RAS 6338

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	)	April 17, 2003
DUKE COGEMA STONE & WEBSTER	)	Docket No. 070-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	)	ASLBP No. 01-790-01-ML

DUKE COGEMA STONE AND WEBSTER'S
ANSWER TO LATE-FILED DEIS CONTENTIONS

Pursuant to the Atomic Safety and Licensing Board's ("Board") Scheduling Order dated April 8, 2003 and 10 CFR § 2.714(c), Duke Cogema Stone & Webster ("DCS") hereby files its Answer to Georgians Against Nuclear Energy's ("GANE") "Late-Filed Contentions Regarding Inadequacies in the Draft Environmental Impact Statement for the Proposed MOX Plutonium Fuel Factory at Savannah River Site," dated March 27, 2003 ("DEIS Contentions"). GANE proposes that these late-filed contentions be admitted in this proceeding on DCS's Construction Authorization Request ("CAR") for the Mixed Oxide Fuel Fabrication Facility ("MOX Facility").

The five late-filed contentions proposed by GANE all allege that the NRC Staff's Draft Environmental Impact Statement ("DEIS"), published in February 2003, fails to comply with the National Environmental Policy Act of 1969 ("NEPA"). Each of the

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contentions is premised upon misstatements of fact and/or misapplications of law, and none of the contentions meets the standards for admission in this proceeding. Accordingly, GANE's request for admission of these late-filed contentions should be denied.

I. LEGAL STANDARDS GOVERNING THE ADMISSIBILITY OF CONTENTIONS

DCS provided a detailed discussion of the legal standards to be applied in ruling on proposed contentions in its "Answer to Proposed Contentions Filed by Georgians Against Nuclear Energy," dated September 13, 2001. Rather than repeating those standards here, DCS refers the Board to Section II of its earlier Answer. However, the principal deficiency in GANE's late-filed contentions is that they fail to show that a "genuine dispute exists . . . on a material issue of law or fact" contrary to 10 CFR § 2.714(b)(2)(iii).

II. ANALYSIS OF GANE'S LATE-FILED NEPA CONTENTIONS

GANE has submitted five proposed contentions on the DEIS. Each is addressed below.

A. Contention 18. Inadequate Basis for Recommendation that MOX Facility Should be Licensed.

GANE submits two proposed contentions — contentions 18.A and 18.B — challenging the basis for the DEIS recommendation that the MOX Facility should be licensed.

1. 18.A Conditional Finding Fails to Comply with NEPA.

> **Contention:** As provided by 10 C.F.R. § 51.71(e), the Draft EIS makes a preliminary recommendation that "unless safety issues mandate otherwise, the action called for is the issuance of the proposed license to DCS, with conditions to protect environmental values." DEIS at [xx]. This conclusion is repeated in Chapter 2.5. DEIS at 2-36.

> The Staff's conditional finding that a license should be issued for the proposed MOX Facility "unless safety issues mandate otherwise" fails to satisfy the National Environmental Policy Act ("NEPA") or its implementing regulations at 10 C.F.R. § 51.71(e) and 10 C.F.R. § 70.22(a)(7), because it appears to be contingent upon the results of a future safety review.

The principal basis underlying this contention is GANE's misstatement of the following straightforward language from the DEIS:

> After weighing the costs and benefits of the proposed action, and comparing alternatives, the NRC Staff . . . includes in this DEIS its preliminary NEPA recommendation regarding the proposed action. . . . [T]he NRC Staff recommends that, *unless safety issues mandate otherwise*, the action called for is the issuance of the proposed license to DCS, with conditions to protect environmental values.[1]

GANE implies that this language in the DEIS suggests that the NRC Staff may change its findings under NEPA based on the results of the safety review. For example, GANE states:

> Under the circumstances, it is not surprising that the Staff is unwilling, at this juncture, to issue a conclusive determination regarding the significance of the *risk posed by the facility to the human environment under NEPA*.[2]

The quoted language from the DEIS simply makes clear that while the NRC Staff has made a preliminary finding *under NEPA* that the action called for is issuance of the license (*i.e.*, the Construction Authorization), it has yet to render a final ruling on the *safety* aspects of the CAR, and thus, no license will ultimately be issued if the results of the safety review prove unsatisfactory. It is clear from a plain reading of the language what the NRC Staff meant. The NRC Staff was *not* stating that it might change its NEPA

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1 DEIS at xx (emphasis added).

