RAS 3934

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 (Savannah River Mixed Oxide Fuel Fabrication Facility)	Docket No. 70-3098-ML ASLBP No. 01-790-01-ML

Blue Ridge Environmental Defense League[1] (BREDL) Response to:
DUKE COGEMA STONE & WEBSTER MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION TO THE COMMISSION (12/17/01)

I. Introduction

The "applicant," Duke Cogema Stone and Webster filed the above motion on December 17, 2001 as a challenge to parts of the Board's December 6, 2001 Order on standing and contentions. This motion illustrates that there are in fact genuine disputes between applicant and parties, and as such the proceeding should proceed as planned.

BREDL's response to this motion addresses Consolidated Contention 5–designation of Control Area (Part II).

[1] Please note that due to the acceptance of BREDL as a party by the Board, NRC staff, and applicant, Don Moniak will no longer be a party to this proceeding as an individual and for the sake of clarity will continue to represent only BREDL during the proceeding.

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II. Control Area Boundary: GANE Contention 5.

At issue are BREDL contention 9A and GANE consolidated contention 5. In its 12/06/01 ruling, the Board found these contentions admissible and consolidated them under GANE Contention 5.[2] In its 12/17/01 motion for reconsideration or certification to the Commission, the applicant included this contention among those it requested the Board to "either: (1) reconsider and modify its rulings related to the above contentions; or (2) certify those rulings to the Commission for its consideration pursuant to 10 CFR § 2.1209(d)." (Page 2).

A. Applicants requests pertaining to Consolidated Contention 5

1. Page 11: "DCS respectfully requests that the Board 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, and dismiss Consolidated Contention 5. In particular, DCS requests that the Board reconsider the distinction between the controlled area as used in Part 20, and the controlled area as used in 10 CFR § 70.61."

2. Page 20: "DCS respectfully requests that the Board reconsider its prior ruling and hold as a matter of law that Consolidated Contention 5 does not identify any valid basis for contesting the controlled area boundary as established for the purposes of Section 70.61."

3. Page 20-21: "If the Board does not reconsider and reverse its prior determination, DCS requests that it certify Consolidated Contention 5 to the Commission...In its certification, the Board should request direction from the Commission on the following questions:

(1) For the purposes of the requirements in 10 CFR § 70.61, must a licensee have the

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authority to limit access to the controlled area for reasons that are unrelated to protection of individuals against the effects of intermediate and high consequences events; and

(2) For the purposes of the requirements in 10 CFR § 70.61, must a licensee directly be able to limit access to the controlled area, or may the licensee make arrangements with a third party to limit access to the controlled area?"

B. Summary of BREDL Response

1. Motion for reconsideration and dismissal. The applicant described the criteria for an interlocutory reconsideration as consisting of, "the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. While a reconsideration motion should not be based on a new thesis, a request to reexamine existing record material that may have been misunderstood or overlooked, or to clarify a matter that the party believes is unclear, is appropriate."

BREDL respectfully requests that the Board reject the applicant's request for reconsideration on the basis that the motion:

- interprets the purpose of the rules and therefore functions as a challenge to the NRC's rules rather than a "misapprehended legal principle;"
- cites distinctions between rules that do not exist and are irrelevant;
- cites precedents that are inappropriate and irrelevant;
- cites information deemed relevant by the applicant is actually irrelevant
- provides no new critical factual evidence;
- includes false information

2. Request for Certification to the Commission in the Alternative;

The applicant cited the Commission's referral order as justifying its request:

"On the admission of contentions, or the admitted contentions themselves, raise novel legal or policy questions, the presiding officer should readily refer or certify such rulings or questions to the Commission on an interlocutory basis. The Commission is amenable to such early involvement and will evaluate any matter put before it to ensure that substantive interlocutory review is warranted."[3]

The request for certification should be rejected because:

- the applicant failed to identify these as novel legal or policy issues at the time contentions were admitted;[4]
- the applicant's request is based upon erroneous presumptions;

3. BREDL does agree, in part, with applicant's statement that, "in either case, DCS believes that issues related to the proper legal interpretation of these regulations can, and should, be resolved now." (Page 10). Resolution is achievable at this time through the simple designation of the SRS F-Area control area as the SRS F-Area. This would provide a Control Area that is more in line with the size of the precedents cited by the applicant, and allow the applicant to avoid costly litigation while adjusting its design basis now rather than in 2003.

