RAS 4932

October 7, 2002

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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| In the Matter of | ) | |
| DUKE COGEMA STONE & WEBSTER | ) | Docket No. 0-70-03098-ML |
| (Savannah River Mixed Oxide Fuel Fabrication Facility) | ) | ASLBP No. 01-790-01-ML |

**GEORGIANS AGAINST NUCLEAR ENERGY'S REPLY TO DCS'S AND NRC STAFF'S RESPONSES TO NEW AND AMENDED CONTENTIONS**

Pursuant to the Atomic Safety and Licensing Board's ("ASLB's") order of September 25, 2002, Georgians Against Nuclear Energy ("GANE") hereby replies to Duke Cogema Stone and Webster's ("DCS's") and the Nuclear Regulatory Commission ("NRC" or "Commission") Staff's responses opposing the admission of GANE's late-filed contentions regarding DCS's revised Environmental Report ("ER").[1] GANE also responds to the question posed by the ASLB in its order. *See* Section II below. Contrary

[1] Duke Cogema Stone & Webster's Answer to Georgians Against Nuclear Energy's New and Amended Contentions on the Revised Environmental Report (September 23, 2002) (hereinafter "DCS Response"); NRC Staff's Response to Late-Filed Contentions Submitted by Georgians Against Nuclear Energy (September 26, 2002) (hereinafter "Staff Response"). These pleadings respond to Georgians Against Nuclear Energy's New and Amended Contentions Opposing Authorization for Duke Cogema Stone & Webster to Construct a Plutonium Fuel Factory at Savannah River Site (September 11, 2002) (hereinafter "GANE's New and Amended Contentions").



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to DCS's and the Staff's arguments, GANE's new and amended environmental contentions are admissible and satisfy the late-filing criteria.

## I. THE CONTENTIONS ARE ADMISSIBLE.

### A. Amended Contention 9, Inadequate Cost-Benefit Analysis

This contention challenges the Revised ER's failure to account for significant costs of the proposed MOX Facility in the cost comparison provided in the ER. In particular, the contention cites DCS's failure to provide any evaluation of the potential costs of accidents at the proposed facility. It is intended to substitute for GANE's original Contention 9, which challenged the ER's failure to include any discussion of costs whatsoever. Georgians Against Nuclear Energy Contentions Opposing a License for Duke Cogema Stone & Webster to Construct a Plutonium Fuel Factory at Savannah River Site at 31 (August 13, 2001) (hereinafter "GANE's Original Contentions").

DCS makes several arguments against the admissibility of the contention. First, DCS argues that the contention lacks an adequate factual basis because it is based exclusively on costs of accidents at the Waste Solidification Building ("WSB"), as listed in Appendix G of the ER. According to DCS, the WSB is not part of the MOX Facility. DCS Response at 9. GANE submits that whether or not the proposed WSB is technically part of the proposed MOX Facility, it has to be considered part of the MOX Facility for purposes of any analysis under the National Environmental Policy Act ("NEPA"), because it provides an important element of the process for handling the waste that will be produced by the MOX Facility. As required by CEQ regulations at 40 C.F.R. § 1502.4(a), "[p]roposals or parts of a proposal which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact

statement." DCS has effectively recognized this by identifying construction of the WSB as a "connected action" [*see* DCS Response at 10], and by providing a discussion of the environmental impacts of the proposed WSB in the Revised ER. In any event, the accidents in Appendix G were intended to serve as examples of accidents whose costs must be considered, not the complete list. To focus solely on the examples given is to miss the point of the contention, which is that as a general matter, the Revised ER does not consider the costs of any accidents.

DCS also argues that the contention is deficient because it does not cite any law, other than NEPA's general requirement that all foreseeable environmental impacts must be evaluated. The specific regulation requiring consideration of costs is 10 C.F.R. § 51.45(c). The regulation was cited in the original Contention 9. *See* GANE's Original Contentions at 31. While GANE acknowledges that it inadvertently failed to repeat a citation to the regulation when it amended Contention 9, GANE submits that the relevant question here is whether DCS had notice of the legal basis for the contention. The original Contention 9 provided adequate notice of the applicable regulatory requirement. DCS has shown that it has absorbed the information, because it has now included a discussion of costs, albeit inadequate, in the Revised ER. Thus, the inadvertent omission of a regulatory citation in the amended contention should not be considered fatal to its admissibility.

DCS next claims that GANE must show some specific legal requirement to consider the costs of accidents, as opposed to other types of costs. DCS Response at 11. This complaint is adequately answered by the broad language of 10 C.F.R. § 51.45(c), which requires, *inter alia,* that:

> The environmental report shall include an analysis that considers and balances the environmental effects of the proposed action, the environmental impacts of alternatives to the proposed action, and alternatives available for reducing or avoiding adverse environmental effects. Except for environmental reports prepared at the license renewal stage pursuant to § 51.53(c), the analysis in the environmental report should also include consideration of the economic, technical, and other benefits and costs of the proposed action and of alternatives.