2 DEIS Contentions at 3 n.2 (emphasis added).

findings on the basis of the safety review, but was instead simply stating the obvious point that, regardless of its ultimate NEPA findings, no license will be issued in the absence of a satisfactory safety review.

This interpretation of the DEIS language is bolstered by the fact that the Commission, in this very proceeding, has acknowledged the converse: "that [NRC's] AEA safety reviews do not satisfy its obligations under NEPA, which has independent statutory force." *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-07, 55 NRC 205, 220 & n.41 (2002), citing *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 729-31 (3d Cir. 1989). Such conditional language is perfectly appropriate for a DEIS (or a Final EIS for that matter). While it was probably not essential that NRC Staff refer to the status of the safety review in the DEIS, the inclusion of that language hardly raises a genuine dispute on a material issue of law or fact as required by 10 CFR § 2.714(b)(2)(iii).

GANE next states, as the basis for this contention, that it "must *assume* that the 'preliminary' recommendation in the Draft EIS will become a final recommendation in the Final EIS . . . [and that to] issue a Final EIS based on a conditional conclusion or recommendation that the proposed action should go forward would constitute a gross violation of NEPA's requirement for prior evaluation of environmental impacts."[3] In support, GANE cites *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

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[3] DEIS Contentions at 4.

GANE's assumptions regarding future NRC actions do not create a dispute regarding a material issue of fact to be admitted as a contention today. Nevertheless, even assuming, *arguendo*, that the NRC Staff's "conditional language" is intended to indicate that the environmental consequences of failing to meet NRC safety requirements have been not been factored into the environmental review, the Staff's position would be entirely appropriate. NRC can reasonably expect that the MOX Facility will only be licensed if it meets NRC's safety requirements. Certainly, GANE is not permitted to contend that the NRC must consider environmental consequences resulting from MOX Facility operation that violates NRC requirements. It is well-settled law that "in the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-09, 53 NRC 232, 235 (2001); *see GPU Nuclear* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 207 (2000).

Furthermore, the case cited by GANE, *Methow Valley*, 490 U.S. at 349, does not support GANE's position, but rather supports the action taken by the NRC here. NRC's review of the environmental consequences of MOX Facility operation *before* issuing a Construction Authorization is entirely consistent with, if not required by, the very admonishment from *Methow Valley* quoted by GANE that agencies must examine environmental consequences before taking action, in order to assure "'the important effects will not be overlooked or underestimated only to be discovered after resources have been committed.'" *Id.*; DEIS Contentions at 4.

GANE next concedes that, "to some extent," this contention "challenges the Commission's ruling" in *Savannah River*, CLI-02-07, 55 NRC at 220-221 (2002).[4] However, GANE "believes that the Commission's NEPA ruling in CLI-02-7 is in error, and lodges [Contention 18.A] in part for the purpose of making a record for a possible appeal."[5] Needless to say, GANE's dissatisfaction with a prior Commission ruling in this proceeding does not provide a basis for admitting a new contention directly challenging that ruling.

NRC's DEIS properly considers the environmental effects of both the proposed construction and the proposed operation of the MOX Facility. Consistent with the prevailing case law and the Commission's prior Order on this very issue, Contention 18.A should not be admitted, because it fails to meet the requirement of 10 CFR § 2.714(b)(2)(iii) that a genuine dispute exists on a material issue of fact or law.

2. 18.B The Draft EIS Contains a Misleading Implication that a License for the Proposed MOX Facility Has Been Prepared.

> **Contention:** At pages xx and 2-[3]6 of the Draft EIS, the Staff misleadingly describes the action to be taken as issuance of "the" proposed license to DCS. In fact, there is no license, or even a license application. The Staff's misleading statement violates NEPA's cardinal requirement for accuracy in representations made in an EIS.

This contention boils down to GANE's objection to the Staff's use of the word "*the*" in the phrase "the action called for is the issuance of *the* proposed license to DCS." Presumably, if the Staff had used the word "a" instead, there would be no proposed Contention 18.B.

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[4] DEIS Contentions at 5.

[5] DEIS Contentions at 5.

