

RAS 3394

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Thomas S. Moore, Chairman
Charles N. Kelber
Peter S. Lam

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RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	September 12, 2001
DUKE COGEMA STONE & WEBSTER)	Docket No. 070-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility))	ASLBP No. 01-790-01-ML

**Duke Cogema Stone & Webster's Answer to
Blue Ridge Environmental Defense League and
Donald Moniak Submission of Contentions
Regarding the Proposed MFFF**

Duke Cogema Stone & Webster ("DCS") hereby files its Answer to the "Blue Ridge Environmental Defense League and Donald Moniak Submission of Contentions Regarding the Proposed MFFF," dated August 13, 2001 ("BREDL Contentions").

Section I provides an introduction and discusses the procedural history relevant to the Atomic Safety and Licensing Board's ("Board") disposition of the proposed contentions submitted by the Blue Ridge Environmental Defense League and Mr. Moniak ("Requestors"). Section II discusses the legal standards to be applied in ruling on the proposed contentions, including a discussion of the appropriate scope of the proceeding on the Construction Authorization Request ("CAR") submitted by DCS. Section III addresses each of Requestors' contentions and demonstrates that none of those contentions meets the standards for admission in this proceeding.

SECY-02

For the reasons discussed below and in DCS' prior Answers on standing, Requestors' request for a hearing should be denied.

I. INTRODUCTION AND PROCEDURAL HISTORY

On May 18, 2001, Requestors sought a hearing before the Nuclear Regulatory Commission ("NRC") on the MOX Facility CAR ("Request for Hearing"). DCS filed its Answer to the Request for Hearing on May 29, 2001 ("DCS Answer"). The NRC Staff filed its Answer to the Request for Hearing (and the requests of others) on June 25, 2001 ("Staff Answer"). Requestors filed their contentions late on August 14 and 16, 2001.¹ As demonstrated below, regardless of whether the Licensing Board finds that Requestors have standing to participate in the CAR proceeding, they have failed to offer a single admissible contention. Accordingly, their Request for Hearing should be denied.

II. LEGAL STANDARDS GOVERNING THE ADMISSIBILITY OF CONTENTIONS

This section discusses the legal standards governing the admissibility of contentions in this proceeding. Subsections A through I discuss the general standards applicable to contentions in NRC proceedings. Subsection J discusses the appropriate scope of safety and environmental contentions that may be litigated within this particular proceeding.²

¹ Requestors filed their contentions in a series of e-mails. The first filing occurred at 12:26 am on August 14, 2001. Further contentions were e-mailed at 1:09 am and 4:29 am on August 14, 2001, and 9:09 am on August 16. The August 16, 2001 submission was sent in response to an August 15 telephone call from counsel for DCS indicating that certain documents listed on the certificate of service had not been actually filed. A hard copy of Requestors' contentions was sent by first class mail on August 14, 2001, and received by DCS on August 20, 2001. The hard copy included several documents that were neither included nor referenced by the e-mail filings. The hard copy also omitted one document that was included in the e-mail filing.

² The following discussion of the applicable legal standards is also included in DCS' Answer to the other petitioners' filings on proposed contentions.

A. Requirements for One Admissible Contention

In order to intervene in an NRC licensing proceeding, an individual or group must demonstrate that it has standing, and “proffer with specificity at least one admissible contention.”³ The NRC will deny a petition to intervene and request for hearing from a petitioner who has standing but has not proffered at least one admissible contention.⁴ When a mandatory hearing is not required (as in this proceeding involving the MOX Facility), licensing boards should “take the utmost care” to assure that at least one good contention is advanced because, absent successful intervention, no hearing need be held.⁵

B. Petitioners Have the Burden

As provided in the NRC’s Notice of Opportunity for a Hearing (“Hearing Notice”), the petitioners “have the burden of showing that the contentions are admissible.”⁶ As stated by the Commission, “[a] contention’s proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions.”⁷

³ *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996); *Gulf States Utility Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994).

⁴ Notice of Acceptance for Docketing of the Application, and Notice of Opportunity for a Hearing; On An Application for Authority to Construct a Mixed Oxide Fuel Fabrication Facility, 66 *Fed. Reg.* 19,994, 19,996 (April 18, 2001); *Florida Power & Light Co.* (Turkey Point Nuclear Power Plant, Units 3 and 4), CLI-01-17, NRC slip op. at 1 (July 19, 2001).

⁵ *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976).

⁶ 66 *Fed. Reg.* at 19,996. A similar statement appears in the Commission’s referral order; *Duke, Cogema, Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, NRC slip op. at 8 (June 14, 2001) (“It is the responsibility of all petitioners to provide the necessary information to show that their contentions satisfy the requirements for admission”).

⁷ *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

C. Contentions Must Satisfy the Requirements in 10 CFR § 2.714(b)

According to the Hearing Notice,⁸ the admissibility of contentions is governed by 10 CFR § 2.714(b)(2). This section states that “[e]ach contention must consist of a specific statement of the issue of law or fact to be raised or controverted,” and requires that the petitioner provide the following information with respect to each contention:

- (i) A brief explanation of the bases of the contention.
- (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
- (iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

A contention that fails to meet any one of these requirements must be rejected.⁹

The Commission has described Section 2.714(b) as “strict.”¹⁰ This strict rule serves several purposes:

First, it focuses the hearing process on real disputes susceptible of resolution in an adjudication. For example, a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances

⁸ 66 *Fed. Reg.* at 19,996.

⁹ *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

¹⁰ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 334 (1999).

about NRC policies. Second, the rule's requirement of detailed pleadings puts other parties in the proceeding on notice of the Petitioners' specific grievances and thus gives them a good idea of the claims they will be either supporting or opposing. Finally, the rule helps to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.¹¹

D. Contentions Must be Specific

10 CFR § 2.714 requires that the bases for each contention be set forth with reasonable specificity.¹² For a contention to be admissible, a petitioner must "refer to the specific portion of the license application being challenged, state the issue of fact or law associated with that portion, and provide a basis of alleged facts or expert opinions, together with references to specific sources and documents that establish those facts or expert opinions."¹³ As the Commission has stated, a "contention should refer to those portions of the license application (including the environmental report and safety report) that the petitioner disputes and indicate supporting reasons for each dispute."¹⁴

If the petitioner does not believe that the application adequately addresses a relevant issue, the petitioner is required to explain why the application is deficient.¹⁵ Additionally, in such cases, the petitioner must provide "supporting grounds" for its contention that the application "must but does [not] consider some information required by law."¹⁶

¹¹ *Id.* (citations omitted).

¹² *Id.* at 335.

¹³ As the Commission stated in its referral order, "[c]ontentions must be specific and accompanied by appropriate factual, documentary, or expert support." *Duke, Cogema, Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, NRC slip op. at 8 fn. 2 (June 14, 2001); *see also* *Yankee Atomic*, CLI-96-7, 43 NRC at 248 (citing 10 CFR § 2.714(b)(2)); *Duke Energy Corp.*, CLI-99-11, 49 NRC at 333.

¹⁴ *Florida Power & Light Co.*, CLI-01-17, NRC slip op. at 22.

¹⁵ *See Arizona Public Service Co.*, CLI-91-12, 34 NRC at 155-56.

¹⁶ *Florida Power & Light Co.*, CLI-01-17, NRC slip op. at 22.

An issue that does not directly controvert a position taken in the application is subject to dismissal.¹⁷

E. Contentions Must Raise a Genuine Issue of Material Fact or Law

Section 2.714(b)(2) requires a petitioner to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.¹⁸ “The dispute at issue is ‘Material’ if its resolution would ‘make a difference in the outcome of the licensing proceeding.’”¹⁹ A contention must be dismissed if it is determined that “the contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.”²⁰

F. Contentions Must Be Supported by Facts or Expert Opinions

A “contention will be dismissed if the intervenor sets forth no facts or expert opinion on which it intends to prove its contention.”²¹ The NRC will not accept an expert opinion as an adequate basis for an issue if it “merely states a conclusion (e.g., the application is ‘deficient,’ ‘inadequate,’ or ‘wrong,’) without providing a reasoned basis or explanation for that conclusion.”²² Furthermore, “a petitioner may not simply incorporate massive documents by reference as the basis for or as a statement of his contentions.”²³

¹⁷ See *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998).

¹⁸ See *Yankee Atomic*, CLI-96-7, 43 NRC at 248.

¹⁹ *Duke Energy Corp.*, CLI-99-11, 49 NRC at 333-34; see also Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 *Fed. Reg.* 33,168, 33,172 (Aug. 11, 1989).

²⁰ 10 CFR § 2.714(d)(2)(ii); 54 *Fed. Reg.* 33,168. A similar requirement is stated in the Hearing Notice of this proceeding (“The contention must be one which, if proven, would entitle the petitioner to relief.”) 66 *Fed. Reg.* at 19,996.

²¹ 54 *Fed. Reg.* at 33,171.

²² *Private Fuel Storage*, LBP-98-7, 47 NRC at 181.

²³ *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989).

G. Contentions Must Focus on the Application and Cannot Be Based Solely on NRC Staff Requests for Additional Information

An intervenor may not rely solely on an NRC request for additional information (“RAI”) as the basis for a contention.²⁴

To satisfy the Commission’s contention rule...Petitioners must do more than “rest on [the] mere existence” of RAIs as a basis for their contention. RAIs generally “indicate[] nothing more than that the staff requested further information and analysis from the Licensee.” The NRC’s issuance of RAIs does not alone establish deficiencies in the application, or that the NRC staff will go on to find any of the applicant’s clarifications, justifications, or other responses to be unsatisfactory.²⁵

Merely citing an RAI is “a far cry from the reasonable specificity our contention rule demands.”²⁶ “Petitioners seeking to litigate contentions must do more than attach a list of RAIs and declare an application ‘incomplete.’ It is their job to review the application and to identify what deficiencies exist and to explain why the deficiencies raise material safety concerns.”²⁷ To establish a genuine dispute with the applicant, “petitioners must use the RAI to make the issue of concern their own. This means they must develop a fact-based argument that actually and specifically challenges the application....Documents, expert opinion, or at least a fact-based argument are necessary.”²⁸ As the Commission has noted:

RAIs are not always “irrelevant to the adjudicatory process.” They can, for instance, provide a jumping-off point for the petitioners to focus upon particular parts of the application and thereby develop potential issues of concern. The extent to which an RAI might help support a contention must be considered on a case by case

²⁴ *Duke Energy Corp.* CLI-99-11, 49 NRC at 335-37; *see also Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993).

²⁵ *Duke Energy Corp.*, CLI-99-11, 49 NRC at 336 (citations omitted); *See also Baltimore Gas & Elec.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 (1998).

²⁶ *Duke Energy Corp.*, CLI-99-11, 49 NRC at 336.

²⁷ *Id.* at 337.

²⁸ *Id.* at 341, 342.

basis, but the Commission expects that in almost all instances a petitioner must go beyond merely quoting an RAI to justify admission of a contention into the proceeding.²⁹

H. Contentions May Not Challenge NRC Rules and Regulations

A licensing proceeding is an improper forum for challenging the validity of previously-issued NRC rules and regulations.³⁰

I. Contentions Must Be Within the Scope of the Notice of the Proceeding

The scope of permissible contentions is bounded by the issues specified in the Notice of Opportunity for Hearing.³¹ A contention that raises matters that are not within the scope defined by the notice cannot be admitted.³²

J. The Scope of this Proceeding is Limited to Only Those Issues Relevant to Whether the CAR Should be Granted

1. The Hearing Scope is Limited by the Hearing Notice and Commission's Referral Order in this Proceeding

In this case, the Hearing Notice explicitly limits the scope of contentions "to matters within the scope of the DCS application for authority to construct a MOX fuel fabrication facility."³³ Furthermore, the Hearing Notice states that contentions are expected to focus on DCS' CAR, Environmental Report ("ER"), or Quality Assurance ("QA") Plan for the MOX Facility.³⁴ Similarly, the Commission's referral order in this proceeding states that

²⁹ *Id.* at 341 (citations omitted).