This broad language clearly contemplates that costs of a proposed action include costs associated with the environmental impacts of the action. One of the most obvious economic costs of a nuclear facility is the cost to the public if an accident should occur that causes a radiological release.

DCS also argues that GANE has not provided any legal authority for its position that an ER must assume the "speculative failure of the proposed waste disposal path." *See also* Staff Response at 10. To the contrary, the contention references a discussion in Contention 14, that NEPA requires consideration of all foreseeable impacts of a proposed action, even if their likelihood is low. The discussion in Contention 14 includes citations to NEPA, judicial decisions, and NRC regulations, and the regulations of the Council on Environmental Quality regarding the need to consider impacts of low-probability events. As discussed in Contentions 9 and 14, instead of addressing the potential for a severe accident at the MOX Facility, DCS simply lists the equipment that is designed to prevent accidents, and assumes they will not occur. *See* GANE's New and Amended Contentions at 2, 6.

The NRC Staff argues that the contention is deficient because it "does not reference other specific sources of information (apart from the revised ER) to support the contention's validity." Staff Response at 14, citing *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1,2, and 3), CLI-91-12, 34 NRC 149, 155-56

(1991) (hereinafter "*Palo Verde*"). However, the *Palo Verde* decision does not support the NRC Staff's argument. In that case, the Commission considered the admissibility of a contention challenging a license amendment application that would increase the allowable setpoint tolerance for the pressurizer safety valves. The ASLB had admitted the contention and two of its bases. Apparently the first basis was somewhat unclear, and therefore the ASLB "inferred" that it constituted a challenge to the High Pressurizer Pressure Trip ("HPPT") response time. *Id.*, 34 NRC at 153. The Commission reversed that aspect of the ASLB's decision, finding no basis in the wording of the contention itself for the ASLB's inference. As the Commission explained, the contention failed to meet the requirement of 10 C.F.R. § 2.714(b) that: "petitioners explain the basis for the contention and read the relevant parts of the license application and show where the application is lacking." *Id.*, 34 NRC at 156. Nowhere does the decision fault the contention for failing to cite documents other than the license application itself. Moreover, while the decision generally referred to the demand of the then recently amended 10 C.F.R. § 2.714(b) for "more supporting information and references to specific documents and sources," *see* 34 NRC at 155-56, nothing in the decision or the

regulation provides that a contention is admissible only if it references documents that are extraneous to the license application.[2]

### B. Amended Contention 11: Inadequate Discussion of Measures for Disposal of Waste

Amended Contention 11 argues that the Revised ER is inadequate because it fails to discuss the viability of proposed measures for the processing and disposal of waste that would be generated by the proposed MOX Facility. The NRC Staff concedes that these impacts must be considered, but argues that it is DOE's responsibility to address them in its own environmental review. Staff Response at 11. This argument ignores the NRC's own assertion that it will consider the environmental impacts of the waste generated by the MOX process in the Draft Environmental Impact Statement ("DEIS") for the

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[2] The relevant portion of the *Palo Verde* decision reads as follows:

> Nowhere in Contention No. 1 do Petitioners maintain a challenge to the HPPT response time. Licensees note in their appeal that the Board viewed Petitioners' contention as claiming insufficient information in the application on HPPT response time. However, Licensees also point out that under 10 C.F.R. § 2.714(b)(2)(iii), such allegation must provide 'the identification of each failure and the supporting reasons for Petitioner's belief.' Licensees' Appeal at 11. Licensees argue that their application is more than adequate.
>
> Whether or not this is the case, Petitioners have clearly failed to meet the aforementioned petition requirements. These requirements are designed to raise the Commission's threshold for admissible contentions and to require a clear statement as to the basis for the contentions and the submission of more supporting information and references to specific documents and sources that establish the validity of the contention. *See* 54 Fed Reg. 33,168, 33,170 (August 11, 1989). Were this basis to be admitted as it exists now, it would fail to meet the standard requiring that petitioners explain the basis for the contention and read the relevant parts of the license application and show where the application is lacking. *Id.* Accordingly, the first basis, concerning HPPT response time, is rejected.