By alleging that there is a misleading implication in the DEIS, GANE is attempting to manufacture an issue where there is none. In fact, the regulations themselves explicitly contemplate a conclusion "that the action called for is the issuance of *the* proposed license." 10 CFR § 70.23(a)(7) (emphasis added). The DEIS merely repeats the language of the rule, and GANE's parsing of the meaning of the word "the" is hardly a substantive basis for the expenditure of resources to litigate a new contention.

Moreover, GANE's suggestion that members of the public somehow will be misled into thinking that a license exists is belied by GANE's own experience in this proceeding. GANE, itself, has long been aware that the operational safety review of the possession and use license application would not occur as "a condition precedent to the preparation of an EIS" in this matter. *Savannah River*, CLI-02-7, 55 NRC at 221. In fact, this very sequence of review was confirmed by the Commission when GANE raised this issue on appeal. *Id.* Obviously, the public has access to these very public proceedings. Furthermore, the DEIS itself states that "DCS plans to submit its application for a 10 CFR Part 70 operating license in *October 2003*."[6] This dispels the suggestion that the DEIS improperly implies that either the application or the license itself has already been prepared.

GANE cites *Hughes River Watershed Conservancy v. Glickman.*, 81 F.3d 437, 446 (4th Cir. 1996) for the proposition that an agency may not rely on misleading assumptions. The facts of *Hughes* are clearly distinguishable from GANE's concern over the use of the word "the" in the MOX Facility DEIS. In *Hughes*, the court found:

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[6] DEIS at 1-3 (emphasis added).

(a) that an EIS for the construction of a dam contained an "inflated" estimate of a *net* $2,188,900 in recreational benefits that was actually a *gross* estimate of the recreational benefits of the project; (b) that the estimate represented a full thirty-two percent of the overall economic benefits of the project; (c) that the *gross* estimate of recreational benefits was erroneously portrayed in the EIS as *net* benefits; and (d) that the EIS-sponsoring agencies "viewed the inflated estimate . . . as crucial in their evaluations of the Project." *Hughes*, 81 F.3d at 446-448. *Hughes* provides no basis for admission of GANE's Contention 18.B.

As a result, Contention 18.B clearly fails to create a genuine dispute on a material issue of fact or law as required by 10 CFR § 2.714(b)(2)(iii), and therefore should not be admitted.

B. Contention 19. Inadequate Support for Conclusions Regarding Environmental Impacts of MOX Facility

GANE submits two proposed contentions challenging the adequacy of the support for the conclusions in the DEIS regarding the environmental impacts of the MOX Facility. Each of these Contentions is addressed below.

1. 19.A Impacts of Waste Solidification Building and Pit Disassembly and Conversion Facility.

Contention: According to the Draft EIS, two new U.S. Department of Energy ("DOE") facilities are "needed" to support the proposed MOX Facility: the Waste Solidification Building ("WSB") and the Pit Disassembly and Conversion Facility ("PDCF"). Draft EIS at 1-7. The PDCF is needed to convert some 25.6 metric tons of surplus plutonium metal to plutonium dioxide, which would be processed at the MOX Facility. Id. The WSB is proposed in order to process the waste product from the proposed MOX Facility into Transuranic ("TRU") waste that can be disposed of at the Waste Isolation Pilot Project. *Id.*

Although the DOE is responsible for building and operating the WSB and the PDCF, the NRC Staff does not appear to have consulted the DOE or any current DOE environmental document regarding the environmental

> impacts of the WSB and the PDCF, in order to verify the factual information or the conclusions it presents in the Draft EIS regarding the environmental impacts of these facilities. Thus, the Draft EIS fails to satisfy NEPA's requirements for cooperation and consultation with other agencies. *See* 42 U.S.C. § 4332(2)(C), 10 C.F.R. § 51.70(c), and 40 C.F.R. § 1501.6.
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> The Staff's failure to consult DOE for the purpose of verifying DCS's representations about the WSB and the PDCF also violates NEPA's well-established requirements that agencies must take a "hard look" at environmental impacts of proposed decisions, and exercise independence in its judgments. *See Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 151 (D.C. Cir. 1985); *Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983); 10 C.F.R. § 51.70(b).
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> Before reaching any definitive conclusions regarding the environmental impacts of the WSB or the PDCF, the NRC Staff should be required to await DOE's determination as to whether these facilities require preparation of an EIS. If the DOE decides that an EIS is warranted for the WSB and/or the PDCF, the EIS should be prepared before the MOX Facility is licensed or built, in order to ensure that all impacts of this integral project are considered.

