looking at the plain language of the rule (and also the 2006 Statements of Consideration for a revision to the rule), OGC determined that the rule applied to licensees, but not applicants. Upon learning of the DPO, OGC sought further information on the factual questions underlying the inquiry regarding section 70.72(d)(2). OGC then came to understand the question was whether, for the purposes of enforcing against section 70.72, MOX Services was appropriately treated as an "applicant" (for its license to receive and possess) or a "licensee" (as a construction authorization holder). The Panel understands that was not OGC's intention, in the February 6 e-mail, to characterize MOX Services as either an "applicant" or a "licensee," as it had not obtained the full context of the question.

Subsequently, on July 12, 2012, after the DPO was filed, OGC sent a second e-mail to the DPO submitter and others, stating, in relevant part:

"E-mail from OGC to NMSS (Feb. 6, 2012)."
The DPO Panel learned that OGC understood the submitter's concern to be that MOX Services could not be cited against section 70.72 because MOX Services is considered an applicant and not a licensee. In this case, we understood OGC's interpretation to be that MOX Services is both an "applicant" (for a license to possess and use) and a "licensee" (because it holds the construction authorization). With this view in mind, OGC looked again at section 70.72, and determined that it applied to MOX Services because MOX Services is, indeed, a "licensee" for the purpose of discussing issues arising under the construction authorization. Through our interviews, the DPO Panel understands that there is a belief that NMSS has the authority to determine whether MOX Services is an "applicant" or a "licensee," and that the decision should be made depending upon the circumstances of the question and the particular rule that applies. Legal advice on the question whether to treat MOX Services as an "applicant" or as a "licensee" may be sought on a case-by-case basis.

Evaluation

Concern 1 The Applicability of 10 C.F.R § 70.72 to MOX Services

Licensing of the MOX facility has been done in two parts. In 2005, the NRC issued MOX Services a construction authorization for the MOX facility, pursuant to (among other provisions) 10 C.F.R. § 70.23(a)(7) and (b).

MOX Services currently is an applicant for a license to receive and possess special nuclear material, which, once granted, would be used to operate the facility. Among other things, in order to grant the possession and use license, the NRC must determine that "construction of the principal structures, systems, and components approved pursuant [section 70.23(b)] has been completed in accordance with the application."14

Construction of the MOX facility will take several years. As construction is ongoing, MOX Services has made, and is expected to continue to make, a large number of changes to the facility. Section 70.72 requires fuel facility licensees to 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. For changes requiring prior NRC approval, the licensee must request a license amendment (section 70.72(d)(1)). For changes not requiring NRC approval, the licensee must briefly summarize all changes made to the safety program for the previous year, and report them to the NRC consistent with Section 70.72(d)(2). We understand that OGC's February 2012 e-mail was

14 E-mail from [redacted] to DPO Submitter (copy to [redacted] NMSS, [redacted] OGC) [redacted] OE (July 12, 2012).

15 Section 70.23(a)(7) requires that prior to commencement of construction, the NMSS Director make certain environmental findings. Section 70.23(b) requires, as relevant here, that the Commission will approve construction of principal SSCs of a fuel fabrication plant when it has determined that "the design bases of the principal [SSCs], and the quality assurance program provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents." (Footnote omitted).

17 10 C.F.R. § 70.23(a)(8).
interpreted by the staff to mean that section 70.72(d) did not apply to MOX Services. Further, the DPO Panel learned that, to date, NMSS has taken the position that section 70.72 does not apply to MOX Services—that is, NMSS has not asked MOX Services for a 70.72(d)(2) report. These determinations led to the concern submitted in the DPO that thousands of engineering changes have been made, but MOX Services has not reported changes to the NRC under section 70.72(d)(2). Without the ability to inspect these changes, the DPO includes the concern that the NRC will be unable to inspect and evaluate construction activities in a timely manner.