34 NRC at 155-56.

proposed MOX Facility. On April 24, 2002, the NRC issued a Federal Register notice stating that the issuance of a DEIS for the proposed MOX Facility will be delayed. 67 Fed. Reg. 20,183. As explained in the notice, the NRC staff decided that the schedule needs to be changed "when, in January 2002, the U.S. Department of Energy (DOE) announced its decision to alter its planned hybrid approach for surplus weapons plutonium disposition [65 FR 1608]." *Id.* The DOE's abandonment of the plutonium immobilization program ("PIP"), and its decision to convert all the plutonium into MOX fuel "requires design changes to the proposed MOX facility." 67 Fed. Reg. at 20,184. The NRC went into more detail as follows:

> *Additional Changes in the Proposed DOE Action:* As a result of the PIP cancellation, 6 metric tons of plutonium, originally slated for immobilization (designated as alternate feedstock), and 2 metric tons from additional sources, would now be processed in a re-designed proposed MOX facility. The alternate feedstock includes impurities that would require more processing than the plutonium already scheduled for conversion into MOX fuel. In addition, the amount of high-alpha waste produced from the MOX facility would be greater, due to processing of the alternate feedstock. The current MOX facility design will be updated to include new or additional equipment and processing steps to accommodate the additional plutonium.
>
> In addition to the changes in the proposed MOX fuel fabrication facility prompted by the PIP cancellation, DOE plans to construct and operate a new waste processing building at the SRS to solidify the MOX waste streams (high-alpha and uranium) that were originally planned to go to DOE's HLW tanks at the SRS.
>
> *Resulting Changes in the Proposed NRC MOX DEIS:* The DEIS will be revised to include and evaluate the proposed changes to the MOX fuel fabrication facility, including new and/or altered equipment plans, additional processing steps and the consequent hazards, a*nd the additional waste generated. The DEIS will also evaluate the changes to the waste processing plans, including construction and operation of a new DOE facility.*

67 Fed. Reg. at 20,184. This notice makes it quite clear that the NRC Staff intends to address the environmental impacts of the WSB and the waste that it generates and processes in the DEIS for the proposed MOX Facility. Thus, it is legitimate for GANE to

raise a contention questioning the adequacy with which DCS has addressed the same issues in its Revised ER.

Even if some decision has subsequently been reached that DOE and not the NRC will address the environmental impacts of the WSB and the waste generated by the MOX facility, that does not mean the contention must be rejected. The NRC's proposal to license a factory for processing plutonium into nuclear power plant fuel constitutes a major federal action with significant impacts on the human environment. The NRC is therefore responsible for ensuring that an adequate EIS is prepared that addresses all foreseeable environmental impacts associated with the action.[3] While it may be decided that DOE is the appropriate agency to address the impacts, the NRC must ensure that its licensing decision is supported by an EIS that is adequate to satisfy NEPA. If, at some point during this proceeding, the DOE prepares an EIS that addresses the environmental impacts of the WSB and the waste generated by the MOX Facility, then the NRC can present evidence that GANE's concerns have been satisfied. In the meantime, the contention should be admitted.

DCS also disputes the portion of the contention which asserts that the Revised ER must address the impacts of generating waste that is neither processed nor disposed of offsite. DCS Response at 13. According to DCS, there is "no legal requirement" that it

[3] DCS argues that it is not necessary to address the impacts of the WSB in the Revised ER because construction of the WSB is only a "connected action" and not the proposed action itself. As discussed above with respect to Contention 9, however, CEQ regulations at 40 C.F.R. § 1502.4 require the consideration of environmental impacts of connected actions, in order to avoid improper segmenting of environmental decisions. DCS cannot avoid a rigorous environmental analysis of the cradle-to-grave impacts of MOX fuel fabrication, merely by asserting that some other entity (*i.e.*, the DOE) is in charge of a part of the process.

demonstrate that DOE has "committed" to build the WSB, nor is there any legal requirement that DCS prove that DOE has the funds budgeted for the WSB at this time, or that the WIPP acceptance criteria will be met. *Id.* This argument misses GANE's point. The point of the contention is that given the numerous uncertainties that attend the question of whether the MOX Facility waste can be disposed of safely offsite, it is necessary to evaluate alternatives such as long-term onsite storage. GANE does not insist that DCS provide assurance that these uncertainties can be resolved; rather, GANE contends that the uncertainties must be recognized, and that this requires consideration of reasonable alternatives to offsite disposal

DCS and the NRC Staff argue that GANE's concern regarding the unexplained reduction in the volume of MOX waste should not be admitted because it is based on an error in the initial ER. DCS Response at 15, Staff Response at 11. In support of this argument, they refer to the following statement in DCS's July 12, 2001, Responses to Request for Additional Information on the Environmental Report, at page 5.
"The volume of stripped uranium in the ER (68,000 gal.) is incorrect. The correct volume of stripped uranium is 35,140 gal/yr average with a maximum of 42,300 gal/yr during transition periods. The ER will be updated to reflect this correction."