³⁰ See 10 CFR §2.758; *Florida Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 and 4), CLI-01-17, NRC slip op. at 17; *Yankee Atomic Electric Co.*, CLI-96-7, 43 NRC at 252.

³¹ See *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 118 (1995).

³² See *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979); see also *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

³³ 66 *Fed. Reg.* at 19,996.

³⁴ *Id.*

“[c]ontentions must be based on information (or alleged lack thereof) contained in either the Applicant’s CAR or its environmental report.”³⁵

DCS has not yet submitted all of the information required for the NRC to issue a license to possess and use special nuclear material (“SNM”) at the MOX Facility, and will not do so until 2002.³⁶ As is clearly reflected in the Hearing Notice, issues related to the application for possession and use of SNM will “be the subject of a separate notice of opportunity for hearing.”³⁷ Thus, this proceeding must be governed by the following fundamental principle: only those contentions raising issues that are relevant to the findings that must be made by the NRC in ruling upon DCS’ request for authorization to construct the MOX Facility are within the scope of this proceeding.

As provided in the Hearing Notice and referenced NRC regulations, in order to issue the construction authorization, the NRC must make the following specific findings:

1. “the design bases of the principal structures, systems, and components and the quality assurance program provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents” (10 CFR § 70.23(b)); and
2. “after weighing the environmental, economic, technical and other benefits against environmental costs and considering available alternatives, that the action called for [under the National Environmental Policy Act (“NEPA”)] is the issuance of the proposed license, with any appropriate conditions to protect environmental values” (10 CFR § 70.23(a)(7)).

³⁵ *Duke, Cogema, Stone & Webster*, CLI-01-13, NRC slip op. at 8 fn. 2.

³⁶ 66 *Fed. Reg.* at 19,995.

³⁷ *Id.*

As stated by the Commission in this proceeding, “the presiding officer shall be guided by these safety and environmental regulations [10 CFR §§ 70.23(b) and 70.23(a)(7)] in determining whether proffered contentions are admissible under 10 C.F.R. § 2.714(b)(2) standards.”³⁸ Thus, the only issues that are appropriate for litigation in this phase of the hearings are those that are material to these two findings.

2. Safety Issues Beyond the Scope of the Proceeding

Based upon the above, any proposed contention that addresses any of the following areas clearly is beyond the scope of the hearing on the CAR and would not provide the basis for granting a hearing request:

- any issues that do not call into question the design bases of the principal structures, systems and components (“SSCs”);
- any issues regarding the adequacy of the design of non-principal SSCs;
- any issues that do not question the ability of the principal SSCs to meet the accident consequence performance requirements in 10 CFR Part 70, Subpart H or to provide adequate protection against natural phenomena; and
- any issues associated with MOX Facility normal operations, including, for example, technical or financial qualifications to operate the MOX Facility and radiological exposures resulting from normal operations.

3. Environmental Issues Beyond the Scope of the Proceeding

The scope of the environmental issues that may be litigated in this proceeding is limited to the determination described in 10 CFR § 70.23(a)(7) (*i.e.*, whether “after weighing the environmental, economic, technical, and other benefits against environmental costs and considering available alternatives, that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values”). These issues revolve around the environmental impacts of construction and operation of the MOX Facility.

³⁸ *Duke, Cogema, Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13,

Construction and operation of the MOX Facility constitute one part of both a larger fuel cycle and a larger national program to dispose of surplus weapons material under the jurisdiction of the Department of Energy (“DOE”), not the NRC. The components of the national program include the following activities:

1. Transportation of surplus weapons plutonium and uranium oxide to the Savannah River Site (“SRS”), disassembly and conversion of the surplus weapons plutonium, and immobilization or transfer to the MOX Facility as feed material for MOX fuel.
2. Fabrication of MOX fuel at the MOX Facility.
3. Transportation of fresh MOX fuel to reactors.
4. Use of the MOX fuel in the reactors.
5. Transportation of the spent MOX fuel from the reactors to a repository.
6. Disposal of the spent MOX fuel in the repository.
7. SRS receipt and processing of wastes from the MOX Facility.
8. Deactivation of the MOX Facility.
9. Decommissioning of the MOX Facility.

All of these activities have been addressed by DOE in prior Environmental Impact Statements (“EISs”).³⁹

In fulfillment of its NEPA obligations, the DOE has prepared several EISs for the surplus plutonium disposition (“SPD”) and related programs, including the:

- *Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement* (“S&D PEIS”) (DOE/EIS-0229) (December 1996). The S&D PEIS evaluated various alternatives for disposition of surplus weapons material and determined that the preferred strategy was a combination of immobilization of some of the surplus weapons plutonium and use of the remainder as feed material for MOX fuel for use in existing reactors;
- *Surplus Plutonium Disposition Final Environmental Impact* (“SPD EIS”) (DOE/EIS-0283) (November 1999).⁴⁰ The SPD EIS evaluated various

NRC slip op. at 7 - 8 (June 14, 2001) (Emphasis added).

³⁹ Attachment 1 identifies the principal locations within the DOE EISs where these activities have been discussed and their environmental impacts addressed. While transfer and treatment of high alpha liquid waste from the MOX Facility were not specifically addressed in these EISs, the impacts associated with managing the high alpha liquid waste in the SRS HLW system are bounded by these EISs.

⁴⁰ This EIS is available at http://www.doe-md.com/pu_docs.asp.

alternatives for implementing the strategy selected in the S&D PEIS. This included evaluating the percent of plutonium disposed by immobilization or conversion to MOX fuel, and selection of the site for the disposition facilities;

- *Draft Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, ("YM DEIS")* (DOE/EIS-0250D) (1999).⁴¹ This EIS examines the impacts of transport of spent nuclear fuel from reactor sites to the geologic repository and the impacts of disposal in the geologic repository. Spent MOX fuel is included in the spent nuclear fuel inventory evaluated.
- *Savannah River Site Waste Management Final Environmental Impact Statement* (DOE/EIS-0217) (1995).⁴² This EIS examines the environmental impacts of continued waste management at SRS under expected, minimum, and maximum waste scenarios. Additional volumes of up to seven million gallons of high level waste are included under the maximum waste forecast.

DOE (not NRC) has overall responsibility for the program for disposing of surplus weapons plutonium, and has reviewed the overall program under NEPA. These facts have several important ramifications with respect to the scope of environmental contentions that are admissible in this proceeding:

- Contentions that pertain to programmatic decisions made by DOE or to the environmental impacts of activities addressed by DOE's programmatic EISs other than the MOX Facility itself are not admissible in this proceeding.

Ordinarily, when a federal action is part of a larger federal program, an agency will elect to prepare an EIS for the entire program, rather than simply preparing an EIS for each of the individual facilities that are part of the overall program.⁴³ As discussed above, DOE has already prepared two EISs governing the overall SPD program. In both of those cases, furthermore, opportunity was provided for public input and comment on DOE's environmental reviews. At issue, therefore, is (1) whether the NRC should defer to the DOE's programmatic EISs, or

⁴¹ This EIS is available at <http://www.ymrp.gov/timeline/eis/deis.htm>.

⁴² This EIS is available at http://nepa.eh.doe.gov/eis/eis0217/eis0217_toc.html.

⁴³ See *Scientists' Institute for Public Information v. AEC*, 481 F.2d 1079, 1085-93 (D.C. Cir. 1973); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

whether it must conduct its own environmental evaluation of the overall SPD program; and (2) whether issues related to the broader federal program may be litigated in an NRC licensing proceeding involving only one specific element of the program.

The NRC was faced with these issues in conjunction with licensing of the Clinch River Breeder Reactor ("CRBR"), which was one part of a broader program for developing liquid metal fast breeder reactors ("LMFBRs").⁴⁴ In that case, the Energy Research and Development Administration ("ERDA"), which was the predecessor to DOE, had prepared and issued an EIS for the LMFBR program. The intervenor in the CRBR licensing proceeding proffered contentions that (1) argued that the NRC should perform a NEPA evaluation of the costs and benefits of the LMFBR program and evaluate alternatives to that program, and (2) challenged "ERDA's conclusions concerning the need for an LMFBR program and the validity of ERDA's environmental assessments."⁴⁵ The Commission concluded that the "need" for a demonstration facility should be "assumed as established by the ERDA EIS."⁴⁶ The Commission ruled that its licensing process:

must be tailored in this case to avoid the Commission's substituting its judgment for that of ERDA with respect to broad planning decisions embodied in the LMFBR statement, such as investigating whether LMFBR technology is a worthwhile overall objective, whether a demonstration reactor is a necessary step in this investigation, and whether in view of the needs of the LMFBR program, construction of such a reactor at this juncture is required.⁴⁷

⁴⁴ See United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976).

⁴⁵ Id. at 72-73.

⁴⁶ Id. at 91-92.

⁴⁷ Id. at 84.

As a result, the Commission limited the scope of the environmental review in the CRBR licensing proceeding to specific CRBR site and design issues related to implementation of ERDA's overall plan for development of the LMFBR that had not been fully addressed by the EIS for the LMFBR program.⁴⁸

Two years after the *Clinch River* decision established the principle that the NRC should defer to decisions reached in another agency's programmatic EIS, the Council on Environmental Quality ("CEQ") implemented its NEPA regulations. One of the CEQ regulations refers to "tiering":

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (Sec. 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available.⁴⁹

The NRC has incorporated the CEQ regulations on tiering into its own regulations (see 10 CFR Part 51, Appendix A.1.(b)), and courts have upheld the NRC's use of tiering in environmental analyses.⁵⁰

Both the Commission's decision in *Clinch River* and the concept of tiering demonstrate that the scope of this proceeding is limited to specific site and design issues involving the MOX

⁴⁸ *Id.*

⁴⁹ 40 CFR § 1502.20 (emphasis added). See also *Guidance Regarding NEPA Regulations*, 48 Fed. Reg. 34,263 (July 28, 1983) (clarifying intent of promulgating tiering regulation).

Facility that were not fully addressed in DOE's programmatic or other related EISs. Thus, for example, since DOE has rendered decisions on the need for the MOX Facility and the location of the MOX Facility in the F-Area at SRS, these issues are beyond the scope of this proceeding. Similarly, given DOE's assessment of the environmental impacts of the various related fuel cycle activities (other than the impacts of the MOX Facility itself), these issues as well are beyond the scope of this proceeding. There is no requirement under NEPA, and it would be contrary to administrative efficiency, for the NRC to reconsider DOE's determination of the environmental impacts of activities that are not being licensed in this proceeding.⁵¹

Therefore, the scope of NRC's environmental review in this proceeding is limited to the environmental impacts of construction and operation of the MOX Facility, and alternatives to mitigate those impacts.

- Contentions that attack programmatic decisions made by DOE, or that request the NRC to mitigate environmental impacts beyond the MOX Facility are not admissible in this proceeding because, even if proven, they would not entitle the petitioner to relief.

