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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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ATOMIC SAFETY AND LICENSING BOARD

February 1, 2002 (11:15AM)

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)

DUKE COGEMA STONE & WEBSTER)

(Savannah River Mixed Oxide Fuel
Fabrication Facility))

Docket No. 0-70-03098-ML

ASLBP No. 01-790-01-ML

**GEORGIANS AGAINST NUCLEAR ENERGY'S
RESPONSE TO DCS MOTION FOR RECONSIDERATION**

Georgians Against Nuclear Energy ("GANE") hereby responds to Duke Cogema Stone & Webster Motion for Reconsideration Or, In the Alternative, For Certification to the Commission (December 17, 2001) ("DCS Motion"). DCS seeks reconsideration of LBP-01-35, Memorandum and Order (Ruling on Standing and Admissibility of Contentions) (December 6, 2001), with respect to the admissibility of several of GANE's and Blue Ridge Environmental Defense League's ("BREDL's") contentions.

As summarized by DCS, in order to prevail on a motion for reconsideration, the movant must identify the aspect of the ASLB's decision demonstrating that "the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information." DCS Motion at

2, quoting *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-00-31, 52 NRC 340, 342 (2000). As discussed below, DCS has not provided any legal insight or factual evidence that warrants reconsideration of the Atomic Safety and Licensing Board's ("ASLB's") decision. Nor does DCS justify referring the issues to the Commission under 10 C.F.R. §§ 2.730, 2.786(g), 2.1209, or the standard set forth in the Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998). Therefore, the Motion for Reconsideration should be denied.

GANE Contentions 1 and 2

In Contentions 1 and 2, GANE asserts that DCS's Construction Authorization Request ("CAR") is deficient because it does not describe design features necessary to meet the NRC's requirements for Material Control and Accounting ("MC&A") and physical security. DCS Motion at 4. DCS asks the ASLB to reconsider its interpretation of 10 C.F.R. § 70.23(b), which provides that:

The Commission will approve construction of the principal structures, systems, and components of a plutonium processing and fuel fabrication plant on the basis of information filed pursuant to § 70.22(f) when the Commission has determined that 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.

DCS disputes the ASLB's decision on two points. First, DCS contests the ASLB's conclusion that the nuclear industry does not have a common understanding of the term "principal structures, systems and components." DCS Motion at 5. DCS identifies three NRC Staff guidance documents that assertedly support DCS's position that there is a "common understanding that security and MC&A systems are not principal

structures, systems or components (SSCs) in plutonium facilities.” *Id.* According to DCS, Regulatory Guide 3.14, *Seismic Design Classification for Plutonium Processing and Fuel Fabrication Plants*, identifies SSCs “that are needed to provide protection against natural phenomena.” *Id.* As the title of the Reg. Guide indicates, the subject of this guidance is much more narrow than the subject of 10 C.F.R. § 70.23(b).

DCS also identifies several other Reg. Guides that allegedly fail to include security and MC&A systems in their lists of SSCs that are needed to protect against accidents and natural phenomena. DCS Motion at 6. However, DCS does not point to any document that authoritatively excludes security and MC&A systems and components from the scope of facilities, systems and components considered to be “principal” to the safe design and operation of a plutonium processing plant. Absent a better articulated understanding of the relative importance of various safety systems in a plutonium processing plant, these documents can hardly be said to reflect a common industry understanding of what constitute principal SSCs. In short, DCS has presented no new factual information that would be sufficient to undermine the ASLB’s conclusion in LBP-01-35.