In this contention, GANE challenges the NRC Staff's conclusions in the DEIS regarding the environmental impacts of the waste solidification building ("WSB") and pit disassembly and conversion facility ("PDCF"). The crux of the contention appears to be that the NRC has failed to meet its statutory duty pursuant to Section 102 of NEPA to "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(2)(c)(v).

Neither Section 102 of NEPA nor the NRC's implementing rules requires that consultation with another agency occur prior to the issuance of a DEIS. *See* 10 CFR § 51.74(a)(2). In fact, the NRC regulations specifically provide that the DEIS is the document that will be distributed to "[a]ny other Federal agency which has

special expertise or jurisdiction by law with respect to any environmental impact involved." *Id.* By using the same language as the statute in Section 51.74(a)(2), the NRC regulations clearly contemplate that NRC will meet its statutory duty to consult with other federal agencies -- such as DOE in this matter -- through its distribution of the DEIS and its implicit request for comments on the DEIS.[7] Consistent with this expectation, DCS understands that DOE may submit comments on the DEIS (even though there is no requirement that it do so).

To the extent that Contention 19.A might be construed as contending that consultation with DOE is required *prior* to issuance of the DEIS, such a contention is contrary to the scheme established in NRC's regulations. As such, the contention fails as a collateral attack on those regulations. *See* 10 CFR § 2.758; *Florida Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 16 (2001).

GANE also cites 10 CFR § 51.70(c) and 40 CFR § 1501.6 for the proposition that NEPA requires cooperation and consultation with other agencies.[8] Section 51.70(c) is inapposite, because it calls for cooperation with state and local (not other federal) agencies "to reduce duplication between NEPA and State and local requirements." Section 1501.6 of the Council on Environmental Quality regulations provides that a lead agency, such as NRC here, should request the participation of any cooperating agency with jurisdiction. However, this rule is permissive in nature, not mandatory, and thus,

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[7] NRC's rulemaking history for the predecessor to this rule, which was originally at 10 CFR § 51.24(c)(1), does not specifically address the use of the statutory language in the rule, but rather only notes that "[p]rovision has been made for routine distribution of draft environmental impact statements." 39 FR 26279, 26279 (July 18, 1974).

[8] DEIS Contentions at 8.

NRC has wide discretion in its application. For example, the Eleventh Circuit has stated that "NEPA regulations *encourage* agencies to coordinate." *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209,1215 (11th Cir. 2002) (citing 40 CFR § 1501.6) (emphasis added). Moreover, under the terms of Section 1501.6(c), DOE could decline cooperating agency status.

In addition, Contention 19.A fails to articulate any potential error in the NRC's DEIS resulting from the alleged lack of consultation with DOE. Rather, GANE vaguely asserts that NRC has failed to take a "hard look" at the environmental consequences.[9] To the contrary, Section 2.2.2 of the DEIS includes a detailed assessment of the PDCF and Section 2.2.4 includes a detailed assessment of the WSB. Appendix H also addresses the impacts of both the WSB and PDCF in considerable detail.[10] In addition, Chapter 4 of the DEIS analyzes environmental consequences from the PDCF and WSB.[11] GANE does not allege that any environmental consequences have been overlooked or inadequately assessed.

Based upon the above, Contention 19.A is inadequate and should fail as a matter of law. In addition, the factual premise of the contention (that NRC has failed to consult with DOE) is incorrect, because NRC has, in fact, consulted with DOE sources in developing the DEIS. The DEIS indicates that NRC has consulted numerous DOE documents including relevant EISs and more recent Records of Decision that provide

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9 DEIS Contentions at 8.

10 DEIS at 2-3 through 2-6, 2-14 through 2-19, H-3.

11 *See, e.g.*, DEIS at 4-33.

information regarding the PDCF.[12] In addition, as GANE is well aware, DOE officials have attended NRC public meetings as part of the environmental scoping process.