The passage cited is the sum total of information pertaining to the purported error. No explanation is given of the reason for the error. This is not, in fact, the first unexplained waste figure change in environmental documentation for the MOX project. At page 3-132, DOE's Surplus Plutonium Disposition EIS (1999) refers to a waste stream of 431 cubic meters per year of TRU waste. This figure converts to 113,900 gallons. Table 3.3 of DCS's original ER shows that the total waste stream amounts to 81,300

gallons, a decrease of over 30,000 gallons. Now, DCS states, without any further explanation, that this is figure is based an error, and the true volume of high-alpha liquid waste is 68,898 gallons, *i.e.*, another 20,000 gallons lower. These are significant discrepancies with respect to quite large amounts of high-alpha liquid waste. Given DCS's failure to provide a clear explanation of the reason for the alleged error, and given that the error was in the non-conservative direction of reducing the volume of waste estimated by DCS, the contention should be admitted. It may be that at some future time, DCS provides a reasonable explanation for the change in the figures. At this point, however, the vacillations in the nuclear waste figures provided by DCS provide a basis for the admission of the contention.

### C. Contention 14: ER Fails to Address Risks of Red Oil Explosion

Contention 14 charges that the Revised ER is deficient because it fails to address the potential for a red oil explosion in the WSB. DCS argues that it is not necessary for the Revised ER to discuss the environmental impacts of a red oil explosion, because it is not the bounding credible accident. DCS Response at 17. However, DCS's definition of what is a credible accident is difficult to discern. DCS argues that GANE:

> ignores the fact that the ER describes DCS' accident analysis methodology, including its performance of a Preliminary Hazards Analysis to estimate accident consequences as a result of all credible events – including low probability ones – and its screening for those events with the highest risk to workers or the public.

DCS Response at 17, citing ER at Appendix G.

An examination of Appendix G, however, shows significant internal inconsistency in the way DCS views the concept of credibility. In Section 5.5.1, the ER states that "all internally initiated accidents are evaluated without regard to their initiating frequency, and all natural phenomena hazard and external man-made hazard generated

events are evaluated unless their probability of impacting the MFFF is extremely low." Revised ER at 5-36. On the other hand, in Section 5.5.2, which follows immediately, the Revised ER states that:

> The environmental risk assessment addresses the consequences associated with accidents in each event type *up to and including design basis accidents. The environmental impacts of beyond design basis events are remote and speculative and do not warrant consideration under NEPA. While beyond design basis events are theoretically possible, their likelihood of occurrence is so low as to not result in any significant, additional risk from MFFF operations.*

*Id.* (emphasis added). This language indicates that DCS believes beyond-design-basis accidents are, by definition, too remote and speculative to be considered. As discussed in Contention 14, such a position runs directly counter to case law interpreting NEPA. *See* GANE's New and Amended Contentions at 6. As long as this language is present in the Revised ER, any representation by DCS that it has made thorough analysis of potential accidents, and has properly determined what is the bounding credible event, is open to question. For instance, although DCS evaluates loss-of-confinement accidents without explosions (ER at G.4.2.2) and explosions without catastrophic loss-of-confinement (*i.e.* credit is given to "robust design of the high-activity waste processing cells") (ER at G.4.2.4) DCS does not adequately justify why an explosion with a catastrophic loss-of-confinement is not a credible bounding accident.

DCS also argues that GANE's reliance on Staff concerns stated in the Draft Safety Evaluation Report is inapposite, because the Staff's concerns relate to the aqueous polishing portion of the MOX Facility. DCS Response at 17 note 51. However, it is clear from the SER that the Staff's concerns relate in general to "red oil phenomena," *i.e.*, the propensity of red oil to explode. DCS does not explain how or why these concerns would be inapplicable to waste processing.

The NRC Staff argues that GANE may not rely on the Draft SER, because the subject of the proceeding is the license application and not the Staff's review. NRC Staff Response at 12 and note 27, citing *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998), *affirmed sub nom. National Whistleblower Center v. NRC,* 208 F.3d 256 (D.C. cir. 2000) (hereinafter "*Calvert Cliffs*"); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147, 150 *reconsideration denied,* CLI-93-12, 37 NRC 355 (1993) (hereinafter "*Rancho Seco*"). The NRC Staff misstates the applicable law. Staff documents may be used to support a contention, as long as the contention also provides an explanation of the deficiencies in the application. *Louisiana Energy Services* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 337-39 (1991) *(hereinafter "Claiborne").* Moreover, the cases cited by the NRC Staff do not hold otherwise. In *Calvert Cliffs*, the Commission cited the *Claiborne* case for the proposition that, if a Staff Request for Additional Information ("RAI") "raises a legitimate question about the adequacy of [a license] application," a petitioner can raise the question in a contention. 48 NRC at 350. In *Rancho Seco,* the Commission found that the mere posing of questions in an RAI "does not indicate *per se* that [an] Environmental Report is inadequate, especially when, as in this case, the Licensee has filed a detailed response to the Staff's inquiry." *Id.,* 37 NRC at 146. *See also id.* at 150. Here, unlike in *Rancho Seco*, DCS has not answered the NRC Staff's concerns about the inadequacy of its discussion of measures to control the potential for a red oil explosion. Moreover, the Draft SER itself lists several incidents in the U.S. and the former U.S.S.R. involving red oil explosions, thus providing independent confirmation beyond the Staff's concerns, that

red oil explosions are a serious hazard. Thus, GANE has provided a sufficient basis for the contention.