Moreover, DCS fails to refute, or even address, the ASLB’s reasoning that using the dictionary definition of the word “principal,” in the “context of a facility that processes tons of weapons-grade plutonium to make MOX fuel,” it “would appear axiomatic that the MC&A and physical protection systems are most important systems and systems of first rank so as to qualify as principal systems within the meaning of section 70.23(b);” or the Board’s observation that the Department of Energy’s oversight

of plutonium processing facilities suggests that “DOE considers MC&A and physical protection systems to be of a rank tantamount to the principal systems under section 70.23(b).” LBP-01-35, slip op. at 27-28. These conclusions are borne out by the “purpose and need” statement in the Surplus Plutonium Disposition Final Environmental Impact Statement, which states that the purpose of the MOX and immobilization programs is “to reduce the threat of nuclear weapons proliferation,” and, in turn, that the focus of the U.S. nonproliferation efforts “includes ensuring the safe, secure, long-term storage and disposition of surplus weapons-usable fissile plutonium.” *Id.*, Vol. 1 – Part 1A at 1-3. Thus, safety and security together constitute paramount objectives of the MOX program.

In its second argument for reconsideration, DCS questions the ASLB’s conclusion that “the design bases of the MC&A and physical protection systems must retain their functionality to make a reasonable assurance determination of protection against natural phenomena and the consequences of potential accidents.” DCS Motion at 7. According to DCS, these systems “are neither designed nor intended to protect against natural hazards or potential accidents.” *Id.*

This is not a new argument, and is already addressed in LBP-01-35 at page 28. DCS provides no new insight into the applicable law. Instead, DCS simply complains that the ASLB did not explain its decision adequately. DCS Motion at 7. In service of this unsupportable argument, DCS provides a truncated quotation from LBP-01-35, which fails to include language that explains the relationship between MC&A and

physical protection systems and other systems that are directly related to protection against natural phenomena and accidents:

Indeed, DCS's argument would effectively read out of the regulation the requirement of a reasonable assurance determination for the quality assurance program. That program also does not protect against natural phenomena and accidents, but instead is intended to provide confidence that other structures, systems, and components (SSCs) will perform satisfactorily. In much the same manner, the MC&A and physical protection systems are interrelated and interdependent upon other facility SSCs and, in the context of a plutonium processing fuel fabrication plant processing tons of weapons-grade plutonium . . .

LBP-01-35, slip op. at 28-29. As noted in GANE's Contention 2 and cited by the ASLB in LBP-01-35 at pages 25-26, the CAR itself shows a relationship between design features for safeguards, security and accident prevention. Section 5.5.2.7.6.2 of the CAR states that:

[t]he impacts of explosions in the F Area are bounded by the impacts accounted for in the MFFF structures for safeguards and security reasons. Thus no new principal SSCs are required for this event.

This statement in the CAR confirms the ASLB's conclusion regarding interrelatedness of design features for safeguards, security, and accident prevention.¹ It also demonstrates that DCS considers safeguards and security design features to be included among the MOX Facility's "principal SSCs." Finally, it illustrates the absurdity of DCS's interpretation of 10 C.F.R. § 70.23(b). Although DCS takes credit for safeguards and security design features in evaluating the adequacy of the design to protect against

¹ Other examples of the relationship between design safety, safeguards and security can also be found in the CAR. See, for example, Section 6.3.3.2.4, which states that the "use of qualified nondestructive assay (NDA) measurement systems is also acceptable in establishing compliance with the double contingency principle," for criticality prevention. Qualified NDA measurement systems are commonly used for material control and accounting.

accidental explosions, it has provided no information whatsoever about the safeguards and security design features on which it relies. Thus, it is impossible to make an adequate evaluation of the adequacy of the MOX design for any purpose related to protection of safety or public health.