C. BREDL response to issues raised by applicant's motion to reconsider and dismiss

1. The purpose of the two rules is misinterpreted. The applicant argued that a distinction exists between 10CFR20.1003 and 10CFR70.61 and that the Board should reconsider its interpretation of these two rules.

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[3] *Duke, Cogema, Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478, 483 (2001).

[4] In contrast, BREDL requested certification of several contentions to the Commission during the September 21, 2001 prehearing for this proceeding in North Augusta, SC. See: *Official Transcript of Proceeding.* NRC. Duke Cogema Stone and Webster Savannah River Mixed Oxide Fuel Fabrication Facility. Work Order NRC-023. Pages 174-175 (Contention Group 3), 178 (Contention Group 4),

a. The applicant argued that, "The purpose of 10 CFR Part 20 (including Section 20.1003) is to control exposure to radiation during normal operation of a facility. Part 20 is not intended to control exposures during accidents.27 In contrast, the purpose of Section 70.61 is to control the risks of accidents.28 As discussed below, this distinction between normal operation and accidents is important in evaluating the acceptability of DCS' proposed designation of the controlled area boundary for the MOX Facility."" (Page 11).

This argument lacks merit, functions as a challenge to the regulations, and represents an incomplete review of the regulations. Most notable is the applicant's citation for "purpose" as a Federal Register notice rather than the actual rule. Central to this citation is the quoted statement, "10 CFR Part 20 does not directly address emergency situations but provides programmatic requirements for normal operations."[5]

This reading is incorrect for the following reasons:

i. The "purpose" of 10CFR20--contained in 10CFR20.1001[6]-- provides no distinction between routine operations and accidents and includes the statement "nothing in this part shall be construed as limiting actions that may be necessary to protect health and safety."

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[5] Footnote 27 reads in part,: *"See* Respiratory Protection & Controls to Restrict Internal Exposures, 10 CFR Part 20, Final Rule, 64 *Fed. Reg.* 54543, 54545 (Oct. 7, 1999) ('10 CFR Part 20 does not directly address emergency situations but provides programmatic requirements for normal operations');"

[6] **§§20.1001 Purpose.**

(a) The regulations in this part establish standards for protection against ionizing radiation resulting from activities conducted under licenses issued by the Nuclear Regulatory Commission. These regulations are issued under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended.

(b) It is the purpose of the regulations in this part to control the receipt, possession, use, transfer, and disposal of licensed material by any licensee in such a manner that the total dose to an individual (including doses resulting from licensed and unlicensed radioactive material and from radiation sources other than background radiation) does not exceed the standards for protection against radiation prescribed in the regulations in this part. However, nothing in this part shall be construed as limiting actions that may be necessary to protect health and safety.

ii. Whereas the licensee claims that 10CFR20 does not pertain to "emergencies," it fails to recognize that ***not all accidents constitute emergency situations.***

iii. What the applicant describes as "accidents"are in fact called "incidents" in 10CFR§§20.2202.[7]

iv. Whereas the applicant states its intent (Page) to comply with 10CFR20.1301(a)[8] within the control area and at the edge of the restricted area, it is in fact also required to achieve ALARA goals in 10CFR20.1101.(b).[9] BREDL argues that ALARA goals dictate a control area designation of greatly reduced size, i.e. F-Area at SRS.

v. In relation to 10CFR70.61(f), 10CFR20.1003 is merely a reference, since the 10CFR70.61(f) "requires the establishment of a control area, ***as defined in Section 20.1003.*** In addition, the licensee must retain the authority to exclude or remove personnel and property from the area." (emphasis added).