**D. Contention 15: Inadequate Discussion of Alternatives**

Contention 15 criticizes the Revised ER for failing to discuss immobilization as an alternative to processing the majority of the U.S. inventory of surplus plutonium at the proposed MOX Facility. As the NRC acknowledges, it has requested comments on the extent to which the immobilization of surplus plutonium should be discussed in the Draft EIS for the proposed MOX Facility. NRC Staff Response at 13. In the meantime, the Staff is taking the position that the Draft EIS can reference previously issued DOE decisions which address immobilization as an alternative. *Id.* However, the NRC Staff's response begs the question of whether immobilization is a reasonable alternative that should be considered in the Revised ER and the Draft EIS for the proposed MOX Facility. To cite old EIS's that have been repudiated by the agency that issued them does not satisfy this requirement. The Revised ER and Draft EIS should acknowledge immobilization as a reasonable alternative and explain why that continues to be true in spite of the federal government's decision to abandon immobilization.

The Staff also seems to argue that under "current circumstances," *i.e.,* DOE's decision to cancel the immobilization program, immobilization is not a "reasonable" alternative, and therefore need not be considered. NRC Staff Response at 14, citing *Natural Resources Defense Council v. Hodel,* 865 F.2d 288, 295 (D.C. Cir. 1988). *See also* DCS Response at 19 (immobilization alternative need not be discussed because it is no longer "available.") However, the fact that the DOE has cancelled the immobilization program does not change the fundamental reasonableness of immobilization as an

alternative strategy for fulfilling the central purpose of the proposed MOX Facility, which is to reduce the threat of nuclear weapons proliferation by providing a means to dispose of surplus weapons-grade plutonium in the United States. *See* Revised ER, Section 2.2 ("Need for the Facility").[4] The only thing that has changed is that the U.S. government has, for political reasons, decided not to pursue immobilization.

As the Court recognized in *Natural Resources Defense Council v. Hodel,* a candid discussion of objectively reasonable alternatives that the agency has rejected is all the more important in such circumstances:

> The purpose [of the requirement to consider alternatives] is not merely to force the *agency* to reconsider its proposed action, but, more broadly, to inform Congress, other agencies, and the general public about the environmental consequences of a certain action in order to spur all interested parties to rethink the wisdom of the action.

865 F.2d at 296 (emphasis in original). In that case, the Court rejected an argument by the Secretary of Interior that he did not have to give any consideration to energy conservation as an alternative to offshore drilling because conservation would not reduce the need for drilling. *Id* at 295-96. The Court held that the Secretary must consider conservation as a partial alternative. *Id.*

Neither the NRC nor DCS has established that the alternative of immobilization is unreasonable, or that it has been or will be adequately addressed by the DOE. Nor have

[4] Thus, this case is distinct from *National Wildlife Federation v. FERC,* 912 F.2d 1471, 1484-85 (D.C. Cir. 1990), cited by the NRC Staff at page 14 note 33, in which the Court refused to require FERC to consider an alternative that did not relate to the purpose of the proposed action. Here, as has been previously acknowledged by the DOE in its generic EIS's for surplus plutonium disposition, immobilization would serve the purpose of reducing the inventory of weapons-grade plutonium in the U.S.

they justified the complete failure of the Revised ER to discuss the immobilization alternative. Therefore, the contention should be admitted.

### E. Contention 16: Inadequate Discussion of Plutonium Stranded by Disposition Program Changes

Contention 16 challenges the failure of the Revised ER to address the environmental impacts of several tons of surplus plutonium covered by the U.S.-Russian Agreement, for which there is no disposition path. DCS argues that GANE has not raised a genuine dispute on a material issue of law or fact, because GANE has brought its concern to the "wrong forum." DCS Response at 20.

GANE agrees with DCS that it would be appropriate for the DOE to address the problem that as a result of the cancellation of the immobilization program, a significant quantity of surplus plutonium exists for which processing in the MOX Facility is not an available means of disposal. However, this does not mean the contention is inadmissible. If for some reason DOE does not prepare such an analysis, or if DOE's analysis is inadequate, then it will become the responsibility of the NRC as the entity that is proposing to license the proposed MOX Facility. As discussed above, the NRC cannot permit construction of the proposed MOX Facility unless and until it finds that its decision is supported by an adequate NEPA analysis.

DCS also argues that GANE's concern is addressed by the Revised ER, because the discussion of the No Action Alternative includes continued storage – or stranding – of all surplus plutonium. The stranding of 8 metric tons of plutonium orphaned by cancellation of the immobilization program does not fall into the category of an alternative, however. Instead, it is an environmental impact that stems from the inability

of the MOX processing program to fulfill its purpose. Thus, the discussion in the ER of the No Action Alternative is not applicable.