Another portion of the Part 70 regulations, not discussed in LBP-01-35, and disregarded by DCS in its Motion, further shows that the Commission's concept of the "principal structures, systems and components" that must be reviewed under § 70.23(b) broadly encompasses the safety of the entire design basis, not just SSCs that are directly related to accident prevention or protection against natural phenomena. Section 70.23(b) states that the construction review is to be based on "information filed pursuant to [10 C.F.R.] § 70.22(f)," which in turn describes a very broad category of information that must be submitted:

Each application for a license to possess and use special nuclear material in a plutonium processing and fuel fabrication plant shall contain, in addition to the other information required by this section, a description of the plant site, a description and safety assessment of the design bases of the principal structure, systems, and components of the plant, including provisions for protection against natural phenomena, and a description of the quality assurance program to be applied to the design, fabrication, construction, testing and operation of the structures, systems, and components of the plant. [footnote omitted]

Notably, § 70.22(f) does not use the word "accidents," but broadly refers to a "safety assessment of the design bases of the principal structure, systems, and components of the plant." Clearly, the Commission did not intend the concepts of "principal structure,

systems, and components,” or “accidents,” to be so narrowly interpreted as suggested by DCS’s Motion.²

Finally, DCS has not provided a basis for referring this question to the Commissioners for interlocutory review. DCS has failed to demonstrate that immediate review of this issue is necessary to “prevent detriment to the public interest” or “unusual delay or expense.” *See* 10 C.F.R. § 2.730(f). Nor can any such effect be foreseen. Instead, this is a situation in which DCS disagrees with the ASLB on the appropriate interpretation of the law. As the regulations provide, the dispute can be raised at the end of a hearing in a petition for review of the ASLB’s ultimate decision. *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant License Termination Plan), CLI-01-25, slip op. at 4 (December 5, 2001). Moreover, DCS has not suggested any reason why the issues presented by Contentions 1 and 2 are so “novel” that they cannot be resolved by the ASLB. *Id.*, slip op. at 6. Clearly, many things about this case are novel, because a plutonium processing plant has not been licensed for many years. DCS has not demonstrated, however, that this contention would “benefit from early review.” *Id.*, slip op. at 6.

² DCS’s narrow definition of what constitutes an “accident” defies ordinary common sense from the perspective of nuclear facility regulation. DCS appears to presume that sabotage or the theft of special nuclear material is not accidental, because it is intended and planned by the perpetrator. This reasoning wrongly focuses on the intent of the perpetrator. For purposes of nuclear facility regulation, it is the intent of the licensee that is important: any loss of control of special nuclear material would constitute an accident, because it would result from the licensee’s unplanned and unintended failure to control nuclear material. The intent of parties who are not regulated by the NRC is simply irrelevant in determining what constitutes an accident. In any event, even DCS’s overly narrow concept of what constitutes an “accident” is satisfied by the unintentional loss of special nuclear material due to negligence or oversight, which MC&A requirements are intended to prevent.

GANÉ Contentions 5 and 8, BREDL Contention 9A

DCS seeks reconsideration of the ASLB's decision to admit GANE Contentions 5 and 8 and BREDL Contention 9A, which challenge DCS's designation of the controlled area as essentially contiguous with the boundary of the entire Savannah River Site (SRS). GANE contends that because DCS does not have control over the SRS, the SRS site boundary is inappropriate for demarcation of the controlled area.

As the Commission has held, motions for reconsideration "should be associated with requests for re-evaluation in light of an elaboration on, or refinement of, arguments previously advanced." *Central Electric Power Cooperative, Inc.* (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981). They may not be used to advance "an entirely new thesis." *Id.* In its September 13, 2001, response to GANE's contention, DCS advanced several arguments, which took up a total of about two pages: (1) that nothing prohibits DCS from exercising control through a protocol with DOE, (2) that NRC has already accepted such arrangements with respect to the gaseous diffusion plants, and (3) that GANE misunderstood the distinction in the way SRS workers would be treated by DCS under normal and accident conditions.

In its Motion for Reconsideration, DCS now proffers about 12 pages of new arguments, not previously advanced, regarding the proper legal interpretation of regulations affecting the determination of the controlled area boundary. This does not constitute a legitimate request for reconsideration of arguments already advanced, but an attempt to have another bite at the apple of opposing the admissibility of GANE's

contentions in the first place. The attempt should be rejected. In any event, as discussed below, DCS's arguments are without merit.