NRC has no jurisdiction over, and cannot change, the programmatic decisions made by DOE regarding the various disposal options for surplus weapons material. (Examples of such programmatic decisions include the decision to pursue MOX fuel fabrication as part of the program for dispositioning surplus weapons materials and the decision to site the MOX Facility at SRS.) Therefore, to the extent that a contention asks NRC to reconsider DOE's decisions, the

⁵⁰ See generally, *Kelley v. Selin*, 42 F.3d 1501, 1518-19 (6th Cir. 1995) (finding NRC's use of tiering "appropriate").

⁵¹ NRC's *Scoping Summary Report for Mixed Oxide Fuel Fabrication Facility, Savannah River Site* (August 2001) ("Scoping Summary Report"), Section 4.1, states that "Because the scope of the MOX FFF EIS is limited to the licensing action now under review by NRC, which is specific to the MOX FFF, issues pertaining to decisions already made by DOE will be addressed by referencing the appropriate DOE analysis." Accordingly, only the proposed action—to license the MOX Facility in the F-Area at SRS—and No action Alternatives will be discussed. See *id.*, Section 3.0.

contention seeks relief that the NRC cannot provide in this proceeding. Accordingly, such contentions must be dismissed under 10 CFR § 2.714(d)(2)(ii).

Similarly, while the NRC has the authority to order DCS to take action to mitigate the environmental impacts of the MOX Facility, it does not have the authority to order the entities responsible for the other SPD program-related activities to take action to mitigate the environmental impacts of their activities. Therefore, contentions that request the NRC to take action to mitigate such activities (such as mitigation of the impacts of transporting feed material to the MOX Facility) must be dismissed, because NRC cannot grant such relief in this proceeding.

- Contentions that pertain to activities that will be the subject of separate NRC licensing actions are not admissible in this proceeding.

The scope of this proceeding is limited to the construction authorization for the MOX Facility. Use of MOX fuel in a reactor and disposal of MOX fuel in a repository will be subject to separate NRC licensing proceedings. The NRC will be determining the environmental impacts of those activities in those separate licensing proceedings.⁵² Therefore, contentions that seek to litigate the environmental impacts of those activities in this proceeding are premature and outside the scope of this proceeding.⁵³

⁵² See *Scoping Summary Report*, Sections 4.3 and 4.5; 10 CFR § 60.21(a).

⁵³ See, e.g., *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, NRC slip op. at 17 (October 6, 2000) (in the context of a license transfer proceeding, the Commission rejected a contention that requested the NRC to consider the cumulative impacts of other license transfers involving the same applicant, holding that “[s]uch an inquiry would go well beyond the scope of the proceeding”).

III. ANALYSIS OF BREDL CONTENTIONS

Requestors have submitted multiple proposed contentions organized into ten groups. DCS reproduces each of the contentions below and demonstrates that none of the contentions is admissible in a hearing on the CAR.

A. Contention Group 1 “Gross Violations of Radioactive Waste Management Rules”

Requestors have submitted five proposed contentions related to radioactive waste management issues at the MOX Facility. Each is discussed below.

1A. “The Applicant proposes to transfer radioactive waste from the proposed facility to a contiguous, but unlicensed, facility (the Department of Energy’s Savannah River Site F-Tank Area) for processing, storage, and disposal, a violation of basic NRC regulations governing handling and disposal of radioactive waste.”

(Emphasis added).

This contention alleges that it is a violation of NRC regulations for DCS to transfer radioactive waste from the MOX Facility to the DOE. As the basis for this contention, Requestors cite the NRC regulation specifying that radioactive waste may be disposed of only by “transfer to an authorized recipient,” and state that transfer of the high alpha liquid waste stream to the DOE F-Area Tank Farm “would violate 10 CFR 20.2001” since the Tank Farm is an “unlicensed waste ... facility”⁵⁴

Contention 1A represents a challenge to, and a clearly erroneous reading of, the applicable NRC regulations. The regulation cited by Requestors, 10 CFR § 20.2001, specifically provides that a licensee may dispose of licensed material “[b]y transfer to an authorized recipient as provided ... in the regulations in parts 30, 40 ... [or] 70 of this chapter.” 10 CFR § 70.42(b)(1) clearly authorizes the transfer of special nuclear material “[t]o the Department”

⁵⁴ BREDL Contentions at 15.

without the DOE holding an NRC license. Similar provisions are contained in the NRC regulations governing byproduct material and source material (*see* 10 CFR §§ 30.41(b)(1) and 40.51(a)(1)). Since a licensee may dispose of waste by transfer to an authorized recipient, and DOE is an “authorized recipient,” there is clearly no violation of the applicable NRC regulations. Thus, Requestors have failed to raise a genuine issue of material fact or law.

Furthermore, Contention 1A fails to assert any deficiency in DCS’ identification of the design bases of the principal SSCs, its QA Plan or its ER. As a result, the contention raises issues beyond the scope of the CAR proceeding and should not be admitted.

1B. “The applicant submitted contradictory and therefore inaccurate reports.”

Requestors assert that certain statements in the ER and CAR are inaccurate and contradictory. In particular, Requestors point out that the ER states that “the greatest impact of operations ... will be the amount of waste generated,” while the CAR refers to a “[v]ery small amount of generated waste that is transferred to SRS.”⁵⁵

Requestors have taken these two statements out of context. The ER (page ES-5) states that “[t]he greatest impact of operations ... will be the amount of waste generated,” but immediately goes on to explain that it is the high alpha liquid waste stream that produces that impact. This waste stream is generated from the aqueous polishing (“AP”) process. The allegedly inconsistent statement from the CAR (quoted incompletely by Requestors) states, on the other hand:

The various waste streams from the MP [MOX processing] process are extensively treated ... resulting in a very small amount of generated waste that is transferred to SRS.⁵⁶

⁵⁵ *Id.*

⁵⁶ *See* CAR, p. 10-3 (emphasis added).

Since the two statements apply to two different parts of the MOX Facility, they are neither inaccurate nor contradictory and do not raise a genuine issue of material fact or law.

This contention is also apparently based on Requestors' assertions that: (1) DCS "provided a false baseline to justify the production of a major new waste stream, in essence claiming that since 36 million gallons of liquid waste already exists onsite, there is no harm in another million gallons"; and (2) it is "patently false" that the high alpha liquid waste stream "represents a small increase in the amount of waste currently in the [DOE] tank farm"⁵⁷

Requestors never identify why they believe that DCS' statements regarding the volume of liquid wastes in the SRS Tank Farms are false. There is no reference to any specific sources or supporting documents.

Nor is DCS' statement about the high alpha waste stream false. As described in Table 5-12 of the ER, DCS anticipates that the MOX Facility will produce less than 100,000 gallons/yr of high alpha liquid waste. When compared to the SRS site inventory of approximately 36 million gallons of liquid waste, this will indeed represent a "small contribution" to the overall SRS liquid waste inventory. Requestors have failed to identify any genuine issue of material fact or law.

Finally, contention 2 fails to assert any deficiency in DCS' identification of the design bases of principal SSCs, its QA Plan or its ER. As a result, the contention raises issues beyond the scope of the CAR proceeding and should not be admitted.

1C. "Applicant failed to identify numerous adverse impacts of radioactive waste generation in the Environmental Review [*sic*]"

This contention is based on a series of statements, all of which appear intended to call into question the future ability of the SRS Tank Farms to receive liquid waste from the MOX

⁵⁷ BREDL Contentions at 15.

Facility.⁵⁸ Requestors assert, among other things, that: (1) DCS has failed to identify “numerous adverse impacts of the radiological disposal plan” and “[n]otable features of the [SRS waste] management system ...”; (2) designs of some of the SRS tanks are “not compliant with current standards and Federal Facility Act Agreements”; (3) there are leaks in the tanks and there have been delays “in reducing the total waste volumes and radioactivity”; (4) alleged “failures and financial boondoggles” are associated with efforts to reduce waste volumes; (5) DCS should have used a baseline of “zero gallons of liquid waste” in its environmental review to reflect the plan to remove all of such waste by 2028, rather than existing site conditions; and (6) DCS failed to identify various “uncertainties” in SRS waste management practices.⁵⁹

This contention focuses on DOE’s management of the SRS Tank Farms and, therefore, raises issues that are outside the scope of this proceeding. The operation of the SRS Tank Farm was encompassed within several prior DOE EISs.⁶⁰

Since Requestors have failed to identify any genuine issue of material fact or law within the scope of this proceeding, this contention should not be admitted.

1D. “DOE committed gross violations of the National Environmental Protection Act [*sic*] during the decision making process by knowingly publishing false, misleading and inaccurate information in legal NEPA documents.”

The bases for this contention are an erroneous reference to 10 CFR § 51.45, the NRC regulation applicable to ERs (which does not apply to DOE), a generalized reference to “[a]ll parts of NEPA,” and a number of assertions that DOE has violated NEPA.

⁵⁸ BREDL Contentions at 15-17.

⁵⁹ BREDL Contentions at 15-17.

⁶⁰ *Final Environmental Impact Statement, Waste Management Operations* (ERDA-1537) (September 1977); *Double-Shell Tanks for Defense High-Level Radioactive Wastes Storage, Final Environmental Impact Statement* (DOE/EIS-0062) (April 1980) (Supplement to ERDA-1537); *Savannah River Site Waste Management Final Environmental Impact Statement* (DOE/EIS-0217) (1995).

This contention, which addresses only DOE actions, is clearly beyond the scope of the proceeding. 10 CFR § 2.714 (b)(2)(iii) states that “[o]n issues arising under [NEPA] the petitioner shall file contentions based on the applicant’s environmental report.” This contention makes no reference to any error or omission in DCS’ ER. An NRC proceeding does not provide a forum to litigate whether DOE has met its separate NEPA obligations associated with the overall surplus plutonium disposition program. Accordingly, this contention should not be admitted.

1E. “The applicant’s analysis and report is dominated by deficiencies.”

This contention is based on several references to alleged deficiencies in the CAR and ER.

1. The CAR

The alleged deficiencies in the CAR include DCS’ alleged failure to: (1) “define the disposal route” for evaporator bottoms; (2) provide for sampling of the “stripped uranium stream”; (3) specify the quantity of principal radionuclides in liquid and gaseous effluents released to unrestricted areas; and (4) specify “details” of the design requirements for the high alpha liquid waste transfer line.⁶¹

All of these asserted deficiencies essentially request greater detail in describing the design of the MOX Facility. However, such detail is not required at this stage, and Requestors’ statements that these details are not provided is an improper challenge to 10 CFR § 70.22(f), which only requires that the “design bases” of principal SSCs -- and not the design details -- be provided in the CAR. The NRC Staff has clarified the definition of “design basis,” as that term applies to the MOX Facility, as:

⁶¹ BREDL Contentions at 20.

the specific functions to be performed by an SSC of a facility, and the specific values or ranges of values chosen for controlling parameters as reference bounds for design.⁶²

Requestors are seeking a level of detail that goes well beyond the design basis information required at this stage in the licensing process.

In addition, the contention is factually inaccurate. Regarding alleged deficiency (1) above, DCS did provide the “disposal route” for evaporator bottoms. Figure 10-1 of the CAR shows that evaporator bottoms will ultimately be included in the high alpha waste stream, which will be discharged to SRS for management.⁶³ Regarding alleged deficiency (2), the “stripped uranium stream” will be sampled. As reflected in CAR Figure 10-1 and DCS’ response to CAR RAI 135, this stream will undergo isotopic dilution prior to transfer to the high alpha waste tanks, and will, of necessity, be sampled in order to confirm adequate dilution.

