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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

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

April 30, 2003 (11:27AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

DUKE COGEMA STONE & WEBSTER

(Savannah River Mixed Oxide Fuel
Fabrication Facility)

Docket No. 0-70-03098-ML

ASLBP No. 01-790-01-ML

**GEORGIANS AGAINST NUCLEAR ENERGY REPLY
TO DCS'S AND NRC STAFF'S OPPOSITIONS TO
LATE-FILED CONTENTIONS REGARDING INADEQUACIES IN THE DRAFT
ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED
MOX PLUTONIUM FUEL FACTORY AT SAVANNAH RIVER SITE**

Pursuant to the Atomic Safety and Licensing Board's ("ASLB's") orders dated March 28, 2003, and April 8, 2003, Georgians Against Nuclear Energy ("GANE") hereby submits its reply to the oppositions filed by Duke Cogema Stone & Webster ("DCS") and the U.S. Nuclear Commission ("NRC") Staff to GANE's late-filed contentions regarding inadequacies in NUREG-1767, the Draft Environmental Impact Statement on the Construction and Operation of a Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina (February 2003) (hereinafter "Draft EIS").¹ As discussed

¹ See Duke Cogema Stone and Webster's Answer to Late-Filed DEIS Contentions (April 17, 2003) (hereinafter "DCS Answer"); NRC Staff Response to Late-Filed

below, DCS's and the Staff's arguments in opposition to the admission of the contentions have no merit.

I. THE CONTENTIONS ARE ADMISSIBLE.

Contention 18. Inadequate basis for recommendation that MOX Facility Should be Licensed.

a. Conditional finding fails to comply with NEPA

In subpart (a) of Contention 18, GANE argues that the Draft EIS'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.

DCS argues that by using this language, the NRC Staff did not mean to say that it might change its NEPA finding on the basis of its safety review, but rather that "regardless of its ultimate NEPA findings, no license will be issued in the absence of a satisfactory safety review."² DCS Response at 3-4.

There are two fatal flaws in this argument. First, the governing regulations, 10 C.F.R. §§ 51.71(e) and 70.23(a)(7)³, do not contemplate the issuance of conditional findings on whether a license should issue or not. 10 C.F.R. § 51.71(e) states that the draft EIS "normally will include a preliminary recommendation by the NRC staff respecting the proposed action." Similarly, 10 C.F.R. § 70.23(a)(7) calls for a

Contentions Submitted by Georgians Against Nuclear Energy on the DEIS (April 18, 2003) (hereinafter "NRC Staff Response").

² Notably, the NRC Staff, which is responsible for the language of the Draft EIS, does not make this argument. *See* NRC Staff Response at 6.

³ In Contention 18, GANE incorrectly cited this regulation as 10 C.F.R. § 70.22(a)(7).

conclusion that “the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values.” While the language of these regulations allows a regulation to contain “preliminary” language that can be changed in the Final EIS, neither regulation contemplates the type of equivocal or conditional finding presented in the Draft EIS.⁴

Second, if DCS’s interpretation of the language of the Draft EIS is correct, then the Draft EIS is extremely misleading, and must be corrected to make clear that the NRC’s NEPA decision will not be supported by any safety review of the proposed operation. To the average reader, the Draft EIS appears to make a factual connection between safety and environmental impacts: the NRC seems to be saying that it would not make a “NEPA recommendation” to allow DCS to build and operate the proposed MOX Facility unless it could also make a positive finding that the proposed facility will pose no undue risk to public health and safety. Draft EIS at xx, 2-36. This is extremely logical. After all, NEPA requires consideration of environmental impacts on the “human environment.” 42 U.S.C. § 4332(C). It is difficult to see how impacts on the human environment would exclude the question of whether operation of a nuclear facility will pose undue risk to public health and safety. Yet, as a practical matter, issues of safety compliance will not inform the NRC’s NEPA decision, because the NRC does not intend to complete its safety review of operation until after the Final EIS is issued.⁵

⁴ It should be noted that the condition expressed in the Draft EIS cannot be satisfied during the NEPA process, because the NRC plans to issue the Final EIS before it completes its safety review.