First, DCS argues that whether the Board interprets 10 C.F.R. §§ 20.1003 and 70.61 to absolutely preclude the use of the SRS boundary as the controlled area boundary, or whether the issue is admitted as a question of fact, "the issues related to the proper legal interpretation of these regulations can, and should, be resolved now." If DCS is willing to stipulate that it does not have control over the entire SRS as required by 10 C.F.R. § 20.1003, then GANE believes it would save all the parties much time and effort if the Board ruled that the boundary of the SRS may not, as a matter of law, be used as the boundary of the controlled area. However, it appears from DCS's Motion that it continues to contend that it does indeed have control over the area. Thus, questions of law and fact remain for development and resolution in the course of the adjudication.

Next, DCS requests that the ASLB "reconsider its interpretation of 10 CFR §§ 20.1003 and 70.61 in light of relevant information in the record, the legislative history of Section 70.61, and relevant precedents." DCS Motion at 11. "In particular," DCS asks the ASLB to reconsider the "distinction" between the concepts of a controlled area as used in Part 20 and Part 70. According to DCS, the purpose of Part 20 is to govern normal operations, while the purpose of 10 C.F.R. § 70.61 is to control the risk of accidents. DCS Motion at 11.

This argument does not raise anything new. First, DCS does not offer any new factual information which has not already been considered. Second, with respect to the

ASLB's interpretation of the law governing establishment of controlled area boundaries, the ASLB has already pointed out that Section 70.61 specifically requires the establishment of a controlled area boundary in accordance with Part 20. In other words, section 70.61 makes the direct connection between Part 20 and Part 70 that DCS seeks to deny. The purpose of incorporating the Part 20 controlled area requirement into 10 C.F.R. § 70.61 is also discussed in the preamble to the proposed rule:

Section 70.61(f) requires licensees to identify a controlled area consistent with the use of that term in Part 20, and provides clarification regarding the activities that may occur inside the controlled area. The function of this term is to delimit an area over which the licensee exercises control of activities. Control includes the power to exclude individuals, if necessary. The size of the controlled area is not specified in the regulation because it will be dependent upon the particular activities that are conducted at the site and their relationship to the licensed activities. [Within the controlled area will be a restricted area (as defined in Sec. 20.1003), access to which is controlled by the licensee for purposes of radiation safety.]

However, the Commission recognizes that certain licensees may have ongoing activities at their site (i.e., within the controlled area) that are not related to the licensed activities. For example, a non-nuclear facility may be adjacent to the nuclear facility but both are within the controlled area (which may be defined similar to the site boundary). This raises a question regarding the appropriate accident standard for these individuals. *Protection of the individuals at the non-nuclear facility must consider that the nature of many potential accidents at a fuel cycle facility is such that there may not be sufficient time during which to take action to exclude individuals from the controlled area.* Therefore, for purposes of the ISA accident evaluation, the rule explicitly contains two options for these individuals (as well as a third option). In the first option, the licensee evaluates, in the ISA, the risk at its location (as opposed to that at any point at or beyond the controlled area boundary) and determines that it meets the performance requirements for members of the public. In the second option, performance requirements for workers may be applied to individuals in the controlled area if the provisions of Section 70.61(f)(2) are satisfied. These conditions ensure that the individuals are aware of the risks to them from the potential accidents at the nuclear facility and have received appropriate training and access to information.

Proposed Rule, Domestic Licensing of Special Nuclear Material; Possession of a Critical Mass of Special Nuclear Material, 64 Fed. Reg. 41,338, 41,344-45 (July 30, 1999) (emphasis added). This language clarifies the Commission's view of the role of a controlled area boundary in protecting members of the public against accidents. It also clarifies that if the timing of an accident permits it, the Commission's first priority is to remove members of the public from the controlled area. Therefore, the question of whether the licensee has the unrestricted ability to remove people from the controlled area is paramount.