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[7] **§§20.2202 Notification of incidents.**

(a) Immediate notification. Notwithstanding any other requirements for notification, each licensee shall immediately report any event involving byproduct, source, or special nuclear material possessed by the licensee that may have caused or threatens to cause any of the following conditions --

(1) An individual to receive --

(i) A total effective dose equivalent of 25 rems (0.25 Sv) or more; or

(ii) A lens dose equivalent of 75 rems (0.75 Sv) or more; or

(iii) A shallow-dose equivalent to the skin or extremities of 250 rads (2.5 Gy) or more; or

(2) The release of radioactive material, inside or outside of a restricted area, so that, had an individual been present for 24 hours, the individual could have received an intake five times the annual limit on intake (the provisions of this paragraph do not apply to locations where personnel are not normally stationed during routine operations, such as hot-cells or process enclosures).

[8] "total effective dose equivalent to a member of the public does not exceed 0.1 rem, and that the dose in any unrestricted area does not exceed 0.002 rem per hour."

[9] "the licensee shall use, to the extent practical, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable (ALARA)."

vi. The range of definitions for "area" terms found in 10CFR20.1003 should also be considered:

- *"Controlled area* means an area, outside of a restricted area but inside the site boundary, access to which can be limited by the licensee for any reason." Instead of a control area *reasonably inside* the site boundary, the licensee proposes a 200,000-acre control area *along* the site boundary.
- "*Restricted area* means an area, access to which is limited by the licensee for the purpose of protecting individuals against undue risks from exposure to radiation and radioactive materials. Restricted area does not include areas used as residential quarters, but separate rooms in a residential building may be set apart as a restricted area." A range of conditions such as "high radiation areas" can be found within the restricted area.
- *"Unrestricted area* means an area, access to which is neither limited nor controlled by the licensee." A more appropriate means of defining a control area might be to define the unrestricted area.

2. Use of inappropriate "precedents." The applicant argued in its motion for precedent in the NRC Part 70 licenses held by the U.S. Enrichment Corporations (USEC) Gaseous Diffusion Plants (GDPs) in Paducah, Kentucky and Portsmouth, Ohio:

"This conclusion is supported by precedents involving other NRC-licensed facilities on DOE reservations. For example, the Gaseous Diffusion Plants ("GDPs") are operated by USEC but are located on DOE sites with activities and personnel not regulated by the NRC. The controlled area at the GDPs is coincident with the boundary of the DOE reservations. Doses to the public from the GDPs are calculated at the boundary of the DOE reservations, not at the protected area fence or the boundary of the GDPs operated by USEC.35 Furthermore, the controlled area at the Paducah GDP includes the West Kentucky Wildlife Management Area, which is open to the public for recreation, including hunting." (DCS motion at page 18)

The applicant made a nearly identical argument at the September 21, 2001 prehearing: "The example that comes to mind, although there may be others, are the Gaseous Diffusion Plants, operated by [USEC] on the Paducah and Portsmouth DOE reservations, in which the controlled area boundary does extend to the boundaries of the site reservation even though USEC, which is the certificate or license holder, only controls a small portion of the facility. So the contention is wrong in our opinion as a matter of law." (Prehearing transcript at 205-1-13)

This argument continues to lack merit and does not constitute a precedent for a plutonium processing facility for the following reasons:

a. The applicants argument is part of its larger approach to treat the MOX FFF plutonium processing facility as just another nuclear fuel fabrication facility. This approach is without merit when considering the relative toxicity and hazards posed by plutonium processing vs. uranium processing and/or enrichment.