⁵ DCS also argues that “GANE is not permitted to contend that the NRC must consider environmental impacts resulting from MOX Facility operation that violates the NRC

To leave the language of the DEIS as-is would inspire a false sense of confidence in the thoroughness of the NRC Staff's review. If the NRC intends to completely divorce its review of the safety of operating the proposed MOX Facility from its review of the operation's environmental impacts, then it should say so clearly in the Draft EIS.

(b) Misleading implication of use of word "the" to describe license.

Subpart (b) of Contention 18 asserts that the Draft EIS misleadingly describes the action to be taken as issuance of "the" proposed license to DCS. DCS argues that the Draft EIS merely repeats the language of the regulations. DCS Answer at 7. As recognized by the Commission in CLI-02-07, however, the regulations contemplate that an applicant may have filed a completed license application at the time it seeks construction approval. 55 NRC 205, 217, note 30 (2002). In that case, a proposed license would exist. In this situation, however, no such application or proposed license exists. In order to ensure that the public is adequately informed that no details exist regarding DCS's proposal for operation of the MOX Facility in accordance with NRC safety regulations, the Draft EIS should be required to use accurate language.⁶

requirements." DCS Answer at 5. While the NRC may refuse to assume that a licensee will violate its permit, GANE is unaware of any precedent holding that the NRC Staff should enter a licensing review process with the assumption that the application will be sufficient to demonstrate that (a) the applicant will comply with NRC regulations and (b) the operation will pose no undue risk to public health and safety. Such an assumption would be absurd.

⁶ DCS also argues that the public is not deceived because GANE is not deceived. DCS Answer at 7. The readership of the EIS for the proposed MOX Facility is much broader than the membership of GANE and BREDL, the two parties who are privy to the NRC proceeding for the approval of the CAR. Moreover, the EIS for the proposed MOX Facility will be used in the operating license proceeding for the facility, in which new parties may participate without the benefit of GANE's knowledge of the CAR proceeding.

Contention 19. Inadequate Support for Conclusions in Draft EIS

(a) Impacts of WSB and PDCF.

In Contention 19, GANE contends that the Draft EIS does not reflect consultation with the U.S. Department of Energy (“DOE”) or any current DOE environmental document regarding the environmental impacts of the Waste Solidification Building (“WSB”) and the Pit Disassembly and Conversion Facility (“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)⁷, and 40 C.F.R. § 1501.6.

DCS argues that the use of the word “should” in the regulations indicates that consultation with other federal agencies is permissive, not mandatory. In the Revised Environmental Report (“ER”), DCS specifically states that the DOE, not DCS, is responsible for building and operating the WSB and the PDCF. ER at ES-3. In GANE’s view, it is nothing short of astounding that an EIS prepared by an agency of the federal government would rely exclusively on representations regarding environmental impacts of a facility, made by a private entity that has no responsibility for building or operating a facility, without also consulting the federal agency that is actually responsible for building and operating the facility.

⁷ DCS correctly points out that 10 C.F.R. § 51.70(c) calls for cooperation with state and local agencies, not federal agencies. GANE withdraws its reliance on this regulation.

DCS also argues that it is appropriate for the Draft EIS to rely on older DOE documents for an evaluation of the environmental impacts of the proposed MOX Facility. DCS Answer at 13. DCS fails to acknowledge that the WSB, which is part of the PDCF, is an entirely new operation, whose impacts could not possibly have been addressed in those pre-existing documents.⁸

The NRC Staff argues that the contention is inadmissible because it fails to identify any inaccuracies in the technical conclusions of the Draft EIS. NRC Staff Response at 9. GANE does not need to do the government's job in order to show that by doing it, a better EIS could have resulted. The procedural requirements of NEPA are designed to ensure that GANE and other members of the public -- who lack the resources of the federal government -- have the benefit of a thorough environmental review of environmental impacts of proposed federal actions.