Regarding alleged deficiency (3), there is no liquid effluent released to an unrestricted area. In fact, there are no radionuclide-containing liquid discharges from the MOX Facility under normal operations.⁶⁴ Also, the components of any gaseous or airborne effluents are discussed in the CAR.⁶⁵

Accordingly there is no deficiency in the CAR.

2. *The ER*

The only deficiency in the ER that is alleged by Requestors in this contention is that the:

construct[ion] of the liquid waste pipeline from the MFFF to the F-Area Outside Facility ... has never been analyzed under NEPA, and involves an unlicensed operator being responsible for the

⁶² *Standard Review Plan for the Review of an Application for a Mixed Oxide (MOX) Fuel Fabrication Facility*, NUREG-1718, at xxii (emphasis added) (August 2000) (“SRP”).

⁶³ See CAR, Section 10.1.4.

⁶⁴ *Id.* at Sections 10.1.1 and 10.1.2.

⁶⁵ *Id.* at Section 10.2.1.2. The ER also discusses airborne effluents in Table D-7.

design and construction of the Applicant's major SSC for avoiding radioactive waste spills.⁶⁶

This is not an admissible contention because it does not raise a material issue of fact or law within the scope of this proceeding. DOE will construct the F-Area Outside Facility for the processing of high alpha liquid waste generated at the MOX Facility. DOE will also construct the pipeline that will convey this waste stream to the F-Area Outside Facility. At the time the ER was drafted, because the facility and pipeline had not been designed by the DOE contractor, environmental impacts of this facility could not be evaluated.⁶⁷

However, the information available to date and provided to the NRC indicates that any NEPA analysis would find that the effect of the pipeline's construction will be insignificant. The ER (p. 5-2) refers to the industrial nature of the site and absence of critical habitat, minimizing construction impacts. In addition, the pipeline is expected to disturb less than one and one-half acres through a previously disturbed industrial area alongside the F-Canyon Building.⁶⁸ Requestors do not provide any information to indicate why installation of a double-walled stainless steel pipe in an already industrialized plutonium processing area would have a significant environmental impact.

Finally, Requestors' unsupported statement that some "license" is required to design and construct these facilities is erroneous since the work will be performed by DOE, and DOE is exempt from NRC licensing.⁶⁹

⁶⁶ BREDL Contentions at 20 (emphasis added).

⁶⁷ See ER, Section 5.1.1.

⁶⁸ See Letter from Peter S. Hastings, DCS to NRC, Response to ER RAI 20 (July 12, 2001).

⁶⁹ See 10 CFR § 70.3 and 70.4 (definition of "Person").

B. Contention Group 2 “NRC Violations of NEPA”

Requestors have submitted four proposed contentions addressing alleged NRC NEPA violations

2A. “NRC failed to implement NEPA early in the process by issuing a timely notice of intent to prepare an Environmental Impact Statement, and by failing to consult with the DNFSB as an expert agency, resulting in an unfair bias in the scope of the proceedings that benefits the Applicant.”

As the basis for this contention, Requestors quote various Council on Environmental Quality (“CEQ”) and NRC regulations, suggest that the NRC should have issued its Notice of Intent (“NOI”) to prepare an EIS shortly after DOE issued the SPD EIS Record of Decision (“ROD”) in January 2000, and state that the NRC Staff “excluded” the Defense Nuclear Facilities Safety Board (“DNFSB”) from the consultation process.

This contention fails to raise any issues within the scope of this proceeding. In any event, no basis is provided for concluding that the NRC Staff has violated NEPA. NRC regulations do not specify precisely when a NOI must be published, and Requestors point to no particular deadline missed by the Staff. Furthermore, while the applicable CEQ regulation (40 CFR § 1502.5) states that an agency shall commence preparation of an EIS “as close as possible to the time the agency ... is presented with a proposal ...,” there is nothing in the NRC or CEQ regulations that mandates a specific deadline for publication of the NOI.²⁰ The NRC’s NOI in this proceeding was very timely, having been published less than 10 days after receipt of the CAR and during the conduct of the Staff’s initial acceptance review.²¹ Until the CAR was filed

²⁰ The NRC gives substantial deference to CEQ regulations (*see e.g. Deukmejian v. NRC*, 751 F.2d 1287, 1302 (D.C. Cir. 1984)), but is not bound by those portions that have a substantial impact on the way in which the Commission performs its regulatory functions (*see Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments*, 49 Fed. Reg. 9352 (March 12, 1984)).

²¹ The ER had been submitted separately, about three months before publication of the NOI.

(specifically requesting that the NRC authorize construction of the MOX Facility), the NRC was not presented with a “proposal” (*see* 40 CFR § 1502.5) that would trigger the need for an EIS and an accompanying NOI. The issuance of the DOE ROD on the SPD EIS does not constitute such a “proposal” before the NRC.

Secondly, Requestors’ allegation that the DNFSB was “excluded” from consultation is unsupportable. They point to no requirement for the NRC to consult with the DNFSB, nor do they state what consultation would be necessary. In fact, no requirement exists. 10 CFR § 51.28(a)(3) requires the NRC Staff to “invite”:

Any other Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce relevant environmental standards.

(Emphasis added.) The DNFSB does not have jurisdiction by law over the MOX Facility⁷² or special expertise in environmental impacts, and will not be developing or enforcing relevant environmental standards at the MOX Facility. Accordingly, there was no requirement to invite the DNFSB to participate in the scoping process.⁷³

For all these reasons, this contention should not be admitted.

⁷² The MOX Facility does not meet the definition of a “Department of Energy defense nuclear facility” subject to oversight by the DNFSB. *See* 42 U.S.C. § 2286g.

⁷³ In their basis statement, Requestors also allege that NRC “failed to provide a clear record of a decision to prepare an EIS as required by 10 CFR 51.25” and has “excluded public participation” in the scoping process. BREDL Contentions at 25. Section 51.25 does not contain any requirements for providing a public record of the reasons for deciding to prepare an EIS, nor does DCS understand why Requestors would complain of the NRC’s decision to pursue a full EIS in lieu of less formal environmental review processes. A formal NRC ROD follows completion of the EIS. *See* 10 CFR § 51.102(a). As for Requestors’ assertion regarding the exclusion of public participation, the NRC Staff’s record of providing a full and fair opportunity for public comment during the scoping process is described in its “Environmental Impact Statement Scoping Process, Scoping Summary Report” (August, 2001).

2B. “NRC and Applicant collaborated to identify the scope of the Environmental Report outside of NEPA provisions, resulting in segmentation of the NEPA process, which again benefits the Applicant in ways contrary to NEPA.”

Requestors point to correspondence between DCS and the NRC Staff regarding the scope of the ER and EIS as the basis for this contention.⁷⁴ Requestors identify no prohibition on such Applicant-Staff correspondence and none exists. Thus, the contention raises no genuine issue of material fact or law.

Furthermore, the meetings and correspondence between DCS and NRC cited by requestors are in full compliance with 10 CFR § 51.40 which states,

A prospective applicant or petitioner for rulemaking is encouraged to confer with NRC staff as early as possible in its planning process before submitting environmental information or filing an environmental report.

Emphasis added. Therefore, this contention is an impermissible attack on NRC regulations and should not be admitted.

2C. “NRC began a defacto NEPA staff review before any time schedule for such review was published.”

This contention lacks specificity and basis and raises no genuine issue of material fact or law. It is not at all apparent what Requestors mean by a “de facto staff review” or how the alleged conduct of such a review “before any time schedule for such review was published” violates any NRC requirement.

The only apparent basis provided for this contention is Requestors’ reference to 10 CFR § 51.15(a) which states, in pertinent part, that the Staff “may ... establish a time schedule for all or any constituent part of the NRC staff NEPA process” and that the Staff will conduct its review in accordance with that schedule to the “maximum extent practicable.” Nothing in this regulation

⁷⁴ BREDL Contentions at 24.

prohibits the Staff from commencing its NEPA reviews before publication of such a schedule. Indeed, the obvious purpose of this regulation is to facilitate prompt NRC Staff NEPA reviews, rather than to impede the Staff's progress in implementing its NEPA responsibilities.

2D. "NRC changed its criteria for Environmental Justice issues under NEPA without informing the public, which more than anything raises doubt about the NRC staff's independence in this process."

The basis for this contention is an apparent editorial or typographical error by the Staff in the SRP. The very letter cited by Requestors (the Staff's December 11, 2000 letter to DCS), shows on its face the absence of any litigable issue:

DCS also requested guidance on whether to follow the Environmental Justice guidance in [the SRP] . . . or the NRC Staff's previously issued guidance on the specific subject of performing Environmental Justice reviews. The SRP states that the Description of the Affected Environment should include "[s]ocioeconomic information, including that for low-income and minority populations within a 50-miles radius (emphasis in NRC letter). This dimension is incorrect. (Emphasis added). DCS should follow the Nuclear Material Safety and Safeguards Policy and Procedures letter 1-50, Rev. 2, which states that "if the facility is located outside the city limits or in a rural area, a 4 mile radius (50 square miles) (emphasis in NRC letter) should be used

The NRC clearly did not change its position, but instead merely corrected a misstatement of its policy on Environmental Justice reviews.⁷⁵ Thus, there has been no change in criteria and this contention does not raise a genuine issue of material fact or law.

C. Contention Group 3 "Conflicts of Interest"

Requestors have submitted three proposed contentions relating to alleged conflicts of interest. Each is discussed below.

⁷⁵ See Letter from Melanie A. Galloway to Robert H. Ihde (December 11, 2000), Enclosure pp. 1-2.

3A. NRC has a Conflict of Interest in this proceeding because it has received, receives, and pursues receiving DOE funding to support licensing activities for the Russian MOX program - - - funding pursued even after the Energy ReOrganization Act of 1974 was amended (see Contention Group 2)."

This contention raises no genuine issue of material fact or law within the scope of this proceeding since it fails to assert any deficiency in DCS' identification of the design bases of the principal SSCs, its QA Plan or its ER. The basis for the contention apparently is the assertion that the NRC receives DOE funding to provide technical assistance to Russian regulatory agencies involved with the Russian MOX program. It is not clear whether Requestors believe NRC should cease accepting such funding, should withdraw from such technical assistance efforts, or should remove itself from the role of licensing authority for the MOX Facility. None of these assertions is a sufficient basis for a contention, however, since the Board does not have the authority to order any of these actions. Congress has, of course, specifically provided that the NRC will be the licensing authority for the MOX Facility.⁷⁶ Accordingly, this contention should not be admitted.

3B. "NRC hired as its NEPA contractor an organization – Argonne National Laboratory—with obvious conflicts of interest in this proceeding to conduct the EIS."

This contention, again, raises no genuine issue of material fact or law within the scope of this proceeding, since it fails to assert any deficiency in DCS' identification of the design bases of the principal SSCs, its QA plan or its ER. Accordingly, this contention should not be admitted.

⁷⁶ See 42 USC § 5842.

- 3C. “The Applicant has a clear conflict of interest in terms of being involved with U.S. foreign/nonproliferation policy and also having a vested interest in parallel efforts in Russia that originated prior to U.S. involvement in the Russian plutonium disposition program. See attachment.”**

DCS has been unable to identify any basis for this contention in the Requestors’ accompanying basis statement. No regulation is cited, and no explanation, beyond the contention itself, is provided.⁷⁷ In any event, even if DCS were “involved with U.S. foreign/nonproliferation policy,” that would have no bearing on its qualifications to obtain a license from the NRC. This contention does not raise a genuine issue of material fact and should not be admitted.