DCS argues that the ASLB should reconsider its ruling because of numerous indications in the language and history of the Part 70 rulemaking, as well as circumstances at existing facilities, that the Commission did not really mean to require that the licensee have complete authority to exclude or remove individuals from the controlled area. DCS Motion at 14-15. DCS argues that the requirement for broad authority over the controlled area is undermined by the fact that the NRC anticipated in the rulemaking that the controlled area may include DOE facilities, which would not be in the full control of the licensee. DCS Motion at 18. This argument ignores several things. First, it ignores the plain language of 10 C.F.R. 20.1003, which requires that the licensee be able to exclude or expel people from the controlled area "for any reason." Clearly, the Commission intended that licensees have unchallengeable authority to exclude people from the controlled area, or to make them leave.

Second, DCS ignores language in the preamble to 10 C.F.R. § 70.61, which states that: [t]he licensee can set the controlled area at any location around its facility *as long*

as it maintains control of that area as specified in Part 20 and retains the authority to exclude or remove personnel and property from the area.” Final Rule, Domestic Licensing of Special Nuclear Material; Possession of a Critical Mass of Special Nuclear Material, 65 Fed. Reg. 56,211, 56,212 (September 18, 2000) (emphasis added). DCS would like the Board to read the first part of the sentence and ignore the second part.

Moreover, DCS ignores the language that characterizes DOE facilities inside the controlled area as “nearby.” DCS does not explain how or why it is that every single DOE facility on the 198,000-acre Savannah River Site is located “nearby” to the 41-acre proposed MOX facility site. Nor does DCS explain why it is necessary, as a practical matter, to include these facilities in the controlled area, or why it is necessary to include various non-nuclear facilities over which DCS lacks control, including public highways, railroad tracks, and a public trash dump. DCS’ arguments that it will be able to control the area through agreements with DOE *see* DCS Motion at 19, raise the type of factual and legal disputes that are appropriately resolved in this public hearing.³

Finally, DCS ignores the complexity of the situation at other facilities where DOE facilities are inside the controlled area. For instance, DCS cites Paducah and Portsmouth as examples of NRC-licensed facilities located on DOE sites, at which the boundaries of the controlled areas are coincident with the boundaries of the DOE reservations. Motion for Reconsideration at 18. However, as the Presiding Officer pointed out during the September 21, 2001, oral argument, portions of the Portsmouth and Paducah facilities are run by the DOE, and therefore they are not necessarily comparable to the proposed MOX

³ Notably, no such agreements have been proffered by DCS to date.

Facility. *See* Tr. at 306-308. DCS has not provided any new information that shows that the ASLB was incorrect. Moreover, DCS's assertions regarding the circumstances attending the determination of controlled area boundaries for other facilities constitute the kind of complex and disputed factual information that should be presented for examination in the hearing process, not accepted at face value for the purpose of dismissing a contention.

As the Board has ruled, GANE and BREDL have raised a legal and factual dispute with DCS over the appropriate location of the controlled area boundary. This dispute is based on the plain language of the regulations, and the factual evidence that DCS does not satisfy those regulations. DCS has provided no basis for its essential argument that, as a matter of law, using the SRS boundary as the controlled area boundary meets the NRC's standards in Part 70 and Part 20. Therefore, the motion for reconsideration should be rejected. Nor does the issue warrant certification to the Commission. DCS has shown no detriment to the public interest or undue expense in going forward with the litigation. DCS is certainly correct that the issue of the appropriate placement of the controlled area boundary is important to the design of the facility, and will affect the cost. Motion for Reconsideration at 20. The fact that the ultimate resolution of a safety issue has cost implications for the licensee, however, does not constitute grounds for directed certification. The alleged error is correctable on appeal from the ASLB's final decision on the CAR. *See Connecticut Yankee*, CLI-01-25, slip op. at 4. Moreover, DCS has not suggested any reason why the issues presented by

Contentions 5 and 8 are so “novel” that they cannot be resolved by the ASLB. *Id.*, slip op. at 6.