The NRC Staff argues that the contention should be rejected because it consists largely of "unsupported GANE opinions." This argument is based on a mischaracterization of the contention. The contention consists primarily of facts regarding the amount of orphaned surplus plutonium that has been created by cancellation of the immobilization program. This material cannot be processed at the MOX Facility, and therefore the MOX Facility falls short of fulfilling its primary purpose, which is to reduce the amount of weapons-grade plutonium that is subject to the U.S.-Russian nuclear disarmament agreement. The NRC Staff does not take issue with any of the facts asserted by GANE, but merely characterizes them as GANE's opinions. The Staff's argument is entirely without merit.

### F. Contention 17: Inadequate Analysis of MOX Production Rate and Reactor Availability.

Contention 17 asserts that additional reactors required to process 3.5 MT of plutonium per year have not been identified and committed to the MOX plan. The environmental impacts of the eventuality of MOX output exceeding reactor usage and fresh MOX fuel containing weapons-grade plutonium accumulating at SRS, including alternatives for coping with this problem, must be analyzed in order to fulfill NEPA's requirement that all foreseeable impacts must be addressed.

DCS argues that GANE's claims are highly speculative. DCS Response at 22. But there is nothing speculative about GANE's concern that the MOX Facility will create MOX fuel for which no user will be found. The ER itself acknowledges that: "[t]he addition of alternative feedstock will result in the need for increased irradiation capacity."

*Id.* at ES-4. The ER goes on to state that "DOE intends to make provision for this capacity," and that DCS assumes that "two generic mission reactors provide this capacity." *Id.* The speculation is in the ER, not GANE's contention. DCS has not identified any plan for using the additional MOX fuel, or the reactors that will use it. In the absence of commitments to use the fuel, the ER must address the environmental impacts that will occur if no use for it is found. The contention should be admitted.

## II. THE CONTENTIONS SATISFY THE LATE-FILING CRITERIA.

DCS argues that the contentions may not be admitted because GANE has not met the Commission's criteria for late-filing in 10 C.F.R. § 2.714(a)(1). These regulations require a balancing of the following five factors:

(1) Good cause, if any, for failure to file on time;
(2) the availability of other means whereby the Intervenor's interest will be protected;
(3) the extent to which the Intervenor's participation may reasonably be expected to assist in developing a sound record;
(4) the extent to which the Intervenor's interest will be represented by existing parties; and
(5) the extent to which the Intervenor's participation will broaden the issues or delay the proceedings.

DCS argues that GANE fails to satisfy the paramount "good cause" element of the standard, because it could have filed the contentions earlier.

GANE filed its new and amended environmental contentions on September 11, 2002, within 35 days of the issuance of an August 7, 2002, NRC Staff letter notifying the parties of the availability of the Revised ER. At that time, GANE believed that the August 7 letter constituted the first notice it had received of the availability of the ER. DCS points out that it sent the ER to GANE by Federal Express on July 11, 2002; and that the package was delivered to GANE's office on July 15, 2002. Thus, to come within

the 30-day period established by the ASLB's April 30, 2002, Memorandum and Order as constituting presumptive "good cause" for late-filing, GANE would have had to file the contentions four weeks earlier, *i.e.*, by August 14.[5]

GANE has now confirmed that a Federal Express package containing the ER was received at GANE's office on July 15. However, the package was inadvertently misfiled before it was opened. GANE's representative now recalls having received a Federal Express package around July 15, but also recalls that she placed the package, unopened, in a locked cabinet. She did this because she mistakenly thought the package contained proprietary documents, which DCS generally sends to GANE in overnight mail packages. As a general rule, GANE's representative tries not to open packages containing proprietary information unless her legal or technical advisor (to whom DCS sends copies of all proprietary documents that it serves on GANE) advises her that there is some reason to do so. At that particular time, GANE's representative was also distracted by the birth of her first grandchild on July 12, and was spending much of her time visiting the hospital. GANE's representative did not become aware that she had already received a copy of the Revised ER until DCS pointed out, in its September 23 filing, that Federal Express had delivered such a package. Thus, the erroneous representation in GANE's

[5] The NRC Staff contends that GANE also lacks good cause because it had "nearly four months advance notice" that DCS would be filing the ER in mid-July. Staff Response at 5. GANE has never understood the MOX review schedule that is on the NRC's website to constitute firm deadlines. Rather, it is GANE's understanding that these dates are targets. For instance, in the ASLB's April 30, 2002, scheduling order, July 15, 2002 is referred to as a "projected date" for submittal of the ER. In fact, target dates have changed a number of times in this proceeding. Thus, it was reasonable for GANE to await notice by either DCS or the NRC Staff that the ER actually had been filed. Because GANE mistakenly misplaced the ER that was sent by DCS, it was not aware that the ER had been filed until it received the Staff's letter of August 7.