Most importantly, however, the applicant here – DCS – is a DOE contractor. When the NRC has requested information related to the Savannah River Site, DCS has been responsible, as the applicant, for providing information to NRC. However, DCS has gathered this information from DOE sources, including another DOE contractor (the Westinghouse Savannah River Corporation ("WSRC") that manages and operates the Savannah River Site for DOE). *See, e.g.*, DCS Environmental Report (Rev. 2), Appendix G (submitted July 11, 2002) (providing environmental information regarding the WSB). DCS assembled environmental information regarding the WSB under its contract with DOE, and virtually all of the specific information regarding the WSB was provided by WSRC or DOE representatives. For information regarding the PDCF, DCS relied upon DOE's existing EISs and included PDCF impacts in its cumulative impacts discussion. *Id.* at 1-4, 5-48 through 5-49. Thus, GANE's claim that "it does not appear that DOE played any role in evaluating the environmental impact of the WSB or new processes to be carried out at the PDCF" is simply wrong.[13] Notably, GANE's implication that there is a separate issue regarding "new processes" at the PDCF is misleading, because the only "new processes" relating to the PDCF involve the processing of waste at the WSB.

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12 *See* DEIS at 2-37 through 2-38 (References for Chapter 2), 4-97 through 4-100 (References for Chapter 4).

13 DEIS Contentions at 9.

GANE concedes that the NRC has referenced "some older DOE EISs," but appears to fault the NRC for not including "any recent reports or correspondence from the DOE."[14] GANE cites no legal support for the implicit proposition that reliance on "older" EISs is somehow inappropriate, and there is no basis for concluding that it is improper for NRC to rely on DOE EISs dating from 1995 to 2002. To the contrary, the courts have upheld the NRC's use of tiering in environmental analyses. *See generally Kelly v. Selin*, 42 F.3d 1501, 1518-19 (6th Cir. 1995), *cert. denied* 515 U.S. 1159. In any event, as described above, DCS obtained detailed information on WSB and PDCF impacts from DOE sources and provided this information to NRC. GANE fails to identify any alleged error in this information or in NRC's analyses, and thus, there is no basis for the contention.

There is also no merit in GANE's suggestion that NRC has failed in its duty to "independently evaluate and be responsible for the reliability of all information used in the draft environmental impact statement." 10 CFR § 51.70(b). The references for Chapters 2 and 4, cited above, reflect NRC's thorough review of available information in preparing the DEIS. More importantly, NRC's independent evaluation of the information provided by DCS is reflected in its numerous Requests for Additional Information ("RAIs") that are a matter of record in the hearing file and that include specific RAIs relating to the PDCF and WSB.[15]

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[14] DEIS Contentions at 9.

[15] Letter from C.Trottier (NRC) to R. H. Ihde (DCS), "Request for Additional Information on the Duke Cogema Stone & Webster (DCS) Proposed Mixed Oxide Fuel Fabrication Facility Environmental Report" dated October 3, 2002 (requesting information regarding PDCF and/or WSB in RAI numbers 1, 2, 3, 6, (continued).

Finally, GANE contends that NRC must await potential additional DOE environmental reviews, and "[i]f DOE decides that an EIS is warranted, the EIS should be prepared *before* the MOX Facility is licensed or built, in order to ensure that all impacts of this integral project are considered."[16] GANE offers no legal support for this proposition, because there is none.[17] The DEIS already considers the environmental impacts of the PDCF and WSB and, thus, "all impacts of this integral project." Moreover, if DOE were to develop any significant new information regarding environmental impacts at some later date, NRC could properly consider whether or not a Supplemental EIS was warranted at that time.

Contention 19.A alleges procedural irregularities that are based upon a misapplication of law and that are inaccurate as a matter of fact. There is no genuine dispute on a material issue of fact or law, and pursuant to 10 CFR § 2.714(b)(2)(iii), no basis for admitting the contention.

2. 19.B. Assumption Regarding Quantity of Plutonium to be Processed at Proposed MOX Facility.

Contention: The Draft EIS's assumption that [ ] 34 metric tons ("MT") of plutonium will be sent to the proposed MOX Facility for processing is not supported by a valid NEPA decision by the DOE.

7, 8, 9, 13, 15, 18, 22, 23, 24, 25, 29, 33, 34, 35, 36, 37, 42, 43, 48, 50, 51, 55, 59, 60, 61, 62, 64, and 65).

16 DEIS Contentions at 11.

17 To the contrary, the United States Supreme Court has held that a federal agency need not defer action until other governmental bodies can reach a final conclusion regarding their own environmental reviews. *Methow Valley*, 490 U.S. at 352-53 (rejecting argument that a federal agency must await specific decisions from other government bodies on environmental mitigation measures).