GANE Contention 12

With respect to Contention 12, DCS’s motion partly consists of a request for clarification of the ASLB’s statement that: “DCS and the Staff are still free to challenge quantitatively the likelihood of such a terrorist initiated event in an attempt to demonstrate it is remote and speculative.” *Id.*, slip op. at 53-54. DCS states that it does not believe that such a quantitative analysis is possible, and cites the Court of Appeals’ affirmation, in 1989, of the NRC’s determination that the risk of a sabotage event was beyond the state of the art of probabilistic risk assessment and not amenable to quantification. DCS Motion at 22, citing *Limerick Ecology Action v. NRC*, 869 F.2d 719 (3rd Cir. 1989).

In admitting the contention, the ASLB stated that the fact of the September 11 terrorist attacks “closes the door, at least for the immediate future, on qualitative arguments that such terrorist attacks are always remote and speculative and not reasonably foreseeable.” LBP-01-35, slip op. at 53. In other words, it is no longer possible to rule out consideration of terrorist attacks in an EIS *per se*, as was the NRC’s policy in 1989. Thus, the ASLB admitted GANE’s contention for a determination as to whether such an attack is foreseeable and therefore must be discussed in an Environmental Impact Statement (“EIS”). DCS and the Staff would bear the burden of proving that such an event is remote and speculative, and therefore need not be considered.

The question raised by DCS is whether the foreseeability or credibility of a terrorist attack on the proposed MOX Facility can be attacked on qualitative grounds, as well as quantitative grounds. GANE believes that under NRC regulations, the question of whether a terrorist attack is foreseeable needs to be addressed in two parts. The first inquiry is to what extent can the likelihood of such an event be quantified. To the extent that it cannot be quantified, foreseeability must be addressed in qualitative terms. *See* NRC regulations for the implementation of the National Environmental Policy Act (“NEPA”), which provide that:

The analysis for all draft environmental impact statements will, to the fullest extent practicable, quantify the various factors considered. To the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms.

10 C.F.R. § 51.71(d). Thus, the regulations do not appear to preclude DCS from addressing the foreseeability of a terrorist attack in qualitative terms. This interpretation seems to be inconsistent with the ASLB’s decision, and therefore GANE agrees with DCS that some clarification would be helpful.

DCS also argues that consideration of a terrorist-caused beyond design basis accident appears to run afoul of the principle that “worst-case” events need not be considered under NEPA. This argument is incorrect. As characterized by the Supreme Court in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989), a worst-case analysis is one that overemphasizes “highly speculative harms.” The point of Contention 12 is that the probability of a terrorist attack on a nuclear facility is not highly speculative, but rather it is “reasonably foreseeable.” *Id.* GANE submitted this contention before September 11 and concurs with the Board that the events of September

2001 provide compelling support to the admissibility of GANE's contention. In any event, GANE does not seek consideration of a worst-case accident.

DCS next criticizes the ASLB's decision by stating that it:

does not appear to discuss whether the events of September 11 make a terrorist-caused beyond design basis accident foreseeable at the MOX Facility itself. The question inherent in NEPA is not whether an event is foreseeable anywhere in the United States, but instead whether such an event is foreseeable at the particular facility under review.

DCS Motion at 23. However, as the ASLB observes in LBP-01-35, the NRC immediately responded to the September 11 attacks by putting nuclear facilities on the highest level of security readiness. *Id.*, slip op. at 53. As has been widely discussed in the press, nuclear facilities are obvious and attractive targets for terrorist attacks. It would be highly illogical to argue that terrorist attack against nuclear facilities are foreseeable, but that such an attack against the MOX Facility is not. In any event, questions about the foreseeability of a terrorist attack on the MOX Facility, including whether the probability of such an attack has increased or decreased since September 11 (See DCS Motion, note 48), raise factual issues that are appropriate for resolution in the hearing.