In its July 2012 e-mail, OGC indicated that section 70.72(d)(2) does apply to MOX Services, by virtue of the fact that MOX Services holds a construction authorization (and is therefore a "licensee."). The Panel concludes, based on our interviews, that it is clear that the February 2012 response was sent without the benefit of full information, including a discussion of facts particular to the MOX facility. We agree with OGC’s July 2012 determination that MOX Services is a licensee by virtue of its construction authorization, and find that section 70.72(d)(2) applies to MOX Services, although our reasoning differs from OGC’s.
In sum, Part 70 provides the flexibility for a two-part licensing scheme, although it does not appear to expressly contemplate such a scheme. If the MOX facility were subject to the usual one-step licensing process (like that used for the recently-licensed uranium enrichment and uranium conversion facilities), Section 70.72 would apply to MOX Services. For this reason, the DPO Panel also finds that a broad interpretation of Section 70.60 would put the MOX facility on equal footing with other Part 70 licensees.

Existing NRC guidance serves as further evidence that the NRC expects to inspect construction changes. In particular, the agency has in place an inspection procedure for the pre-licensing and construction phase of fuel cycle facilities. The inspection procedure provides a basis for determining (among other things):

- if the design control program is adequately defined and includes effective procedures that identify design input controls, processes, analyses, verifications, change controls, interface controls, translates quality standards into design documents, and control deviations from standards;

Finally, Regulatory Guide (RG) 3.74, "Guidance for Fuel Cycle Facility Change Processes," which provides guidance on how licensees can evaluate potential changes to determine whether prior NRC approval is required. Encompasses changes that will occur during construction, such as "facility, design, and process changes."  

Concern 2: MOX Services Should Timely Capture Facility Changes in a Configuration Management System, and Timely Report Those Changes to NRC, and

Concern 3: The NRC needs to have construction change records in a timely fashion, to perform adequate inspections to assure that the changes made under section 70.72(c) by MOX Services during the multi-year construction process were (and are) appropriate and do not require NRC approval.

The DPO stated that "approximately 18,000" engineering changes have been processed in the 5 years that construction has been ongoing. The Panel determined that a change process is needed to support staff findings pursuant to section 70.23(a)(8) that construction of the principal SSCs approved pursuant to section 70.23(b) has been completed in accordance with the License Application. The Panel understands that the staff may be highly challenged, in some

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18 See, e.g., NRC Regulatory Guide 3.74, "Guidance for Fuel Cycle Facility Change Processes (Jan. 2012), at § C 1 b. (examples of activities that the licensee must evaluate under 10 C F R. § 70 72) (ML100890016). RG 3.74 acknowledges the importance of tracking, evaluating, and documenting changes, stating, "Operating experience from nuclear fuel cycle facilities shows that past incidents often resulted from changes implemented at the facility. In some cases, licensee management or personnel did not analyze, authorize, or understand the changes before implementing them." Id. at § A (Introduction).

19 Section 70.23 does not impose a requirement on an applicant to "request" a finding under section 70.23(a)(8), such as a single inspection, on the part of the Staff. Rather, as
circumstances, to determine whether construction was performed in accordance with the License Application, if timely change information is not provided.  

Several of the individuals interviewed expressed the view that the DPO expresses a valid concern that changes be appropriately controlled and reported to the NRC, as applicable. The MOX facility is the only facility that is being constructed prior to receipt of the “possession and use” license, and questions have arisen as to what is “inspectable.”

The MOX facility has a change process currently in place. As discussed above, in 2011, the construction authorization was amended, to condition construction of the MOX facility in accordance with the design bases of the principal SSCs as described in the construction authorization request, as refined in the License Application. The License Application, in turn, includes Section 16.2.3, which governs changes to the License Application. This section describes a process (similar to the process described in Section 70.72) for evaluating whether a change requires an amendment to the License Application. For changes that do not require an amendment, Section 16.2.3 provides that MOX Services will maintain records of changes to the facility, and will submit a yearly summary to the NRC within 30 days of the end of the calendar year during which the changes occurred. Region II staff advised the Panel of MOX Services internal procedure PP8-6 which governs licensing basis configuration management for a process used to identify impacts to the MOX facility’s licensing basis, and ensure appropriate NRC notification.