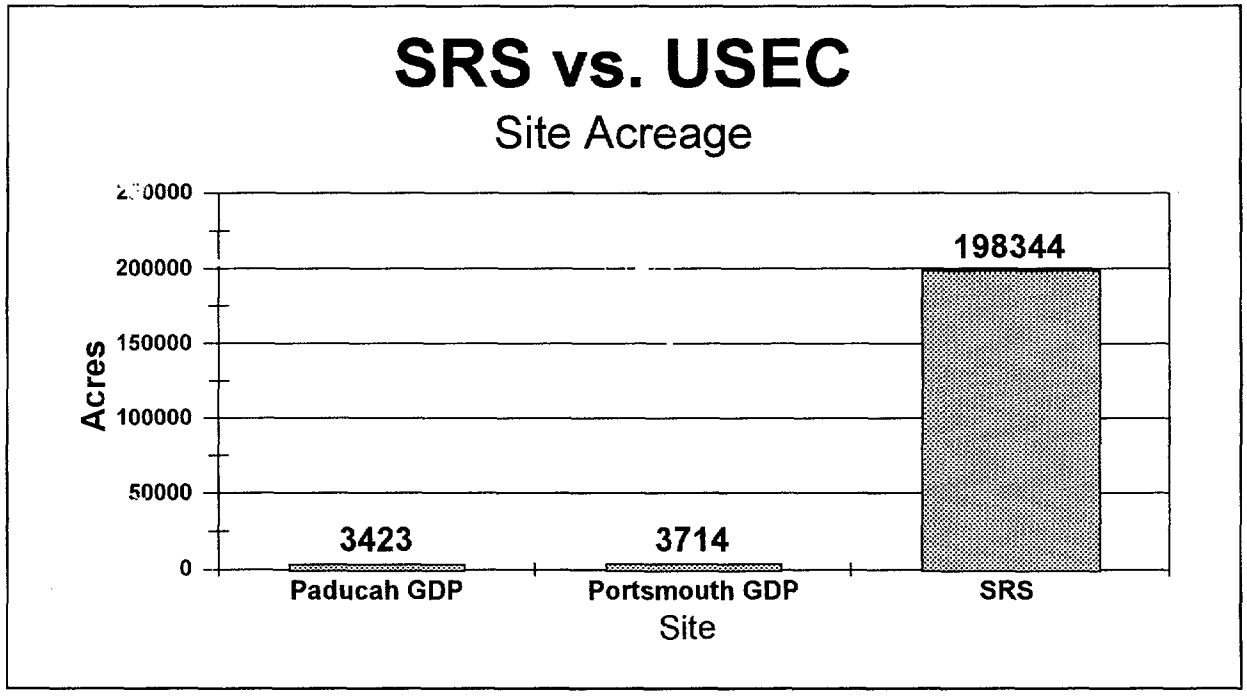

Figure 1. Comparison of Savannah River Site with USEC Gaseous Diffusion Plant Sites. Source: DOE/EM-0563 A Report to Congress on Long Term Stewardship. Volume II. Site Summaries Pages Kentucky-7, Ohio-41, South Carolina-1.

b. USEC *does* control significant portions of the sites in question and the Savannah River Site dwarfs the GDP sites in terms of acreage (See Figure 1).

c. USEC took over existing facilities that were already in operation and had been designed within the DOE boundaries that now function as a control area.

d. The proposed protocol is undefined and subject to future negotiation. DCS has only stated an "intent" to pursue an agreement/protocol with DOE. There is no protocol as yet, therefore the content of the application is what is under contention. Contentions involve the content of the application, not the intent of the applicant as stated in legal proceedings.

e. The applicant is treating its responses to the NRC's CAR RFAI as the existing CAR. Do responses to RFAI constitute a change in the application?

f. The real precedent being proposed by the applicant overlooks the trends at SRS which will increase the difficulty for DOE to enforce the entire SRS as a control area. For example, the *SRS Comprehensive Land Use Plan*, Chapter 3, states that "SRS land should be available for multiple use wherever appropriate and non-conflicting; some land should be designated for continued nuclear and non-nuclear industrial uses; and recreational opportunities should be considered and increased, as appropriate." (Page 3-2).

D. BREDL response to issues raised by applicant's request for certification

1. The first question the applicant requested to be certified to the Commission is:

"(1) For the purposes of the requirements in 10 CFR § 70.61, must a licensee have the authority to limit access to the controlled area for reasons that are unrelated to protection of individuals against the effects of intermediate and high consequences events;"

The primary reason for rejecting this request is that it is based, in large part, upon a series of inappropriate presumptions and inferences:

a. The applicant wrote that, "GANE Contentions 5 and 8 and BREDL Contention 9A ("Consolidated Contention 5") allege that DCS incorrectly designated the Savannah River Site ("SRS") boundary as the controlled area boundary for purposes of 10 CFR § 70.61, in part because 'DCS does not have control over the entire SRS.'[10] This allegation appears to be premised upon the petitioners' assumption that 10 CFR § 20.1003, which defines controlled area as that area to which access can be limited by the licensee 'for any reason,' requires the licensee to be able to assert such control for reasons unrelated to radiological safety." (Page 9).