September 11 filing, that the August 7 NRC Staff letter constituted the first notice GANE had received of the availability of the Revised ER, was made in good faith.

GANE wishes to point out that GANE's mistake might have been avoided if DCS had served the Revised ER, or even a copy of the cover letter enclosing the Revised ER, on GANE's legal advisor. Had GANE's legal advisor known that the Revised ER had been sent to GANE, she could have alerted GANE's representative to the existence and the importance of the document. Although GANE's legal advisor has informally requested DCS to include her on its service list, DCS has taken the position that it is not required to do so unless GANE's legal advisor files a notice of appearance.

At this point, GANE would like to request the ASLB to formally require DCS and the NRC Staff to provide GANE's legal advisor with electronic notice of DCS's and the NRC Staff's correspondence or filings with the ASLB or the Commission, and their correspondence with GANE. If it is not possible to provide the documents electronically, GANE requests that they be served on GANE's legal advisor by whatever other method they are served on GANE. GANE notes that as a general matter, this requirement should not impose any hardship on the parties, because only electronic service is needed unless it is unavailable for some reason.

In any event, GANE acknowledges that its mistake in misfiling the Federal Express package sent by DCS, while honest and in good faith, does not amount to the "extraordinary circumstances" demanded by the ASLB for contentions filed more than 30 days after documents become available. *See* Memorandum and Order (April 30, 2002). Therefore, GANE withdraws its claim to presumptive good cause for the late-filing.

Even where good cause cannot be found, however, late filing may be justified by a "compelling showing" on the four other factors. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-13, 53 NRC 319, 324 (2001) (hereinafter "LBP-01-13"). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 507 (2001) (hereinafter "LBP-01-39"). GANE has met that test.

In considering whether the four other late-filing factors weigh in favor of admitting a contention, the third and fifth late-filing factors receive greater weight than factors two and four. LBP-01-13, 53 NRC at 324. As discussed in GANE's initial pleading, GANE satisfies the third factor because it has demonstrated that its participation "may reasonably be expected to assist in the development of a sound record ...." New and Amended Contentions at 15. As discussed in its contentions, GANE is being advised by Dr. Edwin Lyman, a highly qualified expert on plutonium disposition issues, and expects to provide his testimony. *Id.*[6] GANE also asserted that its ability to contribute to the development of a sound record is aided by the presence of experienced counsel. *Id.*

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[6] DCS argues that GANE's identification of Dr. Lyman as an expert on the revised ER is "somewhat disingenuous," given that Dr. Lyman was not among the experts identified for environmental contentions 9, 11, and 12 in GANE's May 17, 2002 filing identifying its expert witnesses. DCS Response at 7 note 18. GANE did not identify an expert for its original Contention 9, because it essentially was a legal contention that the ER did not include any cost-benefit comparison. Thus, it is irrelevant that GANE identified a different expert for that contention. Contention 12 is before the Commissioners, and it is not clear whether it will be admitted for litigation. Thus, GANE did not identify an expert for that contention. For the original contention 11, GANE identified Dr. Arjun Makhijani as its expert. Dr. Makhijani was out of the country when GANE filed Amended Contention 11, and thus GANE is relying on Dr. Lyman to support the amended contention. GANE anticipates that it may add Dr. Makhijani as a witness at a later point.

DCS complains that GANE's showing is insufficient because "GANE does not identify the "*precise* issues it plans to cover, nor does it provide a summary of the proposed testimony." DCS Response at 7 (emphasis in original), citing *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986) (hereinafter "*Braidwood*"); *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982) (hereinafter "*Grand Gulf*"). *See also Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165-66 (1993) (hereinafter "*Comanche Peak*"), cited in NRC Response at 11 note 20. This argument ignores the fact that the contentions themselves are specific and well-supported. As the ASLB recognized in LBP-01-39, if contentions are stated with "specific thoroughness," it follows that they can be reasonably expected to assist in the development of a sound record. 54 NRC at 520. As discussed above in Section I, GANE's contentions regarding the Revised ER are both specific and thorough in their bases. The cases cited by DCS and the NRC call on intervenors to identify witnesses and issues and to summarize testimony with "as much particularity as possible." *See Braidwood, supra,* 23 NRC at 246; *Grand Gulf,* 16 NRC at 1730; *Comanche Peak,* 37 NRC at 166. GANE has met this standard, by identifying Dr. Lyman as a prospective witness, by pleading its contentions with the level of specificity required by 10 C.F.R. § 2.714, and by providing as much factual detail as possible in the bases of the contentions. Indeed, given the heightened admissibility standard now

imposed by the Commission, it would not be in GANE's interest to hold back any currently available information that might support its contentions.[7]