Contention 19.B alleges that the DEIS is flawed in assuming that 34 metric tons ("MT") of plutonium will be sent to the proposed MOX Facility, because DOE has not yet acted to re-assign 6.5 MT of plutonium from Rocky Flats from the immobilization program to the MOX program.[18] GANE implies, once again, that NRC is bound to await a formal DOE NEPA decision regarding the changes to the national plutonium disposition program. As discussed above, there is no legal support for the notion that NRC must defer its environmental review pending DOE action. Rather, NRC is obligated under NEPA to take a "hard look" and make a reasonable assessment of the proposed action and its environmental impacts.

Ironically, if the NRC had disregarded 6.5 MT of plutonium, and only assumed that 27.5 MT of plutonium would be processed at the MOX Facility, it would be open to criticism that it had not fully evaluated the environmental impact of processing the entire 34 MT of plutonium. In accordance with the requirements of NEPA, NRC has taken a "hard look" at the environmental consequences of processing 34 MT of plutonium, and there is therefore no basis for admitting Contention 19.B.

C. Contention 20. Failure to Discuss Immobilization Alternative

> **Contention:** In Section 2.3.3, the Draft EIS unreasonably rules out immobilization as an alternative strategy for disposing of weapons-grade plutonium, in violation of 10 C.F.R. § 51.71(d). Although the DOE has dropped the immobilization portion of its plutonium disposition strategy for economic reasons, these temporal economic circumstances may change, and thus do not justify the NRC's decision to completely eliminate consideration of the immobilization alternative. To the contrary, consideration of immobilization must be preserved in order to ensure that (a) if and when the DOE's economic circumstances change, the NRC has prepared a decisionmaking document that fully and fairly evaluates a set

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[18] DCS understands that DOE's formal action in this regard may be imminent and will keep the Board advised.

> of reasonable alternative approaches, and (b) the lack of consideration of the immobilization in the Draft EIS does not create a self-fulfilling prophecy, i.e., lead to a failure to fund immobilization because it is not perceived as a viable alternative.
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> Moreover, consideration of immobilization should not be "all-or-nothing." Just as the DOE has done in the past, the NRC should consider immobilization as both a complete alternative and a partial strategy.

In Contention 20, GANE argues that the NRC's DEIS must consider an alternative strategy under which an undefined portion of the 34 MT of plutonium that is proposed to be processed at the MOX Facility would be subject to an immobilization program. In doing so, GANE ignores the NRC's initial conclusion that the environmental impacts of the immobilization alternative had already been evaluated by DOE in a prior EIS. In particular, the DEIS states:

> Before the DOE's January 2002 decision to cancel the plutonium immobilization plant, plutonium immobilization was available as a no-action disposition alternative to the proposed action. *The DOE had already evaluated the environmental impacts of this alternative . . . in the SPD EIS (DOE 1999a), so that a new NRC analysis of this situation was not required.*[19]

This omission is significant, because once the procedural posture is exposed (that is, that DOE has previously considered the environmental impacts of plutonium immobilization), it becomes clear that GANE's challenge is really an objection to NRC's exercise of its discretion as to whether or not to *further* consider an alternative that has already been evaluated by DOE.

GANE's Contention 20 fails, as a matter of law, because the DEIS can tier from and adopt DOE's prior evaluation of this alternative. *See* 10 CFR Part 51, Subpart A,

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[19] DEIS at 2-23 (emphasis added).

Appendix A.1(b). As noted above in response to Contention 19.A, the courts have found NRC's use of tiering "appropriate." *Kelly*, 42 F.3d at 1518-20. Moreover, this Board itself has acknowledged that "the Commission's environmental regulations provide for the tiering, adoption, and incorporation of environmental impact statements of other federal agencies into the Commission's environmental impact statements." *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 424 (2001). To the extent GANE is disputing the NRC's authority to tier from and adopt the SPD EIS (cited in the DEIS as DOE 199a), such a challenge is an impermissible attack on NRC's regulations. *Turkey Point*, CLI-01-17, 54 NRC at 16.

NRC obviously has the *discretion*, though not the legal obligation, to re-evaluate the environmental impacts of alternatives that have been reviewed by another agency, and NRC solicited views as to whether the immobilization alternative should be separately evaluated by NRC, even though DOE had determined that it would not pursue immobilization.[20] However, the DEIS states that none of the comments received identified "any persuasive reasons to further consider the immobilization alternative," and instead, NRC determined "that immobilization is no longer a reasonable alternative to the proposed action."[21] Given that NRC has the option simply to rely on the DOE EIS, NRC's conclusion that immobilization is not a reasonable alternative represents a second basis for concluding that this alternative does not need detailed analysis in the DEIS.