Review of these documents and discussions with interviewees demonstrate substantial confusion as to the change reporting requirements that currently apply to the MOX facility. The DPO Panel learned that, today, changes to the facility are controlled via License Application

construction activities are undertaken. [MOX Services] is likely to take a variety of actions over a period of years that will be, similarly, considered and closed out by the Staff in multiple inspections and review activities. "Shaw AREVA MOX Services, LLC (Mixed Oxide Fuel Fabrication Facility). CLI-09-2. 69 NRC 55:61 n 20 (2009). In CLI-09-2, the Commission affirmed the Board’s dismissal of Contention 7 (a challenge to a future demonstration that principal SSCs have been completed in accordance with the application). The Commission ruled that, as long as the record of the proceeding remained open, the intervenors could file a new or amended “Contention 7” within 60 days of new information becoming available. Although the evidentiary hearing was held in March 2012, the Board is expected to hold the record of the proceeding open until at least February 2013, in order for the Board to receive additional evidence on the applicant’s material control and accounting program.

See generally Haney, Catherine, Director, Office of Nuclear Material Safety and Safeguards, NMSS, letter to David Sexton, Louisiana Energy Services, LLC (LES) “Changes During Construction at the National Enrichment Facility” (Jan. 24, 2011) (ML102910119) (stating, where LES had begun construction work requiring a license amendment prior to NRC approval of that amendment, “there may be some circumstances where if the work is performed without the required prior NRC notice and affirmative response, it would be extremely difficult, if not impossible, for the NRC to conduct inspections as the work is performed (e.g., to determine whether there is adequate rebar in poured concrete).”)

We understand that there may be other applicable guidance documents on other, more specific topics, such as engineering change control.
Section 16.2.3, which the regional staff uses to inspect against. But as the Panel learned through interviews (and as apparent from the documents themselves), while there is much overlap between the change processes in section 70.72, Section 16.2.3, and PP8-6, the processes are not identical, leading to the potential for confusion as to which criteria apply.

This confusion also was made evident through interviews conducted by the DPO Panel. In particular, the Panel obtained a non-public draft "white paper," which appears to originate from MOX Services, and purports to describe the process MOX Services uses to evaluate exceptions or deviations to codes and standards that are part of the design basis commitments stated in the License Application. The "white paper" appears to differentiate between the change process used for the License Application on the one hand, and the ISA Summary on the other. The change process in PP8-6 is characterized as based on both the change criteria in Section 16.2.3 and section 70.72 (as committed to in the License Application). The "white paper" acknowledges that the regulations are not "clear" that a report of changes that do not require prior approval is required at this stage of the facility's licensing. MOX Services therefore proposes to clarify how it will report changes to the NRC.

[R]equest a License Application Revision based on the results of the PP8-6 evaluation. In addition, a change log for the License Application is maintained, however, formal submittal of these changes is performed consistent with [the] schedule agreed to with [the] NRC Project Manager (rather than the 30 days after the end of the calendar year that will be applicable once MOX Services obtains its license.) As a result of discussions with the NRC Project Manager, the next scheduled update to the [License Application] and [ISA Summary] is January 30, 2013.

It is unclear to the DPO Panel how this issue will be resolved.

Conclusions

Because the MOX facility is subject to a bifurcated licensing process (a construction authorization, followed by a separate License Application to possess and use special nuclear material), the NRC Staff and MOX Services do not have a common understanding as to the applicability of 10 C.F.R. § 70.72(d)(2), which applies to "licensees." Further, the NRC Staff itself does not appear currently to have a common understanding of the applicable regulatory requirements governing the change process at the MOX facility.

Based on the documents reviewed and discussed above and based on interviews with the DPO submitter and other knowledgeable individuals, the DPO Panel agrees with OGC's July 2012 statement that the reporting requirement of 10 C.F.R. § 70.72(d)(2) applies to the MOX facility. Stated another way, we agree with the view stated in the DPO that the MOX facility, by virtue of its construction authorization, should comply with the provisions of the rule. Specifically, the Panel concludes that changes related to construction performed by MOX Services under CAMOXX-001 are subject to Section 70.72, to the extent that those changes are appropriately encompassed by the requirements of that rule. Consequently, the DPO Panel finds that MOX Services should, if it is not already doing so, evaluate potential changes to determine whether NRC approval is required prior to their implementation consistent with the requirements of 10 C.F.R. § 70.72 (supported by, as applicable, the relevant guidance, including RG 3.74). MOX
Services therefore is required to submit an annual summary of facility changes made in the previous calendar year, consistent with 10 C.F.R. § 70.72.