DCS also argues that the assistance of counsel is irrelevant, because the only factor that the Commission considers to be relevant in this regard is assistance in cross-examination, which is not available in a Subpart L proceeding. DCS Response at 7. GANE submits that the ASLB is entitled to take into account the fact that GANE's environmental contentions raise some complicated legal issues, due in significant part to the fact that the NRC and the U.S. Department of Energy ("DOE") have overlapping jurisdiction over the MOX Facility project. For instance, several of the contentions question the extent to which the NRC can avoid addressing certain environmental issues on the ground that they are likely to be addressed by the DOE in some prospective environmental analysis. Assistance of counsel is likely to make a great difference in the thoroughness with which these legal issues are addressed.

The fifth factor in the balancing test is the extent to which the Intervenor's participation will broaden the issues or delay the proceeding. In considering this factor, it is important to bear in mind the fact that just a little over three weeks (23 days) elapsed between July 15, when GANE received the Revised ER, and August 7, when the NRC

[7] It is also worth noting that the 1986 *Braidwood* and 1982 *Grand Gulf* cases were decided before the NRC amended its Part 2 regulations to raise the standard for admissibility of contentions in 1989. Thus, the Commission has arguably has already elevated the admissibility standard to the level set in those cases. In addition, the *Comanche Peak* case concerns a petition for late intervention rather than late-filed contentions.

Staff sent out its letter notifying the parties that the Revised ER had been filed.[8] Such a relatively brief delay could not reasonably be found to have the effect of delaying this proceeding. The overall framework for this proceeding is relatively lengthy. Issuance of the Final EIS, which necessarily precedes a hearing, is not scheduled until August 2003. The minor delay caused by GANE's error should not impact this hearing schedule. Moreover, as the ASLB previously has held, if there will already be a hearing on similar issues, or further opportunities for admitting timely contentions due to later filings, the fifth factor should swing the balance in favor of admitting the contention. *Private Fuel Storage*, LBP-01-39, 54 NRC at 520.

Moreover, GANE's new and revised contentions should not significantly broaden the proceeding, because they consist largely of substitutes for contentions that were already admitted. To the extent that the contentions add new issues, the ASLB should take into consideration the fact that the new contentions were prompted by a substantially revised ER, which in turn was prompted by major changes to the federal government's plutonium disposition program. The cause for any broadening of the proceeding stems

[8] The NRC Staff sent the August 7 letter by first-class mail only, and failed to serve the parties by e-mail. In so doing, the Staff violated the ASLB's standing order of July 17, 2001, that all parties must serve their pleadings and other submissions by e-mail, with conforming copies by first-class mail. The Staff's error compounded GANE's delay in filing the new and amended contentions: if GANE had received the August 7 letter by contemporaneous electronic transmission, it would have begun work on its contentions all the sooner, and likely would have submitted them by September 6, *i.e.*, within 30 days from August 7.

directly from these changes to the plutonium disposition program, rather than any action by GANE. Therefore, this factor should weigh in favor of GANE.[9]

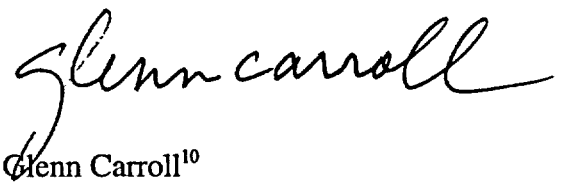
While the second and fourth factors are less consequential, they clearly weigh in favor of admitting GANE's contentions. It is indisputable that there are no other means by which GANE's interests can be protected and no other parties protecting GANE's interests in this proceeding. The fact that the one other party to the case, Blue Ridge Environmental Defense League, did not submit any new contentions, establishes conclusively that GANE's interests will not be represented by any other party. Moreover, commenting on any new generic environmental analysis that the DOE may prepare regarding the disposal of surplus plutonium will not ensure that the NRC's licensing decision in this case complies with NEPA.

[9] DCS claims that GANE has "waived" any argument on this factor, because it was not addressed in the initial discussion of the late-filing factors. DCS Response at 8. However, GANE did assert, as a general matter, that in addition to good cause, it satisfied the four other factors of the late-filing standard. GANE's New and Amended Contentions at 15. GANE did not go into any detail regarding this factor because it was operating under the mistaken belief it was relatively unimportant, given that GANE believed it was meeting the presumptive good cause criteria for the late filing.

## CONCLUSION

For the foregoing reasons, GANE's new and amended contentions should be admitted.

Respectfully submitted,



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Dated October 7, 2002
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[10] This pleading 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 Georgians Against Nuclear Energy's Reply to DCS's and NRC Staff's Responses to New and Amended Contentions was e-mailed to the following with hard copies served by First Class U.S. Mail.

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October 7, 2002 in Decatur, Georgia