D. Contention Group 4 “Qualifications”

Requestors have submitted two contentions relating to the NRC’s qualifications to license and regulate the MOX Facility. Each is discussed below.

- 4A. “The NRC lacks the necessary expertise in the field of industrial-scale plutonium processing to adequately determine whether public health and safety will be protected and to issue a license assuring this.”**

This contention raises an issue that is not litigable in an NRC licensing proceeding. As recently held by the Commission, general attacks on the NRC’s competence do not raise admissible issues.⁷⁸ Furthermore, the contention raises an issue that is clearly beyond the scope of the proceeding and should not be admitted.

⁷⁷ The contention itself states “See attachment” as a basis but does not identify the relevant attachment or how it supports the contention. “Mere reference to documents does not provide an adequate basis for a contention.” *Baltimore Gas & Elec.*, CLI-98-25, 48 NRC at 348.

⁷⁸ *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, NRC slip. op. at 8 (Oct. 6, 2000).

4B. "Shortages in critical skills threatens [sic] to weaken NRC's future ability to protect public health and our environment."

This contention should be rejected for the same reasons as stated above for contention

4A.

E. Contention Group 5 "Unresolved Issue of Authority of Applicant to Apply for and Hold License"

Requestors have submitted five proposed contentions in this group. Each is discussed below.

5A. "Because DOE functions as the financial assurance entity, will [sic] own the MFFF, it should either be the applicant or a co-applicant for the Construction License."

First, this contention fails to assert any deficiency in DCS' identification of the design bases of principal SSCs, its QA Plan, or its ER and is therefore beyond the scope of the proceeding.

Secondly, the contention fails to state the alleged facts or expert opinion upon which Requestors rely, and raises no genuine issue of material fact or law. Requestors point to no statutory provision⁷⁹ or NRC regulation that requires that DOE be the NRC license applicant.⁸⁰ Therefore, this contention should not be admitted.

5B. "DOE is not an historically reliable source of financing."

In support of this contention, Requestors speculate that for various reasons DOE may not choose, or may not be able, to fund either the construction, operation or deactivation of the MOX Facility.

⁷⁹ See 42 USC § 5842.

⁸⁰ Requestors state that "[u]nderstanding that this is an example of a very specific law in NRC's mandate, the Yucca Mountain does provide precedence for direct licensing of DOE." BREDL Contentions at 38. However, the Nuclear Waste Policy Act specifically provides that DOE must obtain an NRC license for the high-level waste repository. See 42 U.S.C. § 10245. There is no such provision applicable to the MOX Facility.

Financial assurance for construction of the MOX Facility is beyond the scope of the issues suitable for litigation in the proceeding on the CAR, since this issue does not relate to adequacy of the design bases of the principal SSCs or the QA Plan. There is no requirement in 10 CFR Part 70 for any fuel fabrication facility applicant to demonstrate financial assurance for construction activities. When the Part 70 regulations were modified for plutonium facilities (to require a demonstration that the design bases of principal SSCs will be adequate in the event of an accident or natural phenomena), no change was made to impose any new financial qualifications or requirements. Thus, this contention also constitutes an impermissible challenge to the NRC's regulations.

Any issue related to DCS' financial qualifications to operate or deactivate the MOX Facility is beyond the scope of the proceeding on the CAR, and should not be admitted.

5C. "The DOE contract with Applicant is a limiting factor in the ability of Applicant to meet NRC license requirements and perform work safely, and therefore is a safety issue to be examined in this proceeding."

The basis of this contention appears to be Requestors' statements that DCS' contract with DOE "does not guarantee funding for the entire project," provides "stop work" authority, and gives DOE the option to authorize or not authorize DCS to move into the construction and later the operations and deactivation phases.⁸¹ To the extent that the contention raises issues regarding DCS' financial qualifications, it is not admissible for the same reasons as stated under contention 5B above. Such issues are beyond the scope of the proceeding on the CAR.

Furthermore, Requestors have not identified how the safety of the MOX Facility could be adversely affected. Finally, the contention also does not meet the pleading standards of 10 CFR § 2.714(b), since the only linkage drawn between DOE's funding of the project and safety is a

general statement that “the licensee’s ability to attain financial assurance from DOE is uncertain, this ... constitutes a Configuration Management and Quality Assurance safety issue ...” and could result in “cutting corners.”⁸² This general reference to configuration management and QA and the possibility of “cutting corners” does not adequately specify a genuine issue of material fact or law. Nor can a contention be based on an assumption that an applicant will not comply with NRC regulations or otherwise “cut corners.”⁸³

5D. “The Applicant is financially obligated to pay the costs of deactivation above and beyond DOE’s allowance of \$10 million, but has yet to provide financial assurance.”

Requestors’ basis for this contention is that the DCS contract with DOE limits DOE’s total liability for deactivation to \$10 million and that DCS is responsible for any additional deactivation costs. Requestors allege that this contractual arrangement:

raises a very real safety issue in regards to meeting license requirements because the costs of deactivation apparently assumes nearly flawless operations and a simple deactivation process, an assumption that defies the record of plutonium processing facilities.⁸⁴

Again, this contention raises financial assurance issues that are beyond the scope of the proceeding on the CAR for the same reasons as stated under contention 5B above. Furthermore, Requestors provide no expert opinions or facts to support their allegation that \$10 million is insufficient, or that DCS has assumed “nearly flawless operations” or “a simple deactivation process.” Nor do Requestors explain why DCS could not pay for costs above \$10 million

⁸¹ BREDL Contentions at 39.

⁸² *Id.* at 39-40.

⁸³ *See GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 210 (2000) (finding no basis for risk of applicant’s technical resources being “stretched too thin” and noting that NRC inspection and enforcement programs are protective of public health and safety).

⁸⁴ BREDL Contentions at 40.

without impacting safety. A contention cannot be based upon an assumption that an applicant will not comply with NRC regulations”⁸⁵ Therefore, Requestors have failed to provide a sufficient basis for admission of this contention, and it should not be admitted.

5E. “The Applicant is presently liable to being held in Breach of Contract, which adds further uncertainty to the project.”

Whether or not DCS is in breach of its contract with DOE is a matter that is entirely outside the scope of this proceeding. This is particularly the case when the alleged breach relates to the contract provisions governing the mission reactors and does not relate to the MOX Facility itself.⁸⁶

F. Contention Group 6 “Compliance Reporting”

Requestors provide one proposed contention in this group.

6A. “The applicant failed to identify and describe its environmental and safety compliance record to NRC. The ER submitted by DCS in December 2000 failed to describe the regulatory compliance history of the licensee. Instead, DCS described the regulatory compliance history of the Savannah River Site Operating Contractor Westinghouse Savannah River Site. WSRC has not submitted a license application to the NRC. Duke Cogema Stone and Webster submitted the license application yet failed to define their own compliance history both here and abroad.”

This contention alleges deficiencies in the ER and appears to be based upon a misunderstanding of 10 CFR § 51.45(d). That regulation requires that the ER list the requisite environmental quality-related permits, licenses, standards and requirements and describe the “status of compliance” with these requirements. Contrary to this contention, the ER clearly

⁸⁵ See *GPU Nuclear Inc.*, CLI-00-06, 51 NRC at 210.

⁸⁶ BREDL Contentions at 41.

identifies the requisite environmental quality requirements and provides the status of DCS' compliance.⁸⁷

Requestors seek "full disclosure of the environmental, safety, and health compliance records of all major and minor partners in DCS." This information is neither required by section 51.45(d), nor an appropriate basis for a contention. Section 51.45(d) calls for a listing and status of permits and approvals "which must be obtained in connection with the proposed action..." (Emphasis added). It does not call for any information regarding the status of compliance of the applicant or other entities with respect to other projects or activities.

Furthermore, DCS has not relied upon the technical qualifications of its parents as the basis for its technical qualifications to design and construct the MOX Facility. Instead, as discussed in Chapter 4 of the CAR, DCS has established minimum qualifications for the managers responsible for design and construction of the MOX Facility. Therefore, the technical qualifications of DCS' parents are not material to this proceeding.

The Commission has previously denied contentions that focus on the technical qualifications of the parents of an applicant, rather than the applicant itself.⁸⁸ For example, in the license transfer proceedings for Oyster Creek, the Commission found that any relevance of petitioner's allegation of a parent company's improper "staffing decisions" in facilities outside the United States was both remote and speculative," because it was the applicant's parent, and not the applicant that was managing those facilities.⁸⁹ Therefore, contention 6A should not be admitted.

⁸⁷ See ER Chapter 7 and Table 7-1. Given the early stage of the MOX Facility project, many of the necessary permits or approvals are in the preparatory stages.

⁸⁸ *Vermont Yankee Nuclear Power Corp.*, CLI-00-20, NRC slip. op. at 11; *GPU Nuclear Inc.*, CLI-00-06, 51 NRC at 209-10; see also Staff Answer at 35.

⁸⁹ *GPU Nuclear Inc.*, 51 NRC at 209-10.

G. Contention Group 7 “Nuclear Reactor Safety Issues”²⁰

Requestors have identified no specific contentions in this category and thus have failed to meet the most basic pleading requirement imposed by 10 CFR § 2.714(b) and the Board’s July 17, 2001 Memorandum and Order.²¹ For purposes of responding to Requestors’ arguments, however, it appears that they are raising the following two issues:

- 7A. “[W]ithout the irradiation services provided by ... commercial reactors, there would be no reason for the Mixed Oxide Fuel Fabrication Facility (MFFF) to seek a license for construction or operation. Therefore, we contend that it is well within the scope of the Atomic Safety and Licensing Board ... to consider the purpose for and, more importantly, the impacts of the material produced at the MFFF.”**
- 7B. “[S]egmentation of the surplus plutonium disposition project into consideration of facilities for fabrication, irradiation, and ultimate disposition is not in accord with ... [NEPA]”²²**

DCS responds to each of these issues below.

First, as explained in Section II above, issues associated with the use of MOX fuel in reactors are clearly outside the scope of this proceeding.²³ Also as discussed in Section II, the environmental impacts of irradiation of MOX fuel are more properly addressed in the context of the separate reactor licensing actions that must be taken in order to permit such irradiation. In any event, a statement that the impacts of MOX fuel irradiation are “within the scope” of the

²⁰ This contention group is structured differently than the Requestors’ other groups of contentions. The title for this section of DCS’ Answer, therefore, is taken from the first sentence of this portion of the BREDL Contentions, which states “[t]his contention group ... focuses on ... nuclear reactor safety issues” BREDL Contentions at 42.

²¹ The Board’s July 17 Memorandum and Order (p.7) directed that “each contention ... be separately numbered setting forth as the first paragraph of the contention the ‘specific statement of the issue of law or fact to be raised or controverted’”

²² BREDL Contentions at 42.