Further, the DPO Panel finds that MOX Services currently has in place processes in Chapter 16 of its License Application, and in internal guidance (PP8-6) that govern changes during construction. These processes are not identical to the evaluation process set forth in section 70.72. Specifically, MOX Service’s License Application and internal guidance appear to set forth overlapping, and potentially inconsistent, direction on the evaluation of construction changes.

**Recommendations**

We recommend that the General Counsel confirm that the reporting requirement of section 70.72(d)(2) currently applies to actions taken by MOX services under the construction authorization (CAMOX-001) for the MOX facility. We further recommend that OGC transmit this position to NMSS in writing, together with any desired clarifying guidance on interactions between NMSS and the Office of the General Counsel regarding the application of section 70.72 on a case-by-case basis.

The General Counsel should advise NMSS to communicate to MOX Services that section 70.72 applies to its current activities under CAMOX-001, explaining the basis for this determination. NMSS, working with regional inspection staff, should collaborate with MOX Services to obtain annual reports encompassing activities undertaken since commencement of construction. This effort might include revising applicable regulatory guidance (e.g., RG 3.74).

The General Counsel should request that NMSS work with MOX Services to revise (via license application amendment or other appropriate mechanism) the change processes identified in the current License Application and PP8-6, in order to ensure that those processes are internally consistent and expected to result in compliance with section 70.72.
Document 5: DPO Decision
MEMORANDUM TO: Melvin C. Shannon  
Resident Inspector/Mox Facility  
FROM: Margaret M. Doane /RA/  
General Counsel  
SUBJECT: DIFFERING PROFESSIONAL OPINION DECISION INVOLING  
APPLICABILITY OF REPORTING REQUIREMENTS IN 10 C.F.R.  
§ 70.72 TO SHAW AREVA MOX SERVICES (DPO-2012-001)  

INTRODUCTION  
On June 29, 2012, a Differing Professional Opinion (DPO) was filed (DPO 2011-001) regarding  
the applicability of the requirements in 10 C.F.R. § 70.72 to Shaw AREVA MOX Services, LLC  
(MOX Services) for reporting changes to its mixed-oxide fuel fabrication facility (MOX facility),  
currently under construction, that do not require prior NRC approval. The DPO questioned a  
statement made in a February 6, 2012 e-mail from an attorney in the Office of the General  
Counsel (OGC) to a Senior Project Manager in the Office of Nuclear Material Safety and  
Safeguards (NMSS). The submitter questioned in that e-mail, that § 70.72 applied, by its terms,  
to licensees but not license applicants.  

On July 25, 2012, Marian L. Zoble, Acting General Counsel, appointed three members to a  
DPO Ad Hoc Review Panel (DPO Panel) to review DPO 2012-001.1 On October 25, 2012, the  
DPO Panel completed its review in accordance with the guidance in Management Directive  
10.159, "The NRC Differing Professional Opinions Program." The DPO Panel concluded that  
changes related to construction performed under the construction authorization are subject to §  
70.72, to the extent that those changes are appropriately encompassed by the requirements of  
that rule. Consequently, the DPO Panel recommended that MOX Services should evaluate  
potential changes during construction to determine whether NRC approval is required prior to  
their implementation, consistent with the requirements of 10 C.F.R. § 70.72, and should submit  
an annual summary of facility changes made in the previous calendar year, consistent with 10  
C.F.R. § 70.72(d)(2). The DPO Panel also recommended that OGC request NMSS work with  
MOX services to revise the change process identified in the current license application to  
ensure it is consistent with § 70.72. After reviewing the DPO Panel’s report, hearing the DPO  
submitter’s views2, and for the reasons set forth below, I accept the DPO Panel’s conclusions  

1 Ms. Doane was appointed General Counsel during the DPO Panel’s review.  
2 On November 14, 2012, the Acting General Counsel spoke to the DPOSubmitter and reported to me  
that the DPO Submitter was satisfied with the DPO Panel’s Report.
and agree that, to the extent necessary, the recommendations of the DPO Panel's recommendations should be implemented.

DECISION

I agree that 10 C.F.R. § 70.72 currently applies to MOX Services, and note that OGC has previously advised NMSS of the applicability of this section to MOX Services. The annual reporting requirement of § 70.72(d)(2), by its terms, applies only to licensees. Because MOX Services currently holds a license in the form of a construction authorization for the current construction activities at the MOX facility, this section applies to it.  