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20 DEIS at 1-13, 2-23.

21 DEIS at 2-23.

GANE argues that the NRC Staff's decision to eliminate consideration of immobilization is "unreasonable for two reasons."[22] First, GANE states that DOE's "budgetary concerns" that motivated its decision to abandon immobilization are "temporal obstacles," and that funding might be restored in the future.[23] In doing so, GANE relies upon the Second Circuit's instruction that "there is no need to consider alternatives of speculative feasibility or alternatives which could only be implemented after significant changes in government policy or legislation." *Natural Res. Def. Council v. Callaway*, 524 F.2d 79, 93 (2nd Cir. 1975). Inexplicably, however, GANE asserts that to "restore funding for immobilization would not require 'significant changes in governmental policy or legislation.'"[24] Ironically, GANE is engaging in the very speculation prohibited by *Callaway*, offering only that DOE may someday change its mind regarding the immobilization alternative and may someday obtain the funding necessary for such a program. GANE offers no concrete facts to suggest that any change in DOE policy is imminent, or any basis for concluding that funding may become available.

Of course, if DOE ever did reverse course and reinstate the immobilization option, NRC could decide whether it might be necessary to supplement its EIS at that time. The speculative prospect, unsupported by fact, that this may occur in the future is not a basis for admitting a new contention.

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22 DEIS Contentions at 15.

23 DEIS Contentions at 15.

24 DEIS Contentions at 15.

Second, GANE argues that the NRC Staff's decision to eliminate immobilization as an alternative is unreasonable, because NRC should consider "partial" immobilization. GANE argues that addressing a partial immobilization alternative "would not undermine U.S.-Russian relations because . . . Russia is leery only of an *all-immobilization* strategy."[25] Whether or not Russia would object to a partial immobilization approach, the critical point is that the U.S. Government, through the DOE, has made a fundamental policy decision to abandon immobilization, and this decision is outside the scope of the NRC's authority. There is no reason, therefore, that NRC should be required to consider a policy in the DEIS that has been abandoned and rejected by the responsible federal government decision-making authorities. GANE is simply wrong in challenging NRC's decision that immobilization is not a reasonable alternative, because NRC has properly found that pursuing this alternative would involve NRC in foreign policy matters outside NEPA's scope.

Essentially, Contention 20 would have the NRC speculate as to future remote possibilities and potential changes in DOE and/or Russian policy, in order to consider an alternative that is currently unreasonable. This does not withstand the "rule of reason," but instead, turns the very case law relied upon by GANE on its head. GANE's contention fails, because NEPA does not require consideration of alternatives that "are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies." *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 834, 837-38 (1972) ("A rule of reason is implicit in this aspect of the law as it is in the requirement that the agency provide a statement concerning those opposing views that

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[25] DEIS Contentions at 16.

are responsible."); *see also Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551 (1978); *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973), *cert denied*, 416 U.S. 961 (1974).

The DEIS properly relied upon DOE's prior environmental review of the immobilization alternative, and therefore, there is no need to further consider GANE's challenge to NRC's discretionary finding that this alternative is not a reasonable one. Nevertheless, NRC's finding readily withstands scrutiny under a rule of reason, while in contrast, Contention 20 is founded in speculation. As such, GANE presents no genuine dispute regarding a material issue of law or fact, as required by 10 CFR § 2.714(b)(2)(iii), and this contention should not be admitted.

III. CONCLUSION

For the reasons set forth above, none of GANE's proffered late-filed contentions are admissible in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Duke Cogema Stone & Webster's Answer to Late-filed DEIS Contentions" dated April 17, 2003 were served this day upon the persons listed below, by both e-mail and United States Postal Service, first class mail.

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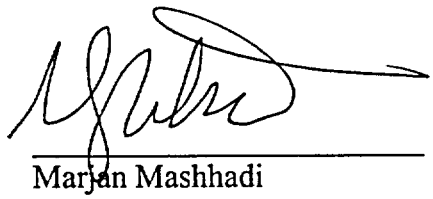

Marjan Mashhadi

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