DCS also asks the ASLB to take into account a recent decision of the Licensing Board in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37 (December 13, 2001), in which the Board rejected a contention "comparable to GANE Contention 12."⁴ DCS Motion at 23. According to DCS, the Board rejected

⁴ The Utah contention is not completely comparable to GANE's contention. The Utah contention had two parts. The first part of the contention challenged the adequacy of the applicant's Safety Analysis Report and the NRC Staff's Safety

the contention on the basis that the rationale for 10 C.F.R. § 50.13 “remains applicable to the Commission’s NEPA responsibilities relating to other facilities.”⁵ *Id.* at 24. DCS urges this ASLB to make a similar ruling.

At the outset, it is important to note that 10 C.F.R. § 50.13 was promulgated in 1967, under the general authority of the Atomic Energy Act. *See* Final Rule, Exclusion of Attacks and Destructive Acts by Enemies of the U.S. in Issuance of Facility Licenses, 32 Fed. Reg. 13,445 (September 26, 1967). At the time 10 C.F.R. § 50.13 was issued, Congress had not yet passed the National Environmental Policy Act of 1969. Thus, the drafters of 10 C.F.R. § 50.13 could not have intended the regulation to govern NEPA considerations.

In *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973), the Appeal Board addressed the applicability of 10 C.F.R. § 50.13 to NEPA questions, and concluded that “the rationale for 10 CFR § 50.13 [is] as applicable to the Commission’s NEPA responsibilities as it is to its health and safety responsibilities.” It is significant, however, that the Appeal Board did not conclude in

Evaluation Report to “adequately evaluate design basis external man-induced events such as suicide mission terrorism and sabotage.” *See* LBP-01-37, slip op. at 2. The second part of the contention challenged the adequacy of the applicant’s Environmental Report and the Staff’s Draft EIS with respect to their failure to discuss the adverse effects of such terrorist attacks. GANE’s contention, in contrast, is exclusively based on NEPA.⁵ NRC regulations at 10 C.F.R. § 50.13 state that an applicant for an operating license amendment is not required to provide:

design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities.

ALAB-156 that 10 C.F.R. § 50.13 governs NEPA considerations *as a matter of law*.

Indeed, such a holding would have placed the Appeal Board in conflict with the Court of Appeals' subsequent holding in *Limerick Ecology Action* that the procedural requirements of NEPA are not limited by the Atomic Energy Act. *Id.*, 869 F.2d at 719. Instead, the Appeal Board examined the applicability of the rule's rationale under NEPA's "rule of reason." *Id.*, 6 AEC at 851. As listed by the Appeal Board, § 50.13's underlying considerations regarding the feasibility and reasonableness of protection against "wartime sabotage," included:

(1) the impracticability, particularly in the case of civilian industry, of anticipating accurately the nature of enemy attack and of designing defenses against it, (2) the settled tradition of looking to the military to deal with this problem and the consequent sharing of its burdens by all citizens, and (3) the unavailability, through security classification and otherwise, of relevant information and the undesirability of ventilating what is available in public proceedings.

Id., citing *Siegel v. AEC*, 400 F.2d 778 (1968). The Appeal Board concluded that this rationale was "as applicable to the Commission's NEPA responsibilities as it is to its health and safety responsibilities."

Twenty eight years after the *Shoreham* case was decided, however, in a decade that has seen the destruction of a federal building in Oklahoma by a truck bomb, the near destruction of a U.S. destroyer by a boat bomb, and the destruction of the World Trade Center by a commercial airliner bomb, these considerations do not continue to hold up under the NEPA rule of reason.

First, the distinction between military attacks and domestic crimes is much more blurry than presented in ALAB-156. Notably, President Bush has declared a "war on terrorism," not on any particular country. In fact, the perpetrators of terrorist acts can

range from actual governments to vigilante groups, to insane individuals. They may reside in other countries, or in the United States. A key feature of terrorists is that they often strike from within the country or its establishments, not from outside.