²³ In this regard, the multiple pages of attached press releases, performance summaries and news articles related to the safety performance of the Catawba and McGuire nuclear power plants add nothing to the Requestors’ position.

proceeding does not identify a genuine issue of material fact or law. DCS has in fact discussed those impacts in Sections 1.2.2 and 5.6.4 of the ER, and the NRC Staff has expressed its intention to address reactor environmental impacts in the EIS as “indirect” impacts.⁹⁴ Finally, to the extent that this contention challenges the “need” for the MOX Facility under NEPA, that determination has already been made by DOE and is not subject to litigation in this proceeding.⁹⁵

With respect to Contention 7B, the appropriate treatment of the overall DOE surplus plutonium disposition program (and whether DOE has properly implemented its NEPA responsibilities in connection with that program) is also an issue that is clearly beyond the scope of this proceeding and beyond the NRC’s authority. Furthermore, Requestors have failed to meet the section 2.714(b) pleading standards in connection with this contention by failing to provide any statement of supporting basis. There is no discussion of the applicable principles of segmentation, or of Requestors’ basis for believing segmentation has occurred. In any event, DOE broadly evaluated the impacts of the overall surplus plutonium disposition program in both of its programmatic EISs.⁹⁶

⁹⁴ The Staff’s Scoping Summary Report states that “the NRC will consider the environmental impacts resulting from the use of MOX fuel ... if and when nuclear power plant operators apply for a license amendment to use such fuel.” The Scoping Summary Report also states that “it is reasonable to consider the impacts of reactor use as an indirect impact in the [MOX Facility] EIS.” See Scoping Summary Report at 22.

⁹⁵ In the Scoping Summary Report, the Staff states that “[o]rdinarily, an NRC environmental impact statement also discusses in detail the need for the proposed action. Here, however, the DOE has already addressed the need for the MOX FFF ... and the EIS will reference the purpose and need analyses performed by DOE pursuant to NEPA.” See Scoping Summary Report at 18.

⁹⁶ Our review of the materials included in Requestors’ Contention Group 7 indicates that the vast majority relates to reactor safety issues. There is however, a brief discussion of “[e]mergency response” issues associated with “Plutonium Fuel Transportation Hazards” and an assertion that “Complete Information has Not Been Made Public.” BREDL Contentions at 46. As discussed in Section II above, emergency response issues are beyond the scope of this proceeding and neither those issues nor the assertion regarding lack of information meets the section 2.714(b) pleading standards or constitutes a valid contention.

H. Contention Group 8 “Department of Energy NEPA Violations (outside of Waste Management at MFFF)”

All six of the proposed contentions contained in this group are based upon claimed violations of NEPA by DOE that are beyond the scope of this proceeding and beyond the NRC’s authority. An NRC hearing does not provide a forum to litigate whether the DOE has met its separate NEPA obligations associated with the overall surplus plutonium disposition program. As a result, all of the Group 8 contentions should be rejected as beyond the scope of the proceeding.

Each of the individual contentions is discussed further below.

8A. “DOE has failed to implement most of the decisions in the ROD for the November 1996 Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement (S&D PEIS). Specifically, DOE has failed to upgrade plutonium pit storage facilities at Pantex Nuclear Weapons Plant, and more immediately to this issue, has failed to provide for long-term storage of non-pit plutonium at SRS.”

Requestors cite, as their basis for this contention, portions of their May 17, 2001 Request for Hearing in which they point out alleged deficiencies in the S&D EIS and “contend” that “DOE’s failure to implement this decision [the S&D EIS ROD] requires a new Environmental Impact Statement for storage and disposition of excess plutonium.”²⁷

Whether or not DOE has: (1) upgraded plutonium pit storage facilities at its Pantex plant in Texas; (2) provided for the long-term storage of non-pit plutonium at SRS; or (3) should prepare a new programmatic EIS is beyond the scope of this proceeding and beyond the NRC’s authority. Requestors have failed to identify any deficiency in DCS’ ER and even if their allegations were true, they would not be entitled to any relief in this proceeding.

²⁷ BREDL Request for hearing at ¶ 4(b)(iii). Requestors also cite portions of an attached report prepared by BREDL entitled “Plutonium: The Last Five Years” (“BREDL Report”), including several pages that do not appear to exist in the version of the BREDL Report served on DCS.

- 8B. **“DOE irreparably biased the SPDEIS towards MOX through the premature solicitation of a MOX contractor. The 1998 DOE Request for Proposals (RFP) for MOX Fuel Fabrication and Irradiation services (Solicitation Number DE-RP0298CH10888 and subsequent amendments) in which DOE requested consortiums of fuel fabricators, engineering firms, and nuclear reactor operators to submit proposals for ‘*design, licensing, construction, operation, and eventually decontamination and decommissioning of a MOX [fuel fabrication] facility as well as irradiation of the MOX fuel in existing domestic, commercial reactors should the decision be made by DOE in the SPD EIS ROD to go forward with the MOX program*’”**

No basis whatsoever is provided by Requestors for this contention, nor does the contention identify a genuine issue of material fact or law. As a result, the contention fails to meet the pleading standards of Section 2.714(b). Whether or not DOE’s solicitation of a MOX contractor was “premature” is also beyond the scope of this proceeding and beyond the NRC’s authority. Even if Requestors’ assertions were true, they would not be entitled to any relief in this proceeding.

- 8C. **“DOE has abandoned its Record of Decision for the SPDEIS and has failed to issue a supplemental EIS to evaluate the impacts of major changes in addition to the liquid radwaste stream at the MFFF:**

- feedstock requirements for the MFFF caused by delays in the PDCF;
- impacts on U.S. ability to meet agreements with Russia due to suspension of the PIP;
- Failure to implement long-term plutonium storage alternatives at SRS;
- increased requirements at the PDCF resulting from MFFF acceptance criteria.”

The only basis provided for this contention is an unexplained reference to various pages of the BREDL Report, several of which do not appear to exist in the version of the BREDL Report served on DCS. Thus, Requestors have failed to meet the pleading standards of section 2.714(b).

In any event, regardless of whether DOE has failed to perform a supplemental EIS to address “major changes” in the SPD program, alleged DOE NEPA violations may not be

litigated in this proceeding and are beyond the NRC's authority. Even if Requestors assertions were true, they would be entitled to no relief in this proceeding.

8D. "The Plutonium fuel/MOX option greatly increases the risk of plutonium theft, diversion, and reuse and DOE greatly underestimated the risk of nuclear explosives being developed from reactor plutonium, in its NEPA process."

The only basis provided for this contention again is an unexplained reference to page 8 of the BREDL Report. Thus, Requestors have failed to meet the pleading standards of section 2.714(b).

Furthermore, this contention raises no issue regarding the design bases of the principal SSCs, the QA Plan or the ER, and criticizes DOE's programmatic decisions under NEPA. It therefore raises issues beyond the scope of this proceeding, and beyond the NRC's authority. Even if Requestors' assertions were true, they would be entitled to no relief in this proceeding.

8E. "DOE failed to identify the dual-use nature of both the PDCF and the MFFF, and both facilities have the potential to be converted into use for plutonium pit fabrication."

The only basis provided for this contention is an unexplained reference to various pages of the BREDL Report, none of which appear to exist in the version of the BREDL Report served on DCS. Thus, Requestors have failed to meet the pleading standards of section 2.714(b).

Furthermore, the licensing action before the NRC is the request for authority to construct the MOX Facility and ultimately to fabricate MOX fuel under an SNM possession and use license. The prospect that either the PDCF or the MOX Facility might hypothetically be used as plutonium pit fabrication facilities is beyond the scope of this proceeding. Any such proposed use of the MOX Facility in particular would clearly not be permissible under the proposed NRC license to be issued. Finally, DOE's implementation of its NEPA responsibilities is beyond the

scope of this proceeding and beyond the NRC's authority. Even if Requestors' assertions were true, they would be entitled to no relief in this proceeding.

8F. "DOE's analysis failed to identify or greatly understated the real hazards of plutonium processing."

The only basis provided for this contention is a reference to "Part I" of the BREDL Report, which is ten pages long and is entitled "The Trouble With Plutonium." This does not provide an adequate basis for the contention. Furthermore, as stated above, DOE's implementation of its NEPA responsibilities is beyond the scope of this proceeding and beyond the NRC's authority. Even if Requestors' assertions were true, they would be entitled to no relief in this proceeding.

I. Contention Group 9 "Inadequate Radiological Protection of Public"

Requestors have submitted two proposed contentions in this Contention Group.

9A. "Applicant used inappropriate control area boundaries and therefore mischaracterized members of the public as occupationally exposed workers."

This contention is based upon the Requestors' statements that: (1) DCS "incorrectly defined its control area as the entire SRS, which even DOE has difficulty securing from trespass and which has two public roads passing through"; (2) the controlled area "includes areas that are open to the public with minimal restrictions ..."; and (3) "[p]eople who travel on Highway 125 [or engage in other public activities in the area] do not receive occupation [*sic*] doses and will not be exposed to educational programs' that the Applicant offers as insufficient mitigation measure [*sic*]." ²⁸

Requestors have provided no explanation as to why the designated controlled area is improper or fails to comply with NRC regulations. 10 CFR § 70.61(f) states that "[e]ach

licensee must establish a controlled area, as defined in § 20.1003.” In turn, 10 CFR § 20.1003 defines “controlled area” as “an area, outside of a restricted area, but inside the site boundary, access to which can be limited by the licensee for any reason.” Of particular relevance, 10 CFR § 20.1301(b) specifically contemplates that a licensee may “permit members of the public to have access to controlled areas” Thus, the contention represents an improper challenge to NRC regulations.

Furthermore, Requestors provide no basis for their statement that DOE has “had difficulty” in preventing trespass on the SRS. As explained in Section 1.1.2.1 of the CAR, and DCS’ responses to NRC Staff RAIs,²⁹ DOE currently controls access to the SRS, and DCS will be establishing a protocol with DOE that will integrate the MOX Facility with the existing SRS emergency preparedness and response plan, in order to limit access to the MOX Facility controlled area in the event of an emergency.

Finally, Requestors’ statement that persons engaging in public activities within the controlled area do not receive occupational doses and will not be exposed to DCS’ “education programs” is correct, but alleges no deficiency in the CAR. As discussed above, 10 CFR § 20.1301(b) permits members of the public to have access to the controlled areas and such persons will be subject to the public dose limits of Part 20.

²⁸ BREDL Contentions at 72-73.

²⁹ See Letter from Peter S. Hastings, DCS to NRC, Response to ER RAI 10 (July 12, 2001); Letter from Peter S. Hastings, to NRC, Response to CAR RAIs 1 and 2. (August 31, 2001).

9B. “The applicant failed to submit an Emergency Management Plan for the MFFF because of the inappropriate definition of a control area.”

This contention is an improper challenge to the NRC regulations which do not require the submittal of an Emergency Plan: (1) with the request for construction authorization¹⁰⁰; or (2) with the application for a possession and use license, if the applicant’s analyses demonstrate that the maximum dose to a member of the public offsite would not exceed certain limits.¹⁰¹

J. Contention Group 10 “Lack of Complete and Accurate Information”

Requestors have identified three proposed contentions in this Group.

10A. “Applicant failed to submit detailed information sufficient for fact checking and analysis of the proposal.”

As an initial matter, this contention does not raise any genuine issue of material law or fact, since NRC regulations do not prescribe a specific level of detail to be included within a CAR. 10 CFR Part 70 identifies the findings that must be made in order for the NRC to authorize construction. In this case, the NRC Staff has reviewed the CAR and has accepted it for docketing, indicating that DCS’ submission provides “sufficient information...for the staff to begin a detailed technical review.”¹⁰² To the extent that further information is considered necessary, the NRC staff may issue an RAI. Issuance of an RAI is not, however, indicative of any improper “failure to submit detailed information.”

The bases for this contention are: (1) a claim that DCS is “contractually obligated ... to minimize the amount of new information for the process”; (2) a reference to “the issues raised in

¹⁰⁰ The SRP also recognizes that no Emergency Plan is required at the CAR stage. See NUREG-1718 at Sections 14.5.1.