The DPO Panel's recommendations include advising NMSS to communicate to MOX Services that § 70.72 applies to its current activities under its construction authorization. Further, the DPO Panel recommends that OGC request NMSS to work with MOX Services to revise (via license application amendment or other appropriate mechanism) the change processes identified in MOX Services' current License Application and applicable procedures to ensure that those processes are internally consistent and result in compliance with § 70.72. I agree with these recommendations, and OGC will implement them as discussed below.

3 The definition of a license in 10 C.F.R. § 2.4 includes “an early site permit, construction permit, operating license, combined license, manufacturing license, or renewed license issued by the Commission” (emphasis added). This is consistent with the broad definition of a license in Section 551 of the Administrative Procedure Act, which provides that a license “includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.” The NRC decided to license the MOX facility in two steps (a construction authorization followed by an operating license), similar to the bifurcated licensing structure of 10 C.F.R. Part 50. Therefore, MOX Services' construction authorization is analogous to a construction permit issued for nuclear reactors.
Based on the above analysis regarding the applicability of § 70.72 to MOX Services, I agree that NMSS should communicate to MOX Services that § 70.72 applies to its current activities under its construction authorization. In addition OGC will work with NMSS to make any revisions as appropriate to generic guidance documents. OGC will work with NMSS to ensure that MOX Services complies with the reporting requirements of § 70.72, including submitting the annual summaries required by § 70.72(d). With respect to the change processes in the current License Application and applicable procedures during construction, I agree that such procedures should be internally consistent and ensure compliance with § 70.72, including § 70.72(c). OGC will continue to work with NMSS to engage MOX Services in order to meet these goals.

CONCLUSION

Based on the DPO Panel’s report and OGC’s independent analysis, I reaffirm that 10 C.F.R. § 70.72 currently applies to MOX Services and we will transmit this position to NMSS in writing. OGC will work with NMSS to review the procedures and, to the extent they are found to be inconsistent with § 70.72(c), OGC will request NMSS work with MOX Services to revise them. Finally, OGC will advise NMSS that it should engage MOX Services to ensure it submits to the NRC an annual summary of changes made pursuant to § 70.72(d)(2).

A summary of the DPO will be included in the Weekly Information Report to advise interested employees of the outcome when the case is closed. Further, the DPO submitter will be included on correspondence involving the developing and/or listing of any follow-up actions and implementation schedules.

I would like to personally thank the DPO submitter for raising this concern, as well as the DPO Panel for thoroughly addressing the issues related to this concern.

cc:  Roy Zimmerman, Director, Office of Enforcement  Renee Pedersen, DPO Project Manager  Catherine Haney, NMSS  Deborah Seymour, Branch Chief, RII/DCP/CPB1  Brooke D. Poole, Panel Chair  Carolyn Faria, Panel Member  Joseph Brady, Panel Member  Marvin Itzkowitz, OGC  Catherine Scott, OGC  Mary Spencer, OGC  Christopher Hair, OGC
Based on the above analysis regarding the applicability of § 70.72 to MOX Services, I agree that NMSS should communicate to MOX Services that § 70.72 applies to its current activities under its construction authorization. In addition OGC will work with NMSS to make any revisions as appropriate to generic guidance documents. OGC will work with NMSS to ensure that MOX Services complies with the reporting requirements of § 70.72, including submitting the annual summaries required by § 70.72(d). With respect to the change processes in the current License Application and applicable procedures during construction, I agree that such procedures should be internally consistent and ensure compliance with § 70.72, including § 70.72(c). OGC will continue to work with NMSS to engage MOX Services in order to meet these goals.

CONCLUSION

Based on the DPO Panel’s report and OGC’s independent analysis, I reaffirm that 10 C.F.R. § 70.72 currently applies to MOX Services and we will transmit this position to NMSS in writing. OGC will work with NMSS to review the procedures and, to the extent they are found to be inconsistent with § 70.72(c), OGC will request NMSS work with MOX Services to revise them. Finally, OGC will advise NMSS that it should engage MOX Services to ensure it submits to the NRC an annual summary of changes made pursuant to § 70.72(d)(2).

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