Second, it cannot be considered impracticable to reasonably anticipate the nature of a serious attack on a nuclear facility. Enough is known about the methods historically used by terrorists, and the vulnerabilities in the designs of nuclear facilities, to evaluate measures that could increase the effectiveness of protection against such an attack.

Third, it is quite clear in the aftermath of September 11 and other terrorist attacks in recent years that the military is generally ineffective in preventing such attacks, because the military does not stand in constant readiness to counter criminal acts and serious domestic threats. The element of surprise gained by suicide bombers is another factor that makes ordinary military protection relatively ineffective. Thus, the “settled tradition” of relying on the military has no practical applicability in this context. Moreover, while the burden of supporting the military may be shared by all citizens, the costs and benefits of protecting against the extreme consequences of such attacks are not so evenly distributed. If a nuclear facility licensee does not take reasonable, feasible, and cost-effective measures that could forestall or mitigate the extreme consequences of a successful terrorist attack, and such an attack occurs with significant offsite radiological releases, then society will bear a disproportionate and unfair share of the burden of failing to take precautionary measures to protect against terrorism.

Third, it simply is not the case that relevant information is unavailable. Sufficient information is available about the means by which a nuclear facility could be

attacked, its vulnerability to attack, and the potential consequences of such an attack, that would permit this issue to be litigated. This information is widely available in the public domain, and in design documents for nuclear facilities. Although it is correct that some information should not be ventilated in public proceedings, reasonable means are available for addressing this problem, such as *in camera* proceedings.

Accordingly, the exclusion in 10 C.F.R. § 50.13 cannot be applied to NEPA considerations as a matter of law. Instead, consideration of the consequences of a terrorist attack against the proposed MOX Facility may only be excluded *ab initio* if it would be reasonable to avoid considering them under NEPA's "rule of reason," *i.e.*, if the considerations that underlie § 50.13 are reasonably applicable in these circumstances. As discussed above, these considerations are not relevant or applicable here.

Accordingly, DCS has not provided a basis for reconsidering the ASLB's decision to admit Contention 12. With respect to the issue of directed certification, the ASLB has already stated that it believes that this issue should be placed before the Commission. However, GANE does not believe that it is necessary to certify all of the questions listed on page 26 of DCS's Motion, regarding the practicalities of litigating the issues raised in Contention 12. All of the six of the practical questions raised by DCS seem to be relatively straightforward and amenable to the making of an evidentiary record. DCS does not explain why it is so difficult to address these issues, nor it is apparent to GANE. Therefore DCS's request for directed certification on these issues should be denied.

CONCLUSION

For the foregoing reasons, with the exception of clarification of the ASLB's Order with respect to GANE's contention 12 on the issue discussed above, the ASLB should deny DCS' request for reconsideration or certification to the Commission.

Respectfully submitted,

A handwritten signature in cursive script that reads "glenn carroll". The signature is written in black ink and is positioned above the printed name and address.

Glenn Carroll⁶
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Dated January 7, 2002
in Decatur, Georgia

⁶ This motion was prepared with substantial assistance from GANE's legal adviser, Diane Curran.

CERTIFICATE OF SERVICE
by Georgians Against Nuclear Energy
(Docket # 70-3098, ASLBP # 01-790-01-ML)

I hereby certify that copies of GANE's Response to DCS Motion for Reconsideration
were sent to the following list via e-mail with paper copies served
via U.S. Postal Service First Class Mail.

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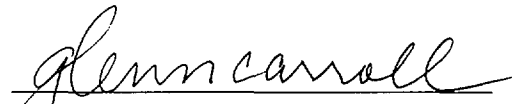
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Respectfully submitted,


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January 7, 2002 in Decatur, Georgia