¹⁰¹ See 10 CFR § 70.22(i).

¹⁰² See Letter from Andrew Persinko, NRC to Robert H. Ihde, DCS (March 28, 2001) (accepting MOX Facility CAR for review).

the [RAIs],”¹⁰³ and; (3) allegations of a “lack of incomplete [*sic*] information” regarding 15 issues.

Requestors have not identified the relevant provisions of the DOE-DCS contract, nor have they explained why such contractual provisions are inappropriate. If DCS is unable to satisfactorily answer the NRC Staff’s RAIs, the CAR will not be approved. Requestors may not “rest on [the] mere existence” of RAIs as a basis for their contentions.¹⁰⁴ The Staff’s issuance of RAIs does not indicate a violation of the completeness and accuracy requirements of 10 CFR § 70.9.

Nor is a genuine issue of material law or fact raised by any of the 15 issues listed as support for this contention. In fact, although the Group 10 contentions purportedly address a “Lack of Complete and Accurate Information,” many of the 15 issues raised in support of contention 10A do not allege any error or omission in the CAR, QA Plan or ER. DCS does not believe that the 15 issues discussed below should be interpreted by the Board as specific contentions. Certainly Requestors have not identified them as such in their pleading. DCS nevertheless responds to each below:

- i. The requirements of the MFFF are inadequately defined because DCS, in documents submitted to NRC, assumes that all plutonium oxide feedstock will derive from the Plutonium Pit Disassembly and Conversion Facility, in spite of the following facts:
 - The U.S.-Russian agreement identified at least 0.5 MT of plutonium presently in oxide as scheduled for MOX option.
 - Approximately 3.7 metric tons of plutonium metal that is not in plutonium pit form is targeted for the MOX option. (For more information see Section 2 of *Plutonium, the Last Five Years*, submitted as an attachment to Group 8).

¹⁰³ Specifically, Requestors claim that “[t]he Applicant submitted a CAR characterized primarily by lack of detail. This is illustrated by the fact that the NRC staff submitted an 86-page Request for Further Information involving 239 questions, or about one question per 8 pages of the report.” BREDL Contentions at 74.

¹⁰⁴ *Duke Energy Corp.*, 49 NRC at 336.

- DOE is actively reviewing potential MOX feedstock options to compensate for the delay in the PDCF.
- The lack of a disposition path for 8-17 MT of plutonium originally in the Plutonium Immobilization disposition path is likely to provoke major design changes at the MFFF to facilitate processing of these more difficult, impure materials in the MFFF.”

Requestors do not explain which “requirements of the MFFF” have not been properly defined, nor what the impact of plutonium feedstock sources other than the PDCF would be on the design bases of the MOX Facility’s principal SSCs. They point to no specific portion of the CAR, QA Plan or ER that is deficient. Therefore, this allegation raises no genuine issue of material fact or law within the scope of the proceeding and lacks a sufficient basis for admission. Furthermore, the source of the plutonium feedstock is not important for the MFFF design so long as the feed meets the design specifications.

- b.¹⁰⁵ “The “design basis” for the MFFF will inevitably change due to changing requirements in the plutonium disposition. Since 1997 the facility footprint has more than tripled in size. (See Attachment, MOX Costs Fact Sheet).”

This general assertion regarding “inevitable” MOX Facility design basis changes fails to describe what design changes may occur, or how they could adversely affect the MOX Facility. As a result, Requestors have failed to meet the pleading requirements of 10 CFR § 2.714(b).

Furthermore, the claim that the MOX Facility footprint has tripled in size since 1997 does not point out any error or discrepancy in the CAR as submitted to the NRC in 2001. This issue does not suggest in any way that the information provided to the NRC is inaccurate.

¹⁰⁵ This paragraph and others following in the BREDL Contentions appear to be mislabeled. DCS has followed the paragraph lettering as reflected in the BREDL Contentions.

- c. “The MFFF design is in conflict with the DOE’s Technical Standard for the Long-Term Stabilization and Storage of Plutonium Oxides and metal, known as the 3013 Standard. DOE’s standard for long-term plutonium stabilization and storage requires “high-firing” of plutonium at 950 degrees Celsius to remove moisture and corrosive impurities. However, the “plutonium polishing” step is far more difficult with high-fired plutonium oxide powder than with plutonium oxide that has not been high-fired. (See Pages 1.6 to 1.7 of Plutonium, the Last Five Years”

This allegation asserts a conflict between the MOX Facility design and a DOE technical standard. Since it fails to allege any deficiency in the MOX Facility design as the design relates to NRC standards, it fails to raise a valid contention. Even if true, it would not entitle Requestors to relief in this proceeding.

In any event, as explained in the DCS Answer to BREDL’s Request for Hearing, the MOX Facility design is not “in conflict with” DOE Standard 3013.¹⁰⁶ On the contrary, the 3013 Standard is specifically included in the design specifications for the MOX Facility and the aqueous polishing process is designed to accommodate high-fired plutonium. No “conflict” is apparent and Requestors have provided no basis for this assertion.

- d. “The proposed location of the MFFF in F-Area at SRS was not selected through site-specific NEPA process, and even if it was, the selection was poor from a seismic and ecological standpoint-proximity to major stream course. According to the SRS Site Selection document, the site is located on fill from past F-Area excavations as well as [*sic*].”

To the extent that this statement addresses the selection of the SRS F-Area as the general site for the MOX Facility, this issue is not open for litigation in this proceeding. In the SPD EIS, DOE selected the F-Area at SRS as the location for the MOX Facility.¹⁰⁷ As discussed in Section II, that decision is not subject to review by the NRC.

¹⁰⁶ See DCS Answer to Blue Ridge Environmental Defense League Request for Hearing regarding mixed oxide fuel fabrication Construction Authorization Request at 18.

¹⁰⁷ See SPD EIS, Section 2.7.1.

To the extent that this statement addresses the choice of a specific site within the F-Area, Requestors have failed to explain how the selection of the proposed site violated NEPA. In its ER, DCS described the process it used to select the specific site location within the F-Area.¹⁰⁸ Furthermore, the NRC Staff has stated in the Scoping Summary Report that its EIS will evaluate “the degree to which impacts would vary depending on where *within the SRS F-Area* the proposed MOX FFF may be located.”¹⁰⁹

Requestors then state that the chosen site is “poor” from a “seismic and ecological standpoint – proximity to major stream course.” Requestors fail to provide any basis to suggest that the site is unsuitable from a seismic perspective; the mere reference to a nearby “major stream course” does not provide the requisite specificity or basis. Similarly, the Requestors do not explain why the location of the MOX Facility on “fill from past F-Area excavations” calls into question any of the design bases of principal SSCs. In any event, since foundations for principal SSCs will be located below the original ground elevation on undisturbed soil, the existence of fill on the property is irrelevant.¹¹⁰

- e. “Design and Certification of the MOX Fuel transport cask is driven by concerns over weight limits in DOE SSTs and transportation costs, which has forced a first-of-its-kind design with a high technical risk factor.”

DOE will be transporting fresh MOX fuel to the reactors and, therefore, this issue is outside the scope of this proceeding. In addition, this assertion represents an improper challenge to the NRC’s regulations, since the transportation packages for the MOX fuel must be certified in accordance with 10 CFR Part 71. Finally, Requestors have not specified what they mean by

¹⁰⁸ See ER, Sections 5.7.2.3 through 5.7.2.6.

¹⁰⁹ Scoping Summary Report at 18 (emphasis added).

¹¹⁰ See Letter from Peter S. Hastings, to NRC, Response to CAR RAI 24 (August 31, 2001).

“concerns over weight limits ... and transportation costs,” nor have they described why there is a “high technical risk factor.” Therefore, this issue lacks the requisite specificity and basis.

- f. “Applicant failed to identify the historic deep boreholes in the area.”

This statement is factually incorrect. Historic deep boreholes are specifically discussed in CAR Section 1.3.5.1.7. The locations of these boreholes are depicted in the CAR, on Figure 1.3.5-18. There are no deep boreholes on the MOX Facility site, with the closest such borehole located several thousand feet to the east of the proposed site. Requestors do not identify why this discussion is insufficient. In addition, Requestors never identify why they believe that these “boreholes” might impact the design bases of principal SSCs, the QA Plan or the ER.

- g. “Applicant failed to identify whether a buried ‘Super Control and Relay Cable’ that was mapped as running parallel to the 115 KV Power Line in the SRS USGS of 1987 is still in the area and whether this is an issue. The failure to identify this, coupled with the applicant’s apparent lack of site knowledge, indicates a trend towards inadequate configuration management, a quality control issue.”

This issue fails to assert any deficiency in DCS’ identification of the design bases of principal SSCs, its QA Plan or its ER. As a result, it raises issues beyond the scope of the proceeding. The cable identified by BREDL was a control cable that communicated electrical transmission equipment status between the F-Area substation and the SCE&G substation that feeds F-Area. (Note, the proper identification for the cable is “Supervisory Control and Relay Cable.”) This cable is actually out of service and was abandoned in place.

- h. “Applicant failed to identify the increased difference in environmental impacts between the Immobilization option and MOX option revealed since the SPDEIS was published. In addition to information identified in Contention Group 1, other risks not found in the immobilization option are:

- substantial risks of plutonium contamination from accidental explosions
- leaks of plutonium and americium contaminated liquids
- higher risks of nuclear criticality due to liquid acid processing

- higher risks from fires due to use of polycarbonate glove box windows that are not flame resistant
- large scale americium production from plutonium purification
- increased proliferation risks due to higher attractiveness of purified weapons-grade plutonium from liquid acid process
- risks of Russian Minatom pursuing an export economy involving plutonium fuel, possibly to nations on the U.S. Export Control List
- Increased risk of failing to meet commitments with Russia to dispose of even 34 MT of weapons plutonium, since the mission reactors can only handle 25.5
- Increased risks of plutonium contamination and/or accidental criticality during the unnecessary transportation of Plutonium/MOX fuel assemblies to mission reactors
- Increased and unnecessary risk to the Charlotte, NC and Rock Hill SC areas from irradiating more dangerous and technically risky plutonium/MOX fuel in Catawba and McGuire NPP
- Increased risk of terrorist attack on SST's because MOX shipments are planned in conjunction with refueling, a fact that reveals a much smaller window for shipments to take place and therefore heightens security risks."

This issue states that DCS has failed to accurately assess the "increased" environmental impacts of MOX fuel fabrication versus immobilization "since the SPDEIS was published."

Requestors' bases are a series of unsupported allegations regarding these increased risks, without reference to any specific portions of the ER or to any sources of supporting information.

DCS is not required to compare the risks of MOX fabrication versus immobilization. That comparison was performed by DOE in its programmatic EISs, and is therefore beyond the scope of this proceeding. Furthermore, Requestors have failed to provide the requisite references to sources or other supporting data for admission of this issue as a contention.

g.¹¹¹ “Applicant used an inflated background radiation value for the Aiken County Area. Aiken County has some of the lowest Radon levels in the region and few homes have basements due to the sandy soils. Therefore, it is entirely inappropriate to use a U.S. average of 200 millirem per year radon dose in this area.”

This issue is beyond the scope of this proceeding because it does not call into question any of the design bases of the principal SSCs, the QA Plan or the ER, and appears to address doses from normal operations. Furthermore, it is supported by no sources or data.