The Staff also argues that it has sent the Draft EIS to the DOE for its comments. NRC Staff Response at 10. GANE is unable to comment at this point on the sufficiency of this measure to moot the contention. GANE believes that the report referenced in footnote 8, in which the DOE appears to provide some discussion of the environmental impacts of the WSB and the PDCF, may have a bearing on this question. As discussed in

⁸ It appears that subsection (b) of this contention, which challenges the Draft EIS's assumption regarding the quantity of plutonium to be processed at the proposed MOX Facility, may have been mooted by the issuance of DOE/EIS-0283-SA1, Changes Needed to the Surplus Plutonium Disposition Program (Supplement analysis and Amended Record of Decision (April 2003). GANE only recently received a copy of this report, and has not had time to review it thoroughly. (We received a copy of the report on April 23, and were told that it was scheduled to be published in the Federal Register on April 24.) GANE's expert consultant is not available until the week of May 5 to assist us in our review of this document. Thus, we do not anticipate being able to file a more conclusive response regarding the mootness of this contention until mid-May.

footnote 8, GANE anticipates that it will be able to conduct a comprehensive evaluation of the DOE report and address its relevance to this contention by mid-May.

Contention 20. Failure to Discuss Immobilization Alternative

In Contention 20, GANE argues that the Draft EIS unreasonably rules out immobilization as an alternative strategy for disposing of weapons-grade plutonium. DCS and the NRC Staff argue that the DOE evaluated the immobilization alternative in its previous EIS's for surplus plutonium disposition, and thus GANE's concern has been satisfied. DCS Answer at 16-17, NRC Staff Response at 12. Those EIS's evaluated immobilization as a part of the chosen plutonium disposition strategy. Now that the strategy has changed, it is not appropriate to completely abandon consideration of the immobilization alternative, as has been done in the Draft EIS. It is important that the Draft EIS hold up immobilization for consideration by future decisionmakers.

DCS argues that immobilization is not a plausible alternative because it has been rejected by policy-makers as a strategy for surplus plutonium disposition. DCS Answer at 13-14. This argument is circular. The purpose of NEPA is to give policy-makers complete information regarding environmental impacts of an array of reasonable alternatives, so that they can make sound decisions. The fact that a policy-maker chooses one alternative over another for economic reasons does not render the rejected alternative implausible.

Finally, DCS argues that Contention 20 is not based on new information in the Draft EIS, because the Revised ER also rejected consideration of the immobilization alternative. The difference is that the NRC conducted a separate and independent

decisionmaking process for determining whether to include immobilization as an alternative in the Draft EIS, including solicitation of public comment. Draft EIS at 2-23. See Notice of Receipt of Supplemental Environmental Report for the Mixed Oxide Fuel Fabrication Facility and Notice of Public Meetings, 67 Fed. Reg. 54,501 (August 22, 2002). GANE and other parties participated in this process, and made comments to the NRC. The NRC found that the comments “did not identify any persuasive reasons to further consider the immobilization alternative.” Draft EIS at 2-23. Thus, because the NRC Staff’s decision is based on data that are different from the data relied on in the ER, GANE is entitled to challenge this determination in its contention. See 10 C.F.R. § 2.714(b)(2)(iii).

II. THE CONTENTIONS SATISFY A BALANCING OF THE LATE-FILING CRITERIA.

DCS does not argue that any of GANE’s contentions fails to satisfy the NRC’s standards for late-filed contentions in 10 C.F.R. §§ (a)(1)(i)-(v) and 2.714(b)(2)(iii). The Staff claims only that Contention 20 is untimely, because it could have been based on the ER. That argument is addressed above.

The Staff argues that the third factor, potential to contribute to the development of a sound record, does not weigh in favor of admitting Contention 20 because GANE did not submit testimony in support of the contention. NRC Staff Response at 18. GANE intends to base its case on Contention 20 on the decision documents of the NRC and DOE. At this point, GANE does not intend to present expert testimony. Even if expert testimony were warranted, nothing in 10 C.F.R. 2.714(b)(2)(iii) requires that a petitioner

do more than identify data or conclusions that are different than the data and conclusions in the ER.

III. CONCLUSION

For the foregoing reasons, the ASLB should admit GANE's late-filed contentions regarding the Draft EIS.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2003, copies of the foregoing Georgians Against Nuclear Energy Reply to DCS' s and NRC Staff's Oppositions to Late-Filed Contentions Regarding Inadequacies in the Draft EIS etc. were served on the following by e-mail and/or first-class mail:

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