This statement is false, presumptuous, lacks foundation, and functions as a distortion of BREDL's original contention. BREDL Contention 9A--*"Applicant used inappropriate control area boundaries and therefore mischaracterized members of the public as occupationally exposed workers"*- focused on the differences between occupational and public radiological doses. Although no distinction was made between doses from accidents and doses from routine operations, there was no reference or discussion of non-radiological issues.

This is a new argument made by the applicant, one not raised by during the September

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[10] *Footnote 22, Page 9: "Memorandum and Order* at 35."

21 prehearing or in previous submissions.

b. The applicant compounded its error of presumption by attempting to interpret the Board's intent: "as indicated above, 10 CFR § 20.1003 defines controlled area as that area to which access can be limited by the licensee "for any reason." Based upon this language, the Board's Memorandum and Order implies that Section 70.61 requires DCS to have the authority to exclude individuals from the controlled area for reasons unrelated to protection of these individuals against radiological accidents at the MOX Facility. Such a broad reading is inconsistent with the intent of the regulation. Based upon this language, the Board's Memorandum and Order implies that Section 70.61 requires DCS to have the authority to exclude individuals from the controlled area for reasons unrelated to protection of these individuals against radiological accidents at the MOX Facility. Such a broad reading is inconsistent with the intent of the regulation." (Page 16).

The applicant then proceeded to describe conditions that were never in dispute,describing a possible need to "to protect sensitive ecological areas from degradation by contact with the public" (Page 16). to justify its own misinterpretation. It is unclear to DCS whether the Board has interpreted 10 CFR §§ 20.1003 and 70.61 as absolutely precluding use of the SRS boundary as the controlled area boundary, or whether instead the Board has simply admitted for litigation the question of whether the SRS boundary should be designated as the controlled area boundary.([page 10).

2. The applicant's second statement for certification read:

"For the purposes of the requirements in 10 CFR § 70.61, must a licensee directly be able to limit access to the controlled area, or may the licensee make arrangements with a third party to limit access to the controlled area?"

The reason for rejecting this request is that it is based on alleged precedents that are irrelevant, and the rules clearly state the licensee is responsible for the control area.

Respectfully submitted,

Don Moniak
Blue Ridge Environmental Defense League

dated January 7, 2001 in Aiken, SC

BREDL–
PO BOX 3487
Aiken, SC 29801
803-644-6953

CERTIFICATE OF SERVICE
by Blue Ridge Environmental Defense League
(Docket # 70-3098, ASLBP # 01-790-01-ML)

I hereby certify that copies of:
1. BREDL's Response to DCS Motion of 12/17/01 for Reconsideration; and
2. BREDL's Additional Comments DCS Motion of 12/17/01 for Reconsideration

were sent to the following list via e-mail with paper copies served via U.S. Postal Service First Class Mail.

Administrative Judge Thomas S. Moore
Chairman
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
tsm2@nrc.gov

Administrative Judge Charles N. Kelber
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
cnk@nrc.gov

Administrative Judge Peter S. Lam
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
psl@nrc.gov

John T. Hull, Esq.
Mitzi Young, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
jth@nrc.gov
MAY@nrc.gov

Glenn Carroll
Georgians Against Nuclear Energy
139 Kings Highway
Decatur, GA 30030
atom.girl@mindspring.com

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: hrb@nrc.gov)

Secretary of the Commission*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications Staff
(E-mail: HEARINGDOCKET@nrc.gov)
(Three copies)

Donald J. Silverman, Esq.
Alex S. Polonsky, Esq.
Morgan, Lewis & Bockius
1111 Pennsylvania Avenue, NW
Washington, DC 20004
dsilverman@morganlewis.com
apolonsky@morganlewis.com

Dennis C. Dambly, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: dcd@nrc.gov)

Respectfully submitted,

Don Moniak
for BREDL , January 7, 2002 in Aiken, SC