In the ER, DCS compared the dose from routine MOX Facility operations to the exposures permitted in 10 CFR Part 20 and, although not required to, DCS also compared operational exposures to background levels of radiation.¹¹² Requestors have not challenged DCS’ conclusions that exposure levels from routine operations will meet 10 CFR Part 20.

Instead, Requestors challenge the voluntary comparison with background levels of radiation, stating that the contribution from radon is too high.¹¹³ The 200 mrem/yr value is the national average taken from *Ionizing Radiation Exposure of the Population of the United States*, National Council on Radiation Protection and Measurements, 1987, NCRP Report No. 93, page 52-55, and DCS is not aware of any mandate to use different data, particularly in light of the voluntary nature of the comparison. Accordingly, Requestors’ statement does not raise a material issue.

¹¹¹ The lettering error is in the BREDL Contentions.

¹¹² See ER, Section 5.2.10.1.

¹¹³ See ER, Table 4-23, “Sources of Radiation Exposure to Individuals in the SRS Vicinity Unrelated to SRS Operations,” which indicates that the U.S. average radon contribution to background radiation exposure is 200 mrem/yr.

- h. “Applicant failed to address beryllium hazards in spite of proposals to use beryllium as a criticality control element. In fact, Applicant failed to identify beryllium as a hazardous substance at the site.”

This issue does not call into question any of the design bases of the principal SSCs, the QA Plan or the ER, and is therefore beyond the scope of the proceeding. Furthermore, it is supported by no sources or other supporting data. In any event, it is in error. Although beryllium was mentioned in the CAR (Section 6.3.3.2.5) as a general example of a material which has reflection properties more effective than water, beryllium will not be used at the MOX Facility for criticality control. The only beryllium expected to be present at the MOX Facility, which is mentioned in the CAR, is in the plutonium feed stock as a trace element.¹¹⁴

- i. “The applicant is taking excessive credit for the mitigation of accident impacts with HEPA filters. Applicant failed to address extensive literature and debate about quality control and maintenance problems with HEPA filters in plutonium facilities.”

This issue does not specify how or why Requestors believe that DCS is taking “excessive credit” for mitigation of accidents with HEPA filters, and does not identify the “extensive literature and debate about quality control and maintenance problems” that DCS has allegedly failed to address. Therefore Requestors have not provided the requisite specificity and basis.

- j. “Applicant did not conduct a thorough review of area tornado history, focusing instead on the SRS site.”

This issue suggests that DCS should have examined the history of tornadoes in the area of the MOX Facility beyond “the SRS site.” Requestors do not identify any violation of NRC requirements in DCS’ review of historical tornado data or how any broader review would have affected the design bases of principal SSCs.

¹¹⁴ See CAR, Table 11.3-27.

In fact, this statement is factually incorrect. DCS' tornado analysis was very broad. Section 1.3.3.4.1 of the CAR states that a "total of 165 tornadoes occurring within a 2-degree square latitude and longitude centered on SRS over a 30-year period from 1967 have been identified." A 2-degree square encompasses over 15,000 square miles. Thus, although the analysis was "centered on SRS" (which encompasses 310 square miles),¹¹⁵ the analysis was clearly not "focused" on SRS.

- k. "Applicant failed to identify that americium buildups will be peaking in the weapons plutonium it will be processing as the MFFF ages, thus increasing radiation risks. (See Plutonium, the Last Five years Page 1-8)."

This issue fails to call into question any of the design bases of the principal SSCs, the QA Plan, or the ER. Even if the statement is accepted as true, Requestors have not provided any basis for concluding that radiation "risks" or doses will exceed applicable limits.

In fact, the statement is not true. As discussed in Section 9.1.3 and tabulated in Tables 9-3 and 9-5 of the CAR, DCS' analyses do account for increases in americium during the life of the MOX Facility.

- l. "Applicant failed to adequately identify SSC's for Crane Operations."

This issue does not identify the particular SSCs that DCS is alleged to have omitted, let alone any basis for Requestors' claim. There are two types of crane operations: heavy-lift and non-heavy-lift (or "material handling"). Section 11.10.7 of the CAR states that there are no principal SSCs associated with the heavy lift cranes to be used in the MOX Facility, and Requestors have provided no basis for calling this conclusion into question. Section 11.7.7 discusses the design bases for principal SSCs for material handling. Requestors do not state why these discussions are inadequate.

¹¹⁵ *Id.* at Section 1.3.1.1.

- m. “Failure to report that liquid radioactive waste stream containing silver is currently not accepted at the SRS Tank Farms (source: WSRC-TR-2000-0-0410).”

This issue fails to assert any deficiency in DCS’ identification of the design bases of principal SSCs, its QA Plan or its ER. As a result, the contention raises issues outside the scope of the CAR proceeding. Furthermore, while the discharge of silver to the SRS Tanks is restricted, the applicable waste acceptance criteria do not prohibit receipt of silver, contrary to Requestors’ statement. The very report cited by Requestors (WSRC-TR-2000-0-0410)¹¹⁶ states that “the amount of silver in the projected Mixed Oxide (MOX) waste stream represent minimal to no impact to HLW operations.”

10B. “Applicant’s Construction Authorization Request is filled with ‘dead-end’ references.”

This statement does not identify a genuine issue of material fact or law. In addition, no basis is provided to support Requestors’ assertion. Therefore, this issue should not be admitted as a contention.

10C. “Applicant has displayed a clear intent to minimally cooperate with the NRC.”

The apparent basis for this contention is Requestors’ reference to an internal memorandum from a member of the DCS staff regarding DCS responses to NRC RAIs. This contention identifies no genuine issue of material fact or law and does not raise any issue with respect to DCS’ identification of the design bases of the principal SSCs, the QA Program, or the ER. Therefore, the contention is beyond the scope of the proceeding

Furthermore, Requestors allege that the memorandum in question was prepared by “DCS management” to establish a “policy” of giving “terse” answers to NRC questions and of

¹¹⁶ Provided by DCS as a reference to ER RAI Attachment 14-2 (July 12, 2001).

“withholding documents that contained information not responsive to the request.” As is evident from the full text of the memorandum set forth below, the intent of the language referenced by Requestors, in context, was to advise personnel working on the RAI responses to focus their responses on the “design bases” of the MOX Facility rather than on the “details of design”—since the latter are not called for by the applicable NRC regulations at the CAR stage:

We will be meeting to discuss and assign responsibilities for providing information to RAIs received from NRC for the CAR. Our goals are to provide terse answers that provide bases rather than details for design. And although some of the requested information is found in other documents not referenced in the CAR, we want to extract only enough information to satisfy bounding conditions.

Section 8.3 or [sic] the SRP states, “Information contained in the application (i.e. CAR) should be of sufficient quality and detail to allow for an independent review, assessment, and verification of the reviewers. [sic] SRP Section 8.4.3.1 states that an application would be acceptable if it addresses the baseline design criteria for chemical safety and includes information on the chemicals, process, equipment, inventories, ranges, and limits. SRP Sections 8.4.3.5 B, C, D, and F recommend that design bases, process safety features and IROFs be included in the applications.

Principle SSTs [sic] for gases, reagents, and utilities were included in Section 11.9.

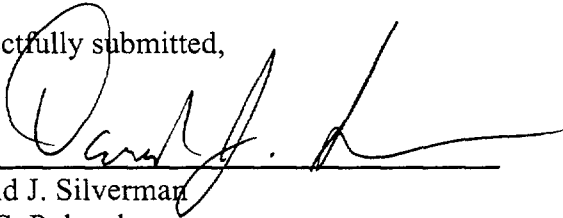
This will be first of your current priorities.

Therefore, this contention should not be admitted.

IV. CONCLUSION

Requestors have failed to demonstrate the essential minimum requirements for standing, as explained in previous DCS Answers. Furthermore, as described above, Requestors have failed to assert any admissible contentions. Consequently, their Request for Hearing should be denied.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Donald J. Silverman', is written over a horizontal line.

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Attorneys for Duke Cogema Stone & Webster

Dated September 12, 2001

**Duke Cogema Stone & Webster's Answer to
Blue Ridge Environmental Defense League and
Donald Moniak Submission of Contentions
Regarding the Proposed MFFF**

ATTACHMENT 1

DOE Action	NEPA Citation
1a. Transportation of surplus weapons plutonium and uranium oxide to SRS	SPD FEIS: Section 4.4.2.6
1b. Disassembly and conversion of surplus weapons plutonium	SPD FEIS: Section 4.4.2
1c. Immobilization of surplus weapons plutonium	SPD FEIS: Section 4.4.2
2. Fabrication of MOX fuel	SPD FEIS: Section 4.4.2 MFFF ER: Section 5
3. Transport of MOX Fuel to mission reactors	SPD FEIS: Section 4.4.2.6
4. Use of MOX Fuel in mission reactors	SPD FEIS: Section 4.28
5. Transportation of spent MOX fuel from mission reactors to a repository	YM DEIS: Chapter 6
6. Disposal of spent MOX fuel in the repository	YM DEIS: Chapter 5
7. SRS receipt and processing of wastes from the MOX facility	SPD FEIS: Sections 4.4.1.2 & 4.4.2.2 SRS FEIS: Section 2.4.2
8. Deactivation of the MOX Facility	SPD FEIS: Section 4.31.1 MFFF ER: Section 5.3
9. Decommissioning the MOX facility	SPD FEIS: Section 4.31.2

MFFF ER—*Mixed Oxide Fuel Fabrication Facility Environmental Report*

SPD FEIS—*Surplus Plutonium Disposition Final Environmental Impact Statement*

SRS FEIS—*Savannah River Site Waste Management Final Environmental Impact Statement*

YM DEIS—*Draft Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

**Before Administrative Judges:
Thomas S. Moore, Chairman
Charles N. Kelber
Peter S. Lam**

In the Matter of)
)
)

DUKE COGEMA STONE & WEBSTER)

Docket No. 070-03098-ML

(Savannah River Mixed Oxide Fuel)
Fabrication Facility))
_____)

ASLBP No. 01-790-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of "Duke Cogema Stone & Webster's Answer to Blue Ridge Environmental Defense League and Donald Moniak Submission of Contentions Regarding the Proposed MFFF" were served this day upon the persons listed below, by both e-mail and United States Postal Service, first class mail, with the exception of Environmentalists, Inc, which was served by Federal Express.

Secretary of the Commission*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
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September 12, 2001

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications Staff

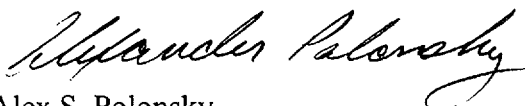
Re: DCS Answer to BREDL and EI Contentions
ASLBP No. 01-790-01-ML, Docket No. 070-03098-ML

Duke Cogema Stone & Webster, LLC ("DCS") hereby files its Answers to BREDL and EI's proposed contentions in the Construction Authorization Request proceeding for the Savannah River Mixed Oxide Fuel Fabrication Facility.

Due to the tragic national events which closed DCS' counsel's offices in Washington, D.C. yesterday, and after consultation with the Licensing Board, DCS will file its Answer to GANE's contentions tomorrow. DCS has alerted GANE to this effect.

In addition, due to the continued suspension of airline flights, we understand that Federal Express air service has been interrupted. Accordingly, overnight delivery to Environmentalists, Inc. by Federal Express may be delayed. We have spoken with EI's representative, Ms. Thomas, and offered to send the Answers by facsimile. Ms. Thomas indicated that Federal Express, although delayed, would be sufficient.

Sincerely,



Alex S. Polonsky

cc: service list